

All You Need To Know About The Ordinance Under Article 123 of The Constitution

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India along with the entire world is battling with a global pandemic, Covid-19 and life in general has come to a standstill. It is during such situations, that the agility of a country's Government is tested. India is being lauded on the global stage for taking stringent steps and being reasonably successful in containing the spread of Covid-19.

The Government not only moved swiftly in announcing the lockdown but it also took necessary steps to ease the tax and regulatory compliances in order to give the businesses a breather amidst such difficult times. On March 24, 2020 the Finance Minister of India, Smt. Nirmala Sitharaman announced a series of measures to deal with the economic impact of Covid-19 and relax the compliances related to return filings whether it be Income Tax or GST, PAN-Aadhaar linking and other statutory and regulatory issues.



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However, since the Parliament was not in session, it was considered necessary to introduce these legislative changes by way of promulgating or passing an ordinance. Hence, an ordinance was passed on March 31, 2020 namely "**The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020**" (referred to as the Ordinance).

WHAT IS AN ORDINANCE?

The term "ordinance" is defined by the Oxford dictionary as an authoritative order. In the context of the Indian Constitution, an ordinance is a temporary law that is passed by the President of India on the recommendation of the Union Ministers or by the Governor of a state as the case may be.

Clause 1 of Article 123 of the Constitution of India grants the President certain law-making powers to promulgate an ordinance when either of the two houses of Parliament is not in session. The fundamental reason for bestowing the executive power to issue an

ordinance to the President is to deal with situations where an emergency in the country necessitates urgent action.

Further, the Governor of a state has the power to promulgate an ordinance under Article 213 of the Constitution of India, when the state legislative assembly is not in session for matters on which state legislature can make laws. However, in certain instances, receiving instructions from the President is a must.

An ordinance can be concerned with any subject that the Parliament has the power to legislate on and is also subject to the same limitations as the Parliament. Accordingly, an ordinance has to be passed in line with the distribution of powers between the Union, State and Concurrent Lists. An ordinance must be approved by the Parliament or the state legislative assembly within six weeks of reassembling or it shall cease to operate. It will also cease to operate in case a resolution disapproving the ordinance is passed by the Parliament or the state legislative assembly as and when they reconvene. In addition, an ordinance can only be re-promulgated thrice.

In the past, questions have been raised on the judicial review of the ordinance making power of the President; and the necessity for 'immediate action' while promulgating an ordinance as executive power has been misused multiple times. One such instance was when the Government had promulgated an ordinance while the bill regarding the same was pending before the Parliament. Therefore, it is sometimes also said that an ordinance is an undemocratic path to law-making. However, the other school of thought is that it is important to pass an ordinance sometimes especially in cases where the opposition unnecessarily blocks the passage of bills which are significant for economic growth. There have been multiple amendments to Clause 1 of Article 123 of Constitution of India wherein first it was amended to reflect that the President's decision to promulgate an ordinance was final and could not be questioned in court. However, later the Constitution of India was amended which made the President's satisfaction to promulgate ordinance subject to judicial intervention. There have also been numerous judicial pronouncements which have discussed this power in detail.

THE TAX ORDINANCE

Now, when we have a detailed background about what an ordinance is, let's go back to our original discussion of the ordinance namely "**The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020**". As discussed earlier the

ordinance was passed by the Government on March 31, 2020. The said ordinance has been passed to give relaxations in respect of the following Acts:

1. The Wealth Tax Act, 1957
2. The Income Tax Act, 1961
3. The Prohibition of Benami Property Transactions Act, 1988
4. Chapter VII of the Finance (No.2)Act, 2004
5. Chapter VII of the Finance Act, 2013
6. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
7. Chapter VIII of the Finance Act, 2016
8. The Direct Tax Vivad se Vishwas Act, 2020

Chapter VII of the ordinance amended the Central Goods and Services Tax Act, 2017 (CGST Act, 2017) by way of inserting Section 168A in the CGST Act, 2017. Sub-section 1 of Section 168A empowers the Government to extend the time limit in respect of actions which could not be completed due to force majeure (namely, war, epidemic, flood, drought, etc. or any other calamity caused by nature) affecting the implementations of provisions of CGST Act, 2017. Further, sub-section 2 of Section 168A clarifies that the power to issue notification under sub-section (1) shall include the power to give retrospective effect to such notification from a date not earlier than the date of commencement of this Act.

In common parlance, Section 168A has been inserted in the CGST Act, 2017 to give powers to the Central Government, on recommendation of GST council to extend the time limit of compliances in case of 'force majeure'. Force Majeure is a situation where an unforeseen event may render performance of certain activities impossible only during the limited time in which the event is in operation, thereby allowing normal activities to resume after the event ceases to operate such as Covid-19. Hence, Section 168A of the CGST Act, 2017 allows the Government to extend dates of all the compliances under the CGST Act, 2017 at once in unanticipated and uncontrolled conditions like the present. Furthermore, Section 168A of the CGST Act, 2017 is a notwithstanding provision; making it an overriding provision over the entire CGST Act, 2017.

This amendment to the CGST Act, 2017 was followed by Notification no. 35/2020-CT dated April 3, 2020 which extended all the due dates of GST compliances falling during the period of March 20, 2020 to June 29, 2020 till June 30, 2020.

Therefore, from the above discussion, it seems pretty clear that since the CGST Act, 2017 did not have appropriate provisions to extend all the compliance due dates under the CGST Act, 2017, the Government followed the necessary procedure of first promulgating an ordinance, inserting the requisite section in the Act and then bringing in the specific Notification to the effect. However, there are a few issues which may require resolution.

ISSUES FOR CONSIDERATION

The first issue arises from the logistical challenges emanating from the requirement of e-filing the VAT appeals, responses to assessment, notices etc. only after a physical signature by the authorised signatory. Thus, the relief granted by states like Maharashtra which are allowing e-filing *vide* an email seems to be outweighed by an onerous requirement of getting it signed physically, notwithstanding the lockdown - whether it reflects a lack of pragmatism or just a plain lack of empathy, is something to ponder upon.

The second issue that may arise in future is the fate of Section 168A of CGST Act, 2017 and the repercussions if it is not approved by the Parliament when it reconvenes. It may create a pandemonium if such a disastrous event happens because billions of taxpayers may be standing in the line of defaulters then.

The third issue at hand is that GST is a tax which gives Centre and State the right to tax the same set of goods and services. However, to extend the due dates, an ordinance has been promulgated by the Centre only; the question that remains unanswered is the fate of the SGST portion of GST. The SGST portion of the tax comes under the state list and is covered by the state legislature. Therefore, the power to pass an ordinance rests with the respective state Governors basis the instructions received from the President on the matter.

There is no denial that the entire Government machinery is taking proactive measures to alleviate hardships wherever possible. Given the rapidly evolving nature of this phenomenon, one can also appreciate that the Government agencies working on these relief measures may not have the luxury of time to take into account all related nuances. Thus, some pitfalls can be expected. However, one has to wait and watch how agile and responsive is the regulatory machinery in plugging these gaps.

With support of Rebecca Pinto - Director at TMSL and the views are personal.