Free movement and exchange of goods throughout the territory of the country is essential for the economic unity of the nation which alone could sustain the progress of the country. This has become more important after the liberalisation and globalisation of the economy. Therefore, in all federation, an attempt is made through constitutional provisions to create and preserve a national economic fabric to remove and prevent local barriers to economic activity, to remove the impediments in the way of inter-State trade and commerce and thus to make the country as one single economic resources of all the various units which may be utilized to the common advantage of all. In other words, proper regulations of the trade promote equality and unity among the regions. Freedom of trade offers one of the most convenient approaches to the origins of civilizations.

It is with the knowledge of the trade barriers which had been raised by the Indian States in exercise of their legislative powers that the Constitution makers framed the Articles in Part XIII. The main object of Article 301 obviously was to allow the free flow of the stream of trade, commerce and intercourse throughout
the territory of India. In drafting the relevant Articles of Part XIII the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal policy which has been adopted by the Constitution for the governance of the country. Political freedom which had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realized that in course of time, different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union, and that they may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The objective of Part XIII was to avoid such a possibility.

Explaining the purpose of enacting Article 301 of the Constitution of India the Supreme Court of India has observed that the provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of a State policy, it embodies and enshrines a principle of paramount importance that the economic
unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country.\(^1\)

7.1. Summing up the Provisions of ‘Freedom of Trade’

Article 301 of the Constitution of India, 1950 provides for the freedom of inter-State as well as intra-State trade, commerce and intercourse, subject, of course, to the provisions of Part XIII of the Constitution of India. Article 301 uses the words ‘trade, commerce and intercourse’. In its broadest significance ‘trade’ includes buying or selling of any goods or commodities or any occupation other than a profession carried on for profit; in its usual meaning it means business of selling or exchanging some tangible or intangible substance or commodity.

Article 301 of the Constitution of India provides freedom to those activities which fall under the categories of trade, commerce and intercourse. On the other hand, any activities not regarded as trade, commerce and intercourse fall outside the purview of the freedom provided under Article 301. Activities

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\(^1\) Justice Gajenderagadkar in *Atiabari Tea Company v. State of Assam*, AIR 1961, SC 232 at 247 in support of his view the learned Judge quoted the following words of Justice Cordozo said with reference to Clause 3 of Section 8 of Article 1 of the Constitution of the United States in *Charles H. Baldwin v. G.A.F. Seeling*, 294 US 511, 523:

This part of the Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together and that in the long run prosperity and salvation are in union and not division.
which are criminal or undesirable would not be protected by Article 301 of the Constitution of India.

While framing the provision of Article 301, the framers of the Constitution kept in mind the Section 297 of the Government of India Act, 1935 which imposed limitations on legislative as well as executive powers of the Provincial governments. Moreover, it was confined in its application to laws made by virtue of the entry relating to trade and commerce within the Province. As the provision was not sufficient to meet the need of achieving economic unity throughout the territory of India, the framers of the Constitution of India wanted to enrich and widen the content of freedom guaranteed under Section 297.

The engagement of the framers of the Constitution while framing the provisions on trade and commerce from the beginning till the tail-end of their task depict the concern and high importance they attached on them. On the other hand the process was not very coherent, consistent or smooth. Building on the foundations of Section 297 of the Government of India Act, 1935 the framers of the Constitution were concerned for the minimization of States’ control and corresponding maximization of the Union’s control over trade and commerce throughout the territory of India. This concern of the framers of the Constitution has been given due deference even in the developments since the commencement of the Constitution.
Article 301 simply says that “trade, commerce and intercourse throughout the territory of India shall be free”; it does not say what trade and commerce are to be free from. The main reason for this is that it is impossible to enumerate all the measures which are deemed to impair the freedom. Moreover, the concept of trade and commerce is a dynamic concept, replete with non-obstante clauses and the presence of exception upon exception in a series of Articles, has often presented complex questions of interpretation before the Court which may require different interpretations at different times. So it was left to the judiciary to decide what amounted to infringement of the freedom guaranteed in Article 301.

Accordingly, in Atiabari Tea Company Ltd. v. State of Assam, the Supreme Court took the view that the freedom guaranteed by Article 301 would become illusory if the movement, transport, or the carrying of goods were allowed to be impeded, obstructed or hampered by the taxation without satisfying the requirements of Articles 302 to 304. Simply because the tax was levied on ‘movement’ of goods, from one place to another, it was held to offend Article 301.

The matter came to be re-considered by the Supreme Court in Automobile Transport v. State of Rajasthan, the Supreme Court ruled that regulatory measures and compensatory taxes for the use of trading facilities were not

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3 Infra, note 6.
hit by Article 301 as these did not hamper, but rather facilitated, trade, commerce and intercourse.

The concept of compensatory tax evolved in this case was something new as in Atiabari, the Supreme Court had dismissed the argument that the money realised through the tax would be used to improve roads and waterways rather curtly by saying that there were other ways, apart from the tax in question, to realize the money, and that if the said object was intended to be achieved by levying a tax on the carriage of goods, the same could be done only by satisfying Article 304(b).

The Supreme Court also ruled that Article 301 did not hit the tax, as it was a compensatory tax having been levied for use of the roads provided for and maintained by the State. Thus, to this extent, the majority view in Atiabari was now overruled by Automobile case.

Hence, these judgments emphasized that the imposition of compensatory tax must be with definite purpose of meeting the expenses on account of providing or adding to the trading facilities either immediately or in future provided quantum of tax is based on a reasonable nexus to the actual or projected expenditure on the cost of the service or facility.

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4 Supra, note 2.
5 Ibid.
However in the case of *M/s. Bhagatram Rajeev Kumar v. Commissioner of Sales Tax*, the Supreme Court went on to say, that “the concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to dealers directly or indirectly the levy cannot be impugned as invalid”.

The pronouncement in *Bhagatram’s* case was relied on by a Bench of two Judges in the case of *State of Bihar v. Bihar Chamber of Commerce*, which reiterated the position that “some connection” between the tax and the trading facilities extended to dealers directly or indirectly is sufficient to characterize it as compensatory tax. The Court further went to hold that the State provides several facilities to the trade, such as, laying and maintenance of roads, waterways, markets etc. and on this premise it was held that the entry tax was compensatory in nature. The learned Judges did not consider it necessary to put the burden on the State to furnish the details of facilities provided to the traders and the expenditure incurred or incurable thereafter.

This decision clearly expanded the scope of the judicially evolved compensatory taxes and were in contrast with the doctrine of direct and immediate benefit as

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7 (1995)1 SCC 673.
8 Ibid.
propounded in the *Automobile*\(^{10}\) case. Subsequently, the Supreme Court in a five member bench in the case of *Jindal Stainless Ltd. v. State of Haryana*,\(^{11}\) reiterated the doctrine of “direct and immediate effect” of the impugned law on trade and commerce under Article 301 as propounded in *Atiabari*\(^{12}\) case and the working test of “direct and immediate effect” enunciated in *Automobile*\(^{13}\) case for deciding whether a tax is compensatory or not. The Supreme Court also decided that constitutional validity of various entry tax enactments, which are subject matter of pending appeals, special leave petitions and writ petitions will now be disposed of in light of the above principles.

The Parliament and the State Legislatures by virtue of Article 245 and Article 246 could exercise legislative powers to interfere with freedom of trade, commerce and intercourse. The inclusion of free trade clause in Article 301 prevents them from doing so. It imposes a general limitation on the legislative powers of both the Centre and the States. But this limitation is not an absolute limitation. The limitation is further qualified by other provisions of Part XIII. Article 302 and Article 304(b) prescribe the conditions and procedural requirement under which the general legislative power of the Centre and the States are to be exercised. Article 303 put forth the conditions under which the

\(^{10}\) Supra, note 6.

\(^{11}\) AIR 2006 SC 2550.

\(^{12}\) Supra, note 2.

\(^{13}\) Supra, not 6
Centre and the States are required to exercised the legislative powers by virtue of the entries relating to trade and commerce only. Article 304(a) clarifies the manner in which the States are to exercise their taxing power relating to tax on goods. Articles 302 to 304 of Part XIII are not to curb on the freedom, rather they all limit the legislative power of the governments. Article 301 imposes a general limitation on both Parliament and State Legislatures whereas the other provisions qualify such limitation.

Part III of the Constitution of India provides fundamental rights and Part XIII provides freedom of trade. The most important fundamental rights which have relation with freedom of trade are right to equality, freedom of movement, and freedom to follow an occupation.

The Supreme Court of India in Atiabari case\textsuperscript{14} does not consider the relation of the freedom of trade guaranteed by Article 301 to other provisions of the Constitution, because the majority judgment held that the freedom of trade, commerce and intercourse enunciated by Article 301 is not subject to the other provisions of the Constitution but is made subject only to the other provisions of Part XIII.

It is observed that this view is incorrect. First, it reads into Article 301 after the word “Subject” the word “only” which is not there, and this is contrary

\textsuperscript{14} Supra, note 2.
to well settled principals of construction. Secondly, discrimination is not only prohibited by Article 303 (1) but also Article 14. Thirdly, trade is dealt with not only in Article 301, but also in Article 19 (1) (g) and the relation of that Article to Article 301 is necessary for a proper interpretation of Part XIII.  

Any law made by any Legislature in India, must be subject to the limitation imposed by Part III of the Constitution. Article 301 does not specifically exclude the operation of Part III, hence, any law made under Article 302-304 must also comply with the limitations imposed by Part III of the Constitution. Further, in exercise of its power under Article 301, Parliament would not be competent to pass discriminatory or arbitrary legislation, in violation of Article 14 or an unreasonable restriction which would offend Article 19(1)(g). A provision infringing Articles 301 and 304 may, and ordinarily will infringe Article 19(1)(g) as well and it can be challenged under Article 19(1)(g).

Clause 3, Section 8 of Article 1 of Constitution of United States says that ‘the Congress shall have power, to regulate commerce...among the several States’. This is an authorization in favour of the Congress to enact laws for the protection and encouragement of commerce among the States. Thus, there is no express provision guaranteeing freedom of trade and commerce. It has been judicially interpreted to mean that the above power of Congress to regulate inter-

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State, commerce is plenary and exclusive, once it is proved that the matter comes within the ambit of the power of Congress, such matter is to be freed from regulation or restraint by the States. Thus, the “Commerce Clause” of the American Constitution constitutes a limitation upon the powers of the State Legislature.

The freedom guaranteed in Article 301 is wider than in the Commerce Clause of the American Constitution. Article 301 does not constitute a source of legislative power, but it imposes a general limitation on the exercise of legislative power, relating to trade and commerce. Article 301 uses the words ‘throughout the territory of India’ instead of ‘among several States’. Thus, the guarantee in Article 301 extends not only to inter-State but also intra-State trade.

Section 92 of the Australian Constitution provides for freedom of trade and commerce. It does not seek to regulate as in case of commerce clause. However, it has been held in numerous decisions of the Privy Council and the Australian High Courts that Section 92 leaves open the regulation of trade and commerce at all events until the regulation is enacted provided it does not impede the true freedom of inter-State Commerce.

Article 301 of the Constitution of India is definitely an improvement on Section 92, in that it provides specific limitations on the powers of the Parliament and the State Legislature. Section 92 nowhere says that it applies to both Commonwealth and the State; this was decided by the judiciary. Further, the
Constitution of India avoids the words ‘among the States’, and uses the words ‘throughout the territory of India’ in Article 301. It should be noted that the above differences in the language of Section 92 of the Constitution of Commonwealth of Australia and Article 301 of the Constitution of India should not be regarded as providing a wider degree of freedom under Article 301 than is guaranteed by Section 92 of the Constitution of Commonwealth of Australia. Article 301 does not incorporate the expression of the widest amplitude used in Section 92 of the Constitution of Australia viz., ‘absolutely free’. Further, Section 92 is subject to no specified restrictions, while Article 301 is subject to restrictions provided in Articles 302, 303 (2), 304 and 305, so it is submitted, the degree of the freedom envisaged in part XIII is narrower than the absolute freedom given by Section 92 of the Constitution of Commonwealth of Australia.

The Section 121 of the British North America Act, 1867, provided that “All Articles of the growth, produce or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.” The language of Section 121 shows that it prohibits the Legislature from levying custom duties or other charges of like nature which restrict the admission of goods produced or manufactured in other States. Further, Section 121 of the Constitution of Dominion of Canada appears under the head of ‘Revenues; Debt; Assets; Taxation’, and so the Court at first interpreted Section 121 to be confined to fiscal barriers. It was not until 1958, that Justice Rand
expanded the scope of Section 121 so as to include any impediment related to the traversing of a provincial boundary. Further, power of the Dominion Parliament is not restricted by Section 121. It may validly go so far as to expressly prohibit the admission of any articles from one Province to another, so long as the prohibition does not involve the imposition of a custom duty.

The Constitution of India in Article 301 does not simply confine the protection to tariff barriers only. Further, Article 301 applies to both Parliament and the State Legislature. Article 301 appears in Part XIII, which provides freedom of trade and commerce with certain exceptions. The words ‘of anyone of the Provinces...into each of the other Provinces’ in Section 121 are of limited application, while the words ‘throughout the territory’ in Article 301 are of general application. Thus, Article 301 has a wider scope than Section 121 of the Constitution of Dominion of Canada.

7.2. Findings

Trade originated with human communication and civilization in prehistoric times and is believed to have taken place throughout much of recorded human history. Trading was the main facility of prehistoric people, who bartered goods from each other before the innovation of the modern day currency. Trade is also called goods exchange economy. It refers to the transfer of ownership of goods from one person or entity to another by getting something in exchange from the buyer. Trade is sometimes loosely called commerce or
financial transaction or barter. A network that allows trade is called a market. The original form of trade was barter, the direct exchange of goods. Later one side of the barter was the metals, precious metals (coins), bill, and paper money. Modern traders instead generally negotiate through a medium of exchange, such as money.

Trade exists for man due to specialization and division of labour, in which most people concentrate on a small aspect of production, trading for other products. Trade exists between regions because different regions have a comparative advantage in the production of some tradable commodity, or because the geographical orientation of one region allows for the benefits of mass production compared to others. As such, trade at market prices between locations benefits both locations.

The Centre, along with State governments, is empowered to enact laws pertaining to goods. In doing so, duplication in work done by the government machinery leads to confusion in the minds of those who have to comply with provisions of legislation. Internal trade in goods is subjected to a multiple licensing system from a number of authorities. Besides, all licenses have to be periodically checked and renewed, which entails submission of returns, display of stocks and prices.

Sales tax from its inception in India has been a constant source of harassment and inconvenience to businessmen. Though the incidence of the tax
falls on the consumer, yet it is incumbent on the dealer to comply with the law. The majority of the dealers in India are small tradesmen without much education. The difficulties of maintaining complicated accounts, assessment of liability on the basis of those accounts, understanding the statute and keeping pace with the frequent amendments of the statute and the rules thereunder present difficulties which are often more burdensome than the tax itself. Further, the administration of tax collection equally with that of checking of tax evasion has been a problem for the government. The multiple taxation of the same commodity under different tax laws and diversity in the rates of tax also give rise to the problem of inter-State trade barriers. Because of the difference in rates, the incidence of the tax on consumers varies from place to place. Further, when there is a great divergence in rates, there is danger of smuggling of goods from one State to another. It is known that there is widespread smuggling along the State borders which the Commercial Tax officials are unable to check.

All such unproductive works involve a great deal of administrative work, leading to corruption and harassment. Unrealistic provisions make it even more difficult. Moreover, lack of uniformity in implementation is another form of distortion. While some States are very vigorous in implementing the laws scrupulously, others are not. For instance, sale of Kesari Dal in any form is banned under Rule 44 (a) of the Prevention of Food Adulteration Rules in some States. In some States where Kesari Dal is produced in large quantities, sales are
allowed. As a result, in one State, the accidental admixture of *Kesari Dal* with other pulses may lead to punitive action. In a neighbouring State, it may be allowed. From the analysis of all the issues, it is found that the freedom of trade is restricted on the following ways:

**Regulatory Regime on Movements of Goods**

- **Goods Specific**
  - Restrictions on Flow of Goods
    - Essential
    - Hazardous
    - Adulterated
    - Licensed
    - Forest
    - Endangered Species
    - Others
  - Fiscal Restrictions
    - Excise
    - Sales Tax
    - Entry Tax
    - Toll
    - VAT
    - Proposed GST
- **Location Specific**
  - Restriction on Flow in Locations
    - State Borders
    - District Borders
    - Municipal Limits
    - Law and Order
    - Bridges
    - Others

Enforcement Agencies are different and the movements of goods may be restricted under any criteria.
The findings of the research work can be viewed in a nutshell as:

- Recent trend of commerce includes e-commerce. E-commerce includes retailing and wholesale business, online newspapers and other information services, online gambling services, offshore and inland banking, stock trading or everything that traditional commerce can offer.

- Article 301 of the Constitution of India is inspired by Section 92 of the Australian Constitution when it refers to freedom of trade and commerce, however, Article 301 is subject to limitations and conditions in Article 302, 303 and 304 which are borrowed from the “Commerce Clause” under Article 1 of the Constitution of United States. Therefore, Part XIII is an amalgamation of the United States and Australian Constitution.

- In none of the legislative list in the Seventh Schedule is ‘intercourse’ included as a subject of legislative power, whereas ‘trade and commerce’ is included in all the three lists.

- Article 19(1)(g) of the Constitution confers, on all citizens, the right to practice any profession or to carry on any occupation, trade or business. Though this right is subject to Article 19(6) in fact, it is in consonance

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16 Pay-per-use schemes for online databases, subscription services, online healthcare services, are a few examples./ Nandan Kamath, Law Relating to Computer Internet & E-commerce, 4th Edition, 2009, Universal Law Publishing Company, Delhi, p.351.
17 Includes online casinos whose servers are located in tax havens or places where gambling is legal./Ibid
18 Ibid.
with the provisions of Article 301. There is some overlap between Article 19(1)(g) and Article 301, but some points of difference between the two viz. Article 19(1)(g) is confined to citizens, while Article 301 is not. Article 19(1)(g) refers to “profession, occupation, trade or business”, while Article 301, speaks of “trade, commerce or intercourse”. Article 19(1)(g) does not contain the words “throughout the territory of India”, which occur in Article 301. In this sense, Article 19(1)(g) may be relevant for international trade also. Article 19(1)(g) confers a fundamental right on its citizens. In contrast, the right conferred by Article 301, though a constitutional right, is not a fundamental right. Article 19(1)(g), though it is subject to Article 19(6), is not made subject to any other express qualifications. But Article 301 is made subject to Articles 302 to 307. Article 19 is primarily intended to restrict legislative or executive action, but has no direct relevance to the concept of federalism. In contrast, Articles 301 to 307 have a direct relevance to the concept of federalism.

- In the *Atiabari case*, the Supreme Court did not consider the relation of freedom of trade guaranteed by Article 301 to other provisions of the Constitution and held that freedom of trade under Article 301 of the Constitution of India is not subject to any other provisions of the

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19 Supra, note 2.
Constitution, except that of Part XIII. This means that once the width and amplitude of the freedom enshrined in Article 301 of the Constitution of India is determined, it can not be controlled by any provision outside Part XIII.

- The measures, which directly and immediately restrict or impede the flow or movement of trade would come within the inhibition of Article 301.\(^{20}\)
- There is no clear definition of direct and immediate restriction.

- The regulatory or compensatory measures did not affect the freedom of trade and commerce.\(^{21}\) There is no clear definition of regulatory or compensatory measures.

- An examination of the cases coming before the Courts, impugning laws passed by the Parliament and the State Legislature shows that transport regulation, commodity control, marketing are felt to be unduly restrictive of freedom of inter-State trade. Further, the licensing authorities are vested with an unlimited and arbitrary discretion.

- There is no authority to carry out the purpose of Article 301 of the Constitution of India and provide safeguard from unauthorized burden and restriction.

\(^{20}\) Supra, note 6.
\(^{21}\) Ibid.
• The grant or creation of monopoly would normally violate Article 301 of the Constitution of India.

• The term “Restriction” has not been pre-fixed by the word “Reasonable” under Article 302.

• Article 301 imposes no limitation on the Parliament as it is difficult to think of a situation in which restriction imposed by the Parliament can be adjudged by the Court as, to be not in the public interest.

• With Globalisation, industries require larger markets and as a country like India cannot develop, if it tries and fragments every State and give them the liberty to levy entry taxes, which amounts to restrictions on trade, imposition of imbalance tax on trade, commerce and intercourse, violate Article 301.

• The excise duty has nothing to do with transaction or movement of goods therefore excise duty does not violate freedom of trade. While Central sales tax is imposed on inter-State transaction and movement of goods and a State sales tax is imposed on the transaction of goods and on their movement within the State, normally both the taxes directly impede the freedom of inter-State as well as intra-State trade and offend against Article 301. Perhaps, Indian Judiciary adopts a mere tolerant attitude towards a sale tax for the protection of government revenue.
• The multiple taxation of the same commodity under different tax laws and diversity in the rates of tax give rise to the problem of inter-State trade barriers. Because of the differences in rates, the incidence of the tax on consumers varies from place to place. Further, when there is a great divergence in rates, particularly in contiguous States, there is danger of smuggling of goods from one State to another.

• VAT was introduced in India for the removal of complicated and cascading effect of sales tax law. It is observed that all the Indian States imposing VAT along with existing sales tax.

• VAT is a tax levied at every stage in the series of the sales of goods generally impair freedom of trade under Article 301 and the consumers are to bear the burden of heavy price rise owing to such multiple levy of VAT, beset with, other allied elements.

• The present GST Bill, 2014 if passed by the Rajya Sabha will not solve the problem of cascading of taxes and the result will remain same as it was after the introduction of VAT.

7.3. Justification of the Hypothesis

During the course of research the Investigator started with the observation that “freedom of trade, commerce and intercourse is not free from excess burden, control and impediments throughout the territory of India” which is based on the
observation of Henry Clay “the call for free trade is unavailing as the cry of a spoiled child for the moon, it never has existed; it never will exist” the Investigator finally arrived at the decisions as discussed in the following paragraphs.

The Constitution of India was adopted in 1950 with the spirit of freedom of profession, occupation, business or trade to all citizens as fundamental right under 19(1)(g) and further reinforced in Article 301 which states that “trade, commerce and intercourse throughout the territory of India shall be free”. However both the Articles 19 and 301 are subject to certain restrictions. The indirect reference to absence of any barrier to trade also comes from Article 14 of the Constitution which guarantees equality before the law and equal protection of the laws.

Article 19(6) and 304(b) of the Constitution allows a State legislature to “impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest”.

Article 302 of the Constitution authorizes Parliament to impose by law, restrictions on the freedom as described in Article 19 in the public interest. Parliamentary power under Article 302 is also subject to the restriction imposed by Article 303(1). This prohibits the enactment of any law (by Parliament or State legislature), which gives preference to one State over another, or a law
discriminating between the States regarding trade and commerce. Under Article 303(2) of the Constitution, however, the aforesaid restriction can be relaxed by the Parliament through law, for dealing with a situation arising from the scarcity of goods in any part of India. In view of this flexibility under Article 302, the Parliament enacted origin based Central Sales Tax Act in 1956 which is levied on inter-State movement of goods. This resulted into fragmentation of the market and encouraged large manufacturers to resort to stock transfers by setting up State wise warehouses to avoid such tax.

The State governments are empowered by the Constitution to legislate on trade and commerce on subjects under the State list. The provisions of Article 301 are also applicable to trade and commerce within the State. According to Article 303(1) neither the State Legislature nor Parliament shall have power to make any law, which discriminates between States regarding trade and commerce in any of the lists in the Seventh Schedule. However, there is an overriding provision in Article 304(b) under which reasonable restrictions can be put in public interest.

Article 304(a) provides that a State Legislature may, by law, impose on goods imported from other States or the Union Territories, any tax where similar goods manufactured or produced in that State also receive similar treatment. However, there should be no discrimination between the imported and
manufactured goods. This provision permits State Legislatures, by law, to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State, as may be required in the public interest. At the same time, by the constitutional provision, no Bill or amendment for the purpose of Article 304(b) shall be introduced or moved in a State legislature, without the prior sanction of the President. Article 304(b) applies only if the restriction is “reasonable”. The term ‘public interest’ however can be used in such a way which leads to fragmentation of the market or creates uncompetitive environment. Many States had enacted entry tax, some of which were later struck down by respective high courts.

By dint of these constitutional provisions, the Indian States usually impose taxes and other measures on imports of products from other States and Union Territories. Therefore, these provisions act as a barrier on the inter-State movement on goods, the extent of which depends on the amount of taxation. Due to the constitutional overlap, the Centre cannot overrule the State governments. This constitutional overlap led to the persistence of the barriers on internal trade.

In order to ensure that free flow of trade and commerce within the country across the States is guaranteed without any barriers, Article 307 empowers Parliament to appoint an appropriate authority for the purpose of monitoring and ensuring that the Constitutional guarantee on free flow of trade throughout the
country is adhered to by the States. Such authority however has not yet been appointed.

Independent India’s focus on centralized power and control has been instrumental in shaping its markets. With the bulk of tax revenues going to the Centre, State governments levied multiple indirect taxes for revenue at varied rates and resorted to taxing the entry of goods at their borders. Central Sales Tax on inter-State sale of goods and restricting input tax credit by States on inter-State sale created tax barrier among States to fragment the Indian market leading to competitive disadvantage. Even at the Center, the socio-political agenda of successive governments led to multiplicity of taxes on different sectors and activities over the years. As each State used its taxation powers under Article 246 of the Constitution to tax different commodities at different rates, India created a patchwork quilt of taxes that came in the way of the smooth flow of goods between States. It was with this apprehension of the trade barriers likely to be raised by the Indian States in exercise of their legislative powers, that the Constitution makers framed the Articles 301 to 307 in Part XIII. Since the safeguard provided in the Constitution were not in operation effectively, the governments at Center and States used flexibilities provided in Article 302 and 304 to levy multiple taxes which led to fragmentation of the Indian market. Therefore today in reality:
A single unified market doesn’t exist in India and there are significant inter-State tax and non-tax barriers to trade. There exist barriers, both fiscal and otherwise, which hinder inter-State trade. These restrictions tend to fragment the national market which not only heightens the possibility of indulgence in trade practices which adversely affect competition but also dent freedom of trade. For example, while the Central Sales Tax is a tax on the export of goods from one State to another, the levies such as entry tax and octroi are in the nature of taxes on import of goods into a local area. Administration of these taxes requires the erection of check posts or physical barriers and this violates the principle of common market within the country. Therefore, the hypothesis is proved to be true and the Investigator has decided the hypothesis to be positive.

From the analysis of all the issues, it is found that today none of the federal Constitutions provides ‘absolute freedom’. Though the Australian Free Trade Clause used the words ‘absolutely free’, the Court did not interpret them accordingly. The era of such freedom has ended with the close of the laissez-faire period. But with the beginning of collectivism and the era of Welfare State in the twentieth first century, the words ‘absolute freedom’ have been abandoned and replaced by ‘restrictive freedom’.
7.4. Suggestions / Recommendations

Law is based on socio-economic philosophy. It has two main features, namely – basic and circumstantial. The former remains constant but the latter is subject to change. Like a religion in which the core always remains constant but the practices associated with it may change, law also contains certain features which are so essential that they cannot be changed or destroyed whereas certain others are changeable. The important aspect here is to maintain the balance between the change and stability, by analysis of the subject matter from the philosophical and practical social view. The Investigator humbly begs to make the following suggestions / recommendations in order to effectively ensure the maintenance of the original theme as well as to keep the laws relating to freedom of trade updated with the ever changing social context, by proper and balanced modifications so as to maintain the spirit and dignity of the Constitution:

- In construing trade of the country, a liberal and large construction should be made and it should include all legitimate activities and should not be left to the subjective opinion of the judge. The government could impose restrictions (which includes prohibitions also) on those activities under Article 19(6), Article 302 and Article 304(b). Until and unless any business activity is prohibited by law, they can not be excluded from the ambit of ‘trade and commerce’. It is not for the Courts to decide which
trading activities are to be given constitutional protection and which are not. The role of judiciary is only to scrutinise whether the restriction imposed is reasonable and in the public interest.

- The meaning of the word intercourse will have to be determined, and the question whether the words ‘trade and commerce’ in Part XIII cover the same field as entry 42 in List I, entry 26 in List II, and entry 33 in List III will also have to be determined.

- The Judiciary shall not adopt a mere tolerant attitude towards a tax law.

- Article 301 of the Constitution should be amended to make it more explicit and widest amplitude by inserting the term ‘absolutely free’ and dropped “subject to the other provisions of this Part”, as it is confusing and superfluous.

    In this regard the investigator humbly intends to propose an amendment of the Article 301 with the same language as:

    “Trade, commerce and intercourse throughout the territory of India shall be absolutely free.”

- In India, there are significant tax barriers to trade. Governments at Centre and States must avoid to levies multiple taxes viz. sale tax, entry tax, toll, double VAT and motor vehicle tax.
• VAT was introduced in India for the removal of complicated and cascading effect of sales tax law. Interestingly, that all the Indian States imposing VAT along with existing sales tax. Therefore, the Indian States must repeal their Sales Tax Act, as it was the pre-condition for the implementation of Value Added Tax system.

• Additional Duties of Excise (Goods of Special Importance) Act, 1957 must be amended and should include more items on its list. Sales tax should be replaced by the additional duties of excise by the Centre, provided that the previous income of the States from this source has to assure to them. There shall be an agreement between Centre and States which may consider the desirability of extending it to a large number of commodities.

• Replacement of present tax structure by GST will necessitate amendment to the Constitution of India. This can be done only if the Parliament of India approves such amendment by two third majorities of members and it is also ratified by over 50% of the 29 State Assemblies. This process has already been initiated in March, 2011 by introduction of the Constitution Amendment Bill in the Parliament of India. There shall be broad consensus within India to implement GST in a framework which does not conflict with country’s federal structure of governance.
• The Goods and Services Tax law is an Information Technology (IT) driven law and not all the States and Union Territories are currently well equipped with infrastructure and man – power to embrace this law. As such, as a changing face in the history of Indian legislation, let first thereby means and then let the law be passed.

• An ideal GST regime intends to create a harmonised system of taxation by subsuming all indirect taxes under one tax. But the present GST Bill excludes octroi duty, thereby, leaving room for further problems on cascading of taxes and free movements of goods. Therefore, it is suggested that the present GST Bill which is pending before the Rajya Sabha should include octroi duty.

• The GST Bill empowers the Centre to impose an additional tax of up to 1%, on the supply of goods in the course of inter-State trade and commerce [called the Integrated Goods and Services Tax (IGST)] for two years or longer, as may be notified by Central Government on the recommendation of the GST Council. This tax will be collected by the Centre and accrue directly to the States from where the supply of the goods originates. This provision may impede a key objective of GST. The GST regime aims to create a harmonised national market for goods and services, and such a market is enabled by levying one tax rate across States to ensure free movement of goods whether within a State, or from
one State to another. The levy of the additional tax distorts the creation of a national market, as a product made in one State and sold in another would be more expensive than one made and sold within the same State. On the other hand, the 1% tax will result in cascading of taxes. This effect will be magnified if the production and distribution chain passes through several States, and if the 1% additional tax applies at each State. The burden of the cascading tax will be borne by the final consumer of the product. Therefore, it is suggested that this provision should be omitted and must introduce a uniform and impartial taxing legislation which does not restrict inter-State trade and commerce.

- There is a need to develop a national level single market by removing all the existing barriers to trade, multiplicity of Acts or legislations, fiscal policies and marketing arrangements across the country.

- Considering the intricate nature and the need for objective examination of the wide-ranging issue connected with the freedom of trade, commerce and intercourse, it is suggested that an expert authority should be constituted under Article 307. Among other things such an authority may be enabled to:
  a. Survey and bring out periodically a report on the restriction imposed on inter-State trade and intra-State trade and commerce by different governments and their agencies;
b. recommend measures to rationalize or modify the restrictions imposed to facilitate free trade and commerce;

c. examine complaints from the public and the traders in this regard; and

d. suggest reforms in the matter of impositions, levying and sharing of taxes for the purpose of Part XIII of the Constitution.

- Proper vigilance Committees should be set up in order to check the tax collection and the collection of the various duties. Further, such a Committee should be allowed to exercise their duties, in a manner, where the loopholes of corruption are cemented and for this, proper administration of the tax – laws is necessary with adequate infrastructure.

These suggestions / recommendations, if accepted, it will become easy to achieve the goal of Article 301 of the Constitution. The 122\textsuperscript{nd} Constitutional Amendment Bill, 2014 popularly known as “GST” Bill faces both condemnation and appreciation. The need of this amendment cannot be denied but at the same time care should be taken so that it cannot destroy the spirit of the federalism. The philosophy, aim and object behind the provisions of Article 301 and its interpretation forwarded by the framers of the Constitution should always be kept in mind. If the amendments as per demands of time be effected then only, the balance between change and stability will be maintained without compromising the philosophy of the Constitution.