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ETHICS EDUCATION EXCELLENCE

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All India Federation of Tax Practitioners
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AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

AIFTP NATIONAL EXECUTIVE COMMITTEE 2019

MEMBERS

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CHIEF-EDITOR'S COMMUNIQUE

This has been a remarkable year as we have seen many changes and path breaking decisions in AIFTP. The launch of the AIFTP Indirect Tax & Corporate Law Journal was unimagined and even we were skeptical about it. However, with this fourth month of publication of this Journal we are satisfied that the objective has been fulfilled and it is a path on which have to move on with continuous improvement and working. The Journal has been divided into different sections covering GST, Corporate Law, Recent Judgments and other news. We are getting Articles from the leading Tax Professionals from all over India and almost 15-20 Articles are being published in each Part of the journal. Almost 5 decisions which are important and recent are published in the journal. It is running into almost 150 pages and the said journal is also circulated on WhatsApp and through E-mail.

We request all the tax professionals to contribute Articles for the Journal and send it to us and with the approval of the editorial team we will publish the same. Important judgments, etc. are also requested to be sent to us. Suggestions if any for further improvement in the journal are required and must and we look forward for it. We are also very grateful to the sponsors / advertisers to this Journal as with their support only we are releasing this journal free of cost to all AIFTP members who had opted for it in hard copy from the official website of AIFTP.

Today is also important in the history of India as the results of the General Elections for Parliament are out and the BJP under the leadership of Shri Narendra Modi will be forming the Government again with absolute majority. A strong India is the need of the hour and it will lead to a development path which would be unmatchable and will lead to a transformation from a developing country to a developed country. The tax policies also require major changes and we are hopeful that in near future there would be clean up in the tax administration and issues relating to it and the issue of corruption would be addressed strongly by the new Government. The need is that the honest taxpayer should not be punished and effective remedy should be available to him and if any grievance is made by him then it should be addressed immediately.

We congratulate the new Government under the leadership of Shri Narendra Modi and are hopeful that the new Government would have policies which are favorable to trade and industry and will also have an effective grievance redressal mechanism.

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23.05.2019

ALL INDIA FEDERATION OF TAX PRACTIONERS
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Membership of All India Federation of Tax Practitionersas on 16th, February 2019

Life Members

Zone	Associate	Individual	Association	Corporate	Total
Central	0	1048	25	0	**1073**
Eastern	6	1567	36	0	**1609**
Northern	0	1194	18	1	**1213**
Southern	1	1280	19	4	**1304**
Western	5	2332	37	5	**2379**
Total	**12**	**7421**	**135**	**10**	**7578**

PRESIDENT'S COMMUNIQUE

The election time is over and we have seen hard fought election for the last two months. At the time of penning of this message the results are out and India has reposed its faith in the dynamic and charismatic leadership of Shri Narendra Modi. The mandate given is tremendous and beyond expectation and it shows that the Indians are aware of the latest trends and requirements for taking the country to new heights and therefore, they have voted wisely looking to a long term future of the country. AIFTP congratulates Shri Narendra Modi on this glorious victory.

The next few months are busy for the professionals. The GST Annual Returns and Audit date is 30th June, 2019 and thereafter in the month of July there would be cut-off date for non audit income tax returns. It would be followed by the tax audits under Income Tax Act and Audits and the Companies Act. The doubts regarding the Forms in the GST annual return and audit are there and in fact for the last two months no clarifications on such doubts has been issued by the Government. With the new Government coming with full majority we expect more simplification and clarity.

The National Tax Conference and NEC will be held in Tirupati on 22nd and 23rd June, 2019. My appeal to all the members of AIFTP to attend the said conference in large numbers. Recently National Tax Conference in Pune was held in the month of May, 2019 and it was a huge success. Great participation, hospitality and wonderful discussions were the hallmark of this conference.

This Indirect Tax & Corporate Law Journal is being regularly published and circulated on time. Comments and suggestions are requested from all the members. Members are also requested to opt for hard copy of it by clicking on the link at the AIFTP website.

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23.05.2019

ERRATA TO THE ARTICLE 'GOODS AND SERVICES TAX – AN ANALYSIS OF SOME KEY AMENDMENTS' PUBLISHED IN FEBRUARY 2019 AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

S Venkataramani, Chartered Accountant, Bangalore
Siddeshwar Yelamali, Chartered Accountant, Bangalore

The manner of utilization of input tax credit on account of insertion of Section 49A of the CGST Act effective February 01, 2019 was explained by the authors in page 28 and 29 of AIFTP Indirect Tax & Corporate Laws Journal Volume 1 No.1 February 2019 publication. In this regard the authors would like to draw attention to the Rule 88A of the CGST Rules, 2017 inserted vide Notification 16/2019 Central Tax dated 29.03.2019 which provides for the order of utilization of input tax credit of integrated tax which is a partial relief to the industries. The implication of this new Rule is as under:

a. Input tax credit of integrated tax (IGST) shall be utilized first towards payment of integrated tax tax and the balance of IGST (after the adjustment against IGST output tax) can be utilized towards payment of CGST or SGST/UTGST in any order. The effect of this that the registered person can now utilize the excess IGST credit (after set-off against IGST output tax) towards payment of CGST and SGST/UTGST in any order. However, utilization of such IGST credit partly for CGST and partly for SGST liability is not permitted.
b. This amendment comes with a condition that IGST credit should be first fully utilized for payment of integrated tax.

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RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg, Jaipur

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
23.04.2019	20/2019-CENTRAL TAX	Section 164 Of The Central Goods And Services Tax Act, 2017 – Central Goods and Services Tax (Third Amendment) Rules, 2019
23.04.2019	21/2019-CENTRAL TAX	Section 148 Of The Central Goods And Services Tax Act, 2017 – registered person u/s 10 – FORM GST CMP-08
23.04.2019	22/2019-CENTRAL TAX	Section 164 Of The Central Goods And Services Tax Act, 2017 – notification No. 74/2018 – Central Tax, dated the 31st December, 2018 – come into force – wef 21st day of June, 2019
11.05.2019	23/2019-CENTRAL TAX	Section 37, read with Section 168 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Time Limit For Furnishing Return In Form GSTR-1 - April,2019 – State of Odisha
11.05.2019	24/2019-CENTRAL TAX	Section 168 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Time Limit For Furnishing Return In Form GSTR-3B - April, 2019 – State of Odisha

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
10.05.2019	10/2019-CENTRAL TAX (RATE)	Sub-Sections (1), (3) and (4) of Section 9 r/w Sub-Section (1) of Section 11 r/w Sub-Section (5) of Section 15 r/w Sub-Section (1) of Section 16 and Section 148 of the CGST Act, 2017 – Amend Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017

CIRCULARS

DATE	CIRCULAR	REMARKS
23.04.2019	98/2019	Clarification on manner of utilization of input tax credit post insertion of the rule 88A of the CGST Rules.
23.04.2019	99/2019	Clarification on extension in time under sub-section (1) of section 30 of the Act to provide a one time opportunity to apply for revocation of cancellation of registration on or before the 22nd July, 2019 for the specified class of persons for whom cancellation order has been passed up to 31st March, 2019.
30.04.2019	100/2019	Clarification on GST Applicability on Seed Certification Tags.
30.04.2019	101/2019	Clarification on GST exemption on the upfront amount payable in installments for long term lease of plots, under Notification No. 12/2017, Central Tax (Rate), S.No. 41, dated 28.06.2017.

REMOVAL OF DIFFICULTY ORDERS

DATE	CIRCULAR NO.	REMARKS
23.04.2019	ORDER NO. 5/2019-CENTRAL TAX	Extention of time limit for filing an application for revocation of cancellation of registration for specified taxpayers.

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TIMELINE - GST

Adv. Abhay Singla
Sangaria (Hanumangarh)

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		May, 2019	20th June 2019
			June, 2019	20th July 2019
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		April to June 2019	31st July 2019
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		May, 2019	10th June 2019
			June, 2019	10th July 2019
(iii)	Quarterly return for Composite taxable persons	GSTR-4	April to June 2019	18th July 2019
(iv)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(v)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	
(vi)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	

(vii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	May 2019	10th June 2019
			June 2019	10th July 2019
(viii)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	May 2019	10th June 2019
			June 2019	10th July 2019
(ix)	Details of inputs/capital goods sent for job-work. Quarterly Form	GST ITC-04	July 2017 to March 2019	30th June 2019
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	30th June 2019

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NEW SIMPLIFIED GST RETURN MODEL

CA SHILVI KHANDELWAL
(DISA, FCA)

Introduction:

GST has been the biggest tax reform in the country. When goods and services tax (GST) law was rolled out since July 1, 2017, a three-stage monthly return filing system was set up — GSTR-1 (sales return), GSTR-2 (purchase return) and GSTR-3 (final monthly returns based on GSTR-1 and 2 matching). However, with businesses facing trouble, the GST Council decided in November 2017 to keep filing of GSTR-2 and 3 in abeyance and introduced a simpler GSTR-3B to facilitate easier return filing and tax payment.

GST Council in its 28thmeeting had decided to undergo another major revamp by approving new simplified return forms and laid down the rules on simplification of return filing. These simplified return forms are being introduced to free the small taxpayers from the hassles of taxation, thereby helping them to focus on their business. Consequently, all the current GST returns which are in place i.e. GSTR 1, GSTR 2, GSTR 3 and GSTR 3B will no longer be in existence.

The transition to new simplified forms is divided in 3 phases. The simplified GST return forms — Normal return, Sahaj return and Sugam return— would be rolled out on a pilot basis from April 1, 2019, while mandatory filing across the country would kick in from July 1, 2019. But, the pilot project envisaged for rolling out simplified GST return forms from April 1 has been deferred and the new forms would be made available once the software is ready. Thus, summary return filing in the form of GSTR-3B has been made continued from April 2019 to June 2019 vide Notification No. 13/2019- Central Tax dated March 7, 2019.

Returns Forms:

In an attempt to simplify returns procedure for Taxpayers, three types of returns has been introduced. Following new and simplified return has been pronounced and shall also include annexures and declaration:

1. **Normal Return- FORM GST RET-1**
   Person having any type of transaction like exports, supply to SEZ, E-commerce etc. shall be requiringfiling this return. These persons shall be able to declare all types of outward supplies, inward supplies and take credit on missing invoices. This return is having option of monthly and quarterly both.
   - Monthly Normal- To be filled by taxpayers whose turnover is more than INR 5 Crores i.e. Large Taxpayers (excluding Composition Dealers, ISD, NRR, TDS and TCS).

- Quarterly Normal- To be filled by taxpayers whose turnover is less than INR 5 Crores i.e. Small Taxpayers

2. **Sahaj Return– FORM GST RET-2 (Quarterly)**
   Person having only outward supply under B2C transactions and inward supplies subject to reverse charge shall be able to opt for this return. Taxpayer cannot enter missing invoice to claim ITC

3. **Sugam Return– FORM GST RET-3 (Quarterly)**
   Persons having only outward supply under B2C and B2B category and inward supplies attracting reverse charge shall be able to opt for this return type. Taxpayer cannot enter missing invoice to claim ITC

Data can be entered on regular basis except 18th to 20th of month following the tax period. Amendment can also be made vide amendment returns in the form of ANX-1A and RET-1A/1B/1C. Each GST return shall further, include 3 forms namely-

Sr. No	Forms	Description
1	ANX-1	Details of Outward Supplies
2	ANX-2	Details of Inward supplies (Auto-Populated)
3	RET-1/2/3	Auto Populated based on ANX-1 and ANX-2 (advances to be manually reported)

Payment of Tax:
The taxpayers need to make payment of tax on a monthly basis even though they have opted for quarterly filing of returns. Payment of tax shall be made by 20th of the month succeeding the month to which the liability pertains via Payment declaration form **GST PMT-08**.
Credit of the tax paid during the first two months of the quarter shall be available at the time of filing the return for the quarter. While filing the quarterly return and feeding the output details and input details of the quarter the total tax calculated shall be reduced by the amount so deposited for the first two months of the quarter and the balance tax shall be payable.

Points to be considered:
1. If the aggregate turnover during the preceding financial year is up to ₹ 5.00 Crores the taxpayer has the option to file return (namely Sahaj or Sugam or Normal) on a quarterly basis.
2. The return form 'Sahaj' is for businesses which make supplies to only consumers (B2C). It includes details of outward supplies and inward supplies attracting

reverse charge as well as summary of inward supplies for claiming input tax credit (ITC).

3. ITC shall be allowed only on the invoice uploaded by the supplier. Recipient should ensure that the supplier uploads invoice within two tax periods, else the ITC claimed will be reversed
4. Recovery of tax shall be first made from the supplier in case where invoice have been uploaded but return has not been filed. In all exceptional circumstances like missing taxpayer, closure of business by the supplier etc. ITC will be recovered from the recipient

Advantages of New return Model:

1. Under the new return filing format, taxpayers who have no purchases, no output tax liability and no input tax credit in any quarter of the financial year would have the option to file one 'Nil' return for the entire quarter. Facility for filing quarterly return shall also be available by an SMS.
2. GST invoice management system has been introduced. The taxpayer shall be able to upload invoices to the GST Portal 24x7 and viewing facility of invoices uploaded by the suppliers shall also be real time. The recipient would be able to accept or reject the invoice in real-time.
3. Concept of amendment in returns shall also be available vide amendment returns in the form of ANX-1A and RET-1A/1B/1C. 2 amendment returns shall be allowed for each tax period.

Introduction of Pilot Project of New Return Model

GST Network has released a demo tool for the new and simplified return filing form on May 22, 2019 which will be launched sometime later in the year. A new return prototype for ANX-1 and ANX-2 has been introduced and has been made live on GST Portal as Web based offline tool. This is only a mock up tool and not a real tool. It will allow users to use functionality such as drop-down menus, invoice upload, upload of purchase register for matching with the system created inward supplies. The prototype does not make any arithmetic calculations but it provides a complete walk-through of the figures reported in the return forms.

The prototype available on the web portal **https://demoofflinetool.gst.gov.in/instructions** gives stakeholders a feel of what the new return filing system will look like. GSTN also sought stakeholder feedback on the proposed offline tool. Stakeholders can share their comments on 'feedback.newreturn@gstn.org.in'.

- Prototype is only a screen layout of the Offline Tool for viewing and familiarizing the stakeholders with the offline tool being developed to prepare proposed return and obtaining their feedback.
- It contains specimen of the screens which will be made available in the

actual Offline Tool to be deployed on the GST Portal soon.

- It is a web based Prototype to view working of Offline Tool by taxpayers, while filling their return in proposed Form GST ANX-1 and GST ANX-2.
- The values entered in the prototype screens may not match with calculated summary shown in summary screens. Prototype does not perform addition/subtraction or other arithmetic calculations. You can enter data but it will not be saved.
- Some of the features of the actual tool will not be available to users in this prototype, such as the feature of saving data, downloading/uploading JSON to GST Portal and related error rectification etc.

Conclusion:

It is being anticipated that these return forms shall greatly simplify the taxation system in India, reduce the tax burden from businesses and help eliminate tax evasion in the country. It must be considered that Forms ANX-1, ANX-2 and RET-1/2/3 are the replacement of GSTR 1, GSTR 2, GSTR3/GSTR 3B. All other returns from i.e. GSTR 4 to GSTR 10 shall continue to be filed in the same manner even after April, 2019. With this background the taxpayers opting for composition scheme under GST will have no change in their return format.

With the introduction of new return filing model, it can be understood that new return formats are going to become an on-going procedure for business entities requiring higher indulgence of professionals in understanding ITC mismatch issues. The taxpayers would now need to ensure that appropriate modifications are executed to their ERPs, business processes, etc. for culling out information to be disclosed and eligibility of input tax credits in new model.

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WALKTHROUGH OF GOODS AND SERVICES TAX ON OUTWARD SUPPLIES – HOTEL SECTOR

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SiddeshwarYelamali, Chartered Accountant, Bangalore

I. Background

Hotel industry sector under the erstwhile indirect tax had its own challenges. The sector was liable to State Value Added Tax and service tax (restaurant having facility of air-conditioning or central air-heating in any part of the establishment) on sale of food, beverages and alcohol. Providing room accommodation service and cab services was exigible to service tax. It had its own set of challenges determining levy of State VAT and Service Tax on providing catering services and banquet hall along with food.

Under the Goods and Services Tax law, this sector has its own challenges in determining the taxability of various service offerings it provides to the customers. In this article, different aspects affecting the hotel industry on 'outward supplies' under the Central Goods and Services Tax Act, 2017 (for brevity, "CGST Act") has been briefly discussed.

II. Central Goods and Services Tax Act, 2017

A. Supply of foods and beverages by restaurant not having accommodation service

a. Section 7 (1A) of the CGST Act provides that supplies listed in Schedule II of the CGST Act shall treated as either as supply of goods or supply services. Paragraph 6(b) to Schedule II of the CGST Act provides that composite supply of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption) shall be treated as supply of services.

b. Supply of food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, mess, cafeteria or dining space of an institution such as a hospital, industrial unit, office, by such institution or by any other person based on a contractual arrangement with such institution for such supply whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied is liable to tax at 5% (2.5% CGST+2.5% SGST) subject to the condition that credit of input tax charged on goods and services used in supplying the service is not taken (Reference Sl. No. 7 (i) to Notification 11/2017 Central Tax (Rate) dated 28.06.2017).

c. On reading the above entry, it can be inferred that 5% (2.5% CGST+2.5% SGST) tax is chargeable only when input tax credit of good and services is not claimed. Does it mean that, if the restaurant chooses to avail credit on input tax of goods and services, can it choose the other option i.e. levy tax at 18% and claim input tax credit. The

authors view is that restaurant can choose to avail credit of input tax of goods and services, in which case the rate of tax would be at 18% (9% CGST + 9% SGST) [Sl. No. 7 (ix) to Notification 11/2017 Central Tax (Rate) dated 28.06.2017]. This tax position is not acceptable to many, but the authors view is that, such tax position can be taken since under the scheme of indirect tax, if a rate of tax is prescribed with a condition, it is the option of the assessee to choose such conditional rate of tax or opt for regular rate of tax as prescribed as prescribed under the law. Many restaurants choose the 5% (2.5% CGST+2.5% SGST) rate of tax since they may not have a very large credit of input tax of goods and services and opting 5% (2.5% CGST+2.5% SGST) rate of tax is much simpler to comply.

B. **Room Accommodation Services:**

1. In terms of Notification No. 11/2017- Central Tax- Rate dated 28.06.2017 as amended by Notification No. 01/2018- Central Tax (Rate) dated 25.01.2018 and drawing guidance from the explanatory notes to scheme of classification of services, the room accommodation services provided by hotel can be classified under the heading ***9963- Accommodation, food and beverage services***.
2. **Rate of tax from July 01, 2017 upto July 26, 2018 based on 'declared tariff':** The Central Government / State Governments have issued a notification specifying the rate of tax applicable for the services based on the HSN classification. The relevant part of the notification is reproduced below:

Particulars	Rate of tax (CGST+SGST)
a. Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having ***declared tariff**** of a unit of accommodation of Rs.1,000/- and above but less than Rs.2,500/- per unit per day or equivalent.	12%
b. Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff* of a unit of accommodation of Rs.2,500/- and above but less than Rs.7,500/- per unit per day or equivalent.	18%
c. Accommodation in hotels including five-star hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff* of a unit of accommodation of Rs.7,500/- and above per unit per day or equivalent.	28%

* Declared tariff is defined in explanation to Sl. No. 7 of Notification 11/2017 Central Tax (Rate) dated 28.06.2017 heading 9963- Accommodation, food and beverage services, declared tariff is defined as below ***"Declared tariff includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit."***

Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having value of supply of a unit of accommodation of less than one thousand rupees per unit per day or equivalent is exempt vide Notification 12/ 2017 Central Tax (Rate) dated 28.06.2017.

3. **Rate of tax*effective July 27, 2018 based on 'value of supply'*:** Rate of tax applicable on room accommodation services based on ***'value of supply'*** as amended vide Notification 13/2018 Central Tax (Rate) – dated 26.07.2018 is as under:

Particulars	**Rate of tax (CGST+SGST)**
a. Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having ***value of supply**** of a unit of accommodation of Rs.1,000/- and above but less than Rs.2,500/- per unit per day or equivalent.	12%
b. Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having ***value of supply**** of a unit of accommodation of Rs.2,500/- and above but less than Rs.7,500/- per unit per day or equivalent.	18%
c. Accommodation in hotels including five-star hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having ***value of supply**** of a unit of accommodation of rs.7,500/- and above per unit per day or equivalent.	28%
The concept of ***"declared tariff"*** for the purpose of determining the rate of tax applicable ***on accommodation services***, ***is done away with***, vide Notification No. 13/2018 dated 26.07.2018. With effect from 27.07.2018, ***"value of supply"*** is the basis for the purpose of determining the rate of tax applicable to accommodation services. ***"Value of supply"*** shall have the same meaning as per Section 15 of the CGST Act, 2017	

Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having value of supply of a unit of accommodation of less than one thousand rupees per unit per day or equivalent is exempt vide Notification 12/ 2017 Central Tax (Rate) dated 28.06.2017.

4. Effect of change in methodology of determining taxability - Notification 13/2018 dated 26.07.2018 effective 27.07.2018 seeks to change the basis of determining the rate of tax applicable, from declared tariff to value of supply. Such change in determining the rate of tax tantamounts to ***"Change in rate of tax"*** in terms of Section 14 of the CGST Act. Accordingly, the time of supply provisions as prescribed under Section 14 of the CGST Act shall be applicable. The time of supply provisions summarised as under shall be applicable for accommodation services spread over the period of amendment (i.e. Guest check in prior to 26.07.2018 and checkout post 27.07.2018)

Supply	Invoice issued	Payment received	GST Rate
Before change (on or before 26.07.2018) i.e. applicable for accommodation upto 26.07.2018	After change (on or after 27.07.2018)	After change (on or after 27.07.2018)	Rate of tax to be determined based on **'value of supply'**
	Before change (on or before 26.07.2018)	After change (on or after 27.07.2018)	Rate of tax to be determined based on **'declared tariff'**
	After change (on or after 27.07.2018)	Before change (on or before 26.07.2018)	Rate of tax to be determined based on **'declared tariff'**
After change (on or after 27.07.2018) i.e. applicable for accommodation from 27.07.2018	Before change (on or before 26.07.2018)	After change (on or after 27.07.2018)	Rate of tax to be determined based on **'value of supply'**
	Before change (on or before 26.07.2018)	Before change (on or before 26.07.2018)	Rate of tax to be determined based on **'declared tariff'**
	After change (on or after 27.07.2018)	Before change (on or before 26.07.2018)	Rate of tax to be determined based on **'value of supply'**

Hotels are generally in the practice of collecting advances from the customers for supply of accommodation services. To the extent the accommodation services are spread during

the period of change in rate of tax (say for instance where guests have stayed during July 20, 2018 to July 30, 2018) the rate of tax has to be determined based on the above table.

5. **Complimentary accommodation provided to the employees:** The following are the implications of complimentary accommodation provided to employees without consideration:
   a. The definition of "Supply" includes the activities specified in Schedule I, made or agreed to be made ***without any consideration***;
   b. Schedule I of the CGST Act lists out supply of goods or services or both made between the related persons without consideration as a taxable supply.
   c. The meaning of "Related person" in terms of Explanation to Section 15(5) of the CGST Act includes employer and the employee as related persons.
   d. Hence, the supply of accommodation services without any consideration to the employees of a hotel is a taxable supply of service. These supplies are to be valued at the open market value or declared / published tariff rate, whichever is the highest, applicable to the category of rooms prevalent at the time of check in of the employee. Rate of tax on the said supply of service shall be as explained in para B2 *supra for the period July 01, 2017 to July 26, 2018*. Effective July 27, 2018 these supplies are to be valued at the open market value i.e. value of supply applicable to the category of rooms prevalent at the time of check in of the employee. Rate of tax on the said supply of service shall be as explained in para B 3 *supra*. The provisions of 'change in rate of tax' are equally applicable to this situation.
6. **Cancellation charges collected on cancellation of accommodation services:** Some Hotels offer an option to cancel the accommodation services booked, by charging cancellation charges. The transaction would qualify as supply of service. The cancellation services provided would tantamount to tolerating an act or a situation and falls within the scope and ambit of paragraph 5(e) of Schedule II of the CGST Act 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as service. Hence, such transactions is liable to GST under the classification 9997- "Other services not specified elsewhere" at 18% (9% CGST + 9% SGST) rate of tax.

C. **Supply of food and beverages by hotels having accommodation service at its restaurant:**

1. As per Section 7(1A) of the CGST Act certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.
2. Paragraph 6 (b) of Schedule II of CGST Act reads:
   The following composite supplies shall be treated as a supply of services, namely
   'supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other

than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration'

Therefore, supply of food and beverages by hotels having accommodation service at its restaurant would be construed as service.

3. Rate of Tax for supply of food and beverages by hotels having accommodation service at its restaurant is as under:
   a. **July 01, 2017 to July 26, 2018:** Where any of the rooms supplied have declared tariff exceeding Rs. 7,500/- per day, the rate of tax would be at 18% (9% CGST+9% GST). If all the rooms supplied in the hotel having declared tariff of less than Rs. 7,500/-, rate of tax was at 5% (2.5% CGST+2.5% SGST) with no input tax credit benefit.
   b. ***With effect from July 27,2018****:* The rate of tax applicable to supply of food and beverages are as under:

Particulars	Rate of tax (CGST + SGST)
a. Supply by way of or as part of any service, of goods being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article of human consumption or drink is supplied, ***other than*** those located in the premises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes ***having declared tariff of any unit of accommodation of Rs.7,500/- and above per unit per day or equivalent***.	**5%** (Provided that credit of input tax charged on goods and services used in supplying the service has not been taken)
b. Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied, located in the premises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes ***having declared tariff of any unit of accommodation of Rs.7,500/- and above per unit per day or equivalent***.	**18%**

Declared tariff has the same meaning as discussed in 'Room

Particulars	Rate of tax (CGST + SGST)
Accommodation Service' supra.	

4. **Supply of food and beverages as part of in-room dining services:** Generally, most of the hotels provide in-room dining services to the customers occupying rooms for stay. Further, hotels raise a separate tax invoice for the in-room dining services. The consideration charged for supply of food / beverages in many hotels is higher than that for the supply of food and beverage made at its restaurant. In terms of the explanation provided in para 2 supra, the said supply is a taxable supply of service. The rate of tax applicable for such in room dining services can be analysed under the following scenarios:
    a. **Consideration for in room dining services is included in the declared tariff:** Considering the industry operations, in room service of food and beverages in authors view are naturally bundled in the ordinary course of supply of accommodation services. Both the supplies are made in conjunction with each other, with accommodation services being principal supply. Hence, in the authors view, the said supply qualifies as ***"Composite supply".*** With regard to the rate of tax, composite supplies are taxable at the rate at which the principal supply is taxable. Hence, the said transaction will be taxed at the rate applicable to accommodation services as discussed in para B (3) *supra*. *Where declared tariff is less than Rs. 1,000/- rate of tax would be at 5% (2.5% CGST+2.5% SGST) with no input tax credit benefit.*
    b. **Consideration for in room dining services are not included in the room rate:**
    The implication is the same as discussed in para (a) supra.

D. **Banquet/ Conference room services**

1. ***Pure banquet services: As per the definition of supply, "supply" includes —***
(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, *rental*, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;"
Banquet services provided by a hotel are a supply of service. The applicable classification, HSN and rate of tax are as under:

Classification	Rental or leasing services involving own or leased non-residential property
HSN	9972
Rate of tax	18% (9% CGST + 9% SGST)

2. ***Supply of food and beverages, audio visual equipment together with banquet services:***

The GST implication of such supply is as follows:

Sl. No. 7 (vii) of Notification 11/2017 Central Tax (Rate) dated 28.06.2017 has the following entry which is liable to tax at 9% CGST

'Supply, by way of or as part of any service or in any other manner whatsoever, ***of goods***, ***including but not limited to food or any other article for human consumption*** or any drink (whether or not alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration, in a premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organising a function) ***together with renting of such premises.***'

Therefore, supply of food and beverages and audio visual equipment along with the use of banquet services would be liable as per the above entry as under:

Classification	Accommodation, food and beverage services
HSN	9963
Rate of tax	18% (9% CGST + 9% SGST)

E. **Supply of Alcohol:** Section 9 of the CGST Act provides that tax shall be levied on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption. Therefore, supply of alcoholic liquor for human consumption is not liable to tax under CGST Act.

F. **Supply of cigarettes:** Supply of cigarettes is a taxable supply of goods. The relevant classification, HSN and rate of tax applicable as per Notification 1/2017 Central Tax (Rate) dated 28.06.2017 is as under:

Classification	Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
HSN	2402
Rate	28% (14% CGST+14% SGST)

Additionally, the said goods are liable to Goods and Services Tax Compensation Cess under Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017) at the rates as per Notification 1/2017 Compensation Cess (Rate) dated 28.06.2017.

G. **Transportation service:**

The transportation services provided for a consideration are covered under the definition of Supply since the said Supplies are made or agreed to be made for a consideration. Hence the same is liable to tax. The classification, HSN, rate of tax in respect of such supply of services is as under:

Classification	Passenger transportation services
HSN	9964
Rate of tax	5% (2.5% CGST + 2.5% SGST) - (ITC of tax paid on goods or services used in supplying transportation services **should not be utilised for paying taxes applicable on outward supplies**) 18% (9% CGST + 9 % SGST) without any restrictions on claiming ITC.

Hotels provide transportation services during the stay period of a customer, either for sightseeing or airport transports on payment of separate consideration. The GST implications is analysed under the following scenarios:

a. **Airports pick up and drop services**: Hotels offers to and fro transportation to airport from the hotel. Considering the industry operations, the transportation services are naturally bundled with the hotel accommodation services. Hence, in authors view, it can be construed as a **"Composite supply"** with accommodation services being the principal supply whether or not such services are negotiated for a single price. With regard to the rate of tax and classification, composite supplies are taxable at the rate at which the principal supply is taxed. Hence the rate of tax shall be the rate applicable to the ***hotel accommodation services*** as explained in para C 3 (a) and C 3 (b) *supra.Where declared tariff is less than Rs. 1,000/- rate of tax would be as in the table above*
   There is another school of thought that the said transportation services provided are itemised supplies liable to tax at rates applicable to such supplies.
b. **Local trip services:** Hotels also provide transportation services to the customers for local trips and such local trip services are not included in the package of facilities offered for the accommodation services. Such supply neither qualifies as composite nor mixed supply. Hence, local trip services and accommodation services though provided at the same time, in authors view are liable to GST at the rates applicable to the individual supplies.

An attempt has been made in this article to make a reader understand the outwards supplies impact for hotel industry under the GST law. This article is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion. The views written in this article is as on March 02, 2019.

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THE INPUT GST CREDIT CONUNDRUM

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Whenever we think of paying any taxes, the first question that all taxpayers ask is - what are the ways in which I can reduce my payment of taxes. In the world of Goods & Services Tax (GST), this question is best answered through claiming and utilizing of input GST credits that are accumulated from various taxable supplies received from vendors/ suppliers. The concept and application of input GST credits is one of the key distinguishing features of our present GST system and its success is entirely dependent on how fair and equitable the input GST credit provisions are under the GST Law.

Section 16 of the Central Goods & Services Act 2017 (the CGST Act) defines the eligibility and conditions for taking input GST credit. Whilst the Section speaks of "taking" input GST credits, the path of such "taking" of credits is effectively divided into two distinct steps (a) the conditions and eligibility for "taking" the credit as outlined under Section 49 of the CGST Act read with applicable Rules – evidenced through claiming the same in the Electronic Credit Ledger of the taxpayer and (b) the "utilization" of such credits by actual reduction of such sums against Output GST liabilities of the taxpayer [Refer Section 41(1) and (2) of the CGST Act]. This distinct two-step process is important to be emphasised upon, since several players in the industry and trade appear to take a view that the step of "taking" or "availing" input GST credit and "utilizing" input GST credit is one and the same step.In other words, the concept of "taking/ availing" credit and "utilizing" credit is the same concept. In my view, they could not be more incorrect on this matter. The provisions of the CGST Act is quite specific on treating the step of "taking/ availing" credit and "utilizing" credit to be different steps in the process of using Input GST Credits.

This is best emphasised in the manner in which Section 41 is read with Section 49 which determines the manner in which input GST credits can be availed and/ or utilized by a taxpayer. As per Section 49 (3), (4) and (5) read together, the GST Law clearly embodies the terms "amount available in Electronic Credit Ledger" and "Electronic Credit Ledger for Utilization" and distinguishes between the two. In other words, any input GST credit is said to be availed and utilized, only when, actually used for making output GST payments.

In this regard, it is also interesting to bring to attention the verdict of the Hon'bleTelengana High Court in the recent case of **MeghaEngineering and Infrastructure Limited**, where, *inter alia*, it was held that a registered taxpayer has an eligible claim towards input GST credit only when such registered taxpayer has correctly filed the GST returns pertaining to the period when such claim of input GST credit is

made. This further endorses the sequence of taking or availing credit which is legitimised only when corresponding GST returns are filed by the claimant taxpayer.

Further, as per Section 50 of the CGST Act, interest applicable on registered taxpayers are based on the gross liability to pay output tax unless such outstanding sum is actually reduced by utilizing input GST credits. Inversely, mere existence of balance of input GST credit in Electronic Credit Ledger appears to have no bearing on the reduction of output GST liabilities unless the balance input GST credits are actually used/ offset against output GST liabilities. On the other hand, in the event of a wrong claim or availment of input GST credit which is reflected in the Electronic Credit Ledger, the CGST Act prescribes interest on such "wrong claim" of input GST credit. It is important to also note that the interest on delay in payment of output GST liability is 18% whereas for wrong claim of input GST credit such interest is at 24%.

Reading the above set of provisions, it is quite clear that the registered taxpayers, in order to safeguard their right to use input GST credits to offset output GST liability, must consider:
(a)a correct claim towards input GST credit in the Electronic Credit Ledger
(b) ensure the correct eligible sums of input GST credits are actually used (and shown as used in the monthly GST returns) to offset their output GST liabilities; and
(c) ensure that appropriate declarations and procedural requirements are in place to comply with Section 49 of the CGST Act – viz., matching and reconciling of vendor invoices.

In other words, the distinctive step of correct claim or availment of input GST credit should be seen as a distinct and different step and it precedes the step of actual utilization of such correctly claimed input GST credits against output GST liabilities.

Further, in light of the provisions of the CGST Act, it is, humbly requested to the GST Council to make necessary amendments in section 50 of the CGST Act at the earliest, while adopting the principle approval of its 31st meeting to provide that interest should be charged only on the net tax liability of the tax payer, after taking into account the admissible input tax credit i.e. interest would be leviable only on the amount payable through the electronic cash ledger, to pull, business community out of the swamp. This would allow for a more humane treatment of outstanding GST dues and allow the taxpayers their legitimate right to use applicable and eligible input GST credits to reduce the differential GST liabilities, if any, that may be crystallised in the future.

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IMPORTANT ADVANCE RULINGS UNDER GST

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1. **Whether the supply of ice-cream by the retail outlets would be treated as "supply of goods" or "supply of service" or "composite supply" and subject to GST accordingly?**

Held: Supply of goods only

In case of ***Arihant Enterprise- AAR Maharashtra,*** the applicant is a partnership firm engaged in the business of reselling ice-creams in wholesale as well as retail sale packages. The applicant sell the ice-creams to its customers "as it is" without any further processing/alteration/structural or chemical change. The only source of revenue generation by the retail store of the applicant is by way of selling ice creams by means of retail packs and by way of Ice-cream scoops. The moot point is that whether the supply of ice-cream by means of retail packs and by way of Ice-cream scoops is a supply of 'goods' or supply of 'service'?

The Authority observed the supply of applicant in two types-

I. Sale of Ice-creams in retail packs,
II. Sale of Ice-creams in Scoops.

In the case of sale of ice creams in tubs of 500 Gms and at the MRP, it is sale of goods with no service being involved.

In the case of sale of ice-creams by scoops, the Authority observed that customer places the order from the menu and the same is delivered to them. In either of the cases, the ice-cream received by the applicant from the franchisor is supplied as it is to the customer and is sold at agreed rates, as mentioned on menu cards. No extra money is charged from the customers who are free to consume the ice-creams inside or outside the outlet. The dominant object even in the case of ice cream in scoops as in the subject case is a sale of goods. A reference to the case of **Govind Ram &ors.vs State of Rajasthan and ors. AIR 1982 Raj 265 was made in this case.**

The applicant's outlets differ from the conventional restaurants. In restaurants, generally the customers go with the intention of ordering articles of foods for the purpose of consuming the same there only, which are then prepared and served by waiters, etc to the customers. Here the ice creams are sold in the same form as received by them and at agreed rates not exceeding the MRP and in most of the case said ice creams appear to be consumed outside the premises of the applicant.

Hence, the Authority held that in the given subject matter there is a transfer of title in ice creams from the applicant to their customers and therefore as per entry no. 1(a) of the Schedule II of the CGST Act, the subject transaction is nothing but a supply of goods.

2. Whether a restaurateur is entitled to pay GST@18% (CGST-9% and SGST-9%) and claim input tax credit?

Held: No

In case of ***M/s Coffee Day Global Limited-AAR Karnataka***, the applicant is in the business of running restaurants under the name and style of ***Cafe Coffee Day*** where non-alcoholic beverages and food items are served. Notification No.46/2017 dated 14.11.2017 provides that restaurants can pay GST @5% (CGST-2.5% and SGST-2.5%), provided they do not avail input tax credit of the tax paid on input goods and services. Notification No.11/2017dated 28.06.2017, at Sl.No.35, provides for levy of GST @18% (CGST-9% & SGST-9%) on supply of unclassified services and the suppliers are entitled to take input tax credit in the circumstances where they pay output tax. The moot point is that whether Notification No.46/2017 dated 14.11.2017 creates a compulsion on the restaurateurs to pay 5% GST without availing ITC?

The applicant contends that Notification No.46/2017 dated 14.11.2017 applies in circumstances where the applicant does not avail input tax credit. It does not prevent a restaurateur from paying tax at 18% (CGST – 9% and SGST – 9%) and availing input tax credit. Therefore the said notification is applicable only in circumstances where the supplier does not claim input tax credit and it would not apply in the circumstances if the supplier wants to avail input tax credit. If the restaurateur avail input tax credit, the transaction would get classified under Sl.No.35 of Notification No.11/2017 and chargeable to tax at 18% (CGST – 9% and SGST – 9%). Hence the restaurateur has the option of paying output tax @ 5% without availing input tax credit or paying output tax @ 18% by availing input tax credit. It was also argued that section 16(1) of the Act confers a right to every registered person paying regular rate of tax to take input tax credit. Under the Notification, availment of concessional rate of tax @5% is subject to the condition that the input tax credit is not availed. If the condition is not fulfilled, then the concessional rate will not apply. The phrase "provided that" signifies that a particular thing must happen before another thing happen. In this context the applicant relied upon on the judgment of the Hon'ble Supreme Court in the case of **State of Kerala Vs Builders Association of India [(1997)104 STC 134 (SC)]**

The Authority found that the supply of food and beverage services is covered under Heading 9963 and Group 99633 as per Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 read with the Annexure to the said Notification. The classification of the services rendered by the applicant is clearly defined under Service Code (Tariff) 996331. The entries at serial number 7 of the aforesaid Notification were amended through Notification No 46/2017 –Central Tax (Rate) dated 14th November, 2017 levying a central tax of 2.5% on restaurant services as provided by the applicant under the condition that credit of input tax charged on goods and services used in supplying the service have not been taken.

As the services provided by the applicant are covered under a specific heading and the Notification carves out a specific rate of tax for that heading, the same shall be applicable to the applicant. Serial number 35 would qualify for invocation only in respect of services that do not find classification elsewhere. Therefore the applicant is covered by serial number 7 and not 35.

3. **Whether GST is chargeable on freight amount excluding diesel cost or on total amount which is inclusive of diesel cost where the recipient of service is providing diesel to the service provider?**

   Held: Yes including Diesel Cost

   In the case of ***M/s Shri NavoditAgarwal-AAR Chhattisgarh*** the applicant transporter engaged in carrying goods of Cement Company namely M/s Shree Raipur Cement. Pursuant to the oral agreement between the aforesaid parties, Shree Raipur Cement proposed that while transporting their cement/ clinkers, diesel required would be provided by Shree Raipur Cement. Further they will also raise separate invoice for diesel on the applicant. Now, the key point on which the applicant sought advance ruling is that whether the cost of such diesel supplied by the recipient is to be added to the freight amount charged by the applicant or not?

   The Authority made a reference to the legal provisions of section 7(1) related to **Supply** section 15(2) (b) related to **Valuation** and section 2(31) related to **Consideration** and held that the diesel provided by the cement company to the applicant is an important and integral component of the applicant's business, without which the process of supply of cement can never get materialized. The applicant was liable to pay the cost of diesel but it has been paid by the cement company.

   Hence, the Authority ruled that the applicant is liable to charge GST on the cement company on total amount including cost of diesel so provided by the cement company.

   Note: *The author is of the view that there could also have been another argument that 'Diesel' is presently a Non-GST item as specified u/s 9(2) so will this be subject to GST at all?*

4. **Whether "Business Transfer Agreement" as a going concern on slump sale basis is exempted from the levy of GST in terms of serial no.2 of the Notification no.12/2017 C.T (Rate) dated 28.06.2017?**

   Held: Yes

   In the case of ***M/s. Innovative Textile Limited-AAR Uttarakhand,*** the applicant is a seller and is carrying on the business of manufacturing of textile yarns, fabrics and garments. The applicant intends to sell their ongoing business of manufacturing of textile yarns and fabrics (namely, 'Sitarganj Business') to M/s SD Polytech (P) ltd. (herein referred to as 'purchaser') in the form of business transfer as a going concern on slump sale basis as a whole with all assets and liabilities. The purchaser agreed to purchase 'Sitarganj Business' as a going concern with all assets and liabilities as set

out in the Business Transfer Agreement. Now the issue which is raised before the Authority is whether the sale of Sitarganj Business as a going concern on slump sale basis is exempt under GST in terms of Notification No.12/2017 dated 28.06.2017?

The Authority made an analysis of the Notification No.12/2017 dated 28.06.2017. At serial no.2 of the notification, the authority found that the services by way of transfer of a going concern, as a whole or an independent part thereof is to be treated as supply of service and is exempted under GST. Further, the Authority also made a reference to clause (d) of section-2(17) relating to definition of 'Business'. The Authority thus observed that the acquisition of goods/services for commencement of business is covered under the said definition.

In view of the above provisions, the Authority held that the applicant has supplied services by way of transfer of Sitarganj Business as a going concern and as per serial no.2 of the Notification No.12/2017 dated 28.06.2017, the same is exempted from levy of GST.

5. Whether the inputs sent to the job-worker and consumed in the process of galvanization should be treated as supply in terms of section 143(3)?

Held: No

In case of ***Ratan Projects & Engineering Co Private Limited-AAR West Bengal,*** the applicant is a manufacturer of cable tray, angel ladder tray etc, which are mainly used for electrical works. The Applicant sends steel structures for galvanizing to a job worker along with furnace oil, zinc, nickel that are to be consumed in the galvanizing process. He seeks a ruling whether dispatch of those consumable materials is to be treated as supply from the principal to the job worker if they are not returned within the time allowed under section 143(1) (a) of the GST Act.

The Authority observed that Job work is defined under section 2(68) of the GST Act as any treatment or process undertaken by a person on goods belonging to another registered person, and a job-worker shall be construed accordingly. The Applicant sends steel structures of different names and shapes to a job-worker for the process of galvanizing, which effectively means the application of a protective zinc coating to prevent rusting. It is, therefore, an intermediate stage in the Applicant's manufacturing activity, and the 'inputs' mentioned in section 143(1) (a) include the intermediate goods arising from the process of galvanizing (refer to Explanation to section 143). Therefore, the return of the galvanized goods to the Applicant satisfies the condition of receiving back the 'inputs' in accordance with section 143(1)(a) of the GST Act. The 'inputs' returned, however, do not include in their original physical forms the goods like furnace oil, zinc etc that have been sent to the job-worker. The Applicant submits that these goods have been consumed in the galvanizing process. Reference was also made to the case of ***RaheeInfratech Ltd [2016 (339) ELT 293 Tri – Kolkata)] CESTAT*****, Kolkata** Bench decided a similar question in the context of Cenvat credit.

The goods that are used up in the galvanizing process cannot be separated from the galvanized goods. So, the zinc, furnace oil or nickel exhausted in the process of galvanizing need not be physically returned. If the galvanized structures are returned that will be sufficient compliance of section 143(1) (a) of the GST Act.

Thus the inputs sent to the job-worker and consumed in the process of galvanization should not be treated as supply in terms of section 143(3).

6. **Whether preparation and serving food to children of Government Schools under Mid-Day Meal Programme of Government and serving of food under Government sponsored Anganwadi meals program is covered under the scope of supply as per section 7 of CGST/RGST Act, 2017?**

Held: Yes

In case of ***M/s The AkshayPatra Foundation-AAR Rajasthan***, the applicant is a Not for Profit organization. It is also a charitable trust registered under sec-12AA of the Income Tax Act, 1961.It is implementing Mid-Day Meal Scheme in the government and government aided schools. The Ministry of Human Resource Development, Government of India has prescribed a Model MOU for partnering with NGOs for implementation of Mid-Day Meal program to all the state governments.

Accordingly, the applicant raises funds by way of donation from Corporate, Trusts, Foundations and general public for meeting the expenditure incurred on the program apart from free grains and food conversion cost received from Government. The applicant contends that serving free food under Mid-day Meal program to government school children is not covered under the scope of "supply" under GST.

The Authority made a reference of section-7 of the GST Act. Further, a reference of section-2(17) of the CGST Act was also given. The word 'commerce' used in section-2(17) has several definitions, like as per business dictionary, it means exchange of goods or services for money or in kind, usually on large scale enough to require transportation from place to place, or across city. As per the documents submitted by the applicant, the Authority observed that the applicant is reimbursed as per the rate fixed by the Government of India for transportation charges. Further the applicant is reimbursed for the cooking cost also. The applicant is receiving conversion charges for cooking of the meal.

In view of the above, it is clear that the activity of preparing and serving of food under Mid-Day Meal and Anganwadi Meal program is covered under the definition of business.

Also, there is no exemption granted to charitable trusts in case of supply of goods which are taxable and not specifically exempt or Nil rated.Also the applicant is receiving consideration (in the form of reimbursement from Government) against the said activity.

Hence the Authority ruled that preparation and serving of food to children of government schools under Mid-Day Meal program and Anganwadi Meal program is covered under the scope of 'supply' under GST.

7. **What is the tax liability under GST for the tour packages, which are provided to guests by way of separate services like accommodation, serving food and beverages, service of authorized guides, trekking accessories etc. against separate invoices?**

Held: As per goods and services supplied

In case of ***Kerala Forest Development Corporation-AAR Kerala*** the applicant is conducting Eco-tourism activities in the reserve forest at Munnar, Gavi, Nelliyampathy and Arippa. The applicant wants to issue separate invoices to customers for the services availed by them, instead of giving as packages. The services offered under different categories are like -Providing accommodation, Preparing and serving food and beverages, providing service of authorized guides, providing trekking accessories.

The above mentioned services are individually available to the customers. Now the applicant needs a ruling on the taxability of GST on the services offered by him against separate invoices. The applicant also stated that charges for accommodation per guest are below threshold minimum to levy tax.

However, the Authority analyzed that the criteria for arriving threshold limit in the case of service of accommodation is not based on the charges realized from guests per head. As per SAC 9963, exemption is eligible only if services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purpose, having declared tariff of a unit of accommodation below one thousand rupees per day or equivalent.

It is stated that food and beverages are prepared in each of the destinations, and are served to the guests as per their choice and separate invoices are issued. Therefore as per Notification No.13/2018 C.T (Rate) dated 26.07.2018 the same is taxable @5% GST without ITC.

The service of authorized guide provided by the applicant is taxable @18% GST. As per Circular No.47/21/2018-GST dated 08.06.2018, it has been clarified that the taxability of supply would have to be determined on case to case basis looking at the facts and circumstances of each case. Where a supply involves supply of both goods and services and the value of such goods and services are shown separately, the goods and services would be liable to tax at the rates as applicable to such goods and services separately.

Hence, the Authority ruled the tax liability of the services provided by the applicant as under-

a) For accommodation- tax liability depends upon the tariff charges per unit of the accommodation.
b) For food and beverages- taxable@5%

c) For authorized guide- taxable@18%

Hence the Authority ruled that the applicant is not entitled to pay the GST @ 18% with input tax credit as the services being offered by the Applicant are classified under a heading attracting GST @ 5%, without input tax credit.

8. Whether the services provided by the applicant in affiliation to specified universities and providing degree courses to students under related curriculums are exempt from Goods and Services Tax vide entry no. 66 of the Notification No. 12/ 2017 – Central Tax dated 28.06.2017?

Held: Yes

In the case of ***M/s Emerge Vocational Skills Private Ltd.-AAR Karnataka,*** the applicant is a private limited company engaged in providing specified educational services in the field of Hotel Management.

Entry No. 66 of the Notification No. 12/ 2017 –Central Tax (Rate) dated 28th June 2017 exempts services provided by education institutions to its students, faculty and staff.

The applicant proposes to obtain an affiliation with a university in the State of Karnataka and shall thereafter be engaged in provision of education in affiliation with the said university in the State of Karnataka.

The University would hold the examination and grant the qualification or degree for the course. The applicant states that, he offers a curriculum to a student which enrolls him / her with a university **recognized by an Indian Law**. The curriculum also involves examination being conducted by the University and all successful candidates are granted University degrees. The applicant is of the view of that university curriculum offered by the applicant may qualify as services provided by educational institution to its students and accordingly exempt from goods and services tax.

The Authority examined the said notification. As per the contention of the applicant, he is getting the institution affiliated to a University in the State of Karnataka and is also proposing to impart education as a part of a curriculum provided by the University and the examination would be conducted by the University and qualifications which are recognized by law would be issued to the successful candidates. Hence the institution would qualify as an "educational institution" for the purposes of such courses only which lead to a qualification **recognized by any law** for the time being in force. The "Services provided by an educational institution to its students, faculty and staff" is exempt from tax under the Central Goods and Services Tax Act and the applicant qualifies as an educational institution in so far as those courses for which affiliation has been obtained from the University in the State of Karnataka and for which University Curriculum is prescribed and the qualifications recognized by the law for the time being in force is given after the conduct of examinations by such University, the applicant is exempted from Goods and Services Tax.

Hence the services provided by the applicant in affiliation to specified universities and providing degree courses to students under related curriculums are exempt from Goods and Services Tax, subject to the condition that such education services provided must be as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force.

9. Whether the following services are treated as exempted supply of service?

i. Printing of Pre-examination items like question papers, OMR sheets (Optical Mark Reading), answer booklets etc,

ii. Printing of Post-examination items like marks card, grade card, certificates to the educational boards upto higher secondary; and

iii. Scanning and processing of results of examinations.

Held: Yes

In the case of ***M/s. K L Hi-tech Secure Print Ltd-AAR Telangana***, the applicant is engaged in the business of providing the services of printing of security documents to its clients, who vary from Government Authorities and agencies, Banks, Educational Boards / Institutions and Private Companies.

Exemption from payment of GST in respect of certain supplies of Services namely **services relating to admission to, or conduct of examination by institution** has been provided under Notification No.12/2017-Central Tax (Rate) dated 28.06.2017 as amended by Notification No.02/2018-Central Tax (Rate) dated 25.01.2018 at serial number (iv).

The Applicant submits that the service provided to an educational institution, by the applicant in relation to conduct of examination by an institution is exempt by virtue of the notifications cited supra. The said service provided by the applicant to the educational institution is towards conduct of examination. Since, the service provided by the applicant towards pre-examination items will be used by the educational institution for conduct of examination; it shall be exempt from GST.

In response to the second question, the applicant added that the services provided by the him to the educational boards by way of printing of marks card, grade card, certificates etc. acts as a medium for communication of examination results to students. The said activity acts as a last leg towards completion of the activity of conducting the examination process by the educational institution.

Against the third question, he contended that the services provided by the applicant to the educational boards by way of scanning and processing of results is more an outsourced activity which otherwise would have been done and undertaken by the educational institution itself. This is an integral part of the conduct of examination and publishing of results of the students who participated in the said examinations.

The Authority ruled that the services provided by the applicant to an educational institution relating to conduct of examination **are exempt**.

10. What would be the classification and the applicable GST rate, for the supply of Printing of cheque book?

Held: 5% rate (where paper is supplied by customer) & NIL (where paper is not supplied by customer).

In the case of ***M/s. K L Hi-tech Secure Print Ltd-AAR Telangana***the applicant is a company engaged in providing the services of printing of cheques to various customer banks and there exists the following two scenarios, where the:-

a) Physical inputs i.e., paper alone supplied by the customer banks, however inks which are used for printing belong to the Company itself;

b) Physical inputs including paper and inks which are used for printing belong to the company itself;

The Authority found that assessee is undertaking two types of supplies-(i) In respect of paper supplied by the banks, they print the cheque format of respective banks and (ii) physical inputs including paper and ink would be borne by the company and the cheques after printing as per the bank's specifications would be supplied to them. In both the cases, the unit prints the cheque and then supplies the cheque book to the bank after completion of the printing work. It is the printing on the cheque paper, which communicates the message to the buyer that the product supplied to him is "Cheque" and not "Cheque paper".

In respect of the situation, where the paper is being supplied by the banks and the applicants are undertaking job work of printing the cheque and converting them as cheque books, the predominant supply in the instant case is supply of service covered under sub-item (c) of item (ii) at Serial No.26 of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 as amended i.e**"services by way of any treatment or process on goods belonging to another person, in relation to- printing of all goods falling under chapter 48 or 49, which attract CGST @ 2.5% or Nil**". The "**cheques, loose or in book form**" being an exempted supply in terms of S.No. 118 to the Notification No. 02/2017- Central Tax (Rate) dated 28.06.2017; the supply of service by the applicant attracts GST @ 5% (2.5% CGST + 2.5% SGST).

In respect of supply of cheque books where the printing paper and inks are being borne by the applicants, the same falls under Tariff heading 4907 as goods and they are an exempted supply in terms of Serial No 118 to the Notification No.02/2017-Central Tax (Rate) dated 28.06.2017. Hence, cheques or cheque books would not attract any GST and are an exempted supply in terms of the Notification.

11. What would be the classification and the applicable GST rate, for the printing and supply of Aadhaar Cards on paper?

Held: Composite supply and rate of tax will be 12%.

In the case of ***M/s. K L Hi-tech Secure Print Ltd-AAR Telangana,*** the applicant has entered into contract with Unique Identification Authority of India (UIDAI) for provision of services of printing and dispatching of Aadhaar Cards.

The applicant contends that the activity of printing and dispatch of Aadhaar cards provided to Unique Identification Authority of India (UIDAI), by the applicant is a supply of service. The applicant carries out the activity of printing of contents of Aadhaar on paper. The product which is generated from the activity will be treated by trade as well as in common parlance as paper, hence the classification that should be under Heading 4901 as per the Notification No. 1/2017-Central Tax (Rate) dated 28th June, 2017. Accordingly, the rate of tax applicable to the product is 5% (i.e., 2.5% - Central Tax and 2.5% - State Tax or 5% - Integrated Tax). The Applicant submits that supply of printing, laminating and enveloping, sorting, franking and dispatching is a composite supply of printing of Aadhaar card whereby, printing of Aadhaar card shall constitute to be the principal Supply and the other services are ancillary to the principal supply and such ancillary service is naturally bundled.

It is important to note that this will always be transaction and business specific; it cannot be specified on an all-pervasive basis. Hence, the applicant provides that the activity provided by the applicant is purely a "service" in relation to printing where the content to be printed along with design and logo is provided by UIDAI and the applicant only prints such content on the paper. Accordingly the activity of printing on the paper will fall within the ambit of Entry No. 27 with heading 9989 (i) of Notification No. 11/2017-Central Tax (Rate) dated 28th June, 2017 as amended from time to time. Accordingly, the applicant believes that the rate of tax for the activity of supply of printed Aadhaar cards on paper to UIDAI will be 12% i.e. (6% - Central Tax and 6% - State Tax or 12%- Integrated Tax).

The Authority observed that the applicant is rendering various supplies like conversion of data to the required file format, printing of aadhaar cards, lamination, franking and dispatching etc. In the entire gamut of things being undertaken by the applicant, all the supplies made by them, are naturally bundled and supplied in conjunction with each other. Each of these supplies is not supplied separately and is dependent on other supplies provided by them. **Hence, the services can be considered as composite service in terms of section 2(30) of CGST/TGST Act, 2017**. These services cannot be considered as mixed supply as each service is dependent on one another and all the supplies are provided in conjunction. All the services are interdependent on one another. Hence it cannot be considered as mixed supply in terms of section 2(74) of CGST/TGST Act, 2017. In the entire gamut of things being undertaken by the applicant, it appears that, it is an activity of predominant nature of supply of service rather than supply of goods. Accordingly, it appears that, the services rendered by the applicant merits as supply of service and accordingly falls under serial no.27 of Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 as amended and the rate of tax applicable is 12% (6% CGST + 6% SGST).

Hence the Authority ruled that the supply of Aadhaar Cards are classifiable under heading 9989 of GST Tariff and attracts GST @ 12% (6% CGST + 6% SGST) in

terms of S.No.27 of Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 as amended.

12. What would be the classification and the applicable GST rate, for the printing and supply of Polyvinyl chloride (PVC) Cards?

Held: Supply of Goods and rate of tax will be 18%

In the case of ***M/s. K L Hi-tech Secure Print Ltd-AAR Telangana*** the Applicant carries out the activity of printing on Polyvinyl chloride (PVC) Cards belonging to the applicant itself for various customers. The printed cards are in the nature of loyalty cards, identity cards and other cards of similar nature without any magnetic stripe. Thus, the applicant based on the above would refer to the classification of the product which is printed by the applicant under the following Chapter heading 3920 as provided in Notification No. 01/2017-Central Tax (Rate) dated 28th June.

The applicant submits that printing activity specified above shall be taxable at the rate specified in Entry No. 27 with heading 9989 (ii) of Notification No. 11/2017-Central Tax (Rate) dated 28th June, 2017 as amended from time to time since the goods on which the activity of printing does not fall under Chapter 48 or 49:-

Thus, the applicant based on the above facts submits that the activity of printing on Polyvinyl chloride (PVC) Cards, the goods being the plastic cards in the given case would fall under within the ambit of Chapter 3920. Hence, the activity of printing on PVC Cards will be liable to tax under GST at the rate of 18% (9% - Central Tax and 9% - State Tax or 18% - Integrated Tax).

The Authority stated that the PVC cards are belonging to the applicant. The predominant supply is that of goods and the supply of printing of the content supplied by the recipient of supply is ancillary to the principal supply of goods and therefore such supply would be classified as supply of goods falling under chapter 3920 of the Customs Tariff as made applicable to GST Tariff, hence it attracts 18% GST (9%CGST+9%SGST) as per Sl.No.106 of Schedule III of Notification No.1/2017-Central Tax (Rate) dated 28th June, 2017.

Hence the Authority ruled that the printing and supply of Polyvinyl chloride cards (PVC) are classifiable under heading 3920 of GST Tariff and **attracts 18% GST (9%CGST + 9%SGST)** in terms of S.No.106 of Schedule III of Notification No.1/2017- Central Tax (Rate) dated 28th June, 2017.

13. Whether the Event Management support services provided in one state to a registered person of another state is governed u/s 12(7) (i) of the IGST Act, 2017?

Held: Yes

In the case of ***Grasshopper Production-AAR Goa,*** the applicant is a service provider of event management to the clients in film shooting industry and providing location for shootings as per the requirements of the clients. All the services are procured from suppliers within the state of Goa in the name of the applicant on

payment of CGST and SGST wherever applicable from the company accounts and charged their clients for cost of supply of such event management. The applicant has been providing services to Gallani Entertainment, Mumbai who is a registered recipient of service. The question of applicant is regarding the place of supply of service provided to Gallani Entertainment.

The Authority gave a reference of section-12 of the IGST Act and held that the applicant is providing services of Event Management to a registered person of Mumbai. As per the provision of section 12(7)(i) of the IGST Act, the place of supply of services, in case of registered person shall be the location of the recipient of such service. Hence, the Event Management support services provided in Goa to a registered person in Maharashtra is governed u/s 12(7) (i) of the IGST Act. The same should be treated as interstate supply and the place of supply shall be Mumbai and the applicable rate of tax is 18%.

14. Whether the service provided for issuing 'Pollution under Control Certificate' for vehicles on behalf of State Government is exempted from GST?

Held: No

In the case of ***M/s Venkatesh Automobiles-AAR Goa*** the applicant is an Authorized Service Centre appointed by the Government of Goa, Directorate of Transport to carry out the services of pollution testing of commercial and non-commercial vehicles. The applicant carries out the abovementioned testing and issue 'Pollution under Control Certificate' on payment of prescribed fees fixed by the Government. For the purpose of issuing the said certificate, the applicant purchases blank leaflets books from Directorate of Transport on payment of prescribed rate per leaf and issues same leaflets to the customers after testing Pollution Control Test at higher rate which is also prescribed by Directorate of Transport. The difference between the cost of procurement of the leaflets and the issue price to customers is the consideration charged for services rendered by him. The applicant is of the view that the services provided by him are covered under SAC 9991 and accordingly exempt from GST.

The Authority considered the facts submitted by him. The Authority stated that the service rendered by the applicant is not covered under Schedule-III appended to the CGST as well as GGST Act. Moreover the services provided by the applicant are not fully covered under SAC 9991. The Government has authorized the applicant to issue Pollution Control Certificate on payments. It is the service provided by the applicant to the customers on payment of service charges. Since the services of testing of Pollution are provided on payment of service charge, the service provided by the applicant is liable to GST.

Hence the Authority of issuance of Pollution under Control Certificate for vehicles issued by the applicant is not covered under SAC 9991 and is covered under Residuary Entry and hence, should be taxed @ 18%.

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JUDICIAL PRECEDENTS UNDER GST LAW

Adv.Mukul Gupta
Sharnam Legal, Gaziabad

1. **Sheen Golden Jewels India Pvt Ltd. Vs. State Tax Officer and Ors. 2019 ACR 30 High Court Kerala**

   In The High Court Of Kerala At Ernakulam WP(C) Nos. 11335, 15523, 15851,15879, 15898, 18326, 25768, 40543, 40545, 40561 and 40646 of 2018; MANU/KE/0448/2019

   1. After seizing the documents, the dealer shall not be kept in suspense. The officer must return the documents within 180 days of seizing the documents. The documents, books of accounts may also be required by the dealer in its day to day business and it's difficult to prepare everything new. The dealer may face serious impediments in its business because of lack of bills, cashbook, and ledger and so on.
   2. The documents in the instant case were seized under VAT Act and the issue was whether the right to seize under KERALA VAT Act 2003 extinguishes when the GST Act was implemented as per the saving and repeals under Sec. 174 KGST Act. Saving provisions of the statute is for the state to continue to hold the right which it executed in the previous law/ statute. Article 246A of the constitution empowers the state and the centre to have simultaneous as well parallel rights to execute the law.

      Court ordered the officers to return the documents.

2. **Willowood Chemicals Pvt. Ltd. Vs. Union of India, R/Special Civil Application No. 4252 of 2018, In The High Court Of Gujarat At Ahmedabad**

   MANU/GJ/1049/2018

   Section 140(1) of Gujarat Goods and Services Tax Act, 2017 (GGST Act): Whether second proviso to Section 140(1) of GGST Act ultra vires. The court held that claims of carry forward of existing duties and credits during period of migration to GST regime should be within prescribed time. Doing away with time-limit for making declarations could give rise to multiple large-scale claims and may trickle in for years together. This makes the task of matching of credits impractical, if not impossible.

3. **Stove Kraft Pvt. Ltd. vs. Assistant State Tax Officer, SGST Dept., Muthanga KERHC W.P. (C) No. 3957 of 2019**

   MANU/KE/0944/2019

   Section 129 of the Central Goods and Services Tax Act, 2017: Three invoices for one e-way bill generated can be possible where the e-way bill shows all the three

invoice numbers. The department may get confused in such case. But the goods must not be detained since there is no legal provision.

4. **H.M. Industrial Pvt. Ltd. Vs. Commissioner of CGST and Central Excise, R/Special Civil Application No. 1160 of 2019, In the High Court of Gujarat at Ahmedabad**
   MANU/GJ/0457/2019
   Section 83 Central Goods and Services Tax Act, 2017: The claim of tax was fulfilled by reversing input tax credit. **Therefore, considering that the amount paid by** reversing input tax credit, the interest of the revenue is sufficiently secured. Therefore, the provisional attachment of the bank accounts made under Section 83 of GST Act is no longer justified.

5. **Perfect Boring Pvt. Ltd. vs. Union of India, R/Special Civil Application No. 1321 of 2019, In the High Court of Gujarat at Ahmedabad**
   MANU/GJ/0190/2019
   Section 83 Central Goods and Services Tax Act, 2017: The object of the Section 83 of CGST Act is to protect the interest of the Government revenue. In the facts of the present case, attachment of the bank accounts of the petitioner has resulted into various hardships to the petitioner which would adversely affect its business and which may result in loss of revenue to the Government, instead if the petitioner provides for some security towards its outstanding dues, the interest of the petitioner as well as the revenue can be protected.

6. **ImartiLakdiVyapariSansthan Jodhpur Vs. State of Rajasthan, In The High Court Of Rajasthan At Jodhpur D.B. Civil Writ Petition No. 1451 of 2018**
   MANU/RH/1055/2018
   Rajasthan High Court has held that the levy under section 17 of the Rajasthan Agriculture Produce Marketing Act, 1961 is a 'Fee' and not a cess and therefore, the same is not abolished after the rollout of GST.

7. **Orson Holdings Company Limited vs. Union of India In The High Court Of Gujarat At Ahmedabad R/Special Civil Application No. 18982 of 2018**
   MANU/GJ/1193/2018, 2018 TaxPub (GST) 0847GujHC
   Central Goods and Services Tax Act, 2017 - Section 122 and Section 129: The constitutional validity of S. 138(10) was challenged as being unconstitutional. It was contended that validity period of e-way bill on the distance travelled within a day couldn't be restricted. The arguments were upheld by the court and returnable notice was issued to the authorities.

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TIMELINES OF COMPLIANCE UNDER THE COMPANIES ACT, 2013 FOR THE MONTH OF MAY & JUNE, 2019

CS Anil Gupta
Jaipur

S. N.	FORM NAME	INFO UPTO	DUE DATE	FEE	PENALTY	APPLICABILITY
1	MSME-1 (One Time Return)	Every Outstanding to MSME more than 45 days as on 22.01.2019	30/05/2019	As per normal fees rules	Normal Additional Fees	Every Specified Company
2	MSME-1 (Half Yearly (01.10.2018 to 31/03/2019)	Every Outstanding to MSME more than 45 days as on 31/03/2019	30/05/2019	As per normal fees rules	Normal Additional Fees	Every Specified Company
3	DPT-3 (One time return)	Time period for which it is to be filled is from 01.04.2014 till 31.03.2019.	Within 90 days from the date of publication of this notification in the Official Gazette i.e. 29.06.2019.	As per normal fees rules	Normal Additional Fees	Every Company (Whether Private or Public Except Government Company).
4	DPT-3 (Yearly compliances)	Time period for which it is to be filled is from 01st of April, 2018 to 31st March, 2019.	On or before 29th June of every year.	As per normal fees rules	Normal Additional Fees	Every Company (Whether Private or Public Except Government Company).

5	DIR-3 KYC	Every Person holding DIN	30/06/2019	Upto Due Date-NIL	Rs. 5000	Every Person having DIN
6	INC-22A (ACTIVE)	Every Company Incorporated before 31/12/2017	15/06/2019	Upto Due Date-NIL	Rs. 10,000	Every Company
7	LLP-11 (Annual return)	Summary of management affairs of LLP till 31/03/2019	30th May 2019	As per normal fees rules	Rs. 100 per day	Every LLP

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IMPORTANT CASE LAWS, CIRCULARS & NOTIFICATIONS UNDER THE COMPANIES ACT

CA. ManishaMaheshwari
Chartered Accountants, Jaipur

CASE LAWS

SUPREME COURT OF INDIA
63 Moons Technologies Ltd. vs. Union of India
CIVIL APPEAL NOS. 4476 TO 4481 OF 2019; APRIL 30, 2019

Subject:-
Amalgamation of holding company with its wholly owned subsidiary
Relevant Sections:
Section 396 of the Companies Act, 1956
Decision:-
In case of amalgamation of holding company with its wholly owned subsidiary, all assets and liabilities of wholly owned subsidiary would become assets and liabilities of holding company as the assessment order did not provide any compensation to either shareholders or creditors of holding company for economic loss caused by amalgamation in breach of Section 396(3). An important condition precedent to passing of final amalgamation order was not met. Final order of amalgamation was to be held ultravires section 396 and violative of Article 14 of Constitution.

NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH
Bran Etechnologies (P) Ltd. vs. Registrar of Companies
CA NO 79/252 (HYD.) OF 2019; APRIL 10, 2019

Subject:-
Struck off the name of the company from register of companies
Relevant Sections:
Section 248 and 252 of the Companies Act, 1956
Decision
A company whose name was struck from register of companies was in existence and was a going concern; name of company was to be restored in Register of Companies as maintained by ROC.

SUPREME COURT OF INDIA

Serious Fraud Investigation Office vs Rahul Modi
CRIMINAL APPEAL NOS. 538, 539 OF 2019; MARCH 27, 2019

Subject:-
Proceedings under provision of Sec. 212: Investigation into affairs of company by Serious Fraud Investigation Office (SFIO)

Relevant Sections:
Section 212(12), 212(1), 212(8) 212 (3) of the Companies Act, 2013
Decision:-
Prescription of period within which a report has to be submitted to Central Government under sub-section (3) of section 212 is purely directory. Even after expiry of such stipulated period, mandate in favour of Serious Fraud Investigation Officer (SFIO) and the assignment of investigation under sub-section (1) would not come to an end. The only logical end as contemplated is after completion of investigation when a final report or 'investigation report' is submitted in terms of sub-section (12) of section 212. It is also held that the act of directing remand of an accused is a judicial function and challenge to order of remand is not to be entertained in a Haebeas Corpus Petition.

Cushman and Wakefield India (P) Ltd vs Union of India (Delhi)
W.P. (C) NOS. 9883, 9889, 9890, 9927 OF 2018
CM NOS. 38508, 38522, 38524, 38673 OF 2018; JANUARY 31, 2019
Subject:-
Eligibility for purpose of registration as Valuer under rule 3(2) of Companies (Registered Valuers and Valuation) Rules, 2017
Relevant Sections / Rules :-
Section 247 of the Companies Act, 2013, read with rule 3 of the Companies (Registered Valuers and Valuation) Rules, 2017
Decision:-
A company, other than a subsidiary company, joint venture or associate of other company forms a separate class for purpose of eligibility for registration as a Valuer under Companies (Registered Valuers& Valuation) Rules, 2017. Said classification is founded on intelligible differentia is reasonable and rule 3(2) is not unconstitutional for violating article 14, article 19(1)(g) and article 301 of Constitution of India thus only companies other than subsidiary companies, associate companies and joint ventures are eligible for purpose of registration as Valuer.

CIRCULARS

1. **GENERAL CIRCULAR NO. 5/2019 [F.NO. 01 /8 / 2013 - CL V (VOL.VI)], DATED 12-4-2019**
   Filing of one time return in Form DTP-3
   Outstanding receipt of money or loan by a company but not considered as deposits, in terms of clause (c) of sub-rule 1 of rule 2 from the 1st April, 2014 to the date of publication of the notification in the Official Gazette, as specified in Form DPT-3 within ninety days from the date of said publication of this notification along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014". It may also be noted that data on deposits should be filed upto 31st March,

2019 (as opposed to 22nd January, 2019 which was originally indicated in the said Rule). Rule change is being issued separately.

2. **GENERAL CIRCULAR NO. 4/2019 [F.NO. 52 / 10 / CAB / 2019], DATED 4-4-2019**
Section 148 of The Companies Act, 2013, read with Rule 6 of the Companies (Cost Records and Audit) Rules, 2014:
Relaxation of Additional Fees and extension of last date of filing e-form CRA-2 (Form of Intimation of Appointment of Cost Auditor by the Company to Central Government) in certain cases under the Companies Act, 2013

3. **GENERAL CIRCULAR NO. 3/2019 [F.NO.01/13/2013-CL-V-PT-II], DATED 11-3-2019**
Section 2(41) of The Companies Act, 2013:
Clarification on filing of e-form RD-1 - Conversion of Public Company into Private Company and change in a Financial Year

4. **GENERAL CIRCULAR NO. 2/2019 [F.NO.12/03/2018-CSR], DATED 8-3-2019**
Section 135 of The Companies Act, 2013:
Corporate Social Responsibility: Extension of tenure of High Level Committee on Corporate Social Responsibility, 2018

NOTIFICATIONS

1. **NOTIFICATION NO. G.S.R. 341(E) [F.NO. 1 / 8 / 2013 – CL -V. VOL. VI], DATED 30-4-2019**
Companies (Acceptance of Deposits) Second Amendment Rules, 2019 - Amendment in Rule 16A

2. **NOTIFICATION NO. G.S.R. 340(E) [F.NO.1 /16 / 2013 – CL – V (PT-I)], DATED 30-4-2019**
Companies (Registration offices and Fees) Third Amendment Rules, 2019 – Amendment in the Annexure of fees of filling

3. **NOTIFICATION NO. G.S.R. 339(E) [F.NO.1 / 22 / 2013-CL-V], DATED 30-4-2019**
Companies (Appointment and Qualification of Directors) Amendment Rules, 2019 - Amendment in Rule 12A

4. **NOTIFICATION NO. G.S.R. [F.NO.1/10/2013-PART-I CL-V], DATED 30-4-2019**

Companies (Registration of Charges) Amendment Rules, 2019 –
Amendment in Rules 3 and substitution of Rule 4, 12, Form No. CHG-1, Form No CHG-8 & Form No CHG-9

5. **NOTIFICATION NO. G.S.R. 330(E) / 332(E) [F.NO. 1/13/2013 CL-V, PART-I, VOL.II], DATED 25-4-2019**
Companies (Incorporation) Fourth Amendment Rules, 2019: Amendment in Rule 25A

6. **NOTIFICATION G.S.R. 329(E) [F.NO.01/16/2013 CL-V (PT-I)], DATED 25-4-2019**
Companies (Registration Offices and Fees) Second Amendment Rules, 2019: Amendment in the Annexure

7. **NOTIFICATION NO. G.S.R. 274(E) [F.NO.01/01/2009-CL-V (PART VIII)], DATED 30-3-2019**
Companies (Indian Accounting Standards) Second Amendment Rules, 2019 - Amendment In Indian Accounting Standards - (IND AS) 101, (IND AS) 103, (IND AS) 109, (IND AS) 111, (IND AS) 12 , (IND AS) 19, (IND AS) 23 AND (IND AS) 28

8. **NOTIFICATION NO. GSR 273(E) [F.NO.01/01/2009-CL-V dated 30-03-2019**
Companies (Indian Accounting Standards) Amendment Rules, 2019 Amendment In Indian Accounting Standards : (IND AS) 101, (IND AS) 103, (IND AS) 104, (IND AS) 107, (IND AS) 109, (IND AS) 113, (IND AS) 115, (IND AS) 1, (IND AS) 2, (IND AS) 7, (IND AS) 12, (IND AS)16, (IND AS) 21, (IND AS) 23, (IND AS) 32, (IND AS) 37, (IND AS) 38, (IND AS) 40 & (IND AS) 41; INSERTION OF (IND AS) 116 AND OMISSION OF (IND AS) 17

9. **NOTIFICATION [F.NO.1/13/2013 CL-V,PART-I,VOL.II], DATED 29-3-2019**
Companies (Incorporation) Third Amendment Rules, 2019 - Insertion of Rule 38A and Form INC - 35

10. **NOTIFICATION NO. SO 1216(E) [F.NO.A-45011/44/2018-AD.IV], DATED 8-3-2019**
Section 419 of the Companies Act, 2013 National Company Law Tribunal and Appellate Tribunal - Notified Benches Of National Company Law Tribunal - Amendment In Notification No. So 1935(E) [F.No.A-45011/14/2016-Ad.Iv], Dated 1-6-2016.

11. **NOTIFICATION NO. GSR 180(E) [F.NO.1/13/2013 CL-V, PART-I, VOL.II], DATED 6-3-2019**

Companies (Incorporation) Second Amendment Rules, 2019 - Amendment in Rules 30 & 38

RULES

1. **Companies (Incorporation) Amendment Rules, 2019 dated 21.02.2019**
   Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) on or before 25.04.2019.

2. **The Companies (Registration Offices and Fees) Amendment Rules, 2019 dated 21.02.2019**
   In the Companies (Registration Offices and Fees) Rules, 2014, in the Annexure, after item VII relating to Fees for filing e-Form DIR-3 KYC under rule 12A of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following item shall inserted, namely:-"VIII. FEE FOR FILING e-Form ACTIVE under rule 25A of the Companies (Incorporation) Rules, 2014

3. **Companies (Incorporation) 2nd Amendment Rule 2019 dated 06.03.2019**
   In the Companies (Incorporation) Rules, 2014 (hereinafter referred to as the said rules):-
   I) in clause (a), sub-rule (5) of rule 30, for the words "with the widest circulation", the words "with wide circulation" shall be substituted.
   II) in the second proviso to sub-rule (2) of rule (38), for the words "equal to rupees ten lakhs" the words "equal to rupees fifteen lakhs" shall be substituted, with effect from 18.03.2019.

4. **Companies (Incorporation) Third Amendment Rule, 2019 dated 29.03.2019**
   The application for incorporation of a company under rule 3U shall be accompanied by e-form AGILII (lNC 35) containing an application for registration of the following namely:-
   (a) Goods and Service Tax Identification Number (GSTIN) with effect from 31"st March, 2019
   (b) Employees State Insurance Corporation (ESIC) with effect from 8th April, 2019
   (c) Employee's Provident Fund Organization (EPFO) with effect from 15th April, 2019 MCA 21

5. **Companies (Indian Accounting Standards) Amendment Rules, 2019 dated 30.03.2019**

   Amendment made into Indian Accounting Standard (Ind AS) 116 i.e. "Leases", applicable w.e.f 01.04.2019

a) Companies (Indian Accounting Standards) Second Amendment Rules, 2019dated 30.03.2019

Amendment made into Indian Accounting Standard (Ind AS) 101 i.e. "First-time adoption of Ind AS", applicable w.e.f 01.04.2019

6. Companies (Incorporation) Fourth Amendment Rules, 2019 dated 25.04.2019

In the Companies (Incorporation) Rules, 2014, in rule 25A, in sub-rule (l) of for the words and figures 'on or before 25.O4.2OI9, the words and figures "on or before 15.06.2019 " shall be substituted.

7. Companies (Registration offices and FeesJ second Amendment Rules, 2019 dated 25.04.2019

In the companies (Registration offices and Fees) Rules,2014, in the Annexure, in item Vlll fee for filling e- form ACTIVE under rule 25A of the companies (incorporation) Rules, 2014 is amended .

8. Companies (Acceptance of Deposits) Second Amendment Rules, 2019, dated 30.4.2019

9. Companies (Registration of Charges) Amendment Rules, 2019 dated 30.04.2019

If the particulars of a charge are not filed in accordance with sub-rule (1), such creation or modification shall be filed in Form No. CHG-l or Form No CHG-9 within the period as specified in section 77 on payment of additional fee or advalorem fee as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.

Form Nos. CHG-l, CHG-8 and CHG-9 shall be substituted, with new forms with effect from 1st August, 2019

10. The Companies (Registration Offices and Fees) Third Amendment Rules, 2019 dated 30.04.2019

11. Companies (Appointment and Qualification of Directors) Amendment Rules, 2019 dated 30.04.2019

In the Companies (Appointment and Qualification of Directors) Rules, 2014, in Rule 12A, for the words and figures "on or before 30th April of immediate next financial year", the words and figures "on or before 30th June of immediate next financial year" shall be substituted.

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COMPOUNDING OF OFFENCES UNDER CUSTOMS

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"A fine is a tax for doing something wrong. A tax is a fine for doing something right"
Anonymous

Introduction[1]:

The above lines aptly justify the context of this article. The article is an attempt to delve into the nuances of Compounding scheme under the Customs Act, 1962. As per the Black Law dictionary *'compound'* means "*to settle the matter by a money payment, in lieu of other liability"*. In common parlance, compounding of an offence is a settlement mechanism whereby one is given an option to settle prosecution in lieu of money. The statutory traces of compounding scheme can be found under Section 137 of the Customs Act, 1962 and Section 9A (2) of the Central Excise Act, 1944 (erstwhile).

Compounding of Offences is available in respect of those offences which are committed against a person (individuals) and not against society or public policy. This scheme of compounding is also impressed under Section 320 of the Criminal Procedure Code, 1973. The compounding scheme under Customs is provided under sub-section (3) of Section 137 of the Act, ibid. Therefore, *'compounding'* deals with cognizance of offences under Section 132 to 135 of the Act.

Compounding scheme under Customs:

Under the Customs Code, the compounding is in lieu of *'prosecution'* unlike the ordinary concept wherein compounding is in lieu of any other liability. The procedure of Compounding is provided under Customs (Compounding of Offences) Rules, 2005 introduced vide Notification No.114/2005-Cus (N.T.) dt.30.12.2005.

Application for *'compounding'* can be moved either prior or after institution of prosecution. The fabric of compounding of offence under Customs is based upon *'Rule of Disclosure'* wherein an applicant is obligated to disclose all material facts, including

[1] The article is jointly authored by **K.P. Singh,** (former Commissioner Customs & Managing Partner Asav Attorneys and Advisors LLP and **PriyojeetChatterjee,** Senior Associate at Asav Attorneys and Advisors LLP.

acceptance of liability without any reservations[1]. The application for compounding can be moved before the Chief Commissioner of Customs having jurisdiction over the place where the offence is committed under the Act, or alleged to be committed. If the offence is committed in more than one place having jurisdiction of more than one authority, than the competent authority will be decided based upon *'Highest Revenue Principle'*.

The compounding authority i.e. Chief Commissioner of Customs is vested with powers under Rule 4 ibid, to call upon a report from the investigating or adjudicating authority as the case may be, for examination of the application. The compounding authority after examining the application either accept the same u/R 5 albeit fixing a compounding amount (if immunity is granted from prosecution) and grant immunity u/R 6 of the Rules, ibid, or reject the same by recording his reservation thereto. The authority is required to follow established norms i.e. Principles of Natural Justice before passing any orders. A person who has been granted immunity u/R 6 of the Rules, ibid, is obligated to pay the compounding fee from the date of receiving such order i.e. usually within one month or as directed by the compounding authority in the order. The compounding authority can also withdraw immunity under Rule 7 sub-rule (2) if during or after the proceedings, any material facts found to be concealed or false evidence is tendered to obtain such immunity.

Fixation of Compounding Fee:

To make the compounding scheme more attractive the government brought amendment in 2008 wherein the compounding fee was reduced albeit subject to payment of duty, interest and penalty u/R 4 of the Rules, 2005. The revised compounding fee was brought into effect vide Notification No. 118/2008-Cus (N.T.) dated. 12.11.2008 wherein compounding was fee capped maximum to 10% of the market value of goods or 1 lac whichever is higher u/s 135 of the Act, to make the scheme attractive.

Benefit of Compounding:

The overall scheme of compounding under the Customs Act is not lucrative in the present form. Intentionally or unintentionally it only targets offences such as smuggling viz gold or other items which does not form a part of exclusion in sub-section 3 of Section 137 of the Customs Act, 1962. The fundamental drawback of the scheme is compounding application can only be made after payment duty, interest and penalty which make the proposition less attractive u/R 4 ibid. Although, penalty or quantum of penalty or redemption fine may be subject to contest at an appropriate forum but the same is required to be deposited before an application is moved, thus burgeoning the process. The compounding scheme may be utilized for effectively and timely resolution of prosecution proceedings and to save day to day hassle in courts or in smuggling cases where duty liability in inalienable irrespective of the prosecution.

[1] Union of India versus Anil Chanana 2008 (222) E.L.T. 481 (S.C.)

Appeal provisions in Compounding:

Though compounding scheme cannot be claimed as a right[1]. The Hon'ble Gujarat High Court held that since the nature of the order is quasi-judicial the appeal may rest with the Tribunal i.e. CESTAT. However, the position is under challenge and currently pending[2]. Though it is settled that appeal against the order of Chief Commissioner will rest before the Tribunal[3] vide various pronouncements.

Conclusion:

Compounding scheme though could be used as an effective tool to minimize litigation but the same is not utilized up to its potential, due to various monetary limitations being drawn in the Rules. Further, if an application for compounding is allowed, the applicant is left with no choice but to pay or face prosecution within a very short period of time. Another major lacuna in the compounding scheme is that there is no mechanism for refund of the compounding amount paid, in case the immunity is withdrawn by the authority. The scheme in the current form only attracts a miniscule audience.

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[1]Commissioner of Central Excise versus Girish B. Mishra 2016 (339) E.L.T. 67 (Guj.).
[2]Commissioner versus Girish B. Mishra 2016 (339) E.L.T. A63 (S.C.).
[3]Videocon Industries Ltd., versus Commissioner of Customs (Imports), Mumbai 2009 (248) E.L.T. 334 (Tri-Mum).

DIRECT INVESTMENT OUTSIDE INDIA INCLUDING ESTABLISHMENT OF BRANCH OFFICE OUTSIDE INDIA BY INDIAN ENTITIES

CA Paresh P. Shah
Mumbai

1. Introduction:

1.1 This Article deals with the provisions of Direct Investment outside India for Resident Indians including setting up of Branches / Offices abroad by Indian entities. It also covers various investments which can be made other than direct investment including prohibition and exceptions where provisions do not apply.

1.2 Section 6(3)(a) of FEMA deals with the "Transfer or issue of any foreign security by a person resident in India". Regulations relating to overseas investment are notified by RBI as Notification No. FEMA 120/RB dt 7.7.2004 (the notification) as amended from time to time. A Master Direction titled 'Master Direction on Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad' has been issued vide FED Master Direction No. 15/2015-16 dt. 01.01.2016. The Master Directions consolidate instructions on rules and regulations framed by the Reserve Bank from time to time.

A person proposing to make investment outside India may do so either by way of participating in any Joint Venture (JV) or by way of incorporating Wholly Owned Subsidiary (WOS) anywhere outside India.

The regulation defines applicant as "Indian Party" and contemplates group/association of more than one company as Indian party. Thus it is possible to have an applicant comprising of more than one entity.

2. Eligible entities:

2.1 A company incorporated in India or a body created under an Act of Parliament or a Partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), can make investments abroad under the automatic route of Investment. [Regulation 6(1)]

Navaratna Public Sector Undertakings, ONGC Videsh Ltd and Oil India Ltd are allowed to invest in overseas unincorporated / incorporated entities in oil sector (i.e. for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route.

Resident corporates and partnership firms registered under the Indian Partnership Act, 1932 may undertake agricultural operations including purchase of

land incidental to such activity either directly or through their overseas offices, provided: a) the Indian party is otherwise eligible to invest under Regulation 6 of the Notification and such investment is within the overall specified limits, and (b) for the purpose of such investment by acquisition of land overseas the valuation of land is certified by a certified valuer registered with the appropriate valuation authority in the host country. (Regulation 6A of the notification).

Listed Indian companies are permitted to invest in shares and other securities of investment grade up to 50% of their net worth into listed companies abroad. [Regulation 6B]

Indian mutual fund registered with SEBI can also invest up to US $ 7 bn abroad in accordance with the SEBI guidelines. [Regulation 6C]

A Registered Trust or the Society engaged in manufacturing/ educational/ hospital sector can also invest abroad if, they are in existence for more than three years, and they have obtained approval of their Governing bodies or the trustees as the case may be. This is subject to RBI approval with certain standard conditions of KYC and they are not in adverse notice of Enforcement agencies in India [Regulation 9A].

A proprietory concern can invest abroad by capitalising not more than 50% fees realisable from the overseas company up to 10% of the capital of the overseas company with standard conditions subject to RBI approval. [Regulation 19]

Unregistered partnership firm and proprietorship concern with a proven track record of Exports (i.e. the export outstanding does not exceed 10% of the average export realisation of the preceding three years and a consistently high export performance) and classified as 'Status Holder' as per the Foreign Trade Policy can also invest outside India up to 10% of their average export realisation in last three preceding financial years or up to 200% of their new owned funds whichever is lower. This is subject to RBI approval & other standard conditions. [Regulation 19A]

Individuals are also permitted to invest abroad by capitalisation of professional fees or consideration in lieu of director's remuneration within the LRS ceiling in force at time of acquisition. In case the LRS ceiling is exceeded, prior approval of RBI is required [Regulation 20].

With effect from August 05, 2013, as stipulated by Ntf. No. 263 dt. March 5, 2013, a resident individual (single or in association with another resident individual or with an 'Indian Party' as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. Such investment shall be within the overall limit prescribed under the provisions of Liberalised Remittance Scheme [Regulation 20A].

Certain non-portfolio and other than direct investment outside India is also permitted such as (i) acquisition of foreign securities by way of gift from PROI,

(ii) acquisition of foreign shares by way of inheritance from a person whether resident in or outside India, (iii) acquisition of qualification shares, purchase shares under ESOP scheme of the Foreign Company to the employees / directors of Indian affiliates, ADR/GDR linked option to the employees of the Indian company, etc. [Regulation 22, 23 & 24]

3. Financial Commitment and methods / sources of financial commitment:

3.1 Financial commitment means the amount of direct investments outside India by an Indian Party -

i. by way of contribution to equity shares or CCPS of the JV / WOS abroad

ii. contribution to the JV / WOS as preference shares (for reporting purpose to be treated as loan)

iii. as loans to its the JV / WOS abroad

iv. 100% of the amount of corporate guarantee issued on behalf of its overseas JV/WOS and

v. 50% of the amount of performance guarantee issued on behalf of its overseas JV/WOS.

vi. bank guarantee/standby letter of credit issued by a resident bank on behalf of an overseas JV / WOS of the Indian party, which is backed by a counter guarantee / collateral by the Indian party

vii. amount of fund/ non fund based credit facility availed by creation of charge (pledge / mortgage / hypothecation) on the movable / immovable property or other financial assets of the Indian party / its group companies

Direct investment outside India means investment by way of contribution to the capital or subscription to the M/A of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange but does not include portfolio investment. Thus, direct investment outside India signifies a long-term interest in the foreign entity (JV or WOS).

It may be noted that Indian party can advance loan to overseas JV/WOS only if it has subscribed to the capital of the JV/WOS.

3.2 There are various sources/methods out of which remittance maybe proposed by Indian party for investment outside India.

Investment can be made in combination of one or more of these sources/methods.

(a) Remittance in cash.

(b) By capitalisation of exports to Joint Venture (JV) or WOS.

(c) Out of the money rose through ECB.

(d) By Swap of the shares of the Indian party or through ADR/GDR Swap.

(e) By remittance from EEFC A/c. or

(f) By applying proceeds of the ADR or GDR issue for capitalising overseas entity.

4. Conditions of overseas investments:

4.1 These conditions are specified in Regulation 6(2) of the notification. It would be noticed that ceiling of quantum of investment is based on the sources through which investment is made and some other conditions is based upon sector in which investment is proposed.

4.2 Overall investment financial commitment is permitted up to 400% of the net worth of Indian company. Financial commitment exceeding USD one billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank. This limit is not applicable where the investment is made out of the proceeds of ADR/GDR and the amount available in the EEFC A/c of the Indian party. Net worth of Indian party will include the net worth of its 51% subsidiary or its parent, provided that subsidiary and the parent has not availed of this facility.

The overall ceiling of 400% of net worth shall comprise of contribution to capital of the JV/WOS, loan granted to JV/WOS and guarantees issued to or on behalf of JV/WOS.

4.3 Party proposing to make investment is not on the exporter's caution list of the Reserve Bank of India or under investigation by Enforcement Directorate or under defaulter list of banking system of India.

4.4 All the transactions relating to investment in a JV or WOS is to be routed through only one branch of the Authorised dealer. However it may designate different ADs for different JV/WOS abroad.

4.5 The Investment in Financial Sector and investment by exchange of shares of an Indian company, in overseas venture are covered by the special conditions. They have to fulfil certain additional conditions specified elsewhere in this Book.

In case of partial or full acquisition of existing foreign company where investment is more than US $ 5 million, valuation of the company will be made by SEBI Category I Merchant Banker or an Investment Banker/Merchant Banker outside India Registered with Appropriate regulatory authority and in other cases by Chartered Accountant or Certified Public Accountant.

Also in case of Swap of shares, in all cases valuation is required from Merchant Banker as explained above.

4.6 Form ODI is filed by the Indian party to the AD and have submitted all the APR

Investment in Overseas Venture as per conditions of regulations 6(2) is also popularly known as "Automatic Route" of Investment Outside India.

5. Prohibited overseas investments:

5.1 An Investment by Indian Party into Overseas Venture is not permitted -

a) into Real Estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs)) and Banking Sector [Regulation 5(2)]. Real Estate Sector is defined to exclude development of townships, construction of residential/commercial premises, roads and bridges. Therefore such developmental activities shall qualify for overseas investment.

b) if investment is in Pakistan

c) by way of portfolio investment except in case of listed Indian companies which can invest by way of portfolio investment, as mentioned elsewhere in this chapter.

An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

5.2 Exceptions [Regulation 4]

However, investment

a) from Resident Foreign Currency Account (RFC A/c) are freely permitted and provisions of this notification are not applicable.

b) by persons not permanently resident in India, in a foreign security from his foreign exchange resources outside India is permitted.

c) by acquisition of bonus shares also do not require any permission if original investment is as per the provisions of the Act.

6. Procedure of making overseas investments:

6.1 The Indian party proposing to invest abroad has to

(a) file Form ODI with the authorised dealer if the method of investment is any one of the five methods as described under Automatic route.

The prescribed Form ODI requires various information to be submitted viz, the information on details of Joint Venture Partner, past financials of Indian party, cost of the overseas project, declaration of Indian party whether it is caution listed.

Indian party is also required to submit

(b) Board Resolution authorising such an investment,

(c) Last three years financial statements, along with

(d) Net worth certificate in the prescribed format, now attached as a part of the application in form ODI

7. Overseas investment in financial services sector:

7.1 As provided in Regulation 7 of the Notification, only an Indian party engaged in financial services activities can invest and participate in the overseas investment in the financial services sector, subject to following additional conditions.

a) Indian party has earned profit from financial services during three preceding financial years

b) has registered itself with regulatory authorities in India for conducting financial service activities

c) have obtained approval from regulatory authorities in India & abroad, for investment in financial sector activities abroad

d) have fulfilled the prudential norms relating to capital adequacy

7.2 A step down subsidiary of JV/WOS investing in a Financial Service sector is also required to comply with above conditions. Unregulated financial service entities

in India, can invest abroad in non-financial sectors under Automatic route. However regulated entities engaged in financial services sector in India will require complying with these norms even when overseas investment is in non-financial sector abroad. Trading in Commodities Exchanges overseas and setting up of JV / WOS for trading in Overseas Commodities Exchanges will be reckoned as financial services activity and will require clearance from Securities and Exchange Board of India (SEBI) on account of merger of Forward Markets Commission with SEBI

8. Post-approval conditions:

8.1 The post-approval conditions that are to be observed by Indian party making investment in an overseas venture as stipulated in Regn. 15 are as under:

i. Indian party shall receive share certificates or any other documentary evidence of investment in the foreign JV / WOS as an evidence of investment and submit the same to the designated AD within 6 months;

ii. Indian Party shall repatriate to India, all dues receivable from the foreign JV / WOS, like dividend, royalty, technical fees etc. within 60 days of its falling due;

iii. Indian Party shall submit to the Reserve Bank through the designated Authorized Dealer, every year on or before December 31, an Annual Performance Report in Part II of Form ODI in respect of each JV or WOS outside India set up or acquired by the Indian party. The APR has to be based on the audited annual accounts of the JV/WOS for the preceding year.

Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian party based on the un-audited annual accounts of the JV / WOS provided:

a) The Statutory Auditors of the Indian party certify that the law of the host country does not mandatorily require auditing of the books of accounts of JV/WOS and the figures in the APR are as per the un-audited accounts of the overseas JV/WOS.

b) That the un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian party.

(c) The above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country/jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country/jurisdiction as prescribed by Reserve Bank of India.

iv. Indian Party shall report the details of the decisions taken by a JV/WOS regarding diversification of its activities /setting up of step down subsidiaries/alteration in its share holding pattern within 30 days of the approval of those decisions by the competent authority concerned of such JV/WOS in terms of the local laws of the

host country. These are also to be included in the relevant Annual Performance Report; and

v. In case of disinvestment, sale proceeds of shares/securities shall be repatriated by Indian Party to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares /securities and documentary evidence to this effect shall be submitted to the Reserve Bank through the designated Authorised Dealer.

vi. An annual return on Foreign Liabilities and Assets (FLA) is required to be submitted directly by all the Indian companies which have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India. Such FLA is required to be sent by email by July 15 every year.

9. Investments by individual in overseas venture by way of direct investment:

9.1 As stipulated in Regulation 20A of FEMA Ntf. 120, a resident individual (single or in association with another resident individual or with an 'Indian Party') may make overseas direct investment in accordance with the criteria as per Schedule V of the Notification which are as under:

a) JV or WOS abroad should not be engaged in the real estate business or banking business or in the business of financial services activity.

b) The JV or WOS abroad shall be engaged in bonafide business activity.

c) JV / WOS should not be located in the countries identified by the Financial Action Task Force (FATF) as "non co-operative countries and territories" as available on FATF website www.fatf-gafi.org or as notified by the Reserve Bank.

d) The resident individual shall not be on the Reserve Bank's Exporters Caution List or List of defaulters to the banking system or under investigation by any investigation / enforcement agency or regulatory body.

e) At the time of investments, the permissible ceiling shall be within the overall ceiling prescribed for the resident individual under Liberalised Remittance Scheme as prescribed by the Reserve Bank from time to time. It should be noted that the investment made out of the balances held in EEFC / RFC account shall also be restricted to the limit prescribed under LRS.

f) The overseas JV or WOS, to be acquired / set up, shall be an operating entity only and no step down subsidiary is allowed to be acquired or set up by the JV or WOS.

g) The valuation shall be as in same manner as applicable to overseas investment by Indian Party as per Regulation 6(6)(a) of the Notification.

h) The financial commitment by a resident individual to / on behalf of the JV or WOS, shall be only in form of equity shares and compulsorily convertible preference shares. Thus, financial commitment by way of loans & guarantees is prohibited.

9.2 Post Investment Changes

Any alteration in shareholding pattern of the JV or WOS may be reported to the designated AD within 30 days including reporting in the Annual Performance Report as required to be submitted in terms of Regulation 15 of the Notification.

9.3 Disinvestment by Resident Individuals

a) Disinvestment may be partial or full by way of transfer / sale or by way of liquidation / merger of the JV or WOS.
b) Disinvestment shall be allowed after one year from the date of making first remittance for setting up or acquiring the JV or WOS abroad.
c) The disinvestment proceeds shall be repatriated to India immediately and in any case not later than 60 days from the date of disinvestment and the same may be reported to the designated AD.
d) No write off shall be allowed in case of disinvestments by the resident individuals.

9.4 Reporting Requirements

a) Part I of the Form ODI, duly completed, should be submitted to the designated authorised dealer, within 30 days of making the remittance.
b) The investment shall be reported by the designated authorised dealer to the Reserve Bank in Form ODI Part I and II within 30 days of making the remittance.
c) The obligations as required in terms of Regulation 15 of the Notification shall also apply to the resident individuals who have set up or acquired a JV or WOS under the provisions of this Schedule.
d) The disinvestment by the resident individual may be reported by the designated AD to the Reserve Bank in Form ODI Part III within 30 days of receipt of disinvestment proceeds

10. Other methods of making investment by individual in an overseas venture other than by way of direct investment:

10.1 Indian Residents who are individuals can acquire the shares of foreign company (under General permission of RBI) by way of:

(a) Gift from Person Resident outside India
(b) Cashless Employees Stock Option Scheme issued by company outside India.
(c) Inheritance from any person Resident in India or outside India
(d) Subscription of shares of such foreign parent company offered under its ESOP Schemes, irrespective of the percentage of the direct or indirect equity stake in the Indian company. Subscription of such shares is permitted to an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle. The consideration payable by resident Indian maybe borne either by foreign company issuing shares or its Indian branch or office or subsidiary or the company in India in which foreign equity holding is not less than 51%.

(e) out of the funds of Resident Foreign Currency account (RFC), all restrictions regarding utilisation of foreign currency balances including any restrictions on investment in any form outside India shall not apply to RFC account.

10.2 Indian Resident can acquire the shares of foreign company under general permission,

(a) as minimum qualification shares of a foreign company for holding the post of a director in that company to the extent prescribed as per the law of the host country where the company is located provided it does not exceed the limit prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

(b) by way of right shares issued by a foreign company provided they were held by virtue of holding shares in accordance with FEMA.

(c) by way of purchase by the employees/directors of an Indian promoter company of shares of an overseas – JV or WOS in the field of software, provided the consideration does not exceed the ceiling as stipulated by Reserve Bank from time to time and the shares so acquired do not exceed 5% of the paid-up capital of the overseas JV/ WOS. The percentage shareholding of the Indian promoter company inclusive of the shares allotted to its employees is not less than the percentage of shares held by it earlier.

(d) by way of purchase, by resident employees and working directors of Indian company in Knowledge based sector, of foreign securities under ADR/ GDR linked stock option schemes up to the ceiling as stipulated by the Reserve Bank from time to time.

In all above case of acquisition of shares by individual, there is a general permission to sale such shares.

11. Different modes of disinvestments from the JV / WOS abroad:

11.1 Disinvestment by the Indian party from its JV / WOS abroad may be by way of transfer / sale of equity shares to a non-resident / resident or by way of liquidation / merger / amalgamation of the JV / WOS abroad. The divestment may or may not involve write-off, the conditions of which are as follows:

a) Divestment not involving write-off:

The Indian Party may disinvest without write off under the automatic route subject to the following:

i. the sale is effected through a stock exchange where the shares of the overseas JV/ WOS are listed;

ii. if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV / WOS;

iii. the Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and / or export proceeds from the JV or WOS;
iv. the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
v. the Indian party is not under investigation by CBI / DoE/ SEBI / IRDA or any other regulatory authority in India; and
vi. other terms and conditions prescribed under Regulation 16 of the Notification
b) Divestment under automatic route involving write-off:
An Indian Party may disinvest, under the automatic route, involving write off in the under noted cases:
a. where the JV / WOS is listed in the overseas stock exchange;
b. where the Indian Party is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore;
c. where the Indian Party is an unlisted company and the investment in the overseas JV / WOS does not exceed USD 10 million; and
d. where the Indian Party is a listed company with net worth of less than Rs.100 crore but investment in an overseas JV/WOS does not exceed USD 10 million
e. all compliances as required under item (i) to (vi) under part (A) of this question

12. Pledge of foreign shares and creation of charge on assets:

12.1 Pledge of assets and shares of Indian party as well overseas company are allowed in favour of overseas lender as well as Resident lender. Pledging of shares is permitted with A.Ds or Indian financial institutions or with overseas lender (which is regulated and supervised as a bank) as a security for fund or non-fund based facilities for itself (i.e. the Indian Party) or for its JV / WOS / SDS whose shares have been pledged, or for any other JV / WOS / SDS of the Indian Party subject to the value of such facility being reckoned as financial commitment and total financial commitment remains within the limit of 400% of net worth of the Indian Party [Regulation 18].

12.2 Charge on assets:

(1) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on its assets [including the assets of its group company, sister concern or associate company in India, promoter and / or director] in favour of an overseas lender (which is regulated and supervised as a bank as per law of host country) as security for availing of the fund based and/or non-fund based facility for its JV or WOS or Step Down Subsidiary (SDS) outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification viz. the value of such facility being reckoned as financial commitment and total financial commitment remains within the limit of 400% of net worth of the Indian Party and a 'No Objection' is obtained from the domestic lender in whose favour charge is

already created on the domestic assets

(2) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on the assets of its overseas JV or WOS or SDS in favour of an AD bank in India as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification viz. the value of such facility being reckoned as financial commitment and total financial commitment remains within the limit of 400% of net worth of the Indian Party and a 'No Objection' is obtained from the overseas lender or domestic AD bank in whose favour charge is already created on the overseas assets

13. Acquisition of immovable property outside India by a resident:

13.1 Immovable property can be acquired outside India:

a. Under section 6(4) of FEMA which provides that a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India..

b. As an inheritance/ gift from a person (i) referred to in sec 6(4) of FEMA; or (ii) who has acquired it prior to July 8, 1947 (iii) who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.

c. Purchased with balances in the Resident Foreign Currency (RFC) account of the resident.

d. As a gift from persons at (b) & (c) above, provided he is a relative of such persons.

e. Purchased with remittances made under the Liberalised Remittance Scheme (LRS). In case members of a family pool their remittances to purchase a property, then the said property should be in the name of all the members who make the remittances.

f. Jointly with a relative provided there are no outflow of funds from India.

g. By an Indian company having overseas offices, for housing its business or for residence of staff.

14. Branch outside India by Indian entity:

14.1 As defined in Section 2(v)(iv) of FEMA, a 'person resident in India', includes an office, branch or agency outside India owned or controlled by such a person resident in India. Accordingly, though the branch is located in a foreign country, it would be deemed to be resident of India and consequently FEMA law, notifications and regulations, including restrictions that are applicable to a person resident in India applies equally to a foreign branch.

14.2 Establishment of a foreign branch by an Indian entity is regulated by way of FEMA notification relating to Foreign currency accounts of a person resident in India viz. FEMA Ntf. 10(R) which gives general permission to a firm or company

registered or incorporated in India to open a foreign currency account with a bank outside India in the name of its office (trading or non-trading) or its branch set up outside India or its representative posted outside India

14.3 The general permission is available to open an overseas branch and a bank account outside India only if the following conditions are fulfilled:

(i) Conducting normal business activities: The overseas branch or office has been set up or representative is posted overseas for conducting normal business activities of the Indian entity.

(ii) Permissible amount of remittance: The total remittances by the Indian entity shall not exceed -

Remittance for Initial expenses: - 15 per cent of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth whichever is higher, where the remittances are made to meet initial expenses of the branch or office or representative.

Recurring expenses: - 10 per cent of such average annual sales/ income or turnover during the last financial year where the remittances are done to meet recurring expenses of the branch or office or representative.

Above restrictions on remittances not applicable in a case where:

a) remittances are made out of funds held in EEFC account of the Indian entity, or

b) the overseas branch/ office is set up or representative posted by a 100% Export Oriented Unit (EOU) or a unit in Export Processing Zone (EPZ) or in a Hardware Technology Park or in a Software Technology Park, within two years of establishment of the Unit.

(iii) The Overseas Branch/Officer/representative shall not enter into any contract or agreement in contravention of the Act, Rules or Regulations made thereunder;

(iv) The account so opened, held or maintained shall be closed,

(a) if the overseas branch/ office is not set up within six months of opening the account, or

(b) within one month of closure of the overseas branch/ office, or

(c) where no representative is posted for six months,

And the balance held in the account shall be repatriated to India;

14.4 Important explanations –

Purchase of acquisition of office equipment and other assets required for normal business operations of the overseas branch/ office/ representative will not be deemed as a capital account transaction;

Transfer or acquisition of immovable property outside India, other than by way of lease not exceeding five years, by the overseas branch/ office/ representative will be subject to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015.

14.5 Export to Branch

The overseas office / branch of software exporter company/firm may repatriate to India 100 per cent of the contract value of each 'off-site' contract.

In case of companies taking up 'on site' contracts, they are required to repatriate the profits of such 'on site' contracts after the completion of the said contracts.

An audited yearly statement showing receipts under 'off-site' and 'on-site' contracts undertaken by the overseas office, expenses and repatriation thereon should be sent to the AD Category – I banks

14.6 Foreign Branch vs Foreign Subsidiary: As a foreign branch is deemed to be a person resident in India, all the restrictions under FEMA that apply to a person resident in India applies to its foreign branch unlike in the case of a foreign subsidiary which by reason of being incorporated overseas acquires the status of person resident outside India. Thus restrictions of purchase of overseas immovable properties, borrowing from Non Residents, business in permitted currency etc will apply to Branch but not to the oversea company. Some of the key differences are as under:

i. A branch is not a legal entity distinct from its parent company; therefore it is the liability of parent company in foreign jurisdiction in relation to the activities of the branch, as compared to subsidiary the liability of which is limited to the extent of its paid-up capital.

ii. Activity of branch is normally restricted by the local jurisdictions and it may not be permitted to operate beyond limits of territory.

iii. Most of the overseas jurisdiction requires registration as a place of business of foreign corporation with comprehensive details of foreign corporation including its accounts, published accounts etc., whereas once subsidiary is established, the entity which is regulated, is a subsidiary and not the parent company which is a shareholder of the subsidiary.

iv. Most of the country where parent company is resident requires comprehensive details of operations of its branch established in overseas territory including prior approval in cases where exchange controls are prevalent. e.g. India

v. Losses incurred by branch can be set off by the parent in its tax return, whereas losses of subsidiary in most cases may not be possible for setoff.

vi. Branch is normally taxed as corporation in most of the jurisdictions, it would be relatively simpler for parents to adjust taxes in other countries paid by branches as tax credit in its own Tax Return as compared to the corporation tax paid by the subsidiary in overseas jurisdiction.

vii. Branch may not pay taxes on remittance while corporation will have to pay withholding tax on dividend in most of the jurisdictions. In U.S.A. even branch is required to pay taxes on distribution/remittance. Except few offshore jurisdictions where branch can be registered as offshore Co., may not be able to access the treaty network of its place of establishment, whereas subsidiary will be able to access treaty network.

The above is only an illustrative list, there may be number of other factors based on the operations between particular Home country and a Host country.

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IMPORTANT CASE LAWS, CIRCULARS AND NOTIFICATIONS ON FEMA AND ALLIED LAWS

CA. ANIL MATHUR
Chartered Accountant, Jaipur

CIRCULARS

1. **CIRCULAR NO. 21, DATED 1-3-2019**
   Voluntary Retention Route (VRR) for Foreign Portfolio Investors (FPIS) Investments in Debt.

2. **CIRCULAR NO. 22 DATED 1-3-2019**
   Hedging of Exchange Rate Risk by Foreign Portfolio Investors (FPIS) under Voluntary Retention Route.

3. **CIRCULAR NO.23 [RBI/2018-19/140], DATED 13-3-2019**
   Trade Credit Policy - revised framework
   The amended Trade Credit policy will come into force with immediate effect. The Master Direction No. 5 dated January 01, 2016 on the subject is being revised to reflect the above changes.

4. **CIRCULAR NO. 24, DATED 20-3-2019**
   Export and import of Indian currency out of India to Nepal or Bhutan and bring into India from Nepal or Bhutan

5. **CIRCULAR NO. 25, DATED 20-3-2019**
   Compilation of R- Returns: Reporting under FETERS
   The Form A2 (revised) and the file format (revised) of the BOP file for reporting under FETERS are given in Annex I and Annex II, respectively.

6. **CIRCULAR NO. 26, DATED 27-3-2019**
   Investment by Foreign Portfolio Investors (FPI) in Government Securities Medium Term Framework
   Revision of investment limits by Foreign Portfolio Investors (FPI) in government securities for 2019-20.

7. **CIRCULAR NO. 27, DATED 28-3-2019**
   Establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other place of business in India by foreign entities

Regulations regarding requirement of prior approval of the Reserve Bank of India, for opening of a Branch Office (BO)/Liaison Office (LO)/Project Office (PO) or any other place of business in India, where the principal business of the applicant falls in the Defence, Telecom, Private Security and Information & Broadcasting sector. The Master Direction No. 10 dated January 1, 2016 is being updated simultaneously to reflect the changes.

8. **CIRCULAR NO. 28, DATED 28-3-2019**
   Foreign Exchange Management (Deposit) Regulations, 2016 –
   Opening of NRO Accounts byy Long Term Visa (LTV) holders, changes related to Special Non-Resident Rupee (SNRR) Account and Escrow Account.

9. **CIRCULAR NO. 29, DATED 11-04-2019**
   Foreign Exchange Management (Foreign Currency Accounts by a person Resident in India) Regulation, 2015 - Opening of Foreign Currency Accounts by re-insurance and Composite Brokers.
   Re-insurance and composite insurance brokers registered with IRDA may open and maintain non-interest bearing foreign currency accounts with an AD bank in India for the purpose of undertaking transactions in the ordinary course of their business.

10. **CIRCULAR NO. 30, DATED 18-4-2019**
    EXIM Bank's Government of India Supported Line of Credit of USD 100 Million to the Government of the Republic of Rwanda
    Under the arrangement, financing of export of eligible goods and services from India, as defined under the agreement, would be allowed subject to their being eligible for export under the Foreign Trade Policy of the Government of India and whose purchase may be agreed to be financed by the Exim Bank under this agreement. Out of the total credit by Exim Bank under this agreement, goods and services of the value of at least 75 per cent of the contract price shall be supplied by the Seller from India and the remaining 25 per cent of goods and services may be procured by the Seller for the purpose of the eligible contract from outside India.

11. **CIRCULAR NO. 31**
    Exim Bank's Government Of India Supported Line Of Credit Of Usd 100 Million To The Government Of The Republic Of Rwanda

12. **CIRCULAR NO. 32 DATED 18-4-2019**
    Exim Bank's Government Of India Supported Line Of Credit Of Usd 66.60 Million To The Government Of The Republic Of Rwanda

13. **CIRCULAR NO. 33, DATED 25-4-2019**
    Investment by Foreign Portfolio Investors (FPI) in Debt

Foreign Portfolio Investors (FPI) is now permitted to invest in municipal bonds. FPI investment in municipal bonds shall be reckoned within the limits set for FPI investment in State Development Loans (SDLs).

NOTIFICATIONS

1. **NOTIFICATION NO.G.S.R.198(E): FEMA 1/2019-RB (F.NO.1 / 2 / EM -2018) DATED 7-3-2019**
   Foreign Exchange Management (Permissible Capital Account Transactions) (First Amendment) Regulations, 2019 - Amendment in Regulation 4

2. **NOTIFICATION GSR 225(E) [NO.1/2019 (F.NO.P-13011/1/2017-ES CELL-DOR], DATED 19-3-2019**
   Section 1 of the Prevention of Money Laundering Act, 2002 –
   Short Title, Extent and Commencement of and notified date for enforcement of Section 22 of Finance Act, 2019

3. **NOTIFICATION NO. FMRD.DIRD.14/2019, DATED 27-3-2019**
   Non-Resident Participation in Rupee Interest Rate Derivatives Market (Reserve Bank) Directions, 2019

4. **NOTIFICATION NO. FMRD.FMSD.12/2019, DATED 15-3-2019**
   Reserve Bank of India (Prevention of Market Abuse) Directions, 2019

5. **NOTIFICATION NO. G.S.R. 312(E) [NO.FEMA 20 (R) (4) /2019-RB (F.NO.1 / 22 / EM / 2016 (FMS-300314135))], DATED 18-4-2019**
   Foreign Exchange Management (Transfer or Issue Of Security By A Person Resident Outside India) (Third Amendment) Regulations, 2019 - Amendment In Regulation 2 And Schedule 5.

CASE LAWS

HIGH COURT OF DELHI

Deputy Director Directorate of Enforcement, Delhi*vs.* Axis Bank
April 2, 2019

Applicable Sections: Section 5 and section 44 of the Prevention of Money-Laundering Act, 2002 and Section 238 of the Insolvency & Bankruptcy Code read with section 71 of the Prevention of Money-Laundering Act, 2002.

Decision:-Enforcement Officer has authority of law in PMLA to attach property other than tainted property being alternative attachable property (or deemed tainted property) on account of its link or nexus with offence (or offender) of money-laundering.

Prevention of Money-Laundering Act has overriding effect over other existing laws in matter of dealing with 'money-laundering' and 'proceeds of crime' relating thereto.
Where order confirming attachment under PMLA has attained finality, or if order of confiscation has been passed or, further if trial of a case for offence under section 4 of PMLA has commenced, claim of a party asserting to have acted bona fide or having legitimate interest will have to be inquired into and adjudicated upon only by special court

APPELLATE TRIBUNAL, PREVENTION OF MONEY LAUNDERING ACT, NEW DELHI
Satyen Suresh Gathani VSDeputy Director, Directorate of Enforcement, Mumbai
Feb 25, 2019

Applicable Sections: Section 5 of the Prevention of Money Laundering Act, 2002
Decision:-A search was carried out by Income-tax Department at factory premises and bank lockers of appellant in course of which huge cash was recovered. A case was registered by CBI under section 420 read with section 120B Indian Penal Code, 1860 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 ('PC Act') against appellant. On basis of FIR registered with CBI, a case was registered against appellant for offence of money laundering punishable under sections 3 and 4. Thereupon, respondent took a view that huge proceeds were generated by appellant out of criminal activities and said proceeds were utilised for purchasing immovable properties. Accordingly a provisional attachment order of those properties was passed under section 5. In terms of section 5, property can be attached only when attaching officer has "reasons to believe" on basis of material on record that a person is in possession of any proceeds of crime or where proceeds of crime are likely to be transferred or dealt with in a manner which would frustrate any proceedings relating to confiscation of such proceeds. In instant case, respondent did not give any cogent and cohesive reason and passed impugned provisional attachment order mechanically, same was to be set aside with a direction to respondent to deal with matter afresh after supplying copies of reasons for proposed action to appellant.

Rajesh Kumar Agarwal*vs.* Deputy Director, Directorate of Enforcement, Delhi
February 6, 2019

Applicable Sections: Section 20 of the Prevention of Money Laundering Act, 2002
Decision:-Adjudicating Authority had passed an order allowing respondent's application for retention of property of appellant on ground that he had acted as mediator for providing benefit to a set of corporate entities which evaded tax, in view of fact that there was no discussion in impugned order with regard to retention of property and, moreover, no order was passed in terms of section 20(2) of PMLA, impugned order was not sustainable and, thus, same deserved to be set aside.

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ALLOTTEES AS STAKEHOLDER IN THE REAL ESTATE SECTOR[1]

Shiva Nagesh, Adv.
Partner- Litigation & Advisory
SHARNAM LEGAL

NainshreeGoyal, Adv.
Associate Lawyer
SHARNAM LEGAL

This is the fourth article in the series written on RERA in this journal. All readers are requested to read the previous 3 articles to fully appreciate the sequence of the statutory provisions.

We have so far understood the main objectives and salient features of RERA Act 2016. We have also analysed and understood the various rights and responsibilities of the primary stake holder under RERA namely the 'promoter' followed by other key stake holders namely the 'real estate agent'.

In this article which will appear as the 4th in the series we have tried to analyse the rights of the 'allottee' and their consequential duties. It would not be an overstatement to point out that the main reason for the enactment of this landmark act is to regulate and promote the Real Estate Sector and to address the nation wide woes and grievances of the home buyers.

Before the enactment of RERA there was no single centralised agency to regulate and promote the real estate industry. The industry was largely unorganised with the presence of a large segment of unscrupulous and overnight operators who were bent upon exploiting the gullible home buyers who were easily lured into buying a house either for self-occupation or for investment purposes. The real estate is considered as the most attractive investment option by Indians next only to investment in gold. Both have very deep rooted sentimental and family oriented values attached to them.

The home buyers had to purely rely on the past track record of the developer in terms of the delivery of the project. There was mushroom growth of new players launching real estate projects with the promise of timely delivery of the projects along with the amenities and facilities promised by them through the attractive brochure and advertisement in the print as well as electronic media. Most of the above promises remained on paper with the promoters hardly meeting the dead line in terms of delivery and where the residential apartments were delivered there was huge gap between what was promised as compared to what was delivered to the allottee.

The home buyers had no centralised agency or state agency which could be approached to register their grievances and seek a time bound redressal of the same. The allottess had to move the district/state/national consumer redressal forums under the Consumer Protection Act 1986 to redress their grievances. There was not enough teeth

[1] Series No. 4/2019

and power available to these forums to compel the real estate promoters to fulfil the promises. No punitive action ranging from steep financial penalties or takeover of the projects from the errant promoters was vested with the consumer forums which could force the promoters to fall in line. Cases which travelled to the Supreme Court from these forums were the only forum where the home buyers could get justice.

But all the home buyers did not have the wherewithal to move the Supreme Court and consequently chose to silently suffer at the hands of the unorganised real estate players

Recently the Apex court has taken a very serious view of gross violations by a leading real estate company which includes illegal diversion of money collected from the home buyers, delay in handing over possession and nonfulfillment of various terms and conditions of the Apartment buyer agreement. The Supreme Court apart from ordering forensic audit of the accounts of the company has also ordered attachment of bank accounts and ordered auction of the personal property of the promoters and has directed NBCC (PSU) to take over and complete the pending projects for hand over to the home buyers.

With multiples cases of default, fraud, financial bungling on the rise and the home buyers losing their hard earned money and in some cases their life long savings the Central government mooted the idea of having a country wide law for the regulation and promotion of the Real estate sector. It first mooted the idea in 2013 and the RERA Act finally saw the light of the day in May 2016.

With the above background let us discuss the rights and duties of 'Allottees' under RERA

Home buyers in common parlance are called as 'Allottees' under the RERA Act 2016. The Real Estate (Regulation and Development) Act, 2016 was made with the purpose to protect the rights of allottees. The setting up of Real estate authority, regularising of the agents and the builders, timely possession, regulating the distribution and spending of money through escrow account and similar features of the statute, all revolve around regularising, and promoting the real estate sector and at the same time ensuring protection of the allottees.

Section 19 of the RERA Act lays down the rights and duties of the allottees. One of the main purposes of the Act is to protect the allottees from the injustice of the unscrupulous developers.

This section lays down rights as well as duties of the allottees. It is very clear that no right is given without any responsibilities and duties. The ambit of stakeholders in the real estate sector is not limited to agents, promoters or real estate authorities, but the allottees have a very important role to play as well.

Allottees play important role by being made aware at each stage about the development of the project which enables them to check the progress of the project accordingly. Allottees who block their funds at one property and wait for the possession from which they can sell and get an investment gain, cannot easily take advantage of such an arbitrage anymore. The proper and timely allocation and payment of fund from

the escrow account regulates misuse and prevents arbitrages of money which affects the economy and the flow of money at large.

Section 19 specifies various rights which the allottees have against the promoters including those which the promoters are liable to fulfil based on the agreement entered into with the allottees, namely –

Stage-wise schedule of completion of the project and the services, claim timely possession of the apartment / plot, entitlement to necessary documents and plans etc.

Specific Rights of Allottees

Sec 19(1): The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the Rules and regulations made thereunder or the agreement for sale signed with the promoter. The information is required by the promoter to be there on the authority's website as well, which must be updated regularly. If any addition has to be made, then permission is needed by 2/3rd of the allottees.

Sec 19(2): The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

Sec 19(3): The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.

Sec 19(4): The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under RERA from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

Sec 19(5): The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

A plain reading of the rights clearly indicates that the rights of the allottee under RERA start from the inception of the project and terminates only after the handing over of the project. In the meanwhile the allottee shall be entitled to know every detail about the project which shall include information about the sanctioned building plans, approvals, provision for water and electricity connections etc through the promoter's website maintained with the State's RERA. All the above information is available in the public domain and the allottee can keep a track about the progress of the construction of the building and development of the plot as the case may be.

Specific duties of Allottees:-

Apart from the rights of the allottees the Act has cast certain duties upon the allottee. The allotteee is required to diligently discharge his duties to ensure seamless progress of the development of the project so that the building or plot is handed over on time as committed by the promoter in the written agreement to sell.

Sec 19(6): Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

Sec 19(7): The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

Sec 19(8): The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

Sec 19(9): Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

Sec 19(10): Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

Sec 19(11): Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act. While the primary responsibility is on the promoter but the allottee is also responsible to take part in the process actively and extend their cooperation.

There is penalty on the allottees too. Since, they are the stakeholders in the real estate sector, their actions have repercussions too and are penalised on per day basis which may amount to payment in case of default upto 5% of the cost of the property allotted to them.

It has been seen in the past that the allottees fail to make payment towards the construction of the project on time which not only adds to their cost by way of interest on delayed payments but also forces the promoter to borrow money at exorbitant rates of interest from financial institutions like NBFC, Private equity funds since banks do not come forward to lend money to them in the fear of the loan given to real estate sector turning into NPA'S. Delayed payment on the part of the allottee not only increases the

cost of the project but also results in delayed completion of the same to the detriment of the other allottees that had made their payment well in time.

Conclusion

Before parting we would like to comment that intention of the Act is very noble and it wants to protect the interest of the home buyers and at the same time ensure that the promoters are able to complete the project on time. The Act has vested the allottees with huge rights to keep a check on the project and to approach the regulator in case of default or delay on the part of the promoter. The Act also provides for sanction of monetary comphensation with the regulator including payment of interest. At the same time the allottees also need to discharge their duties diligently and timely to ensure that they help the promoter in timely completion of the project.

It has already been over two years since the central Act has been notified. Going forward in our future articles we would throw some light on how far the Act has been successfully implemented by the State governments and whether the allottees have been indeed benefitted by the Act or the status quo continues to remain the same as it used to be before the notification of RERA 2016.

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CASE LAWS AND NOTIFICATIONS/CIRCULARS ON REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

CA Sanjay Ghiya (D.I.S.A)
CA AshishGhiya (L.L.B, C.S)

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

MR. SURESH VASUDEV TAHILRAMANI & ORS.V/S M/S EKTA EVERGLADES HOMES PVT.LTD.

The Appellant/Allottee feels aggrieved by order dtd. 23rd February 2018 whereby the promoter /respondent is directed to hand over possession of the flat purchased by appellant with all amenities with Occupation Certificate by the period ending December, 2018, failing which the promoter shall be liable to pay interest from 1st January,2019 till the actual date paid by the allottee/appellant. After examining the order, the authority concluded that there is no error in it requiring any interference as desired by the allottee, the appellant.

Hence the appeal is accordingly disposed of; promoter has agreed to adhere to possession schedule of December, 2018.

M/S KAMBHAR CONSTRUCTIONS V/S MRS. PRADNYA NIKHIL SABLE

The Appellant / Promoter questions legality of Order dated 23rd Nov. 2017 passed by Ld. Member and Adjudicating Officer, MahaRERA. The promoter was to hand over the possession of the flat on or before December, 2015 but he failed to adhere to the deadline though the payments were released within time from allottee. The advocate for the allottee indicated that the promoter has diverted the amounts received from the purchasers in another project. The advocate for the appellant argued that mitigating circumstances prevented him to adhere to the terms. Also, there was tremendous pressure from various outside agencies who were demanding ransom. The Tribunal asked the allottee regarding his desire to continue with the project. But the allottee, flatly denied to go on with the project and insisted for refund of the amount as directed under the order passed by the authority.

Thus, it was held that it is not the failure on the part of the allottee. The obligation of possession is delayed on the part of promoter and hence no interference in the order dated 23rd November, 2017.

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

KESHAVLAL UPADHYAY V/S NEELKAMAL REALTORS SUBURBAN PVT.LTD

The complainant seeks interest on failure of respondent to deliver the possession of booked flat on agreed date.The respondent raised the issue of maintainability of this complaint, on the ground that, since the agreement had been registered under the provisions of MOFA Act the present complaint was governed under the provisions of MOFA Act only. This complaint was, therefore, not maintainable before this authority under the RERA Act.The respondent was entitled for extension if the project got delayed due to non-availability of steel/construction material, war, civil commotion or on act of God, any notice/order/rule/notification of the Government/MBMC/Public authority/court/tribunal, economic downturn or any event beyond the control of the developer or force majeure etc.

The issue as contended by the respondent in response to the complainant is as under;

- Jurisdiction.

The complainant is an allottee in the ongoing project which is registered with MahaRERA under Section-3 of the RERA Act, 2016.The jurisdiction of this authority on such project continues till the project gets completed fully and obligation of the promoter regarding the project get fully discharged. This authority, therefore, has jurisdiction to hear the complainant's grievances concerning the project.

- Economic downturn.
- Ban on sand mining and quarrying of stones.
- Date of completion mentioned in the registration with MahaRERA.

The respondent further stated that the revised date of completion mentioned in MahaRERA registration is 3l-12-2019should be considered as date of possession and no relief could be granted to the complainant.The date of possession mentioned in MahaRERA registration cannot re-write the date in the contract signed by both the parties. The said issue has been clarified by the Hon'ble High Court of Judicature at Bombay in its judgment and order dated 6th December 2017 passed inW.P.No.2737 of 2O17.It is very clear from the above discussion that the reasons cited by the respondent for the delay in completion of the project, do not give any satisfactory explanation.

After the arguments of both sides, the authority has directed the respondent to payinterest to the complainant from 1st July 2017 till the actual date of possession at the rate of Marginal Cost Lending Role (MCLR) plus 2%as prescribed under the provisions of Section 18 of the RERA 2016 and the Rules made thereunder.

KAMALKANT BAJRANGLAL PODDAR V/S J.V. REALITY DEVELOPERS & ORS

The complainants seek the refund of amount paid by them to the respondent with interest and compensation on failure of respondents to deliver the possession of booked flat on

agreed date. Therefore, they filed Consumer Case No. 457 of 2015 before the Consumers Dispute Redressal Commission, M.S. Mumbai and it is pending. However, the respondents have not mentioned the number of this case in the column of pending litigation while registering their project. Therefore, the complainant alleges that they have contravened Section 4 of the RERA Act, 2016.

The authority directed respondents to mention the details of complaint no. 457 of 2015 pending before the Consumers Dispute Redressal Commission, M.S, Mumbai within 7 days and to report the compliance.

KAILASH CHAND & ORS V/S MAGNUM HOME MAKERS PVT.LTD.

The complainants prayed for the direction from the authority to the respondent under section 18 of the Act to pay them interest for the delayed period of possession in respect of their flats in the project as the respondent has failed to deliver the flat within two years from the date of booking. Respondent argued that he has refunded the entire money paid by the complainant, without any deductions and the same has been accepted by the complainant. Therefore, even prior to the enactment of the Real Estate (Regulation and Development) Act, 2016, the complainant has ceased to be an allottee. He further added that he is not liable to pay any interest to the complainant.Thus after examination of the above facts, the authority decided that the complainant is no longer an allottee in the project, and has not been able to point out any contravention or violation of the provisions of the Real Estate (Regulation and Development) Act 2016 or the rules or regulations made there under.

MADHYA PRADESH REAL ESTATE REGULATORY AUTHORITY

32 APPLICANTS & ORS. V/S SHILPI REALTIES PVT LTD

The applicants alleged that they made registry of their plots and some of them got building constructed on it but following facilities were not provided to the applicants in the project-

1. Electrification
2. Road
3. Water Facility
4. Sewage Treatment Plant not constructed
5. Broken boundary wall
6. General development like Park, Temple etc. not completed.

The respondent replied to the complainants through e-mail in context to the above matter raised by the complainants. After considering submissions of both the parties, the authority decided that the remaining work is to be completed as per the date given in the judgment. The respondent is to provide electric facility, complete road construction and also to provide water facility within 6 months which will be monitored by the technical person of the Authority on monthly basis. All party to this complaint was directed to

withdraw all legal cases pending. The technical member will submit the progress report on development of the project within 6 months to the court.

SHASHI SABLOK V/S SVS BUILDCON PVT LTD

The complainant seeking directions to the respondents to refund the amount of consideration accepted by them on their failing to handover the possession of the flat to the complainant till date. The respondent contended that the project of the respondent is nearby complete and assured that the possession of the flat will be handed over by the end of December 2017. He further contended that the possession couldn't be provided due to unavoidable obligations. On scrutinizing the case, it was found that the authority in the order dated 11th September 2017 concluded that the causes of delay in possession submitted by the respondent earlier are very vague and inconsiderable. Therefore, the respondent was directed to pay the compensation as per the rate of Rs. 5 per sqft pm. as mentioned in the agreement and thereby overriding the provision of section 18 of RERA (Act) in terms of compensation along with interest.

VIRENDRA KUMAR VERMA V/S IBD UNIVERSAL PVT LTD

The applicant booked a flat in the respondent's project, whereby the booking agreement was entered on 22.05.2014. Therefore, the applicant claims that even though the Allotment Letter does not provide the delivery date, the applicant was orally promised to handover the possession of flat in time and he is compelled to reside on rent because of delay in possession. Hence, the applicant prayed for interest and compensation. In response, the respondent alleged that the applicant, Virendra Kumar Verma, has not paid the full amount of installments and is liable to pay an additional interest over such delay of installment. He further argued that applicant's home loan bank had declined to release any further amount. Also, he mentioned that no oral assurance was given regarding the date of possession. On examination of documents produced, the authority decides that though the documents do not mention a delivery date yet a reasonable period of time for completion shall be granted for a project, considering its nature and size and the same shall be coupled with the chargeability of interest. In context of delayed payment, the authority held that there has been no delay on the part of the complainant and up to date payments has been made by the bank.

NOTIFICATIONS/CIRCULARS

TAMIL NADU REAL ESTATE REGULATORY AUTHORITY
ORDER NO.G.O. (Ms) No.166
DATE: 29.11.2018

1. In the Government Order first read above the Government has notified the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 in order to implement

the Central Act. Accordingly, the Real Estate Regulatory Authority has been established on 22.06.2017.

2. Under section 3(1) of The Real Estate (Regulation and Development) Act, 2016 "No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act" and hence Registration with Tamil Nadu Real Estate Regulatory Authority is mandatory for all the projects. Tamil Nadu Real Estate Regulatory Authority has taken several steps to make the Promoters to register their project with Real Estate Regulatory Authority.
3. A clause has also been included in the final approval letter issued by Chennai Metropolitan Development Authority and Directorate of Town and Country Planning wherein it was stated that the Promoters should register their projects with Tamil Nadu Real Estate Regulatory Authority before commencing any booking or selling. Inspite of several measures taken by this Authority, still certain Promoters have not registered their projects with Tamil Nadu Real Estate Regulatory Authority which ought to be registered.
4. Hence, in the letter 2nd read above, the Chairperson, Tamil Nadu Real Estate Regulatory Authority has requested the Government to issue necessary orders making mandatory to produce TNRERA Registration Certificate for issue of Completion Certificate by Chennai Metropolitan Development Authority, Directorate of Town and Country Planning, Local Planning Authorities and Local Bodies where the area of and proposed to be developed exceeds 500 square meter or the number of apartments proposed to be developed exceeds 8 inclusive of all phases in the proposed Common Building Rules as Completion Certificate guidelines.

The Government carefully examined the request of the Chairperson, TNRERA in para 4 above and direct the Member Secretary, Chennai Metropolitan Development Authority and Commissioner of Town and Country Planning to include the registration of projects with TNRERA as one of the conditions in the planning permission and its compliance is a pre-requisite for issue of Completion Certificate, where the area of land proposed to be developed exceeds 500 square meters or the number of apartments proposed to be developed exceeds 8 inclusive of all phases. Compliance of this condition shall also be checked and ensured before issue of Completion Certificate. This condition is also to be incorporated in the Tamil Nadu Combined Development Regulations and Building Rules, 2018.The Principal Secretary / Member Secretary, Chennai Metropolitan Development Authority and the Commissioner of Town and Country Planning is directed to pursue action accordingly.

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IMPORTANT CASE LAWS, CIRCULARS & NOTIFICATIONS ON INSOLVENCY AND BANKRUPTCY CODE, 2016 (IBC)

Adv. ArpitMathur
Jaipur

CASE LAWS

Principal Director General of Income-tax vs Synergies Dooray Automotive Ltd
NCLAT (NEW DELHI)
COMPANY APPEAL (AT) (INSOLVENCY) NO 205 OF 2017
AND 309, 559, 671 & 759 OF 2018; MARCH 20, 2019

Relevant Sections:-
Section 5(20) of Insolvency & Bankruptcy Code, 2016
Judgement:-
Income Tax Department of Central Government' and 'Sales Tax Department(s) of State Government' and 'local authority', who are entitled for dues arising out of existing law are 'Operational Creditor' within meaning of section 5(20) of the 'I&B Code'

J. Manivannan*vs.* Deputy Superintend of Police, Economic offences Wings
(NCLT- Chennai)
MA/697 & CP/381/IB/2018; MARCH 19, 2019

Relevant Sections:-
Section 9 & Section 238 of Insolvency & Bankruptcy Code, 2016
Judgement:-
Applicant Resolution Professional filed application against Deputy Superintend of Police, Economic Offences Wing for a direction to provide books of accounts, records and latest list of payables and receivables of corporate debtor seized by them to applicant immediately in order to enable applicant to carry out duties in accordance with Insolvency and Bankruptcy Code, 2016. It was held that competent authority and investigation officer(s) under TNPID Act (Tamil Nadu Protection of Interest of Depositors Act) including Deputy Superintend Police, Economic offences were directed to hand over all records of corporate debtor including books of account along with chits security deposits to Resolution Professional.

MSTC Ltd*vs*AdhunikMetalliks Ltd.
(NCL-AT) Kotkata
COMPANY APPEAL (AT) (INSOLVENCY) NOS. 519 OF 2018, 53 & 54 OF 2019;
MARCH 15, 2019

Relevant Sections:-
Sec. 31(1), Sec. 33(3) and Sec.14 of Insolvency & Bankruptcy Code, 2016
Judgement:-

In Corporate Insolvency Resolution Process initiated against corporate debtor, NCLT by impugned order approved 'Resolution Plan' under section 31(1) submitted by Liberty House Group and rejected claim of operational creditor to treat additional expenses incurred by it as Resolution Cost, and thereby to pay it, it was held that NCLT rightly held that section 14 will override any other provisions contrary to same. Any amount due to operational creditor prior to date of Corporate Insolvency Resolution Process (Admission) could not be appropriated during moratorium period. Therefore, no case had been made out by operational creditor to treat any amount as a 'Resolution Cost'.

Reliance Industries Ltd vsSatish Kumar Gupta
(NCLT - Ahd.)
C.P. (IB) NO 39/7 NCLT/AHM/2017
FEBRUARY 26, 2019

Relevant Sections:-
Section 25, read with section 60 of Insolvency & Bankruptcy Code, 2016
Judgement:-
In Corporate Insolvency Resolution Process (CIRP) of corporate debtor, instant applicant filed its claim as an operational creditor with Resolution Professional (RP) towards work done for construction of Weir-cum-causeway, under a Triparte agreement with its beneficiaries i.e. State Municipal Corporation and other participating industries, who have also provided free financial assistance to such project, wherefrom corporate debtor was drawing additional water. It was a case of applicant that RP vide its impugned communication partially accepted claim made by it against principal amount, and summarily rejected claim of applicant with regard to interest component without mentioning reason for same. It is settled legal position that RP has not been vested any adjudicatory power and he is legally expected to collate and verify claim submitted before him and to place same before CoC (Committee of Creditors) for its proper consideration under provisions of section 21 and in case there arise need for some clarification/direction, then he is expected to approach Adjudicating Authority. Thus, RP's impugned communication was not legally sustainable and thus, liable to be set aside. RP was directed to register total claim of present applicant, as being an operational creditor, submitted before him, so that proper apportionment of payable amount could be made.

Surya Alloys Industries Ltd *vs*Larsen & Toubro Ltd
(NCLT - Mum.)
CP (IB) NO 225/NCLT/MB/MAH/2018; FEBRUARY 21, 2019

Relevant Sections:-
Section 5(6), read with sections 8 and 9 of Insolvency & Bankruptcy Code, 2016
Judgement:-
Corporate debtor issued purchase orders to operational creditor for supply of Elastic Rail Clips (ERC). On account of non-payment of invoices, operational creditor sent a demand notice and, eventually, filed petition under section 9 against corporate debtor.

In its reply, corporate debtor submitted that dispute with regard to quality of Elastic Rail Clips existed between parties before issuance of demand notice and corporate debtor had informed operational creditor about said issues of quality via e-mails much prior to issuance of demand notice. Since dispute as regards quality of Elastic Rail Clips existed between parties prior to issuance of demand notice, petition filed under section 9 was to be dismissed.

Manoj Kumar Agarwal, *In re*
(NCLT - Mum.)
M.A. NO.1039/2018, C.P. (IB) NO. 1686(MB)2017; FEBRUARY 19, 2019

Relevant Sections:-
Section 30, read with section 31 of Insolvency & Bankruptcy Code, 2016

Judgement:-
Two resolution plans were received by RP and after some revision; one resolution plan submitted by company Max Spare was approved by 100 per cent of voting share of CoC. Since CoC had approved resolution plan with 100 per cent voting following all statutory procedures, it was to be accepted in toto and had to be approved while allowing instant application. Waiver as sought by resolution applicant, of statutory liabilities / contingent liabilities incurred and accrued / due to statutory authorities viz. VAT, Sales Tax, Income-tax, Excise, Customs, FEMA and Export obligation etc. was to be approved in accordance with law.

Surinder Singh Bhatia. *vs.* Vitol SA.
(NCLT - Ahd.)
IA NOS. 287 OF 2018 & 85 OF 2019, C.P. (IB) NO. 19 OF 2017; FEBRUARY 14, 2019

Relevant Sections:-
Section 60, read with sections 35, 66 and 67of Insolvency & Bankruptcy Code, 2016

Judgement:-
Corporate Debtor Company was under liquidation and under control and charge of liquidator. Applicant was director of corporate debtor company. He filed application seeking permission to travel to Abu Dhabi for attending wedding ceremony of his friend's son. It was submitted that Special Judge, CBI had granted permission to one of directors of company to travel abroad. Respondent creditor objected to grant of any permission to applicant stating that applicant's said friend had embroiled in money laundering activities. Since corporate debtor was under liquidation, it was in domain of liquidator to raise objection, operational creditor was supposed to put his claim / grievance against suspended management of company under liquidation before liquidator. Liquidator having not raised any objection to instant application filed along with e-invitation card specifying period and place of visit, permission for foreign travel was to be granted.

Narayan Niryat India (P.)Ltd. *vs.* EVA Exotica (P.)Ltd.
(NCLT - Kolkata)
CP. (IB) NO. 379/KB/2018; FEBRUARY 13, 2019

Relevant Sections:-
Section 5(6), Section 238A, and section 9, read with section 18 of the Limitation Act, 1961, Insolvency & Bankruptcy Code, 2016

Judgement:-
Delivery of goods was proved by delivery of invoices and corporate debtor had failed in proving a pre-existing dispute in regard to quality of goods and rate of goods, dispute raised by way of issuing reply notice would not at all be a pre-existing dispute as it could be ruled out that dispute raised was a dispute to stage-manage false evidence so as to defeat claim of operational creditor.

There was no acknowledgement in writing as laid down under section 18 of Limitation Act, 1963, applying section 19 of limitation Act, 1963, period of Limitation would run from payment of part consideration of amount due. As per Entry No. 15 of Schedule of Limitation Act, 1963, in cases where price of goods is to be paid after expiry of a fixed period of credit, threeyears period of limitation runs from time when period of credit expires.

Corporation Bank vs. Amtek Auto Ltd.
(NCLT-Chd.)
CP(IB) NO. 42/CHD/HRY/2017; FEBRUARY 13, 2019

Relevant Sections:-
Section 12 of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Applicant filed application under section 7 in case of corporate debtor which was admitted and a Resolution Professional was appointed. In course of corporate insolvency resolution process (CIRP), Resolution Professional received resolution plans from two applicant's i.e. respondent No. 1 and one 'DVI'. Resolution plan submitted by respondent No. 1 was approved by Tribunal. However, resolution applicant failed to honour its commitment to comply with requirements for implementation of approved plan and expressed its inability to comply with commitments on one pretext or other. Financial creditor thus filed instant application seeking grant of minimum 90 days for Resolution Professional to make another attempt for a fresh process rather than forcing corporate debtor into liquidation on account of fraud committed by respondent No. 1. In terms of section 12, certain period can be excluded from total permissible period of 270 days; however, there is no scope of granting extension beyond 270 days under any circumstances. In view of aforesaid legal position, permission to restart process, make advertisement and invite fresh plans etc., would defeat very mandate of section 12. Therefore, prayer made in instant application for starting fresh process for resolution of corporate debtor could not be accepted. However, on facts of case, instant application was to be disposed of by directing that period commencing from date when other applicant i.e.

DVI, submitted its final plan up to date of receipt of copy of this order be excluded while calculating period of 270 days for completion of resolution plan.

Satyendra Jain vs. OmwayBuilestate (P.)Ltd.
(NCLT - New Delhi)
COMPANY PETITION (IB) NO. 1013 (PB) OF 2018; FEBRUARY 12, 2019

Relevant Sections:-
Section 5(8)&238 read with section 7,of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Corporate debtor borrowed loan against payment of interest as agreed between parties. Loan was disbursed against consideration for time value of money with a clear commercial effect of borrowing. Moreover debt claimed in application for initiating CIRP included both component of outstanding principal and interest and not only claim would come within purview of 'financial debt' but also applicant could clearly be termed as 'financial creditor' so as to prefer application under section 7.
Recovery suit was filed by financial creditor against corporate debtor before High Court, wherein decree was passed in 2013. But even after lapse of more than five years, corporate debtor had not paid pending dues. Instant application under section 7 for CIRP filed by financial creditor in 2018 was to be admitted.

CIL Australia North Pty Ltd. *vs.* Sharp Corp. Ltd.
(NCLT - New Delhi)
COMPANY PETITION (IB) NO. 1728/ND/2018; FEBRUARY 12, 2019

Relevant Sections:-
Section 5(6) read with section 9 of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Applicant operational creditor alleged that corporate debtor failed to make payments for supply of Australian Desi Chickpeas as per contracts. It stated that in furtherance to arbitration proceedings initiated by corporate debtor, two settlement agreements were executed by and between parties wherein corporate debtor had agreed to pay dues in regular monthly instalments and as a consequence of failure of corporate debtor to make payments, debt under settlement agreements became due. On other hand, corporate debtor contented that after receiving of two letters to execute alleged settlement agreements; corporate debtor disputed execution of aforesaid Settlement Agreements as well as existence of any debt whatsoever and preferred a civil suit seeking a decree that said agreements be declared null and void. Said Civil suit before appropriate authority was preferred much prior to demand notice sent by applicant under section 8. Since a pre-existing dispute was established by corporate debtor, instant applicant for initiation of CIRP preferred by operational creditor was to be rejected.

Rahul Singhwal*vs.* Sarvottam Rolling Mills (P.)Ltd.
(NCL-AT)
COMPANY APPEAL (AT) (INSOLVENCY) NO. 21 OF 2019; FEBRUARY 8, 2019

Relevant Sections:-
Section 9,of the Insolvency and Bankruptcy Code, 2016

Judgement:-
There was pre-existence of dispute between parties regarding short supply of material by operational creditor and corporate debtor had settled claim of operational creditor prior to constitution of CoC (Committee of Creditors). Impugned order passed by Adjudicating Authority to initiate CIRP against corporate debtor was to be set aside.

SGM Webtech (P.)Ltd. *vs.* Boulevard Projects (P.)Ltd.
(NCLT - New Delhi)
COMPANY PETITION (IB) NO. 967(PB) OF 2018; FEBRUARY 8, 2019

Relevant Sections:-
Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Judgement:
Financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor when a default has occurred. Home buyer, who purchased residential flat in a housing project is a financial creditor and can initiate CIRP against defaulting builder or developer who has defaulted to refund booking amount on its failure to give possession of flat on time

Indian Bank *vs.* Infinitas Energy Solutions (P.)Ltd.
(NCLT- Chennai)
MA NO.341/2018, CP (IB) NO. 558/CB/2017; FEBRUARY 6, 2019

Relevant Sections:-
Section 33, read with section 30, of the Insolvency and Bankruptcy Code, 2016

Judgement:
Where resolution plan was sought to be reviewed and ultimately no resolution plan was passed by CoC (Committee of Creditors) for reasons of commercial non-viability of proposals, corporate debtor was to be ordered for liquidation.

NOTIFICATION

1. **NOTIFICATION NO. GSR 222(E) [F.NO.30/20/2018/ INSOLVENCY], DATED 14-3-2019**
   Insolvency and Bankruptcy (Application to Adjudicating Authority) Amendment Rules, 2019 - Amendment in Form 1, Form 5 and Form 6

2. **NOTIFICATION NO. SO 1091(E) [F.NO.30/25/2018-INSOLVENCY SECTION], DATED 27-2-2019**
Section 7 Of The Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Initiation By Financial Creditor - Notified Persons Who May File An Application For Initiating Corporate Insolvency Resolution Process Before The Adjudicating Authority On Behalf Of The Financial Creditor.

PRESS RELEASE

IBBI PRESS RELEASE NO. IBBI/PR/2019/06, DATED 6-3-2019

Insolvency and Bankruptcy Board Of India Signs a Co-Operation Agreement withthe International Finance Corporation

1. The Insolvency and Bankruptcy Board of India (IBBI) signed a Cooperation Agreement today with the International Finance Corporation (IFC), a member of the World Bank Group (WBG). The agreement was signed by Mr. K. R. Saji Kumar, Executive Director, IBBI and Mr. Jun Zhang, Country Manager, IFC India, in the august presence of Mr. InjetiSrinivas, Secretary, Ministry of Corporate Affairs, Dr. M. S. Sahoo, Chairperson, IBBI, Mr. Gyaneshwar Kumar Singh, Joint Secretary, Ministry of Corporate Affairs, and other distinguished officers of the Ministry of Corporate Affairs and IBBI.

2. The Insolvency and Bankruptcy Code, 2016 (Code) provides for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders and, for this purpose, has established an institutional infrastructure comprising of Adjudicating Authorities, the IBBI, insolvency professionals, insolvency professional agencies and information utilities. The IBBI exercises regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. It writes and enforces rules for processes, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code.

3. The IBBI is interested in the effective implementation of the Code and its allied rules and regulations. The IFC is interested to assist the IBBI to further build the capacity of the insolvency professionals, and insolvency professional agencies for the purposes of the Code. The Cooperation Agreement envisages technical assistance upto 30th June, 2021 by the IFC to IBBI in this regard. It inter alia covers assistance in (a) Workshops and Training for Insolvency Professionals and Officers of the IBBI; (b) Train the Trainers for Workshops for Insolvency Professionals, (c) Development of National Insolvency Programme, (d) Insolvency and valuation examinations.

PRESS RELEASE NO. IBBI/PR/2019/07, DATED 16-3-2019

Roundtable On "Insolvency and Bankruptcy Code, 2016: Looking Ahead-Global Learning, Local Application" Organised By The Insolvency And Bankruptcy Board Of India (IBBI) And The Society Of Insolvency Practitioners Of India (SIPL) On 15th -16th March, 2019

1. The Insolvency and Bankruptcy Board of India (IBBI) and the Society of Insolvency Practitioners of India (SiPI) organised a Roundtable on 'Insolvency and Bankruptcy Code, 2016: Looking Ahead - Global Learning, Local Application" on 15th - 16th March, 2019 in New Delhi.

2. The Roundtable brought together the key stakeholders, including representatives from the Government, regulators, academics, credit institutions, investment funds, industry, asset reconstruction companies as well as insolvency professionals and legal practitioners, from India and overseas. They tracked developments in the insolvency landscape over the last two years and deliberated the challenges faced by them to identify opportunities and think about the road ahead, keeping in view the global developments and best practices.

3. In his key note address, Mr. SanjeevSanyal, Principal Economic Adviser, Ministry of Finance emphasised the need for creative destruction, which is envisaged in the Insolvency and Bankruptcy Code, 2016 (Code), to accelerate economic growth. He believed that implementation of the Code will promote entrepreneurship and credit market. He shared his thoughts on building institutions, including judicial reforms and contract enforcement, and making it easy for firms to do business.

4. In his address, Dr. M. S. Sahoo, Chairperson, IBBI stated that the law is getting refined and clarified by the legislature, the executive and the judiciary and its objectives are getting crystallised. He stated that the law envisages rescuing a viable firm and closing an unviable one. If the stakeholders decide to liquidate a viable firm because of market imperfections or otherwise, the law enables them to rectify the decision by resorting to section 12A of the Code (withdrawal) section 230 of the Companies Act, 2013 (compromise or arrangement) or regulation 32 (e) and (f) of the Liquidation Regulations (Sale of firm as going concern).

5. In his address, Hon'ble Mr. Justice Arjan K. Sikri, Former Judge, Supreme Court of India appreciated the commendable progress made in implementation of the Code. He explained the rationale of emerging jurisprudence and also the changes made in the Code since its enactment. He called for capacity building at all levels and building institutions for effective implementation of the Code, particularly provision of adequate infrastructure with the Adjudicating Authority.

6. In his address, Hon'ble Mr. Justice S. J. Mukhopadhyay, Chairperson, National Company Law Appellate Tribunal explained the nature of timelines under the Code. He stated that the Code does not provide for liquidation; it is the outcome only when attempts to resolve insolvency of a firm fail. He clarified that the Committee of Creditors is supreme as regards commercial decision is concerned. However, the Adjudicating Authority must look at the process and also balance the interests of

various stakeholders. He made certain suggestions, including case management and time management, for expediting disposal by the Adjudicating Authority while admitting a firm into corporate insolvency resolution process or approving a resolution plan.

7. The Roundtable featured presentations and discussions on seven themes, namely, Insolvency of Group Companies: Way Forward in India; Prepacks: A Blueprint for India; Liquidating Companies - Experience in India and UK; Insolvency Case Management; Insolvency of Individuals - The Way Forward; Regulating the Insolvency Professionals - Role of Intermediaries; and Decision making by Committees of Creditors.

IBBI PRESS RELEASE NO. IBBI/PR/2019/08, DATED 19-3-2019

Insolvency and Bankruptcy Board Of India Signs a Memorandum of Understanding withthe Securities and Exchange Board of India

1.The Insolvency and Bankruptcy Board of India (IBBI) signed a Memorandum of Understanding (MoU) today with the Securities and Exchange Board of India (SEBI). The MoU was signed by Mr. Anand Baiwar, Executive Director of the SEBI and Mr. RiteshKavdia, Executive Director of the IBBI at Mumbai.

2. The IBBI is established under the Insolvency and Bankruptcy Code, 2016 (Code) to promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of the Code. It exercises regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. It writes and enforces rules for processes, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code.

3. The SEBI is established under the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and promote the development of, and to regulate, the securities market, including debt market, and for matters connected therewith or incidental thereto. It administers the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Depositories Act, 1996, and certain provisions of the Companies Act, 2013.

4. Both the IBBI and the SEBI are interested in the effective implementation of the Code and its allied rules and regulations, which have redefined the debt-equity relationship and aims to promote entrepreneurship and debt market. They have agreed under the MoU to assist and co-operate with each other for the effective implementation of the Code, subject to limitations imposed by the applicable laws.

5. The MoU provides for: (a) sharing of information between the two parties, subject to the limitations imposed by the applicable laws; (b) sharing of resources available with each other to the extent feasible and legally permissible; (c) periodic meetings to discuss matters of mutual interest, including regulatory requirements that impact each party's responsibilities, enforcement cases, research and data analysis, information

technology and data sharing, or any other matter that the parties believe would be of interest to each other in fulfilling their respective statutory obligations; (d) cross-training of staff in order to enhance each party's understanding of the other's mission for effective utilisation of collective resources; (e) capacity building of insolvency professionals and financial creditors; (f) joint efforts towards enhancing the level of awareness among financial creditors about the importance and necessity of swift insolvency resolution process of various types of borrowers in distress under the provisions of the Code, etc.

IBBI PRESS RELEASE, DATED 26-3-2019

Guidelines For Appointment Of Insolvency Professionals As Administrators Under The Securities And Exchange Board Of India (Appointment Of Administrator And Procedure For Refunding To The Investors) Regulations, 2018

1.The Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018, (Regulations) provide for appointment of Insolvency Professionals (IPs) as Administrators for the purposes specified therein. A copy of the said Regulations is at Annexure A. These Guidelines have been prepared in consultation with SEBI to facilitate appointment of IPs as Administrators.

Guidelines

2. The IBBI and the SEBI have mutually agreed upon to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. The IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and the SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with the Regulations. A Panel shall be valid for six months and a new Panel will replace the earlier Panel every six months. For example, the first panel under these Guidelines will be valid for appointments during April - September, 2019, the next panel will be valid for appointments during October- March, 2020, and so on.

3. An IP will be eligible to be included in the Panel of the IPs if-

(*a*) there is no disciplinary proceeding, whether initiated by the IBBI or the IPA of which he is a member, pending against him;

(*b*) he has not been convicted at any time in the last three years by a court of competent jurisdiction;

(*c*) he expresses his interest to be included in the Panel for the relevant period; and

(*d*) he undertakes to discharge the responsibility as an Administrator, as and when he may be appointed by the SEBI.

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JUDGMENTS

HIGH COURT OF ORISSA AT CUTTACK BENCH

D.B. CIVIL WRIT PETITION NO. 20463 OF 2018
APRIL 17, 2019

M/S SAFARI RETREATS PVT LTD & ORS **…. Petitioner**
VERSUS
CHIEF COMMISSIONER OF CGST & ORS **…. Respondent**

For the Petitioner (S): Mr. S Ganesh, Mr. AdhirajMohanty, Mr. AK Samal and Mr. L Sahoo
For the Respondent (S): Mr. TusharKantiSatapathy and Mr. D Behura

Issue was regarding restriction in Section 17(5)(d) to avail the benefit of credit of tax input paid by the petitioner on the purchases of input materials and services which have been used in the construction of the shopping mall for set off, against the CGST and OGST payable on rent received from the tenants of the shopping mall.
Held - The provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted. The very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.

HON'BLE THE CHIEF JUSTICE SHRI K.S. JHAVERI
HON'BLE SHRI JUSTICE K.R. MOHAPATRA

By way of this writ petition the petitioners have challenged the action of the opposite parties whereby the opposite parties without considering the provisionsunder Section 17 (5)(d) of the Central Goods and Services Tax Act (in short "the CGST Act") held that the provisions of the CGST Act is not applicable in the case of construction of immovable property intending for letting out for rent.

2. The case of the petitioners is that the petitioners are mainly carrying on business activity of constructing shopping malls for the purpose of letting out of the same to numerous tenants and lessees. Huge quantities of materials and other inputs in the form of Cement, Sand, Steel, Aluminum, Wires, plywood, paint, Lifts, escalators, Air-Conditioning plant, Chillers, electrical equipments, special facade, DG sets, transformers, building automation systems etc and also services in the form of consultancy service,

architectural service, legal and professional service, engineering service and other services including services of special team of international designers in every sphere of construction of Mall are required for the aforesaid construction purpose and therefore the petitioner no.1 Company has to purchase/receive these goods and services for carrying out the said construction. All these goods and services which are purchased/received for such construction are taxable under the CGST Act and OGST Act and as such the petitioner No.1 has to pay very huge amounts of Central Goods and Services Tax (hereinafter to be referred to as `CGST') and Odisha Goods and Services Tax (hereinafter to be referred to as 'OGST') on such purchases.

One of the large shopping mall constructed by the petitioner No.1 Company at Esplanade, 721 Rasulgarh, Bhubaneshwar, Khordha, Odisha has been completed recently and the petitioner No.1 has made necessary arrangement for letting out different units of the said shopping mall to different persons on rental basis. It is an undisputed fact that the activity of letting out the units of the shopping mall attracts CGST and OGST on the amount of rent received by the petitioner No.1 because the activity of letting out the Units in the said Mall amounts to supply of service under the CGST Act/ OGST Act. The petitioner No.1 having accumulated input Credit of GST amounting to Rs 34,40,18,028/- (Rupees thirty four crores forty lacs eighteen thousand twenty eight only) in respect of purchases of inputs in the form of goods and services is desirous of availing of the credit of input tax charged on the purchase/supply of goods and services which are consumed and used in the construction of the said shopping mall in order to utilise the said input credits to discharge and pay the CGST and OGST payable on the rentals received by the petitioner no.1 from the tenants of the said shopping mall and approached the revenue authorities in this regard. However, the petitioner no.1 was advised to deposit the CGST and OGST collected without taking input credit in view of restrictions placed as per Section 17(5)(d) and was warned of penal consequences if it did not do so. The petitioner no.1 has thus to pay very large amounts of CGST and OGST.

3. Applicability of CGST Act and OGST Act in the present case are:

a) The CGST Act was implemented with effect from 1st July, 2017 inter alia with the object of avoiding the cascading effect of various indirect taxes and so as to reduce the multiplicity of a number of indirect taxes. The said CGST Act is based on the VAT concept of allowing input tax credit of tax paid on inputs, input services and capital goods which can be utilised for payment of output tax so as to obviate the cascading effect of multistage levies and taxes. GST is levied on supply of goods or services or both, in India w.e.f. 1st July, 2017. Each State Government has passed its own State GST Act to impose GST on the supply of goods or services or both within the State and this State GST Acts are practically copies of CGST Act, as the definitions and other provisions are identical. For the purpose of imposing GST within the State of Odisha, Government of Odisha has passed OGST Act wherein almost all the provisions are virtually identical to that of CGST Act.

b) The business of the petitioner No.1 in the present case inter alia consists of construction of shopping malls and letting them out to different persons on rental basis and collection of rent from them. In view of Section 7 of CGST Act and OGST Act read with paragraph-2 (b) of Schedule II of the aforesaid two Acts, the activity of the petitioner No.1 of letting out of the units of the shopping mall to different persons amounts to "Supply" within the meaning of both the two Acts and as such the petitioner No.1 squarely comes within the definition of `supplier' as appearing in Section 2 (105) of both the aforesaid two Acts and accordingly the Petitioner is liable to pay CGST and OGST on the said rental amounts received by it.

c) Section 22(1) of CGST Act as well as OGST Act inter alia provide that every supplier shall be liable to be registered under the CGST Act and OGST Act in the State from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees. Petitioner No.1 duly applied for such registration and a certificate of registration was issued to the petitioner No.1 in Form GST REG-06 under Section 25 of the CGST Act read with Rule 10 of the Central Goods and Service Tax Rules, 2017 and a Goods and Service Tax Identification Number was assigned to the petitioner No.1 which is 21AAGCS2244F1ZU (Annexure-1) to the writ petition. Once the petitioner No.1-Company is registered under Section 22 of the CGST Act, it becomes the "Taxable person" within the definition as contained in Section 2 (107) of the CGST Act and OGST Act.

d) Section 9 of the CGST Act is the charging section which inter alia provides that subject to the provisions of Sub-section (2) of Section 9, there shall be levied a tax called the Central Goods and Service Tax on all intra State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 of the CGST Act and at such rates, not exceeding twenty percent, as may be notified by the Government on recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Similar provisions in the State Act namely OGST Act have also made under Section 9 of the said Act.

e. In view of the aforesaid discussion, petitioner No.1 being a taxable person is liable to pay CGST as well as OGST in respect of the rent realized by petitioner No.1 from different tenants to which the units of the shopping mall are let out.

f. In order to avoid the cascading effect of various input taxes, Section 16 of the CGST as well as OGST Acts which provides that every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49 of the CGST Act as well as Section 49 of the OGST Act, be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Therefore, in tiew of Section 16 of the CGST Act as well as OGST Act, the petitiotter No.1 being a registered dealer is statutorily entitled to avail of the benefit of taking credit of the input tax charged on the supply of goods and various services which are consumed or utilized

for the construction of the aforesaid shopping mall and set off the same against, the CGST and OGST payable on the rentals received from the tenants of the said shopping mall as there is no break in the supply chain of petitioner No.1 and the receipt of rentals and the tax payable thereon are the direct and inexorable consequence of the construction of the mall and the payment of GST on the inputs goods taxguru.in and services which have been consumed and utilised for the construction of the shopping mall.

g) However, the benefit of input tax credit has been denied to the petitioner by applying Section 17(5) (d) of the CGST Act as well as of the OGST Act and the language of the said sub-section in both the Acts is identical. The said Section 17(5) (d) of both the aforesaid Acts inter alia provides that notwithstanding anything contained in sub section (1) of Section 16 of both the aforesaid Act and sub section (1) of Section 18 of both the aforesaid Acts, input tax credit shall not be available in respect of the goods and services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business. The Petitioner has been informed by the authorities under the CGST Act and OGST Act that in view of the aforesaid Section 17(5)(d) of both the aforesaid Acts the petitioner cannot avail of the benefit of credit of tax input paid by the petitioner on the purchases of input materials and services which have been used in the construction of the shopping mall for set off, against the CGST and OGST payable on rent received from the tenants of the shopping mall.

h) Section 17 of the CGST Act inter alia reads as under:

> ***17. Apportionment of credit and blocked credits-***
>
> *(1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.*
>
> *(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.*
>
> *xxxxxx*
>
> ***(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-***
>
> *[(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:-*
>
> *(A) further supply of such motor vehicles; or*
>
> *(B) transportation of passengers; or*
>
> *(C) imparting training on driving such motor vehicles;*
>
> *(aa) vessels and aircraft except when they are used—*
>
> *(i) for making the following taxable supplies, namely:-*

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as. hey relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available-

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or-'clause (aa) are used for the purposes specified therein;

(ii) where received received by a taxable person engaged-

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both-

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force;]

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business. Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;
(g) goods or services or both used for personal consumption;
(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.
xxxxxxx

On a plain reading of Section 17(5)(d), it is clear that what it contemplates and provides for is a situation where inputs are consumed in the construction of an immovable property which is meant and intended to be sold. The sale of immovable property post issuance of completion certificate does not attract any levy of GST. Consequently, in such a situation, there is a break in the tax chain and, therefore, there is full justification for denial of input tax credit as, on the completion of the transaction, no GST would at all be payable and, therefore, no set-off of the input tax credit would be required or warranted or justified. But the position is totally different where the immovable property is constructed for the purpose of letting out the same, because, the tax chain is not broken and, on the contrary, the construction of the building will result in a fresh stream of GST revenues to the Exchequer on the rentals generated by the building. The denial of input tax credit in such a situation would be completely arbitrary, unjust and oppressive and would be directly opposed to the basic rationale of GST itself, which is to prevent the cascading effect of multi-stage taxation and the inevitable increase in costs which would have to be borne by the consumer at the end of the day. In the present case also, the effect of denial of input tax credit would be a sharp and inevitable increase in the cost which the owner of the building would be compelled to incur, which would render the building itself uncompetitive as compared to previously existing similar built-up units. Further, the denial of the input tax credit in respect of a building which is meant and intended to be let out would amount to treat it as identical to a building which is meant and intended to be taxguru.in sold. As already pointed out, these two types of transactions cannot possibly be compared or bracketed together, for the purpose of levy of GST, as already explained in detail earlier. The treatment of these two different types of buildings as one for the purpose of GST is itself contrary to the basic principles regarding classification of subject-matter for the levy of tax and, therefore, violative of Article 14 of the Constitution. Such a classification also constitutes the treatment of assessees' like the Petitioner on a totally different footing as compared with other assessees who have a continuous business and an unbroken tax 'chain likethe'Petitioner arid grant of input tax credit to others while denying it to the Petitioner. Thus, the same is violative of the Petitioners' fundamental right to equality guaranteed by and under Article 14 of the Constitution, on this distinct and independent ground also. Further, as also pointed out hereinafter, the GST authorities are themselves reading down Section 17(5)(d) and treating it as inapplicable to a builder who sells units in the building before the issuance of a completion certificate and who is required to pay CGST/OGST on the amount of sale price received by him. To grant input tax credit to a builder who sells building where

completion certificate has not been issued at the time of sale while denying it to a person like the Petitioner is patently and egregiously arbitrary and discriminatory. Further, such an interpretation of Section 17(5)(d) of both CGST and OGST Act leads to double taxation, i.e., firstly, on the inputs consumed in the construction of the building and secondly, on the rentals generated by the same building. It is also a settled principle of interpretation of tax statutes that interpretation should be adopted which avoids or obviates double taxation. This principle is also directly applicable to the present case. It would also be violative of the Petitioners' fundamental right to carry on business under Article 19(1)(g) of the Constitution as it would impose a wholly unwarranted and unreasonable and arbitrary restriction which would render buildings now constructed for letting out uncompetitive, by imposing the burden of double taxation of GST on such buildings, i.e., firstly, on the inputs consumed in the construction and, thereafter, on the rentals generated by the building. It is therefore, submitted that, in accordance with well-settled principles of interpretation of statutes, Section 17(5)(d) requires to be read down in order to save it from the vice of unconstitutionality, by confining the provision to cases where the building in question is constructed for the purpose of sale of the same post issuance of completion certificate, thereby terminating the tax chain, and by not applying Section 17(5)(d) to cases where the building in question is constructed for the purpose of letting out the same and where the tax chain is not broken. It is further submitted that if this interpretation of Section 17(5)(d) is not accepted, then there would be no alternative except to declare that provision as unconstitutional and illegal and null and void.

i) The interpretation of Section 17(5) (d) of both CGST Act and OGST Act which leads to the conclusion that on the facts and circumstances of the present case the petitioner No.1 is not entitled to avail the benefit of taking input tax credit while paying CGST and OGST on rent received from different tenants of the shopping mall, clearly goes against the intention of the Legislature and also frustrates the object sought to be achieved by the Legislature in enacting the said CGST Act and OGST Act. It is an undisputed fact that CGST Act and OGST Act are implemented to obviate the cascading effect of various indirect taxes and to reduce multiplicity of indirect taxes. It cannot be disputed that' in the business of the petitioner No.1-Company right from the starting point of construction of the shopping mall and upto letting out of different units of the said shopping mall, there is no break in the business activity of the petitioner and it is a continuous business of the petitioner No.1 and the supply of services to the tenants of the shopping mall are a continuous supply of services as defined in Section 2 (33) of the CGST Act and OGST Act. There is also no break or interruption in the tax chain. Therefore, when there is no break in supply of services, which implies the continuation of the business activity of the petitioner No.1 and there is no break in the tax chain and if that is the undisputed clear position then by interpreting Section 17(5) (d) of both CGST Act and OGST Act, the authorities under both the Acts cannot contend that in the middle of the business the petitioner No.1 is not entitled to take credit of input tax, against the CGST and OGST paid on rent received from the tenants of the shopping mall and such an interpretation clearly goes against the intention of the Legislature and also frustrates the object for

which the aforesaid Acts were enacted. Such an interpretation will debar those taxable persons like the petitioner No.1, who carry on a continuous bliSizess without any break but in spite of that they would be treated differently being denied the benefit of taking input tax credit as available to those taxable person under Section 16 of both CGST Act and OGST Act and such classification of taxable persons into two category even though both have continuous business activities and both have an unbroken tax chain is a clear violation of the fundamental rights of the petitioner as guaranteed under Article 14 and 19(1) (g) of the Constitution of India.

j) The classification which the legislature has made in CGST Act and OGST Act by denying input tax credit to one class of taxable persons having a continuous business by placing them under Section 17 (5) (d) of both the aforesaid Act while other taxable persons coming under the aforesaid two Acts are allowed to 'avail the benefit of input tax credit under Section 16 of both the aforesaid two Acts, has no reasonable basis underlying such classification when both categories of taxable persons are carrying on a continuous business without any break in the tax chain. It is very important to note that when a builder sells units in a building before issuance of a completion certificate, he is required to pay CGST and OGST on the amount of sale price received and at the same time he is also allowed credit and set off of the CGST and OGST paid on the inputs consumed to construct the building and 'thus the GST authorities themselves recognise and accept the position, that where, in respect of a building under construction, the tax chain is not broken, Section 17(5)(d) is not 'applicable and input tax credit cannot be denied. Consequently, not to adopt the same interpretation of Section 17(5)(d) in the present case where also there is no break in the tax chain, is highly arbitrary and discriminatory. In the case of the petitioner even the business is a continuous one without a break in the tax chain, yet it has been placed under Section 17(5) (d) of the CGST Act and OGST Act and the benefit of taking input tax credit has been denied and therefore on that ground alone and by itself Section 17(5) (d) of CGST Act and OGST Act requires to be struck down as violative of Article 14 of the Constitution if the said clause (d) of sub-section (5) of Section 17 is not read down as submitted earlier.

k) Schedule II Paragraph 5 (b) inter alia provides that sale of a building to a buyer before issuance of a completion certificate etc. is a supply of service for the purpose of imposing CGST and OGST. Here the legislature used the phrase 'intended for sale' whereby the intention of the builder was made the decisive factor by the Legislature. Precisely the same approach should have been adopted in the present case also. Otherwise, it would be highly arbitrary and discriminatory application of the provision. Therefore, two different categories of builders were mentioned one in paragraph 5 (b) of Schedule II and the other is in Section 17 (5) (d) of the CGST Act and OGST Act. But the case of the petitioner No.1 is completely different from the two categories mentioned hereinbefore. The shopping mall which the petitioner No.1 is constructing is neither "intended for sale' nor "on his own account' but it is "intended for letting out". Therefore, by no stretch of imagination, it can be concluded that the shopping mall which is constructed by the petitioner No.1 is 'intended for sale' or 'on his own account' and as such when the said

shopping mall is constructed purely for the purpose of letting out, then such construction of the shopping mall will not come within the mischief of Section 17(5)(d) of CGST Act and OGST Act. On the aforesaid clear position of law, if the GST authorities are trying to bring the petitioner case under section 17(5) (d) of both the aforesaid Acts then several words has to be read into the Section 17(5) (d) of the said two Acts which are not permissible in law and it is a well settled law that in constructing fiscal statute and in determining the liability of a subject to tax, one must have regard to the strict letter of law and no words can be added to a statute or read into it which are not there. Legislature has also imposed another condition in Section 17(5) (d) of both the aforesaid Act which reads as 'when such goods or services or both are used in the course or furtherance of business' this condition is applicable only when the immovable property is constructed 'on his own account' as appearing in that sections, which means that the taxable person on whose account the said immovable property is constructed. The said condition cannot be applied to any other cases far less when the construction of the immovable property is intended for letting out.

l) If the benefit of taking credit of input tax under Section 16 of the CGST Act and OGST Act is denied to the petitioner No.1 by invoking Section 17(5) (d) of the CGST Act and OGST Act, in that event, the very object of enacting CGST Act and OGST Act for reducing the cascading effect of various indirect taxes and reduction of multiplicity of indirect taxes, will be frustrated even when the business of the petitioner No.1 is a continuous one and there is no break at any point of time. It is a well settled law that the interpretation which defeat the very intention of the legislature should be avoided and that interpretation which advances the legislative intent will have to be accepted.

4. Learned counsel for the petitioners in order to advance his argument regarding the purpose of Section 17 (5)(d) of the Act, has taken the provisions of Sections 16, 17(1), 17(2), 17(5) of the CGST Act which are reproduced below:

> ***"16. Eligibility and conditions for taking input tax credit-***
>
> *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*
>
> *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—*
>
> *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
>
> *(b) he has received the goods or services or both.*
>
> *[Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—*

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;)

(c) subject to the provisions of section 41 [or section 43A], the tax charged in respect of such supply has been actually paid . to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

This clause provides for eligibility, conditions and time period for taking input tax credit. This clause provides that a registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business. (Notes on Clauses).

17. Apportionment of credit and blocked credits-

(1) Where the goods or services or *both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.*

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

xxxxxxxxx

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, nprnely:-

[(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:-

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used-

(i) for making the following taxable supplies, namely:-

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available-

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged-

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both-

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

'Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force;]

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130."

5. Learned counsel for the petitioners further contended that for the purpose of letting out he is earning out commercial rent income and he has to pay 18% GST on that. This is a chain transaction pursuant to the construction activity which he has carried out. To support his contention, learned counsel for the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***Eicher Motors Ltd. v. Union of India,*** reported in (1999) 2 SCC 361, paragraphs-5 and 6 of which are reproduced below:

"5. Rule 57-F(4-A) was introduced into the Rules pursuant to the Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under. Heading No. 87.01 or motor vehicles falling under Heading Nos. 87.0,2 and 87.04 or chassis of ***such tractors or such*** *motor vehicles under Heading* ***No.***

87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 *was allowed. Prior to the 1995-96 Budget, the Central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the* ***same was that the credit*** *of* ***duty paid on*** *inputs could* ***have been used for discharge*** *of duty/liability only in respect of* ***those final products in the manufacture*** *of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In the 1995-96 Budget, the MODVAT Scheme* ***was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs*** *is less than the duty liable to be paid on the final products and thus the credit of duty* ***earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of*** *cash. Prior to the 1995-96 Budget, the excise duty on inputs used in the manufacture of tractors and commercial vehicles varied from 15% to 25%, whereas the final products attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise* ***duty required to be paid on final products*** *could have exceeded the total input* ***credit allowed. Since*** *the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation* ***of the*** *credit,* ***all*** *vestitive* ***(sic) facts or*** *necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16-3-1995. Thus the assessees became entitled to take* ***the*** *credit of the 'input instantaneously once the input is received in the* ***factory on the basis of the****existing, Scheme, Now by application of Rule 57- F(4-A), the credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate that the Scheme is merely being altered and, therefore, does not have any retrospective or retroactive effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesses concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme*

was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assesses.

6. We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these gdods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities .concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

5.1 He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Collector of Central Excise, Pune v. Dai IchiKarkaria Ltd.,*** reported in (1999) 7 SCC 448, paragraph-18 of which is quoted below:

"18. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

6. Taking into consideration, learned counsel for the petitioners has contended that Section 17(5)(d) of the CGST Act is to be read down for the purpose of interpretation in continuation to give benefit to the assessee or to, the person who has paid GST and it has to be interpreted in continuity of the transaction since rent income is arising out of the Malls which are constructed after paying GST on different items. He further contended that the interpretation which he is canvassing has now been supported by the Government Circular dated 8.12.2018 which is reproduced below:

"Ministry of Finance**Effective tax rate on complex, building, flat etc.**
Posted On:08 DEC 2018 5:16PM by PIB Delhi

It is brought to the notice of buyers of constructed property that there is no GST on sale of complex/building and ready to move-in flats where sale takes place after issue of completion certificate by the competent authority. GST is applicable on sale of under construction property or ready to move-in flats where completion certificate has not been issued at the time of sale.

Effective rate of tax and credit available to the builders for payment of tax are summarized in the table, for pre-GST and GST regime.

Period	**Output Tax Rate**	**Input Tax Credit details**		**Effective Rate of Tax**
Pre-GST	Service Tax: 4.5% VAT: 1% to 5% (composition scheme)	Central Excise on most of the construction materials : 12.5% VAT: 12.5 to 14.5% Entry Tax: Yes	No input tax credit (ITC)of VAT and Central Excise duty paid on inputs was available to the builder for payment of output tax; hence it got embedded in the value of properties. Considering that goods constitute approximately 45% of the value, embedded	Effective pre-GST tax incidence: 15-18%
GST	Affordable housing segment: 8% Other segment: 12% after 1/3rd abatement of value of land	Major construction materials, capital goods and input services'used for construction of flats, houses, etc. 'attract GST of 18% or more.	ITC was approximately 10-12%. ITC available and weighted average of ITC incidence is approximately 8 to 10%.	Effective GST incidence, for affordable segment and for other segment has Not increased as compared to pre-GST regime.

Passing projects in the affordable segment such as Jawaharlal Nehru National Urban Renewal Mission, Rajiv AwasYojana, PradhanMantriAwasYojana or any other housing scheme of State Government etc., attract GST of 8%. For such projects, after offsetting input tax credit, the builder or developer in most cases will not be required to pay GST in cash as the builder would have enough ITC in his books of account to pay 'the output' CTST.

For projects other than affordable segment, it is expected that the cost of the complex/buildings/flats would not have gone up due to implementation of GST. Builders

are also required to pass on the benefits of lower tax burden to the buyers of property by way of reduced prices/installments, where effective tax rate has been down."

6.1 He contended that in view of this interpretation which is canvassed by the petitioners is supported by for which he has taken Clause 5 (b) of Schedule II of the Central Goods and Services Tax Act which is reproduced below:

"5. Supply of services

The following shall be treated as supply of services, namely:-

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(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier."

7. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Spentex Industries Limited v. Commissioner of Central Excise and others,*** reported in (2016) 1 SCC 780, para 26 of which is reproduced below:

"26. We are also of the opinion that another principle of interpretation of statutes, namely, principle of contemporanea.expositio also becomes applicable which is manifest from the act of the Government in issuing two notifications giving effect to Rule 18. This principle was explained by the Court in *DeshBandhu Gupta and Co. v. Delhi Stock Exchange Association Ltd. (1979) 4 SCC 565* in the following manner: (SCC pp. 572-73, para 9)

"9. It may be stated that it was not disputed before us that these -two documents which came into existence almost simultaneously with the issuance of the notification could be looked at for finding out the true intention of the Government in issuing the notification in question, particularly in regard to the manner in which outstanding transactions were to be closed or liquidated.

The principle of contemporaneaexpositio (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction. (Maxwell 12th Edn. p. 268). In Crawford on Statutory Construction (1940 Edn.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction commonly referred to as practical construction although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In Baleshwar Bagarti u. Bhagirathi Dass (1908) ILR 35 Cal 701 the principle, which was reiterated in MathuramohanSaha v. Rain Kumar Saha, ILR 43 Cal. 790: (AIR 1916 Cal. 136) has been stated by Mookerjea, J. thus:

***"….** It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts;*

.... Such interpretation may, if occasion arises have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction."

Of course, even without the aid of these two documents which contain a contemporaneous exposition of the Government's intention, we have come to the conclusion that on a plain construction of the notification the proviso permitted the closing out or liquidation of all out-kanding transactions by entering into a forward contract in accordance with the rules, bye-laws and regulations of the respondent."

8. He has also relied upon the decision of the Hon'ble Supreme Court in the case ***of Indian Metals and Ferro Alloys Ltd. v. Collector of Central Excise, Bhubaneswar,*** reported in 1991 Supp (1) SCC 125, paragraphs 14 and 15 of which are reproduced below:

"14. However; even assuming that there could have been some doubt as to the intention of the legislation in this regard, the matter is placed beyond all doubt by the revenue's own consistent interpretation of the item over the years. It has been pointed out that prior to March 1,1975; residuary Item 68 was not in the schedule. If the revenue's contention that these poles are not pipes and tubes is correct then they could not have been brought to duty at all before March 1, 1975. But the fact is that transmission poles have been brought to duty between 1962 to 1975 and that could only have been under Item 26-AA (for there was no residuary item then). This is indeed proved by the fact that this very assessee was thus assessed initially and also by the issue of notifications of exemption from time to time which proceed on the footing that these poles were assessable to duty under Item 26-AA but were entitled to an exemption if certain conditions were fulfilled. Indeed, the assessee also applied for and obtained relief under one of that exemption notification since 1964.

15. It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under Item 26-AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to March 1, 1975 to specifically clarify whether the poles would fall under Item 26-AA or not. This argument proceeds on a misapprehension. The revenue is not being precluded from putting forward the present contention on grounds of estoppels. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the condition in the exemption notifications were fulfilled) and the issue of notifications from time to time (the first of which was almost contemporaneous with the insertion of Item 26-AA) are being relied upon on the doctrine of contemporaneoexpositio to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument: see K.P. Varghese v. TTO, (1981) 4 SCC 173; State of Tami1nadu v. Mahi Traders, (1989) 1 SCC 724; CCE v. Andhra Sugar Ltd., 1989 Supp (1) SCC 144 and Collector of Central Excise v. Pane Exports P. Ltd., (1989) 1 SCC 345. Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used

in a statutory instrument, we think the assessee's contention that its products fall within the purview of Item 26-AA should be upheld."

9. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***ShayaraBano v. Union of India and others,*** reported in (2017) 9 SCC 1. Though he has requested to go through the pages 75 to 84 and pages 91 and 92 of the said judgment but he has relied upon paragraphs 67 and 87, which are reproduced below:

"67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in E.P. Royappa v. State of T.N., (1974) 4 SCC 3 stated: (SCC p.38, para 85)

"85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic prineiple which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle ? It is a founding faith, to use the words of Bose, J., "a way of life". and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate is activist magnitUde¯. 'Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment. It is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are

different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell,State of A.P. v. McDowell and Co., (1996)3 SCC 709 when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unrdasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation cbyibusly would not involve the latter challenge but woilld only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."

10. Another judgment learned counsel for the petitioners has sought to rely upon which relates to Income Tax, where accepting the contention of the Department the Hon'ble Supreme Court in the case of **Oxford University Press v. Commissioner of Income Tax,** reported in (2001) 3 SCC 359 in paragraphs 26 and 32 has observed as under:

"26. On examination of the different provisions in Section 10 dealing with exemption from the tax it would be clear that each one of the said provisions is intended to serve a definite public purpose and is meant to achieve a special object.

32. I am of the view that the expression "existing solely for educational purposes and not for purposes of profit" qualifies a "university or other educational institution". In a case where a dispute is raised whether the claim of exemption from the tax by the assessee is admissible or not it is necessary for the assessee to establish that it is a part of a university which is engaged solely or at least primarily for educational purposes and not for purposes of profit and the income in respect of which the exemption is claimed is a part of the income of the university. This question assumes importance in a case like the one in hand where the assessee is nothing more than a commercial establishment/business enterprise engaged in the business of printing, publishing and selling of books in this country. The label "University Press" is not sufficient to establish that it is engaged in any educational activity. The purpose of the existence of the 'assessee in this country, as appears from the material on record, is possibly to earn profit. If the interpretation of the provision in Section 10(22) of the Act as urged on behalf of the assessee is accepted the provision will be exposed to challenge on the ground of being irrational and, therefore, arbitrary. Then the question will arise for what purpose is this exemption from tax extended to the assessee? How is it different from the large number of such establishments engaged in the business of printing, publishing and selling of books?

11. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***K.P. Varghese v. Income-Tax Officer, Ernakulam and another,*** reported in Vol.131 (1981) ITR 597, more particularly pages 604 and 605 which read as follows:

"The primary objection against the literal construction of s.52, sub-s.(2), is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but it can certainly help to fix its meaning It is a well-recognised rule of construction that a-statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the revenue would lead to a wholly unreasonable result which could never have been intended by the Legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement and it is quite well known that sometimes the completion of the sale may take place even a couple of years after the date of the agreement the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price, at which the property is sold, by more than 15% of such agreed price…. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no under-statement of consideration in respect of the transfer and the transaction is perfectly honest and bona fide and, in fact, in fulfillment of a contractual obligation, the assessee, who has sold the property, should be liable to pay tax on capital gains which have not accrued or arisen to him? It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation undertaken by him. It is difficult to conceive of any rational reason why the Legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such a contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the asessee nor has been received by him."

12. Lastly, learned counsel for the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others,*** reported in 1991 Supp (1) SCC 600, paragraphs 118 and 122 of which are reproduced below:

"118. Legislation, both statutory and constitutional, is enacted; it is true, from experience of evils. But its general language should not, therefore, necessarily be confined to the form that evil had taken. Time works changes, brings into existence new conditions and purposes and new awareness of limitations:' therefore, a principle to be valid must be capable of wider application than the mischief which gave it birth. This is particularly true of the constitutional constructions. Constitutions are not ephemeral enactments designed to meet passing occasions. These are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it ……." In the application of a Constitutional limitation or inhibition, our interpretation cannot be only of 'what has been' but of 'what may be'. See the observations of this Court in Sunil Batra v. Delhi Administration, (1978) 4 SCC 494. Where, therefore, in the interpretation of the provisions of an Act, two constructions are possible, one which leads towards constitutionality of the legislation would be preferred to that which has the effect of destroying it. If we do not read the conferment of the power in the manner we have envisaged before, the power is liable to be struck down as bad. This, we say in spite of the

argument by many including learned Solicitor General of India and Smt. ShyamlaPappu that in contractual obligations while institutions or organisations or authorities, who come within the ambit of Article 12 of the Constitution are free to contract on the basis of 'hire and fire' and the theory of the concept of unequal bargain and the power conferred subject to constitutional limitations would not be applicable. We are not impressed and not agreeable to accept that proposition at this stage of the evolution of the constitutional philosophy of master and servant framework or if you would like to call it employer or employee relationship. Therefore, these conferments of the powers on the employer must be judged on the constitutional peg and so judged without the limitations indicated aforesaid, the power is liable to be considered as arbitrary and struck down.

122. In the aforesaid view of the matter, I would sustain the constitutionality of this conferment of power by reading that the power must be exercised on reasons relevant for the efficient running of the services or performing of the job by the societies or the bodies. It should be done objectively, the reasons should be recorded, it should record this and the basis that it is not feasible or possible reasonably to hold any enquiry without disclosing the evidence which in the circumstances of the case would be hampering the running of the institution. The reasons should be recorded, it need not be communicated and only for the purpose of the running of the institution, there should be factors which hamper the running of the institution without the termination of the employment of the employee concerned at that particular time either because he is a surplus, inefficient, disobedient and dangerous."

13. Mr. T.K. Satapathy, learned counsel for the opposite parties has also relied upon the counter affidavit of opposite party Nos.1, 2, 5 and 7. Paragraphs-4, 9 and 11 of the said counter affidavit are reproduced below:

"4. That as regard paragraphs-1 of the writ application the Petitioner's contention that the denial of input tax credit is ultra vires of Article 14 and 19 (1) (g) of the constitution of India is unjust and improper. In this regard, it is humbly submitted that in case of the ***Indian Oil Corporation Ltd v. State of Bihar (TS-347-SC-2017-VAT),*** *while dealing with the issue of set up of VAT against the entry tax the Hon'ble Court held that 'no assessee' claim set off as a matter of right and levy of Entry Tax cannot be assailed as unconstitutional only because set off clear that Article 14 of the Constitution can be said to be breached only when there is perversity or gross disparity resulting in clear and hostile discrimination practiced by the legislature, without any rational jurisdiction for the same". In view of the above, the taxpayer cannot claim credit of Input Tax without any authority of law. Further, restrictions with respect to availment of credit accrued under the existing law being reasonable are equally applicable to all. As the suitability and requirement of taxpayer varies from person to person, rule/Act can not be changed/amended acoordingly. It is mandatory for the taxpayers to adhere the restrictions prescribed in Act and Rule as such restrictions can not be challenged by the tax payer under the plea of being violative of the Petitioner's fundamental rights guareented under Articles 14 and 19(1)(g) of the Constitution of India.*

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9. That as regard paragraph-5 (f) of the writ petition it is humbly submitted that As per Section 16 of the CGST as well as OGST Acts every registered person shall subject to

such conditions and restrictions as may be prescribed and in the manner specified in section 49 of the CGST Act as well as Section 49 of the OGST Act, be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course of furtherance of his business and the said amount shall be credited. The Petitioner has stated that as they are registered dealer, they are statutorily entitled to avail of the benefit, of taking credit of the input tax charged on the supply of the goods in various services which are consumed or utilized for the construction of the aforesaid Shopping mall and set off the same against the CGST and OGST payble on the rentals received from the tenants.

In this regard it is to state that as already mentioned in paragraph-7 of the counter affidavit regarding restrictions prescribed for the Registered persons under Section 17(5)(d) of the CGST/OGST Act'2017, to which the Petitioner is also required to strictly adhere to. While interpreting the Section 16 supra the Petitioner is omitting the conditions and restrictions as prescribed for the registrants. Nowhere under CGST/OGST Act, 2017 and Rules framed thereunder is it mentioned that the Registrant shall follow the Act/Rule to the extent of their suitability only. ,

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11. That as regard paragraphs-5 (i) of the writ petition it is humbly submitted that the Government has restricted in availment of ITC u/s 17(5)(d) of the CGST Act 2017. The petiioner has erred in accepting the fact that Input tax credit is not a matter of right which cannot be deprived. This issue has already been decided by the Hon'ble Supreme Court in case of Oil Corporation India Limited v. State of Bihar under the Entry Tax Act.

(i) The Hon'ble Supreme Court, in its judgment in the case of Inidan Oil Corporation Ltd. Vs. State of Bihar [TS-347-SC-2017-VAT] while dealing with the issue of set off of VAT against entry tax, the court held that, ***"no assessee can claim set off as a matter of right and levy of Entry Tax cannot be assailed as unconstitutional only because set offf is not given".***

In view of the above, the taxpayer cannot claim credit accumulated due to suppy of inputs (goods as well as services) used by them for construction of their project as a vested right for payment of GST on the output taxable supply of Renting of their said property.

(ii) Powers to restrict flow of credit also exist under Section 16(1) of the CGST Act which empowers the Central Government to impose conditions and restrictions on availing input tax credit. This shows a Legislative intent that input tax credit may not always be allowed partially or fully. Input tax credit provisions do not provide for that all the tax paid on inputs should be available as credit. Some credits have been denied under section17 in the Act itself and to allow flexbility, the Act provides that restrictions can be placed on availabiltiy of credit. In this regard, reliance is also placed on the recent judgment of Hon'ble Delhi Court in the case of ***Cellular Operators Association of India and Others Vrs. UoI [2018-TIOL:-310-11C-DEL-ST]*** wherein the Hon'ble Court rejected the claim of the taxpayer to allow credit of unutilised education and higher education cess and upheld the power of the Government to restrict utilisation of balance cess.

(iii) In case of ***Mohit Minerals Pvt Ltd. Vrs. Union of India*** wherein the petitioner challenged the decision of the Government to disallow the credit of Clean Environment Cess paid on coal that was in stock as on 30th of June, 2017 and payment of Compensation Cess thereon in the GST regime, thus resulting in double taxation. The Hon'ble Supreme Court held that the petitioner is not entitled for any set off of payments made towards Clean Energy Cess in payment of Compensations to States Cess.

(iv) GST is a new stystem of taxation which provides setting off of input tax credit against the output tax liability along the entire value chain till the final retail level. Under the earlier tax regime, credit of inputs was available for final product in respect of certain taxes/duties only. For example Credit of duty of excise could not be utilised against VAT and vice versa. It can be therefore said that GST is applicable only on value addition along the entire supply chain and thus, cascading effect of taxes has been eleminated. Thus, under the GST regime, more input tax credit is available to tax payer along the entire supply chain as compared to the previous tax regime. Further, the transitional provisions under the CGST Act provide adeqauate credit of taxes accumulated under the erstwhile taxation regime to taxpayers in the GST regime.

(v) It may be noted that Section 17(5)(d) of the CGST Act prescribes denial of credit for certain class of taxpayers with certain conditions and limitations. This would mean that legislature has decided in its wisdom the credit of taxes which would be allowed in credit as ITC and the tax that has not been allowed, as policy call of the Government, given effect through legislation, cannot be obtained through judicial review.

(iv) In case of **JCB India Ltd Vs. Union of India 2018-TIL-23-HC-Mum-GST,** the Hon'ble Court held- *"CENVAT credit is a mere concesstion and it can not be claimed as a matter of right- Credit on inputs under the existing law itself is not absolute but restricted or conditional right- if the existing law itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that such rights under existing law could have been enjoyed and availed of irrespective of the period or time provided -therein-. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder- In the circumstances, it is not possible to agree with the Counsel appearing for the Petitioner that imposition of condition vide clause(iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1) (g) of the Constitution of India-if right to availment of CENVAT credit itself is conditional and not restricted or absoulte, then the right to pass on that credit cannot be claimed in absoulte terms-there cannot be estoppel against a statute- transitional arrangements that have been made have clear nexus with the object sought to be achieved cannot be struck down as having – no such relation or nexus petitions fail.*

14. Mr. Satapathy, learned counsel for the opposite parties has relied upon the unreported decision of the Bombay High Court in Writ Petition No.3142 of 2017 ***(JCB India Limited v. Union of India),*** paragraphs-6, 28, 56, 57 and 61 of which are reproduced below:

> *"6. To abolish the cascading effect, the CGST Act provides for the input tax credit eligibility in terms of these transitional provisions. Section 140(1) of the CGST Act inter*

alia provides that a manufacturer will be entitled to carry forward the closing balance of CENVAT credit, subject to certain conditions. Further, Section 140(3) of the CGST Act inter alia allows a registered trader to avail input tax credit of goods held in stock as on 1-7-2017, subject to certain conditions. It is submitted that upon a plain reading of the provisions and particularly Clause (iv) of sub-section (3) of Section 140, the input tax credit of stock of goods can be availed only when such goods are purchased after 30-6-2016. A trader or a depot of a manufacturer was not entitled to avail credit as the CENVAT Credit Rules, 2004 allows credit availment only by a manufacturer or a service provider. However, there were provisions through which an importer could pass on the credit of duty paid by registration as first stage dealers. By the GST and particularly by virtue of the provisions contained in Section 140(1) and Section 140(3) of the CGST Act, a situation of inequality amongst the manufacturer and the depot/trader as far as the stock on 1-7-2017, occurs and such ineligibility of credit under the GST regime causes discrimination between the petitioner and other manufacturers. It is put to a disadvantageous position as far as the closing stock on 1-7-2017 in respect of goods lyingin stock prior.to 30-6-.2016.

28. Prior thereto, in support of the argument that Article 14 is salutary in its application, it is urged that the Judgments in the compilation would throw light on these propositions canvassed. Our attention was specifically invited to a Judgment in the case of Eicher Motors Ltd. v. Union of India, reported in 1999 (106) E.L.T. 3 (SC). That is on the point that rights accrued during the existing law are specifically saved under Section 174 of the CGST Act, 2017, which would include the right to pass on the CENVAT credit and such an accrued right cannot, therefore, be taken away and in the manner done. On the point of promissory estoppel, our attention has been invited to several Judgments in the compilation and particularly the principle emerging from the Judgment in MotilalPadampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Others, reported in (1979) 2 SCC 409.

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56. To our mind, therefore, the learned Additional Solicitor General is right in his contention that a CENVAT credit is a mere concession and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of. It is in these circumstances that we are unable to agree with the Counsel appearing for the petitioners that the impugned condition defeats any accrued or vested right. It was never vesting in them in such absolute terms, as is argued before us. If the existing law itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that such rights under the existing law could have been enjoyed and availed of irrespective of the period or time provided therein. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder. In the circumstances, it is not possible to agree with the Counsel appearing for the petitioners that imposition of the condition vide Clause (iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

57. We would refer to the Judgments which are heavily relied,upon in this context. It is stated that the rights and privileges accrued during the existing law have been specifically saved under Section 174 of the CGST Act, 2017 If what are saved are the rights and privileges of the nature noted above, then it cannot be said de hors the conditions or de hors the restriction on availment or enjoyment of that right they have been saved by the CGST Act. In other words, if rights are conferred with conditions under the existing law, then, they are saved by the CGST Act with such conditions and not otherwise. There must be clear provision to grant it otherwise than in terms of the existing Law or in other words, the restrictions or co¯nditions on availment of that right are removed totally. No such provision has been brought to our notice. It is clear that if right to availment of CENVAT credit itself is conditional and not restricted or absolute, then, the right to pass on that credit cannot be claimed in absolute terms. It is argued that it is a vested right accruing to the petitioner.

61. We are not confronted with a situation of the lapsing of the credit though the petitioners may equate the position before us with that of Eicher Motors. We are dealing with the validity and legality of a condition imposed in the transitional arrangement. While moving from one legislation to another comprehensive legislation, in the latter legislation the Legislature deemed it fit arid proper to continue the earlier or erstwhile arrangement by terming it as a transition or transitional one. That continuation was with conditions and one of the conditions which is questioned here is consistent with the conditions imposed under the existing law. Such a situation was not dealt with in Elcher Motors. Thus, the decision is clearly distinguishable."

15. Mr. Satapathy has also relied upon the decision of the Delhi High Court in. IrritPetition (Civil) No.7837/2016 ***(Cellular Operators Association¯of India and others v. Union of India and another)*** decided on 15th February, 2018, paragraphs-5 and 16 of which are reproduced below:

"5. The grievance of the petitioners is, and they claim a vested right to avail benefit of the unutilized amount of EC or SHE credit, which was available and had not been set off as on 1st March, 2015 and 1st June, 2015 for payment of tax on excisable goods and taxable services respectively. The contention is that EC and SHE were subsumed in the Central Excise Duty, the general rate of which was increased from 12% to 12.5%, and service tax, which was increased from 12.36% to 14%. Reliance is placed upon the Budget Speech of the Finance Minister and the memorandum explaining provisions of Finance Bill, 2015, which reads:-

11.8. As part of the movement towards GST, I propose to subsume the Education Cess and the Secondary and Higher Education Cess in Central Excise duty. In effect, the general rate of Central Excise Duty of 12.36% including the cesses is being rounded off to 12.5% The Service Tax rate is being increased from 12% plus Education Cesses to 14%. The Education Cess' and Secondary and Higher Education Cess' shall be subsumed in the revised rate of Service Tax. Thus, effective increase in Service Tax rate will be from existing rate of 12.36% (inclusive of cesses) to 14%. The new Service Tax rate shall come into effect from a date to be notified by the Central Government after the enactment of the Finance Bill, 2015. Till the time the revised rate comes into effect, the levy of Education

cess' and Secondary and Higher Education cess' shall continue to be levied in Service Tax.

Reference is also made to the Explanation given by the Joint Secretary, Tax Research Unit, Ministry of Finance, Government of India, vide letter F.No.334/5/2015-TRU dated 28th February, 2015, which reads:-

The rate of Service Tax is being increased from 12% plus Education Cesses to 14%. The Education Cess' and _ Secondary and Higher Education Cess' shall be subsumed in the revised rate of Service Tax.

Thus, the effective increase in Service Tax rate will be from the existing increase in Service Tax rate will be from the existing rate of 12.36% (inclusive of cesses) to 14%, subsuming the cessesll The contention is that EC and SHE, which were earlier imposed and then withdrawn from 1st March, 2015 and 1st June 2015 for excisable goods and taxable services respectively, had been subsumed and included in the excise duty and service tax, and therefore, the amount lying in the credit towards EC and SHE should be available for availing CENVAT credit. This was not a case of abolition of EC and SHE, but the cesses were added and became part of the excise duty or service tax. Reliance is placed on the dictionary definition of the term — subsumed, which means to include, absorb in something else or incorporated into something larger or more general. Therefore under law, unutilised EC and SHE should be allowed to be utilised for payment of basic excise duty in excisable goods and service tax on taxable service, for otherwise the action would be clearly arbitrary, capricious and tantamount to lapsing of credit accrued on the input, though higher excise duty or service tax was payable on the output. The petitioners, it is asserted, have a vested right to claim benefit of utilization of the unutilized credit. Reliance is placed upon the judgment of the Supreme Court in Eicher Motors Limited and Another versus Union of India and Others, (1999) 2 SCC 361 and Samtel India Limited versus Commissioner of Central Excise, Jaipur, (2003) 11 SCC 324.

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16. The decision in the case of Eicher Motors Limited and Another (supra) is distinguishable, for in the said case, what was subject matter of challenge was Rule 57-F(4-A), which' had stipulated that unutilized credit as on 16th March, 1995 lying with the manufacturers of tractors under Heading 87.01 or motor vehicles 87.02 and 87.04 'or chassis of tractors or motor vehicles under Heading 87.06 shall lapA and shall not be allowed to be utilized for payment of duty on excisable goods. The proviso, however, had stipulated that nothing shall apply to the credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock as on 16th March, 1995, thereby creating an anomalous situation. Credit of tax paid on inputs and even finished products was available, but not in respect of the sold products. This was clearly taking away a vested right in the form of an amendment to the Rule. There was lapse of credit, which could not be utilized, though the tax/duty had not been withdrawn. The Supreme Court noticed that the credit attributable to inputs had already been used in manufacture of final products that had been cleared, and this alone was sought to be lapsed, notwithstanding the fact that the right had become absolute. On a holistic reading of the entire scheme, it was observed that when acts have been done by the parties concerned on the strength of the Rules, incidence following thereto must take place in accordance with the scheme or

the Rules; otherwise it would affect the rights of the assessees. Further, right had accrued on the date when the assessee had paid tax on the raw materials or inputs and the same would continue till the facility available thereto got worked out or until the goods existed. As noticed above, tax/duty had not been withdrawn. Lastly and more importantly, Section 37 of the Central Excise Tariff Act, 1985 did not enable the authorities to make the Rule impugned therein. The legal ratio in Eicher Motors Limited and Another (supra) was followed in Samtel India Limited (supra) wherein amended Rule 57-F(17) of the Central Excise Rules, 1944 was challenged. The Rules had postulated lapsing of credit in case of manufactured goods falling under sub-heading 8540.12, though the proviso had provided for credit of duty in respect of inputs lying in stock or contained in finished goods lying in stocks. It was held that the said scheme of credit of input tax, in view of amended provision, could not be made applicable to goods which had already come into existence and under which the assessee had claimed credit facility. As noticed above, in the present case, credit of EC and SHE could be only allowed against EC and SHE and could not be cross- utilized against the excise duty or service tax....."

16. Mr. Satapathy, has also relied upon the decision of the Hon'ble Supr'ena Court in,,the ,case *ofGovernment* ***of Andhra Pradesh, and others v. P. Laxmi Devi,*** reported in (2008) 4 SCC 720, paragraphs-72, 73 and 80 of which are reproduced below:

"72. *As regards fiscal or tax measures greater latitude is given to such statutes than to other statutes. Thus in the Constitution Bench decision of this Court in R.K. Garg v. Union of India [(1981) 4 SCC 675: 1982 SCC (Tax) 30] this Court observed: (SCC pp. 690-91, para 8)*

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [1 L Ed 2d 1485: 354 US 457 (1957)] where Frankfurter, J. said in his inimitable style:

'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of 'ankaic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the numbed or times the judges have been overruled by .ev,ehtsiself-lithitation can be seen to be the path to judicial wisdoi and institutional prestige and stability.'

The court must always remember that 'legislation is directed, to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract Propositions and do not relate to

abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaptation of remedy are not always possible' and that judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig Refining Co. [94 L Ed 381 : 338 US 604 (1949)] , be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which' may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

17. Lastly, Mr. Satapathy has relied upon the judgment of the Hon'ble Supreme Court in the case of ***State of M.P. v. RakeshKohli and Others,*** reported in (2012) 6 SCC 312, paragraphs-23, 24 and 32 to 35 of which are reproduced below:

23. In P. Laxmi Devi [(2008) 4 SCC 720], a two-Judge Bench of this Court was concerned with a judgment of the Andhra Pradesh High Court. The High Court had declared Section 47-A of the 1899 Act, as amended by A.P. Act 8 of 1998 that required a party to deposit 50% ,deficit stamp duty as a condition precedent for a reference to a Collector under Section 47-A, unconstitutional. The Court said in P. Laxmi Devi [(2008) 4 SCC 720] as follows: (SCC p. 735, paras 19 & 21)

"19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide CIT v. V. MR. P. Firm Muar [AIR 1965 SC 1216]. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

21. It has been held by a Constitution Bench of this Court in ITO v. T.S. DevinathaNadaI¯ [AIR 1968 SC 623] (vide AIR paras 23-28) that where the language of a taxing provision is plain, the court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned ani'bndment to the Stamp Act."

24. *While dealing with the aspect as to how and when the power of the court to declare the statute unconstitutional can be exercised, this Court referred to the earlier decision of this Court in Rt. Rev. Msgr. Mark Netto v. State of Kerala [(1979) 1 SCC 23] and held in para 46 of the Report as under: (P. Laxmi Devi case [(2008) 4 SCC 720], SCC p. 740)*

"46. In. our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under Schedule VII List I, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no mariner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former – view must – always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide Rt. Rev. Msgr. Mark Netto v. State of Kerala [(1979) 1 SCC 23] , SCC para 6 : AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise."

32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:

(i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,

(ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,

(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,

(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and

(v) in the field of taxation, the legislature enjoys greater latitude for classification.

Had the High Court kept in view the above well-known and important principles in law, it would not have -declared clause (d), Article 45 of Schedule I-A as violative of Article 14 of the Constitution being arbitrary, unreasonable and irrational while holding that the provision may pass the test of classification.

33. By creating two categories, namely, an agent who is a blood relation i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the legislature has sought to curb inappropriate mode of transfer of immovable properties, Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power-of-attorney holder to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power-of-attorney holder, he may execute the conveyance himself. The legislative idea behind clause (d), Article 45 of Schedule I-A is to curb the

tendency of transferring immovable properties through power of attorney and inappropriate documentation.

34. By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode of transfer by providing that power of attorney given to a person other than kith or kin, without consideration, authorising such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is the subject-matter of the power of attorney. In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible documents, the real intention of which is the transfer of immovable property.

35. The 'classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the 1899 Act. 'The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable."

Therefore, he has contended that the interpretation is to be put as per the language used in'Seddon 17(5)(d) of the Act.

18. We have heard learned counsel for both the sides.

19. The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central and State and to prevent multi taxation.Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16 (1)(2) where restriction has been putforward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation putforward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is, covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

20. In that view. of the Matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in **(1999) 2 SCC *361 (supra),*** the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.

21. In that view of the matter, prayer (a) is required to be granted. However, we are not inclined to hold it to be ultra vires. Prayer (b) is not accepted.

The writ petition is allowed to the aforesaid extent.

HIGH COURT OF RAJASTHAN AT JAIPUR BENCH

D.B. CIVIL WRIT PETITION NO. 2031 OF 2018
D.B. CIVIL REVIEW PETITION NOS. 269, 270 OF 2018
FEBRUARY 12, 2019

SANWARIA SWEETS (P.)LTD. **…. Petitioner**
VERSUS
UNION OF INDIA **…. Respondent**

For the Petitioner (S): Mr. J.K. Mittal, Mr. Vagish Kumar Singh and Mr. AnupamAgarwal
For the Respondent (S): Mr. SatishAgarwal and Mr. Kinshuk Jain

Where information was received by DGGSTI that pouches were being manufactured in an unregistered premises resulting in huge evasion of Central Excise Duty by a person and incriminating documents were found in his possession during the search operations conducted on various premises and since his role in operation of unregistered factory became apparent, it could not be said that respondents did not have sufficient material to form requisite 'reason to believe' as envisaged under section 12F read with section 18 of Act of 1944 and section 100(4)(5) Cr. P.C. to conduct search in question
HELD: Even otherwise, it is trite that an error committed by the Officer in seizing the documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by it vitiate the search. If prima facie there are grounds to justify the belief of the officer in conducting search, this Court would have no reason not to accept such belief, although it may or may not have entertained such belief. Whether or not the concerned official of the respondents had "reason to believe" cannot be scrutinised by this Court under "legal microscope, with an over-indulgent eye which sees no evil anywhere within the range of its eyesight". In any case, all those documents, which have been seized, would undergo scrutiny of the concerned Court if and when prosecution is launched against the accused by filing charge sheet. It would not be appropriate for this Court to go into that question at this premature stage.

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ
HON'BLE MR. JUSTICE GOVERDHAN BARDHAR

Writ Petition No. 2031/2018 has been filed by the petitioner, M/s. Sanwaria Sweets Private Limited through its Director, Mr. Ajay Sharda inter alia with the prayer that the action of the officers of the respondent namely Directorate General of Goods and Service Tax Intelligence (for short 'DGGSTI') in conducting search in the premises of the

petitioner at Jaipur on 27.08.2017 be declared arbitrary, malicious, motivated and illegal, being contrary to the provisions of the Central Excise Act, 1944 (for short 'the Act of 1944') and also without jurisdiction. It is further prayed that the respondents be directed to return all the documents including original sale/title deeds of various immovable properties taken away on 27.08.2017 during the aforesaid search and Respondent No. 1, Union of India be directed to take action against the officers of the DGGSTI, in particular against Respondent No. 3, Mr. Rajesh Verma for indulging in vexatious search in the premises of the petitioner.

2. Review Petition No. 269/2018 has been filed by Respondent No. 2, DGGSTI and Review Petition No. 270/2018 has been filed by Respondent No. 3, Mr. Rajesh Verma, seeking review of order dated 09.08.2018 passed by Division Bench of this Court whereby the Central Government was directed to act pursuant to prayer clause (C) of the writ petition, i.e. to take action against the officers of Respondent No. 2 and against Respondent No. 3, in terms of Service Rules, for indulging in vexatious search in the premises of the petitioner and not to take any coercive action against the writ petitioner.

3. We have heard Mr. J. K. Mittal, learned counsel appearing on behalf of the writ petitioner and Mr. Satish Kumar Agarwal as also Mr. Kinshuk Jain, learned appearing on behalf of the respondents as well as review petitioners.

4. Mr. J.K. Mittal, learned counsel for the writ petitioner submitted that this Court required the respondents to return the original files seized during search of the premises of the writ petitioner and when they failed to do so, this Court on 09.08.2018 deprecated conduct of the respondents and directed that action be taken against official respondents in terms of prayer Clause (C) of the writ petition and restrained them from taking any coercive action against the writ petitioner. The respondents returned the original files on 26.09.2018, inventory of which was prepared by the respondents in terms of aforesaid order. It is argued that the search conducted by the department was not only arbitrary exercise of power but also malicious and motivated action being in breach of provisions of Section 12F and Section 18 of the Act of 1944 read with Section 100(4)(5) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). According to the respondents, the search was conducted on 27.08.2017 and record pertaining to various firms and properties were taken away as mentioned in panchnama prepared on that day. However, as per Section 12F of the Act of 1944, only those documents or books or things could be seized, which are "useful for or relevant to any proceedings under this Act,". The aforesaid provision therefore did not allow the respondents to take away any or everything like the title deeds of immovable properties of various firms/companies, which cannot be said to be the documents falling within the scope of that provision. The assertion of the respondents in their counter affidavit that the entries at Serial No. 21 to 24 of the Annexure-A to the panchnama aforesaid were inadvertently typed as photo copies but the fact is that all these documents which were taken away by the respondents mentioned photo copies, without sealing, without recording the number of pages and specific description of the documents of each file. The said action was not inadvertent but was deliberate and when the respondents were rebuked and directed by this Court to

return the same, it was at that stage, that the respondents admitted that they seized many original documents, which were neither sealed nor paginated, nor specific description of the documents was mentioned in the panchnama. Moreover, at Serial No. 26 and 31 of Annexure-A to the panchnama dated 27.08.2017, the entries were left blank and the respondents in their counter affidavit sought to justify this by terming the same as an inadvertent error. As per the respondents, rest of the documents was photo copies of their originals. Even this assertion turned out to be incorrect. Contention of the respondents that there are no provisions in the Act of 1944 to seal the resumed documents as they have evidentiary value and need to be checked over and over again during the course of investigation is liable to be rejected. If this argument is accepted, there will be no authenticity of the documents taken away by the respondents during search. The respondents could even change or interpolate the documents.

5. It is argued that as per panchnama dated 27.08.2017 at various places, particularly on pages 26, 39 and 46, and the respondents in their counter affidavit admitted that the documents were "resumed" while the law only permits that the documents which are found relevant may be "seized". As per Section 100(5) Cr.P.C. a list of all the things seized in the course of search shall be prepared by the officers, therefore, there is no concept of "resume" but only to "seize". When the law requires a particular thing to be done in a particular manner, the same has to be done only in that manner or not to be done at all. In support of this argument, reliance has been placed on the judgment of the Supreme Court in ***CIT* v. *Pearl Mech. Engg. & Foundry Works* (*P*) *Ltd.,* [2004] 4 SCC 597**. It is argued that even as per Section 100(4) of Cr.P.C. search needs to be conducted with two or more independent and respectable inhabitants of the locality in which the place is to be searched is situated. It is evident from the panchnama that one of the panch witnesses was from Kotputli and another was from Delhi. Therefore, it is clear that these two persons were accompanying the search team and they cannot be termed as independent and respectable inhabitants of the locality in which the place to be searched is situated. That is why original sale deeds were taken away by describing them photo copies, that too without sealing and without recording the number of pages and giving specific description of the documents of each file. Reliance has been placed on the judgment of the Supreme Court in ***Mahesh Chandra* v. *Regional Manager, U.P. Financial Corporation* [1993] 2 SCC 279** wherein it has been held that wherever wide power is conferred by statues on public functionaries, the same is subject to inherent limitation that it must be exercised in just, fair, and reasonable manner, bona fide and in good faith and whatever is unreasonable is arbitrary.

6. It is argued that Constitution of India was amended vide the Constitution (One Hundred and First Amendment) Act, 2016, by which it enabled the provisions read with Entry 84 of the Union List of 7th Schedule to the Constitution and the levy of central excise duty was amended, which came into force w.e.f. 16.09.2017. The power of levy of excise duty has been restricted to only six items, which are petroleum related products, natural gas and tobacco. There is no saving clause in the Act of 2016 and the transactional provisions in Section 19 of the said Amendment Act provides that

notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or re-appealed by a competent Legislature or by other competent authority or until expiry of one year from such commencement, whichever is earlier. While the Central Goods and Service Tax Act, 2017 (for short 'the Act of 2017') came into force w.e.f. 01.07.2017, therefore, even on the basis of aforesaid transactional provisions contained in Section 19, the respondents on or after 01.07.2017, could not have exercised the power under the Act of 1944. There being no saving clause in the amending Act of 2016, the power under the Act of 1944 ceased to exist as the saving clause under the General Clauses Act, 1897 does not apply to Constitution of India. The argument therefore is that the search conducted on 27.08.2017 under Section 12F of the Act of 1944 is without jurisdiction. The officers who conducted the search are admittedly the officers appointed under the Act of 2017 vide notification no. 14/2017-Central Tax, dated 01.07.2017 issued under Section 3 read with Section 5 of the Act of 2017 and these officers can by no stretch of imagination treated as authorised officers in any manner under the erstwhile Act of 1944. In fact, the officers appointed under the Act of 1944 became the officers appointed under the Act of 2017 and not vice versa. Therefore, the search was wholly without jurisdiction.

7. Mr. J. K. Mittal, learned counsel for the writ petitioner without prejudice to the aforesaid submissions argued that premises of the petitioner are not connected with other searches in the residence of Mr. NatwarLalSharda. The respondents did not dispute that not even a single penny was due against Mr. NatwarLalSharda. However, they still justify said search at the premise of the writ petitioner. There was no provision of recovery of tax due against one person from another person/company or legal heirs. The notice has to be given only to the person chargeable with duty and said duty cannot be recovered from any other person. Reliance has been placed on judgment of the Supreme Court in ***Shabina Abraham* v. *CCE & Customs,* 2015 (322) ELT 372 (SC)**. The search therefore could not be conducted on the assumption and presumption even if the tax becomes due against any other person. Reliance placed by the respondents in their counter affidavit on Section 11DDA of the Act of 1944, which provides for attachment of property belonging to the person to whom notice is issued under Section 11A and 11D for duty of excise, has no applicability in the present case for various reasons such as (i) there is no attachment of property done by the respondents; (ii) even under the said provisions attachment could be done only of the property belonging to the person to whom such notice is issued; (iii) the respondent illegally had taken away admittedly the documents of immovable properties of various companies/firms not belonging to Mr. NatwarLalSharda; (iv) till now no notice has been issued under the aforesaid provisions against the petitioner; (v) the respondents, even admitted that till date no notice or amount is due even against Mr. NatwarLalSharda. Thus, the entire action of the respondents is malicious and arbitrary.

8. Relying on the judgment of Delhi High Court in ***eBIZ.com* (*P*) *Ltd.* v. *Union of India,* 2016 (44) S.T.R. 526 (Del.)**, learned counsel argued that in that case it has been held that search and arrest conducted without issuance of show cause notice and determination of duty is illegal. It is argued that there is no alternate remedy in the law to challenge the validity of search and action of the respondents and it is settled law that writ petition against such challenge is maintainable. Law is settled that there should be 'reason to believe' and not 'reason to suspect' at the time of authorization of search by the competent officer. Reliance has been placed on the judgment of the Supreme Court in ***ITO* v. *M/s Seth Brothers & Others,* 1969 (74) ITR 836** and judgment of Calcutta High Court in ***Bishnu Krishna Shresth*a v. *UOI & Others,* 1987 (27) ELT 369 (Cal.)**. It is argued that saving clause under Section 174 of the ACT of 2017 only applies to pending proceedings and does not permit initiation of fresh proceedings. Reliance in support of this argument has been placed on the judgment of the Supreme Court in ***Kolhapur Canesugar Works Ltd. &Anr.* v. *Union of India &Anr.,* [2002] 2 SCC 536 *and Ambalal Sarabhai Enterprises Ltd.* v. *AmritLal& Co. &Anr.* [2001] 8 SCC 397**. Learned counsel denied suggestion that the prayer made in Writ Petition No. 9956/2017 and Criminal Writ Petition No. 3532/2017 filed before Delhi High Court by Mr. NatwarLalSharda, father of one of the Directors of the petitioner-company are exactly the same. Argument of the respondents referring to the statement of Mr. NatwarLalSharda alleging hawala transactions and contending that the same was subject matter of investigation by Enforcement Directorate (ED) is wholly unsubstantiated and factually incorrect. The respondents, with a view to mislead this Court, have tried to connect the search conducted at the residential premises of Mr. NatwarLalSharda on 30.01.2017 and 26.08.2017 with the search conducted at premises of the writ petitioner on 27.08.2017 only because one of the Directors of the petitioner-company happens to be son of Shri NatwarLalSharda.

9. Per Contra, Mr. SatishAgarwal, learned counsel for the respondents opposed the writ petition and argued that all the documents referred to in prayer clause (B) of the writ petition have already been handed over to the writ petitioner against a clear receipt, which fact has been admitted by the learned counsel for the writ petitioner during the course of arguments. It is denied that the search was conducted by the respondents without having any "reason to believe". It is denied that the search was illegal and arbitrary. The examination of documents, statements of various concerned persons recorded in this case under Section 14 of the Act of 1944, during the investigation of the said case revealed a case of evasion of central excise duty on illegal manufacturing of Pan Masala/Gutkha by an unregistered factory situated at Village Belinga, District Bastar, Chhattisgarh and it was found that Mr. NatwarLalSharda, one of the Directors in M/s. Sanwaria Sweets Private Limited was the master mind in running and managing illegal business of manufacturing and clearance of Pan Masala/Gutkha and he has deliberately indulged in further sale of said Pan Masala/Gutkha inside the deep jungles of Bastar, thus resulting in evasion of central excise duty of more than Rs. 63 crores, which is subject to calculation. In the context of above investigations, searches have been

conducted at relevant places under Section 12F of the Act of 1944 read with Section 18 of the Act of 1944 and Section 174(2)(e) of the Act of 2017. During the investigation, it was found that Mr. NatwarLalSharda is one of the Directors of M/s. Sanwaria Sweets Private Limited, J-6, 2nd Floor, Himmat Nagar, Tonk Road, Jaipur, Rajasthan and the said premises is also a common registered premises of more than a dozen companies, in which Mr. NatwarLalSharda and/or his family members are Directors/Partners/Proprietors. Therefore, a search at M/s. Sanwaria Sweets Pvt. Ltd. was carried out on 27.08.2017 on the reasonable belief of the competent authority that the documents/things pertaining to the case have been secreted at above place.

10. Relying on the judgment of Karnataka High Court in ***British Physical Laboratories India Ltd.* v. *Assistant Collector, Directorate of Revenue Intelligence Anti Evasion* (*Central Excise*) *and Another, 1983* (*14*) *ELT 2270,*** it is argued that if department is able to produce reasonable evidence of such belief, "reasons to believe" cannot be doubted in writ proceedings. Learned counsel further relied on the judgment of the Supreme Court in ***R.S. Seth GopikisanAgarwalv.R.N. Sen, Assistant Collector of Customs & Central Excise, Raipur and Others, 1983* (*13*) *ELT 1434* (*SC*)** and submitted that it has been held therein that the non-mention of reasons in itself does not vitiate the order. Referring to Para 9 of the aforesaid judgment which deals with Section 100 Cr.P.C., it is argued that Section 12F (2) of the Act of 1944 makes it clear that "the provision of Cr.P.C. relating to search and seizure shall, as far as may be applied to search and seizure under this Section. Learned counsel relied on the judgment of the Supreme Court in ***Income Tax Officer* v. *M/s. Seth Brothers & Others,*** **[1969] 2 SCC 324** and submitted that therein it was held that any irregularity in the course of entry, search and seizure committed by the Officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the Officer has in executing the authorisation acted bona fide. It was also held that mere fact that a large number of documents have been seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is mala fide. Reliance is placed on the judgment of the Supreme Court in ***State of Gujarat* v. *Shri MohanlalJitamaljiPorwal and Another,*** **[1987] 2 SCC 364** wherein it has been held that the courts cannot sit in the appeal on the question whether or not the official concerned had seized the articles in the "reasonable belief that the goods were smuggled goods".

11. Referring to judgment of the Supreme Court in ***Seth Durga Prasad Etc.* v. *H.R. Gomes, 1966* (*2*) *SCR 991***, it is submitted that the Supreme Court in that case held that the object of the grant of power under Section 105 of the Customs Act, 1962 is not to search a particular document but of documents or things which may be useful or necessary for the proceedings, either pending or contemplated. It is argued that filing of present writ petition is intended to scuttle the investigation in a case of this nature and to demoralise the officers, who are investigating the matter under the close supervision of senior officers in a fair and fearless manner. Two separate writ petitions are pending before two different Division Benches of Delhi High Court and having failed to get any interim order from Delhi High Court, Mr. NatwarLalSharda has indulged in filing of

present writ petition through his son Mr. Ajay Sharda. It cannot be said that no incriminating material was recovered from the search in question. It is argued that the writ petitioner has heavily relied upon page no. 25 and 26 of the Annexure-A to panchnama but has conveniently ignored to point out recovery of incriminating material from the drawer of the table in the cabin of Mr. NatwarLalSharda, Managing Director of the petitioner-company, which proves that he is the real owner of the unregistered factory and actual beneficiary of the business in Village Belinga, District Bastar, Chhattisgarh and is the mastermind of the entire fraudulent operation resulting into robbing India of more than Rs. 63 crores by indulging in clandestine manufacturing and removal of excisable goods.

12. We have given our anxious consideration to rival submissions and carefully perused the material on record.

13. So far as prayer clause (B) of the writ petition is concerned, the same does not survive as pursuant to order of this Court dated 26.09.2018; the petitioner has already received all the documents including those files which contained original sale deeds/title deeds etc. As regards the main relief which has been prayed for in the writ petition that action of the officials of the respondent-DGGSTI formerly known as DGCEI in conducting search in the premises of the petitioner at Jaipur on 27.08.2017 should be declared arbitrary, malicious, motivated and illegal, being contrary to the provisions of the Act of 1944 is concerned, before venturing to examine that argument on merits, we deem it appropriate to refer to the relevant case laws on the subject.

14. The Supreme Court in ***Pukhraj*v. *D.R. Kohli,* (*1962*) *Supp. 3 SCR 866*** held that when a Court is dealing with a question as to whether the belief in the mind of the officer, who affected the seizure, was reasonable or not, it is not sitting in appeal over the decision of the said officer. All that the Court can consider is whether there is ground which prima facie justifies the said reasonable belief. The Supreme Court in ***State of Gujarat* v. *MohanlalJitamaljiPorwal& Another* (*supra*)** relying upon its earlier judgment in ***Pukhraj*(*supra*)**, held that if prima facie there are grounds to justify the belief the courts have to accept the officer's belief regardless of the fact whether the court of its own might or might not have entertained the same belief. It was further held that whether or not the officer concerned had entertained reasonable belief under the circumstances is not a matter which can be placed under legal microscope, with an over-indulgent eye which sees no evil anywhere within the range of its eyesight.

15. The Supreme Court in ***Income Tax Officer, Special Investigation Circle-B, Meerut* v. *Messrs Seth Brothers & Others etc.* (*supra*)** held that where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the Court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. Again, any irregularity in the course of entry, search and seizure committed by the officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the officer has in executing the authorisation acted bona

fide. An error committed by the Officer in seizing documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by itself vitiate the search, nor will it entitle the aggrieved person to an omnibus order releasing the documents seized. But the circumstance that the large number of documents has been seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is mala fide.

16. The Supreme Court in ***M/s. S. Ganga Saran & Sons (Pvt.) Ltd. Calcutta* v. *Income Tax Officer & Others,* [1981] 3 SCC 143** held that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under Section 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words under Section 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid.

17. In ***Dr. Pratap Singh & Another* v. *Director of Enforcement, Foreign Exchange Regulation Act & Others,* [1985] 3 SCC 72**, the Supreme Court held that the expression 'reason to believe' is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith; it cannot merely be pretence. Madras High Court in ***Chitra Construction Company* vs. *The Additional Commissioner of Customs, 2013 SCC Online Mad 61*** held that in the present socio-economic scenario it becomes all the more important for the authorities concerned, authorised by law, to unearth and to bring to light large scale evasions in the payment of taxes and other such serious irregularities being committed with impugnity. Even if there had been certain minor irregularities committed by the authorities concerned, relating to the procedural aspects of the search

seizure operations, they cannot be held to be substantial or sufficient in nature to declare the search and seizure operations as illegal and void.

18. Adverting now to the facts of the present case, we find that this writ petition has been filed by M/s. Sanwaria Sweets Private Limited through its Director, Mr. Ajay Sharda, who is none other than the son of Mr. NatwarLalSharda. The respondents have asserted that Mr. NatwarLalSharda also happens to be one of the Directors of the petitioner-company. They also asserted that he filed two writ petitions before Delhi High Court. In Writ Petition No. 9956/2017, he has prayed that action of the officers of respondents in conducting search on 30.01.2017 and 26.08.2017 at his residential premises be declared arbitrary, malicious, motivated and illegal. Order dated 10.11.2017 passed by Delhi High Court in that writ petition, which has been reproduced by Respondents No. 1 and 2 in para 6 of their counter affidavit, indicates that Mr. NatwarLalSharda was already granted bail and the respondent-department had applied for cancellation of the bail. Delhi High Court on being informed that the respondents had filed an application for cancellation of bail observed that pendency of the aforesaid writ petition would not come in the way of the Magistrate/Sessions Court while deciding the application for cancellation of bail. It was clarified that the respondents can record the statements of the petitioner and his wife in that case, who would also cooperate with the respondents.

19. Para 11 of the aforesaid counter affidavit states that an intelligence was received in the office of erstwhile Directorate General of Central Excise Intelligence (Hqrs.), New Delhi (DGCEI) now re-named as DGGSTI, that 9 FFS Pouch Packing Machines manufacturing Pan Masala of 'NAZAR' brand were being run in an unregistered premises in a remote location at Village Belinga situated at Jagdalpur-Raipur Highway, Chhattisgarh, resulting in huge evasion of central excise duty. The intelligence also indicated that one person named Mr. NatwarLalSharda, based in Jaipur is the main master mind behind the entire evasion. Based on the said intelligence, simultaneous search operations were conducted at various premises related to the case at Bastar, Indore and Jaipur on 30.01.2017. Searches were conducted after following due procedure made under Section 12F read with Section 18 of the Act of 1944. On 30.01.2017, simultaneous search operations were conducted at the various premises related to the business of the petitioner including his residence by the erstwhile DGCEI. During the course of searches, incriminating documents/ records and various electronic devices such as mobile phones were found in possession of Mr. NatwarLalSharda and his family members, Mr. AshishSharda and Shri Ajay Sharda, which were proved relevant for the investigation. On analysis of the documents seized/resumed during the search, scrutiny of call details and decoding of various messages (both test and Whatsapp messages, most of which were deleted deliberately) exchanged between the associated persons, the role of Mr. NatwarLalSharda in operation of the unregistered factory became apparent. Statements of various key persons were recorded under Section 14 of the Act of 1944 including buyers of Pan Masala/Gutkha of 'Nazar' brand, suppliers of the raw materials including supari

and menthol, the owner of 'Nazar' brand Mr. AshishSharda, nephew of Mr. NatwarLalSharda and Mr. NatwarLalSharda himself. This resulted in huge loss to the Central Government of Central Excise duty of more than Rs. 63 crores.

20. It has been further stated that during the course of investigation, incriminating messages both text and Whatsapp exchanged between the raw material supplier and Mr. NatwarLalSharda with regard to payments through hawala were found and admitted by Mr. NatwarLalSharda. He has used the hawala route for making and receiving large amount of payments in gross contravention of the relevant rules, which is also subject matter of investigation by the Enforcement Directorate. Para 22 of the counter affidavit states that during search on 27.08.2018 at J-6, Himmat Nagar, Tonk Road, Jaipur, from the cabin of Managing Director, Mr. NatwarLalSharda, in one of the drawers of his table, certain small rolls of packing materials which contained particulars printed thereon as "VACHAN" Premium Pan Masala, Mfd. by SS Industries, SP2033, Ramchandrapura, RICCO Industrial Area, Jaipur, Rajasthan-302022 MRP Rs. 4/- and Rs. 8/- and small packing material, which contained particulars printed thereon such as 'premium quality VACHAN chewing tobacco MRP Rs. 0.75/- & MRP Rs. 1/- were found. On enquiry from Mr. PuneetJethila, Vice President of M/s. Sanwaria Sweets Private Limited, Jaipur, who was present during the search proceedings at the said premises at M/s. Sanwaria Sweets Pvt. Ltd., J-6, 2nd Floor, Himmat Nagar, Tonk Road, Jaipur, failed to give any explanation and rather pleaded ignorance stating that Mr. NatwarLalSharda would be able to answer it. It has been stated in Para 23 of the counter affidavit that during the search conducted of the illegal factory at Bastar by the officers of erstwhile DGCEI (now DGGSTI) on 30.01.2017, samples/finished goods/ Pan Masala of 'Nazar Premium', 'Nazar Pan Masala', 'Nazar Premium Gutkha', "VACHAN" Premium Pan Masala, 'Virat Premium', 'BajiRao Premium' and 'Nagpuri Premium' were seized/resumed.

21. In view of detailed counter affidavit filed by the respondents, close connection of Mr. NatwarLalSharda with the petitioner-company inasmuch as his relationship with Mr. Ajay Sharda as also the fact that he along with his close relatives was running more than a dozen companies from a common registered office in the same premises, which was searched by the respondents, we are not inclined to uphold the contention that the respondents did not have sufficient material to form requisite "reason to believe" as envisaged under Section 12F read with Section 18 of the Act of 1944 and Section 100 (4)(5) Cr.P.C. to conduct the search in question. We are also not inclined to countenance the submission that since the Act of 2017 came into force w.e.f. 01.07.2017, proceedings of search could not have been carried out at Jaipur premises of the petitioner-company and that the said proceedings would not be saved by virtue of Section 174 of the Act of 2017. We hold so because the proceedings of search and seizure carried out in the premises of the petitioner at J-6, 2nd Floor, Himmat Nagar, Tonk Road, Jaipur, Rajasthan were in continuation of the proceedings already initiated prior to enforcement of the Act of 2017, which is evident from the fact that the respondents had already on receipt of

intelligence conducted simultaneous search operations at various places at Bastar, Indore and Jaipur on 30.01.2017 after following the due procedure under Section 12F read with Section 18 of the Act of 1944. So far as the question of relevance of the documents seized by the respondents, most of which were original title deeds/sale deeds of the immovable properties, is concerned, we find that certain incriminating material was found from drawer of the table in the cabin of Mr. NatwarLalSharda, Managing Director of the petitioner-company, which shows that he is the real owner of the unregistered factory and actual beneficiary of the business in Village Belinga, District Bastar, Chhattisgarh. Merely because some of the files that were seized by the search team contained original sale/title deeds of the immovable properties and the same were eventually returned back would not be sufficient to vitiate the entire action of the respondents because the material suggests that the officials of the respondents in doing so acted bona fide. Mere use of the word, "resumed" in place of "seized" at certain places in the panchnama would not in any manner invalidate the action of the respondents in ultimately seizing certain documents in the course of investigation. Even otherwise, it is trite that an error committed by the Officer in seizing the documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by it vitiate the search. If prima facie there are grounds to justify the belief of the officer in conducting search, this Court would have no reason not to accept such belief, although it may or may not have entertained such belief. Whether or not the concerned official of the respondents had "reason to believe" cannot be scrutinised by this Court under "legal microscope, with an over-indulgent eye which sees no evil anywhere within the range of its eyesight". In any case, all those documents, which have been seized, would undergo scrutiny of the concerned Court if and when prosecution is launched against the accused by filing charge sheet. It would not be appropriate for this Court to go into that question at this premature stage.

22. In view of above discussion, Writ Petition No. 2031/2018, being devoid of merits, is dismissed.

23. Since we have dismissed the main writ petition, therefore, order dated 09.08.2018 passed by this Court, of which review has been sought by filing petitions would merge with this final judgment and therefore, Review Petition No. 269/2018 and 270/2018 are not required to be decided on merits. They are also accordingly disposed of.

24. Office is directed to place a copy of this judgment on record of connected matters.

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HIGH COURT OF GUJARAT AT AHMEDABAD BENCH

R/SPECIAL CIVIL APPLICATION NO. 7397 OF 2019
APRIL 11, 2019

M/S GARDEN SILK MILLS LTD. **…. Petitioner**
VERSUS
UNION OF INDIA **…. Respondent**

For the Petitioner (S): Mr Anand Nainawati
For the Respondent (S): MrNirzar S Desai

The petitioner having given up his right (i.e. file an appeal) to the order of rejecting the refund, the respondent revenue are bound to re-credit the amount of refund rejected to the electronic credit ledger by an order made in Form GST PMT-03. In case it is not possible to re-credit the amount to the electronic credit ledger by the respondent revenue due to non-availability of mechanism on the GSTN Portal, the petitioner shall be permitted to manually take ITC of the amount of the refund rejected in FORM GSTR-3B

HONOURABLE MS.JUSTICE HARSHA DEVANI
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

1. Mr. NirzarDesai, learned senior standing counsel waives service of notice of rule on behalf of the respondents.
2. By this petition under article 226 of the Constitution of India, the petitioner seeks the following substantive reliefs:

   "*28. The petitioners, therefore, pray:*

   a. that this Hon'ble Court be pleased to set aside the impugned orders and allow the refund of Rs.17,55,13,818/-.

   b. that this Hon'ble High Court issue a Writ of Mandamus or any other writ, order or direction to respondent No.3 under Article 226 of the Constitution of India to grant the refund of Rs.17,55,13,818/-

   c. In the alternative, this Hon'ble Court be pleased to allow the petitioners to take themselves the re-credit of Rs.17,55,13,818/- on the basis of Form GST RFD-PMT 03 issued by the Respondent No.3 in their Electronic Credit Ledger at the time of filing of Monthly Summary Return – GSTR 3B or direct the Respondent No.3 to grant such re- credit immediately in Form GSTRFD-01B."
3. The petitioner is engaged in the manufacture of Polyester Filament based Yarns, Textile-grade Polyester Chips, Grey Fabrics and Finished Fabrics. The products so manufactured by the petitioner are cleared for home consumption or are cleared to

Special Economic Zone (SEZ). Section 54(3) of the Central Goodsand Services Tax Act, 2017 (hereinafter referred to as "the CG&ST Act") provides that a registered person may claim refund of any unutilised input tax credit at the end of any tax period, if the registered person has made :

a) zero rated supplies made without payment oftax;
b) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or, both as may be notified by the Government on the recommendations of the Council

4. For the period from July 2017 to October 2017, the petitioner filed in all six refund claims under provisions of section 54(3) of the CGST Act on the followinggrounds:

   i) Refund of accumulated input tax credit on account of inverted duty structure.

   ii) Refund of accumulated input tax credit on account of supplies made to SEZ without payment oftax.

   iii) Refund of accumulated input tax credit on account of exports without payment of integrated goods and services tax.

5. In terms of the procedure envisaged under the Central Goods and Services Tax Rules, 2017 (hereinafter referredtoas“theCG&STRules”)andtherelevant notifications and circulars clarifying the process of manual filing of refund claims in Form GST RFD-01A, the refund claims were manually filed in Form-RFD-01A.Upon submission of such claim, refund ARN receipt was also generated. It is the case of the petitioner that since on-line refund procedure was still facing teething problems, formal refund claim, as instructed, was also filed manually wherein the petitioner submitted the copies of RFD-01A, ARN receipt, copy of Electronic Credit Ledger (ECL) and GSTR-3B filed for the relevant period. The totalrefund claim of the petitioner was Rs.17,55,13,818/-.

6. Rule 90(3) of the CG&ST Rules provides that where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant in FORM GST RF D-03 through the common portal electronically, requiring him to file a fresh refund application after rectification of such deficiencies. On 16.1.2018, the third respondent issued six deficiency memos dated 16.1.2018 under Form RFD-03 in respect of six refund applications filed by the petitioner pointing out several deficiencies on scrutiny of the application filed by the petitioner. By the said letter, the third respondent advised the petitioner to file fresh refund application, after rectification of the above deficiencies. By a letter dated 18.1.2018, the petitioner replied to the deficiency memos and rectified all the deficiencies pointed out by the third respondent. However, it is the case of the petitioner that no acknowledgments were provided by third respondent for suchsubmissions.

7. It is further the case of the petitioner that even subsequently the petitioner provided each and every information and documents, which was sought for by the third

respondent. However, no acknowledgment for any such response was provided by the third respondent at any instance. Even after repeated visits to the office of the third respondent and insisting that such acknowledgment is provided, for suchsubmissions.

8. Section 54(6) of the CG&ST Act read with rule 91 of the CG&ST Rules, provides that in case of refund for zero rated supplies ninety percent of the refund so claimed, should be granted on provisional basis within a week. It is the case of the petitioner that in any case under section 54(7) of the CG&ST Act; the proper officer has to issue the order under section 54(5) within sixty days from the date of receipt of the application complete in allrespects.
9. The petitioner was awaiting the refund order from the third respondent; however, till 1.3.2018, neither was any refund order passed nor was any further deficiency memo issued by the third respondent. The petitionerwas therefore, constrained to inquire about the status of the refund claim. Vide letter dated 1.3.2018 addressed to the third respondent, the petitioner inter alia stated that since the amount of refund claim filed by them was huge and they had also debited the same from the Electronic Credit Ledger, non passing of the order is adversely affecting the working capital of the petitioner. The petitioner, accordingly, requested the third respondent to expedite the disposal of the refund applications.However, subsequently, by the impugned order dated 7.3.2018, the third respondent rejected the refund claims on the ground that the petitioner has failed to submit compliance/file a fresh refund application within the prescribed time limit, that is, thirty days in terms of Circular No. 17/17/2017- GST dated 15.11.2017 in respect of deficiency memos issued on 16.1.2018. The petitioner by letter dated 13.3.2018 requested the third respondent to follow the proper procedure as envisaged under the provisions of the CG&ST Act read with CG&ST Rules. On 15.3.2018, the petitioner sent a reminder letter to the third respondent reiterating the contents of letter dated 15.3.2018 and also stated that the refund claims were rejected on the grounds not envisaged in law and withholding of credit was contrary to the Government objectives. On 22.3.2018, the officials of the petitioners met the third respondent and requested the finalisation of the refund claims by crediting the Electronic Credit Ledger through the common portal in terms of rule 93(2) of the CG&ST Rules. In furtherance thereof, the petitioner also addressed a letter dated 23.3.2018 to the third respondent. Since there was no response from the third respondent, the petitioner has filed the present petition seeking reliefs notedhereinabove.
10. At the outset Mr. Anand Nainawati, learned advocate for the petitioner submitted that the petitioner is not pressing the reliefs prayed for vide paragraph No.28 (a)and (b) of the petition and has confined the present petition to the relief claimed vide paragraph No.28(c).
    a) Itwassubmittedthatthepetitionerisonlypressing the alternative relief of re-crediting the amount of Rs.17,55,13,818/- on the basis of Form GST

RFD-PMT 03 issued by the third respondent in their Electronic Credit Ledger at the time of filing of monthly summary return – GSTR 3B or for a direction to the third respondent to grant such re-credit immediately in Form GST RFD-01B. The attention of the court was invited to rule 93 of the CG&ST Rules, 2017 which provides for credit of the amount of rejected refund claim and reads thus:

"*93. Credit of the amount of rejected refund claim*

(1.) Where any deficiencies have been communicated under sub-rule (3) of rule 90, the amount debited under sub-rule (3) of rule 89 shall be re-credited to the electronic credit ledger.

(2) Where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in FORM GST PMT-O3.

Explanation: For the purposes of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal."

b) It was submitted that in terms of sub-rule(2) of rule 93, where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of rejection, is required to be re-credited to the Electronic Credit Ledger by an order made in Form GST PMT-03. It was submitted that in the present case, the petitioner having given up the challenge to the order rejecting the refund, the respondents are bound to re-credittheamountofRs.17,55,13,818/-totheElectronicn Credit Ledger by an order made in Form GST PMT-03.

11. On the other hand, Mr. Nirzar Desai, learned senior standing counsel for the respondents, submitted that resort can be made to the provisions of rule 93 of the CG&ST Rules provided that in terms of the Explanation thereto, either the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal. It was submitted that in this case the petitioner has not submitted such undertaking with regard to non-filing of the appeal against the rejection order, and hence, in the absence of the requirements of rule 93 being fulfilled, the question of re- crediting the amount does notarise.

12. In the rejoinder, Mr. Nainawati invited the attention of the court to the status report of the complaint made by the petitioner to the Prime Minister's Office, Exhibit 3 to the affidavit-in-rejoinder, wherein it has been stated that the GST PMT-O3 has already been issued but the rejected amount has not been re-credited in the Electronic Credit Ledger since there is no mechanism to re-credit the rejected amount to the Electronic Credit Ledger of the claimant online on the common portal. It was submitted that re-credit has not been refused on the ground of non-compliancewiththeprovisionsoftheExplanationtorule 93 of CG&ST Rules but on

the ground that there is no mechanism to do so. It was submitted that if there is no mechanism for re-crediting the amount to the Electronic Credit Ledger, the petitioner may be permitted to manually take the credit.

13. In the light of the submissions made by the learned counsel for the respective parties, the sole controversy that remains to be decided in the present case is, whether the petitioner is entitled to re-credit of the amount of Rs.17,55,13,818/- on the basis of Form GST RFD-PMT 03 issued by the respondents in its Electronic CreditLedger?
14. Sub-rule (2) of rule 93 of the CG&ST Rules provides that where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of the rejection, shall be re-credited to the Electronic Credit Ledger by an order made in FORM GST PMT-O3. The Explanation thereto says that for the purposes of the rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file anappeal.
15. In the present case, it is an admitted position that the petitioner has not filed any appeal, and hence, the question of the appeal being rejected does not arise. Insofar as giving an undertaking in writing to the proper officer that the petitioner shall not file an appeal is concerned, the learned counsel for the petitioner has stated before this court that the petitioner shall not file an appeal against the order rejecting its refund. Moreover, with a view to comply with the requirements of the Explanation to rule 93 of the CG&ST Rules, it would also file an undertaking as required.
16. However,asisapparentfromtheabovereferred status report, the amount has not been re-credited not on account of non compliance with the provisions of the Explanation to rule 93 of the CG&ST Rules, but since there is no mechanism for re-crediting the amount to the Electronic Credit Ledger. In either case, the court is of the view that the petitioner is entitled to the alternative relief prayed for in the petition.
17. For the foregoing reasons, the petition succeeds and is accordingly allowed. The third respondent-Assistant Commissioner, CGST and Central Excise, Division I, Surat, is hereby directed to re-credit the amount of Rs.17,55,13,818/- to the Electronic Credit Ledger on the basis of Form GST RFD-PMT 03. To comply with the provisions of the Explanation to rule 93 of the CG&ST Rules, the petitioner shall file an undertaking as required. In case, it is not possible to re-credit the amount to the Electronic Credit Ledger, the petitioner shall be permitted to manually take credit of the aforesaid amount. This entire exercise shall be carried out on or before 19.04.2019. Rule is made absolute accordingly to the aforesaid extent, with no order as to costs. Direct service is permitted.

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HIGH COURT OF DELHI AT NEW DELHI BENCH

W.P. (C) 10022/2018 & CM 39032/2018 (STAY)
MAY 07, 2019

SONKA PUBLICATION (INDIA)PVTLTD **…. Petitioner**
VERSUS
UNION OF INDIA **…. Respondent**

For the Petitioner (S): Mr. Vineet Bhatia
For the Respondent (S): MrAmitBansal and MrAmanRewaria, Advocates for R-3. MrSatyakam, Addl. Standing Counsel, GNCTD.

Question before the Hon'ble Court was, whether the books in question are classifiable as 'Printed Books' falling under HSN 4901 [exempted] or as children's 'Drawing Books' under HSN 4903 [exempted] or as 'Exercise Books' under HSN 4820 [chargeable to 6% tax]?
Held: The books published and sold by the petitioner are classifiable under HSN 49.01 (Printed Books- Exempt) and not HSN 48.02 (Exercise Books- Chargeable to GST at 6%).

HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MS JUSTICE REKHA PALLI

1. A very short but interesting question that arises for consideration in the presentpetitioniswhetherthebooks"SulekhSarita Parts I to V" are "Printed Books" classifiable under "HSN 4901" or "Exercise Books" under "HSN 4820" of the Central Goods and Service Tax Act (CGST Act)? If the books are classified under HSN 4901, as contended by the Petitioner, then they would be completely exempt from tax in terms of the CGST Act as well as Delhi GST Act. If they are to be considered as „Exercise Books" classified under HSN 4820, as contended by the Respondents, then they are subject to 6%tax.

2. AsimilarquestionaroseinthecontextoftheCentralExciseTariffAct before this Court in W.P. (C) No.7198/2016 (***The Central Press Private Limited v. Union of India***). There the publisher contended that their „work books" were used in the SarvaShikshaAbhiyan as a basic tool for education. By an order dated 31st August 2016, this Court directed the Central Board of Excise and Customs („CBEC") to consider all aspects of the matter and pass an appropriateorder.

3. In examining the said issue pursuant to the order passed by this Court, the CBEC issued a Circular No.1057/6/2017 – CX dated 7th July, 2017 where*, inter alia,* it

was observed asunder:

> *"(ii) The issue has been examined. Exercise Books have been explained in HSN under explanatory note (2} to Heading 48.20 as, "These may simply contain sheets of lined paper but may also include printed examples of handwriting for copying in manuscript". Such exercise Books are specifically classified under heading 4820 of the erstwhile CETA, 1985. These are nothing but stationary items having blank pages with lines for writing and may also include printed texts for copying manually. In common parlance they are more akin to handwriting "note books" for practising rather than "work books" containing printed exercise. This definition of Exercise Books is in harmony with other items specified under Chapter Heading 4820 of erstwhile CETA, 1985 such as registers, note books, diaries, letter pads etc. where printing is incidental to their primary use i.e. writing. The fact that printing is incidental to their primary use is the guiding principle for classification of Exercise Books under heading 4820 of erstwhile CETA,1985.*
>
> *(iii) Printed work books on the other hand are books where printing is not merely incidental to the primary use. HSN Explanatory notes (A) to the heading 49.01 reads as, "Books and booklets consisting essentially of textual matter of any kind, and printed in any language or charactersinclude textbooks (including educational workbooks sometimes called writing books), with or without narrative texts, which contains questions or exercises (usually with spaces for completion in manuscript). Thus, printed work books containing questions followed by spaces for writing or other exercises would fall within the scope of Chapter 49. The said goods are different from Exercise Books falling under Chapter 48 which are stationary items with blank pages with lines for writing and some time may also include printed texts for copying manually, as explained in the preceding para. Further, since printing in case of printed workbooks is not merely incidental to the primary use of the of the goods, such goods are classifiable under Chapter 49, in terms of Chapter note 12 to Chapter 48 of erstwhile CETA, 1985.*
>
> *(iv) Similarly, HSN Chapter note (6) to Chapter 49 read with HSN explanatory note under heading 49.03 covers children's workbooks consisting essentially of pictures with complementary texts, for writing or other exercises, and children's drawing or colouring books, provided the pictures form the principal interest and are not subsidiary to the text. Thus, children's drawing books which are in harmony with said HSN Chapter note (6) and HSN Explanatory note to heading 4903 would fall under Chapter49."*

4. As far as the present case is concerned, the Petitioner filed an application for advancing ruling on 9th January 2018, seeking a clarification whether the books published by the Petitioner, viz.; *SulekhSarita*Parts I to V are printed books classifiable under HSN 4901 to 10 or as "Exercise Books" under HSN 4820. Another issue raised by the Petitioner was whether a person exclusively supplying goods that are wholly exempted under tax is required to be registered under the GSTAct.

5. The Authority for Advancing Ruling (AAR) passed anorder dated 6th April, 2018 holding that the aforementioned books *SulekhSarita*Parts I to V, printed and sold by the Petitioner, are classifiable as „Exercise Books" under HSN 4820. The AAR also held the Petitioner has to get itself registeredifithadGSTliabilityunderReverseChargeMechanism(„RCM") i.e. under Section 24 (iii) of the CGST Act notwithstanding that under Section 23 (i) (a), it may not be liable to pay any tax.

6. It is significant that in the present petition, which challenges the aforementioned order of the AAR, all the grounds raised by the Petitioner pertain to the first issue regarding classification of the books printed and sold by the Petitioner and not the second issue concerning registration under the CGST Act. Learned counsel for the Petitioner states that notwithstanding the ruling of the AAR against it on the second issue, the Petitioner has got itself registered under the CGST Act. Accordingly, this Court is not examining the secondissue.

7. The reasoning of the AAR for holding that the Petitioner"s books are classifiable under HSN 4820 proceeds asunder:
   (i) Heading 49.01 generally covers "textual reading material/books including text-books, catalogues, prayer books etc. It specifically covers „educational workbooks or writing books". Heading 49.03 generally covers „children's picture, drawing or colouring books whereinpicturesformtheprincipalinterestinthebooks".Heading 48.20generallycovers„stationerybooks".Exercisebooksthatcontain simplesheetswithprintedlinesormayevenhaveprintedexamples of handwriting for copying by the students" also covered Heading 48.20.
   (ii) The main feature which differentiates „work books" of Heading 49.01 from „exercise books" of Heading 48.20 is that „the work books of Heading 49.01 contained questions or exercise within the space given forwritingtheanswerswhereas,theexercisebooksunderHeading 48.20 contained printed text with space for copying manually."
   (iii) An examination of the books printed and sold by the Petitioner revealed that "only in very few pages, any printed exercise or questions is given. Hence, in these books, the primary use is writing and printing is

incidental". Further since none of the books contained any pages with „children's picture", drawing or colouring matter", classification of any of them under heading 49.03 is not possible. Therefore, the goods were to be correctly classified under HSN4820.

8. This Court has heard the submissions of MrVineet Bhatia, learned counsel for the Petitioner, MrAmitBansal learned counsel for the Principal Commissioner, GST and MrSatyakam, Addl. Standing Counsel, GNCTD. This Court has also examined the books printed by the Petitioner, viz.,*SulekhSarita*Parts I to V. Illustratively, the Court would like to refer to *SulekhSarita*PartV.

9. To begin with, the name of the author of the book is prominently printed onthefirstpageasistheISBNnumber.Ithasacontentspagewhich explains the broad features of the book. The first part contains practice exercises where the student is expected to copy the printed text in the lines given immediately below. But, that would be a very limited way of looking at the book as a whole. In fact, there are many portions of the book subsequently where a student is expected to answer questions. The student is expected to write down the meaning of Hindi words. The student is expected to write a short essay on a given aspect.

10. It appears from reading the book *SulekhSarita*Part V (and this holds good for the other Parts I to IV) as a whole that while in the initial phases, the teacher is expected to guide the student and the book is used as a tool in that endeavour, there are substantial portions of the book where after completing that phase, the student is asked to write words of his or her own. For instance in page 16, the student is expected to listen to at least 40 difficult words that the teacher might speak out in the class and write down those words in the space provided in the book. In other words, the student is not merely copying from a printed text. Here the listening and retentive abilities of the student are beingtested.

11. Then there are at least three pages (50 to 52) where the Hindi word is given in the left hand column and the student is expected to give the meaning of the word, in Hindi, after locating it in the dictionary. This again is not a mechanical exercise of simply copying from a written text that is already provided in the book. In page 53 of the book, the student is expected to join two Hindi words to make another Hindi word. An example already given in that page is the word „*swatantra*". There are many words possible to be made by combining two of the many Hindi words in that page. This tests the student"s comprehension. It requires application of mind.

12. Then at page 54, the teacher is asked to dictate 40 difficult words or a paragraph and the student after listening to it is expected to write it down in the space provided. In the last two pages i.e. 61 and 62, the student is expected to write a

short piece on the topic already suggested like „*pedlaganekelabh*", „*maccharo se bacho – kyonawshyak – kaisebache'* and so on. Here again, the student is not expected to copy words from a printed text but think of his or her own topics and write a few sentences on thetopic.

13. This Court, therefore, is not persuaded to concur with the assessment made by the AAR of the above book that "only in very few pages, any printed exercise or questions is given." An educational text is like a handholding exercise for a child. While in the first few pages, it may appear that the child is asked to mechanically reproduce from the printed text, as the course progresses, the child is encouraged to think on his or her own. This is what precisely this „work book", or as the Court would like to rephrase it, this „practice book" does. At the end of the course, by using these books, the attempt is to enhance the educational value addition as far as the child is concerned. The attempt is to help the child think on his own and to enable the teacher to evaluate the child"s output. By no means can it be said that these books are for enabling a child to merely copy words from a printed text in order to improve his or her ownhandwriting.

14. The Court is conscious that in the note appended to the HSN, it hasbeen stated that Heading 49.01 excludes „children"s workbook consisting essential pictures with complementary text, for writing another exercises". But then none of the books which form the subject matter of the present petition can be viewed as a mere text „for writing or other exercises". These books are meant to help the child think, apply his or her mind and come up with some creative answers. It also tests the listening, comprehension and retention skills of the child; of what is spoken in the classroom and for testing the understanding of the child of that which has been taught.

15. While no two cases are identical, it may be useful to refer to a few decisions only to understand the approach the Court is expected to adopt in matters of classification. In ***C.C. (General), New Delhi v. Gujarat Perstorp Electronics Ltd. 2005 (186) ELT 532 (SC)***, the Supreme Court was seized of the issue "whether the goods and materials imported by the Company in the form of FEEP comprising of equipments, drawings, designs and plans are classifiable under Chapter Heading 49.01 or 49.06 of Schedule 1 of the Customs Tariff Act, 1975 and the Company is entitled to the benefit under Notification Nos. 107/93-Cus and 38/94-Cus. Or they are classifiable under Chapter Heading 4911.99 as contended by the department?" In the process of answering the said question in favour of the Assessee, the Supreme Court observed asunder:

> *"In popular sense, "book" means a collection of a number of leaves or sheets of paper or of other substance, blank, written or printed, of any size, shape and value, held together along one of the edges so as to form a material whole and*

protected on the front and back with a cover of more or less durable material. The Court also referred to dictionary meaning. It was observed that one must refer not only to the physical, but also functional characteristic of "book". It must be functionally useful for the purpose of assessee's business or profession. To put it differently, it must be a tool of his trade an article which must be part of the apparatus with which his business or profession was carried on. It must have utility value enabling its owner to pursue his business or profession with greater advantage. It must, thus, satisfy a dual test. It must bear both physical and functional characteristics of a book. It must be a collection of a number of sheets of paper or of other substance, having suitable size, shape and value, bound together at one edge so as to form a material whole and protected on the front and back with covers of some kind and functionally useful to the assessee for carrying on his business orprofession."

16. Therefore, the emphasis was on a „functional characteristics" of a book. In other words, the Court must ask what purpose the book will serve. In this case, a question to be asked is whether the books in question merely help the child in improving the child"s handwriting by providing space in a book by copying from a written text or does it pose questions to the child to answer and whether the teacher then can evaluate, on the basis of such answers, the child"sabilityandunderstanding?Inthepresentcase,the„workbooks"or „practice books" printed and sold by the Petitioner certainly fall in the latter category i.e. they test the child"s knowledge, ask questions which the child has to answer, and facilitate evaluating the child"s understanding.

17. These books are not „exercise books" as understood by the trade. It must be mentioned at this stage that the learned counsel for the Petitioner has produced before the Court samples of such „exercise books/ exercise note books" as understood in trade parlance. These are simply bound volumes of blankpageswhichmaycontainlinestofacilitatewriting.Theydonothing more than providing space for writing.

18. Consequently, this Court is satisfied that in the present case, the books published and sold by the Petitioner are classifiable under HSN 49.01 and not HSN 48.02. In terms of Notification No.2/2017-Central Tax (Trade) dated 28th June, 2017 i.e. Entry No.119 thereunder, such goods classifiable under HSN 49.01 i.e. „printed books, including Braille books" are wholly exempted from tax.
19. Since, this is the only question that has been raised before the Court; the impugned order dated 9th April 2018 to that extent is hereby setaside.
20. The writ petition is accordingly allowed, but in the circumstances, with no orders as to costs. The pending application is also disposed of.

HIGH COURT FOR THE STATE OF TELANGANA

WRIT PETITION NO 46792 OF 2018
APRIL 15, 2019

M/S. MAGMA FINCORP LIMITED **…. Petitioner**
VERSUS
STATE OF TELANGANA **…. Respondent**

For the Petitioner (S): Sri J.K. Mithra appearing for Sri P. Anil Mukerji
For the Respondent (S):Sri J. Anil Kumar, Standing Counsel for Commercial Tax.

Once it is admitted that credit was available to the petitioneron the date of switch over from VAT regime to GST regime and onceit is admitted that the petitioner may be entitled to make a claim forthis credit in other modes, the second respondent oughtto have given a purposive interpretation to Section 140 of the Act readwith Sections 16 to 21 of the Telangana GST Act 2017.
The matter was remanded back to the secondrespondent for a fresh consideration in the light of the observations.

THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
THE HON'BLE SRI JUSTICE P. KESHAVA RAO

Challenging the rejection of transitional relief in terms of sections 73 and 74 of the Telagnana Goods and Services Act, 2017 (for short 'the Act') read with Rule 121 thereto, and a consequential demand made for the alleged excess claim of transitional relief, the Dealer has come up with the above writ petition.

2. Heard Mr. P. Anil Mukharji, learned counsel appearing for the petitioner and Mr. J. Anil Kumar, learned Special Standing Counsel for the respondents.
3. The petitioner is engaged in the business of leasing and financing of vehicles and equipments. They were earlier registered under the Telangana Value Added Tax Act and now registered under the Central and State GSTActs.
4. According to the petitioner, they had an input tax credit to the tune of Rs.1,79,23,784/-, as on the date of bifurcation of the composite State of Andhra Pradesh, namely, 02.06.2014. In order to deal with the question of transfer of ITC, as between the bifurcated States that came into existence after reorganization, a circular dated 12.05.2015 was issued by the commissioner of Commercial Taxes. The circular prescribed that those dealers, who migrated from the State of Andhra PradeshtotheStateofTelanganamayclaimNetCreditCarried Forward (NCCF) in the State to which they have migrated after the appointed date. It was further

stipulated that the formula shall be in tune with Section 56 of the Andhra Pradesh State Reorganization Act, 2014.

5. According to the petitioner, they migrated to the State of Telangana after bifurcation and the amount of total ITC available to their credit was shown in the Web Portal of the Department as Rs.1,77,65,101/-.
6. It is the case of the petitioner that there are no provisions available in the VAT return form to show such credit and the petitioner continued to use such credit. By June 2017, the petitioner had already used credit worth Rs.33,53,485/- leaving a balance credit of Rs.1,43,96,486/-, as on 01.07.2017, when the State and Central GST Law came intoeffect.
7. The petitioner claims to have filed all their returns up to 30.06.2017 under the Telangana VAT Act,2005.
8. After the GST Law came into force with effect from 01.07.2017, the registered dealers were made entitled under Section 140 of the Telangana GST Act, 2017 to take in their electronic credit ledgers, the amount of credit carried forward in their returns, furnished under the existing law. As per this transitional arrangement, the petitioner filed TRAN-1 on 07.10.2017 under the Telangana Goods and Services Tax Act, 2017 for the transfer of ITC of Rs.1,43,96,486/- available as on 30.06.2017 under the State VAT Act. But, the officials attachedtotheofficeoftheAssistantCommissioner(StateTax) visited the premises of the petitioner on 13.03.2018 purportedly for the verification of TRAN-1 filed by them. Thereafter, a notice dated 28.05.2018 was issued advising the petitioner not to claim transitional credit and calling upon the petitioner to produce documentary evidences for the transitional relief.
9. The petitioner submitted a reply on 07.08.2018. Without passing any orders on the reply so filed, the Assistant Commissioner (State Tax) issued another notice dated 05.10.2018 and the petitioner again filed a reply on07.11.2018.
10. A personal hearing was conducted on 16.11.2018 and thereafter an order dated 26.11.2018 was passed by the Assistant Commissioner (State Tax) rejecting the transitional relief and demanding payment of an equivalent amount on the ground that it was an excess claim. It is against the said order that the petitioner has come up with the above writpetition.
11. Assailing the impugned order of rejection of transitional relief, it is contended by Mr. Anil Mukharjee, learned counsel for the petitioner (1) that multiple notices by different persons holding the office at different points of time are bad in law, (2) that the impugned order has been passed on the basis of provisions of law which are inapplicable, (3) that in any case the simultaneous invocation of sections 73 and 74 of the Act was wrong (4) that Rule 120 cannot override the Act, (5) that the three conditions laid down in the proviso to Section 140(1) of the Act are not satisfied in this case, (6) that the respondentscannotrelyupontheCCTcirculardated12.05.2015,asit has no application to GST law, which came into effect only in 2017 and (7) that the

impugned order does not deal with various contentions raised by the petitioner, in theirreply.

12. In response to the above contentions, it is argued by Mr. J. Anil Kumar, learned Special Standing Counsel that the case on hand is a classic example of the difficulties posed by the transition from VAT regime to GST regime, even before the problems posed by the bifurcation of the State got resolved. According to the learned Special Standing Counsel, Section 140 of the Telangana GST Act does not deal with the question of apportionment between the bifurcated States and that a clear mechanism was provided in the VATIS system as to how a dealer could utilize the Net Credit Carried Forward (NCCF). According to the learned Special Standing Counsel, the petitioner ought to have claimed the benefit of 28 NCCF against the liabilities in the monthly returns in VAT 200 or CST-VI or the assessment liabilities under both VAT and CST. They also had the option to claim refund, but the Dealer did not avail these opportunities. In this case, the assessment for the period 2011-12 to 2013-14 was already completed and hence, the learned Special Standing Counsel contended that a Dealer, who failed to take advantage of the mechanism provided, cannot have anygrievance.
13. We have carefully considered the abovesubmissions.
14. It is seen from the impugned order that there is no dispute about the fact that there was excess credit carry forward (NCCF) to the tune of Rs.1,77,65,101/- as on 01.06.2014, immediatelypreceding the day on which the State was bifurcated. It is also admitted in the impugned order that after the bifurcation, the petitioner paid taxes to the tune of Rs.93,38,148/-, in cash, instead of adjusting the 28 NCCF. Only a small portion of the credit available to them was adjusted towards tax. It is further admitted in the impugned order that one of the prescribed mode of utilizing 28 NCCF, was to claim refund. But, according to the respondents, the State GST Act does not provide for utilization of the 28 NCCF as transitional relief. Therefore, the second respondent concluded that the Assessing Authority has no such power beyond what is prescribed by the Statute and that the Dealer is always at liberty to adjust the liabilities in pending assessments under VAT and CST and thereafter claimrefund.
15. In the light of the admitted facts reflected even in the impugned order, it is clear that the petitioner is not making an illusory or stale claim, but is making a claim for something that he is entitled, even according to the respondents, though in a differentform.
16. To put it in simple terms, it is not the case of the respondents that the petitioner is claiming something that they are not lawfully entitled. All that is stated by the second respondent is that while the petitioner may be entitled either to adjust the available credit against any liabilities under the VAT regime or to claim refund, they are not entitled to seek transitionalrelief.
17. The provision for transitional relief is to be found in Section 140 of the

Telangana GST Act, 2017. It reads asfollows:

***140. Transitional arrangements for input tax credit**:- (1) A registered person, other than a person opting to pay tax Transitional under section 10, shall be entitled to take, in his electronic credit ledger, credit of the amount of Value Added Tax [and Entry Tax] carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law, not later than ninety days after the said day, in such manner as may beprescribed:*

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:-

(i) where the said amount of credit is not admissible as input tax credit under this Act;or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointeddate;

Provided further that so much of the said credit as is attributable to any claim related to section 3, sub-section (3) of section 5, section 6, section 6A or sub-section (8) of section 8 of the Central Sales Tax Act, 1956 (74 of 1956) that is not substantiated in the manner, and within the period, prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 shall not be eligible to be credited to the electronic creditledger:

Provided also that an amount equivalent to the credit specified in the second proviso shall be refunded under the existing law when the said claims are substantiated in the manner prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed input tax credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may beprescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as input tax credit under the existing law and is also admissible as input tax credit under this Act.

*Explanation.—For the purposes of this section, the expression — "unavailed**input tax** credit" means the amount that remains after subtracting the amount of **input tax** credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of **input tax** credit to which the said person was entitled in respect of the said capital goods under the existinglaw.*

(3) A registered person, who was not liable to be registered under the existing law or who was engaged in the sale of exempted goods [or tax free goods] under the existing law but which are liable to tax under this Act [or where the person was entitled to the credit of input tax at the time of sale of goods], shall be entitled to take, in his electronic credit ledger, credit of the

value added tax [and entry tax] in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under thisAct;

(ii) the said registered person is eligible for input tax credit on such inputs under thisAct;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of tax under the existing law in respect of such inputs;and

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointedday:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of tax in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the sale of taxable goods as well as exempted goods [or tax free goods] under the existing law but which are liable to tax under this Act, shall be entitled to take, in his electronic creditledger,-

(a) the amount of credit of the value added tax [and entry tax]carried forward in a return furnished under the existing law by him in accordance with the provisions of sub- section (1);and

(b) the amount of credit of the value added tax [and entry tax] in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods [or tax free goods] in accordance with the provisions of sub-section(3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of value added tax [and entry tax] in respect of inputs received on or after the appointed day but the tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other taxpaying document of the same was recorded in the books of account of such person within a period of thirty days from the appointedday:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that the said registered person shall furnish a statement, in such manner as maybe prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be

entitled to take, in his electronic credit ledger, credit of value added tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions,namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under thisAct;

(ii) the said registered person is not paying tax under section10;

(iii) the said registered person is eligible for input tax credit on such inputs under thisAct;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of tax under the existing law in respect of inputs;and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointedday.

(7) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may beprescribed."

18. Obviously, the above provision is intended to take care of the contingency where a registered person has credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day. Such a person is made entitled under sub-section (1) of Section 140 of the Act to take credit in his electronic credit ledger. There are three provisos to sub-Section (1) of Section 140 of the Act. The second and third provisos are not relevant for our purpose, as they relate to credit attributable to any claim related to certain provisions of Central Sales Tax Act,1956.
19. But the first proviso, which may be relevant, stipulates that under two contingencies, a registered person shall not be allowed to take credit. These contingencies are (1) where the amount of credit is not admissible as Input Tax Credit under this Act and (2) where the registered person has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed day. It is not the case of the second respondent that the case of the petitioner would fall under any of the contingencies stipulated in the first proviso to sub-section (1) of Section140.
20. Sections 16 to 21 of the Telangana GST Act, 2017 deal with Input Tax Credit. While Section 16 lays down the eligibility as well as the conditions for taking Input Tax Credit, Section 17 speaks about the apportionment of credit, when the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes. Section 18 takes care of certain circumstancessuchastheonewhereITCwasavailableinrespectof the inputs held in stock or semi finished or finished goods on the day immediately preceding the date from which a person became liable to pay tax under the GST Act. Section 19 deals with ITC in respect of Inputs sent for job work and Section 20 speaks about the manner of distribution of credit by input service

distributor.

21. It is not stated in the impugned order that Section 140 does not have any application to the case on hand. All that is stated in paragraph 2 of the impugned order is that it is only the amount available as ITC in the VAT DCB for the month of June 2017 that the petitioner is eligible for claiming it as transitional relief. But, this is not supported by the provisions of Sections 16 to 21 of the TGST Act, 2017 so as to make the case of the petitioner fall under thefirst contingency contemplated in the first proviso to sub-section (1) of Section 140. There is also no complaint by the respondents that the petitioner failed to furnish all the returns required under the existing law for the period of six months immediately preceding the appointed day.
22. Even while rejecting the claim for transitional relief, the second respondent has not only admitted the availability of excess credit in favour of the petitioner, but has also conceded that he petitioner may either claim refund or adjust their liability against pending assessments under the VAT or CST Acts. But, it appears that no assessment is pending either under the VAT Act or under the CST Act. Therefore, the only way the petitioner can make use of this credit, even according to the second respondent, is to make a claimfor refund. But, we do not know what difference it would make for the respondents, whether the petitioner seeks refund or seeks adjustment of their liability under the GSTregime.
23. Once it is admitted that credit was available to the petitioner on the date of switch over from VAT regime to GST regime and once it is admitted that the petitioner may be entitled to make a claim for this credit in other modes, we think that the second respondent ought to have given a purposive interpretation to Section 140 of the Act read with Sections 16 to 21 of the Telangana GST Act 2017. As he has failed to do the same, the matter requiresreconsideration.
24. Therefore, the writ petition is allowed and the impugned order is set aside and the matter remanded back to the second respondent for a fresh consideration in the light of the observations contained in this order. The second respondent may pass fresh orders within a period of 4 weeks from the date of receipt of a copy of this order.
25. Consequently, miscellaneous petitions, if any pending, shall stand closed. No order as to costs.

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HIGH COURT OF GUJARAT AT AHMEDABAD BENCH

R/SPECIAL CIVIL APPLICATION NO 5873 OF 2019
APRIL 18, 2019

OCTAGON COMMUNICATIONS PVT LTD. **…. Petitioner**
VERSUS
UNION OF INDIA **…. Respondent**

For the Petitioner (S): Mr. Uchit N Sheth
For the Respondent (S):

The petitioner was permitted to file manual returns in Form GSTR-3B for the months November, 2017 onwards, subject to final outcome of the petition.

HONOURABLE MS.JUSTICE HARSHA DEVANI
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

1. Despite service of notice, there is no appearance on behalf of the respondents No.2 and 3.
2. Mr. UchitSheth, learned advocate for the petitioner has submitted that there is no condition for making payment of tax as a pre-condition for filing return of Form GSTR-3B. It was submitted that in the absence of any such provision, the on- line system of the respondents which does not allow filing of returns without payment of tax liability admitted as per such returns is contrary to legal provisions. It was further submitted that if the petitioner is not able to file return in Form GSTR-3B by 20th April, 2019 the petitioner would be deprived of input tax credit.
3. Having regard to the urgency of the matter and the fact that there is no response from the respondents No.2 and 3, by way of ad-interim relief, the petitioner is permitted to file manual returns in Form GSTR-3B for the months November, 2017 onwards, which would be subject to final outcome of the petition. Stand over to 13th June,2019.
4. Direct service is permitted today.

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COMMERCIAL NEWS

CA Ribhav Ghiya, Jaipur

1. High Court issues notice to Centre and Delhi govt on 'blocked credits' under GST

The Delhi High Court on Monday issued a notice to the Centre and the Delhi government on the issue of 'blocked credits' under the Goods & Services Tax (GST) regime. Such a mechanism is affecting hotels and malls.

The GST Act has a provision, under Section 16, for input tax credit (ITC), which helps businesses deduct the tax paid on inputs at the time of paying tax on output, thus lowering the tax paid in cash. However, this Section is subject to certain restrictions as laid down under Section 17 of the Act. These restrictions are also referred to as 'blocked credits'.

The related Section says: "Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business."

The petition was moved by a firm building a five-star hotel in the Capital. It has been procuring multiple goods and services, including works contract services, for use in the construction of the property.

Denial of credit

The petition mentioned that by virtue of provisions under the Act, the input tax credit available on the procurement of goods and services or both, including works contract services used for the construction of the immovable property, is denied to the petitioner.

The denial of credit disregards that the property so constructed by the petitioner would be used by it for furtherance of business, it said.

The petition specifically talks about two provisions related with 'blocked credits'. Section 17(5)(c) ITC shall not be available in respect of the "works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service".

Similarly, Section 17(5)(d) says ITC will not be available for "...goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account, including when such goods or services or both are used in the course or furtherance of business."It was prayed before the court to quash and declare both the provisions as violating the fundamental right of

the petitioner and, therefore, violation of Article 14 of the Constitution (equality before law).

According to Abhishek A Rastogi, partner at Khaitan& Co, who is arguing the matter in the Delhi High Court, the arbitrariness with respect to Section 17(5) of the CGST Act and the respective State Acts arises as these provisions intend to deny credit for construction projects while the objectives of the GST are completely different and provide for credits to the receiver when the output is in the course or furtherance of business. The impugned provisions have been challenged on the grounds of arbitrariness and vagueness of the phrase 'on his own account'.

"The distinction between B2B (business to business) and B2C (business to consumer) transactions, especially for cases when the output activity is charged to GST, needs to be looked into to avoid tax cascading effect," he said.

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2. GST Council may consider national bench of AAAR next month

The GST Council is likely to consider next month a proposal for setting up a national bench of the Appellate Authority for Advance Ruling (AAAR) to reconcile the contradictory orders on similar issues passed by AARs in different states, a move aimed at providing certainty to taxpayers.

Sources said the revenue department is mulling on the idea of a national bench of AAAR since it feels that the Authority for Advance Ruling (AAR) mechanism in its current form is not serving its objective of providing certainty to taxpayers under the Goods and Services Tax (GST) regime.

"There has been a view that a second Appellate Authority for Advance Ruling needs to be set up. It would be a national bench only to reconcile divergent verdicts passed by state AARs. We will present the proposal before the GST Council, which is expected to meet in June," an official told PTI.

The AARs in different states have passed about 470 orders, while AAARs have disposed of around 69 cases till March 2019.

Out of the orders passed by AARs, contradictory orders were passed in about 10 cases, a couple of which were later clarified by the Central Board of Indirect Taxes and Customs (CBIC).

The official further said the GST law would have to be amended for setting up a second appellate authority since the Act in its present form does not provide for a centralised authority.

Setting up of a national bench of AAAR would help bring certainty in the GST era as divergent rulings by AARs leave the industry flummoxed about the tax implication of a particular business decision.

"The composition of the national bench of AAAR would be decided after the states agree to the proposal," the official added.

In view of the confusion created by contradictory rulings, the revenue department had last year too mooted a proposal to set up a centralised appellate authority for advance ruling to bring uniformity in such cases.

The GST Council, chaired by Union Finance Minister and comprising state counterparts, was scheduled to discuss it in its meeting in July 2018. However, the council did not arrive at a decision on the agenda item.

Under the GST law, each state is required to set up an Authority for Advance Ruling (AAR) comprising one member from the central tax department, and another from the respective state.

An aggrieved party can file an appeal against an order of the AAR to the AAAR within a period of 30 days, which may be further extended by a month.

The appellate authority has two members -- the Chief Commissioner of Central Tax as designated by the CBIC and the Commissioner of State Tax.

The appellate authority has been mandated to pass order within 90 days of the filing of an appeal.

Industry is of the view that since both the AAR and AAAR only have tax officers as members, the ruling is most cases is tilted towards the revenue side.

The New Delhi bench of the AAR had in March last year held that duty-free shops at airports are liable to deduct GST from passengers. However, these shops were exempt from service tax and Central Sales Tax in the earlier regime. This had created a flutter in the industry.

Similarly, the solar industry too was left in a vexed situation when the Maharashtra AAR said that 18 percent GST rate would be levied for installation works, but the Karnataka bench of AAR passed an order levying 5 percent GST on the same.

Also, the AARs in Tamil Nadu and Gujarat had passed divergent orders on applicability of GST on catering services in an industrial/office unit, which was later clarified by the CBIC through a circular.

Besides, there were contradictory orders passed by AARs in different states on levy of GST on payment made by breweries to brand owner, availability of Input Tax Credit (ITC) on cess paid and also whether ITC is admissible when the recipient settles the payment through a book adjustment.

AMRG & Associates Partner Rajat Mohan said: "A National Bench/ Regional Benches needs to be implanted in the quasi-judicial decision-making process of AAR so that decisions of the lower authority could be re-calibrated by a higher centralised authority freeing them from revenue bias and passing on relief of certainty by preserving a nation-wide single line of verdicts."

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3. Power producers seek removal of double taxation on imported coal

Industry body Association of Power Producers (APP) has urged the Finance Ministry to provide relief from double taxation on imported coal for the dry fuel-starved electricity generating firms.

APP has shot off a letter to Revenue Secretary Ajay BhushanPandey seeking removal of Good and Services Tax (GST) on import freight for coal.

Power producers' troubles have mounted since the GST regime came into effect in mid-2017. They are compelled to pay GST on import freight for coal even after paying tax on the CIF (cost, insurance and freight) value of the imported dry fuel, it said.

"We understand that several importers have challenged this levy of GST on ocean freight in various courts on the ground that once having paid IGST on full value of imported coal inclusive of freight element, charging GST again on ocean freight amounts to double taxation and is bad in law. However, till date necessary notifications to address the same has not been issued," APP Director General Ashok Khurana said in the letter.

He added that while the High Level Empowered Committee is devising means to alleviate stress in the power sector, the issue of avoidable double taxation still remains unresolved.

Close to a dozen imported coal dependent companies have approached the high courts of Mumbai, New Delhi and Gujarat to get the relief from double taxation.

In the past couple of years, companies such as JSW Energy, Global Coal Ventures, Victory Ventures, SarogiUdhyog, Anmol India and Vertigo Impex have filed the petitions.

Petition by trade body All India Bulk Importer and Exporters Association too is pending before the Mumbai High Court.

Power producers are arguing that input credit of GST paid on imports is not available since power is out of the GST ambit.

India imported over 160 million tonnes of coal in 2018-19 and the dry fuel deficit is only likely to rise due to growing electricity demand coupled with sluggish coal production in the country.

Double taxation is resulting in additional burden on already stressed power sector. India has one of the largest coal fired power generation capacities in the world with close to 200 GW of installations.

A number of power generation projects are turning into non-performing assets due to unavailability of coal and delayed payments from financially weak distribution utilities, among others, the letter added.

Requesting anonymity, a senior official of an independent power producer said, "Power sector continues to struggle to secure fuel and to save itself from the double taxation. The government must ensure adequate coal supplies to ensure uninterrupted

electricity at an affordable cost to the end users instead of increasing fuel costs through e-auctions and double taxation."

He added that officials of the Finance Ministry should not wait for the formation of the new government or the next meet of the GST Council to deal with the issue.

Power producers have been pursuing the government on this issue since 2017.

"It is a well-accepted that double taxation is unreasonable and against the principles of equity. Accordingly, the double taxation needs to be avoided. This anomaly should have been ratified long time back. However, it is surprising to note that this issue still remains unresolved," Khurana wrote.

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