AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

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

HOMAGE

DR. NAVRATAN MAL RANKA,
SR. ADVOCATE
PAST PRESIDENT, AIFTP

It is said that legends are good listeners, good story tellers and most importantly good friends. They are often the source of sage advice, a benefit of their many years of experience. The time spent with such personalities turn into precious memories that are conserved in the hearts forever. Our beloved Mr. Ranka, the living legend was much more; we had the rarest privilege to be his companions & colleagues in the legal profession.

Mr. Ranka strongly believed in five principles of life as were taught by Bhagwan Mahaveer: Satya, Ahimsa, Aparigrah, Achaurya and Bhahamacharya. Mahatma Gandhi preached and practiced these five principles and became Mahapurush with being worshippedworld over.He believed that these principles including Anekantwad are of universal application and adoption.

Mr. Ranka would always say: Be simple. Shed ego. Have compassion. Learn to give. Be happy and smile. Work hard. Live life after discharging debts of friends, relatives, society and the nation. Do not die in debt, else would have to repay with compound interest on next birth. Discard all prejudices, ideologies, presumptions and assumptions, live in the present moment and give credit of the final result to the almighty. Give Charity acquired through honest means and not from dishonesty. It is not the quantity that one gives away but the sincerity and the circumstances under which a charitable act is performed, that win the approval of the God.

A successful person is one who makes people around him also successful. Mr. Ranka was an avid motivator to the young professionals and students of law. His motivation philosophies can be described in the following words:

Its easy to be thankful for the good things.
A life of rich fulfillment comes to those
who are thankful for the setbacks.
Gratitude can turn a negative in to a positive.
Find a way to be thankful for your troubles.
And they can become your blessings.

Some of the real life meritorious principles and traits that Mr. Ranka followed and taught everyone around him, whom, we are sure many of you who know him personally would recollect, are:

- He was married to the legal profession, and at the same time, for him his family came first and foremost. He always used to say: Leave your work at office.
- He was early to rise and early to retire in the day.
- He taught everyone to be well disciplined and mannered.
- He believed and taught us: Fear none, except one, who is above everyone.
- Be smartly and appropriately dressed and well presentable. He was very comfortable whether he was in Kurta Pajama or in a Jodhpuri Suit or a regular Suit. He was very proud of his collection of his ties and used to personally take care of his clothes. His mantra was '*You take care of clothes and clothes will take care of you*'.
- He was extremely punctual and valued time of everyone, such that the clock could instead follow him.
- He always believed in the younger generation and kept everyone motivated. He used to say that use computers and modern technology but do not become its addict.
- Obstacles are no more than a challenge – face boldly.
- Love, Laugh and lead meaningful life and lay treasures in heaven – not on earth.
- Do the duty with determination, devotion, dedication, discipline, without desperation. Failure is step towards success.
- Awake, arise with attitude and motivation and stop not till the aim is achieved.
- Do not chase money, what's destined for you will come to you and what's not, you anyways can't get it.
- World is now a global village – Interact without prejudices of caste, creed, colour, class, community, gender, economic imbalance and religion.
- Stand on your own legs, without looking at the family wealth. It will give you strength and self-satisfaction with charming glow on your face.

He had utmost respect and commitment towards his legal practice and the principle that he followed to perfection could simply be stated in the following lines:

Koi bura kaho ya achha lakshmi aave ya jaave
Laakhon varsho tak jiyu ya mrityu aaj hi aa jave
Athva koi kaisa hi bhay ya laalach dene aave
To bhi nyay marg se mera kabhi na pag digne paave

Though Mr. Ranka's achievements are towering and cannot be put into words or be listed down but it'll be good to share a few of them:

- He practiced the profession of law for a period of 66 years
- Out of the said number of years, he practiced as a designated Senior Advocate for a period of 29 years
- Mr. Ranka's father, son and both the grandsons – All have been and are in the legal profession
- That makes four generations covering over a collective period of more than 150 years in the legal practice
- Mr. Ranka was widely known as the Bhishm Pitamah in the field of taxation.
- His peers used to par him with the legendary Nani Palkhivala – with whom Mr. Ranka was fortunate to have worked alongside.
- Some of the titles that he received over the celebrated tenure are: "AIFTP Man of the Millennium", "Jain Sewa Ratna", "Samaj Gaurav", "Vivekanand Gaurav Samman", "Pride of Nation" and "Best Citizen of India 2010".
- He was a Gandhian by philosophy and has installed 37 marble statues of Father of the Nation across India
- He has presented and donated around 4,000 precious law books to various organizations and educational institutions all over India.
- He was honoured with "Doctor of Philosophy"Honorius Causa earlier this year in recognition of his eminence and contributions in the Legal practice and public life.
- He had traveled extensively all over the globe and covered all the continents for leisure and professional exploits.
- He had set up and established Amar Jain Medical Relief Society, Jaipur in 1961.
- He attended all the clients in order of their arrival to the chamber, irrespective of their economic strength. No priority to anyone.
- Mr. Ranka was a pioneer in organizing National level Moot Court competitions in Rajasthan and enthusiastically participated in the events which saw participation from every State in India
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Death is more universal than life, everyone dies. But Mr. Ranka has left him alive in each of our hearts. Let's all come together and celebrate his journey of life. Remembering him is easy, we would do it every day, but missing him is a heartache, which would never go away.

He donated his body for research to the JNU Hospital following his own Principles/ He is still doing his work of teaching even after death.

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About Dr. N. M. Ranka,

Born at Beawar in 1933, Mr. Ranka did Graduation in Commerce in 1953 and in Law in 1955. He joined the Profession in 1953, was enrolled as a Pleader in 1956 and as an Advocate in 1962. He had been designated as Senior Advocate in 1990.

He was a reputed Senior Advocate in the field of Tax Laws, a philanthropist and tax expert of national repute. He had been chairman or faculty or brain's trust trustee at more than 750 Tax Conferences, Seminars or Workshops organized in different parts of India. He had contributed articles and papers exceeding 500, which have been published in national tax journals. He had been felicitated by a large number of Tax and other Associations. All India Federation of Tax Practitioners has honoured him as "AIFTP Man of the Millennium" and "Jain Sewa Ratna" by Shree Jain Sewa Sangh, Mumbai. He had been conferred on 05.01.2019 the Degree of 'Doctor of Philosophy' Honoris Causa in recognition of his eminence and contributions in Legal Practices and Public Life by 'JECRC University, Jaipur.

He was co-author of 'Hindu Undivided Family & Taxation'. He had compiled (i) Glimpses of Gandhian Philosophy; (ii) 'N.A. Palkhivala Living Law Legend – Par Excellence'; (iii) "Vital Role of the Constitution in Women – Empowerment" (in Hindi); (iv) Constitutional Perception of Fundamental Duties for free distribution (in English & Hindi); (v) Glimpses of Gandhian Philosophy. Chief Editor - 'Senior Advocates of Rajasthan - A Laudable Legacy. He was co-author and has edited many tax books published by AIFTP of which he has been National President (2000-2002). He had authored his biography with title "LAW PROFESSION: MY EXPERIENCES & EXPECTATIONS". All books are widely and freely distributed all over India.

He was past president of All India Federation of Tax Practitioners (AIFTP) and Patron and past president of Rajasthan Tax Consultants' Association and Jaipur Tax Consultants' Association, President of Mansarovar Advocates Club Trust, Chairman of Ranka Public Charitable Trust and trustee or member of a large number of Charitable Trusts and Societies in educational and medical field. He was Secretary or Vice-President of Amar Jain Medical Relief Society for over 35 years and set up a Medical Hospital with all facilities. He is member of Supreme Court Bar Association, Bar Association of India, All Gujarat Federation of Tax Consultants and many more professional associations. He was life member of Law Institute of India and has been conferred honorary membership of Direct Taxes Professionals' Association, Kolkata and Rotary Club of Beawar.

"AIFTP SALUTE THIS LEGENDARY PROFESSIONAL"

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CHIEF-EDITOR'S COMMUNIQUE

This month's AIFTP Indirect tax & Corporate Law Journal covers important Articles relating to the GST, Customs, RERA, Insolvency & Bankruptcy Code and other important laws. This particular edition also brings light to some latest Judgments of the Hon'ble Supreme Court and High Court among others which clear out the position with regard to powers of the GST Officials and the provisions of Arrest under the CGST Act, 2017.

We are deeply saddened by the demise of Dr. N. M. Ranka, Senior Advocate, Past President of AIFTP. This is not only a loss to the entire legal fraternity but also a personal loss as he was a father figure to me. He was our guardian, philosopher and guide. He always gave us his valuable suggestions and advises and was a guiding force for all of us. This is an irreparable loss to the legal community and we would always feel the void.

We appeal to all our members to contribute to this Journal by giving their valuable suggestions and inputs so that we may improve with each edition. We appeal to all the members to enroll themselves on the official website of AIFTP i.e. www.aiftponline.org in order to get the hard copies of this monthly Journal.

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13.06.2019

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

This issue of the Indirect Tax & Corporate Laws Journal is being issued early to coincide with the National Tax Conference at Tirupati. This part will be released at Tirupati Conference. We are happy to state that the Journal is being published regularly on time and we had received much appreciation for the Articles and the judgements being covered in it in addition to the Notifications and Circulars of GST and other allied acts.

This Journal is specifically dedicated in the memory of late Dr. N.M. Ranka, Senior Advocate and Past President of AIFTP. He was the legendary figure and a doyen of the Profession. He was a great motivator and guiding person and his presence in almost all the National Tax Conference and NEC Meeting was a inspiration to all of us. It is a great loss not only to me but to the profession as well as to the AIFTP.

The next Conferences have been announced and we will be at Shimla in September and at Kota in October. We will also be having special one day's Seminar at Varanasi to coincide with Deepawali and special arrangements for the *darshan* etc. are being made.

It is the time for all of us to concentrate on the professional work as the coming few months are the busiest month for the Tax Professionals. At present the last date for filing fo annual return and Audit report for GST is 30th June and thereafter in July the Income Tax returns for non audit cases have to be filed.

AIFTP is sending representation for the Direct taxes and also Indirect taxes particularly GST for the consideration of the Central Government and GST Council. The Union Budget is going to be presented on the 5th July, 2019 and we expect major changes in the Tax Laws. Please send your suggestions to us immediately.

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13.06.2019

AIFTP FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
22.06.2019	National Executive Committee Meeting	Tirupathi
23.06.2019	National Tax Conference	Tirupathi
04.08.2019	One Day Seminar	Patna
26.08.2019 to 04.09.2019	International Study Tour, 2019	Europe
Sept. 2019	National Tax Conference	Shimla
12.10.2019	National Executive Committee Meeting	Kota
12 & 13.10.2019	National Tax Conference	Kota
11, 12.11.2019	One Day Seminar & Darshan of Lord Viswanath, Ganga Arti and Dev Deepavali	Varanasi

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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		June, 2019	20th July 2019
			July, 2019	20th Aug 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.		June, 2019	10th July 2019
			July, 2019	10th Aug 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	June 2019	10th July 2019
			July 2019	10th Aug 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	June 2019	10th July 2019
			July 2019	10th Aug 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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REVERSE CHARGE MECHANISM UNDER GST

P.V. Subba Rao, Advocate, Hyderabad
CH. Vamsi Krishna, Chartered Accountant, Hyderabad

One of the basic concepts of taxation is predictability ie, the provision must be easily and correctly understood. There should be also ease of determining the liability. While the persons, who dealt with service tax, had exposure to the nuances of Reverse Charge Mechanism (RCM), dealers exclusively engaged in paying tax (VAT or Sales Tax) on the sale of goods have never heard of RCM. There used to be levy of contingent purchase tax in sales tax/VAT scenario in certain specified circumstances like when purchased from unregistered dealers etc., akin to Section 9 (4) of the CGST Act, 2017 (for short GST Act).

For better understanding of the concept 'Reverse Charge Mechanism' in the GST scenario, one has to understand beforehand the FORWARD or Normal Charge Mechanism. The preamble of the GST Act reads as follows:-

"An Act to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto".

The GST Act is therefore enacted to levy and collect tax on supply of goods or services or both. 'Scope of Supply' can be found in Section 7. 'Supplier' is defined in Section 2 (105). Generally it is the 'supplier', who has to pay the tax. Charging Section 9 (1) provides for levy of tax on supplies of goods or services or both. Payment of tax on RCM basis is therefore an exception. For example, if a Chartered Accountant provides service, he is liable to pay GST on the supply of such service, as a supplier, which is a forward charge. On the other hand, if an Advocate provides service to a Company, the recipient Company has to pay GST on reverse charge basis.

In the case of Reverse Charge Mechanism, recipient of supply is liable to pay GST and accordingly he has to comply with the relevant provisions of the GST Act. 'Recipient' has been defined in Section 2 (93). 'Reverse charge' has been defined in Section 2 (98). Payment of tax on RCM basis would be applicable both in respect of intra State receipts as well inter State receipts as per the relevant Notifications issued.

RCM under service tax scenario:

Sub-section (2) of section 68 of the Finance Act 1994 read as follows:-

"Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."

As per Notification No. 30/2012-service tax, dated 20.6.2012, as amended from time to time, in respect of the specified services therein, the recipient is made liable to pay service tax under RCM,

RCM under the GST scenario:

1. What is RCM under GST?

As per section 2 (98) of the Act "Reverse charge" means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of Section 9, or under sub-section (3) or sub-section (4) of Section 5 of the Integrated Goods and Services Tax Act. There is no liability to pay tax under RCM in respect of goods and services which are generally exempt.

2. Categories of RCM.

Section 9 (3) Applicable to all cases of supply of specified goods or services or both, which are notified by the Government.

Section 9 (4) Applicable to all cases of supply of goods or services or both by a supplier, who is not registered to the registered persons. (pre-amended provision)

Section 9 (5) also provides for payment of tax, if notified, on intra State supplies of services by the electronic commerce operator if such services are supplied through it.

3. Extracts of Section 9 (3) and 9 (4) of the CGST Act 2017.

Section 9(3)→ "The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both."

Section 9(4)→ "The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both."
(The above Section 9 (4) is the pre-amended provision)

4. Registration:

A person who is required to pay tax under reverse charge has to compulsorily get himself registered under the GST Act and the respective threshold limits are not applicable to him, vide Section 24 (1) (iii).

5. Relevant Notifications issued:-

As per Notifications No.4/2017 and,13/2017 Central tax (Rate) dated 28.6.2017 and Nos.4/2017 and 10/2017 dated 28.6.2017 Integrated tax (Rate)}, issued under Section (9) (3) in the case of following supplies, GST is required to be paid under RCM.

S. No	Description of supply of goods or services	Supplier of Goods/service	Recipient of Service
RCM for Services:			
1	Supply of Services by a goods transport agency.	GTA.	Any Factory, Society, Co-operative society, body corporate, Partnership firm, Registered person under GST, casual taxable person.
2	Legal services.	An individual Advocate including a senior advocate or firm of advocates.	Any business entity located in the taxable territory.
3	Services supplied by an arbitral tribunal	An arbitral Tribunal.	Any business entity located in the taxable territory.
4	Sponsorship services	Any person	Any body corporate or partnership firm located in the taxable territory
5	Any Services by Central/State	CG, SG, UT or LA.	Any business entity located in the taxable territory.

	Government, Union Territory or Local authority.		
In the case of above services, following services by CG, SG, UT or LA are excluded from payment of tax under RCM i. Renting of immovable property to any person. ii. Services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than CG, SG,UT and LA. iii. services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport. iv. transport of goods or passengers. Note: CG means Central Govt, SG means State Govt, UT means Union territory, LA means Local Authority.			
5A	Renting of immovable property to a person registered under the Central Goods and Services Tax Act, 2017 (12 of 2017).	CG, SG, UT or LA	Any person registered under the Central Goods and Services Tax Act, 2017.
5B	Transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of project.	Any person	Promotor
5C	Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of project.	Any person	Promotor
6	Services supplied by a	A director of	The company or a body

	director of a company or a body corporate.	a company or a body Corporate.	corporate Located in the taxable territory.
7	Services supplied by an insurance agent.	An insurance agent	Any person carrying on insurance business, located in the taxable territory.
8	Services supplied by a recovery agent.	A recovery Agent.	A banking company or a financial institution or a non-banking financial company, located in the taxable territory.
9	Transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 relating to original literary, dramatic, musical or artistic works.	Author or Music composer, photographer, artist, or the like	Publisher, music company, producer or the like, located in the taxable territory.
10	Supply of services by the members of Overseeing Committee.	Members of Overseeing Committee Constituted by the RBI.	RBI.
11	Services supplied by individual Direct Selling Agents (DSAs) other than a body corporate, partnership or limited liability partnership firm.	Individual DSAs other than a body corporate, partnership or limited liability Partnership firm.	A banking company or a nonbanking financial company, located in the taxable territory.
12	Services provided by business facilitator (BF).	BF	A banking company, located in the taxable territory.
13	Services provided by	An agent of	A BC, located in the taxable

	an agent of business correspondent (BC).	(BC)	territory.
14	Security services (Not applicable to CG, SG, UT, LA or GA and composition taxable persons)	Any person other than a body corporate	A registered person, located in the taxable territory.
15	Any service supplied by any person who is located in a non-taxable territory.	Any person located in a non-taxable territory	Any person located in the taxable territory other than Non-taxable online recipient.
RCM for goods:			
1	Cashew nuts, not shelled or peeled	Agriculturist	Any registered person
2	Bidi wrapper leaves (tendu)	Agriculturist	Any registered person
3	Tobacco leaves	Agriculturist	Any registered person
4	Silk yarn	Any person Who manufactures silk yarn from raw silk or silk worm cocoons for supply of Silk yarn.	Any registered person
4A	Raw cotton	Agriculturist	Any registered person
5	Supply of lottery tickets.	SG, UT or LA.	Lottery distributor or selling Agent.
6	Used vehicles, seized and confiscated goods, old and used goods, waste and scrap	SG, CG, UT and LA.	Any registered Person.
7	Priority Sector Lending Certificate	Any registered person	Any registered person

6. Is payment of tax under RCM under section 9 (4) of the CGST / SGST (UTGST) Act, 2017 / Section 5(4) of the IGST Act, 2017 still inforce?

Even though it is mentioned in Section 9 (4) that, GST under RCM has to be paid by the recipient in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person under Section 9 (4), it is however made applicable only for such receipts which exceed Rs. 5,000 in a day, vide Notification No. 8/2017 Central Tax (Rate) dated 28.6.2017. Thus during the relevant period, registered persons may have to look into their daily expenses and examine whether there is any RCM liability.

- However RCM under 9 (4) is made not applicable till 31.03.2018 by Notification No. 38/2017 of Central Tax (Rate) dated 13.10.2017 and it has been further extended to 30.06.2018 by Notification No. 10/2018 Central tax (Rate) dated 23.3.2018. It has been further extended to 30.09.2018 by Notification No. 12/2018 Central tax (Rate) dated 29.6.2018. Finally it has been extended up to 30.09.2019 by Notification No.22/2018 Central Tax (Rate) dated 6.8.2018.
- Result:- Up to 12.10.2017, tax under RCM under Section 9 (4) would be payable if such receipts in a day exceed Rs.5,000. From 13.10.2017, all such receipts are exempt from RCM.
- Significant change:- Section 9 (4) has been amended by The Central Goods and Service Tax (Amendment) Act 2018 (No. 31 of 2018) with effect from 1.2.2019 and the following is the amended Section 9 (4) of the CGST Act,

"The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.".

Thus, as in the case of Section 9 (3) receipts, even Section 9 (4) receipts are made liable to tax under RCM, only when a class of registered persons has been specified through a Notification for payment of tax on RCM basis.

By Notification No. 07/2019 Central Tax (Rate) dated 29.03.2019 Government notified the following three classes of persons, who are required to pay tax on RCM basis under Section 9 (4) of the CGST Act.

S. No	Description of supply of goods or services	Recipient of Service
1	Supply of such goods and services or both which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, in a financial year as	Promoter

	prescribed in notification No. 11/ 2017- Central Tax (Rate), dated 28th June, 2017, at items (i), (ia), (ib), (ic) and (id) against serial number 3 in the Table, published in Gazette of India vide G.S.R. No. 690, dated 28th June, 2017, as amended	
2	Cement which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, in a financial year as prescribed in notification No. 11/ 2017- Central Tax (Rate), dated 28th June, 2017, at items (i), (ia), (ib), (ic) and (id) against serial number 3 in the Table, published in Gazette of India vide G.S.R. No. 690, dated 28th June, 2017, as amended.	Promoter
3	Capital goods falling under any chapter in the first schedule to the Customs Tariff Act, 1975 (51 of 1975) supplied to a promoter for construction of a project on which tax is payable or paid at the rate prescribed for items (i), (ia), (ib), (ic) and (id) against serial number 3 in the Table, in notification No. 11/ 2017- Central Tax (Rate), dated 28th June, 2017, published in Gazette of India vide G.S.R. No. 690, dated 28th June, 2017, as amended.	Promoter

7. Time of Supply (TOS) in the case of RCM:

TOS FOR GOODS{section 12 (3) of CGST ACT}	**TOS FOR SERVICES {section 13(3) of CGST ACT}**
TOS shall be the earliest of the following dates: 1. The date of the receipt of goods, or 2. The date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier, or	TOS shall be the earlier of the following dates: 1. Date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier OR 2. The date immediately following sixty days from the date of issue of invoice or any other document, by

3. The date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called in lieu thereof by the supplier. However where it is not possible to determine the time of supply under any of the above clauses, the TOS shall be the date of entry in the books of account of the recipient of supply.	whatever name called, in lieu thereof by the supplier. However where it is not possible to determine the time of supply under any of the above clauses, the TOS shall be the date of entry in the books of account of the recipient of supply. Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier.

8. Are the supplies which fall under RCM, exempt supplies in the hands of the supplier?

As per Section 17 (3) of the CGST Act 2017, the value of exempt supply under Section 17 (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis. Therefore, in the hands of the supplier, it is an exempt supply.

9. Details to be mentioned on tax invoice in case of RCM:

As per Rule 46 (p) of the CGST Rules, 2017, it is required to mention "whether the tax is payable on reverse charge basis".

10. Payment only in CASH:

Any tax payable under reverse charge shall be paid by debiting the electronic cash ledger only. In other words, reverse charge liability cannot be discharged by using input tax credit. However, after discharging reverse charge liability, credit of the same can be taken by the recipient, if he is otherwise eligible.

11. Whether GST Compensation Cess would be applicable to reverse charge?

Yes. Compensation Cess has also to be paid under RCM, wherever applicable.

12. When ITC on tax paid under RCM is to be claimed?

As per the tweet from the Official twitter of the GOI for queries on GST, "ITC of RCM can be claimed in the same month in which it is paid."

13. Reversal of ITC under Rules 42 and 43?

As supply on which recipient is liable to pay tax under RCM is an exempt supply in the hands of supplier, reversal under Rules 42 and 43, as the case may be, would be applicable.

14. Self-Invoice in case of RCM

As per Section 31 (3) (f) of the CGST Act, a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of Section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both. (Also please see Rule 36 (1) (b)).

15. What is meant by 'supplier, who is not registered'?

Generally he must be doing business but he is not registered for his own reasons. There may not be any obligation to register also. Such person may not be considered as 'supplier, who is not registered.'

The following Press release by the Central Government may be of some help in this regard.

"PRESS RELEASE

13th July, 2017

Sub: Further clarification on tax in reverse charge on gold ornaments

In the GST master class held on 13/07/2017, in one of the replies given to an on-the-spot-question, it was informed that purchase of old gold jewellery by a jeweller from a consumer will be subject to GST @ 3% under reverse charge mechanism in terms of the provisions contained in Section 9(4) of the CGST Act, 2017.

2. On further examination, it is felt that the issue needs to be clarified.

3. Section 9(4) of the said Act mandates that tax on supply of taxable goods (gold in this case) by an unregistered supplier (an individual in this case) to a registered person (the jeweller in this case) will be paid by the registered person (the jeweller in this case) under reverse charge mechanism. This provision, however, has to be read in conjunction with section 2(105) read with section 7 of the said Act. Section 2 (105) defines supplier as a person supplying the goods or services. Section 7 provides that a supply is a transaction, for a consideration by a person in the course or furtherance of business.

4. Even though the sale of old gold by an individual is for a consideration, it cannot be said to be in the course or furtherance of his business (as selling old gold jewellery is not the business of the said individual), and hence does not qualify to be a supply per se. Accordingly the sale of old jewellery by an individual to a jeweller will not attract the

provisions of section 9(4) and jeweller will not be liable to pay tax under reverse charge mechanism on such purchases. However, if an unregistered supplier of gold ornaments sells it to registered supplier, the tax under RCM will apply".

Some Advance Rulings

M/s MEDIVISION SCAN AND DIAGNOSTIC RESEARCH CENTRE (P) LTD 12.04.2019 - GST – Kerala AAR

Whether diagnostic service provider has to take registration under GST - Whether the applicant is exempt from GST considering the exemption provided in the Notification No.12/2017-CT (Rate) dated 28-06-2017?

HELD - By virtue of Section 23 of State Goods and Services Tax Act, any person engaged exclusively in the business of supplying goods or services or both, that are not liable to tax or wholly exempt from tax under GST Act, are not liable to take registration. However, such persons are liable to obtain registration if they are receiving any goods or services liable to tax under reverse charge as per notifications issued under Section 9(3) of the State Goods and Services Tax Act – the services provided by way of diagnosis come under the category of health care services covered under SAC 9993 in connection with health care services provided by a clinical establishment and are, therefore, exempted.

UDAYAN CINEMA PVT LTD: 26.02.2019 - GST – West Bengal AAR –

The Applicant intends to produce a feature film, a portion of which is planned to be shot at locations outside India - whether applicant is liable to pay IGST on the reverse charge on the payments to be made to Line Producer in Brazil and, if so, what should be the rate depending upon the classification of the service of a Line Producer –

The Line Producer to be engaged for the shooting of a feature film in Brazil is supplying motion picture production service, classifiable under SAC 999612 - The Applicant is liable to pay IGST on the payments made to the above Line Producer in terms of Sl. No. 1 of Notification No. 10/2017 – IGST (Rate) dated 28/06/2017at 18% rate specified under Sl. No. 34(vi) of Notification No. 08/2017 – IT (Rate) dated 28/06/2017, as amended from time to time - if the Applicant modifies the contract so that the Line Producer acts as pure agent for certain services in addition to the main supply of motion picture production service, the related transactions will be import of services from the actual suppliers, and the amount paid on actual cost basis for procuring those services will be subjected to IGST at the applicable IGST rate on such services.

M/s FAMOUS STUDIOS LTD: 21.12.2018 - GST – Maharashtra AAR –

Whether the exemption from payment of GST on reverse charge basis under section 9(4) of the CGST Act/SGST Act for receipt of supply of goods and / or services by us from an unregistered person is applicable irrespective of any threshold limit right from 01-07-2017 vide Notification No.8/2017 dated 28.06.2017 r/w Notification 38/2017 dated 13-10-2017 – Applicant's view that RCM provisions are inapplicable for the period from 01.07.2017 to 12.10.2017 - HELD – From the reading of provisions of Reverse Charge Mechanism and the relevant notification, we find that there is no clear stipulation that the amendment is retrospective or prospective - Applying the Golden rule of construction and the principles laid down by the Apex Court we conclude that there is nothing to show that the amendment Notification No.38/2017 would have retrospective effect and therefore the provisions of Reverse Charge u/s.9(4) of the CGST Act are applicable, irrespective of any threshold limit, right from 01.07.2017 - the benefit of exemption from payment of tax on RCM as provided u/s. 9(4) of the CGST Act is not applicable from 01.07.2017 as claimed by the applicant

NMDC LIMITED: 22.02.2019 - GST – Chhattisgarh AAR –

Classification of royalty paid in respect of mining lease - Determination of the liability to pay tax on contributions made to District Mineral Foundation (DMF) and National Mineral Exploration trust (NMET) as per MMDR Act, 1957 – HELD - The royalty paid by Applicant-M/s NMDC in respect of mining lease is classifiable under sub heading 997337 under category 'Licensing services for the right to use minerals including its exploration and evaluation', attracting GST at the same rate as applicable for the supply of like goods involving transfer of title in goods, under reverse charge basis - The contributions made to District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET), by M/s NMDC as per MMDR Act, 1957 are liable to GST, under reverse charge basis.

M/s BAHL PAPER MILLS LTD: 04.05.2018 - GST – Uttarakhand AAR –

Whether under Reverse Charge Mechanism, IGST should be paid by the importer on ocean freight in case of CIF basis contract, when service provider and service recipient both are outside the territory of India - if yes, then what will be the supporting document for importer under RCM to take the credit of IGST paid on ocean freight under CIF basis contract - HELD – in terms of notification no. 8/2017 - Integrated Tax (Rate) and notification no. 10/2017 - Integrated Tax (Rate) an importer is required to pay IGST on the ocean freight. Therefore as on date, even if the importer has already paid IGST on CIF value imported goods, he is still required to pay IGST on ocean fright - mere filing of an application before the Hon'ble High Court does not render a notification issued by the Central Government ultra vires until or unless the same is turned down by the

competent court - Credit of IGST paid can be taken on the basis of invoice/challan issued.

M/s PUREWAL STONE CRUSHER: 11.09.2018 - GST – Uttarakhand AAR –
GST on Road Usage charges, Government Fee, penalty paid - input tax credit on Pokland, JCB, Dumper & Tipper – HELD - "Abhivahan Shulk" i.e. the Road Usage charges paid to the Govt, is different from toll tax and is covered under Service Code 9997 and to be treated as "other services" and is liable for GST. The applicant is liable to pay GST @ 18% on the same under reverse charge .

Circular 78/52/2018 – GST dated 31.12.2018

In case an exporter of services outsources a portion of the services contract to another person located outside India, what would be the tax treatment of the said portion of the contract at the hands of the exporter? There may be instances where the full consideration for the outsourced services is not received by the exporter in India.
It is clarified vide Circular 78/52/2018 – GST, that the supplier of services located in India would be liable to pay integrated tax on reverse charge basis on the import of services on that portion of services which has been provided by the supplier located outside India to the recipient of services located outside India. Furthermore, the said supplier of services located in India would be eligible for taking input tax credit of the integrated tax so paid.
Thus, even if the full consideration for the services as per the contract value is not received in convertible foreign exchange in India due to the fact that the recipient of services located outside India has directly paid to the supplier of services located outside India (for the outsourced part of the services), that portion of the consideration shall also be treated as receipt of consideration for export of services in terms of section 2(6)(iv) of the IGST Act, provided the: (i) integrated tax has been paid by the supplier located in India for import of services on that portion of the services which has been directly provided by the supplier located outside India to the recipient of services located outside India; and (ii) RBI by general instruction or by specific approval has allowed that a part of the consideration for such exports can be retained outside India.

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ADVANCE RULING MECHANISM UNDER GOODS AND SERVICES TAX LAW

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A. Background

The provisions of Advance Ruling have been part and parcel of taxing statutes viz., under the Income Tax Act, 1961 and also under the erstwhile laws viz. Central Excise Act, 1944; service tax provisions (Finance Act, 1994) and State Value Added Tax laws. Under the erstwhile laws Central Excise Act, 1944; service tax provisions (Finance Act, 1994) and State Value Added Tax laws, Advance Ruling generally provided for a mechanism wherein an application could be made to the prescribed authority seeking a ruling on classification of goods / services, rate of duty / tax or admissibility of input tax credit subject to certain conditions. The provisions relating to Advance Ruling under the GST laws are somewhat similar to erstwhile indirect tax laws.

In this article an attempt has been made to briefly explain the methodology involved in making an application for Advance Ruling and Appeal to the Appellate Authority for Advance Ruling under the Central Goods and Services Tax Act, 2017 (for brevity, "CGST Act"). It may be noted that the provisions of Advance Ruling are same under the State Goods and Services Tax Act, 2017 / Union Territory Goods and Services Tax Act, 2017.

B. Advance Ruling under CGST Act

1. Meaning of some terms

a. Advance ruling means
- a decision provided by the Authority or the Appellate Authority
- on matters or on questions specified in Section 97(2) or Section 100(1) of the CGST Act
- in relation to the supply of goods and/or services
- ***undertaken or proposed to be undertaken*** by the applicant;

b. **Applicant** means any person registered or desirous of obtaining registration under the Act.

c. **Application** means an application made to the Authority u/s 97(1) of the CGST Act

d. **Authority** means the Authority for Advance Ruling**,** constituted u/s 96 of the CGST Act:
- To be located in each State
- Comprising one member each from amongst officers of Central tax and State tax appointed by Central and State Government, respectively.

e. **Appellate Authority** means the Appellate Authority for Advance Ruling constituted u/s 99 of the CSGT Act:
- To be located in each State
- Comprising of Chief Commissioner of Central tax (designated by the Board) and Commissioner of State tax having jurisdiction over the applicant.

2. **Application for Advance Ruling**

a. Advance Ruling can be applied in respect of the following issues:
   i. **Classification** of any goods or services or both;
   ii. Applicability of a **notification** issued under the provisions of this Act;
   iii. Determination of **time and value of supply** of goods or services or both;
   iv. Admissibility of **input tax credit** of tax paid or deemed to have been paid;
   v. Determination of the **liability to pay tax** on any goods or services or both;
   vi. Whether applicant is required to be r**egistered**;
   vii. Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or **results in a supply of goods or services** or both, within the meaning of supply.

Application for Advance Ruling cannot be filed for determination of 'Place of Supply'

b. An application for advance ruling should be made in Form GST ARA 1. As on date, to the best of our knowledge the online facility for filing the application for advance ruling on the GST portal is still in pilot mode. Therefore, the application in the prescribed form should be filed in print form to the designated authority.

c. The application should be accompanied with a fee of Rs. 10,000/- (Rs.5,000/- CGST + Rs.5,000/-SGST). The fee should be remitted online banking channels through GSTN portal www.gst.gov.in as under:
   i. In case of registered person, the payment should be made by clicking the window 'services' and then selecting 'payments' in the GSTN portal and provide GSTIN of the registered person to generate a challan.

ii. In case of unregistered person, User-Id needs to be first created in GST portal by clicking the window 'services' and then selecting 'Generate User Id for Advance Ruling' in 'user service'. After generating User-Id, payment can be made using the option discussed in (i) supra.
iii. The payment challan should be enclosed along with the application.

d. Some precautions to be taken while filing an application for Advance Ruling:
   - Issue or matters on which advance ruling is sought should be appropriately selected in the application form.
   - Framing of 'Question' in respect of the issue on which advance ruling is required should be simple and unambiguous. Incorrect or incomplete framing of question will lead to incorrect Ruling.
   - Statement of facts on the 'Question' on which advance ruling is sought need to be drafted carefully. Non-disclosure of facts in full will lead to incorrect Rulings.
   - Statement containing interpretation of law in respect of which 'Question's raised should be clearly drafted.

3. **Process of admission of Application and issuance of order:**

a. The Authority upon receipt of application will forward a copy of the application to the concerned officer and direct the officer to furnish relevant records to the Authority.
b. After examination of the application and records, the Authority shall call for a hearing for admission of application. No application can be rejected unless an opportunity of hearing is given to the applicant.
c. Where an application is rejected, the Authority should specify the reasons for rejection in the order and copy of the order should be sent to the applicant and the concerned officer.
d. Application shall not be admitted if the Issue / Question are pending or already decided in the applicant's case under the CGST Act.
e. If the application is admitted, opportunity to present the case would be given to the applicant / authorized representative and the concerned officer.
f. After hearing the case, the Authority shall pronounce the advance ruling on the 'Question' mentioned in the application. The Authority shall pronounce the order within 90 days from the date of receipt of application. However, it may be noted that in many cases the orders are pronounced beyond 90 date of receipt of application.

g. A copy of the advance ruling pronounced by the Authority duly signed by the members and certified shall be sent to the applicant, the concerned officer and jurisdictional officer.
h. Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority for hearing and decision on such question.

4. **Appeal to the Appellate Authority**
a. The Appellate Authority for Advance Ruling constituted under the provisions of a State Goods and Services Tax Act or a Union Territory Goods and Services Tax Act shall be deemed to be the Appellate Authority in respect of that State or Union territory.
b. The applicant, concerned officer or the jurisdictional CGST/ SGST officer aggrieved by any advance ruling can file an appeal to the Appellate Authority.
c. Appeal should be filed within 30 days of communication of the advance ruling. The Appellate Authority can condone the delay by a further period of 30 days if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within specified period.
d. Applicant should file an appeal in Form GST ARA-02 along with a fee of Rs. 20,000/- (Rs. 10,000/- CGST+Rs.10,000/- SGST).
e. As on date, to the best of our knowledge the online facility for filing the appeal is not yet activated on the GST portal. Therefore, the appeal in the prescribed form should be filed in print form to the designated authority.
f. The concerned officer or the jurisdictional officer (revenue) should file an appeal in Form GST ARA-03. No fee is payable by the revenue for filing an appeal.
g. The Appellate Authority, after giving an opportunity of hearing to the parties to appeal, shall pass an order as it thinks fit, confirming or modifying the ruling appealed against or referred to.
h. The Appellate Authority shall pass an order within 90 days from the date of filing of the appeal or reference made by the Advance Ruling Authority.
i. Where the members of the Appellate Authority differ on any point or points referred to in appeal or reference made by Authority [refer paragraph 3 (h) supra], it shall be deemed that no advance ruling can be issued in respect of the question under the appeal or reference.
j. A copy of the advance ruling pronounced by the Appellate Authority duly signed by the Members and certified shall be sent to the applicant, the concerned officer and jurisdictional officer.

5. **Validity of Advance Ruling pronounced by the Authority or the Appellate Authority**

a. The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter shall be binding only on the applicant who had sought the advance ruling and on the concerned officer or the jurisdictional officer in respect of the applicant.

b. The advance ruling shall be binding so long as the law, facts and circumstances supporting the original advance ruling have remained unchanged.

c. The advance ruling may be declared to be void-ab-initio where advance ruling has been obtained by the applicant / appellant by fraud or suppression of material facts or misrepresentation of facts and thereupon all the provisions of this Act or the rules made thereunder shall apply to the applicant or the appellant as if such advance ruling had never been made. No such order will be passed unless an opportunity of being heard has been given to the applicant or the appellant. A copy of the order declaring that the advance ruling to be void, shall be sent to the applicant and the prescribed officers.

6. **Rectification of Advance Ruling: by Authority / Appellate Authority:**

a. The Authority/Appellate Authority that pronounced the advance ruling may amend any order passed by it to rectify any error apparent on the face of the record.

b. Error may be noticed by the Authority or the Appellate Authority on its own accord, or brought to its notice by the concerned officer, the jurisdictional officer, the applicant or the appellant.

c. Rectification should be made within 6 months from the date of the order.

d. Rectification which has the effect of enhancing the tax liability or reducing the input tax credit should not be passed without giving the applicant or the appellant an opportunity of hearing

7. **Conclusion**

Some pointers which can be handy while preparing application for advance ruling are given below:

1. The GSTIN / User-id, name of the applicant, registered address and correspondence address should be correctly mentioned in the application.
2. Nature of activity and description of the activity should be clearly mentioned in the application
3. Facts of the case should be related to the business of the applicant. Hypothetical issues should not be mentioned in the application.

4. All the documents relating to the facts and issues for which advance is ruling is sought should be enclosed along with the application.
5. The 'Questions' framed in the application for which advance ruling is sought should be very clear and should not be vague.
6. If there are more than one issues for which advance ruling is sought, separate 'Questions' needs to be framed for each issue. If two or more questions merged into a single question, the Authority may answer some question and other question may be left answered.

An attempt has been made in this article to make a reader understand the basics of Advance Ruling 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 June 08, 2019.

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IMPORTANT ADVANCE RULINGS UNDER GST

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1. **Whether ITC can be claimed on inward supplies by the recipient when consideration is paid through book adjustment?**

Held: Yes

In the case of *M/s Senco Gold Ltd.-AAR West Bengal,* the applicant is engaged in the manufacturing and retailing of jewellery and articles made of gold, silver, platinum, diamonds and other precious stones. Apart from his own retail stores, he also maintains a network of franchisee- operated stores. He grants such a franchisee the right and license to operate a showroom and to use, in connection therewith, certain Proprietary Marks and System. The applicant raises tax invoices on the franchisee for the supply of jewellery and other articles and also for Franchise Support Services in terms of the Agreement periodically. The Franchisee also raises tax invoices on the Applicant for the supply of old gold, silver etc., received from the customers. He intends to settle the mutual debts through book adjustments. He seeks an advance ruling on whether the input tax credit is admissible when he settles through book adjustment the debt created on inward supplies from the Franchisee?

The Applicant argues that apart from the second proviso to section 16(2) of the GST Act, the GST Act nowhere makes availing of input tax credit dependent upon the payment to be made for the inward supply. The captioned proviso also does not prescribe or restrict the mode in which the payment has to be made. The Applicant submits that payment through adjustment of the books of accounts is a prevalent commercial practice. The Applicant also referred to rule 19(8) of the West Bengal Value Added Tax Rules, 2005.

The Authority, by referring to section-49(2), provided that it does not prohibit the Applicant from reporting in the return input tax credit when consideration is paid to the supplier by way of book adjustment. In fact, section 49 does not deal with the mode of the transaction between the recipient and the supplier. Third proviso to section-16(2) clearly states that no input tax credit is admissible unless the recipient pays the supplier the consideration for the supply received. The most common asset class used for such payment is money, although other assets unless specifically excluded by law, may be used provided the payee accepts. The definition of

'consideration', in the present context cast the net so wide that almost no form of payment is excluded, thus incorporate the payment made by book adjustments.

The Authority ruled that the applicant can pay the consideration for inward supplies by way of setting off book debt.

2. Whether supply of pure food items such as sweetmeats, namkeens, cold drink and other edible items from a sweetshop which also runs a restaurant is a transaction of supply of goods or a supply of service?

Held: Supply of goods

In the case of *Kundan Misthan Bhandar-AAAR Uttarakhand,* the applicant is running sweetshop and a restaurant in two distinctly marked separate parts of the same premises and is also maintaining separate accounts as well as separate billings for the two types of business. The goods sold from the sweetshop are being billed exclusively as sweetshop sales; whereas the goods supplied from the restaurant are billed under restaurant head. The applicant sought a ruling whether supply of sweetmeats, namkeens, cold drink and other edible items from a sweetshop is a supply of goods or supply of services.

In response to this question, the Authority for Advance Ruling ruled that the supply shall be treated as supply of service and sweetshop shall be treated as extension of restaurant.

Aggrieved by the said ruling, the applicant filed an appeal to the Appellate Authority for Advance Ruling. The Appellate Authority stated that nature of the business establishment making supply of food, drinks and other articles for human consumption will not determine whether the same is a supply of goods or services but will depend on the constituents of each individual supply and whether same satisfies the conditions/ ingredients of a 'composite supply' or 'mixed supply', as defined under Section 2(30) and 2(74) of the CGST Act respectively. Composite supply' is defined as "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

Thus when the goods such as sweets, namkeens, cold drinks and other edible items are supplied to customers in the restaurant or as takeaway from the restaurant counter and which are being billed under restaurant sales head should fall under 'composite supply' with restaurant service being the principal supply. Since supply of food in this case, is naturally bundled with the restaurant service. The taxability of all such goods supplied to or through the restaurant will be governed by the principal

service i.e. restaurant service and GST rate with applicable conditions will also be applicable to all such goods also. Input credit will not be allowed in this case. All goods which are supplied to customers through sweetshop counter have no direct or indirect nexus with restaurant service. Anyone can come and purchase any item of any quantity from the counter without visiting the restaurant. The billings of such sales are also done separately. Thus such sales, by no stretch of imagination, can be clubbed with restaurant service. These sales do not satisfy the basic requirement of 'composite supply' i.e. 'being naturally bundled and supplied in conjunction with each other'. These sales are completely independent of restaurant activity and will continue even when the restaurant is closed, either temporarily or permanently. Hence such sales will be treated as supply of goods with applicable GST rates on the items sold. Input credit will be allowed on such supply.

3. **Whether GST paid on building materials, such as cement, concrete, bricks, cement or marble or stone slabs or tiles, paint, polish and any other building materials meant for repair of building and GST paid on supply of labour for carrying out for repair of building shall be available for ITC? Will it make any difference if aforementioned works are carried out in a composite manner as a works contract, where material as well as labour is supplied by a contractor as a composite supply under works contract?**

Held: To the extent capitalized not allowed

In case of *M/S Rambagh Palace Hotels Pvt. Ltd. –AAR Rajasthan,* the applicant is a five star deluxe heritage hotel engaged in hospitality business operated under the brand name Taj group. The hotel is run under internationally reputed brand Taj and therefore, there is a challenge to maintain its reputation at very high level. With these objectives, it has to up keep the hotel's building, equipments, furniture & fixtures, surroundings and its infrastructure in excellent operational condition. In this pursuit, it has to constantly incur expenditure on construction, renovation, repairs and maintenance of hotel's immovable and movable property. Thus, the applicant sought a ruling regarding the ITC of taxes paid on repairs and maintenance of the hotel.

The Authority observed that nature of work undertaken by the applicant is predominantly for immovable property involving transfer of goods and services; therefore, the activity is works contract for carrying out repair and maintenance work. Further, immovable property includes land, benefits to arise out of land and things attached to earth, or permanently fastened to anything attached to the earth. A reference to section-17 of the CGST Act was made which debars certain activities/ supplies/work from the eligibility to claim ITC. The activity of repair and

maintenance which encompasses supply of goods for a construction activity is of immovable nature. The provisions of ITC for the said supply of goods is covered under Section 17(5) (d) read with explanation mentioned therein. Therefore, ITC on GST paid on such goods as mentioned above will not be available to the extent of capitalization of the said goods as mentioned in Explanation of Section 17(5) of the CGST/RGST Act, 2017.

Regarding supply of labour, the Authority stated that supply of manpower is a supply of service and is covered u/s 17 (5) (d) and in relation to construction service. Thus, ITC will not be available on such supply of manpower to the extent of capitalization of the said supply.

If supply of goods and services supplied for construction work of an immovable nature is done in composite manner, i.e. 'works contract', then also it falls within the ambit of section-17 (5) (c), resulting in non-availment of ITC to the extent of capitalization of the said goods.

4. Whether the supply of medicines, consumables, surgical items used in the course of providing healthcare services to in-patients and patients admitted for a day procedure such as IVF for diagnosis or treatments which are naturally bundled and are provided in conjunction with each other, would be 'Composite supply' and are eligible for exemption under 'health care services'?

Held: Composite supply, exempt

In case of *M/s Kindorama Healthcare Private Limited-AAR Kerala,* the applicant renders medical services with experienced professionals. They have categorized the patients as 'in-patient' and 'out-patient' for administrative purpose. The inpatients are provided with facilities for accommodation, medicines, consumables, implants, dietary foods including surgical procedures for treatment. They issue a consolidated bill against these services. The applicant contends that healthcare services provided by them, they are exempt from payment of tax.

The Authority examined that the patients visit the hospital with basic intention of getting treatment for their ailment. Based on the severity of ailment, they are admitted as inpatients. During the period of admission in the hospital, the patient is under continuous monitoring of doctors and nurses. The invoice raised against these services is a consolidated bill charging for all services. Thus it is clear that the applicant is providing a bundle of services under healthcare services. Also a reference of section-2 (30) of the CGST Act was given which defines 'composite supply'. The provision of services of supply of medicines, consumables, etc. used in the course of providing healthcare services to inpatients is a composite supply in terms of sec-2 (30) of the CGST Act.

The Authority ruled that in case of inpatients, the applicant provides a bundle of supplies which is classifiable as healthcare services eligible for exemption under GST.

5. Whether the Bounce Charges collected by a bank for dishonor of cheques should be treated as a supply under the GST regime?

Held: Yes

In the case of *Bajaj Finance Ltd.-AAR Maharashtra*, the applicant is a non-banking financial company and is providing various types of loan such as auto loans, loan against the property, personal loans, consumer durable goods loans, etc., to their customers and charge interest on such loans disbursed, for which they enter into agreements with borrower/customers. The agreements provide for repayment of the loan in the form of Equated Monthly Installments (EMI) vide cheque/Electronic Clearing System (ECS), etc. The installment of the loan is computed taking into consideration the amount of loan, duration of the loan and the amount of EMI that would be payable. In case of dishonor of cheque/ECS/NACH or any other electronic or clearing mandate by the customers, the Applicant collects bounce charges, which is in line with the agreed terms and conditions of the agreement. The bounce charges are generally a fixed amount per default committed by the customer. The question sought for ruling is that whether these bounce charges comes within the scope of supply or not?

The applicant is of the view that that such bounce charges collected, are in the nature of penalty/liquidated damages and therefore, the same is not a consideration for supply of service and hence, not be subjected to GST levy. The Bounce Charges are collected on account of failure of the borrower/customer in fulfilling its obligation to ensure that the funds were available to honor a cheque or meet a direct debit for the loan installment. Therefore, the Bounce Charges are not recovered in lieu of, or, in return for any activity.(It is not consideration for the applicant)

The Authority examined that while drafting the agreement the applicant itself has defined 'Bounce Charges'' as charges for dishonor of post-dated cheques, etc. Such bounce charges are collected by them from their customers for the reason that the said customers have dishonored the cheques issued by them towards payments of EMI and the applicant has tolerated the said act of their customers of dishonoring of cheques, etc. As per section 2(31) of the CGST Act, consideration involves monetary value of forbearance of any act. Hence it is clear that the applicant is in receipt of consideration in the form of bounce charges. Again as per schedule-II (5) (e), the applicant has tolerated the act of dishonor of cheque/ECS. However, the applicant argued that for coming within the ambit of schedule-II (5) (e), there must

be an agreement to the obligation of tolerating an act. In absence of any such agreement, there cannot be a service. The Authority stated that the applicant has clearly stated in their agreement that in case of dishonor of cheques/ECS, 'Bounce charges' shall be collected. It is not additional interest as claimed by the applicant.

The Authority ruled that there is a clear understanding or agreement between the parties in the present case to foresee and tolerate an act or a situation of default on the part of the client for a monetary consideration which is actually a consideration received by the applicant, though in the agreement they may be giving this consideration, other names such as 'penal charges', penalty, Bounce Charges, etc., as thought proper by them, but these different nomenclatures in their Agreement would in no way change the actual nature of monetary "consideration" which would clearly be taxable for the supply of services as per Sr.No.5(e) of schedule-II of the CGST Act, 2018.

6. Whether the cleaning services provided to the Northern Railways are exempt under S. No. 3 of the Notification No. 09/2017-Integrated Tax (Rate), dated 28-6-2017 and corresponding Acts?

Held: No

In case of *VPSSR Facilities-AAR New Delhi,* The applicant has started the business of executing service contract, i.e. cleaning, sanitation, manpower supply, washing, housekeeping, etc. in Delhi and outside Delhi. The applicant has applied for and has been awarded a contract from Northern Railway, New Delhi for providing services in relation to housekeeping, cleaning, sanitation, and waste management, locomotives cleaning and washing at Delhi. The Northern Railway has refused in writing to pay GST to the applicant on the basis of S. No. 3 of Notification No. 9/2017 - Integrated Tax (Rate), dated 28.06.2017. Thus applicant applied for advance ruling questioning whether the cleaning services provided to Northern Railway is exempt or not?

The applicant is of the view that their business is to execute service contract, i.e. cleaning, sanitation, manpower supply, washing, housekeeping, etc. in Delhi and outside Delhi, station, building cleaning, platform cleaning, track cleaning, office and waiting hall cleaning, toilet cleaning, circulating area cleaning, shed floor, pits, urinals, desalting of manholes, underground drains and open drains, disposal of industrial waste to dumping ground, loading of ferrous scrap, cutting of grass and shrubs and removal of cobwebs. So the same shall be classified under the levies and GST @ NIL taxable.

The Authority found that for the impugned services to be covered under the S. No. 3 of the Notification No. 09/2017- Integrated Tax (Rate), dated 28.06.2017,and

parallel notifications of CGST and SGST the following aspects need to be examined:

(i) Whether the said cleaning services can be considered as "pure services" or the same are works contract services/composite services involving supply of goods also.

(ii) Whether the service receiver i.e. Northern Railways is covered in any of the categories i.e. 'Central Government' or 'State Government' or 'Union Territory' or local Authority' or a 'Governmental Authority' or a 'Government Entity'.

(iii) Whether the said cleaning activity is in relation to any function entrusted to a Municipality under Article 243W of the Constitution of India.

In relation to the first question, it is held that in the present case, the cleaning contracts of the applicant with the Northern Railways, which may involve use of consumables such as soap/detergent/chemicals of a minimal quantity and of a very nominal value, are "pure service" contracts.

As far as second aspect is concerned, it is observed that as per Section 3(8) of the General Clauses Act, 1897, the 'Central Government' means the President. Therefore, the officers subordinate to him while exercising the executive powers of the Union vested in the President and in the name of President are also covered in 'Central Government'. It is observed that contracts by Northern Railway to the applicant have been awarded in the name of the President of India. Hence, it is held that Northern Railway is covered in the said Notification as 'Central Government'.

Regarding the third aspect, The Authority observed that the Railways cannot be called a Municipality under Articles 243P and 243Q of the Constitution of India. Further, the functions of Railways i.e. transport of goods or passengers are not covered in Schedule XII of the Constitution which covers the constitutional functions of Municipalities. The cleaning services supplied to Railways i.e. cleaning of locomotives, railway stations, railway lines provided by the applicant cannot be said to be covered in Clause (6) of Schedule XII of the Constitution which covers 'public health, sanitation conservancy and solid waste management' functions of the Municipalities. The Municipalities are constitutionally entrusted with such functions in relation to urban areas but they are not entrusted with such functions in relation to Railway properties.

The Authority ruled that cleaning services supplied by the applicant to the Northern Railways are not exempted under S. No. 3 of the Notification No. 09/2017 - Integrated Tax (Rate), dated 28.06.2017, as amended by Notification No. 2/2018 - Integrated Tax (Rate), dated 25.01.2018 and parallel Notifications of CGST and SGST.

7. Whether a person is liable to pay tax under the CGST/SGST Act, on merger of his proprietorship firm as a going concern with a private limited company on the fixed assets and currents assets including stocks of raw material, semi-finished and finished goods? Whether ITC available in the credit ledger account or cash ledger account of proprietorship firm shall be transferred to respective credit ledger and cash ledger account of the private limited company, consequent upon merger?

Held: No, only unutilized ITC can be transferred.

In the case of *B.M. Industries-AAR Haryana*, the applicant is a proprietorship firm as a going concern engaged in manufacture and sale of aluminum profiles, owning fixed assets, current assets and also has long-term as well as current liabilities. The applicant proposes to merge as GOING CONCERN with a private limited company. The question of ruling is that whether the applicant is liable to tax on the merger of proprietorship business with a private limited company?

The applicant contends that Section 7 of the CGST Act, 2017 defines the scope of supply. As per sub-section 1, the supply includes sale, transfer, barter, exchange made for a consideration in the course of or for furtherance of business. The transfer of the applicant's business as a going concern to a private limited company is not in the ordinary course of business or for the furtherance of business. The selling of business is not the business of the applicant. It, in fact, cannot be called a transaction in the normal course of business or for furtherance of business. It is an extraordinary activity which shall bring the business to an end in the hands of the applicant although it will continue to operate with regularity and permanently in the hands of the buyer. As the action of the applicant is not in the regular course of business nor it has the impact of furtherance of business, therefore, the activity cannot be termed as supply as per Section 7 & hence exempt from the payment of tax. Further Reference was made to schedule-II of the CGST Act. He also stated that Section 18(3), read with Rule 41 allows the transfer of the input tax credit shown in the account of the applicant as balance of the Electronic Cash Ledger and The Electronic Credit Ledger to the respective ledgers of merged company subject to observance of conditions prescribed in Rule 41 of CGST Rules.

The Authority stated that as per Schedule II of the CGST/HGST Act, 2017, para 4 pertains to transfer of business assets. An exception is provided that if the business is transferred as a going concern, then it will not be treated as supply under GST. Regarding the transfer of balance of ITC and cash balance, the CGST Act, through section-18 read with rule-41, makes it clear that in case of merger, a registered person, by filing Form GST ITC-02, electronically on common portal, can transfer unutilized input tax credit lying in his electronic credit ledger to the transferee. Here

it is to be noted that these provisions pertains to transfer of unutilized input tax credit. These provisions are not applicable to unutilized balance lying in electronic cash ledger.

8. Whether manufacturing services on physical inputs owned by principal and made available to the principal amounts to job work under GST?

Held: Yes

In the case of *M/s Irene Rubbers-AAR Kerala*, the applicant is a job worker engaged in the production of rubber backed rubber edged coir mats and polypropylene mats of various designs and size as required by the principal on the materials provided by the principal. The rubber compound required for rubber backing and edging is prepared in a mixing mill. The applicant cuts the material in desired size and mixing the material with molten rubber compound. Accordingly the molten rubber compound and coir materials are fused with the aid of hydraulic press. Lastly, finishing is done and the resultant product is delivered to the principal. The applicant sought a ruling on whether the process of the applicant amounts to 'job work' under GST?

The Authority observed that any treatment or process undertaken by a person on goods belonging to another registered person is a job work as defined u/s 2(68) of the CGST Act. As per the circular no.38/12/2018 dated 26.03.2018, it is clarified that, in addition to the goods received from the principal, the job worker can use his own goods for providing the services of job work. The services are performed on physical inputs owned by units other than units providing the services. As such, they are characterized as outsourced portions of a manufacturing process. The value of services is based on the service charges paid, not on the value of goods manufactured.

The Authority ruled that manufacturing services on physical inputs owned by the principal is treated as service by way of job work and is covered under SAC 9988.

9. Whether the supply of diagnostic services such as clinical biochemistry, micro biology, chemotology, radiology, ECG, radiometry etc. are exempt from GST under Notification No.12/2017-CT (Rate) dated 28.06.2017? Whether such diagnostic service provider is liable to take registration under GST?

Held: Exempt, no registration required (except the person is liable to pay tax under RCM)

In the case of *M/s. Medivision Scan and Diagnostic Research Center Pvt Ltd.-AAR Kerala,* the applicant is a clinical establishment engaged purely in diagnostic services such as clinical biochemistry, micro biology, chemotology, radiology, ECG,

radiometry etc. It is coming under the purview of Clinical Establishment Act and rendering services through qualified laboratory technicians, doctors and radiologist.

The applicant is of the view that medical diagnostic services will not attract GST either under forward charge or reverse charge mechanism by virtue of Notification No.12/2017-CT (Rate) dated 28.06.2017. Moreover, as per sec-23(1) (a) of the CGST Act, they are not liable for registration as they are engaged in the business of supplying services which are not liable to tax.

The Authority observed that health care services provided by clinical establishment, an authorized medical practitioner or para medics are exempted by Notification No.12/2017-CT (Rate) dated 28.06.2017. A reference was made to the clause-2 (zg) of the said notification was made which defines 'health care services'. Clause-2(s) of the said notification defines 'clinical establishment'. With a conjoint reading of the above two definitions, it can be concluded that a place established as an independent entity or part of an establishment in connection with the diagnosis or treatment of diseases where diagnostic services with the aid of laboratory or other medical equipments comes within the definition of 'clinical establishments'. Hence all treatment or diagnosis or care for illness, injury, deformity, abnormality or pregnancy by a clinical establishment is covered under health care treatment and are exempted whether it is provided by clinical establishment or in their individual capacity. Hence the services of diagnostic service provider are exempt under the said notification.

Regarding the question of registration, the Authority made reference of section-22, 23 and 24 of the CGST Act. By virtue of sec-23, the diagnostic service provider is not liable to take registration under GST subject to the condition that it is not liable to pay tax under RCM. If the diagnostic service provider is liable to pay tax under RCM, then it will be liable for registration under GST despite of the fact that it is exclusively providing exempt services.

10. Whether an amount charged as interest on transaction based short term loan given by the Del Credere Agent (DCA) to buyers of material is exempt from tax in terms of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017?

Held: Yes

In the case of *M/s. Shreenath Polyplast Pvt. Ltd-AAR Gujrat,* the applicant is a Del Credere Agent (herein after referred to as "DCA") appointed by the supplier of goods (herein after referred to as "principal") and has dual role, the first role is to promote the sale and take orders for goods to be supplied by the principal directly and the second role is to guarantee the principal for the payment of goods supplied. The applicant clarified that the role of the DCA is limited to order booking and

ensuring payment to the principal in case of default from the customer. In the entire transaction, neither principal supplies the goods to DCA, nor does DCA supply the goods to customers. Goods are directly supplied by Principal to the customers at the price declared by the principal from time to time by charging applicable GST on the invoice. On the due date, the customer pays to principal directly for the material supplied to them. In case of any delay in payment from the customer, principal charges interest along with GST. on some occasions, when the buyer is not in a position to pay to principal on the due date, he approaches DCA to extend short term loan and the loan is extended by the DCA by making payment to the principal on behalf of the customer. The loan is repaid to DCA by the customer along with agreed interest.

The applicant contends that amount charged by DCA as interest from the buyer of the materials is not liable to tax in terms of Sr. No. 27 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. It also stated that DCA is not supplying any Page 2 of 5 3 goods to the customer but it is the principal who is directly supplying the goods to the customers. Thus, interest charged by DCA from customers is not for delayed payment of consideration of any underlying supply but said interest is charged towards loan given to the customers and hence such interest will be covered under item 27 of the table attached to the impugned notification.

The Authority observed that extension of loan by the applicant (DCA) to the customers is a transaction separate from the transaction of supply of goods by the principal to the customers against consideration wherein the applicant (DCA) also gets the commission from the principal. Also by reading section -15 of the CGST Act, it becomes clear that the interest received by the applicant is consideration towards loan extended to the customers and such interest is not towards the payment of consideration for supply of goods by the principal to the customers. Further Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 exempts the services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services).

The Authority ruled that Service provided by a Del Credere Agent by way of extending short term loans in so far as the consideration is represented by way of interest, is covered under Sl. No. 27 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and Notification No. 12/2017-State Tax (Rate) dated 30.06.2017, and hence exempt from payment of Goods and Services Tax.

11. Whether Khadi readymade garments are exempt under GST?

Held: No

In the case of *M/s Udyog Mandir-AAR Rajasthan*, the applicant is a manufacturer of khadi garments who buys khadi fabrics from the market and gets those fabrics stitched and makes own garments. The khadi fabrics has been made exempt from tax vide Notification No.28/2017-C.T (Rate). The applicant wants a ruling on taxability of the khadi garments manufactured from khadi fabrics.

The Authority observed that Khadi fabric, sold through Khadi and Village Industries Commission (KVIC) and KVIC certified industries/outlets have been exempted from the purview of GST vide Notification No. 02/2017 C.T (Rate) dated 28.06.2017 which was further amended vide Notification No. 28/2017 C.T (Rate) dated 22.09.2017.The said amended notification exempts khadi fabrics and not readymade garments of khadi. The entry for readymade khadi garments is mentioned at Serial No. 170 (GST-5%) and Serial No. 223 (GST-12%) of Schedule-I and Schedule-II respectively of Notification No. 01/2017 –C.T (Rate) dated 28.06.2017 as amended from time to time.

The Authority ruled that the supply of readymade khadi garments is taxable-

If sale value is less than 1000, then 5% GST.

If sale value is more than 1000, then 12% GST.

12. Whether royalty paid in respect of mining lease can be classified under "Licensing for the right to use minerals including its exploration and evaluation" falling under the heading 9973 attracting GST at the same rate of tax as applicable on supply of like goods involving transfer of title in goods? Whether contributions made to District Mineral Foundation and National Mineral Exploration Trust as per MMDR Act is liable to tax?

Held: Yes

In the case of *NMDC Ltd-AAR Chhattisgarh*, the applicant is a state-controlled mineral producer of the Government of India. It is owned by the Government of India and is under administrative control of the Ministry of steel. It is India's largest iron ore producer and exporter producing million tons of iron ore from fully mechanized mines in Chhattisgarh. The applicant pays royalty @ 15%. Also, sections 9B and 9C of Mines and Minerals (Development & Regulation) Act, 1957 mandates that the miners shall contribute 30% of royalty to District Mineral Foundation and 2% of Royalty to National Mineral Exploration Trust. The applicant seeks clarification as to whether royalty paid in respect of Mining Lease can be classified under "Licensing services for the right to use minerals including its exploration and evaluation" falling under the heading 9973 attracting GST at the same rate of tax as applicable on supply of like goods and whether such statutory

contributions made amounts to "Supply" and whether the same is liable for GST under reverse charge.

The applicant is of the view that the entries prescribing the rate of tax for the service code 9973 does not specifically cover the Licensing services for the right to use minerals including its exploration and evaluation and therefore it will be covered under the residuary entry "leasing or rental services, with or without the operator, other than (i), (ii), (iii), (iv) and (v) above", with applicable tax rate as the same rate of tax as applicable on the supply of like goods involving transfer of title in goods. Accordingly, in such cases, the relevant tax rate as applicable on the underlying natural resource would be applicable on the amount of royalty paid. Since, Iron Ore attract 5% GST Rate, royalty paid for mining of Iron Ore will attract 5% GST Rate.

The Authority made a reference to section-2 (98) of the CGST Act which stipulates regarding liability to pay tax under reverse charge, meaning therein that the liability to pay tax shall be on the recipient of goods/services rather than the supplier of goods/services. Further Reverse Charge Mechanism is applicable for certain notified services as mentioned in Notification No. 13/2017-Central Tax (Rate), dated 28-6-2017. As per SI. No. 5 of the said Notification, services supplied by the Central Government, State Government, Union territory or local authority to a business entity attracts GST, under reverse charge basis by the recipient of such services. Thus Sl. No. 5 of the said Notification states that the services supplied by the Central Government/State Government to a business entity will come under Reverse Charge Mechanism.The applicability thereof of GST rate for the aforementioned service is to be based on the classification of service. The mining right so granted is covered under Heading No. 997337. It specifies 'Licensing services for the right to use minerals including its exploration and evaluation'. This is covered under Entry No. 17 of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017. On careful scrutiny of the Notification, the aforementioned service is not covered in any of the specifically mentioned descriptions of Entry No. 17 and thereby it qualifies being categorized in the residual clause of Entry No. 17, wherein it has been specified that the rate applicable for such service should be of same rate as applicable for the supply of like goods involving transfer of title in goods. Thus GST is payable on reverse charge basis by the applicant on royalty paid to the Government at the rate of supply of like goods being mined, on account of availing mining rights.

Regarding the tax liability of contributions to DMF and NMET, the main thrust of the applicant is that the amounts given to both the trusts are not a commercial transaction in the course of business and the contributions are made for public welfare activities. The Authority stated that it is amply clear from rules 2(1)(d) and

2(1)(e) of the Chhattisgarh District Mineral Foundation Trust Rules, 2015 that the way in which a Collector of a District enters into an agreement/contract to gain royalty from mining lease of the Government land, in the same way he enters into an agreement with the applicant to make it contribute to both the trusts in addition to royalty. Thus both the trusts uphold parallel rights on ownership rights on Government land with regard to royalty of mining lease. Accordingly it gets concluded that the contribution made by the applicant to DMF and NMET merits treatment as mining royalty in the course or furtherance of business of the applicant.

Again, in terms of section 2(69) of the CGST Act, both DMF and NMET qualify being treated as local authority. On the basis of Notification No. 13/2017-Central Tax (Rate), dated 28-6-2017 there arises the liability of payment of GST upon the applicant on the contributions made to DMF and NMET under reverse charge basis.

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JUDICIAL PRECEDENTS UNDER GST

Adv. Mukul Gupta
Sharnam Legal, Gaziabad

1. HSN Classification: Whether the books 'Sulekh Santa 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)? The Court pointed that note appended to the HSN, it has been 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'. Therefore, the emphasis was on a 'functional characteristics' of a book. The Court must ask what purpose the book will serve.
In The High Court Of Delhi Sonka Publication (India) Pvt. Ltd. vs. Union of India and Ors W.P. (C) 10022/2018 and CM 39032/2018 **MANU/DE/1579/2019**

2. Section 69 of the Customs Act, Section 5 (1) IGST Act 2017: Goods sold to passengers by Duty Free Shops (DFS) are not cleared for home consumption nor for removal to another warehouse or otherwise provided in the Customs Act, 1962 and hence the goods are cleared without payment of duty only for export u/s 69 of the Customs Act under an invoice which is also deemed to be a shipping bill. No IGST is payable.
The goods being a part of passenger's bonafide baggage are cleared for home consumption by the passenger under the Baggage Rules, 2016 and not by the DFS, hence no customs duty is payable by the DFS and therefore under proviso of Section 5 (1) of the IGST Act read with Section 12 of the Customs Act 1962, No IGST is payable either.
In the Allahabad High Court P.I.L. CIVIL No. 12929 of 2019 Atin Krishna vs. U.O.I. thru Secy. Ministry of Finance and Ors

3. Section 69 GST Act 2017: Applicant taken into custody for claiming ITC illegally, to be released on bail on execution of bond with one surety. The High Court of Gujarat observed that the involvement of applicant was merely to execute the transactions on behalf of his employer. The role of the applicant appeared to be restricted to a limited extent as compared to the co-accused. However, if breach of

any of the conditions is committed, then the Sessions Judge concerned would be free to issue warrant or take appropriate action in the matter.

High Court of Gujarat, Madhav Gopaldas Shah v. State Of Gujarat [2019] 104 taxmann.com 456 (Gujarat); In the High Court of Gujarat at Ahmedabad r/criminal misc. Application no. 1665 of 2019 Madhav Gopaldas Shah vs State Of Gujarat

4. Section 130 of the U.P. Goods and Services Tax Act, 2017, Read with 2(17) of the UPGST Act, 2017, 2(105) 2(94) 2(107) of the UPGST Act, 2017: The Competent Authority issued a show cause notice on the petitioner confiscating his vehicle.

The High Court of Allahabad observed that for seizure and confiscation, it was immaterial that the person proceeded against was not a registered person or a supplier or a taxable person or was not doing any business as per the CGST Act, 2017. It was enough that he was a transporter of goods and the goods transported had been seized in transit. If the charge was made out against the transporter, the revenue could proceed to seize goods and vehicle

According to the provisions of penalty imposed for certain offences under the CGST Act, 2017 he would fall within the definition of 'any person' who concerned himself in transporting or removing goods and would be liable for of penalty to the extent of Rs. 25,000, if found guilty of the offence. However, petitioner had a right to file a reply against a show cause notice issued to him

The High Court of Allahabad held that a show cause notice issued to the transporter was valid, even though he was not supplier of goods.

High Court of Allahabad, Ashok Kumar Bhatia v. State of U.P. [2019] 104 taxmann.com 453 (Allahabad); In the Allahabad High Court Writ tax No. 1660/ 1676/ 1697/ 1645 of 2018

5. Section 129 of Goods and Service Act, 2017: The goods and the vehicle of the petitioner had been seized as the date of the tax invoice mentioned in the E-WAY bill was different from the date mentioned in the tax invoice. The petitioner had filed a writ petition before High Court of Allahabad for release of goods & vehicle seized.

The High Court of Allahabad observed that the petitioner was the owner of the goods and there was no allegation of having evaded tax, therefore, it would not be a valid ground for the seizure of the goods.

In the High Court of Allahabad, Ganga Industries v. Union of India- [2019] 105 taxmann.com 75 (Allahabad); MANU/UP/5509/2018;

6. First Schedule to the Customs Tariff Act, 1975 (51 of 1975), CGST Act 2017: The appellants filed an appeal to the Supreme Court where they contended that High Court of Gujarat could not entertain the petition which involved a classification dispute.

The Supreme Court observed that when there was a serious dispute with regard to classification of service, the respondents ought to have responded to the show-cause notices by placing material in support of their stand. There was no reason to approach the High Court questioning those show-cause notices. The Supreme Court set aside the judgement passed by the High Court with a liberty to respondents to file response to the show-cause notices and held that classification of a service to be decided by Apex Court only.

Union of India v. Coastal Container Transporters Association - [2019] 104 taxmann.com 364 (SC); **Civil Appeal No. 2276 of 2019 arising out of S.L.P. (C)No.25699 of 2018**

7. Rule 61 (5) and section 39(1) Goods and Services Tax Act 2017: Petitioner seeks permission to allow manual filing of GSTR-3B for August 2017. Petitioner grievances that the system accepted the GSTR-3B but the information and details in all the columns of the return were shown as "zero" despite the fact that the tax liability had been duly paid. Court held that in the absence of proper response on the part of the respondents, the petitioners, who have been diligently prosecuting the matter all throughout, should not be made to suffer, and hence, The petitioners are permitted to file manually GSTR-3B for August 2017 with correct and true details and the respondents are directed to accept and acknowledge such GSTR-3B manually filed by the petitioners.

Messrs Vishnu Aroma Pouching Pvt Ltd Vs Union Of India 2019-Vil-221-Guj; In The High Court of Gujarat at Ahmedabad R/Special Civil Application No. 5629 Of 2019

8. Section 171 of the Central Goods and Services Tax Act, 2017: The petitioner was operating restaurants under the name and style of 'Dominos Pizza'. The petitioner had challenged the order passed by National Anti-Profiteering Authority (NAPA) which had imposed penalty for profiteering indulged by the petitioner by charging more price by issuing wrong tax invoices.

As per submissions made by the petitioner, there was no judicial member in the NAPA. As per the CGST Rules, 2017 there was no provision for constitution of an appellate authority to review the orders passed by the NAPA.

The High Court of Delhi observed that there were other petitions already pending in this Court which raised a similar challenge to the constitutional validity of the above provisions apart from challenging the orders of the NAPA. The High Court of Delhi had granted a stay order on sum of Rs.20 crores.

The High Court Of Delhi Jubilant Food Works Ltd. v. Union of India [2019] 105 taxmann.com 144 (Delhi)

9. Section 11 Of The Central Goods And Services Tax Act, 2017: Where assesse had established a new unit in Uttar Pradesh and it was eligible for exemption from payment of tax under Uttar Pradesh Sales Tax Act, 1948 and then under Uttar Pradesh Trade Tax Act, 1948 and then under Uttar Pradesh Value Added Tax Act, 2008, there is no scheme for such exemption under Goods and Services Tax Regime.

LG Electronics India (P) Ltd. v. State of U.P. - [2019] 105 taxmann.com 214 (Allahabad); In High Court of Judicature at Allahabad writ Tax No: - 615 of 2018

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

CS Anil Gupta
Jaipur

S. NO.	FORM NAME	INFO UPTO	DUE DATE	FEES	PENALTY	APPLICABILITY
1	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).
2.	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).
3.	DIR-3 KYC	Every Person holding DIN	30/06/2019	Upto Due Date-NIL	Rs. 5000	Every Person holding DIN
4.	INC-22A (ACTIVE)	Every Company Incorporated before 31/12/2017	15/06/2019	Upto Due Date-NIL	Rs. 10,000	Every Company

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IMPORTANT CASE LAWS, CIRCULARS & NOTIFICATIONS UNDER THE COMPANIES ACT

CA. Manisha Maheshwari
Chartered Accountants, Jaipur

CASE LAWS

SUPREME COURT OF INDIA
Birla Corporation Ltd. *vs.* Adventz Investments & Holdings Ltd.
CRIMINAL APPEAL NOS. 875,876,877 OF 2019
MAY 9, 2019

Subject:-
Oppression and mismanagement of administration of Company under provisions of Act
Relevant Sections:
Sections 397 and 398 of Companies Act, 1956
Decision
Respondents were shareholders of appellant Company and had filed a Company petition under Sections 397 and 398 of Companies Act, 1956 before Company Law Board (CLB) alleging oppression and mismanagement in affairs of appellant company i.e. Birla Corporation. Appellant had filed a criminal complaint of theft of 54 documents on basis of which petition was filed. It is held that use of documents by respondents in judicial proceedings is to substantiate their case namely, "oppression and mismanagement" of administration of appellant-Company and their plea in other pending proceedings and such use of documents in litigations pending between parties would not amount to theft. No "dishonest intention" or "wrongful gain" could be attributed to respondents and there is no "wrongful loss" to appellant so as to attract the ingredients of Sections 378 and 380 IPC. Therefore, criminal proceedings against respondents were to be quashed.

SUPREME COURT OF INDIA
Ram Parshotam Mittal *vs.* Hotel Queen Road (P.) Ltd.
CIVIL APPEAL NOS. 3934, 3935 OF 2017
MAY 10, 2019

Subject:-
Shares can be transferred only in accordance with section 108 of Companies Act, 1956 which provides for filing of share certificate which was a mandatory requirement.
Relevant Sections:

Section 286, 300 and 108 of the Companies Act, 1956

Decision

Respondent HQRL issued shares in favour of its holding company Moral and appellants (directors) without notice to Hillcrest which was a preference shareholder. Allotment and transfer of shares without filing share certificate along with duly executed share transfer form were to be cancelled as Hillcrest had voting rights and there was breach of sections 286, 300 and 108 of the Companies Act, 1956

Department of Income Tax, Ward-4(1)(2), Ahd. *vs.* ROC (NCLT - Ahd.)

CO APPEAL NO: 395 / 252(3) / NCLT / AHM / 2018

APRIL 5, 2019

Subject:-

Restoration of name of the company in register of companies by ROC which is struck off by Registrar earlier

Relevant Sections:

Section 252 of the Companies Act, 2013, read with rule 3(1) of the Companies (Removal of names of companies from the register of companies) Rules, 2016

Decision:-

ROC initiated proceedings under section 248(1) for purpose of striking off of name of company on ground that it had not filed balance sheet and annual returns since its incorporation. The appellant I.T. department had reopened income tax assessment of said company for assessment year 2011-12 and if name of said company was not restored, proceedings initiated against said company would become futile and would cause serious prejudice to revenue of Central Government. As per rule 3, when some legal / administrative action against company had been initiated or being contemplated, name of such companies could not be deregistered. Thus it was held to protect interest of revenue / Central Government, it was just and proper that name of said company be restored in statutory registered being maintained by ROC so as to enable appellant as well as other regulatory authorities to proceed further in respect of its legal action against company in light of rule 3(1).

Circulars

1. **GENERAL CIRCULAR NO. 6/2019 [F.NO.01 / 22 / 2013 – CL – V] DATED 13-5-2019**

- Clarification for Form ADT-1 filed through GNL-2 under the Companies Act, 2013
- In continuation of General Circular No. 09/2014 dated 25.04.2014, the Ministry of Corporate Affairs has received representation from stakeholders seeking relaxation

of fee for filing e-form no. ADT 1, particularly form ADT 1 filed through GNL-2 during the period from 01.04.2014 to 20.10.2014 for appointment of Auditor for the period from 01.04.2014 to 31.03.2019 due to non-availability of e-form ADT-1 during the said period.

- Accordingly, the matter has been examined and it is hereby clarified that companies which had filed Form no. ADT-1 through GNL-2 as an attachment (by selecting 'others') during the period from 01.04.2014 to 20.10.2014 may file e-form no.ADT-1 for appointment of Auditor for the period upto 31.03.2019 without fee, till 15.06.2019 (since fee had been paid for filing GNL-2 for the same purpose) and thereafter fee and additional fee shall be applicable as per Companies (Registration of Office and Fees) Rules, 2014.

Notification

1. **NOTIFICATION NO. G.S.R. 390 (E) [F.NO.05/01/2019-CSR], Dated 30-5-2019**
   Section 467 of the Companies Act, 2013 - Schedules - Power of Central Government to Amend - Amendment in Schedule VII

2. **NOTIFICATION G.S.R. 377(E) [F.NO. 1/4/2016 CL-I], DATED 22-5-2019**
   National Financial Reporting Authority (Meeting for transaction of Business) Rules, 2019

3. **NOTIFICATION G.S.R. 376(E) [F.NO. 1/21/2013 CL-V], DATED 22-5-2019**
   Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2019 - Amendment in Rule 9A and Insertion of Form PAS-6

4. **NOTIFICATION NO. G.S.R. 369(E) [F.NO. NFRA-01 / 1 / 2019 - COMP.-MCA], DATED 16-5-2019**
   National Financial Reporting Authority (Recruitment, Salary, Allowances And Other Terms And Conditions Of Service Of Secretary, Officers And Other Employees Of Authority) Rules, 2019

5. **NOTIFICATION NO. G.S.R. 368(E) [F.NO.1/22/2013-CL-V], DATED 16-5-2019**
   Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2019 - Insertion of Rule 12B

6. **NOTIFICATION F.NO.1/13/2013 CL-V, PART-I, DATED 10-5-2019**

Companies (Incorporation) Fifth Amendment Rules, 2019 - Substitution of Rule 8 and insertion of Rules 8A and 8B

7. **NOTIFICATION NO. G.S.R. 351(E) F.NO. 1/30/2013 CL.V, DATED 8-5-2019**
National Company Law Tribunal (Second Amendment) Rules, 2019 - Amendment in Rule 84

8. **NOTIFICATION NO. G.S.R. 350(E) F.NO. 1/28/2013-CL-V(PART), DATED 8-5-2019**
Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2019 - Amendment in Rule 4 & Form No: STK- 4 and insertion of Form No: STK – 8

9. **NOTIFICATION NO. G.S.R. 343 (E) [F.NO.1/16/2013-CL-V(PT-I)], DATED 1-5-2019**
Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2019 - Amendment in Rules 2 and 3

Rules

1. **The National Company Law Tribunal (Second Amendment) Rules, 2019 on 08.05.2019**
In the National Company Law Tribunal Rules, 2016 (hereinafter referred to as the principal rules), in rule 84, after sub-rule (2), the sub-rules (3) & (4) have been inserted specifying the requisition number of member or members and depositor or depositors to file an application under sub-section (1) of section 245.

2. **The Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2019 on 08.05.2019**
Rules prescribed fees of Rs. 10000/- instead of already prescribed fees of Rs. 5000/- for filling of Form No: STK -2. Further mandated to fill all the pending forms up to the end of the financial year in which the company ceased to carry its business operations and prescribed new Form No: STK-8.

3. **The Companies (Incorporation) Fifth Amendment Rules, 2019 on 10.05.2019**
These rules prescribed rules applicable to name of the Company which resemble too nearly with name of existing company or undesirable names and provided list of word or expression which can be used only after obtaining previous approval of Central Government.

4. **The Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2019 dated 16.05.2019**
   In the Companies (Appointment and Qualification of Directors) Rules, 2014, after rule 12A, the following rule shall be inserted, namely: - '12B. Directors of company required to file e-form ACTIVE.

5. **The Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2019 dated 22.05.2019**

- Shall come into force with effect from 30th September, 2019
- In the Companies (Prospectus and Allotment of Securities) Rules, 2014 (hereinafter referred to as the principal rules), in rule 9A,- (i) in sub-rule (7), for the word and figures "Regulations, 1996", the word and figures "Regulations, 2018" shall be substituted; (ii) for sub-rule (8), the sub-rules 8A shall be substituted
- New Form PAS – 6 i.e. "Reconciliation of Share Capital Audit Report (Half-yearly)" has been inserted.

6. **The National Financial Reporting Authority (Meeting for Transaction of Business) Rules, 2019 dated 22.05.2019**

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TRADE MIS-INVOICING AND ITS CONSEQUENCES UNDER THE CUSTOMS ACT, 1962

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The Concept of Trade Mis-invoicing

Trade Mis-Invoicing is a method of tax fraud by falsifying the price, quantity, nature of goods or services in a commercial international transaction. It is believed that trade mis-invoicing is one of the biggest reasons and main channel for Illicit Financial Flows (IFFs). "Illicit Financial Flows" is defined as any money that is illegally earned, transferred or utilised. It has been reported at various instances that eighty percent of the IFFs flows through mis-invoicing. Illicit Financial flows though mis-invoicing had been one of the biggest concerns for developing as well as developed countries economies. The Global Financial Integrity (GFI) had citied mis-invoicing as the main module of illegally transfer of money. As per the report of GFI's, in 2015, nearly 84% of the illicit money transferred from countries like China, Russia and India are due to trade mis-invoicing. In the recent year, it is hard to understand the nature and quantum of mis-invoicing, as a variety of big corporates use this as tax planning.

Types of Mis-invoice

Undervalued Mis-invoicing

An undervaluation of the invoices is usually done by the Exporters to transfer capital out of the country and thus bringing reduced foreign exchange into the country. Undervaluation of invoices is to lessen the value of the goods on paper i.e. on invoice. Under invoicing are also done to pay lesser Customs Duty to the importing country as to support the importer. For instance, recently, in 2015, Government levied 20 percent safeguard duty *ad valorem* on of import of *"Hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more"* vide Notification No. 02/2015-Customs (SG) dated 14.09.2015. After imposing the said duty, the exporter countries started undervaluation of invoice to pay lower duty (SAD). It is alleged that Korea

exported 64,913 tonnes of hot-rolled coil in October at $275 (₹18,425) a tonne, much below its domestic selling price of $420 (₹28,140) a tonne[1].

Overvalued Mis-invoicing

An overvaluation of invoices is done to allegedly transferring money to out of the country. "Overvaluation of invoices" is done by an importer when he overvalued the imported goods than the actual value. An importer may also use this tactic to transfer foreign currency in his foreign accounts. It is one of way to transfer funds through hawala transaction. In legal terms, it is trade based money laundering. At present, the most media-hyped case of Diamond Merchant Nirav Modi is the classic example of overvaluation of invoices. It is alleged by the Enforcement Directorate that three companies of Nirav Modi – Solar Exports, Stellar Diamonds and Diamonds R Us – are mainly into over-invoicing. They import goods and continue to circulate them, again and again[2]. In the year 2015, Reserve Bank of India, for the first time asked the banks through a notification to tighten monitoring of export finance on the wake of over invoicing scam detected by the Enforcement Directorate. Over-valued mis-invoicing is a novel way of money laundering and agencies are still trying to curb this crime.

Multiple Invoicing

This kind of mis-invoicing is done when the exporter or manufacturer issue two or more invoices for the same goods or transaction. This justifies cash flow transaction with the evident of those duplicate invoices. This is one of the hardest and toughest to detect by the investigation agencies, since several different financial institutions are involved in the cash transaction.

Offence of Trade Mis-invoicing

Trade Mis-invoicing is deliberately putting wrong value of the goods in the invoice and is an offence under Section 135 of the Customs Act, 1962. Relevant part of the abovementioned section is reproduced below:

> ***"SECTION 135 Evasion of duty or prohibitions*** *(1) without prejudice to any action that may be taken under this Act, if any person -*
>
> *a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being*

[1] https://www.thehindubusinessline.com/companies/underinvoicing-by-exporters-is-new-worry-for-steel-industry/article8000993.ece

[2] https://mumbaimirror.indiatimes.com/mumbai/crime/how-over-invoicing-helped-nirav-modi/articleshow/62954758.cms

imposed under this Act or any other law for the time being in force with respect to such goods; or

b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be; or

c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113; or

d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods,

he shall be punishable, -

i. in the case of an offence relating to, -

A. any goods the market price of which exceeds one crore of rupees; or

B. the evasion or attempted evasion of duty exceeding fifty lakh of rupees; or

C. such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

D. fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds 4[fifty lakh] of rupees,

with imprisonment for a term which may extend to seven years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

ii. in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both."

The premier requisite to trigger this section is the malafide intention. Any individual not having any malafide intention of mis-declaration cannot be made guilty under this section. Same was endorsed by Hon'ble High Court of Judicature at Bombay in *Ravindra Janardan Nair* versus *State of Maharashtra* reported in 1991 (52) E.L.T. 524 (Bom.). The Hon'ble High Court in this instant case let off the accused charged under Section 135(1)(a), *ibid*, since there was no attempt of any fraudulent evasion or an attempt at evasion of duty chargeable on goods.

It is pertinent to mention here that the offence of Mis-declaration i.e. mis-declaration of invoice is a non-bailable offence. The accused may be arrested by the authorised/designated Customs Officer under section 104, *ibid*, and the procedures of

Criminal Procedure Code, 1973 shall be applicable into it. The accused will possess all the rights as specified under CrPC and as envisaged by the Hon'ble Supreme Court in D. K. Basu Case[1]. Further, it may be taken into note that in case of ambiguity or uncertainty, Customs Act shall prevail over CrPC, since it is a special Act.

Further, Mis-invoicing also leads to trade-based money laundering which is also an offence under The Prevention of Money Laundering Act, 2002 (PMLA). Mis-invoicing is a scheduled offence under the PMLA if the total value involved is one crore rupees or more[2]. In 2015, the limit was increased from thirty lakh to one crore vide Finance Act, 2015[3].

Consequences of Mis-invoicing in the Indian Economy

Illicit Financial Flows had been a major concern for the developing countries from the past 20 years. The Global Financial Integrity has already recognised trade mis-invoicing as the largest section in transaction of illegal transferring of funds. India being a developing country is obviously not immune from this global transferable disease. In a recent report of Global Financial Integrity, India lost over USD 12 million equivalent to Rupees 90,000 Crores in 2016. The sanctity of this quantum can be evaluated from the ground that approximately it is equivalent to 5.5 percent of the total revenue in 2016. It is reported that India is quite affected by this illegal activity. Imports coming into India are over-valued to transfer illegal funds out of the country and imports are under valued to evade Customs Duty or Value Added Tax (VAT). As per the Report, USD 9 billion in import mis-invoicing can be further broken down by uncollected VAT (USD 3.4 billion), uncollected customs duties (USD 2 billion), and uncollected corporate income tax (USD 3.6 billion).

Conclusion

Trade Mis-invoicing is indeed affecting the Indian Economy and economy of developing countries. It is one of the major chambers of illicit financial flows and need to be curbed immediately. Investigation Agencies like Enforcement Directorate and the DRI must tighten their seats to curb this economic offence. The GFI Report, as discussed above, also suggested the governments to adopt and fully implement all of the Financial Action Task Force's (FATF) anti-money laundering recommendations with proper implementation of the laws already in place. Trade Mis-invoicing is a hazard to the banking and other financial institutions and its associated integrity; hence curtailment of the same is obligatory.

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[1] (1997) 1 SCC 416

[2] Section 2(y)(ii) of the Prevention of Money Laundering Act, 2002

[3] Act No. 20 of 2015

OVERSEAS PROPERTY, SECURITY & FOREIGN EXCHANGE

CA Paresh P. Shah
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1. Introduction

Acquisition & Transfer of Overseas property, security and Foreign Exchange (Security, Property and Currency collectively referred as Assets) is dealt under FEMA under Sec 4, 6(4) and 9 of the FEMA. It states that,

A person resident in India (PRII) shall not acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. —Save as otherwise provided in this Act, (Sec 4 of FEMA).

A PRII may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India as per Sec 6(4) of FEMA.

If there is any amount of foreign exchange due or has accrued to any PRII, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank as per Sec 8 of FEMA.

Thus law does not permit PRII, to hold any assets abroad unless it is permitted and also if there is any entitlements of these assets due to PRII it must be brought to India in the manner specified with certain relaxations and the exemptions. However PRII is allowed to continue to hold all the three types of the assets abroad including the income therefrom and the new asset acquired out of proceeds of these assets or the funds if the assets were acquired by him while he was PROI and was inherited from PROI as authorised by Sec 6(4).

The law further provides that

Provisions of section 4 and section 8 shall not apply to the following cases (Sec 9 of FEMA):

(a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;

(b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;

(c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;

(d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;

(e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and

(f) such other receipts in foreign exchange as the Reserve Bank may specify

Thus except a general approval, PRII cannot hold any assets (property, security or currency) outside India. Such approvals are found under section 6(4), Notification 7(immovable property), Notification 120 and LRS (Securities) under the FEMA.

The manner of repatriation and possessions/exemptions of currency is also provided in Notification 9 and 11 respectively.

"Acquisition and transfer of Immovable property outside India by a PRII is a capital account transaction under Foreign Exchange Management Act. The relevant regulation is Notification No FEMA 7 /2000-RB dated 3rd May 2000), hereinafter referred to as "Fema 7"

Objective of Fema 7 is to manage the use of foreign exchange through acquisition of property outside India, allowing only specified PRII to acquire and hold property through specified routes/modes ie Acquisition by sale or purchase or by Gift or by inheritance

Immovable property is neither defined under the FEMA, nor defined under the relevant notification. Since Immovable property is not defined, one has to take the meaning as understood in common parlance. Immovable property will include residential property, commercial property, agriculture property, etc.

The law relating to these three assets can not be framed in the same manner as nature of assets are different and it can not be subjected to same set of rules for acquisition, it's sale, holding and repatriation to India because repatriation of immovable property can not be equated to Currency or the security and hence they are found in dedicated notification for each of these three assets.

2. A PRII can acquire and Transfer Immovable Property outside India through following Modes

2.1 Acquisition of Immovable Property – Resident Foreign Currency Account (RFC)

A PRII can buy Immovable Property outside India out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015; (Regulation 5(1)(b))

2.1.1 What is RFC Account?

RFC Account is a bank account opened by a Resident Individual with an Authorised Dealer to maintain funds earned in foreign currency. Returning Indians can transfer the balances held in Non-Resident External Account or Foreign Currency Non Resident Account to an RFC Account. The funds in RFC Account are free from restrictions regarding utilisation of foreign currency balances, including any investments outside India. Funds in RFC account can be used freely for any current/capital account transactions.

Permissible Credits:

1. Foreign exchange received as payment/service/gift/honorarium while on visit abroad or from a Non-Resident who is on a visit to India
2. Unspent Amount of Foreign Exchange acquired from AD for travel Abroad
3. Gift from Close Relative
4. Earning through exports of Goods/services, Royalty
5. Disinvestment proceeds on conversion of shares into ADR/GDR
6. Foreign Exchange received as earnings of LIC claims/ maturity/surrendered value settled in forex from an Indian Insurance company

2.1.2 Transfer of Immovable property acquired out of funds held in RFC Account

i. A PRII who has acquired property outside India out of funds held in RFC Account:
   a. Can sell the property outside India without RBI permission
   b. Transfer the Property by way of Gift or Inheritance to his relative who is a PRII

ii. Funds held in the RFC Account can be used freely with no restrictions or limits to purchase a foreign security outside India as per Regulation 4 of Notification No. FEMA 120/RB-2004, dated July 7, 2004

2.2 Acquisition of Immovable Property by way of Gift or Inheritance

A PRII may acquire immovable property outside India, by way of gift or inheritance from

i. A PRII in case of property purchased on or before 8th July 1947 and continued to be held by him with the permission of Reserve Bank of India. (Regulation 5 (1)(a))
ii. A PRII if such immovable property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. (Regulation 5 (1)(a))
iii. A PRII who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition. (Regulation 5(2)). It maybe noted that a PRII can acquire Immovable Property outside India only through the LRS route

2.2.1 Transfer of Immovable Property by way of Gift or Inheritance

A PRII who has acquired property as per the above reference can transfer the same by way of Gift or Inheritance to PRII. Transfer by way of sale can be done after taking special permission from RBI. One may note that there is no general approval for sale of property acquired by Gift or Inheritance.

2.2.2 Transfer of Immovable Property Outside India - Other cases

i. A PRII who had acquired property outside India when he was not a resident in India can sell the property outside India without the permission of RBI
ii. Fema 7 is silent about transfer of property by way of inheritance from a Non-Resident to a Resident Indian. Transfer of property from a PROI to a PRII by way of Inheritance maybe presumed as permitted being a right provided under the constitution of India to a citizen of India

2.3 Acquisition of Immovable Property by Indian company having overseas office

A company incorporated in India having overseas office, may acquire immovable property outside India for its business and for residential purposes of its staff (Regulation 5(3)), provided total remittances do not exceed the following limits prescribed for initial and recurring expenses, respectively:

i. 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;
ii. 10 per cent of the average annual sales/ income or turnover during the last two financial years.

2.4 Acquisition of Immovable Property jointly with a relative who is a PROI

A PRII can jointly acquire an Immovable Property with a relative who is a PROI, provided there is no outflow of funds from India; (Regulation 5(1)(c))
'Relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual

2.5 Acquisition of Property through Liberalised Remittance Scheme (LRS)

i. Under LRS an Individual being a resident of India can purchase Immovable property outside India by remitting funds up to US$ 2,50,000 per person per financial year. 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.

ii. Property cannot be purchased on instalment basis under LRS, As Financial commitment cannot be over and above LRS limit. As per Circular 32 dated August 14, 2013 payment allowed in Instalments within LRS is only for pre – existing contracts ie contracts existing before 14.08.13.(This was considered due to the reduction in the LRS limit from US$ 2,00,000 to US$ 75,000)

2.5.1 Transfer of Property acquired through Liberalised Remittance Scheme (LRS)
A Property purchased through LRS can be transferred to a PRII by way of inheritance or gift. Also it can be transferred by way of sale to PROI or PRII

2.6 Acquisition of Immovable Property outside India through a foreign company
Companies, LLPs and registered partnerships (Indian Entities) are permitted to directly invest in the equity of or set up foreign companies, which can then purchase real estate abroad (provided it is as per the business requirements of the overseas Joint Ventures/Wholly owned Subsidiary). As per Notification 120 dated July 7, 2004 The Total Direct Investment of the Indian Party in Joint Ventures / Wholly Owned Subsidiaries shall not exceed 400%, or as decided by the Reserve Bank from time to time, of the Net Worth of the Indian Party as on the date of the last audited balance sheet.

2.7 Buying and Leasing Immovable Property outside India
Can an Indian Party acquire Property for leasing activity abroad as Real Estate Business is not allowed under FEMA Notification No. FEMA 120/RB-2004 dated July 7, 2004 dealing with Overseas Direct Investment?
"Real estate business" means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges; (Notification No FEMA 120/RB-2004) (ODI)

Under the FDI guidelines it is defined as:
Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships; (Notification No FEMA 20(R)/ 2017-RB) (FDI)
Explanation:
a. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of "real estate business".
b. Earning of rent income on lease of the property, not amounting to transfer, will not amount to real estate business.
c. Transfer in relation to real estate includes,
(i) the sale, exchange or relinquishment of the asset; or
(ii) the extinguishment of any rights therein; or
(iii) the compulsory acquisition thereof under any law; or
(iv) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
(v) any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.
In the definition of Real Estate Activity As per Notification No FEMA 20(R)/ 2017-RB It is clarified in the definition that leasing of property does not amount to transfer, Hence earning of Rent Income on lease of property will not amount to Real Estate business and it should be permitted.
Can one Apply the FDI guidelines for Buying and Leasing property outside India if Notification No FEMA 120 is silent on it?
In the definition of Real Estate Activity As per Notification No FEMA 120/RB-2004 Leasing of Immovable property outside India is not mentioned in the prohibited activities under Real Estate Business Definition Nor does it form a part of the Inclusions, which is explained by FAQ no 62 of ODI as given below:
Q. Is development/construction (and thereafter, sale) of residential /commercial premises by an overseas Joint Venture (JV) or Wholly Owned Subsidiary (WOS) treated as real estate business under ODI regulations (FEMA Notification No. FEMA 120/RB-2004 dated July 7, 2004 as amended from time to time)? (Overseas Direct Investment (ODI) FAQ 62)

Ans - No. In terms of regulation 5(2) read with Regulation 2 (p) of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, buying land (along with building/pre-existing structures) for construction/development of residential/commercial premises (before selling) as one integrated core activity, is not treated as real estate business activity.

Considering the clarification given in FAQ 62 of ODI it could be concluded that Leasing of Immovable property after construction could be permitted, But since there is no clarification given by Reserve Bank regarding buying and Leasing of property, It is advisable to approach the Reserve Bank of India in such cases and get the Clarification/Approval on the same

4. Exemptions

i. Property Held by a PRII who is a national of a foreign state;
ii. Property acquired by a PRII on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.
iii. If Property is acquired on a lease not exceeding five years
(As per Regulation 4)

5. Acquisition & Transfer of Foreign Security outside India

5.1 A PRII can acquire foreign security by way of:

i. Holding, Owning and Transferring Approval of Foreign Securities as allowed under Sec 6(4) of the FEMA as referred to in paragraph 2 of the Introduction
ii. Through funds in RFC Account
iii. Through the LRS route, which allows selling of foreign security as well as retaining the funds abroad

iv. Acquisition under notification 120 of FEMA for a bonafide business activity (as discussed in the earlier article of Investment outside India). Now we can consider the other aspects of Overseas security in the following paragraph:

A. A PRII being an Individual may acquire foreign securities by way of:
a) Gift from a PROI
b) Cashless Employees Stock Option Scheme issued by a Company Incorporated outside India. Provided there is no remittance from India
c) Inheritance from a person whether resident in or outside India.
d) Qualification shares issued by an entity incorporated outside India for holding the post of a director in the entity. Subject to certain conditions
e) Accepting shares issued by a Foreign company to a PRII who is an employee or a director of Indian office or branch of a foreign entity or of a

subsidiary in India of a foreign entity or of an Indian company in which foreign entity has direct or indirect equity holding, may accept the shares offered by such foreign entity. Subject to certain conditions.

B. A Domestic Depository may acquire, hold and transfer equity shares of eligible company resident outside India, being the underlying shares for the purpose of issuing IDRs as may be authorized by such company or its Overseas Custodian Bank.

5.2 A PRII can transfer Foreign security by way of:

i. Gift to a relative who is a PROI upto the LRS limit
ii. Inheritance to a PROI or PRII
iii. Sale of Security to a PROI by a PRII, thus transfer through sale of Foreign Security to a PRII is not permitted

6. Acqusition of Currency:

Currency can be acquired by PRII under Current Account Transaction Rules for various bona fide purposes such as travel, maintenance of relatives, Medical, Educational etc by Individuals as well as purposes of setting up education Chair feasibility study etc by Non Individuals.

It can also be acquired overseas by Gift or inheritance or as Income

Currency can be used only for the purposes for which it is granted and subject to certain allowance for possession it must be surrendered to the Authorised dealer.

Rules are framed to use the Foreign Exchange through currency, traveller's cheques, debit and credit cards.

It can be used only outside India most of the time and hence Currency rules for its export and Import are also framed including it's repatriation and surrender.

Certain overseas Foreign Currency accounts are also permitted to PRII as well as rules for its closure.

Transactions in Foreign exchange are also required to be carried out through authorised dealer only with a restriction to compensatory transactions in India for payment of rupees India against foreign exchange outside India and vice versa. (Sec3 of FEMA)

We will deal with these aspects in detail in the next article.

7. <u>Conclusion</u>

Sr.No	Transferee	Gift	Inheritance	Sale
Immovable Property Outside India				
1	PRII	Permitted	Permitted	Not Permitted

2	PROI	Not Permitted	Not Permitted	Permitted
Foreign Security Outside India				
3	PRII	Not Permitted	Permitted	Not Permitted
4	PROI	Permitted**	Permitted	Permitted
Foreign Exchange				
5	PRII	Not Permitted	Permitted	Not Permitted
6	PROI	Permitted**	Permitted	Permitted

* All the Above transfers are done by a PRII
** Upto LRS Limit of US$ 2,50,000

It may be inferred from the above that law relating to Immovable Property, Foreign Security and Foreign exchange in case of its acquisition and transfer is different. For Eg: Inheritance of overseas immovable property from a PROI is not permitted in favour of PRII where as in Securities transfer is permitted.

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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. 34, DATED 24.05.2019

"Voluntary Retention Route" (VRR) For Foreign Portfolio Investors (FPIS) Investment in Debt.

Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to the following regulations, as amended from time to time, and the relevant directions issued under these regulations.

a. Foreign Exchange Management (Permissible Capital Accounts Transactions) Regulations, 2000 notified *vide* Notification No. FEMA 1/2000-RB dated May 03, 2000;

b. Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 notified *vide* Notification No. FEMA 3(R)/2018-RB dated December 17, 2018;

c. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 notified *vide* Notification No. FEMA.20(R)/2017-RB dated November 07, 2017; and

d. Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 notified *vide* Notification No. FEMA 25/RB – 2000 dated May 03, 2000.

2. AD Category – I banks may refer to A.P.(DIR Series) Circular No. 21 dated March 01, 2019 on 'Voluntary Retention Route' (VRR) for Foreign Portfolio Investors (FPIs) investment in debt. Based on the feedback received the directions have been revised as given in the Annex. These changes include, *inter alia*, the following:—

a. Introduction of a separate category, viz., VRR-Combined (see para 2.x, Annex).

b. The requirement to invest at least 25% of the Committed Portfolio

Size within one month of allotment has been removed (see para 6.a, Annex).

c. FPI are provided with an additional option at the end of the retention period, *viz.*, continue to hold their investment until the date of maturity or the date of sale, whichever is earlier (see para 6.c, Annex).

3. FPIs that were allotted investment limits under the 'tap' open during March 11, 2019 - April 30, 2019 may, at their discretion, convert their full allotment to VRR-Combined.

4. These directions shall be applicable with immediate effect.

5. The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/ approvals, if any, required under any other law.

Notifications

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

SUPREME COURT OF INDIA

Maars Software International Ltd. *vs.* Union of India

April 2, 2019

Applicable Sections:

Section 8 of **the** Foreign Exchange Management Act, 1999

Decision:-

Appellant company was engaged in business of software exports. ED carried out an investigation in affairs of company to examine genuineness of internal affairs of company and also to verify various international dealings and business operations which company had executed with its overseas customers involving huge foreign exchequer. On basis of said investigation ED filed a complaint before Adjudicating Authority that appellant company had failed to repatriate proceeds of export and thus, had contravened provisions of section 8 of FEMA. Adjudicating Authority imposed a penalty of Rs. 4 crores on company and Rs. 1 crores on second appellant,

who was Managing Director of company. Appellants filed materials to show as to what steps they had taken to repatriate export proceeds. Tribunal considered said material, set aside impugned order and directed authorities to refund amount which was deposited by appellants in these proceedings for filing appeal. However, High Court did not examine case of parties in context of material placed by appellant and instead, proceeded on wrong assumption that since appellants did not file any material, a case was made out against them. Since observation of High Court was contrary to record of case and hence, interference in impugned order passed by High Court was called for.

APPELLATE TRIBUNAL FOR FOREIGN EXCHANGE MANAGEMENT ACT, NEW DELHI

Dr. D. Rewatha Thera *vs.* Joint Director, Directorate of Enforcement, Lucknow

JANUARY 23, 2019

Applicable Sections:

Section 4, read with section 8 of the FEMA, 1999, section 12 of the Foreign Contribution (Regulation) Act, 2010 and regulation 3 of the Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange), 2000.

Decision:-

The appellant was a general secretary of society incorporated in India. It was a case of society that it inherited said amount as per voluntary settlement deed executed by settlors being persons resident outside India. Since, it was not registered under Foreign Contribution (Regulation) Act, and was prohibited from accepting foreign contribution; it moved an application in office of Ministry of Home Affairs for obtaining prior permission of Central Government under Foreign Contribution (Regulation) Act for acceptance of foreign contribution. However no permission was granted, governing body of society decided to transfer said amount to bank account of society as maintained in Sri Lanka till Home Ministry grant permission. Undisputedly, had moved an application in office of Ministry of Home Affairs much prior to realization of said amount for granting permission for repatriation of said amount. Then, by transferring these funds in Sri Lanka and by making various applications to Home Ministry for granting permission for repatriation of said amount, the society had taken all reasonable steps to realize and repatriate foreign currency in India. Thus, the society could not be held guilty of violating provisions of section 4 in view of facts and circumstances of instant matter.

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BACKBONE OF RERA: THE REAL ESTATE REGULATORY AUTHORITY[1]

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

Nainshree Goyal, Adv.
Associate Lawyer
SHARNAM LEGAL

The Real Estate Regulatory Authority (RERA) will monitor and govern the overall progress of the real estate project right from its inception and its reign continues till the project is handed over to the allottees after construction.

Apart from regulating the real estate sector in general and the specific real estate projects under its domain RERA has brought in lot of comfort to the allottees in terms of their dealing with the Promoters for now they are assured that there is a strong regulator put in place to monitor the progress and growth of the real estate project.

It would not be exaggerative to treat Real Estate Regulatory Authority as the backbone of the Real Estate Law. RERA is vested with sweeping powers to accomplish its objective of sustaining, fostering and nurturing the real estate sector.

With this background let us now discuss the relevant statutory provisions of RERA as enshrined in the RERA ACT 2016.

Establishment and incorporation of Real Estate Regulatory Authority- Section 20

The appropriate Government i.e. the respective state government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers given to it and to perform the functions assigned to it under the Act under chapter V. The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority. Further, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be. Until the establishment of a Regulatory Authority under the section 20 of the Act, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department, as the Regulatory Authority for the purposes under the Act. After the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall be transferred to the Regulatory Authority established and shall be heard from the stage such applications, complaints or cases are transferred. The Authority shall be a body

[1] Series No. 5/2019

corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

Composition of Authority (Section 21 and Section 22)

The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at-least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration. It may be noted that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government. Further, a person who is or has been in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.

Term of office of Chairperson and Members (Section 23)

The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-five years, whichever is earlier and shall not be eligible for reappointment. There must not be any financial or other interest which may affect the function as a member.

Salary and allowances payable to Chairperson and Members (Section 24) must not be varied to the disadvantage along with other terms and conditions of service. The Chairperson or a member can relinquish his office by giving in writing three months' notice period or can be removed from the office as per Section 26 of this Act. Any vacancy caused to the office of the Chairperson or any other Member shall be filled-up within a period of three months from the date on which such vacancy occurs. As per Section 25, the Chairperson shall have powers of general superintendence and directions in the conduct of the affairs of Authority and shall also be presiding over the meetings of the Authority, manage and exercise the powers and administrative functions.

Removal of Chairperson and Members from office in certain circumstances (Section 26)

(1) The chairperson and the members can be removed from the office on duly being notified as per procedure notified when:

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence, involving moral turpitude; or

(c) has become physically or mentally incapable of acting as a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

(2) The Chairperson or Member shall not be removed from his office on the ground specified under clause (d) or clause (e) of sub-section (1) except by an order made by the appropriate Government after an inquiry made by a Judge of the High Court in which such Chairperson or Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Restrictions on Chairperson or Members on employment after cessation of office (Section 27)

(a)The chairperson or a member is not allowed to accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office;

(b) Act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or such Member had, before cessation of office, acted for or provided advice to the Authority;

(c) Give advice to any person using information which was obtained in his capacity as the Chairperson or a Member and being unavailable to or not being able to be made available to the public;

(d) Enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.

The Chairperson and Member is not allowed to communicate or reveal to any person any matter which has been brought under his consideration or known to him while in the powers.

Government with consultation of the authority can appoint officers and employees to discharge of their functions as per Section 28 under the Act.

There needs to be regular meetings maintaining the rules, quorum, business timings and such other rules made by the authorities under section 29 of the Act. If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting. The meeting is to be decided on the basis of majority of votes by the Members present and voting, and in the event of equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote. The questions which come up before the Authority should be disposed within a period of sixty days from the date of receipt of the application. However where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

Section 31 gives the provisions to file a complaint with the authority on being an aggrieved person against the promoter or real estate agent.

It must be kept in mind that "person" includes the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Functions of Authority

Main duties of authority are to promote healthy and transparent real estate sector and facilitate the growth for promotion of real estate sector (section 32). The ones in the Act are:

1) protection of interest of the allottees, promoter and real estate agent;
2) creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;
3) creation of a transparent and robust grievance redressal mechanism against acts of omission and commission of competent authorities and their officials;
4) measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;
5) measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;
6) measures to encourage grading of projects on various parameters of development including grading of promoters;
7) measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations;
8) measures to facilitate digitization of land records and system towards conclusive property titles with title guarantee;

9) to render advice to the appropriate Government in matters relating to the development of real estate sector;

Any other issue that the Authority may think necessary for the promotion of the real estate sector.

Advocacy and awareness measures under section 33 ensure that the authorities take measure to spread awareness. The government along with the authority can make policies and ensure to have its effect. The authority within 60 days, give its opinion to the appropriate Government for the same. The Authority needs to take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.

Other functions of authority under Section 34 include:

1) to register and regulate real estate projects and real estate agents required to be registered under the Act;
2) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
3) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;
4) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;
5) to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;
6) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the Act and the rules and regulations made thereunder;
7) to ensure compliance of its regulations or orders or directions made in exercise of its powers under the Act;
8) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of the Act.

Authority under section 35 has been vested with powers call for information, conduct investigation. The authority found it necessary to do so, then it may suo

moto order in writing and record reasons to call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing explanation relating to its affairs as the Authority may require. It can also appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent. The authority can exercise same powers as vested in a civil court like:-

(i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;
(ii) summoning and enforcing the attendance of persons and examining them on oath;
(iii) issuing commissions for the examination of witnesses or documents;
(iv) any other matter which may be prescribed.

Power to issue interim orders has been given under Section 36 to restrain any promoter, allottee or real estate agent from carrying on any act until the conclusion of such inquiry of until further orders. Powers of Authority to issue directions under section 37 says that it may issue such directions from time to time, to the promoters or allottees or real estate agents, as it may consider necessary and such directions shall be binding on all concerned.

Powers of Authority under Section 38

(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that— (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suomotu, make reference in respect of such issue to the Competition Commission of India.

The authority has power to rectify the order under section 39 within a period of two years from the date of the order made under the Act to amend to rectify any mistake.

Recovery of interest or penalty or compensation and enforcement of order, etc. may be made by the authorities under section 40 when a promoter or an allottee or a real

estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him.

GROUND REPORT ON THE STATUS OF RERA IMPLEMENTATION

It has been two years since the Real Estate (Regulation & Development) Act, 2016, came into force — the various provisions of the law became effective on May 1, 2017. Work is still on to develop the infrastructure required for the effective function of the reformatory law popularly shortened as the RERA, which is aimed at purging India's real estate sector of its many ills.

In some cases, states have not been able to set up the online portal they are supposed to for the benefit of the homebuyers.

Aside from the fact that the basic infrastructure for the functioning of the RERA is missing in many states, 28 States/UTs only have set up Real Estate Regulatory Authority out of total number of 36[1]. There is still lag in setting up authorities.

There are several other challenges in its way to become a success. For instance execution of the orders of the Authority does not have proper procedure. There is lag in execution as well.

CONCLUSION WITH A POSITIVE NOTE

A silver lining amidst the dark clouds can be found in the comments of Industry leaders on formation and functioning of RERA:

"*The RERA has brought an ample amount of semblance and discipline in the last two years. With the advent of the RERA, the ground realities, issues, problems and challenges facing the sector have been addressed in a dexterous manner".*

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[1] http://mohua.gov.in/cms/implementation-status.php

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

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

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

SEA PRINCES REALTY V/S MANOJ VOTAVAT & ORS.

The 7 appeals are by M/s. Sea princess Realty (Promoter) and 7 Appeals are by flat purchasers (Allottees) from the said Project. Both have assailed order of the Ld. Chairperson, MahaRERA dtd Jan. 16, 2018, passed in the respective complaints filed by Allottees. The Ld. Counsel for the promoter says the direction to pay interest itself is erroneous He says that the building is complete in all respects ready for occupation as the Occupation Certificate is issued by BMC on December 21, 2017. He contended that the order under challenge is harsh and detrimental to the interest of the promoter.The Ld. Counsel for the allottees has taken recourse to the information conveyed by the Promoter as on 9th January, 2018 on the RERA website which highlighted that the project as on that date was not complete as at some place it was 0%, 90% and in some case it is 95% of the work completed. If the project was incomplete as on 09.01.2018 as according to promoter, then Occupation Certificate issued cannot be termed as a legal document. He criticized the Occupation Certificate by further highlighting the photographs taken in the month of March 2018 and 3rd April 2018. He argued that strict against the promoter must be taken as hard earned money of the allottee is consumed.

The Tribunal found that it was unfortunate that the architect has toed to the tune of the promoter in certifying that the building is complete. It is not that only one or two elevators which are installed are non-functional but the recreational amenities, the clubhouse, the podium, the entrance, the staircases, scaffolding at the entrance of the wing, glass facades scaffolding at the floor lobby, floor lobby with building material, entrance lift door not functional, amphitheater is not complete which clearly indicated that the certificate issued by the architect was factually incorrect.

Thus, the tribunal ordered the promoter M/s. Sea Princess Realty to pay interest @ 10% p.a. as directed by Ld. Chairperson in the Order dated January 16, 2018 effective from 1st January, 2017 till actual handing over the individual flat to each of the allottees

duly complete in all respect with amenities. The Secretary MahaRERA is also requested to independently initiate action under the provisions of RERA against Mr. Manoj Dubal (architect) for issuing factually incorrect Certificate.

SAMAJ KALYAN CHS LTD & ors.V/S NIRAJ MANSUKHLAL VED & ors.

The complainants entered into a re-development agreement with the respondents to redevelop the plot/building. Therefore, the complainant alleged that the respondents failed to give possession and pay rent as agreed.Respondents made their contention and stated that nor the complainants are the allottees and neither the respondents are the promoter to the said matter. Therefore, the authority has no reason to entertain this issue.

On perusing the submissions made by all the parties to the case, the authority held that the complainants are in fact the promoters in the project and not the allottees as Societies are land owners who are causing construction of project for selling part of it and land owners comes under the definition of the promoter. Also, execution of separate agreements with the members of the society does not make the society as allottees. The authority also placed reliance over other ambits of definition of the promoter.Thus, authority gets jurisdiction in respect of disputes between the allottees and promoters which relates to the registered project or its phase only. The portion of the project (rehab component) which is not registered with the authority is beyond the control of the authority for which it cannot exercise its powers. Hence, authority concluded that dispute of co-operative society being a promoter with another promoter/developer cannot be entertained.Respondents were directed to mention the names of the respective societies as promoter of their respective projects registered with RERA and upload relevant agreements as well.

SUMAN DHANJIWADI CHOTALIA V/S NEELYOG CONSTRUCTION PVT LTD

The complainant has filed the complaint stating that complainant's grandfather was entitled to the plot of lands on which construction of project is being carried out by the respondent. The complainant further stated that the complainant along with other heirs is in possession of the said property and till date names of the predecessors of the complainant are appearing in "Other Rights" in the Property Card. He further pointed out that the respondent has failed to disclose all pending litigations in the project.The respondent argued the above contention by producing an Order of Dy. Director of Land Records stating wrongfully mentioning of names in the Property Card. He further argued that litigation details uploaded on RERA website are complete in all respect.On verifying the above facts, authority concluded that the dispute between the complainant and the respondent is of civil nature. Moreover, the complainant failed to point out any

contravention of RERA (Act) and to prove his right of fair title over the property and therefore, he has no locus standi in the project. Accordingly, complaint is dismissed.

NEHA AGRAWAL V/S SHETH INFRAWORLD PVT LTD

The complainant booked an apartment with the respondent. They entered an agreement to sale dated 5th January, 2016. But the respondent has failed to handover possession of said apartment in agreed time. Therefore, complainant claims the interest for delayed possession.Respondent argued that primary reasons for delay in construction and handing over possession of said apartment were stop work notice for period May 2015 to Feb 2016, complainant's default in making timely payments, sand shortage, labour shortage, demonetization and heavy rainfall.After hearing the arguments of both the parties and in view of the above facts, the authority has directed the respondent to handover the possession of the said apartment, with Occupancy Certificate, to the complainant on or before 31st March 2018 failing which the respondent shall liable to pay interest as already 95% of the consideration has been received by the respondent.

SATISH B. SHETTY V/S GURUASHISH CONSTRUCTION PVT.LTD.

The complainant alleged that the respondent has failed to hand over the possession of booked apartment on agreed date. Therefore, claiming the refund of amounts paid to the respondent along with interest and compensation.The respondent submitted by virtue of an order passed by NCLT that he is under an Insolvency Resolution Process (IRP). Hence, the present complaint cannot be proceeded with until the IRP is completed.

On reviewing the facts in this case, it was clear that NCLT prohibited the institution of suits or continuation of pending suits or proceedings against the corporate debtor. Therefore, authority held that though the complainant is entitled for certain reliefs under RERA yet they can't be granted at this juncture. Hence, the complainant was given liberty to file a fresh complaint after finalization of the said IRP.

PUNJAB REAL ESTATE REGULATORY AUTHORITY

RAJINDER Kr. KALIA & ors V/S BARNALA BUILDERS & PROPERTY CONSULTANT

Complainants were promised the possession on or before 31.12.2012. However, possession of flats was taken by the complainants in the year 2013, on different dates, after making payments of balance amount. The main grievance of complainants is in regard to the delayed possession i.e. from 01.01.2013 till date of actual possession, which was completed in the year 2013, although offer for allotment was made before 31.12.2012. They have also demanded refund of parking charges and three years

maintenance charges of Rs.1 lakh paid in advance. They have also mentioned about minor variations in the specification and non-installation of generator of 793 KVA and solar power system for water heating etc. The complainants also alleged variations in the carpet area for which they want of refund of excess amount charged along with interest.

In his preliminary objections, the respondent has invoked arbitration clause as mentioned in the agreement to sell and wants the complainants to seek remedy as per the provisions of Arbitration and Conciliation Act, 1996 as well as Arbitration and Conciliation (Amendment) Act, 2017. This issue has already been settled by the Authority in Complaint titled as 'Surjit Kaur V/s M/s Omaxe Chandigarh Extension Developers Pvt. Ltd.' In view, thereof, the authority found no merit in objection raised by the respondent. Complainants failed to prove any evidence in support of their contention that maintenance charges were wrongly levied or objected to at the time of taking over of possession.

In view of facts mentioned above, the authority is of the view that complainants have not been able to make out a case for refund of any amount paid by them to the promoter and also interest on the same. The authority, therefore, found above said complaints having been filed at a belated stage with considerable delay of more than three years, without any supporting evidence. Hence, they are not entitled to refund of any amount or interest thereon. Complaints are accordingly dismissed being devoid of merit. However, they may file separate complaint in Form 'N' before the Adjudicating Officer for any claim of compensation.

MADHYA PRADESH REAL ESTATE REGULATORY AUTHORITY

SUNIL KUMAR V/S PARASNATH BUILDERS & DEVELOPERS

The complainant appeals that in context to the flat purchased by him from the respondent, he has not received the quality of service as promised to him. He complains about the following –

1. Electrical Fitting
2. Improper fixing of Doors
3. Water Facility
4. General Development

Thereby, prays for the provision of better facilities in the flat purchased for residential purpose.

The respondent replied to this complaint that no such matters was raised by the complainant at the time of accepting the possession vide letter dated 30.06.2017. Further, the complainant has made alterations in the electrical points & fittings but did not complain to the respondent.Later, the respondent on issuance of interim order by the

authority has made all the alterations as requested by the complainant. However, the complainant yet not satisfied with the work done and states that the door is not properly latched & water tube is not properly fixed in place.The authority found that the complaint is regard to internal maintenance of the flat. The submission made by the complainant does not point out any structural damage in the flat. Even though no issue is raised by the applicant as referred in Possession Acceptance Letter, he is provided with some remedy for maintenance. Therefore, no further proceedings in the case. Plaint stands dismissed.

YASH RAJ GUPTA V/S GLOBES HOUSING PVT LTD

The complainant booked a property with the respondent whereby sale transaction was executed on 16.09.2014 however he alleged that the possession of the said property is not provided to him till date and thereby claims the refund of amount originally paid to the respondent along with compensation.The respondent contended that the booked property of the complainant is ready for possession but the complainant himself is not accepting the possession so as to escape the liability for payment of maintenance, security deposit and tax & other revenue expenses.After hearing to the rival submissions, the authority concludes that as the sale agreement already executed & authority has no power to cancel such sale agreement& the property is already ready for use since 1 year. Therefore, applicant is directed to take possession immediately from respondent after payment of outstanding demand (if any). Thus, is not entitled to any compensation. Accordingly plaint is dismissed.

NOTIFICATIONS/CIRCULARS

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
ORDER NO: 07/ 2019
DATE: 08.02.2019

APPROVAL OF ASSOCIATION OF ALLOTTEES FOR ORDER UNDER SECTION 7(3) OF THE ACT

Whereas, Hon High Court by an order dated 6th December 2017 in the Writ Petitions No. 2737, 2711, 2255, 2708, 2727, 2256, 2730, in Neel Kamal Realtors Suburban Pvt. Ltd. and anr. Vs. Union of India and others had observed as follows: -

"It is possible that a genuine promoter, after making good efforts is unable to complete the project within the time stipulated at the time of initial declaration or under extended period. Considering the extent of power conferred on the authority under Section 7, we need to put up a harmonious construction on the provision of Section 6 of RERA. The law confers powers under Section 7 on the authority, in the larger public

interest to regulate the real estate sector. The authority shall be entitled to take into consideration reasons and circumstances due to which the project could not be completed within the extended aggregate period of one year as prescribed under Section 6. We, therefore, find that a balanced approach keeping in view the object and intent of the enactment and the rights and liabilities of promoter and allottee in larger public interest is to be adopted. The authority would exercise its discretion while dealing with the cases under Sections 6, 7, 8 read with Section 37 of RERA."

"We would observe that in case the promoter fails to complete the project in the prescribed time declared by him or the extended time under Section 6, then it shall not mean that the only outcome would be to oust the promoter from the project."

"In case the promoter establishes and the authority is convinced that there were compelling circumstances and reasons for the promoter in failing to complete the project during the stipulated time, the authority shall have to examine as to whetherthere were exceptional circumstances due to which the promoter failed to complete the project. Such an assessment has to be done by the authority on case to case basis and exercise its discretion to advance the purpose and object of RERA by balancing rights of both, the promoter and the allottee in such exceptional cases, the authority would be entitled to allow the same promoter to continue with the subject project for getting the remaining development work complete as per the directions issued by the authority. It shall not be interpreted to mean that in every case a promoter who fails to complete the project under the extended time under Section 6 would get further extension as of right."

Whereas, Section 7(3) of the Real Estate (Regulation and Development) Act, 2016 reads as under:

"7(3). The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

In cases, where the promoter of a MahaRERA registered project is unable to complete the project in the extended time of one year, granted under Section 6, further extension may be given only in those cases where the concerned association of allottees resolve that instead of revoking the registration, the existing promoter be permitted to complete the project in a specific time period and on payment of same fees as prescribed under the Rules for extension.

Provided that Association of allottees shall be Association or society or co-operative society or a federation or any other body by whatever name called, consisting of a majority of allottees having booked their plot or apartment or building, as the case may be, in the project.

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

Adv. Arpit Mathur
Jaipur

CASE LAWS

SUPREME COURT OF INDIA

JK Jute Mill Mazdoor Morcha *vs.* Juggilal Kamlapat Jute Mills Company Ltd.
CIVIL APPEAL NO: 20978 OF 2017
APRIL 30, 2019

Relevant Sections:-
Section 5(20) and 5 (21) of the Insolvency and Bankruptcy Code, 2016
Judgement:-
NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by trade union to corporate debtor. What is clear is that trade union represents its members who are workers, to whom dues may be owed by employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all.
A registered trade union which is formed for purpose of regulating relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

SUPREME COURT OF INDIA

Dharani Sugars and Chemicals Ltd. *vs.* Union of India
(CIVIL & PETITION) NOS. 66, 1399 OF 2018 AND OTHERS
APRIL 2, 2019

Relevant Sections:-
Section 225 of the Insolvency and Bankruptcy Code, 2016 read with sections 35AA, 35A and 35AB of the Banking Regulation Act, 1949
Judgement:-
Central Government has power to issue directions. If a specific provision of Banking Regulation Act makes it clear that RBI has a specific power to direct banks to move

under Insolvency Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside four corners of statutes which govern them, namely, RBI Act and Banking Regulation Act. Sections 35AA and 35AB which give RBI certain regulatory powers cannot be said to be manifestly arbitrary and therefore, these provisions are constitutionally valid. RBI can only direct banking institutions to move under Insolvency Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorization to do so; and (ii) that it should be in respect of specific defaults and therefore section by necessary implication, prohibits this power from being exercised in any manner other than manner set out in Section 35AA. Thus, circular dated 12-2-2018 issued by RBI by which RBI promulgated a revised framework for resolution of stressed assets is ultra vires section 35AA and has no effect in law and, therefore, all actions taken under said circular, including actions by which Insolvency Code has been triggered must fail along with said circular.

HIGH COURT OF DELHI

Amira Pure Foods (P.) Ltd. *vs.* Canara Bank

W.P. (C) NO: 5467/2019

MAY 20, 2019

Relevant Sections:-

Section 18 of the Insolvency & Bankruptcy Code, 2016

Judgement:-

Section 18 of the Insolvency & Bankruptcy Code, 2016 entitles Interim Resolution Professional / Resolution Professional (IRP/RP) to monitor assets and take control and custody of assets of corporate debtor. Thus, where IRP/RP approached DRAT for taking over godowns / properties of Corporate Debtor, DRAT could have recalled its order so that IRP / RP could take over assets of corporate debtor in exercise of its mandate under Insolvency & Bankruptcy Code, 2016. DRAT was not powerless to modify its own order whereby two court commissioners had been appointed to take over control of assets of corporate debtor.

L&T Finance Ltd. *vs.* Baywatch Shelters (P.) Ltd.

(NCLT- Chennai)

COMPANY PETITION (IB) NO: 637/2018

March 20, 2019

Relevant Sections:-

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016

Judgement:-

Financial creditor sanctioned loan to corporate debtor. In view of corporate debtor's failure to repay loan as per agreed terms, application was filed under section 7 along with balance sheet of corporate debtor reflecting debt liability and statement of account disclosing part payment made to financial creditor. Corporate debtor had taken no defence in respect of amount of loan availed. Financial creditor furnished material to prove existence of debt and default against corporate debtor and corporate debtor had also taken no defence in respect of same, CIRP application was to be admitted

Dena Bank *vs.* Kansal Building Solutions (P.) Ltd.
(NCLT - New Delhi)
COMPANY PETITION (IB) NO: 816 (PB) OF 2018
MARCH 25, 2019

Relevant Sections:-

Section 7 of the Insolvency and Bankruptcy Code, 2016, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Judgement:-

As per section 7(1), an application to initiate CIRP could be maintained by financial creditor either by itself or jointly with other financial creditors. Applicant financial creditor sanctioned various facilities including cash credit limit and term loan to corporate debtor. Corporate debtor committed default in repayment. Account of corporate debtor was declared as NPA. Later on, applicant filed instant application to initiate CIRP against corporate debtor. Along with said application, applicant also filed Bankers Certificate in terms of Bankers Book Evidence Act, 1891 and relevant documents necessary for proper disposal of instant application. Corporate debtor raised objection that cash credit was wrongly classified as NPA because it was still operative account and statement of accounts showed that even after date of NPA, account had been regularly debited and credited for various entries. It was also alleged that there had been discrepancy in amount claimed by applicant. It was noted that while dealing with an application under section 7, it is only to be considered as to whether there is a debt due in law and whether there is default in paying financial debt and it is beyond jurisdiction of Adjudicating Authority to examine as to whether account was correctly declared as NPA. Further, Tribunal was not supposed to ascertain quantum of amount of default. Since financial creditor had placed on record voluminous and overwhelming evidence in support of claim as well as to prove default and, moreover, application of financial creditor was complete and there was no disciplinary proceeding pending against proposed RP, said application was to be admitted.

Optiemus Infracom Ltd. *vs.* Indus Mobile Distribution (P.) Ltd.
(NCLT- Chennai)
CP (IB) NO: 763/2018
MARCH 28, 2019

Relevant Sections:-
Section 9 of the Insolvency and Bankruptcy Code, 2016, read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Judgement:-
Operational creditor was distributor of mobile handsets. It supplied mobile handsets and its accessories to corporate debtor and raised invoices for same. Corporate debtor defaulted in payment. Thus, operational creditor filed instant application to initiate insolvency resolution process. It was found that along with said application, in compliance of provisions of section 9 operational creditor had filed an affidavit deposing therein that corporate debtor had not given notice of dispute or raised any dispute regarding unpaid operational debt. Bank Certificate pertaining to its account had also been placed on record. Since operational creditor had fulfilled all requirements of law for admission of application under section 9 and therefore instant application to initiate insolvency resolution process against corporate debtor was to be admitted.

Tech Megacorp International (P.) Ltd., *In re*
(NCLT- Chennai)
MA NO: 236/2019 AND TCP/114/IB/2017
APRIL 2, 2019

Relevant Sections:-
Section 54, read with section 35, of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Pursuant to order for liquidation of corporate debtor, claims from stakeholders were received and list of stakeholders was prepared by liquidator. No claim from IT department or any statutory authorities were received. In final report submitted under section 35, liquidator stated that neither record, document, books of account were available, nor any of Directors / Promoters of corporate debtor was traceable and, hence, liquidation process could not be effectively followed up and no valuers could be appointed in absence of financial records and any discoverable assets, as prescribed. Said final report provided that there was no legal proceeding instituted, concluded or pending for and against corporate debtor during pendency of liquidation proceedings. Corporate debtor was to be ordered for dissolution.

Anuj Bajpai *vs.* State Bank of India
(NCLT - Mum.)
MA NO: 1123 OF 2018 AND CP NO. 172 / IBC / NCLT / MB / MAH / 2017
APRIL 8, 2019

Relevant Sections:-
Section 52 & 53 read with sections 29A and 35 of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Financial creditor, SBI, had filed a petition under section 7 and liquidation order against corporate debtor was passed. Applicant 'A' was appointed as liquidator. Applicant filed application for direction to SBI that if it wanted to opt out of liquidation, no contravention of section 35 would take place. SBI was granted permission to opt out of liquidation process, however, a bar was imposed on secured creditors to sell assets of corporate debtor to disqualified persons under section 29A. On facts under heading 'Corporate liquidation process - Secured creditor in', prayer of liquidator for direction to SBI to pay all sums due to any workman or employee from provident fund, pension fund and gratuity fund was to be rejected as EPF dues are not treated as assets to be covered in liquidation estate, however, same were liability of corporate debtor which had to be paid by liquidator as per section 53, and not by secured creditor out of proceeds from sale of secured assets if it exercised its option under section 52(1)(b).

IVL Finance Ltd. *vs.* Incom Cables (P.) Ltd.
(NCLT - New Delhi)
CP IB NO: 759(PB) OF 2018
APRIL 8, 2019

Relevant Sections:-
Section 7, Section 12A and Section 238 of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Since, instant petition was complete as per requirements of section 7(2) and other conditions prescribed by rule 4(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and there were overwhelming evidence to prove default, same was to be admitted. It is also held that provisions of Code are to be overriding other laws. Thus pendency of proceedings before arbitrator would not cause any impediment with regard to initiation of CIRP.
Further held that object of the I&B Code is to resolve insolvency which cannot be achieved unless petition to initiate CIRP is admitted. Even said petition can be withdrawn after admission if requirement of section 12A are fulfilled. Before

constitution of CoC, petition can be withdrawn by filing an application under Rule 11 of NCLT Rules, 2016

Padmanabhan Venkatesh *vs.* V. Venkatachalam
(NCL-AT) NEW DELHI
COMPANY APPEAL (AT) (INSOLVENCY) NOS. 128, 220 & 247 OF 2019
I.A. NO: 675 OF 2019
APRIL 8, 2019

Relevant Sections:-
Section 31, read with sections 25 and section 60 of the Insolvency and Bankruptcy Code, 2016

Judgement:-
Resolution plan must ensure not only maximization of value of assets of corporate debtor but also value of assets of financial creditors and operational creditors. Resolution Professional of corporate debtor filed an application for acceptance of resolution plan approved by CoC. On perusal of said resolution plan, it was evident that liquidation value was Rs. 597.54 crores, however, upfront payment suggested by resolution applicant was less i.e. 477 crores and therefore, said resolution plan was against section 30(2)(b). Successful resolution applicant should increase upfront payment of Rs. 477 crores to Rs. 597.54 crores by paying additional Rs. 120.54 crores approximately to make it at par with average liquidation value of Rs. 597.54 crores and deposit Rs. 120.54 crores by improving resolution plan in Escrow Account. If successful resolution applicant failed to undertake payment of additional amount of Rs.120.54 crores, plan so approved would be set aside and thereafter, Adjudicating Authority would pass appropriate order in accordance with law.

Dharnendra Enterprise *vs.* H.V. Synthetics (P.) Ltd.
(NCLT - Ahd.)
C.P. (IB) NO: 117/9/NCLT/AHM/2018
APRIL 9, 2019

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

Judgement:-
Operational creditor supplied different chemicals to corporate debtor. Amount was due by corporate debtor. Financial creditor issued demand notices but corporate debtor refused to accept same. Only when CIRP application was filed respondent made part payment. Despite repeated efforts by financial creditor, corporate debtor had neither come

forward for settlement nor appeared before Tribunal. CIRP application was to be admitted.

Guneet Pal Singh Majitha *vs.* Dharmendra Kumar
(NCL-AT) NEW DELHI
COMPANY APPEAL (AT) (INSOLVENCY) NO: 752 OF 2018
APRIL 11, 2019

Relevant Sections:-
Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016
Judgement:-
Respondent was owner of office space. He entered into an agreement to sell said property to appellant for a sum of Rs.3.75 crores, out of which, 1.25 crores was paid by appellant as advance money. As per said agreement, it was specifically agreed between parties that in case respondent was not able to handover possession of property within stipulated time, respondent could return advance money to appellant within time span of 120 days subject to an additional payment towards interest in addition to repayment of amount advanced for purchase of property. It was also agreed between parties that in case respondent desired to refund advance money, then a minimum interest of advance given by appellant would be paid by respondent towards opportunity cost of fund used in addition to repayment of advance amount. From said agreement, it was clear that appellant was an allottee and amount was disbursed by him towards consideration of time value of money. Thus, appellant came within meaning of 'financial creditor'.

Sunil Jain *vs.* Punjab National Bank
(NCL-AT) NEW DELHI
COMPANY APPEAL (AT) (INSOLVENCY) NO: 156, 180 & 481 OF 2018
COMPETANT CASE (AT) NO: 10 OF 2018
APRIL 24, 2019

Relevant Sections:-
Section 31 and 5(13) of the Insolvency and Bankruptcy Code, 2016
Judgement:-
Two resolution plans were received by RP, one from appellant and other from company 'C'. While evaluating suitability, feasibility and commercial viability of corporate debtor, CoC found that resolution plan submitted by resolution applicant 'C' was superior than resolution plan submitted by appellant. Thus, impugned order passed by Adjudicating Authority rejecting resolution plan submitted by appellant could not be interfered with. Further where operational creditor, a supplier of coal, supplied same to corporate debtor during period of CIRP to keep corporate debtor as a going concern, it was duty of RP to

include cost incurred towards said supplies in 'resolution process cost' for payment in favour of operational creditor.

Ram Ratan Kanoongo *vs.* Sunil Kathuria
(NCLT - Mum.)
MA 436/2018 & CP NO: 172/IBC/NCLT/MB/MAH/2017
MAY 7, 2019

Relevant Sections:-
Section 19(2), 45, 66 read with Section 26 of IBC, 2016 and section 48, 67, 70, 71, 72 and 73 of the Code

Judgement:-
Liquidator noticed syphoning off of funds of corporate debtor and filed application praying for a direction to respondent directors / promotes to pay sums in respect of benefits received by them from corporate debtor; respondents were directed to return syphoned sums and to revert back an equal amount of benefits received by them from corporate debtor

NOTIFICATION

1. **NOTIFICATION NO. G.S.R. 378(E) [F.NO. 30/68/2018-INSOLVENCY], DATED 21-5-2019**
   Insolvency and Bankruptcy Board of India (Salary, Allowances and Other Terms and Conditions of Service of Chairperson and Members) Third Amendment Rules, 2019-Amendment in Rule 3

CIRCULAR

1. **CIRCULAR NO30/21/2018-INSOLVENCY SECTION, DATED 8-5-2019**
   Invitation of public comments on the Draft Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019

2. **CIRCULAR NO. IBBI/IP/21/2019, DATED 2-5-2019**
   Temporary surrender and revival of professional membership of an Insolvency Professional

3. **CIRCULAR NO. IBBI/IP/020/2019, DATED 12-4-2019**

Compliance with Regulations 7 (2) (CA) and 13 (2) (CA) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

4. CIRCULAR F.NO.IP-12011/1/2019-IBBI, 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

PRESS RELEASE

IBBI PRESS RELEASE, DATED 14-5-2019
Insolvency Professional to act As Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2019

IBBI PRESS RELEASE, DATED 12-5-2019
Discussion Paper on amendments to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

IBBI PRESS RELEASE, DATED 8-5-2019
Discussion Paper on Corporate Insolvency Resolution Process along with Draft Regulations

IBBI PRESS RELEASE, DATED 8-5-2019
Discussion Paper on amendments to the Insolvency and Bankruptcy Board Of India (Information Utilities) Regulations, 2017 and the Insolvency and Bankruptcy Board Of India (Model Bye-Laws And Governing Board Of Insolvency Professional Agencies) Regulations, 2017

IBBI PRESS RELEASE, DATED 27-4-2019
Discussion paper on Corporate Liquidation Process along with Draft Regulations

IBBI PRESS RELEASE, DATED 26-4-2019
Invitation of public comments: Bankruptcy Process for Personal Guarantors to Corporate Debtors along With draft regulations

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JUDGMENTS

HIGH COURT FOR THE STATE OF TELANGANA

D.B. CIVIL WRIT PETITION Nos. 4764, 4769, 4892, 5074, 5130, 5329, 6952 and 7583 of 2019
APRIL 18, 2019

WP No.4764 of 2019:
P.V. Ramana Reddy S/o. P. Shankar Reddy, Managing Director, Infinity Metals Products India Ltd., Hyderabad …. Petitioner
VERSUS
Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.4769 of 2019:
G. Srinivasa Raju S/o.O. Ramakrishna Raju, Director M/s.Sujana Universal Industries Ltd, Hyderabad …. Petitioner
VERSUS
Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.4892 of 2019:
Venkata Satya Dharmavathar Bollina, S/o. Late Bhapiraju, Director, M/s.Hindustan Ispat Pvt. Limited, Hyderabad …. Petitioner
VERSUS
Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.5074 of 2019:
Balarama Krishna Mandava S/o. M. Kotaiah, Director, M/s. EBC Bearings India Limited, Plot No.10, Bollaram, Hyderabad …. Petitioner
VERSUS
Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.5130 of 2019:

M/s. VS Ferrous Enterprises Private Limited, Hyderabad, Rep. by Authorised Sri Vedula Sairam and others …. Petitioner

VERSUS

Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.5329 of 2019:

Smt. Jagannagari Ragavi Reddy W/o. J. Satya Sridhar Reddy, Partner of M/s.Hyderabad Steels, Hyderabad …. Petitioner

VERSUS

Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.6952 of 2019:

Challa Durga Adi Deva Vara Prasad, S/o.Challa Rama Somayaji, Chief Financial Officer, M/s.MSR India Ltd, Medak District …. Petitioner

VERSUS

Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

WP No.7583 of 2019:

Telapolu Ram Prasad S/o. Balakoteshwara Gupta, Ranga Reddy District …. Petitioner

VERSUS

Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others …. Respondents

For the Petitioner (S): Sri R. Raghunandan Rao, Sri Kailash Nath PSS, Sri T. Niranjan Reddy, Sri Laxmi Kanth Reddy Desai

For the Respondent (S): Sri K. M. Nataraj, Sri B. Narasimha Sarma, Sri K. Lakshman, Asst Solicitor General

The Division Bench of the Telangana High Court had observed that sub Section (1) of Section 69 of the Act empowers the Commissioner to order the arrest of a person, when such a person is believed to have committed a cognizable and non-bailable offence.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
HON'BLE SRI JUSTICE P. KESHAVA RAO

COMMON ORDER: ***(Per Hon'ble Sri Justice V. Ramasubramanian)***

1. Challenging the summons issued by the Superintendent (Anti Evasion) of the Hyderabad GST Commissionerate, under Section 70 of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act') and the invocation of the penal provisions under Section 69 of the Act, the Directors (Past and/or present) of a few Private Limited Companies, a Chief Financial Officer of a company and the Partner of a Partnership Firm have come up with the above writ petitions.

2. We have heard Mr. R. Raghunandan Rao and Mr. T. Niranjan Reddy, learned Senior Counsel appearing for the petitioners and Mr. K.M.Nataraj, learned Additional Solicitor General appearing on behalf of the Union of India.

Facts in brief

3. Since the facts out of which these writ petitions arise, differ marginally from each other, we shall bring out the facts of each case separately:

(i) Brief facts in WP No.4764 of 2019:

The petitioner in this writ petition is the Managing Director of a Company, by name, Infinity Metals Products India Limited, engaged in the manufacture of iron and steel products. The Company is a listed company. A search was conducted in the premises of the Company by the officials of the GST Commissionerate on 27.02.2019 and a summon dated 27.02.2019 was issued to the petitioner under Section 70 of the CGST Act calling upon the petitioner to appear on 28.02.2019, to give evidence truthfully on the matters concerning the enquiry. According to the petitioner, he was traveling on an urgent work on 27.02.2019 and hence, he made a request to grant time for appearing and cooperating with the investigation. But a second summon dated 01.03.2019 was issued directing the petitioner to appear on 05.03.2019. The petitioner admittedly did not appear on 05.03.2019, but gave a letter seeking two weeks time. Therefore, a third summon dated 05.03.2019 was issued calling upon the petitioner to appear for an enquiry on 07.03.2019 with a threat that prosecution would be launched if he failed to do so. Challenging the said summon, which was the third summon (dated 05.03.2019), WP No.4764 of 2019 is filed.

(ii) Brief Facts in WP No.4769 of 2019:

The petitioner in this writ petition is the Managing Director of another Public Limited Company known as Sujana Universal Industries Limited, which is engaged in the business of manufacturing Iron and Steel products. A search was conducted in the premises of the said company on 27.02.2019 and summon under Section 70 of the Act was issued on 27.02.2019 calling upon the petitioner to appear on 27.02.2019 at 5.00 p.m. According to the petitioner, he appeared in the office of the Superintendent (Anti

Evasion) at 5.00 p.m. on 27.02.2019 and he was questioned till about 8.00 p.m. Thereafter, he was asked to come back at 9.00 p.m. and it is the case of the petitioner that the enquiry which started at 9.00 p.m., on 27.02.2019 continued till 4.00 a.m. on 28.02.2019. Though he was directed to appear again in the afternoon of 28.02.2019, he could not appear as his health suffered a setback. Therefore, the petitioner claims to have given a letter dated 28.02.2019 seeking time till 04.03.2019. Even according to the petitioner he did not appear on 04.03.2019, but came up with the above writ petition challenging summon issued on 27.02.2019.

(iii) Brief Facts in WP No.4892 of 2019:

The petitioner in this writ petition is a Director of a Private Limited Company, by name, Hindustan Ispat Private Limited, engaged in the manufacture of iron and steel products. A search of the premises of the company was conducted on 27.02.2019 and a summon dated 27.02.2019 was served, calling upon the petitioner to appear for an enquiry. According to the petitioner, the staff of the company appeared for the enquiry and cooperated with the authorities. However, the petitioner claims to have found, after returning to Hyderabad on 07.03.2019, summon dated 27.02.2019 pasted on the door of his residence. Therefore, the petitioner has come up with the above writ petition.

(iv) Brief Facts in WP No.5074 of 2019:

The petitioner is one of the Directors of a Public Limited Company, which is also a listed Company, by name, EBC Bearings India Limited, engaged in the manufacture of iron and steel products. A search was conducted in the premises of the said company by the officials of the GST Commissionerate on 27.02.2019 and a summon dated 27.02.2019 was issued to him under Section 70 of the Act. According to the petitioner, he appeared before the concerned authority in response to the summons on 27.02.2019, but was made to wait till 1.30 p.m. Thereafter, he was questioned from 6.00 p.m. onwards on 27.02.2019 till 3.00 a.m. on 28.02.2019. The petitioner claims that he was harassed without food or water and was coerced to sign a statement at 3.00 a.m. on 28.02.2019, though the date was recorded in the statement as 27.02.2019. This led to the petitioner suffering a setback in his health. According to the petitioner he was admitted in the hospital on 28.02.2019, but he was again served with a summon calling upon him to appear for an enquiry on 01.03.2019. The petitioner claims to have sent a reply seeking time on the ground of ill health. According to the petitioner, the officials of the GST Commissionerate stormed the hospital on 06.03.2019 and threatened him with arrest and prosecution if he did not appear for investigation. Therefore, after discharge from the hospital on 07.03.2019 the petitioner approached this Court with a writ petition in W.P. No.4893 of 2019. When the writ petition came up for hearing on 08.03.2019, an

authorization for arrest issued by the Principal Commissioner of Central Tax on 07.03.2019 under Section 69 of the Act was produced. Therefore, challenging the arrest authorization issued on 07.03.2019, the petitioner came up with the above writ petition in WP No.5074 of 2019. (It may be recorded at this juncture that after an interim order of protection was granted in this writ petition, the first writ petition WP No.4893 of 2019 was withdrawn).

(v) Brief Facts in WP No.5130 of 2019:

A Private Limited Company, by name, V.S. Ferros Enterprises Private Limited, carrying on the business of trading in iron and steel products and three Directors of the said Company (one of whom claims to have resigned on 11.02.2019) have come up with this writ petition. According to the petitioners, a search was conducted on 27.02.2019. The petitioners claim that thereafter a summon dated 07.03.2019 addressed to the second petitioner herein (who claims to be a former Director) was served on one of the clerical staff of the 1st petitioner Company at about 7.00 p.m., calling upon the second petitioner to appear for an enquiry at 4.00 p.m. According to the petitioners, the summon was bereft of any details and the petitioners could not make out the nature and details of the investigation initiated against them. However, the petitioners claim that through a remand application filed by the concerned authorities, in the case of one J. Satya Sridhar Reddy, Proprietor of M/s. Bharani Commodities, they came to know that certain allegations were leveled against the 1st petitioner Company as though they passed on credit to the tune of Rs.26.95 crores by issuing GST invoices, for the period from July 2017 to December 2018, without either paying GST or without any transfer of goods. Therefore, challenging both the search conducted on 27.02.2019 and the summon issued on 07.03.2019 to the 2nd petitioner, the Company as well as two other Directors, together with the second petitioner, have come up with the above writ petition

(vi) Brief Facts in WP No.5329 of 2019:

This writ petition is filed by a lady, who claims to be a sleeping partner (her husband is the only other partner) in a Partnership Firm, by name, M/s.Hyderabad Steels. According to the petitioner, her husband J. Satya Sridhar Reddy is the Managing Partner of the Firm. On 27.02.2019 a search of the residential premises of the petitioner was conducted by the officials of the GST Commissionerate, on the basis of a search warrant. After the search, an undated summon under Section 70 of the Act was served calling upon the petitioner to appear on 27.02.2019 at 17.00 hours. According to the petitioner, she appeared for the enquiry and was detained under the guise of investigation till 1.30 a.m. on 28.02.2019 without providing food or water. The petitioner claims that a statement was forcibly extracted from her at 1.00 a.m. on 28.02.2019, with the date 27.02.2019. Thereafter, she

was allowed to go at 2.00 a.m. on 28.02.2019. According to the petitioner, a second summon was issued on 28.02.2019 asking her to appear at 3.30 p.m. The petitioner duly complied with the same and was again detained till 2.00 a.m. on the next day. During this period, the petitioner's husband was out of station and as soon as he returned to Hyderabad and appeared before the authorities, he was arrested and remanded to judicial custody. Therefore, apprehending that the same fate would fall on her, the petitioner has come up with the above writ petition, when a third summon dated 06.03.2019 was issued calling upon her to appear for the enquiry at 6.00 p.m. on 06.03.2019.

(vii) Brief Facts in WP No.6952 of 2019:

The Chief Financial Officer of a company, by name, MSR India Limited, has come up with the above writ petition claiming *inter alia* that the Director General of GST Intelligence registered a case against another company, by name, Flora Corporation Limited, for alleged creation of fake GST invoices without actual movement of goods and for allegedly passing on wrongful ITC to certain companies; that on the basis of a statement allegedly recorded from an authorized signatory of Flora Corporation Limited, the respondents issued summons for the appearance of the petitioner on 28.02.2019; that when he appeared at 2.00 p.m., on 28.02.2019, he was detained till 6.30 a.m. on 01.03.2019; that during this period he was made to sign a statement under coercion; that on 05.03.2019, the petitioner sent a letter retracting from the statement; that on 11.03.2019 he received summons for appearance on 12.03.2019; that fearing ill-treatment, he absconded himself; that again he received summons on 15.03.2019 for appearance on 18.03.2019; that the officers of the respondents are harassing all the employees of the company; that through one of the Directors of the Company, the petitioner was again summoned to appear on 01.04.2019 and that repeated summoning and the extraction of statements under threat of arrest are contrary to law.

(viii) Brief Facts in WP No.7583 of 2019:

The Managing Director of a company, by name, Suyati Impex Private Limited, has come up with the above writ petition contending that a search was conducted in the godown of the company on 02.04.2019; that he was served with a summon on the spot on 02.04.2019 and was whisked away in the vehicle brought by the 3rd respondent, to his office; that in the office a statement was recorded and he was released at 6.00 p.m. on 03.04.2019, after 26 hours; that a statement was extracted under coercion to the effect as though the petitioner created fake invoices in the names of five proprietary concerns run by him and through such fake invoices, without actual movement of goods, ITC claims were passed on; that the petitioner was again summoned to appear on 05.04.2019; and that since he apprehended arrest, he was compelled to file the writ petition.

4. Since the petitioners in these writ petitions were apprehending arrest, at the time when they came up before this Court, we granted interim protective orders, not to arrest the petitioners, but on condition that they appeared before the concerned authorities, whenever summoned and also cooperated in the investigation. Thereafter, the Superintendent (Anti Evasion), who is the 3rd respondent in most of the writ petitions, has come up with a counter affidavit.

Contents of the Counter – affidavit:

5. Since an investigation is now pending, which if results in the prosecution of the petitioners, may lead to the petitioners being tried for certain offences punishable under the Act, we will only record the gist of the averments contained in the counter affidavit for the purpose of completion of narration. We shall not dwell deep into the facts pleaded in the counter affidavits, since we do not want either the prosecution or the defence to get prejudiced by any finding however remotely we make on the facts. With this note of caution, we shall record the averments contained in the counter affidavits, for the purpose of completion of narration.

6. The counter affidavits proceed briefly on the following lines:

i) that a group persons including the petitioners herein and the person who is already detained and sent to judicial custody floated//incorporated several Proprietary concerns/ Partnership Firms/ Limited Companies;

ii) that such Proprietary concerns/Partnership Firms/Limited Companies claimed input tax credit on the basis of certain invoices, without there being any actual physical receipt of goods;

iii) that these entities also issued many such invoices from July 2017 onwards charging GST without supply of goods against the invoices;

iv) that these bogus/fake invoices were used to avail and utilise fraudulent ITC of GST by the recipients of such invoices

v) that one of these entities availed fraudulent input tax credit to the tune of Rs.17.60 crores without actual receipt of any goods and they also passed on the above credit by issuing fake GST invoices without supplying goods;

vi) that the very same premises of some of these entities were used by all others to do circular trading/bill trading;

vii) that the entity which availed ITC to the tune of Rs.17.60 crores, paid only a sum of Rs.5,676/-;

viii) that another entity availed fraudulent ITC to the tune of Rs.11.92 crores without actual receipt of goods;

ix) that a third entity availed fraudulent ITC to the tune of Rs.35.45 crores without actual receipt of goods, though they paid only a sum of Rs.20,645/-towards GST;

x) that yet another entity availed fraudulent ITC to the tune of 20.70 crores without actual receipt of goods;

xi) that one of these entities availed fraudulent ITC to the tune of Rs.47.28 crores, without receipt of any goods;

xii) that yet another entity availed fraudulent ITC to the tune of Rs.26.95 crores

xiii) that one of these entities availed fraudulent ITC to the tune of Rs.39.29 crores without actual receipt of goods;

xiv) that one company availed ITC to the tune of Rs.24.85 crores without actual receipt of goods, but paid a GST amount of Rs.27,853/- only;

xv) that many GST invoices and E-way bills of these entities showed that these entitles have shown transportation of goods weighing more than double the capacity of the lorries/trucks in which they were allegedly sent showing thereby that all these documents are fabricated documents;

xvi) that the creation of fake E-way bills is an offence punishable under the Act;

xvii) that one of these entities generated 10 invoices on a single day as though there was sale of a huge quantity of TMT Bars to another company, which created documents to show that all of them were resold by that company to a third company on the very same day;

xviii) that these documents clearly showed circular trading without there being any actual trading;

xix) that one of these entities availed huge credit facilities to the tune of Rs.15 crores from a nationalized bank, by showing such huge turnover without there being none

xx) that apart from indulging in circular trading among themselves, these companies also created fake GST invoices to enable their friendly business entities to take input tax credit;

xxi) that in this process, they defrauded the revenue to the tune of several crores of rupees and by availing credit facilities from Banks by showing these turnover, they also defrauded the banks;

xxii) that in response to the summons issued under Section 70 of the CGST Act, 2017, the concerned persons or their employees appeared and made voluntary statements on 27.02.2019 giving graphic details as to how huge ITC claims were generated on paper;

xxiii) that the statements made by some of the writ petitioners showed that these business entitles did not have any godown/warehouse and that they never bought and sold any goods;

xxiv) that the fraudulent input tax credit claimed by all these entities put together totals to a whooping sum of Rs.224.05 crores;

xxv) that the volume of turnover indicated in the GST invoices is about Rs.1289 crores

xxvi) that the petitioners were thus guilty of defrauding the revenue to the tune of Rs.225 crores;

xxvii) that the petitioners have thus committed offences under clauses (b), (c) and (f) of sub-section (1) of Section 132 of CGST Act, 2017, all of which may be punishable with imprisonment which may extend to 5 years apart from a fine;

xxviii) that the offences committed by the petitioners are cognizable and non-bailable in terms of Section 132(5) of the CGST Act;

xxix) that some of the petitioners, who obtained interim protective orders, failed to comply with the directions contained in the order to appear at the given time on the appointed date; and

xxx) that the present writ petitions are nothing but applications for anticipatory bail filed under Article 226 of the Constitution of India and hence, the writ petitions are liable to be dismissed.

Contentions on the side of the petitioners:

7. The main contentions of Mr. R. Raghunandan Rao and Mr. T.Niranjan Reddy, learned Senior counsel appearing for the petitioners are:

i) that the maximum punishment that could be imposed under Section 132 of the CGST Act, 2017 is only an imprisonment for 5 years, apart from fine and that therefore, under sections 41 and 41-A of the Code of Criminal Procedure, after its amendment, a person cannot be arrested so long as such person complies and continues to comply with the notice for his appearance;

ii) that though Section 41A (3) of the Code confers discretion upon the police officer to arrest a person despite such person complying with the notice, the same has to be done only for reasons to be recorded;

iii) that since it is always open to the respondents to scrutinise the books of accounts and pass orders of assessment reversing the input tax credits availed by the dealers under the Act, there is no necessity to arrest the petitioners, especially when no adjudication has taken place under the Act;

iv) that since the officers under the CGST Act, 2017 are not police officers and they are not entitled to seek custody of the persons arrested under the Act, the arrested person will only be remanded to judicial custody and hence there is no chance for the officers to conduct any enquiry with him after arrest.

v) that the power to order arrest, conferred upon the Commissioner under Section 69 (1) of the Act is available only in cases where he has reason to believe;

vi) that since the power under section 69(1) is made, under sub-Section (3), subject to the provisions of the Cr.P.C., the phrase "reason to believe" is to be understood in the context of how the said phrase is defined in Section 26 of the Indian Penal Code; and

vii) that in any case, all the offences under the Act are compoundable under section 138 of the CGST Act and hence arrest is wholly unnecessary.

8. The learned senior counsel for the petitioners relied upon a few decisions where the Supreme Court condemned pre trial arrest in cases where it was not necessary. They also relied upon a judgment of the Delhi High Court which opined that the Commissioner can have reason to believe in terms of Section 69(1), only after adjudication is made.

Contentions of the Learned Additional Solicitor General:

9. In response to the above contentions, it was argued by Mr. K. N. Nataraj, learned Additional Solicitor General

i. that Sections 41 and 41-A of Cr.P.C. will have no application to the cases on hand, since the stage at which the provisions of the Cr.P.C. 1973 would apply, is only after arrest, in view of Section 69(3),

ii. that the summons for appearance issued under Section 70 and the authorization for arrest issued under Section 69 (1) of the CGST Act 2017 do not come within the purview of the expression "Criminal Proceedings", since it is only after the launch of prosecution that criminal proceedings would commence,

iii. that persons like the petitioners herein are not described as accused anywhere in the CGST Act, 2017 so as to enable them to invoke the protection under Article 20 (3) of the Constitution of India

iv. that the Commissioner exercising power under Section 69(1) is not a police officer,

v. that Section 132 (1) lists out about 12 different types of offences under Clauses (a) to (l),

vi. that 5 out of these 12 offences are cognizable and non-bailable in view of Section 132(5) of CGST Act,

vii. that the remaining 7 offences are non-cognizable and bailable in view of Section 132(4) of the CGST Act,

viii. that under Section 136 of the CGST Act, a statement made and signed by a person on appearance in response to any summons issued under Section 70 of the Act shall be relevant, to the extent indicated therein, and

ix. that the petitioners are not entitled to convert the writ Court into a Court of anticipatory bail.

10. The learned Additional Solicitor General placed reliance upon several judgments of the Supreme Court to drive home the point that the proceedings under the Act till the stage of launching of the prosecution are not criminal proceedings and that the Commissioner or the appropriate officer under the Revenue Laws are not police officers and that at the stage of issue of notices under Section 70 of the Act, the Court cannot interfere.

11. We have carefully considered the above rival contention.

Discussion and Analysis:

12. We do not think that it is necessary for us to deal with some of the contentions raised by the learned Additional Solicitor General as the learned Senior Counsel appearing for the petitioners do not dispute the correctness of the same. The fact (1) that until a prosecution is launched, by way of a private complaint with the previous sanction of the Commissioner, no criminal proceedings can be taken to commence, (2) that persons who are summoned under Section 70(1) of the Act and persons whose arrest is authorised under Section 69(1) of the Act are not to be treated as persons accused of any offence until a prosecution is launched and (3) that an officer of the Central Tax authorised under Section 69(1) of the Act to arrest a person is not a police officer, are all not disputed by the learned Senior Counsel for the petitioners. Therefore, it is not necessary to consider in great detail, the decisions of the Supreme Court in **Badaku Joti Savant v. State of Mysore**, **Ramesh Chandra Metha v. State of West Bengal, Illias v. Collector of Customs**, **Percy Rustomji Basta v. State of Maharashtra**, **Veera Ibrahim v. State of Maharashtra** and **Poolpandi v. Superintendent, Central Excise**.

Broad propositions of law emerging out of the above decisions

13. However, the propositions of law that could be culled out from the aforesaid decisions, can be summed up in brief as follows:

i. that officers under various tax laws such as the Central Excise Act etc., are not police officers to whom Section 25 of the Indian Evidence Act 1872 would apply,

ii. that the power conferred upon the officers appointed under various tax enactments for search and arrest are actually intended to aid and support their main function of levy and collection of taxes and duties,

iii. that a person against whom an enquiry is undertaken under the relevant provisions of the tax laws, does not automatically become a person accused of an offence, until prosecution is launched,

iv. that the statements made by persons in the course of enquiries under the tax laws, cannot be equated to statements made by persons accused of an offence, and

v. that as a consequence, there is no protection for such persons under Article 20(3) of the Constitution of India, as the persons summoned for enquiry are not persons accused of any offence within the meaning of Article 20(3) of the Constitution of India.

14. The learned Senior Counsel appearing for the petitioners have no quarrel about the above propositions. In fact, the petitioners have not come up with these writ petitions contending (i) that the enquiry before the respondents partake the character of criminal proceedings and (ii) that the officers of Central Tax are police officers and that therefore the statements made to them are inadmissible. The petitioners are not even seeking the protection of Article 20(3) of the Constitution of India. On the other hand, the petitioners agree and undertake to appear before the officers and cooperate in the investigation. Their main grievance is about the possibility of their arrest and detention to custody. But the objection of the respondents is that writ proceedings are not to be converted into proceedings for anticipatory bail.

Whether Article 226 can be used as a substitute to section 438, Cr.P.C

15. What the petitioners seek in these cases is a direction to the respondents not to arrest them in exercise of the power conferred by Section 69(1) of the CGST Act, 2017. This in essence, is akin to a prayer for anticipatory bail. **Since no first information report gets registered before the power of arrest under Section 69(1) of the CGST Act, 2017 is invoked, the petitioners cannot invoke Section 438 of the Code of Criminal Procedure for anticipatory bail. Therefore, the only way they can seek protection against pre-trial arrest (actually pre-prosecution arrest) is**

to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

16. The contention of Mr. K.M. Nataraj learned Additional Solicitor General contended that writ proceedings cannot be converted into proceedings for anticipatory bail, is unacceptable. If the enquiry initiated by the Commissioner of GST is actually a criminal proceeding, then the petitioners can perhaps invoke the jurisdiction of this Court or of the Court of Sessions under Section 438 Cr.P.C. But, if the enquiry by the respondents is not a criminal proceeding and yet the respondents are empowered to arrest a person on the basis of a reason to believe that such a person is guilty of commission of an offence under the Act, then the only recourse available to such persons, to protect their personal liberties, is to invoke Article 226 of the Constitution of India.

17. It must be pointed out that despite the fact that **the enquiry by the officers of the GST Commissionerate is not a criminal proceeding; it is nevertheless a judicial proceeding**. This can be seen from sub-Section (2) of Section 70 of the CGST Act 2017. Section 70 of the CGST Act, 2017 reads as follows:

> *"**70.** (1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.*
>
> *Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code."*

18. Under sub-Section (1) of Section 70 of the CGST Act, 2017 the proper officer under the CGST Act 2017 has the power to summon a person either to give evidence or to produce a document. The power has to be exercised in the manner as provided in the case of a civil Court under the CPC. In other words, the Proper Officer under the Act can be taken to have been conferred with the powers conferred upon the civil Court under Order XVI CPC.

19. The interesting part of Section 70 is sub-Section (2) of Section 70. This sub-Section declares every enquiry to which Section 70(1) relates, to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. As a consequence, a person who is summoned under Section 70(1) of CGST Act, 2017, to give evidence or to produce document becomes liable for punishment, if he intentionally gives false evidence or fabricates false evidence or intentionally offers any insult or causes any interruption to any public servant.

20. Therefore, even if the enquiry before the Proper Officer under CGST Act, 2017 is not by its nature, a criminal proceeding, it is nevertheless a judicial proceeding and hence, the person summoned is obliged neither to give false evidence nor to fabricate evidence. He is also obliged not to insult and not to cause any interruption to the Proper Officer in the course of such proceedings.

21. A person, who faces the threat of arrest in a criminal proceeding, may be entitled to invoke Section 438 Cr.P.C., subject to 2 conditions. They are (i) that section 438, Cr.P.C. applies to the State in which the prosecution takes place and (ii) that the application of Section 438 Cr.P.C., is not ousted by the special enactment under which such a person is prosecuted. For instance, Section 438 Cr.P.C., is not applicable in some of the States such as the State of Uttar Pradesh. Similarly, the provision for anticipatory bail stands excluded by Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

22. Where the applicability of Section 438 Cr.P.C. is specifically excluded, the High Court would be extremely cautious in exercising the same power indirectly by resorting to Article 226 of the Constitution of India. In **Km. Hema Mishra v. State of Uttar Pradesh**, the Supreme Court noted the decision of the Constitution Bench in **Kartar Singh v. State of Punjab,** wherein it was held that a claim for pre-arrest protection is neither a statutory right nor a right guaranteed under Articles 14, 19 and 21 of the Constitution of India. Though the Constitution Bench held that there is no bar for the High Court to entertain an application for pre-arrest protection under Article 226 of the Constitution of India, it was held that the power should be exercised sparingly. In a separate but concurring judgment in **Km. Hema Mishra,** A.K. Sikri, J., as he then was, held that the High Court is empowered to entertain a petition under Article 226 of the Constitution of India, where the main relief itself is against arrest. After having said so, the learned Judge made the following observations:-

> *"Obviously, when provisions of Section 438 of Cr.P.C., are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused person would not be entitled to claim such a relief under Article 226 of the Constitution of India. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus."*

23. But, nevertheless, the learned Judge also held that the High Court is not completely denuded of its powers under Article 226 of the Constitution of India, to grant such a relief in appropriate and deserving cases. The learned Judge pointed out that this

power is to be exercised with extreme caution and sparingly in those cases where the arrest of a person would lead to total miscarriage of justice.

24. Therefore, the contention of the learned Additional Solicitor General that the writ petitions are not maintainable may not be correct in view of the decision of the Constitution Bench in **Kartar Singh** and the decision in **Km. Hema Mishra**. But, nevertheless, this Court has to keep in mind two things, namely, (1) the note of caution issued by the Supreme Court that this power should be exercised sparingly in appropriate cases and (2) that as a fundamental principle, a writ of Mandamus would lie only to compel the performance of a statutory or other duty. There is a fundamental distinction between a petition for anticipatory bail and the writ of mandamus to direct an officer not to effect arrest. A writ of mandamus would lie only to compel the performance of a statutory or other duty. No writ of mandamus would lie to prevent an officer from performing his statutory functions.

25. While this Court may have to look into the facts of these cases for examining whether the cases of the petitioners would fall under the category of exceptional cases as indicated in **Kartar Singh** and **Km. Hema Mishra**, this Court should also see whether by issuing the writ of Mandamus, we would be preventing the Commissioner or Proper Officer from performing any of their statutory functions.

26. Arguments were advanced on both sides on the question as to the stage at which the provisions of Cr.P.C. would come into play under Section 69 (3) of the CGST Act, 2017, especially for the purpose of finding out the applicability of Sections 41 and 41A of the Cr.P.C. Section 41A was inserted in the Code of Criminal Procedure by way of Criminal Procedure Code Amendment Act, 2008 and was further modified by another Amendment Act, 2010. Section 41A(3) of Cr.P.C., prohibits the arrest of a person who complies and continues to comply with a notice for appearance issued under sub-Section (1) of Section 41A of Cr.P.C. However, Section 41A(3) of Cr.P.C. also gives discretion to the Police Officer, for reasons to be recorded, to arrest the person even though he complied with and continued to comply with the notice under sub-Section (1) of Section 41A of the Code.

27. The argument of the learned Senior Counsel for the petitioners is that since the maximum punishment prescribed under Section 132 of the CGST Act, 2017 is imprisonment for five years and also since the petitioners have complied with the notices for appearance, there is no necessity for the Commissioner to order their arrest under Section 69 (1) of the CGST Act, 2017. This is in view of section 41-A (3) of the Code.

28. But, the reply of Mr. K.M. Nataraj, learned Additional Solicitor General, to the above contention is that the petitioners cannot invoke Section 41A Cr.P.C., since the

provisions of Cr.P.C. would become applicable under Section 69(3) of the CGST Act, 2017, only after the arrest of a person and not before.

29. Section 69 of the CGST Act, 2017 reads as follows:

> ***"69.*** *(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.*
>
> *(2) Where a person is arrested under sub-section (1) for an offence specified under subsection (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.*
>
> *(3) Subject to the provisions of the Code of Criminal Procedure, 1973,—*
>
> > *(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;*
> >
> > *(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station."*

Some incongruities in section 69 and 132, CGST Act

30. It can be seen from the language employed in sub-Sections (1), (2) and (3) of Section 69, that there are some incongruities. **Under sub-Section (1) of Section 69, the power to order arrest is available only in cases where the Commissioner has reasons to believe that a person has committed any offence specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017. The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017 are made cognizable and non-bailable under Section 132(5) of the CGST Act, 2017**.

31. Therefore, it is clear from sub-Section (1) of Section 69 of the CGST Act that **the power of the Commissioner to order the arrest of a person, can be exercised only in cases where such a person is believed to have committed a cognizable and non-bailable offence.** As we have pointed out elsewhere, Section 132(1) of CGST Act, 2017 lists out 12 different types of offences from clauses (a) to (l). The

offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 are declared cognizable and non-bailable under sub-Section (5) of Section 132 CGST Act, 2017. All the other offences specified in clauses (f) to (l) of sub-Section (1) of Section 132 of the CGST, 2017 Act are declared as non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act, 2017.

32. But the incongruity between Section 69(1) and sub-Sections (4) and (5) of Section 132 of CGST Act, 2017 is that **when the very power to order arrest under Section 69(1) is confined only to congnizable and non-bailable offences, we do not know how an order for arrest can be passed under Section 69(1) in respect of offences which are declared non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act.**

33. Section 132 of the CGST Act, 2017 reads as follows:

132. *(1) Whoever commits any of the following offences, namely:—*

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

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(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be noncognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

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34. If **CGST Act, 2017 is a complete code in itself in respect of (1) the acts that constitute offences, (2) the procedure for prosecution and (3) the punishment upon conviction, then the power of Commissioner, who is not a Police Officer, to order the arrest of a person should also emanate from prescription contained in the Act itself**. Section 69(1) of CGST Act, 2017 very clearly delineates the power of the Commissioner to order the arrest of a person whom he has reasons to believe, to have committed an offence which is cognizable and non-bailable. Therefore, we do not know how a person whom the Commissioner believes to have committed an offence specified in clauses (f) to (l) of sub-Section (1) of Section 132 of CGST Act, which are non-cognizable and bailable, could be arrested at all, since Section 69(1) of the CGST Act, 2017 does not confer power of arrest in such cases.

35. The fact that the power of arrest under Section 69(1) of the CGST Act, 2017 is confined only to cognizable and non-bailable offences, is also fortified by sub-Section (2) of Section 69 which obliges the Officer, who carries out the arrest to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours. The duty enjoined upon the Officer carrying out the arrest, to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours, is co-relatable under sub-Section (2) of Section 69 of the CGST Act, 2017 to Section 132(5) of the CGST Act, 2017 that deals only with cognizable and non-bailable offences.

36. But, interestingly, clauses (a) and (b) of sub-Section (3) of Section 69 of the CGST Act, 2017 deal in entirety only with cases of persons arrested for the offences which are indicated as non-cognizable and bailable. The phrase "subject to the provisions of the Code of Criminal Procedure" is used only in sub-Section (3), which deals in entirety only with the procedure to be followed after the arrest of a person who is believed to have committed a non-cognizable and bailable offence. While clause (a) of sub-Section (3) gives two options to the Officer carrying out the arrest, namely, to grant bail by himself or to forward the arrested person to the custody of the Magistrate, clause (b) confers the powers of an Officer incharge of a police station, upon the Deputy Commissioner or the Assistant Commissioner (GST), for the purpose of releasing an arrested person on bail, in the case of non-cognizable and bailable offences.

37. In other words, **even though Section 69(1) of the CGST Act, 2017 does not confer any power upon the Commissioner to order the arrest of a person, who has committed an offence which is non-cognizable and bailable, sub-Section (3) of Section 69 of the CGST Act, 2017 deals with the grant of bail, remand to custody and the procedure for grant of bail to a person accused of the commission of non-cognizable and bailable offences.** Thus, there is some

incongruity between sub-Sections (1) and (3) of Section 69 read with section 132 of the CGST Act, 2017.

38. Another difficulty with Section 69 of the CGST Act, 2017 is that sub-Sections (1) and (2) of Section 69 which deal with the power of arrest and production before the Magistrate in the case of cognizable and non-bailable offences, do not use the phrase "subject to the provisions of Cr.P.C." This phrase is used only in sub-Section (3) of Section 69 in relation to the arrest and grant of bail for offences which are non-cognizable and bailable, though no power of arrest is expressly conferred in relation to non-cognizable and bailable offences.

39. It is important to note that under sub-Section (4) of Section 132 of the CGST Act, 2017, all offences under the Act except those under clauses (a) to (d) of Section 132 (1), are made non-cognizable and bailable, notwithstanding anything contained in Cr.P.C. In addition, Section 67(10) of the CGST Act, 2017 makes the provisions of Cr.P.C. relating to search and seizure, apply to searches and seizures under this Act, subject to the modification that the word "Commissioner" shall substitute the word "Magistrate" appearing in Section 165 (5) of Cr.P.C., in its application to CGST Act, 2017.

40. Therefore, (1) in the light of the fact that Section 69(1) of the CGST Act, 2017 authorizes the arrest only of persons who are believed to have committed cognizable and non-bailable offences, but Section 69(3) of the CGST Act, 2017 deals with the grant of bail and the procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences and (2) in the light of the fact that the Commissioner of GST is conferred with the powers of search and seizure under Section 67(10) of the CGST Act, 2017, in the same manner as provided in Section 165 of the Cr.P.C., 1973, the contention of the Additional Solicitor General that the petitioners cannot take umbrage under Sections41 and 41A of Cr.P.C. may not be correct.

41. Though for the purpose of summoning of witnesses and for summoning the production of documents, the Proper Officer holding the enquiry under the CGST Act, 2017 is treated like a Civil Court, there are four other places in the Act, where a reference is made, directly or indirectly, to the Cr.P.C. They are (1) the reference to Cr.P.C. in relation to search and seizure under Section 67(10) of CGST Act, 2017, (2) the reference to Cr.P.C. under sub-Section (3) of Section 69 in relation to the grant of bail for a person arrested in connection to a non-cognizable and bailable offence, (3) the reference to Cr.P.C. in Section 132 (4) while making all offences under the CGST Act, 2017 except those specified in clauses (a) to (d) of Section 132 (1) of CGST Act, 2017 as non-cognizable and bailable and (4) the reference to Sections 193 and 228 of IPC in Section 70(2) of the CGST Act, 2017. Therefore, the

contention of learned Additional Solicitor General that in view of Section 69(3) of the CGST Act, 2017, the petitioners cannot fall back upon the limited protection against arrest, found in Sections 41 and 41A of Cr.P.C., may not be correct. As pointed out earlier, Section 41-A was inserted in Cr.P.C. by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008. Under sub-Section (3) of Section 41A Cr.P.C., a person who complies with a notice for appearance and who continues to comply with the notice for appearance before the Summoning Officer, shall not be arrested. **In fact, the duty imposed upon a Police Officer under Section 41A(1) Cr.P.C., to summon a person for enquiry in relation to a cognizable offence, is what is substantially ingrained in Section 70(1) of the CGST Act**. Though Section 69(1) which confers powers upon the Commissioner to order the arrest of a person does not contain the safeguards that are incorporated in Section 41 and 41A of Cr.P.C. we think Section 70(1) of the CGST Act takes care of the contingency.

42. In any case, the moment the Commissioner has reasons to believe that a person has committed a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as provided in Sections 41 and 41A of Cr.P.C. may have to be kept in mind.

43. But, it may be remembered that Section 41A(3) of Cr.P.C., does not provide an absolute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is entitled under Section 41A(3) Cr.P.C., for reasons to be recorded, arrest a person. **At this stage, we may notice the difference in language between Section 41A(3) of Cr.P.C. and 69(1) of CGST Act, 2017. Under Section 41A(3) of Cr.P.C., "reasons are to be recorded", once the Police Officer is of the opinion that the persons concerned ought to be arrested. In contrast, Section 69(1) uses the phrase "reasons to believe". There is a vast difference between "reasons to be recorded" and "reasons to believe.**"

44. It was contended by Mr. Niranjan Reddy, learned Senior Counsel for the petitioners that under Section 26 IPC, a person is said to have "reason to believe", if he has sufficient cause to believe. Therefore, he contended that an authorization for arrest issued under Section 69(1) of the CGST Act, 2017 should contain reasons in writing. But in one of the cases on hand, the authorization for arrest does not contain reasons. Therefore, it was contended that the authorization was bad.

45. But, as we have pointed, the requirement under Section 41A(3) of Cr.P.C. is the "recording of a reason", while the requirement under Section 69(1) of CGST Act, 2017 is the "reason to believe". In fact, on the question as to whether or not, reasons to believe should be recorded in the authorization for arrest, the learned Additional

Solicitor General submitted that reasons are recorded in files. The learned Additional Solicitor General also produced the files.

46. **If reasons to believe are recorded in the files, we do not think it is necessary to record those reasons in the authorization for arrest under Section 69(1) of the CGST Act.** Since Section 69(1) of the CGST Act, 2017 specifically uses the words "reasons to believe", in contrast to the words "reasons to be recorded" appearing in Section 41A(3) of Cr.P.C., we think that it is enough if the reasons are found in the file, though not disclosed in the order authorizing the arrest.

47. Once it is found that Article 226 of the Constitution of India can be invoked even in cases where Section 438 Cr.P.C. has no application (in contrast to cases such as those under the SC/ST Act where it stands expressly excluded) and once it is found that the limited protection against arrest available under Sections 41 and 41A Cr.P.C. may be available even to a person sought to be arrested under Section 69(1) of the CGST Act, 2017 (though the necessity to record reasons in the authorization for arrest may not be there), it should follow as a coronary that the writ petitions cannot be said to be not maintainable.

48. That takes us to the next question as to whether the petitioners are entitled to protection against arrest, in the facts and circumstances of the case. We have already indicated on the basis of the ratio laid down by the Constitution Bench in **Kartar Singh** and the ratio laid down in **Km. Hema Mishra** that the jurisdiction under Article 226 of the Constitution of India to grant protection against arrest, should be sparingly used. Therefore, let us see *prima facie*, the nature of the allegations against the petitioners and the circumstances prevailing in the case, for deciding whether the petitioners are entitled to protection against the arrest. We have already extracted in brief, the contents of the counter affidavits. We have summarized the contents of the counter affidavits very cautiously with a view to avoid the colouring of our vision. Therefore, what we will now take into account on the facts, will only be a superficial examination of facts.

49. In essence, the main allegation of the Department against the petitioners is that they are guilty of circular trading by claiming input tax credit on materials never purchased and passing on such input tax credit to companies to whom they never sold any goods. The Department has estimated that fake GST invoices were issued to the total value of about Rs.1,289 crores and the benefit of wrongful ITC passed on by the petitioners is to the tune of about Rs.225 crores.

50. The contention of the petitioners is that the CGST Act, 2017 prescribes a procedure for assessment even in cases where the information furnished in the returns is found to have discrepancies and that unless a summary assessment or special audit is conducted determining the liability, no offence can be made out under the Act.

Therefore, it is their contention that even a prosecution cannot be launched without an assessment and that therefore, there is no question of any arrest.

51. It is true that **CGST Act, 2017 provides for (i) self assessment, under Section 59, (ii) provisional assessment, under Section 60, (iii) scrutiny of returns, under Section 61, (iv) assessment of persons who do not file returns, under Section 62,** (v) **assessment of unregistered persons, under Section 63, (vi) summary assessment in special cases, under Section 64 and (vii) audit under Sections 65 and 66.**

52. But, to say that a prosecution can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act, 2017. The list of offences included in sub-Section (1) of Section 132 of CGST Act, 2017 have no co-relation to assessment. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses (b) and (c) of sub-Section (1) of Section 132 of the CGST Act. The prosecutions for these offences do not depend upon the completion of assessment. Therefore, the argument that there cannot be an arrest even before adjudication or assessment, does not appeal to us.

53. An argument was advanced by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that all the offences under the Act are compoundable under sub-Section (1) of Section 138 of the CGST Act, 2017, subject to the restrictions contained in the proviso thereto and that therefore, there is no necessity to arrest a person for the alleged commission of an offence which is compoundable.

54. On the surface of it, the said argument of Mr. Raghunandan Rao learned Senior Counsel for the petitioners is quite appealing. But, on a deeper scrutiny, it can be found that the argument is not sustainable for two reasons:

(1) Any offence under CGST Act, 2017 is compoundable both before and after the institution of prosecution. This is in view of the substantial part of sub-section (1) of Section 138 of the CGST Act, 2017. But, the petitioners have not offered to compound the offence, though ***compounding is permissible even before the institution of prosecution****.*

(2) Under the third proviso to sub-Section (1) of 138, compounding can be allowed only after making payment of tax, interest and penalty involved in such cases. Today, the wrongful ITC allegedly passed on by the petitioners, according to the Department is to the tune of Rs.225 Crores. Therefore, we do not think that even if we allow the petitioners to apply for compounding, they may have a meeting point with the Department as the liability arising out of the alleged actions on the part of the petitioners is so huge. Therefore, the argument that there cannot be any arrest as long as the offences are

compoundable is an argument of convenience and cannot be accepted in cases of this nature.

55. Another argument advanced by the learned Senior Counsel for the petitioners is that since the Proper Officer under the CGST Act, 2017, even according to the respondents is not a Police Officer, he cannot and he does not seek custody of the arrested person, for completing the investigation/enquiry. Section 69(2) obliges the Officer authorized to arrest the person, to produce the arrested person before a Magistrate within 24 hours. Immediately, upon production, the Magistrate may either remand him to judicial custody or admit the arrested person to bail, in accordance with the procedure prescribed under the Code of Criminal Procedure. There is no question of police custody or custody to the Proper Officer in cases of this nature. Therefore, it is contended by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that the arrest under Section 69, does not advance the cause of investigation/enquiry, but only provides a satisfaction to the respondents that they have punished the arrested person even before trial. According to the learned Senior Counsel, the arrest of a person which will not facilitate further investigation has to be discouraged, since the same has the potential to punish a person before trial.

56. But, the aforesaid contention proceeds on the premise as though the only object of arresting a person pending investigation is just to facilitate further investigation. However, it is not so. The objects of pre-trial arrest and detention to custody pending trial are manifold as indicated in section 41 of the Code. They are:

a) to prevent such person from committing any further offence
b) proper investigation of the offence;
c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;
d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;

Therefore, it is not correct to say that the object of arrest is only to proceed with further investigation with the arrested person.

57. It is true that in some cases arising out of similar provisions for arrest under the Customs Act and other fiscal laws, the Supreme Court indicated that the object of arrest is to further the process of enquiry. But, it does not mean that the furthering of enquiry/ investigation is the only object of arrest.

58. Therefore, all the technical objections raised by the petitioners, to the entitlement as well as the necessity for the respondents to arrest them are liable to rejected. Once this is done, we will have to examine whether, in the facts and circumstances of

these cases, the petitioners are entitled to protection against arrest. It must be remembered that the petitioners cannot be placed in a higher pedestal than those seeking anticipatory bail. On the other hand, the jurisdiction under Article 226 has to be sparingly used, as cautioned by the Supreme Court in **Km. Hema Misra (cited supra).**

59. We have very broadly indicated, without going deep, that the petitioners have allegedly involved in circular trading with a turnover on paper to the tune of about Rs.1289.00 crores and a benefit of ITC to the tune of Rs.225.00 crores. The GST regime is at its nascent stage. The law is yet to reach its second anniversary. There were lots of technical glitches in the matter of furnishing of returns, making ITC claims etc. Any number of circulars had to be issued by the Government of India for removing these technical glitches.

60. If, even before the GST regime is put on tracks, some one can exploit the law, without the actual purchase or sale of goods or hiring or rendering of services, projecting a huge turnover that remained only on paper, giving rise to a claim for input tax credit to the tune of about Rs. 225.00 crores, there is nothing wrong in the respondents thinking that persons involved should be arrested. Generally, in all other fiscal laws, the offences that we have traditionally known revolve around evasion of liability. In such cases, the Government is only deprived of what is due to them. But in fraudulent ITC claims, of the nature allegedly made by the petitioners, a huge liability is created for the Government. Therefore, the acts complained of against the petitioners constitute a threat to the very implementation of a law within a short duration of its inception.

61. In view of the above, despite our finding that the writ petitions are maintainable and despite our finding that the protection under Sections 41 and 41-A of Cr.P.C., may be available to persons said to have committed cognizable and non-bailable offences under this Act and despite our finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017, we do not wish to grant relief to the petitioners against arrest, in view of the special circumstances which we have indicated above.

62. Therefore, the Writ Petitions are dismissed. Consequently, miscellaneous petitions, if any pending, shall stand dismissed. No order as to costs.

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SUPREME COURT OF INDIA

SPECIAL LEAVE TO APPEAL (CRL.) NO: 4430/2019
MAY 27, 2019

P.V. Ramana Reddy …. **Petitioner**
VERSUS
Union of India and others …. **Respondents**

For the Petitioner (S): Mr. Ranjit Kumar, Mr. Parmatma Singh, Mr.Mayank Jain, Mr. Madhur Jain, Mr. Vikram Choudhary, Mr. Ashish Batra, Mr. Sarthak Saurav, Mr. Wattan Sharma, Mr. Harshit Sethi, Mr. Amit K. Nain, Mr. B. Krishna Prasad

For the Respondent (S): Mr. Tushar Mehta, Mr. K.M. Nataraj, Mr. Rupesh Kumar, Mr. Kanu Agarwal, Mr. Rajat Nair, Ms. Shraddha Deshmukh, Mr. B.V. Balram Das, Mr. B. Krishna Prasad, Mr. Mukul Rohatgi, Mr. Abhishek Rastogi, Mr. Sanjeev Kumar, M/s. Khaitan & Co.

The Supreme Court dismissed a plea challenging Telangana High Court judgment that held that a person can be arrested by the competent authority in cases of Goods and Service Tax (GST) evasion.

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANIRUDDHA BOSE

Arising out of impugned final judgment and order dated 18-04-2019 in WP No. 4764/2019 passed by the High Court for the State of Telangana At Hyderabad.

Having heard learned counsel for the petitioner and upon perusing the relevant material, we are not inclined to interfere. The special leave petition is accordingly dismissed.

Pending interlocutory applications, if any, shall stand disposed of.

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HIGH COURT OF UTTAR PRADESH AT ALLAHABAD BENCH

PIL CIVIL NO: - 12929 of 2019
MAY 03, 2019

ATIN KRISHNA **…. Petitioner**
VERSUS
UNION OF INDIA **…. Respondent**

For the Petitioner (S): In Person
For the Respondent (S): C.S.C., A.S.G., Sheeran Mohiuddin Alavi, Shubham Tripathi

Exemption under GST on goods supplied to and from DFS is rightly conferred and the claims of any accumulated unutilized ITC are refundable to respondent.

HON'BLE MR. JUSTICE PANKAJ KUMAR JAISWAL
HON'BLE MR. JUSTICE RAJNISH KUMAR

1. Heard Sri Atin Krishna petitioner-in-person, Sri Savitra Vardhan Singh, learned counsel for the Union of India-respondent no.1 Sri Manish Mishra, learned counsel for the State-respondent no.2 and Sri Sameer Rohatgi, learned counsel for the respondent no.3.

2. This petition is filed in public interest seeking to ensure that the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act") Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as "SGST Act") and Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act") are implemented in proper manner qua the duty free shops (hereinafter referred to as "DFS") operated at Chaudhary Charan Singh International Airport, Lucknow (hereinafter referred to as "Airport") by respondent no.3.

3. The petitioner submitted that due to the mis-interpretation of the provisions of CGST/SGST/IGST Acts, (GST Act), the public exchequer is being made to suffer huge financial loss and therefore, it is necessary in public interest that this Court provides true and correct interpretation of the applicable provisions of the aforesaid enactments so as to ensure that the revenue loss to the public exchequer is forthwith prevented.

4. The petitioner alleged that the respondent no.3 herein, has been operating at the arrival and departure termination of Airport since 2004 and the operations of these shops are governed in accordance with the provisions of Customs Act 1962. The

respondent no.3 is required to obtain registration of its business under CGST Act and SGST Act and is allotted respective GSTIN numbers and owing to registration obtained under the respective Acts, the activity undertaken by the respondent no 3 also attracts the provisions of GST Act. However, the provisions of these enactments are being mis-interpreted and the DFS operated by the respondent no.3 are presently enjoying various exemptions causing severe loss of revenue to the public exchequer.

5. The contention of the petitioner is as under:-

(i) The respondent no.3 is liable to pay IGST on the goods imported into the territory of India, which it is not doing.

(ii) Despite the DFS operated by the respondent no.3 being in the State of Uttar Pradesh, the goods were sold to the International passengers without charging the applicable taxes under CGST and SGST Acts. The petitioner submitted that the requirement to charge applicable CGST and SGST on the sale of goods at the DFS of the respondent no.3 was prior to Amendment of GST Act i.e. upto 31st January, 2019.

(iii) The respondent no.3 is incorrectly permitted to claim refund of accumulated input tax credit of GST paid on service of renting of immovable property by AAI and procurement of domestic goods and services. This refund is being granted under the grounds that the sale made to the International passengers at the departure terminal DFS is exports of goods and hence zero-rated. The sale invoice issued to the International passengers is incorrectly being considered as proof of exports of goods.

6. The petitioner submitted that a transaction must suffer IGST the moment the supply of goods cross the territorial waters of India. Therefore, the supply of imported goods to respondent no.3 needs to be subjected to tax under Section 5 of the IGST Act. He further submitted that from the standpoint of Section 8 (1) of the IGST Act, the sale made to International passengers at the arrival terminal DFS of the respondent no.3 should be considered as intra state supply of goods and accordingly, such sale shall attract applicable CGST and SGST under Section 9 (1) of the CGST Act and SGST Act upto 31st January, 2019 and that the activity undertaken from the departure terminal DFS operated by the respondent no.3 is not an export of goods under GST Act as the essential ingredients to qualify for export is nothing being satisfied by the respondent no.3. The grounds mentioned in the writ petition is based upon a reported decision of Hon'ble Apex Court rendered in the matter of Burmah Shell Oil Storage and Distributing Co. of India Ltd. Vs. CTO (1961) 1 SCT 902, State of Kerala Vs. Cochin Coal (1961) 12 STC 1 (SC), Madras Marine Co. Vs. State of Madras, 1986 (3) SCC 552 as well as Judgement rendered by Bombay High

Court in the matter of Narang Hotels and Resorts Pvt. Ltd. Vs. Stateof Maharastra and others (2004 135 STC 289 (Bom.)

7. Learned counsel for the respondent no.3 opposed the petition by filing reply. He submitted that supply of goods to and from the DFS is before the clearance of imported goods for home consumption/export and the supply of goods from DFS at International Airports are considered as export of goods. He relied upon the decision of Hon'ble Supreme Court rendered in the matter of M/s Hotel Ashoka (India Tourism Development Corporation Limited) Vs. Assistant Commissioner of Commercial Taxes and another (Civil Appeal No. 2560 of 2010) reported in 2012 (276) FLT 433 (SCC), judgement rendered by Bombay High Court in the matter of Sandeep Patil Vs. Union of India & another in Criminal Public Interest Litigation St. No.3 of 2019 and the Central Government's order dated 31.08.2018 bearing No. 634/2018- CUS (WZ)/ASRA/Mumbai passed under Section 129 DD of the Customs Act, 1962 in the case of Aarish Altaf Tinwala.

8. Learned counsel for the respondent no.3 has further submitted that the provisions of IGST Act (i.e. Sections 5, 7 and 8) are relevant for the purpose of addressing the contentions raised in the present PIL. The supply of goods imported into the territory of India till they cross customs frontiers are considered as Inter-State Supply as per Section 7 (2) of the IGST Act which reads as follows:-

"7(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce"

9. On a careful reading of Section 7 (2) along with Sections 2 (10), 2(4) of IGST Act and Sections 2 (11) and 2 (13) of Customs Act, 1962, it is concluded that "crossing the customs frontier of India" under the IGST Act means crossing the limits of custom area which includes the area of customs port, customs airport or land customs station or a warehouse and also any area in which imported goods are ordinarily kept before clearance by customs authority. The DFS located in the custom airport, the custom warehouse are both part of the custom area as defined under Section 2 (11) of the Customs Act, 1962. The supply of imported goods to and from the DFS does not cross the customs frontier and hence these supplies will be an inter-State supply in accordance to Section 7 (2) of the IGST Act. Consequently, they cannot be an inter-State supply liable to CGST and SGST under Section 9 of the CGST Act and SGST Act.

10. The point of time is one of the essential ingredients for levy of integrated tax on supply of goods imported into India and is governed by the proviso of Section 5 (1) of the IGST Act read with the provisions of Customs Act, 1962. Section 5 (1) of the IGST Act provides for levy of GST on inter-State supply, which reads as follows:-

"5(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and service tax on all inter-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 Central Goods and Service Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said ct at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962"

(ii) Sub-Section (7) of Section 3 of the Customs Tariff Act, 1975 reads as under:-

"(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under Section 5 of Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of imported as determined under sub-Section (8).

11. Section 7 (2) read with proviso of Section 5 (1) of the IGST Act states that integrated tax on "goods imported into India" shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975. Further, such tax is required to be levied "at the point" when the duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962 and at no other point.

12. The point of time when duties of customs are levied on goods imported into India under Customs Act, 1962 is only when such goods are cleared for home consumption. It is read as under:-

"12(1) Except as otherwise provided in this Act or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force on goods imported into, or exported from India".

13. Hon'ble Apex Court in the matter of Kiran Spinning Mills Vs. Collector of Customs, 1999 (113) ELT 0753 SC held as under:-

"...this Court has held in Sea Customs Act-1964

(3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country".

14. Similarly, Hon'ble Apex Court, in the matter of Garden Silk Mills Ltd. Vs. Union of India, 1999 (113) ELT 0358 S.C., observed that the taxable event for levy of customs duty is reached when the bill of entry for home consumption is filed. The relevant part of the judgement reads as follows:-

> *"...It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed".*

15. The above observations of Hon'ble Apex Court make it clear that the effective taxable event for the purpose of levy of Customs Duty is the time only when the goods cross the customs barrier and the bill of entry for home consumption is filed i.e. when the goods become part of the mass of goods within the country. Therefore, when the goods are imported from outside India and are kept in customs warehouse and exported therefrom, the stage for payment of customs duty under Customs Act, 1962 does not arise. Hence neither Custom duty nor IGST is payable.

16. The warehouse goods are supplied by the DFS to the International arriving passengers before its clearance for home consumption. The arriving passengers thereafter cross the customs frontier at the airport along with the goods and only then clear the same for home consumption. The passenger is therefore liable to pay the applicable duties of customs. The goods being a part of passenger's bonafide baggage are cleared for home consumption by the passenger under the Baggage Rules, 2016 and not by the DFS, hence no customs duty is payable by the DFS and therefore under proviso of Section 5 (1) of the IGST Act read with Section 12 of the Customs Act 1962, No IGST is payable either.

17. The supply of warehoused goods by the DFS at the departure terminal is to departing International passengers i.e. the passengers travelling from India to a foreign destination. Thus, the goods supplied are never cleared for home consumption and the warehoused goods are exported by the DFS, therefore the levy Customs duty and of the IGST do not arise.

18. The above observations conclude that IGST is not payable on the supply either to or from the DFS located at the arrival or at departure terminal.

19. The definition of "exports of goods: in Section 2 (5) is simply taking of goods from India to a place outside India. This definition is identical to the definition in Section 2 (18) of Customs Act 1962. In the case of Collector of Customs, Calcutta Vs. Sun Industries 1988 SCR (3) 500 under the Customs Act, 1962, the issue was as to whether the goods loaded on a ship which had passed beyond the territorial waters of India, by reason of some engine trouble decided to sail back into the territorial

waters of India, can be said to have been exported out of India. Section 2 (18) of the Customs Act, 1962 defines the term "export" as under:-

"2(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India."

The Apex Court, analysing the above Section held as under:-

"... But the expression "taking out to a place outside India" would also mean a place in high seas. It is beyond the territorial waters of India. High Seas would also mean a place outside India, if it is beyond the territorial waters of India. Therefore, the goods were taken out to the high seas outside territorial waters of India; they will come within the ambit of expression "taking out to a place outside India". Indubitably the goods had been taken out of India. "Place" according to Webster Comprehensive Dictionary, International Edition page 964 means a particular point or portion of space, especially that part of space occupied by or belonging to a thing under consideration; a definite locality or location. It also means an open space or square in a city. Therefore, in international trade the ship beyond the territorial waters of a country would be a place outside the country, if the goods are taken to that place, that is to say, a situation outside the territorial waters of a country and the title to the goods passes to the purchasers. Then, in our opinion, the goods are taken to a place outside India...."

20. The Hon'ble Apex Court held that "taking out to a place outside India" would also mean a place beyond territorial waters, i.e. high seas hence in the context of Section 2 (5) of IGST Act, to constitute an "export" mere taking out of India, is enough.

21. Export of goods is a zero rated supply and a person making zero rated supplies can claim refund of unutilised ITC as provided in Section 16 (1) and Section 16 (3) of the IGST Act, which reads as under:-

XXXXX

22. Since the entire activity of a DFS namely, warehousing, stocking and sale/supply happens as per the provisions under Chapter IX of the Customs Act and under Customs supervision and control. The sale of goods takes place only to International passengers and on obtaining from them payment in approved currency. Every sale is covered by a sale voucher, which shall be deemed to be the Shipping Bill or Bill of Entry under Section 69 or 68 as the case may be. As a condition of the license granted to DFS under Section 58A of the Customs Act, DFS are permitted to deposit the goods at the warehouse without payment of duty on execution of a bond. As per Section 71 of the Customs Act, the goods so deposited can either be cleared from the warehouse for home consumption (u/s 68) or for export (u/s 69) or for removal to another warehouse or otherwise provided in the Customs Act. Further Section 73A, Custody and Removal of Warehoused Goods, of the Customs Act provides that all

warehoused goods shall remain in the custody of person who is granted a license under Sections 57/58/58A of the Customs Act until they are cleared for home consumption or transferred to another warehouse or are exported or removed as otherwise provided in the Customs Act. Such warehoused goods are thereafter only allowed to be cleared for home consumption after filing a bill of entry under Section 68 and payment of duty. In the event where the warehoused goods are not cleared for home consumption, they can be cleared for export, without payment of duty under Section 69 after filing shipping bill for export.

23. The Public Notice dated 22 07.2004 [Para 4.1], Standing Order dated 03.03.2008 (para 3.3) and Public Notice dated 21.12.2018 [Para 7.1] submitted by the respondent no.3 further clarifies that the invoice issued to passenger at International departure terminal is deemed to be a "shipping bill" for the purpose of exports under Section 69 of the Customs Act and the Section 50 of the Customs Act provides that a 'shipping bill' has to be presented to the customs officer for export of goods in an aircraft.

24. It is clear that the goods sold to passengers at the International departure terminal DFS are not cleared for home consumption nor for removal to another warehouse or otherwise provided in the Customs Act, 1962 and hence the goods are cleared without payment of duty only for export under Section 69 of the Customs Act under an invoice which is also deemed to be a shipping bill.

25. Hence the sale/supply at the International departure terminals DFS would be export of goods under Customs Law and therefore will be considered as exports of goods under GST Act, since the definition of "export" and "export of goods" under both the laws is the same.

26. The supply from DFS of the respondent no.3 at departure terminal of the Airport is similar to a FOB export; the only difference being that in the case of DFS supply, the International passenger also acts as carrier of goods out of India.

27. The Bombay High Court in the case of Sandeep Patil (supra) has taken a similar position with respect to DFS which reads as under:-

"6. Respondent no.2 while selling the goods from its duty free shops at departure terminal hold themselves as exporters of the goods and therefore it falls under the ambit of "exporter" as defined in section 2 (20) of the Customs Act, 1962. Applying the definition provided in the Customs Act, in this context, the goods supplied to the duty free shops by the Indian and international manufacturers/ suppliers are 'exported goods' and on reading this definition in conjunction with the definition of exporter, it is clear that the duty free shop operator is the "exporter" and the supply of goods to the international passengers is an export.

8. The above policy shows that the export oriented units which undertake to export their entire quantity of goods and services, are permitted to do so by setting up retail outlets i.e. duty free shops at International Airports.

11. In the matter of DFS India Private Limited Vs. Commissioner of Customs, the Apex Court took cognizance of the fact that business undertaken at the departure duty free shop is in the nature of export. In fact pursuant to this order, the stocks of tobacco products held by respondent no.2 at duty free shops came to be released by the Department of Customs after being satisfied that the business undertaken from the duty free shops at departure is export. In pursuance of this order of the Apex Court, the High Court in the matter of DFS India Pvt. Ltd. Vs. The Commissioner of Customs also granted final relief in favour of respondent no.2. If the legislature intent which is also supported by various precedents noted above is not to extent the restriction under the COTPA to shops situated beyond India and not to apply the restrictions on passengers importing tobacco products, that is not trade or commerce. Even in GST regime, duty free shops at international airports are considered non taxable area and their sales whether at arrival or departure lounge are considered as export."

28. The claim of the petitioner is that there is no 'export' of goods since the goods does not have a specific destination. It is however, observed that the facts of the four cases relied upon by the petitioner in the present petition are of a different nature as compared to the operation undertaken from the DFS. In all the four cases, the destination of the goods were very clear viz aircraft (in Burmah Sheel and Narang Hotel) and ship (in Coching Coal and Madras Marine). Thus, the destination was within the Indian territorial waters. In the present case of DFS, it is very clear that if a foreign destination of the foreign going passenger, the passenger also acts as a carrier and the goods are appropriated outside India. In view thereof, it is clear that the decisions relied upon by the petitioner are misplaced, have no relevance to the facts of the present PIL and therefore cannot be relied upon in the context of the business undertaken by the answering respondent no.3.

29. In view of above discussion, we find that exemption under GST on goods supplied to and from DFS is rightly conferred and the claims of any accumulated unutilized ITC are refundable to respondent no.3. The petition is devoid of merit and the same deserves to be dismissed.

30. Accordingly, we dismiss the Public Interest Litigation.

31. No order as to cost.

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HIGH COURT OF MADRAS

Writ Petition No.5501 of 2019 & WMP No.6251 of 2019
APRIL 04, 2019

M/S JAYACHANDRAN ALLOYS (P) LTD **…. Petitioner**
VERSUS
THE SUPERINTENDENT OF GST AND CENTRAL EXCISE, HEAD QUARTERS PREVENTIVE UNIT, OFFICE OF THE COMMISSIONER OF GST AND CENTRAL EXCISE, SALEM – 636001 & ORS **…. Respondent**

For the Petitioner (S): Mr. P.S.Raman, Sr. Counsel, for, Mr. P.Rajkumar
For the Respondent (S): Ms. Aparna Nandakumar, Sr. Standing Counsel

Section 132 of the Act imposes a punishment upon the Assessee that 'commits' an offence. The use of words 'commits' make it more than amply clear that the act of committal of the offence is to be fixed first before punishment is imposed. Thus, 'determination' of the excess credit by way of the procedure set out in Section 73 or 74, as the case may be is a pre-requisite for the recovery thereof. Sections 73 and 74 deal with assessments and as such it is clear and unambiguous that such recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to 'determination' in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.

HONOURABLE Dr. JUSTICE ANITA SUMANTH

1. The petitioner is an Assessee before the respondent authorities, in terms of the provisions of the Central Goods and Services Tax Act, 2017, (in short 'CGST Act'). The CGST Act was implemented with effect from 01.07.2017 and provides for the assessment of turnover from sales and services as enumerated therein. Regular monthly returns have been filed by the petitioner and this is not disputed.
2. While this was so, there appears to have been an investigation initiated by the respondents in the premises of the petitioner, commencing from 15.10.2018 and continuing on various dates thereafter. Seizures of voluminous documents and records have been affected. The petitioner has also been called upon to furnish various records and has done so, under letters dated 17.11.2018 and 22.11.201
3. The list of documents submitted on 17.11.2018 is set out below:-

'JAYACHANDRAN ALLOYS PVT LTD
Following Original / Documents submitted to GST HPU Officers dt: 17/11/2018

S.No.	Name of the Register	Reports Date	
		From	To
1	Despatch Inspection Report	3/14/2018	4/21/2018
2	Lead Counting Note	9/25/2018	11/1/2018
3	Daily stock book	9/6/2018	11/17/2018
4	Vehicle Follow up chart	7/5/2018	9/20/2018
5	Daily stock book	5/30/2018	9/5/2018
6	Daily stock book	11/1/2017	2/18/2018
7	Despatch Inspection Report	5/31/2018	6/26/2018
8	Despatch Inspection Report	2/6/2018	3/13/2018
9	Battery Dimandle scrap Inward	2/11/2018	11/16/2018
10	Lead Outward Note	7/11/2018	11/17/2018
11	Lead Outward Note (security)	3/28/2018	11/17/2018
12	Lead Outward Note	11/1/2018	11/17/2018
13	JCA Ganeshapuram to JCG Perundhurai DC Material Register	10/12/2018	11/17/2018
14	Store Inward Note	7/1/2018	11/17/2018
15	Loading Log sheet	7/11/2017	8/21/2017
16	Daily stock book	4/25/2017	8/21/2017
17	Daily stock book	8/3/2017	7/9/2017
18	Lead Loading Log sheet	10/10/2017	12/26/2017
19	Lead Loading Log sheet	7/13/2018	9/5/2018
20	Export Inspection Report	3/23/2017	10/31/2017
21	Export Inspection Report	6/28/2018	11/11/2018
22	Vehicle Follow up chart	7/18/2017	5/2/2018
23	1 Box File		

4. In letter dated 22.11.2018 addressed by the petitioner to the first respondent, acknowledged by the first respondent on the same date, the details of other documents and records supplied by the petitioner are mentioned, as follows:

'The total Nos. of documents submitted is 61 Nos. and the hard copy

given to you is 56 Nos.
The total No. of pages given to you is 2935
The total No. of registers submitted is 34 Nos.'

5. Statements have been recorded from various persons including the Managing Director of the petitioner company on various dates in the course of proceedings as below:-

S.No.	Name of the Staff	Designation	Hearing Date
1	Mr.V.Saravanan	Billing Staff / Authorised Signatory	6.12.2018 & 7.12.2018
2	Mr.V.Vinothkumar	Stores Supervisor	6.12.2018 & 7.12.2018
3	Mr.D.Rathinamoorthi	Stores Supervisor	7.12.2018
4	Mr.S.Viveganandhan	Production Manager	17.12.2018
5	Mr.M.Mahendhiran	Despatch Supervisor	18.12.2018
6	Mr.S.Sivagurusamy	General Manager	19.12.2018
7	Mr.D.Jegadeesh	Finance Manager	26.12.2018
8	Sri.C.Pradeep	Managing Director	27.12.2018, 03.01.2019 & 04.01.2019

6. While this is so, and the process of investigation is on-going, the petitioner sought copies of the statements recorded from it as well other materials seized, with no response forthcoming from the department. Hence this writ petition, praying for a mandamus directing the respondents to provide copies of the documents and records seized during the inspection as well as copies of statements recorded by the inspecting authorities, to grant opportunity to the petitioner and to pass an order of assessment in accordance with law.

7. A Miscellaneous Petition has been filed seeking the grant of an interim injunction restraining the respondents from proceeding cocercively against the petitioner and their staff including arresting them by invoking the provisions of Section 69 of the Act, pending disposal of the writ petition.

8. A counter affidavit has been filed by the respondents attempting to answer the main as well as the interim prayer.

9. The following issues arise, in my view, for resolution:-

1. *Whether the petitioner is entitled to mandamus as prayed for in regard to supply of the documents and statements sought for by it in the light of the provisions of the Act?*

2. *Whether the interim protection sought for to prevent the respondents from invoking the powers under Section 69 of the Act read with Section 132 thereof in respect of the petitioner is liable to be granted?*
3. *Whether the petitioner's request for a direction to the respondents to complete adjudication and make an assessment after following the due process of law is liable to be accepted?*

10. The Central Goods and Service Tax Act, 2017, is a virgin enactment, born on 01.07.2017. The scheme of the Act is however not so different from the Indirect Tax Statutes that it has subsumed, the provisions of which it integrates, to provide a comprehensive and single assessment for turnover from the sale of goods and provisions of services.

11. Simply put, the scheme calls for regular returns to be filed by a dealer in terms of section 39 of the Act. These returns constitute a self-assessment by the Assessee under Section 59 of the CGST Act in regard to its turnover. The returns may either be accepted by the Assessing Authority in terms of Section 60 or if the officer is of the view that further verification and scrutiny is required, notice may be issued under Section 61 (1) of the Act, calling upon the Assessee to appear and make its submissions in support of the returns. If the explanations of the assessee are found acceptable, the assessee shall be informed accordingly in terms of Section 61 (2) and no further action shall be taken in that regard. In the event that the explanation is not satisfactory, the Assessing Authority is empowered to pass an order of assessment to the best of his/her judgment, after scrutiny and verification of the available materials on record in terms of Section 61 (3) of the Act.

12. An assessment under Section 73 of the CGST Act, in circumstances where a determination of tax that is either not paid, short paid, erroneously refunded or Input Tax Credit that has been wrongly availed or utilized, is to be completed within three years. In cases where the Assessing Authority believes that there has been under-assessment by virtue of fraud, wilful mis-statement or suppression of facts, a period of five years is provided in terms of Section 74 (10) of the CGST Act.

13. Section 67 of the CGST Act provides for the power of inspection, search and seizure, and has been invoked in the present case.

14. It is the petitioners' case that the proceedings for inspection in the present case have resulted in untold harassment. The officials of the Department have intimidated the petitioner, its Managing Director and staff. Statements recorded as well as the materials seized have not been furnished to the petitioner despite repeated requests, thus constraining the petitioner to approach this Court for the

same.

15. The petitioner has also made various submissions with regard to the merits of the additions that have been proposed in the course of the proceedings. I consciously refrain from adverting to the same in detail since this Court is not concerned with the merits of the proposed assessment but only the procedure that is adopted by the respondents to frame such assessment. As regards the procedure itself, the petitioner claims that there has been no proper compliance with the requirements of the statute. The Managing Director of the petitioner was threatened that he would be arrested in the light of the provisions of Section 69 of the CGST Act and he was coerced into signing statements, including one dated 21.02.2019, admitting various liabilities and providing for a schedule of payments to the Department.

16. The anticipated demand as per the statement recorded is of a sum of Rs.18,99,50,468/-, and the petitioner has undertaken to remit Rs.5,00,00,000/- on or before 28.02.2019 and the balance of Rs.13,99,50,468/- before the end of March 2019. The said statement has been retracted the very next day vide letter dated 22.02.2019 sent by registered post and e-mail. The petitioner relies on various Circulars issued under the erstwhile service tax regime to state that the powers of arrest and prosecution would arise only if the Department is in possession of evidence to prove that the Assessee had indulged in fraud or had intended to defraud the Revenue. The Circulars address specifically habitual offenders whereas in the present case the petitioner is a sterling assessee that has made substantial payments of taxes over the years.

17. The petitioner cites the decision of the Division Bench of the Delhi High Court in the case of *Make My Trip (India) Pvt. Ltd. V. Union of .India & Ors* (W.P.(C) 525/2016 & CM 2153/2016) dated 01.09.2016 that has been confirmed by the Supreme Court in Civil Appeal No.8080/2018, dated 23.01.2019, in support of its arguments.

18. A counter has been filed by the Department. On merits, the Department states that the petitioner has availed Input Tax Credit substantially in excess of what it is entitled to, of an extent of Rs. 18.99 crores. According to the Department, incriminating records and evidences have been found in the course of the investigation based on which the following additions are liable to be made on the basis of the supporting evidences stipulated alongside:

a) Rs.6.75 crores - On the basis of 132 bogus invoices supported by 132 false goods receipt note and false e-way baill wrongfully generated.

b) Rs.5.40 crores - ITC wrongfully claimed on reverse charge admitted in GST 3B return filed for April 2018.

c) Rs.3.72 crores – difference in stock, sales and production supported by stock inventory and mahazar prepared during stock inspection.
d) Rs.3.74 crores – difference in shortage and finished goods under job work.

19. The counter also refers to various explanations that have been offered at the time of inspection by the petitioner as well as the averments contained in the affidavit filed in support of the writ petition and proceeds to analyse the statements and averments. The Department states that the provisions of Section 16 (1) that stipulate the eligibility and conditions for availing ITC have not been complied with in the present case since movement and delivery and remittance of tax in regard to the goods / services has not been established.

20. The GST regime requires the Assessee to establish movement of goods in addition to documentation establishing sales and purchase transactions and in the present case, there is no evidence to establish the movement of goods. Thus, the Department is categorical that the petitioner is a defaulter. Various details have been found in the premises in the course of investigation in support of the aforesaid factual position. The Department accepts that the investigation is on and no assessment has been framed. However substantial reliance is placed on statement dated 21.02.2019 wherein various lapses on the part of the petitioner have been tabulated and the petitioner has signed the same conceding to the lapses and agreeing to pay the tax arising therefrom amounting to a sum of Rs.18,99,50,468/-. The Department also refers to the conduct of the Assessee in avoiding summons and in not co-operating with the proceedings.

21. As regards the allegation that the Managing Director had been coerced into signing statement dated 21.02.2019 under threat of arrest, the counter states that *'they had only pointed out the statutory provision (*section 132 of the Act) *as it exists'*. The respondents reiterate that the petitioner has indulged in Bill Trading activity which is an offence under Section 132 of the CGST Act. According to them Section 132 (i) (c) read with Section 132 (i) (b) of the Act provides that where the person has availed Input Tax Credit using Invoices/Bill without actually supplying such goods or services, he/it has committed a punishable offence. Such punishment, where the benefit wrongly availed exceeds rupees five hundred lakhs, is imprisonment which may extend to five years with fine. It is on the strength of the aforesaid conclusion, on merits, that the Department accepts in counter as well as orally before me that the provisions of Section 132 of the CGST Act were only *'pointed out'* to the petitioner and there was no coercion at all!

22. Reliance is placed on the judgment of the Supreme Court in the case of

Radheshyam Kejriwal v. State of West Bengal and another, (266 ELT 294) that, according to the Department, settles the position that proceedings for prosecution can be launched simultaneous with assessment.

23. The Department also relies on a decision of a learned Single Judge of this Court and one each of the Rajasthan and Bombay High Courts dismissing applications seeking Anticipatory Bail filed by the petitioners therein, who apprehended arrest during investigation conducted by the GST Department. The petitioner, for its part, relies on a decision of a learned Single Judge of the Karnataka High Court granting anticipatory bail upon request by an assessee who was alleged to have indulged in bill trading activities. The aforesaid decisions have been rendered by various Benches in the background of applications filed by assessees for anticipatory bail in the light of allegations of bill trading activities and threats of arrest, similar to the present case.

24. As regards the request to supply copies of documents, the respondents rely on the provisions of Section 67 (5) of the CGST Act, extracted earlier. According to them, a person from whose custody documents have been seized shall be entitled to receive copies thereof or take extracts only in cases where, in the opinion of the proper officer such supply of copies will not prejudicially affect the on-going investigation.

25. Ms.Aparna states that such prejudice as above will be caused in the present case. It is however relevant to state that this argument is advanced only orally and does not figure in the counter.

26. Heard the detailed submissions of Mr.P.S.Raman, learned senior counsel, for Mr.Rajkumar, learned counsel for the petitioner and Ms.Aparna Nandakumar, learned Senior Standing counsel, assisted by the officials of the Department, for the respondents.

27. The Act provides for an assessment to be made after notice to be issued to the assessee. In the present case, the petitioner/assessee has been filing monthly returns regularly. This is not disputed. However the Department apprehended that the petitioner was engaging in bill trading activities and launched an investigation in the premises to verify the business activities of the petitioner and its compliance with the provisions of the Act.

28. In the course of the investigation, the respondents state that there was substantial evidence to establish their suspicions regarding the bill trading activities carried on by the petitioner. Various documents were seized. The petitioner also furnished documents as called for by the department. Though the department alleges that the petitioner did not co-operate with the investigation and did not attend hearings in response to summons issued, the tabulation of the summons issued and attendance

details of the petitioner indicate otherwise. Such details, as per the counter filed by the Department, are extracted below:

XXXXXXXX

29. Thus, on an appreciation of the details in the departmental counter, the allegation regarding lack of co-operation and response on the part of the petitioner appears contrary to fact.

30. As part of the investigation, the department has recorded statements, copies of which have been sought for by the petitioner. Pursuant to a direction issued by this court on 08.03.2019 to furnish the documents and statements recorded, the petitioner confirms that some have been so provided, but not all. Ms.Nandakumar relies on the provisions of Section 67(5) extracted at paragraph 27 of this order. A perusal of the provision makes it clear that the statute entitles the Department to refrain from handing over copies of documents seized where it believes that such furnishing may be prejudicial to its interest. However, there is no such averment in the counter in regard to the documents sought for by the petitioner. The main prayer of the petitioner is for furnishing of copies of documents and records seized from its premises on 15.10.2018, 16.10.2018 & 17.10.2018. Thus, if the Department was of the view that this prayer was not liable to be granted for reasons that the documents were sensitive or such production would prejudice its interests, it ought to have said so in counter. In the absence of any such averment I must only conclude that there is no such apprehension in the mind of the Department and the prayer of the petitioner is thus, liable to be accepted. Copies of the documents sought will be furnished within a period of two (2) weeks from the date of receipt of a copy of this order upon remittance of copying charges. As far as statements are concerned, there being no condition imposed/ restriction placed in statute, copies of the same will be furnished upon remittance of copying charges within two(2) weeks from date of receipt of a copy of this order.

Issue (i) is answered in favour of the petitioner.

31. The provisions of Section 132 of the CGST Act are relevant to determine question (ii) framed above and are extracted hereunder:-

XXXXX

32. Statement dated 21.02.2019 recorded from the Managing Director of the petitioner company reads thus:

> *'STATEMENT OF SHRI.C.PRADEEP, S/o. P.CHANDRASEKARAN, AGED 36 YEARS, MANAGING DIRECTOR OF M/s.JAYACHANDRAN ALLOYS PVT LTD. (GSTIN 33AABCJ8003C1Z8) No.18, RANGASAMY ROAD, RS PURAM, COIMBATORE – 641 002 HAVING UNIT-1 AT GANESHAPURAM, UNIT – II AT PERUNDURAI SIPCOT*

WAREHOUSE AT KAREGOUNDANPALAYAM. GIVEN BEFORE THE SUPERINTENDENT OF GST & CENTRAL EXCISE, HEADQUARTERS PREVENTIVE UNIT, SALEM AT OFFICE OF THE COMMISSIONER OF GST & C.EX, NO.1, FOULKS COMPOUND, ANAI MEDU, SALEM 636 001 ON 21-02-2019 AT 11.00 HRS UNDER SECTION 70 OF CGST ACT 2017.

I have made myself present before the GST Officer at the above Office address on being summoned by them and I am giving this statement before him in the form of Questions & Answers. As I have given my basic details I don't repeat the same now in previous statements. I am ready to offer my statement in the form of Questions & Answers as did earlier. The GST Officers have explained to me the provisions of Section 70 of CGST Act 2017 which I have understood fully. The officers also showed to me the Section 193 and 228 of the IPC as per which I understood that I have to give true and correct statement otherwise punishable under the law.

Q1: From the previous statements given by you the following are points and GST liability on those points are summarised below:

XXXXX

When you are going to pay the GST liability of Rs.18,99,50,468/-?

I admit unconditionally that I am liable to pay a sum of Rupees 18,99,50,468/- (Eighteen crores ninety nine lakhs fifty thousand four hundred and sixty eight) an amount approximately equal to the GST evaded by my company on my instruction. I am willing to pay the amount along with interest. I shall pay Rs.5 crore before 28th February 2019 and the remaining amount before March 31st 2019. I accept that I have past avoided my appearance before department on 7.2.2019 due to my son naming ceremony. I had sent by FM to represent on my behalf before the department even though I was aware that no one except me know the full details of my company. I fully accept all the liabilities along with interest and assure that I shall pay the same as above.

XXXXX

33. The GST enactment subsumes various enactments including the Central Excise Act, the Finance Act providing for the levy of Service Tax and State Value Added Tax Acts. Thus the interpretation given to the provisions of the aforesaid statutes would equally govern the working of the present statute (GST) as well. No doubt, the interests of the revenue are paramount and have to be protected, but the actions of the Revenue Department draw power only from a wholistic interpretation of the statutory provisions. Any excess in this regard would vitiate the legitimacy of the exercise.

34. The Delhi High Court, in the case of *Make My Trip (India)* (supra) has considered the powers of the Directorate General of Central Excise Intelligence (DGCEI) for

arrest, investigation and assessment in the light of service tax levy under the Finance Act, 1994. The Bench, after consideration of the judgment of the Supreme Court in *Radheshyam Kejriwal* (supra) relied upon by the revenue before me summarises its conclusions as follows:

XXXXX

35. The aforesaid decision was carried in Appeal before the Supreme Court and the following order passed in C.A.No.8081/2018 & C.A.No.8082/2018, dated 23.01.2019:-

> *'Heard learned counsel for the parties at length.*
>
> *The issue is as to whether the power of arrest under Section 91 of the Finance Act, 1994 ('the said Act') can be exercised without following the procedure as set out in Section 73A(3) and (4) of the said Act. The High Court has decided, after detailed discussion, that it is mandatory to follow the procedure contained in Section 73A(3) and (4) of the said Act before going ahead with the arrest of a person under Sections 90 and 91. We are in agreement with the aforesaid conclusion and see no reason to deviate from it.*
>
> *Accordingly, these appeals are dismissed.'*

36. Though the discussions and conclusions therein have been rendered in the context of Chapter V of the Finance Act, 1994, levying service tax, I am of the view that they are equally applicable to the provisions of the CGST Act as well. Section 132 of the Act as extracted earlier, imposes a punishment upon the Assessee that *'commits'* an offence. There is no dispute whatsoever that the offences set out under (a) to (l) of the provision refer to those items, that constitute matters of assessment and would form part of an order of assessment, to be passed after the process of adjudication is complete and taking into account the submissions of the Assessee and careful weighing of evidence found and explanations offered by the Assessee in regard to the same.

37. The use of words 'commits' make it more than amply clear that the act of committal of the offence is to be fixed first before punishment is imposed. The allegation of the revenue in the present case is that the petitioner has contravened the provisions of Section 16(2) of the Act and availed of excess ITC in so far as there has been no movement of the goods in the present case as against the supplier and the Petitioner and the transactions are bogus and fictitious, created only on paper, solely to avail ITC. The manner of recovery of credit in cases of excess distribution of the same is set out in Section 21 of the Act. This section provides that where the Input Service Distributor distributes credit in contravention of the provisions contained in Section 20 resulting in excess distribution of credit to one

or more recipients, the excess credit so distributed shall be recovered from such recipients along with interest, and the provisions of Section 73 or Section 74, as the case may be, shall, mutatis mutandis, apply for determination of amount to be recovered.

38. Thus, 'determination' of the excess credit by way of the procedure set out in Section 73 or 74, as the case may be is a pre-requisite for the recovery thereof. Section 73 and 74 deal with assessments and as such it is clear and unambiguous that such recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to 'determination' in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.

39. The exceptions to this rule of assessment are only those cases where the assessee is a habitual offender, that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in proceedings to pre-empt the assessment and initiate action against the assessee in terms of section 132, for reasons to be recorded in writing. There is no allegation, either oral or in writing in this case that the petitioner is an offender, let alone a habitual one.

40. In the present case, the Department does not dispute that action was intended or envisaged in the light of Section 132 of the CGST Act, the counter fairly stating that the provisions of Section 132 of the CGST Act were *'shown'* to the Assessee. There is thus no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under 132 and this action is contrary to the scheme of the Act. While the activities of an assessee contrary to the scheme of the Act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the statute. I am of the considered view that the power to punish set out in Section 132 of the Act would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.

41. I draw support in this regard from the decision of the Division Bench of the Delhi High Court in the case of *Make My Trip (India)* (supra), as confirmed by the Supreme Court reiterating that such action, as in the present case, would amount to a violation of Constitutional rights of the petitioner that cannot be countenanced.

42. The decision of this Court in Criminal Original petition No.30467 of 2018 (batch

case), dated 12.02.2019 is relied upon by the respondents. The learned single judge states that *'in the light of the grave position put forth by the prosecution and also the fact that the investigation was at very early stages'*, the request for Anticipatory Bail should be rejected and proceeds to do so. This decision does not take into consideration the decision of the Delhi High Court in the case of *Make My Trip (India) Pvt. Ltd,* (supra), confirmed by the Supreme Court and also does not take into account the relevant statutory provisions of the Revenue enactment, that in my view are necessary to appreciate the lis in proper perspective. The decision is thus distinguishable on facts and in law.

43. As far as the decision rendered by the Rajasthan High Court is concerned, it is distinguishable on facts, as at paragraph 20 thereof, the learned Judge records that the petitioner therein did not controvert the claim that the claim of Input Tax Credit is made based on fake invoices. Thus, no defence was put forth by the petitioner to the allegation of Bill Trading in that case, which is not so in the case before me. This decision is also distinguishable on facts.

44. The learned Single Judge of the Bombay High Court, in Anticipatory Bail Application, in the case of *Meghraj Moolchand Burad v. Directorate General of GST (Intelligence), Pune and another, Anticipatory Bail Application No.2333 of 2018* has considered a similar case and has rejected the Anticipatory Bail taking into consideration the conduct of the applicant, gravity of offence and the serious allegations made. This order has travelled to the Supreme Court in Petition for Special Leave to Appeal Crl. Nos.244/2019, dated 09.01.2019 by the petitioner therein, wherein the Bench has issued notice and granted interim protection in the following terms:-

> Issued Notice
>
> *In the meantime, the petitioner shall not be arrested, provided he appears before the Directorate General of GST Intelligence and in the event of his arrest, he shall be released on bail on furnishing security to the satisfaction of the competent authority.*
>
> *Learned counsel for the petitioner has submitted that the petitioner shall regularly appear, as and when he is called.'*

45. Moreover, the High Court of Karnataka at Bengaluru in Criminal Petition No.979 of 2019 c/w Criminal Petition No.980/2019, dated 19.02.2019 while considering the grant of Anticipatory Bail, in circumstances very similar to the matter before me, has allowed the petition and granted bail in favour of the Assessee with conditions.

46. Issue (ii) is answered in favour of the petitioner. Issue (iii) is allowed, directing the respondents to conclude the process of adjudication within a period of twelve (12)

weeks from today, after issuing show cause notice to the petitioner setting out the proposals for assessment, affording full opportunity to the petitioner to respond to the same and advance submissions in person, and pass a reasoned and speaking order, in accordance with law.

47. It is clarified that all observations made in the course of this order are only in the context of the issues that arose for resolution in this writ petition and nothing said herein shall prejudice the stands of either party in the process of adjudication or passing of final order of assessment.

48. To a pointed query as to the measures available for protection of the interests of the revenue pending adjudication / assessment Ms.Nandakumar urges that the power under Article 226 of the Constitution of India are wide enough for the Court to call upon the petitioner to deposit an amount, fixed at the discretion of the court for such protection. Ms.Nandakumar suggests, as the basis for the exercise of such discretion, the amounts set out in the statement recorded from the Managing Director of the petitioner company, extracted elsewhere in this order. She points out that the statement itself makes it more than amply clear that the suppression engaged in by the petitioner is in the region of crores of rupees, leading to the demand computed in the statement, of an amount in excess of Rs.18 crores. The Managing Director of the Petitioner company, according to the department, conceded to the proposals for assessment and has undertaken to remit a sum of Rs.5,00,00,000/- on or before 28.02.2019 and the balance of Rs.13,99,50,468/- before the end of March 2019. Thus she submits that the petitioner be directed to remit a sum of Rupees five crores as a security for the demand as confirmed by the Managing Director.

49. The above request is unacceptable. A statement is no substitute for an assessment. No doubt, the value of the statement and the retraction thereof will be considered by the Assessing Authority while framing the order of assessment and nothing stated in this order shall be considered to be a fetter upon the powers of the assessing authority to do. However, in the absence of a statutory provision that enables such imposition of a condition even prior to determination of the violations by an assessee and quantification of the consequent demands, this argument is rejected.

50. I however find that the statue contains *inter alia* Section 83 that vests the power of interim and provisional attachment of property to protect the interests of the department, pending assessment. The Section is extracted hereunder:

> ***83. Provisional attachment to protect revenue in certain cases.-***
> ***XXXXX***

The above provision is in pari materia with the provisions of Section 281B of the income Tax Act, 1961 that also provides for a provisional attachment of property of an assessee pending adjudication and assessment/re-assessment proceedings where the Income Tax Department believes that such attachment is necessary to protect the interests of the Revenue. The provision is extracted below for the sake of completion and to demonstrate that the provisions of Section 83 have been framed along identical lines as Section 281B.

> *'Provisional attachment to protect revenue in certain cases*
>
> *281B. (1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the [Assessing] Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the [Principal Chief Commissioner or] Chief Commissioner, [Principal Commissioner or] Commissioner, [Principal Director General or] Director General or [Principal Director or] Director], by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.*
>
> *Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):*
>
> *Provided that the [Principal Chief Commissioner or] Chief Commissioner, [Principal Commissioner or] Commissioner, [Principal Director General or] Director General or [Principal Director or] Director] may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years [or sixty days after the date of order of assessment or reassessment, whichever is later].'*

51. Thus, there is ammunition available in the arsenal of the department that can well be utilised to protect its interests.

52. In summary, this Writ Petition is allowed. Connected WMP is closed, with no order as to costs.

*****

COMMERCIAL NEWS

CA Ribhav Ghiya, Jaipur

1. New GST return system for taxpayers: Here are all the details

The government has unveiled a transition plan for taxpayers under the goods and services tax to switch to new simpler return forms. In order to ease the transition process, between July-September the new form would be available on trial basis for familiarization.

The GST Council in its 31st meeting had decided that a new GST return system will be introduced for taxpayers.

The Goods and Services Tax Network had shared a prototype of the offline tool in May, 2019, an official statement said on Tuesday. The look and feel of the offline tool would be same as that of the online portal.

There are three main components to the new return – one main return (FORM GST RET1) and two annexures (FORM GST ANX-1 and FORM GST ANX-2).

From July, 2019, users would be able to upload invoices using the FORM GST ANX-1 offline tool on trial basis for familiarisation. They would also be able to view and download, the inward supply of invoices using the FORM GST ANX-2 offline tool under the trial program.

The summary of inward supply invoices would also be available for view on the common portal online. They would also be able to import their purchase register in the offline tool and match it with the downloaded inward supply invoices to find mismatches from August 2019.

Between July to September, 2019 for three months, the new return system (ANX-1 & ANX-2 only) would be available for trial for taxpayers to make themselves familiar, the statement said.

This trial would have no impact at the back end on the tax liability or input tax credit of the taxpayer, the statement added.

In this period, taxpayers shall continue to fulfil their compliances by filing FORM GSTR-1 and FORM GSTR-3B i.e. taxpayers would continue to file their outward supply details in FORM GSTR-1 on monthly or quarterly basis and return in FORM GSTR-3B on monthly basis. Non-filing of these returns shall attract penal provisions under the GST Act, it said.

From October, 2019 onwards, FORM GST ANX-1 shall be compulsory and FORM GSTR-1would be replaced by FORM GST ANX-1.

Large taxpayers, with aggregate annual turnover over Rs 5 crore in the previous financial year, would upload their monthly FORM GST ANX-1 from October, 2019 onwards.
However, small taxpayers, with turnover upto Rs 5 crore, will need to file the first compulsory quarterly FORM GST ANX-1 only in January, 2020 for the quarter October to December, 2019.
Invoices can be uploaded in FORM GST ANX-1 on a continuous basis both by large and small taxpayers from October, 2019 onwards, it said.
FORM GST ANX-2may be viewed simultaneously during this period but no action shall be allowed on such FORM GST ANX-2, the statement said.
For October and November, 2019, large taxpayers would continue to file FORM GSTR-3B on monthly basis. They would file their first FORM GST RET-01 for the month of December, 2019 by 20th January, 2020.
The small taxpayers would stop filing FORM GSTR-3B and would start filing FORM GST PMT-08 from October, 2019 onwards. They would file their first FORM GST-RET-01 for the quarter October, 2019 to December, 2019 from 20th January, 2020. From January, 2020 onwards, all taxpayers shall be filing FORM GST RET-01 and FORM GSTR-3B shall be completely phased out, the statement said. The government will issue separate instructions for filing and processing of refund applications between October to December, 2019.
Reported by the Economic Times on 12th June, 2019

2. GST Meet: GST Council To Meet On June 20, May Fix Rs 50 Crore Turnover Threshold For E-Invoice

The Finance Ministry is likely to propose Rs 50 crore as the turnover threshold for entities to generate e-invoice on a centralised government portal for business-to-business sales as it looks to curb GST evasion, an official said.
The GST Council, which will meet on June 20, will take a final decision on the turnover threshold for issuance of e-invoice for B2B sales after consultation with state.
Analysis of return filing shows that as many as 68,041 businesses have reported a turnover of over Rs 50 crore and accounted for 66.6 percent of total GST paid in FY18.
Further, while these businesses account for just 1.02 percent of GST payers, they make up almost 30 per cent of the B2B invoices generated in the system.
"The turnover threshold for entities to generate e-invoice for B2B sales is likely to be fixed at Rs 50 crore if the GST Council agrees. With this threshold, big taxpayers who are better placed technologically to integrate their software would have to generate e-invoice for B2B sales," the official told PTI.

With e-invoice generation, entities with turnover above Rs 50 crore would be saved from the twin activities of filing returns and uploading invoices. From the government's side, this would help in curbing invoice misuse and tax evasion.

The official further said that under the current system, there is a gap between the time of generation invoices and filing of sales returns.

The number of entities filing monthly summary sales returns GSTR-3B and paying GST is higher than those filing outward supply return GSTR-1, in which invoice-wise details have to be filed. Analysis suggests the gap could be either because of genuine difficulty in uploading invoices or with the intention of misusing input tax credit, the official said.

The ministry is planning to roll out the e-invoice system by September.

The official further said that data analysis shows that as many as 3.9 crore B2B invoices worth above Rs 50,000 are generated every month, which works out to be 12 lakh per day.

The number increases to about 1 crore per day if all B2B invoices generated irrespective of amount are taken into account.

The official said 1 crore invoice generation per day can be handled by GSTN/NIC as this would be similar to the number of e-way bills currently being generated on the portal

The ministry feels that e-invoice would increase ease of doing business if it becomes part of using business process and there is no need for additional reporting, the official said.

AMRG & Associates Partner Rajat Mohan said, "Government must develop a risk profile of all the taxpayers and it can be easily figured out that big corporates are rarely involved in activities of tax avoidance, thereby anti-tax evasion measures should be eyed at tier-II and tier-III taxpayers in a phased manner."

Reported by BloombergQuint on 9th June, 2019

3. Centre releases Rs 57 lakh as GST refund for 'langars': Harsimrat Kaur Badal

CHANDIGARH: Union minister Harsimrat Kaur Badal said on Thursday that the Centre has released Rs 57 lakh as refund on the GST charged on raw materials used to prepare food at 'langars' in gurdwaras, including the Golden Temple.

The three-time Bathinda MP thanked Prime Minister Narendra Modi for fulfilling the promise made to the Sikh community by initiating the process of refunding the Goods and Services Tax (GST) imposed on religious institutions.

In a statement issued here, she said the Union ministry of culture has released Rs 57 lakh GST refund to the GST authority in Ludhiana which is to be forwarded to the Shiromani Gurdwara Parbandhak Committee, which manages Sikh shrines.

"This is the first installment of GST refund and henceforth this refund will be issued quarterly to the SGPC. I thank the prime minister for the respect shown to Sikh sentiments by resolving this issue to the satisfaction of the Sikh community," the minister said.

The previous NDA government had decided to waive the GST on items used in preparing food at 'langars' (community kitchen) by providing financial assistance under the 'Seva Bhoj Yojna'.

Reported by the Times of India 14th June, 2019

4. Cut in GST rate on footwear to promote growth, exports: CLE Chairman to Govt.

Leather exporters in the country have urged the finance ministry to reduce the rate of goods and services tax (GST) on footwear with a view to promote growth of the industry and push exports.

Council for Leather Exports (CLE) Chairman P R Aqeel Ahmed raised this issue at a pre-Budget meeting chaired by Finance Minister Nirmala Sitharaman here on June 11.

He said that the domestic footwear sector holds huge potential to create jobs and earn foreign exchange.

"Reduction of GST on footwear would help promote growth of domestic footwear industry," he said in a statement.

The council has sought reduction of GST rate to 12 per on footwear priced above Rs 1,000.

GST rate on footwear worth up to Rs 1,000 was reduced to five percent, while those above this value still attract a GST rate of 18 percent.

Currently, export of leather and its products stands at about USD 6 billion. Major export destinations include Europe and the US.

Last year, the commerce minister announced a Rs 2,600 crore package for the leather sector to boost exports.

The sector employs about 42 lakh people.

Reported by Money Control on 12th June, 2019

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