ETHICS EDUCATION EXCELLENCE

AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

Volume-1 | Part-2 | March-2019

All India Federation of Tax Practitioners
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020 Tel.: 22006342/49706343
Fax : 22006343 | E-mail : aiftp@vsnl.com | Website : aiftponline.com

AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

AIFTP NATIONAL EXECUTIVE COMMITTEE 2019

MEMBERS

CONTENTS

SECTION: I

SECTION: II - GOODS & SERVICE TAX

SECTION: III - CORPORATE LAWS

SECTION: IV - JUDGMENTS

SECTION: V - MISCELLANEOUS

Ujjal Bhuyan
Judge

सत्यमेव जयते

Gauhati High Court
Guwahati - 781001
☎: (0361) 2600008 (O)
2513506 (R)

Dated : February 18, 2019

Message

I am very happy to learn that All India Federation of Tax Practitioners (AIFTP) has decided to publish a journal *(AIFTP Indirect Tax and Corporate Laws Journal*) covering indirect taxes and corporate laws.

It is indeed a very welcome and timely step.

Indirect taxes and corporate laws cover a wide spectrum in the field of law. It is difficult for a tax practitioner, be he an advocate or chartered accountant, to keep track of the case-laws of subjects as vast and diverse as GST, Company Law, Insolvency and Bankruptcy Code, Labour Laws etc. Such a journal will come in handy for the tax-practitioners.

My best wishes to all the members of AIFTP led by their dynamic President and I am confident that the journal will be useful to all the stakeholders.

Thanking You.

Yours sincerely,

(JUSTICE UJJAL BHUYAN)

Dr Ashok Saraf
National President
All India Federation of Tax Practitioners
215, Rewa Chambers 31, New Marine Lines, Mumbai-400020
1, Chanakya Path, G S Road, Guwahati – 781005.

Res : 15. B. N. Das Lane. Ambari. Lamb Road. Guwahati-781001

TESTIMONIALS

Dr. N.M. RANKA, Past President, AIFTP, Jaipur

Conceptually well designed well planned with coverage of indirect and other laws is highly commendable. It fulfills long cherished demand of those practising on indirect tax and allied laws. My hearty congratulations and blessings.

Achintya Bhattacharjee, National Vice President (East)

AIFTP Indirect Tax and Corporate Laws Journal has been published. It's an excellent initiative and a commendable effort by Dr. Ashok Saraf, our National President, and a great leader of the Federation. My Heartiest congratulations for the new initiative for introducing such excellent journal. AIFTP Indirect Tax and Corporate Laws Journal will remain as centre of excellence and knowledge in the years to come. This journal will keep our members up-to-date with the latest developments in the field of indirect taxes and provide a great opportunities for the young professionals also.Once again I express my good wishes to the National President Dr. Ashok Saraf, Secretary General Mr. Anand Pasari, and Chief Editor of the journal Mr. Pankaj Ghiya. Thanks

Ajay Sinha, National President of Association of Tax Lawyers India-New Delhi

It's an encyclopedia really fruitful for professional. Good efforts. Heartiest Congratulations.

N.D. Saha, Chairman, AIFTP-EZ, Kolkata

I am very proud on the publication of the free indirect tax. I would request to induct atleast two persons in the editorial board from Kolkata. This is my suggestion only. You are the best judge.

Achintya Malla Bujor Barua
JUDGE

GAUHATI HIGH COURT
(High Court of Assam, Nagaland,
Mizoram and Arunachal Pradesh)
GUWAHATI - 781001, ASSAM
Ph : 0361-2663697 (R)
Cell : +91 9864041182
E-mail : ambujorbarua@outlook.com

MESSAGE

The Indirect Tax and Corporate Laws Journal of the All India Federation of Tax Practitioners is truly an innovative concept which would benefit all the members of the Federation in keeping themselves updated with the provisions of the law through the summary of the various case laws laid down by the Supreme Court and the High Courts, as well as the concepts that emanates from the articles of the experts in the respective fields, as contained therein.

I had the benefit of going through the first issue of the journal and the manner in which the contents are being laid out in a simple and understandable language would definitely contribute to the skill enhancement of the members of the Federation.

I congratulate Dr. Ashok Saraf, National President of the All India Federation of Tax Practitioners and his team for developing and executing the concept of publishing a journal of the Federation and I also wish that the journal would be a grand success in terms of popularity as well as utility.

A. M. Bujor Barua

March 7th, 2019

TESTIMONIALS

S.R. Wadhwa, Chairman, Direct Tax Representation Commitee, New Delhi

It is a very very good idea to start a monthly journal on Indirect tax. The problem that sometimes arises is to get high quality articles and editing. The persons at the helm are competent. Let us hope they will maintain high quality of the journal and keep its out- put topical.

Chirag Parekh, Treasurer, AIFTP, Mumbai

Today I have received AIFTP Indirect Tax Journal Article are very good Total 19 Articles amd 104 pages This is an innovative idea by Our National President Sir Salute and Congratulations to you At the same time Chief Editor Shri Pankaj Ghiya also deserve appreciation for his time bound and hard work Great work by Both of you for the Professional Faternity.

Sanjay Kumar, Vice President, AIFTP, Allahabad

Sir, Today I received the First Part of the First Vol of the Indirect Tax & Corporate Journal. The Articles and Compilation is very informative, professionally useful and the Chief Editor Mr Pankaj Ghiya and his team needs to be applauded. In future a token subscription may be fixed to meet the costs.

Bhaskar B. Patel, Vice President, AIFTP, Vadodara

Congratulations to Dr Ashok Saraf National President AIFTP and entire team

Kalyan Rai Surana
JUDGE

GAUHATI HIGH COURT
(High Court of Assam, Nagaland,
Mizoram & Arunachal Pradesh)
GUWAHATI-781001 (ASSAM)

To,
Mr. Pankaj Ghiya,
Chief Editor,
AIFTP Indirect Tax & Corporate Law Journal,
All India Federation of Tax Practitioners,
215, Rewa Chambers,
31, Marine Lines,
Mumbai - 400020.

Date: 08.03.2019.

Dear Mr. Pankaj Ghiya,

I had the pleasure of going through the inaugural issue of AIFTP Indirect Tax & Corporate Law Journal. At the outset, I must thank Dr. Ashok Saraf, your Federation's National President for giving me the said first issue of the journal.

Your journal is a well organized compendium of informative material on GST, Company Law, Real Estate (Development & Regulation Act, 2016 and various other laws.

On a perusal of the said issue, I see that you have undertaken a herculean task on yourself. I envisage that your AIFTP Indirect Tax & Corporate Law Journal would make its own mark in the tax and corporate world. I congratulate you for leaving no stone unturned to educate and update the learned Tax Practitioners as well as other readers of your journal about tax and corporate laws, etc. There is no doubt that the readers would be immensely benefitted by your young journal.

Your first issue contains informative articles, which will go a long way to keep your members and subscribers up-to-date on various facets of the tax and corporate laws, etc. in one journal. I complement you and your entire editorial team for the remarkable work done in bringing out such an informative journal, which would definitely go a long way in continuous tax education in this Country. I also wish your journal a commercial success.

Sincerely,

(KALYAN RAI SURANA, J).

RESI: JUDGES BUNGALOW NO.8, NEAR GAUHATI HIGH COURT GUEST HOUSE, KHARGHULI MAIN ROAD, KHARGHULI, GUWAHATI-781004

TESTIMONIALS

CA RAJESH MEHTA, Chairman, AIFTP-CZ, Indore

The new Indirect taxes & Corporate Law Journal published by AIFTP with kind efforts of Our National President Dr. Ashok Saraf, and Chief editor Pankaj Ghiya with other members of editorial board, is a unique one covering all recent topics under GST and also covering relevant and useful allied laws for we professionals, is really admirable and a landmark publication, will be helpful in our day to day practice. We all will and must also contribute articles and FAQ and useful case laws etc. etc. for timely and smooth publication in every month.

Hemendra V. Shah, Member NEC, Hyderabad

Dear Dr Ashok Saraf Ji & Dear Shri Pankaj Ji, Thank you for sending AIFTP Indirect Tax & Corporate Laws Journal - February 2019. Journal is very very handy and helpful. Congratulations

CA Manoj Nahata, Member, NEC, Guwahati

The Brain Child of National President Dr. Saraf and the hard working of Sri Pankaj ji Ghiya resulted in a dream come true. This Journal is an indeed a need of hour. After GST implementation, this is really a comprehensive Journal covering not only GST but other laws as well. My hearty congratulations to Dr. Saraf, Pankaj Ji and entire Editorial Team.

Narayan Jain, Member, NEC, Kolakata

Congratulations to President Dr. Ashok Saraf and Dear Pankaj Bhai Ghiya for excellent maiden issue of journal on GST.

Subhash Agarwal, Advocate, Kolkata

Congratulations! Superb piece of publication

CHIEF EDITOR MESSAGE

Continuous Education is must for any Professional to excel in his field and particularly for the Tax Professional regular updatation and understanding of the Amendments and the Notifications being constantly issued by the Government requires a regular Education by way of attending Conferences, reading Journals and Updation through the other means of Communication. The effort of this Team of AIFTP is to service the Members by way of holding Seminars and Conferences throughout India and also on the persistent demand of the Indirect Tax Professional to start a new Journal specifically for the Indirect Tax & Corporate Laws. The first issue of "AIFTP Indirect Tax & Corporate Laws Journal" was launched in Feb., 2019 and was an instant hit. It was appreciated by one and all and it was circulated by way of hard copy sent by post to the Members who opted for hard copy and was also sent by Whatsapp and E-Mail to all the Members and other Tax Professionals. Needless to say that this Journal will be free of cost to all AIFTP Members who opt for hard copy for the Year 2019.

We had asked the Experts in the field of Indirect Tax & Corporate Laws to share their knowledge and wisdom for the benefit of the Professional Brotherhood and send Updates, Articles, Judgments etc. for publication in the Journal. The Editorial Team considers all the material received and publish it after editing if required. Again a request to the Professional Brethren to share their Articles and Updates for the Journal.

Vast changes has been made in the GST Law and Procedure and w.e.f. 1st April, 2019 the face of the GST Law and Procedure would undergo a tremendous change. Different type of return forms like "Sahaj", "Sugam" etc. has been notified. Even the Annual Return format has been notified. Various notifications has been issued including the notification for the increase of Threshold Limit etc. which would have far reaching effect on the working of the Tax Professionals. The National Bench of GST Tribunal has been notified by the Central Government at Delhi and there is demand by all the Tax Professionals to have the Benches of the said Tribunal at Bombay, Kolkata and Chennai also initially and later at all State Capitals. In the Corporate Laws again many changes has been made and the push is on the compliance and even for minor delay in filing the penalty / late fee amount is quite substantial.

The Team of this Journal is working hard for giving you the best and we requires your suggestions and contribution for the effective working. Please send your Appreciations, Suggestions, Articles, Advertisement and continue to Patron this Journal.

"Wish you all a Very Happy Holi"

Regards,

PANKAJ GHIYA
Chief Editor
+91 9829013626
pankajghiyajaipur@gmail.com

TESTIMONIALS

R.D. Kakra, Member, NEC, Kolkata

Completely Agree. It's a Best journal in all India in Both volumewise and contents wise. Heartiest congratulations to Our N President Dr. Saraf and Editor of the Journal and all the members who Contributed articles.

Rajendra Sodani, Member, NEC, Ujjain

Congratulations to Dr. Ashok Saraf Sir and Sh Pankaj bhai for publising of new Journal on indirect tax on GST and other law. Which is very excellant work and the material of the journal is very Rich.

Dr. P. Daniel, Member, NEC, Thane

I could not go through the entire magazine. However after going through the pages of the magazine I have no hesitation in recommending that this magazine is useful for everyone. It has covered all the burning issues of GST and I recommend this magazine for everyone juniors and also seniors in the Profession. I congratulate everyone who were behind this project and particularly to the National President for taking this bold step. With good wishes.

CA A.K. Srivastava, Member, NEC, New Delhi

Indirect taxation has undergone a sea change with the implementation of GST. To understand the nauances of the new legislation, a dedicated journal has been the need of the day. AIFTP under the leadership of Dr Ashok Saraf has taken a very timely step to start a new journal. The articles and news items covered in the first issue are very informative and helpful.

Dr. Naveen Rattan, Advocate, Amritsar

Monthly journal on indirect taxes released at Ghaziabad is marvellous step to spread legal knowledge amongst the tax community. Dr. Ashok Saraf and Mr. Pankaj Ghiya deserves full appreciation and my sincere best wishes.

PRESIDENT'S MESSAGE

The First Issue of AIFTP Indirect Tax & Corporate Laws Journal has been launched in Feb., 2019 as promised and I am grateful to all the Members who had appreciated this Journal. I may state that due to the consistent demand of the GST Professionals for a specialize Journal this was thought and within short time we had released the First Issue and the next issue of the month of March, 2019 is covering more Articles and Updates and in this issue we had started a new section namely Judicial Decisions. The Important Judicial Decisions on GST and Corporate Laws will be printed in this New Section for the benefit of the Members. As earlier communicated the Journal is free for all Members if they opt for Hard Copy on the website of the AIFTP i.e. www.aiftponline.org. We are also sending this Journal in Soft Copy to all the Members.

Friends, AIFTP is an Organization which is working for continuous Education for the Members by holding Seminars and Conferences. Recently Seminar has been held at Ghaziabad, Ludhiana etc. and National Tax Conferences are planned at Ranchi, Triputi, Udaipur, Mumbai etc. in the Year 2019. Apart from it we are also publishing AIFTP Journal which is more on Income Tax laws and also publishing AIFTP Times containing the activities of AIFTP. The Membership of AIFTP can be taken online through the website i.e. www.aiftponline.org.

The Central Election has been announced and it is the duty of all to vote in the Election. We as Professionals also have a duty towards the society to motivate others to compulsory caste their vote and participate in the Electrol process. India is a vast Democracy and require participation of all and particularly Educated Class. AIFTP will also run a Campaign for the awareness on casting of Votes.

This Journal is in the starting phase and requires your suggestion and contribution. Please send your comments and also the publishing material like Articles, Updates and Judgements.

In the age of Digitalization and Computerized working it is necessary for all of us to opt for E-Library and Cloud working. We are thinking of adding a subject in all the Conferences / Seminars for the updation of Computer skills.

"Wish you all a Very Happy Holi"

DR. ASHOK SARAF
National President, AIFTP
+91 9864020679
drashoksaraf@gmail.com

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. DEEPAK GARG
Jaipur

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
07.03.2019	10/2019-CENTRAL TAX	Section 23, Read With Section 24, Of The Central Goods And Services Tax Act, 2017 – Registration – Persons Not Liable For – Supply of Goods -aggregate turnover – does not exceed forty lakh rupees– w.e.f. 01-04-2019
07.03.2019	11/2019-CENTRAL TAX	Section 148 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Turnover upto 1.5 crore - Time Limit For Furnishing Return In Form GSTR-1 - April-June, 2019
07.03.2019	12/2019-CENTRAL TAX	Section 37, read with Section 168 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Turnover above 1.5 crore - Time Limit For Furnishing Return In Form GSTR-1 - April-June,2019
07.03.2019	13/2019-CENTRAL TAX	Section 168 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Time Limit For Furnishing Return In Form GSTR-3B - April-June,2019
07.03.2019	14/2019-CENTRAL TAX	Section 10 Of The Central Goods And Services Tax Act, 2017 – Composition Levy – Extension of Threshold – Rs. 1.5 crore - supersede notification No. 08/2017 - Central Tax dated 27.06.2017

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
07.03.2019	02/2019-CENTRAL TAX (RATE)	Section 9, read with Section 11, read with Section 16, of the CGST Act, 2017 – Composition Scheme Benefit –Supplier of Services – Turnover upto Rs. 50 Lakhs – @ 6%

CIRCULARS

DATE	CIRCULAR	REMARKS
07.03.2019	92/2019	Clarification on doubts related to treatment of sales promotion scheme under GST
08.03.2019	93/2019	Clarification on nature of supply of Priority Sector Lending Certificates (PSLC)

REMOVAL OF DIFFICULTIES ORDER

DATE	ORDER	REMARKS
08.03.2019	3/2019 – CENTRAL TAX	Removal Of Difficulties in implementation of Notification No. 2/2019 - Central Tax (Rate)– Central Tax Dated 13.10.2017 – Issue of Bill of Supply

*****

TIMELINE - GST

CA DEEPAK KHANDELWAL
JAIPUR

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers ***** Due date of GSTR- 3B for the month January 2019 has been extended to 22 February 2019***		March, 2019	20th April. 2019
			February, 2019	20th March. 2019
	(b) Newly migrated taxpayers		July 2017 to Feb 2019	31st March 2019
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		Jan to Mar. 2019	30th Apr. 2019
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		February, 2019	11th Mar. 2019
			March, 2019	11th Apr. 2019
	(c) Newly migrated taxpayers		July 2017 to Feb 2019	31st March 2019
(iii)	Quarterly return for Composite taxable persons	GSTR-4		
	(a) Normal Composition Taxpayers		Jan to Mar. 2019	18th Apr. 2019
	(b) Newly migrated taxpayers		July 2017 to Feb 2019	31st March 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 is required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	February 2019	10th March 2019
			March 2019	10th April 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	February 2019	10th March 2019
			March 2019	10th April 2019
(ix)	Details of inputs/capital goods sent for job-work. Quarterly Form	GST ITC-04	July 2017 to Dec 2018	31st March 2019
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	30th June 2019

*****

NITTY-GRITTIES OF INPUT TAX RESTRICTIONS – GOODS AND SERVICES TAX

Siddeshwar Yelamali
Chartered Accountant, Bangalore

S Venkataramani,
Chartered Accountant, Banglore

I. Background

Every business procures goods and / or services for the purpose of business or furtherance of business. Therefore, every registered person contends that the input tax credit of goods and / or services (for brevity, 'input tax') should be allowed as set-off. However, the tax laws impose certain conditions and restrictions in respect of the availment and utilization of input tax credit. Even under the erstwhile CENVAT Credit Rules and State Value Added Tax Act, certain restrictions were imposed on availment and utilization of input tax credit. In this article an attempt is made to analyse certain restrictions which are imposed in respect of availment and utilization of input tax credit in terms of Section 17 of the Central Goods and Services Tax Act, 2017 (for brevity, 'CGST Act').

II. Input tax restriction in terms of Section 17 of the CGST Act can be analysed in two parts viz (A) Partial Restriction and (B) Full restriction.

A. Partial restriction of input tax credit

1. Before applying partial restriction in respect of input tax, the blocked input tax credit in terms of Section 17(5) of the CGST Act has to be excluded from the available input tax credit.
2. Section 17(1) of the CGST Act pre-supposes that input tax credit which is meant for purposes other than business shall be restricted. .
3. Section 17(2) of the CGST Act – When input tax credit of goods and / or services are used partly for exempt supplies and partly for taxable supplies, input tax credit shall be restricted to the extent relatable to exempt supplies. The said restriction of ITC is to be determined separately for input / input services and capital goods as discussed below.
   - Determination of value of input tax restriction in respect ***input and input services*** attributable to exempt supplies provided in Rule 42 of the CGST Rules, 2017 which is summarized below:

i. Inputs / input services ***usedexclusively*** for ***exempt supplies*** should not be claimed;
ii. Eligible input tax credit of input or input services ***used exclusively*** for ***taxable supply*** to be claimed in full;

Common eligible input / input services used for exempt supply and taxable supply to be determined in following manner:

$$\frac{\text{Aggregate value of exempt supplies}}{\text{Total turnover in the State during the tax period (Month)}} \times \text{Common input tax credit}$$

a. ***Exempt supplies*** is sum total of the following
   - Nil rated supplies
   - Supplies wholly exempt under section 11 of the CGST Act / section 6 of the IGST Act
   - Transactions in securities
   - Supplies made by a supplier wherein the supplies are liable to tax in the hands of the recipient (reverse charge transactions)
   - Non-taxable supply: supply which is not leviable to tax under the CGST Act / IGST Act viz – High sea sales; supply of liquor for human consumption, supply of petroleum crude, HSD, Motor spirit, natural gas and ATF; Sale of building where entire consideration is received after completion certificate; Sale of land

Explanation to Rule 45 of the CGST Rules
- Value of land and building shall be taken as the same as adopted for the purpose of paying stamp duty
- Value of security shall be taken as 1% of the sale value of such security

b. Exempt supplies for the purpose of this formula ***does not*** include the following
   - Value of services by way of accepting deposits, extending loans or advances in so far as the ***consideration is represented by way of interest or discount***, ***except*** in case of a banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances
   - Value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India

Zero rated supplies (export supplies and SEZ supplies) are not to be considered as exempt supplies

c. ***Total turnover*** in the State during the tax period (month) is sum total of the following
   - Value of all taxable supplies
   - Exempt supplies
   - Exports of goods or services or both
   - Inter-State supplies of goods or services

d. The above prescribed formula should be applied in every tax period. Further, the above said formula ***will have to be reapplied at the end of financial*** year for the financial year and upon reapplication of the formula:
   - if the aggregate credit claimed during the financial year is excess on comparison with the reapplied formula, then the excess input tax credit should be added to the output tax and interest at 18% to be paid from 1st day of the succeeding financial year till the date of payment **or**
   - If the aggregate credit claimed during the financial year is less on comparison with the reapplied formula, then the differential input tax credit to be claimed as credit before September of the succeeding financial year.

e. Illustration for the above computation as provided in Rule 42 of the CGST Rules is given below:

Sl. #	Particulars	Reference	CGST	SGST/ UTGST	IGST
1	Total input tax on inputs and input services for the tax period May 2018	T	1,00,000	1,00,000	50,000
	Out of the total input tax (T):				
2	Input tax used exclusively for non-business purposes	T1	10,000	10,000	5,000
3	Input tax used exclusively for effecting exempt supplies	T2	10,000	10,000	5,000
4	Input tax ineligible under Section 17(5)	T3	5,000	5,000	2,500
	Total		25,000	25,000	12,500
	ITC credited to Electronic Credit Ledger	C1 = T - (T1 + T2 +T3)	75,000	75,000	37,500

Sl. #	Particulars	Reference	CGST	SGST/ UTGST	IGST
	Input tax credit used exclusively for taxable supplies (including zero-rated supplies)	T4	50,000	50,000	25,000
	Common credit	C2 = C1 - T4	25,000	25,000	12,500
	Aggregate value of exempt supplies for the tax period May 2018 (Note 1)	E	25,00,000	25,00,000	25,00,000
	Total Turnover of the registered person for the tax period May 2018 (Note 1))	F	1,00,00,000	1,00,00,000	1,00,00,000
	Credit attributable to exempt supplies	D1 = (E/F) * C2	6,250	6,250	3,125
	Credit attributable to non-business purposes	D2 = C2 * 5%	1,250	1,250	625
	Net eligible common credit	C3 = C2 - (D1 + D2)	17,500	17,500	8,750
	Total credit eligible (Exclusive + Common)	G = T4 + C3	67,500	67,500	33,750

Note 1: If the registered person does not have any turnover for May 2018, then the value of E and F shall be considered for the last tax period for which such details are available.

iii. Section 17(2) of the CGST Act is reproduced below

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

The Section uses the word partly for effecting taxable supplies and partly for effecting exempt supplies; but the Section does not provide for a situation where input or input services are exclusively used for exempt supplies. Rule 42 of the CGST Rule provides for the reversal of input or input services used exclusively for exempted supply as discussed supra. The moot question that arises here is whether the Rules can over-ride the Section, since the section 17(2) does not

provide for reversal of input or input service used exclusively of exempted supplies.

For instance, a manufacturing entity in the very same premise - manufactures product 'A' which is taxable supply; and product 'B' which is exempt from tax. If the raw material 'X' is used exclusively for manufacture of exempt product 'B' (raw material 'X' is not used for manufacture of product 'A'), can Rule 42 prescribe for reversal of input tax of raw material 'X' when Section 17(2) of the CGST Act does not provide for the same. However, taking a position not to reverse input tax in such cases would have to be legally contested.

- Determination of value of input tax restriction in respect ***capital goods*** attributable to exempt supplies provided in Rule 43 of the CGST Rules, 2017 is summarized below:
  i. Input tax credit of capital goods ***used exclusively*** for ***exempt supplies*** should not be claimed
  ii. Input tax credit of capital goods ***used exclusively*** for ***taxable supply*** to be claimed in full
  iii. Common input tax credit of capital goods used for exempt supply and taxable supply to be determined in following manner:
    a. The useful life of capital goods to be considered as 5 years from the date of invoice. The input tax credit for a tax period to be determined by dividing the input tax credit of a capital good by 60 (i.e. the life of capital goods over 5 years is converted to 60 months).
    b. The following formula to be applied to the amount of ITC arrived at in (a):

$$\frac{\text{Aggregate value of exempt supplies}}{\text{Total turnover in the State during the tax period (Month)}} \times \text{Common input tax credit}$$

The meaning of 'exempt supplies' and 'turnover in a State' is the same as discussed under 'determination of value of input tax restriction in respect ***input and input services***' supra.

c. Illustration for the above computation of common eligible input tax credit as provided in Rule 43 of the CGST Rules is given below:

Sl. #	Particulars	Reference	IGST
1	ITC on capital goods whose residual life remain (Annexure A)	Tr	6,500
2	Aggregate value of exempt supplies for the tax period May 2018	E	25,00,000
3	Total Turnover of the registered person for the tax period May 2018	F	1,00,00,000
4	Credit attributable to exempt supplies	Te = (E/F) * Tr	1,625

Annexure A - ITC on capital goods whose residual life remain

Sl. #	Particulars	Reference	Amount
	For May 2018		
1	Inward supply value of Machinery X	a	12,50,000
	IGST @ 12%	b	1,50,000
	Invoice Value		**14,00,000**
	Date of inward supply		**12 April 2018**
	Life of the capital goods (in months) - for GST purpose is 5 years	c	**60**
	ITC attributable for 1 month	Tm1 =b/c	**2500**
2	Inward supply value of Machinery Y	e	20,00,000
	IGST @ 12%	f	2,40,000
	Invoice Value		**22,40,000**
	Date of inward supply		**21 May 2018**
	Life of the capital goods (in months) - for GST purpose is 5 years	g	**60**
	ITC attributable for May 2018 (1 month)	Tm2 = f/g	**4000**
	Aggregate of ITC on common credits	Tr = Tm1 + Tm2	**6500**

- A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the following options:
  a. Follow the procedure as discussed supra input tax restriction in respect input, Input service and capital goods; or
  b. Claim an amount equal to 50% of the eligible input tax credit on inputs, capital goods and input services in the month. Balance ITC would lapse.

  The option once exercised during a financial year cannot be withdrawn till the end of the financial year.

B. **Full restriction of input tax credit (Blocked credits)**

1. Motor vehicles / Vessels / Aircraft
   a. Motor vehicle
   - **July 2017 to January 2019 -** The restriction was applicable on usage of motor vehicles for all purposes excluding for transportation of goods and taxable supply of transportation of passengers, imparting training and further supply of such vehicles. Further, ITC was restricted on motor vehicles used for transportation of persons irrespective of seating capacity.

- **Effective February 2019** - Input tax credit (ITC) restriction on motor vehicles is now limited to usage of the same for transportation of persons only (with certain exclusions)

Purpose	Specification	Conditions
Transportation of persons	Approved seating capacity upto 13 persons (including drivers)	Capacity upto 13 Credit eligible only if the used for making following taxable supplies: ▪ Further supply of such motor vehicles ▪ Transportation of passengers ▪ Imparting training for motor driving
Transportation of persons	Approved seating capacity more than 13 persons (including drivers)	Credit is admissible without any restriction

ITC on motor vehicles like dumpers, tippers, fork lift trucks etc., is now allowed.

b. Vessel / Aircraft: ITC on vessels and aircrafts shall be allowed only when they are used for
   - Further taxable supply of vessel / aircraft
   - Transportation of passengers
   - Imparting of training on navigation of vessel / flying of aircraft

c. ITC of motor vehicle, vessel / aircraft used for transportation of goods is allowed

2. **General Insurance, repair and maintenance services of motor vehicle / vessel / aircraft** - ITC on payment of general insurance, repair and maintenance services in relation to the motor vehicles, vessels or aircraft will be allowed effective February 2019 as follows:
   a. ITC on such motor vehicles, vessels and aircrafts is eligible when availed as discussed in paragraph B (1) supra.
   b. To a manufacturer of motor vehicles, vessels and aircrafts.
   c. To the person engaged in supply of general insurance services in respect of the motor vehicles, vessels and aircrafts insured by him.

   For the period July 2017 to January 2019, some experts are of the view that the input tax credit in respect of the above was available without any restrictions.

3. **Leasing, renting or hiring of motor vehicles / vessels / aircraft –**
   - **July 2017 to January 2019 –** Restriction was only on rent a cab except where the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force. ITC credit of air tickets purchased for travel of personnel was allowed; however, there is a school of thought that ITC credit of air tickets purchased for travel of personnel is not eligible even during this period.

- **Effective February 2019** – Credit would be admissible only in the following circumstances:
  a. ITC on such motor vehicles, vessels and aircrafts is eligible when availed as discussed in paragraph B (1) supra.
  b. Where inward supply of such service is used by the registered person for making an outward taxable supply of same categories of goods or services.
  c. When inward supply of such service is used by the registered person for making ***as an element*** of a taxable composite or mixed supply.
  d. Where it is obligatory for an employer to provide the same to its employees under any law for the time being in force

4. **Food and beverages; outdoor catering; beauty treatment; health services; cosmetic and plastic surgery; life insurance and health insurance -** Credit would be admissible only in the following circumstances:
   a. Where inward supply of such service is used by the registered person for making an outward taxable supply of same categories of goods or services.
   b. When inward supply of such service is used by the registered person for making as an element of a taxable composite or mixed supply.
   c. Where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

5. **Membership of a club, health and fitness centre Travel benefits extended to employees on vacation such as leave or home travel concession -** Credit would be admissible only when it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

6. ITC on works contract services when supplied for ***construction*** of an immovable property (other than plant and machinery) is restricted except where it is an input service for further supply of works contract service. ***Construction includes*** re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property.
   - ITC on works contract service for plant and machinery is eligible.
   - Is ITC available to the developer supplying residential flats to end customer before issuance of completion certificate, since supply of flats by developer may not tantamount to works contract service – Notification 11/2017 dated 28.06.2017 provides for a separate entry for construction services as under
     - ✓ 'Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier'
     - ✓ Composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017

     Therefore, in authors view supply of residential flats to end customers before issuance of completion certificate by a developer would fall under

construction of complex / building and not works contract service and therefore, ITC would be available to the developer.

7. ITC is restricted on goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) ***on his own accountincluding*** when such goods or services or both are used in the course or furtherance of business. The meaning of construction is same as discussed in paragraph 6 supra
   - ITC for construction of plant and machinery is eligible.
   - ITC of goods / services for construction of building for letting out is not eligible even though it is for furtherance of business.
   - Can ITC be claimed when renovation or repairs are carried out to an immovable property wherein it may be for self-use or for renting?

Particulars	**Input tax credit eligibility**
Cost of renovation capitalized with building	Not eligible
Cost of renovation is not capitalized with building	Eligible.

However, it may be noted that the supplier of service would categorize his service under 'works contract service' and therefore, the eligibility of credit would not be available as it is not meant for supply works contract service. It may be argued that the supplier of service though he classifies it as 'works contract service', the service received for renovation of building is 'construction service' and therefore eligible as credit provided the cost of renovation or repairs is not capitalized with the building.

Meaning of plant and machinery for paragraph 6 and 7 supra: Plant and machinery means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports ***but excludes***-
(i) land, building or any other civil structures;
(ii) Telecommunication towers; and
(iii) Pipelines laid outside the factory premises.

8. ITC is not available on goods or services or both on which tax is paid under composition scheme.

9. ITC is not available on goods or services or both received by a non-resident taxable person. However, IGST paid on goods imported by a non-resident taxable person is available.

10. ITC is not available on goods or services or both used for personal consumption.

11. ITC is not available on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.
    - Is ITC required to be restricted in case of supply involving - say buy one get one free or any goods supplied free with any other supply for a consideration? The above restriction does not cover such a situation and therefore, in the authors view such free supply would be for furtherance of business and as such, no reversal of ITC is required where free supply is made. This view may be contested by the tax department.
    - ITC restriction / reversal is required to be made for free samples as the section specifically covers free sample.

12. Restriction in respect of tax paid by reason of:
    - Fraud or any wilfull-misstatement or suppression of facts (Section 74 of the CGST Act, 2017).
    - Detention, seizure and release of goods and conveyances in transit (Section 129 of the CGST Act, 2017).
    - Confiscation of goods or conveyances (Section 130 of the CGST Act, 2017).

"An attempt has been made in this article to make a reader understand the restrictions on input tax credit 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 28th February, 2019."

*****

WHY 'PETROLEUM PRODUCTS' SHOULD BE BROUGHT UNDER GST?

Adv. MUKUL GUPTA
Senior Partner & Counsel
SHARNAM LEGAL

In accordance to the Constitution of India, the Goods and Service Tax (GST) can be levied on 'Petroleum Products', but it is the GST Council that would decide when such products can be brought under its regime.

In terms of Article 279A (5) of the Constitution of India, *"Goods and Service Tax Council shall recommend the date on which the GST be levied on Petroleum Crude, High Speed Diesel, Motor Sprit(commonly known as petrol), Natural Gas and Aviation Turbine Fuel."*

We understand that during initial years of operation of GST, Petroleum Products were proposed to be excluded from the purview of GST for various reasons including that this issue should not be a hurdle in early implementation of GST in our country.

Major Benefit to the Economy

Petroleum Products are the major source of fuel for the industry and excluding the same from GST would add to overall tax cost of production. All industrial fuels should be part of the GST normally as any other product, to reduce the overall cascading of taxes, so as to make Indian products competitive in the international market. If there are revenue considerations, the same can be achieved by restricting the credit to end customers.

Present Effect

Soaring fuel prices have been the talk of the town lately and fairly so. Even a meagre increase in fuel price not only impacts the consumers directly in their day-to-day needs but also has an effect on inflation.

Currently, Petroleum products such as crude oil, natural gas, diesel, and petrol and aviation fuel are outside the ambit of GST and they are subject to levy of Central Excise and State specific VAT (Value Added Tax) regulations.

Since, these products are still outside the GST net, there is a loss of 'input tax credits'of the amount one pays towards Central Excise and State VAT, as the same cannot be off-set towards output GST. Similarly, GST on inputs/capital goods and input services becomes a cost for the Petroleum industry, if Petroleum products are brought under GST, then, even with the highest tax slab rate of 28 percent, there would be considerable price reduction. This drop itself would bring in the first level of respite for the consumers and would also bring uniformity in the fuel taxes imposed across the country.

If one makes an indicative computation of fuel prices under GST (if the Government bring Petroleum products under the highest slab of 28 per cent GST) it

will suggest that fuel prices could reduce in the range of atleast 10-20 percent due to saving in taxes, which would have a direct impact on disposable income of any household. It will also allow seamless flow of input tax credit which will indirectly reduce prices of Petroleum products as also other products where Petroleum is a major input.

Even the Aviation Ministry is pushing for inclusion of Aviation Turbine Fuel (ATF) or jet fuel in GST, as higher jet fuel prices are impacting airlines and in turn passengers through rising fares dearly.

Revenue impact

However, bringing Petroleum products under GST (even with the highest slab of 28 percent) would significantly dent the Government's kitty as the revenue dependency on current tax levy is high. In order to compensate this gap, the Government may also resort to introduction of additional cess on the Petroleum products, which would mean that the ultimate price to consumer may not see a substantial dip, which maybe counter-productive.

Fear of the States

States are presently empowered to levy taxes over and above the GST. States get upto 40 percent of their revenue from Petroleum products and if there are losses after bringing them (on par) with the GST, neither the Centre nor the States can absorb such losses.

Dangerous View

Recently, there have been reports of the possibility on combination of both, GST (with highest slab of 28 percent) and local Sales Tax or VAT (to be levied by the States). But, this may not result in any substantial/ desired reduction in pricing and may also give rise to further complications in taxing structure.

Amendments in the Constitution of India prescribed that Petroleum products can be brought under GST and Excise as well as VAT will continue on them.

There are two possibilities:

- To bring Petroleum products under the GST in some rate slab and continue with VAT and Excise as well;
- The Governments do not impose any Excise and VAT, but levy GST withhighest slab of 28 percent and then Cess, not for compensation, but to be shared between Centre and States. The Government also have a provision for Additional Excise Duty on Petroleum products.

If the first possibility is fructified then it will result in a tax structure more complicated than what it is now. Besides, if Central Excise & VAT added to GST, then what is the benefit of bringing them (the fuel prices) into GST regime? This system may serve the purpose of manufacturers, as they will get input tax credit, but it will have cascading effect on consumer.

General public/ consumers will benefit only if both Centre and States decide to settle for lower income from petrol and diesel. A stable methodology of bringing in Petroleum products under the GST ambit is the need of the hour.

*****

GST ON INTERMEDIARY SERVICES

Mr. VIVEK CHIVUKULA
Tax Practioner
Hyderabad

Intermediary services provided outside India are interstate or intra state: Taxable @ 18% or Zero rated supply?

Earlier under service tax regime, wef 1.7.2012, commission agent for services provided to foreign principal were under intermediary services and were taxed to service tax. Similarly wef 1.10.2014, the commission agent for goods where such services provided to foreign principal were covered under intermediary services and taxed to ST under Rule 9 of Place of Provision of service Rules (POPS). This change had led to service tax being demanded on commission agent services though booking of orders for goods with Indian customers was done for foreign principal and commission received in convertible foreign exchange.

It has been morethan a year since the implementation of GST, yet there are some problems which require immediate attention of the government to clarify, one of such issue is 'place of supply' of intermediary services for the chargeability of GST.

It is a general trade practice for the Indian entities to provide intermediary services to the recipient located outside the Indian Territory. This aims to determine whether the 'supply of services' by the intermediaries to the recipients located outside India amounts to **export of services** or not?

Firstly it is important to understand the meaning of 'intermediary' first. Under Section 2(13) of IGST Act, 2017, 'intermediary' is been defined as a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.

Certain terms that have been read in the definition are:

1. An intermediary is only a facilitator of the goods and services; it can be a broker or agent or any other person.
2. The act of facilitation gives rise to two supplies:

– Supply between the principal and the third party.

– Supply of the intermediaries' services for a commission/fee

3. If the intermediary is supplying the goods/services in his own name/title, then the status of 'intermediary' cannot be accrued to the agent.

Though the term 'broker' and 'agent' are different; broker being a middleman whose job is only to facilitate whereas agent acts on behalf of the principal; yet under the Act these terms have been put together under one umbrella of 'intermediary'.

Section 13(8)(b) of the IGST Act

The services provided by intermediaries located in India to the recipient located outside India in lieu of fee/commission charged for the said services amounts to 'supply' of services. Now, in order to determine whether the said transaction will be Export of

Services and/ or an intra-state supply or inter-state supply, the 'place of supply' of such services must be determined.

Section 13 of IGST Act determines the place of supply of services where either the location of supplier **or** the location of recipient is outside India. Here, default Section 13(2) provides that the 'place of supply' shall be the 'location of the recipient' unless the services falls within the ambit of specified sections from 13(3) to 13(13) of the IGST Act. In pursuance of Section 13(8)(b) of the IGST Act, the **place of supply** in case of the 'Intermediary services' shall be the 'location of the supplier of services'.

Example: If XYZ is a company registered in UAE and taking services of finding prospective customers in India by an Indian ABC company registered at Delhi. ABC co. is providing intermediary services to this UAE co. and charging commission for the same.

As per Section 13(8)(b), the location of supplier shall be the place of supply in case of intermediary services. Since, the location of the supplier is Delhi and place of supply is also Delhi in given case, therefore this transaction will not be covered within the definition of export of services (as provided in Section 2(6) of IGST Act) as it is not satisfying one of the conditions of **place of supply being outside India**, which are reproduced herein below:

(i) The supplier of service is located in India;
(ii) The recipient of service is located outside India;
(iii) The place of supply of service is outside India;
(iv) The payment for such service has been received by the supplier of service in convertible foreign exchange; and
(v) The supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8

Therefore, going by the strict interpretation of Section 13(8) of IGST Act, the supply of services by the Intermediaries to the recipients outside India are **not export of services**.

Recent Judicial Advance Ruling:

Global Reach Education Services Pvt. Ltd (AAR Kolkata) : In this case, the applicant was promoting the foreign university and was helping them in enrolling Indian students. In providing the promotional services, the promotional company was charging commission/fee from the foreign university. In this very case, the authorities found that the Indian representative was an intermediary acting as an independent representative. Citing Section 13(8)(b) of the IGST Act, the Hon'ble West Bengal Advance Ruling Authority ruled that the **place of supply** shall be the place of supplier of service and such intermediary services would not be termed as export of services.

Intermediary services: Whether intra-state supply or inter-state supply?

Section 13(8) states that the **place of supply** in case of intermediary services becomes the **location of the supplier**. Therefore, in the above discussed example, the place of supply of intermediary services provided by company ABC located in India becomes the place of the supply of Intermediary service. This leads to the location of supplier and the place of supply being in same state, which means that the transaction between the intermediary service providers to a recipient outside India becomes **intra-state supply**.

Analyzing Section 8(2) and Section 7(5)(c) of the IGST Act:

- **Section 8(2)** of IGST Act, while defining intra-state supply of services states that:

*"**Subject to the provisions of section 12**, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply"*

Now, for Section 12 to be applicable, location of supplier as well recipient must be in India.

It means Section 8(2) cannot be applied to the supply of intermediary services as the recipient is situated outside the taxable territory of India, hence, taking the transaction of providing intermediary services outside the purview of intra-state supply or services.

- Further, application of **Section 7(5)(c)** of IGST Act, 2017 shall make the said transaction as inter-state supply, which states that *"Supply of goods or services or both,*
*c) In the taxable territory**, not being an intra-State** supply and **not covered elsewhere in this section**, shall be treated to be a supply of goods or services or both in the course of **inter-State trade or commerce**".*

Therefore, it may be safely concluded with conjoint reading of Sections 8(2) and 7(5)(c) of the IGST Act that intermediary services given to the recipient outside India by an intermediary in India is an **Inter-State Supply**.

Section 16 of the IGST Act makes the export of services as zero rated supplies. This will provide benefit of exports to the registered intermediary service providers providing services to recipient outside India. This will further reduce the cost of Intermediary service providers and make the Indian services highly competitive in International market, which in turn will become a fertile ground for earning foreign exchange.

Why place of supply for intermediary services should be changed to location of recipient:

When an Indian recipient imports services from the foreign intermediary service providers, then, this transaction would fall outside the GST ambit as location of supplier and place of supply i.e. location of supplier, both are outside India. Hence, no reverse charge will be applicable in hands of the Indian recipient of intermediary services. This logic also supports the contention of changing place of supply provisions for intermediary services from location of supplier to location of recipient.

Application of Section 13(8) of IGST Act is reducing the Indian forex reserves by making the imports tax free and exports taxable. For instance, when the supplier is in the foreign territory and the intermediary is also located in the foreign territory, but the location of the recipient is in the Indian Territory. Now, if the location of foreign intermediary service provider is made the place of supply, then this transaction will be kept outside the ambit of GST and the consequent transaction shall be tax-free for the Indian recipient making the import of service much more convenient and feasible for Indian recipient as compared to Indian intermediary service provider providing services to the foreign recipient. Therefore, in order to deal with this problem, the government should make the location of recipient as the place of supply. This will make the import of services by the Indian recipient taxable at par with exporter of intermediary services in India.

Therefore, in order to resolve the above, it is suggested that the Govt. should immediately amend the provisions for place of supply of intermediary services to the location of the recipient outside India and should be treated as export of services which will be in the interest of India.

*****

TAX LIABILITY ON MINERAL MINING RIGHTS

CA RIBHAV GHIYA
Jaipur

The service of granting Mineral Mining Rights by the Government is a taxable supply of service under the provisions of GST. The scenario was the same in the earlier regime also and there was no ambiguity on it. However, there were some doubts with respect to the rate of tax at which the said service would be taxable. Various taxpayers from the industry have filed Advance Rulings before their respective Advance Ruling Authorities to obtain clarity on the Rate of tax applicable on Supply of Service of granting mining rights. The main contention raised by the Applicants M/s. United Mining Corporation and M/s. Pioneer Partners in their respective Applications before the Authority for Advance Ruling, Haryana was on the lines that the Notification No. 11/2017-CT (Rate) dated 28.06.2017 as amended vide Notification No. 01/2018-Central Tax (Rate) notifies the Central tax on intra-state supply of service. The Annexure appended to the said Notification specifies that at Serial No. 257 the group 99733 includes sub-heading 997337 which is for:

> *"Licensing services for the right to use minerals including its exploration and evaluation"*

The Royalty or the Dead Rent paid by the applicant to the Government is nothing but an amount paid for getting right to use the minerals granted to it for a specified period as per terms of the lease. In the given transaction the lease deed has been executed for leasing of mines, Hence, the classification of services is in accordance with Notification No. 11/2017-CT (rate) dated 28.06.2017 and the said transaction is covered under Serial no. 17 of the said Notification. The said entry is reproduced for your kind perusal:

		(viii) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv), (v), (vi) and (vii) above.	Same rate of central tax as applicable on supply of like goods involving transfer of title in goods	

It is therefore clear that the services of right to use natural resources classify under heading 9973 and since description of service under Serial no. (i) to (vii) does not cover such services of right to use minerals therefore it would fall under the residual entry at serial no. 17(viii). Being so, the rate of tax applicable on such services shall be the **same rate of tax as applicable on supply of like goods involving transfer of title in goods**.
Therefore, the Dead rent payable to the Government by the Applicant is the consideration against the transfer of right to use minerals including its exploration and evaluation as per the lease granted by the Government of Rajasthan to the Applicant. The service of right

to use minerals including its exploration and evaluation as per Sr. No. 257 of the annexure appended to Notification No. 11/2017-Central tax (rate) dated 28.06.2017 is included in heading 99733 under Chapter 9973.

The Haryana Authority for Advance Ruling held that the same is classified under Entry (viii) of Serial No. 17 of the said Notification and the tax Rate Applicable would be the same as the rate on like goods involving transfer of title in goods.

However, the said Entry has now been amended with effect from 31.12.2018 by way of Notification No. 27/2018-CT(Rate) dated 31.12.2018 by way of which the rate of tax has been fixed at the rate of 18% instead of the same being dependant on the rate of tax on like goods involving transfer of title in goods. The same is reproduced hereunder for perusal:

(3)	*(4)*	*(5)*
"(viia) Leasing or renting of goods	*Same rate of central tax as applicable on supply of like goods involving transfer of title in goods*	-
(viii) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv), (v), (vi), (vii) and (viia) above	*9*	*-";*

Similar Application has also been filed before the Authority for Advance Ruling, Rajasthan in the case of M/s. Aravali Polyart Pvt. Ltd. where it is held by the Authority on 15.02.2019 that they are in agreement with the fact that the said service falls under Entry (viii) of Serial no. 17 and falls under Chapter heading 9973 but in the light of the said Amendment, now the service of leasing of mineral mining rights would be at the rate of 18% and not at the rate of the like goods at which they are supplied with effect from 31.12.2018.

Therefore, the rate of tax applicable on License Fees i.e. Dead Rent / Royalty has now been fixed at 18% after the introduction of amendment to Notification 11/2017-CT(Rate) dated 28.06.2017 vide Notification No. 27/2018-CT(Rate) dated 31.12.2018. The earlier Advance Rulings on this issue do not hold good because of the amendment in the GST Rate Notification for Services.

*****

SOME IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata,
FCA, DISA (ICAI)
Guwahati

1. Whether GST is applicable on sales of business on going concern basis along with all assets and liabilities?

Held: No

In case of ***Rajashri Foods Pvt Ltd - AAR Karnataka*** held that transfer of business /unit as a going concern along with all assets and liabilities, either as a whole or an independent part thereof, for a lump sum consideration does not constitute an activity taking place in the course of business or for furtherance of business. However, since the word "includes" has been used in Section 7(1) the scope of supply goes beyond the meaning of the expression "in the course or furtherance of business". Therefore in the case of the transfer of a going concern even if the act of transfer does not constitute an activity carried out in the course of regular business or for furtherance of business, the activity may still qualify to be termed as a supply. Further transfer of business assets as per Entry Sl. 4 of Schedule-II is considered as supply of goods. The transfer of business assets implies that a part of the assets are transferred and not the whole business. It is the applicant's case that the entire business is proposed to be transferred, where all assets and liabilities will be transferred to the new owner and business would have continuity, regularity and permanency. Further in part 4(c) of Schedule II it is provided that when the business is transferred as a going concern then it does not amount to supply of goods. It, therefore, becomes clear that such transfer of business does not constitute a supply of goods.

Further the Notification, No. 12/2017- Central Tax (Rate) dated 28th June 2017 in Column number 3 of the Table gives the description of the services. Serial number 2 of the Notification provides for "Services by way of transfer of a going concern, as a whole or an independent part thereof". This indicates that the activity of transfer of a going concern constitutes a supply of service. The Notification further provides "Nil" rate of tax on such a supply.

2. Whether input tax credit is admissible on inward supplies for construction of warehouse which are constructed by using pre-fabricated structure?

Held: No

In case of ***Tewari Warehousing Co. Pvt. Ltd. - AAR West Bengal*** the facts are that the applicant is stated to be supplying warehousing services, is constructing a warehouse on leasehold land, using pre-fabricated technology. According to the Applicant, it can be dismantled and reconstructed at a different location. The question was raised whether the input tax credit is admissible on the inward supplies for

construction of the said warehouse? It was contended that anything embedded in the ground and is not movable (except in certain cases like standing timber, grass, growing crops and the like) or anything that is permanently fixed to such things which are so embedded to the ground can be called an immovable property. Further it can be dismantled and moved from one place to another. The Applicant further argued that the System is movable property and, therefore, the provisions of section 17(5) (c) & (d) of the GST Act, blocking input tax credit on inward supplies for construction of immovable property, is not applicable. It was held that the Applicant is constructing a warehouse that is intended to be used as a permanent structure, and associated with beneficial enjoyment of the land on which it is being built. The technology used for the construction of the warehouse involves the application of pre-fabricated structures and also civil work for supporting the pre-fabricated structure and developing the floor of the warehouse. The warehouse cannot be conceived without beneficial enjoyment of the civil structure embedded on earth. The warehouse being constructed is, therefore, an immovable property, and the input tax credit is not admissible on the inward supplies for its construction, as the credit of such tax is blocked under section 17(5) (d) of the GST Act.

3. **Whether ITC is available on GST charged by a contractor for hiring buses/cars for transportation of employees?**

Held: No

In case of ***YKK India Pvt. Ltd. - AAR Haryana*** it was held that the services of the contractor for hiring of buses/cars for transportation of employees qualify as "rent-a-cab" services and thus ineligible to claim ITC as per section-17(5) (b) (iii). The contention of the applicant that due to difference in phrases "hire" and "rent", in their case, the impugned would not qualify as "rent-a-cab", have no grounds, as "hiring" and "renting" are synonyms in terms of the judgment in case of ***Commissioner of Service Tax Vs. Vijay Travels [2014 (36) S.T.R.5139 (Guj.)].*** Further it was also observed that the impugned service is not a service which is obligatory for an employer to provide to its employees under any law for the time being in force or it is an inward supply of services is being used by the applicant for making an outward taxable supply of the same category of services or as a part of a taxable composite or mixed supply.

4. **Whether the services provided by the owner of boarding house to the students for lodging along with food is a composite supply within the meaning of section-2(30) of the GST Act, where the supplier charges a consolidated amount for combination of services?**

Held: No

In case of ***Sarj Educational Centre - AAR West Bengal***, the facts are that the applicant has entered into an MOU with St. Michael's School under the management of Sunshine Educational Society, for providing boarding facility exclusively to the students of the said school. The boarding facility shall include lodging, housekeeping, laundry, medical assistance and food. The consideration is a consolidated charge on

the individual boarder for the combination of the services. It was held that the bundle of services offered to the recipients consists of both taxable and non taxable supplies which are not indivisible. Therefore, bundles of taxable supplies that are inseparable and supplied only in conjunction with one another in ordinary course of business. The services the Applicant supplies are not, therefore, composite supply, as defined under Section 2(30) of the GST Act. Therefore, the combination of services offered to the recipients is a 'mixed supply' within the meaning of section-2(74) of GST Act.

5. Whether GST is leviable on the rent payable by a Hospital, catering life saving services?

Held: Yes

In the case of ***M/s Tathagat Health Care Centre LLP - AAR Karnataka***, it was held that during the service tax regime, the rent, on the room service provided to the heart care patients undergoing treatment, was exempt from service tax under notification no. 25/2012 ST dated 20-06-2012. In the GST regime, hospital services are all exempt from GST. Hence the hospital does not have any output service tax to set off against the input tax arising from payment of GST on rent. Renting in relation to immovable property is defined at 2(zz) of the Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 as (zz) "renting in relation to immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property". The impugned service of Rental or leasing services involving own or leased non-residential property is classified under the heading (SAC) 997212 and is taxable under GST. Further no specific exemption is available under any notification for the time being in force for the said service. Also there is no provision available in the Act which allows exemption on an input service if the output service provided by the taxable person is exempt.

6. In case of invoices being raised by supplier in the previous month and goods being received in the succeeding month, when does the input tax credit can be availed by the recipient?

In the case of ***Pasco Motor LLP - AAR Haryana***, the facts of the case were that the applicant purchases goods from its vendor having different locations in the Country. The goods remained in transit for roughly 5-10 days. The sales invoices are raised in the end of the month by its vendor but material arrives to its place only in the next month. So in such a situation the question is when the applicant would claim ITC? Whether in the month in which invoices raised or in the month in which goods actually received by them? The applicant contended that when the goods are delivered to transport for further movement it is deemed to be delivered to registered person only within the meaning of the provision of section 16. So ITC should be available immediately. However, the AAR held that such situation is covered for to 'Bill to-Ship to' transactions. Thus the input tax credit shall be available to applicant only

when the applicant has received goods. The reference of section-12- "Time of Supply" of the CGST/HGST Act was also given in the ruling.

7. Whether IGST can be charged in "Bill to-Ship to" transactions wherein both supplier and recipient are located in same state and third party is located in different state?

Held: Yes.
In case of ***Ms. Umax Packaging – AAR Rajasthan*** held that in case of "Bill to-Ship to" transactions wherein supplier and recipient are located in same state and third party is located in different state, IGST would be chargeable on both the transactions i.e. Supplier to Third Party and Third Party to Recipient even though goods have been delivered in same state and have not crossed the boundaries of the State of the Original.

8. Whether ITC is available for ambulance purchased for employees as per legal requirements under Factories Act, 1948?

Held: No
In the case of ***Nipha Exports Pvt Ltd. - AAR West Bengal***, it was held that input tax credit on inward supply of ambulance, being a motor vehicles, is not admissible under section 17(5)(a).An exception has been carved out under section 17(5)(b)(iii)(A) for services which are obligatory for an employer to provide to its employees under any law for time being in force is limited only to rent-a-cab, life insurance and health insurance and, hence, input tax credit is not admissible on ambulance purchased. Section-17 of CGST Act blocks any such enjoyment, even though provisioning of ambulance service to employees is obligatory under Factories Act, 1948.

9. What is the nature and rate of tax applicable on supply of sweetmeats, namkeens, Dhokla, snacks, ice-cream, Jalebi, cholabhatura, takeaway of these products etc. from ground floor of sweetshop which also runs restaurant in first floor?

In case of ***M/S. KundanMisthanBhandar – AAR Uttarakhand*** held that:
(i) The supply shall be treated as supply of service and sweet shop shall be treated as extension of restaurant;
(ii) The rate of GST on aforesaid activity will be 5% as on date, on the condition that credit of input tax charged on goods and services used in supplying the said service has not been taken;
(iii) All the items including takeaway items from the said premises shall attract GST of 5% as on date subject to the condition of non availment of credit of input tax charged on goods and services used in supplying the said service.

10. Whether registration is required in the State of West Bengal where goods are imported and stored in Custom Bonded warehouse and dispatched to customers there from directly on billing from Mumbai?

Held: No

In case of ***M/S. Sonkamal Enterprises Pvt Ltd – AAR Maharashtra*** held that the applicant stores the goods at rented Customs Bonded Warehouse. Goods are removed from the warehouse only when they get orders from customers and terms of delivery will be Ex-Terminal. Further risk and rewards will be transferred to customer the moment the goods are cleared. It was held that the applicant is not required to obtain the registration in West Bengal as supply of goods and invoicing would be done from Mumbai.

11. Whether applicant is eligible to take Input Tax Credit of the CGST & SGST charged by M/s Catalyst Consulting Chennai in respect of brokerage services and adjust the same against output tax payable against Renting of immovable property?

Held: Yes

In case of ***Adwitya Spaces Private Limited - AAR Tamilnadu*** held that the applicant is eligible to take credit of the CGST and SGST charged by M/s. Catalyst Consulting Chennai in the Tax invoice No. C-007/ 17-18 dated 20.12.2017 raised on the applicant for real estate brokerage services for renting of property on a fee basis rendered by Catalyst Consulting, subject to the conditions as per Section 16, 17 and 18 of CGST & SGST Act.

12. Whether ITC admissible on GST paid for stay in hotel accommodation provided to GM/MD of company?

Held: No

In case of ***Posco India Pune Processing Center (P.) Ltd. - AAR Maharashtra*** held that Input Tax Credit is not admissible in respect of GST paid for stay in case of rent free hotel accommodation provided to General Manager and Managing Director of company as same is used for personal consumption of MD/GM and is not in furtherance of any business.

Our Comment: This advance ruling has created again the same dispute which the Income Tax authority often creates i.e whether a particular expenditure is business expense or personal nature. In case of a corporate entity it is a fact that the Company cannot act per se or as such. Rather its representative viz: Directors / CEO /CFO Etc. acts on behalf of it. So in such cases it is believed that when the hotel accommodation is taken for official visit then there should not be a question of personal nature. Let's wait and watch the further litigation which may arise on this issue.

13. Can a person adjust the ITC of one state's CGST for payment of another state's CGST?

Held: No

In case of ***Storm Communications Private Limited - AAR West Bengal***, the main issue was whether the Applicant registered in West Bengal, can claim/adjust/avail ITC on the CGST & SGST charged on the invoices issued by Tamil Nadu suppliers. Here, the basic concept of "place of supply" comes into play. In this case, the location of the

supplier, providing hotel, banquet hall or restaurant in Tamil Nadu and the location of the recipient i.e. the Applicant, receiving the service, is also Tamil Nadu. So, the Applicant can avail ITC on the said invoices in Tamil Nadu only, if registered in Tamil Nadu. In no case, the Applicant can claim/adjust/avail ITC outside Tamil Nadu on the said invoices, even if the invoices are issued as B2B mentioning the Applicant's GSTIN in West Bengal.

As the Applicant is not registered under section 25(1) in Tamil Nadu, the SGST and CGST paid on intra-state inward supply in Tamil Nadu are not "input tax" to the said person. The GST Act does not contain any concept of "input tax" to an unregistered person. No credit of it is, therefore, admissible under the GST Act.

14. Whether credit will be available in GST of office fixtures & furniture, A.C. plant & sanitary fittings on' newly constructed building on its own account for furtherance of business and accounting entry is capitalized in books of account?

Held: No

In the case of ***Bahl Paper Mills Ltd. - AAR Uttarakhand***, it was held that as per Explanation to the Section 17 of CGST Act, 2017 credit is not available in respect of land, building or any other civil structure.

Therefore, in view of the aforesaid provisions of law, Credit of GST paid in relation with building or any other civil structure is not available and since sanitary fittings are integral part of building or any other civil structure, credit of GST paid on such sanitary fittings is not available. However, credit of GST is available on office fixtures & furniture, AC plant.

15. Whether registration required for electronic commerce operators (ECO) who are facilitating for conduct of religious functions between Pundits and customers, as the services of Pundits are exempted?

Held: Yes

In the case of ***Sadashiv AnajeeShete - AAR, Maharahtra*** it was held that the applicant (here, the electronic commerce operator) is required to get registered by virtue of section-24 of the CGST/MGST Act and liable to GST on transaction value being the commission amount. It is the Pundits who are providing religious services not the applicant. Hence only the Pundits are exempted for their services by virtue of Notification No.12/2017 Central Tax under Sr. No.-13.

*****

RECENT CASE LAWS IN GST REGIME

CA ARPIT HALDIA
JODHPUR

Case-1: Advantage India Logistics (P.) Ltd. v. Union of India [2018] 98 taxmann.com 120 (Madhya Pradesh) - Dated 23rd August 2018

Issue: Proper officer under SGST authorised to act as proper officer for levy of Tax and Penalty under IGST for goods detained during movement from one State to another

Facts: Vehicle was transporting goods for inter-state supply of goods from Gurgaon, Haryana to Pune, Maharashtra. As per E-Way Bill System, number of vehicle was mentioned as HR-38-0823 whereas, correct vehicle number was HR-38-X-0823. It was found by the respondent that E-Way Bill was defective and not updated, therefore, show cause notice was issued on 13.07.2018 to inspect the subject vehicle on 15.07.2018. On inspection, in exercise of powers under Section 129(1) of the MPGST Act passed the seizure order on 15.07.2018. The respondent in compliance of the statutory mandate under Section 129(6) passed a final order dated 23.07.2018 directing the petitioner to pay an amount of Rs.4,20,266/- (minimum) as tax and penalty in terms of Section 129(3) of the MPGST Act.

The sole contention of the learned counsel for the petitioner is that in absence of any notification under Section 4 of IGST Act, 2017, Proper Officer in SGST is not competent to issue show cause notice and impugned seizure memo dated 15.07.2018 is wholly without jurisdiction.

Held: Officers appointed under the Madhya Pradesh GST Act are authorized to be proper officers for the purpose of IGST and, therefore, contention of petitioner that no notification was issued and in absence of any notification under Section 4 of the IGST Act has no force. Therefore, contention of the petitioner that action of the respondent is wholly without jurisdiction was rejected by the High Court.

Case-2- Bhumika Enterprises v. State of U.P. [2018] 92 taxmann.com 343 (Allahabad) Dated - April 3, 2018

Issue: E-Way Bill generated after movement of goods but before seizure order

Facts: The petitioner has affected the sale of Iron and Steel weighing 20 M. Ton for a sum of Rs. 6,00,000/- to one M/s. Ram Naresh Ramakant, Bindiki, Fatehpur. The purchaser situated at Bindiki, Fatehpur is also a registered dealer to whom the petitioner has raised tax invoice No.60 dated 25.3.2018. The said goods were being transported from Varanasi to Bindiki, Fatehpur and on bypass road Nawabganj at Allahabad respondent intercepted vehicle on 26.3.2018 at 9 a.m. and detained vehicle for verification of goods and documents accompanying the goods.

Contention of the Petitioner: Due to technical fault of the State Web-site E-way bill-02 could not be generated on 25.3.2018 before the movement of the goods from Varanasi to Fatehpur, however, the same was generated on 26.3.2018 in the morning which was much before the date of seizure order which has been admittedly passed on 27.3.2018 at 6 p.m. The counsel for the petitioner has also submitted that since both the consignor and consignee are registered with the respective Assessing Authority and are allotted requisite GSTIN number therefore there was no reason to disbelieve the contention of the petitioner. So far as the ground no.3 related to mentioning of the GSTIN number of dealer of Allahabad instead of Fatehpur, the counsel for the petitioner has submitted that the said mistake was a bona fide mistake as such in fact a clerical error and the same was rectified while downloading E-way bill-02 in which the correct registration number of consignor M/s. Ram Naresh Ramakant, Bindki, Fatehpur was mentioned.

Held: There is no dispute with regard to quality and quantity of the goods and further that the invoice issued clearly indicates of charge of C.G.S.T. and S.G.S.T by the petitioner. It was further noticed that there is no dispute with regard to registration of the seller (the petitioner) and the purchaser as also that the goods were being transported from Varanasi to Fatehpur which are detained in between the aforesaid two places. From perusal of the record it was noticed that E-way bill-02 has been downloaded/issued in favour of the petitioner on 26.3.2018 at 11.50 a.m. and admittedly seizure order has been passed on 27.3.2018 at 6 p.m. before which the E-way bill-02 has been produced by the petitioner.

The submission of the learned counsel for the State is that the transaction has been made with one unknown person therefore there were some lacuna noticed by the seizing authority. High Court found no substance in the submission of the learned counsel for the State as the tax invoice was raised in favour of the consignee namely M/s. Ram NarshRamakant, Bindki, Fatehpur and the same was available with the seizing authority. High Court also observed that seizing authority should have made an inquiry from the said dealer/consignee whose TIN number was mentioned in the tax invoice.

Since the tax invoice indicating the tax charged and the same admittedly found during the course of inspection/detention and E-way bill-02 has been downloaded much before the seizure order, High Court held that there was no justification in the impugned seizure order and therefore, writ petition was allowed and seizure order dated 27.3.2018 as well as the show cause notice issued under Section 129(3) of the Act for imposition of penalty was set aside.

Case-3: Joint Plant Committee [2018] 92 taxmann.com 208 (AAR-WEST BENGAL)

Query: Whether applicant will be liable for registration under any clause of Section 24 of the GST Act even if it is not making any taxable supply. The question is relevant in the context of the Applicant only with respect to Section 24(iii) of the GST Act when the person is required to pay tax under the Reverse Charge.

Facts: Applicant is a non-profit organisation set up by the Central Government under Clause 17 of the Iron & Steel (Control) Order vide SO 1567 dated 07/04/1971. The functions of the Applicant, as specified in the above notifications of the Ministry of Steel, Government of India, include management and operation of the Steel Development Fund and other funds accumulated under the Iron & Steel (Control) Order, 1956, study and

analysis of and maintenance of a comprehensive database on market situation in the Iron & Steel Sector including fluctuation in market price, production, availability and movement of material etc.

Held: Applicant is engaged exclusively in supplying goods and services that are wholly exempt from tax, and, therefore, not liable to be registered in accordance with the provisions under section 23(1) of the GST Act, subject to the condition that applicant is not otherwise liable to pay tax under the Reverse Charge mechanism under Section 9(3) of the GST Act or 5(3) of the IGST Act. As the applicant is unregistered and not liable to be registered, the provisions of Reverse Charge under section 9(4) of the GST Act or 5(4) of the IGST Act will not apply.

Case-4: Tewari Warehousing Co. (P.) Ltd [2019] 102 taxmann.com 295 (AAR-WEST BENGAL)

Query: Whether Input Tax Credit is allowed for Construction of Warehouse using pre-fabricated technology?

Held: AAR held thatwarehouse is to be used as a permanent structure without an intention to be removed in the near future: The applicant is constructing a warehouse that is intended to be used as a permanent structure, and associated with beneficial enjoyment of the land on which it is being built. Further, warehouse is an immovable property in itself and cannot be conceived without the civil work supporting the pre-fabricated structure and floor upon which pre-fabricated structure is built upon: The technology used for the construction of the warehouse involves the application of pre-fabricated structures and also civil work for supporting the pre-fabricated structure and developing the floor of the warehouse. Warehouse cannot be conceived without beneficial enjoyment of the civil structure embedded on earth.

The warehouse being constructed is, therefore, an immovable property, and the input tax credit is not admissible on the inward supplies for its construction, as the credit of such tax is blocked under section 17(5) (d) of the GST Act.

Case-5: Nipha Exports (P.) Ltd. [2019] 102 taxmann.com 449 (AAR-WEST BENGAL)

Query: Whether input tax credit is admissible on ambulances purchased for the benefit of the employees under legal requirement of the Factories Act, 1948.

Facts: Applicant purchased ambulance on 22/11/2018, vide Invoice No. INV19A001475 dated 22/11/2018 of M/s Supreme & Co Pvt Ltd (GSTIN: 19AACCA7232K1ZK).

Held: The amended provisions of GST Act referred by the applicant have come into effect from 01/02/2019 vide Notification No. 2/2019-CT dated 29/01/2019. Section 17(5) of the GST Act, as it stood prior to the amendment, is, therefore, relevant. Eligibility for claiming input tax credit under section 16(1) is subject to the provisions of law at the time of occurrence of the taxable event, irrespective of when the claim is made. Second proviso to section 1 7(5)(b) of the GST Act, as it stands post amendment effective from 01/02/2019, is not applicable to a transaction made in November 2018.

Input tax credit is not admissible on the ambulance purchased in November 2018, as Section 17(5) of the GST Act, as it stood in the relevant period, blocks any such

enjoyment, even if provisioning of ambulance service to the employees is obligatory under the Factories Act, 1948.

Case-6: Sarj Educational Centre [2019] 102 taxmann.com 448 (AAR-WEST BENGAL)

Query: Whether combination of services provided by the applicant to students with lodging facility is a composite supply within the meaning of section 2(30) of the GST Act, and whether supply of such service is eligible for exemption under Sl. No. 14 of Notification No. 12/2017–CT (Rate) dated 28/06/2017 (hereinafter the Exemption Notification).

Facts: Applicant is providing boarding facility with lodging, housekeeping, laundry, medical assistance and food to the residents. Consideration is a consolidated charge on individual boarder for the combination of the services. Applicant provides services to both day boarders and boarders requiring lodging facilities. In FY 2018-19, annual consideration for the services without lodging facilities are segregated and charged on the day boarders at Rs.71,800/- per head, of which Rs.66,000/- is boarding fees. The boarding fees for those who enjoy lodging facilities is Rs.1,56,000/- per head. These lodgers have to pay an additional amount of Rs.13,600/- per head for housekeeping and laundry services, whereas the day boarders pay only Rs.5,800/- per head for such service.

Held: Consideration charged by applicant is not for lodging and food only.A flat amount is charged for maintenance, electricity and laundry instead of reimbursement of the actual cost. Medical assistance extended to the boarders is not usually supplied with lodging and food service in ordinary course of business. Although services are offered in a bundle, they are not indivisible, and different considerations are paid for different packages of such services offered to the recipients, depending upon their requirement for lodging facility. For example, laundry service is not offered to the day boarders.These are not, therefore, bundles of taxable supplies that are inseparable and supplied only in conjunction with one another in ordinary course of business. The services the Applicant supplies are not, therefore, composite supply, as defined under Section 2(30) of the GST Act. Applicant is offering several individual services in two different combinations to the recipients, depending upon their need for lodging facility. Each of the recipients, however, is charged a consolidated amount for the combination of services he wants to enjoy. The combination of services is, therefore, offered as a mixed supply within the meaning of Section 2(74) and therefore taxable in accordance with section 8(b) of the GST Act. Being mixed supply, value of the entire combination of services offered is taxable at the applicable rate.

Case-7: Downtown Auto (P.) Ltd v. Union of India [2019] 102 taxmann.com 431 (Gujarat)

Issue: No documents have been prescribed U/Sec 140(3)(iii) till date, therefore petitioner is entitled to take credit on the basis of documents in possession of the petitioner evidencing payment of duty.

Contention by the Petitioner: Section 140(3)(iii) same provides that said registered person should be in possession of invoice or other prescribed documents evidencing

payment of duty under the existing law in respect of such inputs. It was submitted that in the facts of the present case, no documents have been prescribed under the Central Goods and Services Tax Rules. Since no documents have been prescribed till date, therefore when petitioner has produced documents evidencing payment of duty, he is entitled to the credit in respect thereof.

Held: By way of ad-interim relief, the respondents are restrained from making any coercive recovery against the petitioner in connection with the subject matter of this petition.

Case-8: Edayar Metals v. Union of India [2019] 102 taxmann.com 190 (Kerala), Leo Logistics v. Union of India [2019] 102 taxmann.com 125 (Kerala), Coastal Freez Tech &Sanitaries v. Goods Service Tax Council [2019] 102 taxmann.com 70 (Kerala)

Issue: Petitioner attempted to upload the Form but it failed because of system error

Facts: Petitioner, a registered dealer under Kerala Value Added Tax Act, migrated to GST regime. To use input tax available to its credit at the time of migration, petitioner had to upload FORM GST TRAN-1 within stipulated time. Petitioner asserts that though it attempted to upload the Form within the time, it failed because of some system error. The petitioner, therefore, seeks directions to enable him to take credit of the available input tax.

Held: Not only the petitioner but also many other people faced this technical glitch and approached this Court. Petitioner may apply to Nodal Officer. Petitioner applying, Nodal Officer will look into the issue and facilitate the petitioner's uploading FORM GST TRAN-1, without reference to the time-frame. If petitioner applies within two weeks after receiving this judgment, Nodal Officer will consider it and take steps within a week thereafter. If the uploading of FORM GST TRAN-1 is not possible for reasons not attributable to the petitioner, the authority will also enable it to take credit of the input tax available at the time of its migration.

Case-9: NapinImpex (P.) Ltd. v. Commissioner of DGST, Delhi [2018] 98 taxmann.com 462 (Delhi)

Issue: Complete Sealing of Premises by the DGST Officials under GST is per se illegal.

Facts: The petitioner alleges that its premises were visited by the Revenue authorities on 29.08.2018 when the DGST officials directed production of books of account and other documents. Since the petitioner was not in possession of those, it sought 24 hour time for the same. Apparently, a temporary sealing of the premises was ordered. On the next date i.e. 30.08.2018, the premises were completely sealed.

Contention of the Petitioner: It is contended that the DGST lacks statutory power and authorization to indefinitely seal the premises in a manner it has proceeded to do so.

Contention of the Respondent: Learned counsel for the DGST, appearing on advance notice, submitted that till date the petitioner has not cooperated as it has neither produced the books of account nor other materials. It is further submitted that according to the

instructions available to them, the premises can be immediately de-sealed provided the petitioner cooperates.

Held: Given the plain text of the statute i.e. especially Section 67(4) which merely authorizes the concerned officials to search the premises and if resistance is offered, break-open the lock or any other almirah, electrical device, box, etc. containing books and documents, the complete sealing of the premises, in the opinion of the court is per se illegal. Even if it were assumed that the respondents temporarily restrained the petitioner from using its premises, for a few hours, till the books of account are made available in order to secure the evidence available in the premises that could not have assumed the life on "its own", at least indefinitely. In these given circumstances, this petition has to succeed. Since the premises have been in the possession of the respondents for over a month, a direction is issued to remove the seal forthwith – within the next 12 hours and hand over the premises to the petitioner.

Case-10: Global Reach Education Services (P.) Ltd. [2018] 96 taxmann.com 107 (AAAR-WEST BENGAL)

Issue: Whether services of Commission Agent as Intermediaries to recipient situated outside the Country are Export

Query and Facts: Appellant is a Private Limited Company primarily engaged in promoting the courses of Foreign Universities in India among prospective students. Appellant argued that function of an intermediary is to facilitate or arrange supply of goods *or* services between two *or more* persons. Appellant *on* the *contrary* was providing services on its own account, in the nature of marketing and promotion of courses of Foreign Universities in India and remuneration paid for these services was based on a percentage of fees paid by students admitted to the University.

Held: The Appellant in the instant case was free to refer students to Australian Catholic University (ACU) or any other University of its choice. The fee paid to Appellant was not tied to the promotional activities or expenses incurred to promote Courses of ACU but as a percentage of fee paid by the students who got admitted to ACU. In other words, no consideration was paid in spite of incurring expenses by the Appellant for promoting activities of ACU, if no student joined ACU.

The Appellant promotes courses of the University, finds suitable prospective students to undertake the courses, and, in accordance with University procedures and requirements, recruits and assists in the recruitment of suitable students, and hence, the Appellant is to be considered as an intermediary in terms of Section 2(13) of the IGST Act. The services of the Appellant are not 'Export of Services' under the GST Act, and are eligible to tax.

*****

JUDICIAL PRECEDENTS UNDER GST LAW

Adv. MUKUL GUPTA
Sharnam Legal, Gaziabad

Section 68, 129 of the CGST ACT 2017: N.V.K. Mohammed Sultan Rawther v. Union of India
Detention of goods and the vehicle on the grounds of wrong classification of goods and application of incorrect rate of tax on invoice. The process of detention of the goods cannot be resorted to when there is a bona fide dispute, the records truly reflect the transaction and the taxpayer's explanation accords with its past conduct.

Section 129 CGST Act 2017: Saji S. v. Commissioner, State GST Department
The Tax and penalty was paid under wrong heads between IGST and SGST. The amount remitted under one head can be adjusted under another head under the law as the either of the amounts has been received by the government itself. Accordingly, the Court directed officials to transfer the amount from the head 'SGST' to 'IGST' even though the process may take time.

Section 129 CGST Act 2017: Pioneer Polyleathers Limited v. Assistant State Tax Officer
Tax and penalty was not paid by the assessee through cash or demand draft as desired by the authority to immediately resolve the issue as other means of payment of tax and penalty may result in delay in apportionment. The court held the payment of liability through cash or demand draft is against the spirit of GST. The taxpayer cannot be made to suffer on the ground that there may be delay and difficulty in apportionment.

Section 174 of CGST Act: Imarti Lakdi Vyapari Sansthan Jodhpur v. State of Rajasthan
The question was if there is Power of State after the introduction of GST to still levy tax / cess payable under the Rajasthan Agricultural Produce Marketing Act, 1961. The court ordered that Marketing fee levied under the Rajasthan Agricultural Produce Marketing Act, 1961 is in the nature of 'fee'. This is neither excluded nor subsumed similar to other indirect taxes post implementation of GST. The State has power under Constitution to levy such fee.

Section 129 CGST ACT: Rai Prexim India Private Limited v. State of Kerala
There was Discrepancy in single digit of value of goods declared on e-way bill. Single "0" (Zero) at the end of the value of goods was missing. The court ordered that a human error cannot be capitalised for penalty. The goods cannot be detained if the assessee paid IGST in accordance with the value shown on the tax invoice.

Section 6 read with 129 of CGST Act 2017: Carpenters Classics India Private Limited v. Assistant State Tax Officer

E-way bill generated but not carried along with consignment. Mere online generation of e-way bill would not suffice. As per the law, e-way bill needs to be in physical or electronic form. Either of the form is acceptable but should be carried along. The Court agreed that though there is no evasion of tax, it cannot chip away from the statutory scheme where the scheme has an economic efficacy.

Section 129 and 130 of the Kerala State Goods and Services Tax Act, 2017: Kun Motor Co. Pvt. Ltd. vs The Asst. State Tax Officer

No e-way bill was accompanied with the car during its transportation to buyer. Car was transported by dealer on buyer's direction. Court said that when a person residing in one State goes to another State and purchases goods, the supply transaction terminates on the person taking possession of the goods in the other State. The activity of movement of car by the dealer was not part of original 'supply' transaction and it is a 'personal effect' of the buyer. The High Court also observed that such ex-works sale transaction attracts CGST and SGST whereas the industry currently charges IGST on ex-works sales where the buyer is located in other State.

Section 129 of CGST Act 2017: Timexo Fasteners India Private Limited v. State of Uttar Pradesh

Consignment was detained as e-way bill had expired. The objection is not justified as the authorities allowed e-way bill to expire after the detention of the goods by incorrectly recording the time of interception, even though the goods reached well within time. Court ordered in favour of the assesse.

Section 58A of the Customs Act, 1962, Section 68, 69 of CGST Act 2017: A1 Cuisines Private Limited v. Union of India

The taxpayer sold the goods from the Domestic Security Hold Area at International Airport. The Court held that such supply cannot be said to have taken place in an area beyond the customs frontiers of India or outside India. Further, it is practically difficult for the authorities to verify whether a passenger is travelling to foreign jurisdiction or not.

Section 122 CGST Act: Adesh Jain v. CCT

Wrong availment of input tax credit. Application of bail was rejected because there were serious allegations against the accused of making fictitious sales of value more than Rs. 200 crores causing tax evasion consequently caused loss to the government through wrongful availment of input tax credit of the value of more than Rs. 27 Crores.

*****

TIMELINES OF COMPLIANCE UNDER THE COMPANIES ACT FOR MONTH OF APRIL, 2019

CS ANIL GUPTA
Jaipur

S. N.	FORM	INFO UPTO	DUE DATE	FEES	PENALTY	APPLIC ABILITY
1	***MSME-1 (Initial Return)***	Every Outstanding to MSME more than 45 days as on 22-01-2019	30 Days from the date of availability of Form on MCA	As per normal fees rules	Normal Additional Fees	Every Specified Company
2	***DPT-3***	Details of outstanding Loan/ receipt of money as on 22-01-2019	90 days (i.e., 20-04-2019)	As per normal fees rules	Normal Additional Fees	Every Company having outstanding
3	***DIR-3 KYC***	Every Person holding DIN as on 31-03-2019	30/04/2019	Upto Due Date NIL	5,000	Every person having DIN
4	***INC-22A (ACTIVE)***	Every Company Incorporated before 31-12-2017	25-04-2019	Upto Due Date NIL	10,000	Every Company
5	***NFRA-1***	Every Company on which These Rules Applicable	30 Days from the date of availability of Form on MCA	As per normal fees rules	Normal Additional Fees	Every Company on which These Rules Applicable

IMPORTANT CASE LAWS UNDER THE COMPANIES ACT, CIRCULARS & NOTIFICATIONS

CA MANISHA MAHESHWARI
Jaipur

CASE LAWS

K.N. RESOURCES (P.) LTD.
VERSUS
KHALSA OVERSEAS LTD.
HIGH COURT OF MADHYA PRADESH, JANUARY 22, 2019

Subject: - Winding up by Tribunal.
Relevant Sections: Section 271 of the Companies Act, 2013 / Section 433 of the Companies Act, 1956
Decision: - Petitioner Company provided financial facility of Rs. 3.90 crores to respondent company. Respondent company failed to repay this and petitioner filed petition for winding up of respondent. Respondent raised a dispute regarding amount of debt and claimed that it had repaid some amount towards loan. However, there was no iota of evidence to show repayment of loan by respondent. On contrary, there was confirmation slip issued by respondent acknowledging credit balance of Rs. 3.90 crores as on 31-3-2016. It was also noted that said financial facility was secured by respondent by executing charge document mortgaging its assets in favour of petitioner and respondent itself furnished amount of charge to ROC in prescribed form and in turn, ROC reflected said admitted amount in certificate for registration of charge. It is held that respondent, after having issued confirmation slip and filling up statutory form, could not take a defence that amount was disputed. Defence of respondent was not in good faith and therefore, respondent company was to be wound up.

NIRVED TRADERS (P.) LTD.
VERSUS
KARVY FINANCIAL SERVICES LTD. (BOMBAY)
JANUARY 14, 2019

Subject: - Winding up - Stay of suits etc. on winding up order
Relevant Sections: - Section 279 of the Companies Act, 2013, read with section 34 of the Arbitration and Conciliation Act, 1996/Section 446 of the Companies Act, 1956.
Decision: - Appellant defaulted in repayment of business loan. Arbitrator passed an award directing appellant to pay outstanding amount. Single Judge confirmed said award. It was case of appellant that in meanwhile, an order for its winding up was passed at instance of third party and hence, Single Judge could not have passed impugned order without seeking leave of Company Court under section 446. It was noted that when award was passed, winding up proceeding against appellant was pending and when

petition against arbitration award was decided by Single Judge, appellant already been ordered to be wound up. But appellant it had not disclosed factum of pendency of winding up proceeding to Arbitrator and factum of order of winding up to Single Judge. It is held that when arbitrator passed an award directing appellant to pay outstanding amount, in view of fact that Company Court passed order of winding up of appellant but same was not disclosed either before Arbitrator or to Single Judge in appeal, appellant could not seek to invalidate arbitral award on ground that impugned order could not be passed without seeking leave of Company Court.

STATE BANK OF INDIA
VERSUS
KAMLESH KALIDAS SHAH (NCLAT) (DELHI)
JANUARY 17, 2019

Subject: - Transfer of shares - Refusal of registration and appeal there against
Relevant Sections: -Section 58, read with section 59 of the Companies Act, 2013.
Decision: - A share broker, purchased shares of appellant bank 'SBI' as held by two registered holders and lodged same to 2nd appellant Share Transfer Agent (STA) to transfer same in his name. However, STA rejected transfer due to mismatch of signatures of transferors. Thus, shareholder by way of instant petition sought direction to 'SBI' to transfer shares in his name. It was a case of 'SBI' that NCLT had no jurisdiction to entertain or try disputes pertaining to equity shares of SBI as it was not a company. Shares could only be transferred after valid execution of documents and supported with valid transfer deed having proper signatures of registered holder. It was noted that 'Imperial Bank' was named as SBI. It was not in dispute that 'Imperial Bank' was a company and it continued to be company on take over as SBI. Later on SBI also came out with an Initial Public Offer (IPO) and allotted its shares to various shareholders including individuals - It was also noted that Share Transfer Form submitted by shareholder to STA for transfer of shares in question was prescribed under Act. Thus, argument of SBI that Companies Act is not applicable to them was not convincing. On contrary SBI being a body created by an Act of Parliament, it had higher responsibility than ordinary company to take care of its all stakeholders and therefore, SBI is a company for purpose of transfer of securities and, therefore, NCLT had jurisdiction to entertain or try disputes pertaining to transfer of equity shares. Further, as per SEBI's Circular No. SEBI/HO/MIRSD/DOS3/CIR/P/2018/139 dated 6-11-2018, in case of non-availability/major mismatch in transferor's signature, transferor is required to update his/her signature by submitting bank attested signature alongwith an affidavit and cancelled cheque to RTA/company. Thus, shares in question were to be transferred in the shareholder's name subject to compliance with SEBI Circular.

CIRCULARS

GENERAL CIRCULAR NO. 1/2019 F.NO. 17/6/2017-CL V (PT I), DATED 21-2-2019
Extension for last date of filing initial return in MSME FORM-I.

NOTIFICATIONS

NOTIFICATION NO. : S.O. 1068(E) F.NO.NFRA-05/6/2018 - NFRA-MCA, 28-2-2019
Section 132 of the Companies Act, 2013 - National Financial Reporting Authority (NFRA) - Constitution of part time member and appointment of

NOTIFICATION NO. : SO 1039(E) F.NO.A-12023/03/2013-AD.IV, 27-2-2019
Section 408 of the Companies Act, 2013: Constitution of notified judicial and technical members of National Company Law Tribunal vide amendment in Notification NO. SO 2563(E) [F.NO.A-12023/03/2013-AD.IV], dated 28-7-2016

NOTIFICATION: G.S.R. 143(E) F. NO. 01/16/2013 CL-V (PT-I), 21-2-2019
Companies (Registration Offices and Fees) Amendment Rules, 2019: Insertion of item VIII in the Annexure

NOTIFICATION: G.S.R. 144(E) F. NO. 01/13/2013 CL-V (PT-I) VOL.II, 21-2-2019
Companies (Incorporation) Amendment Rules, 2019 - Insertion of Rule 25A and e-form Active (INC-22A).

NOTIFICATION: G.S.R. 131 F.NO.1/25/2013-CL-V, 19-2-2019
Companies (Adjudication of Penalties) Amendment Rules, 2019 - Substitution of Rule 3

NOTIFICATION: G.S.R. 130(E) F.NO. 1/21/2013-CL-V, 19-2-2019
Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2019 - amendment in FORM PAS-3

NOTIFICATION NO. : G.S.R. 125(E) F.NO.NFRA-05/5/2018-NFRA-MCA, 18-2-2019
National Financial Reporting Authority (manner of appointment and other terms and conditions of service of Chairperson and Members) Amendment Rule, 2019 - Amendment in Rule 4

NOTIFICATION NO. : G.S.R. 100(E) F. NO. 1/1/2018 CL-V, DATED 8-2-2019
Companies (Significant Beneficial Owners) Amendment Rules, 2019 - Amendment in Rule 2; substitution of Rules 3, 4, 7 & 8, Form Nos. BEN-1, BEN-2, BEN-3 & BEN-4

*****

IMPORTANT POINTS UNDER THE BANNING OF UNREGULATED DEPOSIT SCHEMES ORDINANCE, 2019

CS NAVEEN JAIN
Jaipur

Who are Depositor and deposit taker?

The laws defines that any person who makes deposit under this Ordinance called the ***depositor***. All persons such any individual or group of individuals; proprietorship concern; partnership firm; LLP; company; AOP; trust; co-operative society and any other arrangement of whatsoever nature, receiving or soliciting deposits called ***depositor taker*** except following:

(i) a Corporation incorporated under an Act of Parliament or a State Legislature;
(ii) a banking company, a corresponding new bank, the State Bank of India, a subsidiary bank, a regional rural bank, a co—operative bank or a multi- State co-operative bank as defined in the Banking Regulation Act, 1949.

Banning of Unregulated Deposit schemes (UDS)

From the effective date of the Ordinance:

- All unregulated deposits schemes (UDS) shall be banned.
- Depositor taker can't accept or operate any UDS.
- Ban on Fraudulent default in Regulated Deposit Scheme (RDS).
- A Prize Chit or Money circulation scheme banned under the provisions of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 shall be deemed to be an UDS.

What is Unregulated Deposit Scheme (UDC) and Regulated Deposit Scheme (RDS)?

Only deposit schemes listed in First Schedule of the Ordinance are Regulated Deposit Sechems (RDS). Apart from this, deposits accepted under any scheme or an arrangement registered with any regulatory body in India constituted or established under a statute shall be treated RDS.

Unregulated Deposit Scheme means a Scheme or an arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under the First Schedule.

What kind of deposits are considered under the Ordinance?

The Ordinance is given wide definition of deposit where cover almost all cases of deposits except provided in the exhaustive list. As per clause 4 of Section 2 of the Ordinance, definition of deposit as under:

Deposit means an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period or otherwise, either in cash or in kind or in the form of a specified service, with or

without any benefit in the form of interest, bonus, profit or in any other form, but does not include —

(a) Amounts received as loan from a scheduled bank or a co—operative bank or any other banking company.

(b) Amounts received as loan or financial assistance from the Public Financial Institutions or any non-banking financial company or any Regional Financial Institutions or insurance companies;

(c) Amounts received from the appropriate Government, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature;

(d) amounts received from foreign Governments, foreign or international banks, multilateral financial institutions, foreign Government owned development financial institutions, foreign export credit collaborators, foreign bodies corporate, foreign citizens, foreign authorities or person resident outside India subject to the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder;

(e) Amounts received by way of contributions towards the capital by partners of any partnership firm or a limited liability partnership;

(f) amounts received by an individual by way of loan from his relatives or amounts received by any firm by way of loan from the relatives of any of its partners;

Relatives for the purpose of this ordinance, monies received from whom not to be treated as deposits.

For the purpose of this ordinance term relative is the same meaning as assign to it in the Companies Act, 2013. As per Companies Act, 2013 relative means anyone who is related to another, if—

(*i*) They are members of a Hindu Undivided Family;

(*ii*) They are husband and wife; or

A person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely: –

(1) Father:

Provided that the term "Father" includes step-father.

(2) Mother:

Provided that the term "Mother" includes the step-mother.

(3) Son:

Provided that the term "Son" includes the step-son.

(4) Son's wife.

(5) Daughter.

(6) Daughter's husband.

(7) Brother:

Provided that the term "Brother" includes the step-brother;

(8) Sister:

Provided that the term "Sister" includes the step-sister.

Depositor means any person who makes deposit under this ordinance and it includes

(*i*) an individual;

(*ii*) a Hindu Undivided Family;

(*iii*) a company;

(*iv*) a trust;

(*v*) a partnership firm;

(*vi*) a limited liability partnership;
(*vii*) an association of persons;
(*viii*) a co-operative society registered under any law for the time being in force relating to co-operative societies; or
(*ix*) Every artificial juridical person, not falling within any of the preceding sub-clauses;
(g) Amounts received as credit by a buyer from a seller on the sale of any property (whether movable or immovable);
(h) Amounts received by an asset re—Construction Company.
(i) Any deposit made under section 34 or an amount accepted by a political party under section 29B ofthe Representation of People Act, 1951;
(j) Any periodic payment made by the members of: the self—help groups operating within such ceilings as may be prescribed by the State Government or Union territory Government;
(k) Any other amount collected for such purpose and within such ceilings as may be prescribed by the State Government;
Most important "clause l" of the exceptions which specifies that amount received in the course of or for the purpose of business and bearing a genuine connection to the business in the course of which the amount has been received does not fall under the definition of deposit. "Clause l" specifies following inclusive items which will not be considered as deposits: -
(i) payment, advance or part payment for the supply or hire of goods or provision of services and is repayable in the event the goods or services are not in fact sold, hired or otherwise provided
(ii) Advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement;
(iii) Security or dealership deposited for the performance of the contract for supply of goods or provision of services; or
(iv) An advance under the long—term projects for supply of capital goods except those specified in item (ii):
Provided that if the amounts received under items (i) to (iv) become refundable, such amounts shall be deemed to be deposits on the **expiry of fifteen days** from the date on which they become due for refund:
Provided further that where the said amounts become refundable, due to the deposit taker not obtaining necessary permission or approval under the law for the time being in force, wherever required, to deal in the goods or properties or services for which money is taken, such amounts shall be deemed to be deposits.

OTHER MAJOR PROVISION:
Fraudulent default in Regulated Deposit Schemes (section 4)
No deposit taker, while accepting deposits pursuant to a Regulated Deposit Scheme, shall commit any fraudulent default in the repayment or return of deposit on maturity or in rendering any specified service promised against such deposit.

Wrongful inducement in relation to Unregulated Deposit Schemes (section 5)

No person by whatever name called shall knowingly make any statement, promise or forecast which is false, deceptive or misleading in material facts or deliberately conceal any material facts, to induce another person to invest in, or become a member or participant of any Unregulated Deposit Scheme.

INFORMATION ON DEPOSIT TAKERS

Intimation of business by deposit taker (section 10)

(1) Every deposit taker which commences or carries on its business as such on or after the commencement of this Ordinance shall intimate the authority referred (yet to be made) its business in such form and manner and within such time, as may be prescribed.

(2) The Competent Authority may, if it has reason to believe that the deposits are being solicited or accepted pursuant to an Unregulated Deposit Scheme, direct any deposit taker to furnish such statements, information or particulars, as it considers necessary, relating to or connected with the deposits received by such deposit taker.

Explanation. — For the removal of doubts, it is hereby clarified that—

(a) The requirement of intimation under sub-section (1) is applicable to deposit takers accepting or soliciting deposits 'as defined in clause (4) of section 2; and

(b) The requirement of intimation under sub-section (1) applies to a company, if the company accepts the deposits under Chapter V of the Companies Act, 2013.

Attachment of property of malafide transferees (section 16)

(1) Where the Designated Court is satisfied that there is a reasonable cause for believing that the deposit taker has transferred any property otherwise than in good faith and not for commensurate consideration, it may, by notice, require any transferee of such property, whether or not he received the property directly from the said deposit taker, to appear on a date to be specified in the notice and show cause why so much of the transferee's property as is equivalent to the proper value of the property transferred should not be attached.

(2) Where the said transferee does not appear and show cause on the specified date or where the Designated Court is satisfied that the transfer of the property to the said transferee was not a bonafide transfer and not for commensurate consideration, it shall order the attachment of so much of the said transferee's property as in its opinion is equivalent to the proper value of the property transferred.

Punishment for contravention of section 4 (section 22)

Any deposit taker who contravenes the provisions of section 4 shall be punishable with imprisonment for a term which may extend to seven years, or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of the fraudulent default referred to in said section, whichever is higher, or with both.

Punishment for contravention of section 10 (section 26)

Whoever fails to give the intimation required under sub-section (1) of section 10 or fails to furnish any such statements, information or particulars as required under subsection (2) of that section, shall be punishable with fine which may extend to five lakh rupees.

Cognizance of offences (Section 27)
Notwithstanding anything contained in section 4, no Designated Court shall take cognizance of an offence punishable under that section except upon a complaint made by the Regulator:
Provided that the provisions of section 4 and this section shall not apply in relation to a deposit taker which is a company.

Offences to be cognizable and non-bailable (Section 28)
Notwithstanding anything contained in the Code of Criminal Procedure, 1973 every offence punishable under this Ordinance, except the offence under section 22 and section 26, shall be cognizable and non-bailable.
Note: We should wait for Rules and more clarification from the Ministry of Law and Justice.

*****

OVERVIEW OF PROVISIONS OF FEMA

CA PARESH. P. SHAH
Mumbai

1. Introduction

1.1 Foreign Exchange management Act, 1999 (FEMA) came into force on 1st June 2000. It is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

1.2 FEMA is administered by the Reserve bank of India (RBI) and enforced by the Enforcement Directorate (ED). It applies to whole of India and all branches, offices and agencies outside India, which are owned or controlled by person resident in India i.e. extra territorial jurisdiction.

1.3 FEMA has in total 49 sections in which sections 1 to 9 are substantive and the rest are procedural /administrative.

1.4 A number of Notifications are issued after the initial 25 Notifications, most of the time only to amend the existing one or more of the 25 Notifications.

1.5 Master Circulars and Master Directions are issued to explain each Notification in a lucid manner.

1.6 Press Releases and Notifications under the series G.S.R. are issued by the Government to announce Government Policy on Foreign Investments including consolidated Foreign Direct Investment Policy and to amend the Current Account Transaction Rules from time to time.

2. Dealing in foreign exchange - Section 3

2.1 Section 3 is the major substantive provision in FEMA which bestows power on RBI for giving general or special permission for transactions involving foreign exchange or any receipt or payments between resident and non- resident.

2.2 Section 3 states that: Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall —

i. Deal in or transfer any foreign exchange or foreign security to any person not being an authorised person.
ii. Make any payment to or for the credit of any person resident outside India in any manner.
iii. Receive otherwise (than) through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation- For the purpose of this Section, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a

corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person.

iv. Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.— For the purpose of this Section, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any Act of exchange or promissory note, or transferring any security or acknowledging any debt.

2.3 It may pertinently be noted that Section 3 applies to -

i. All the persons in India whether they are residents or non-residents as non-residents are not permitted to sell their foreign exchange in India except to an Authorised Dealer. Even two non-residents cannot deal in rupees in India for settling transactions outside India;

ii. Rupee transactions in India between non-residents and residents which are not freely permitted as resident Indians are not permitted to pay any non-resident;

iii. Rupee transactions in India between two residents representing payment by order or on behalf of any non-resident unless it is through an Authorized Dealer and represented by way of corresponding inward remittance from outside India;

iv. All persons in India whether residents or non-residents for financial transactions in India towards acquisition, creation or transfer of any asset outside India.

3. Types of Transactions under FEMA

3.1 There are 2 types of transactions under FEMA:

i. Capital Account Transactions

ii. Current Account Transactions

3.2 Capital Account Transactions:

3.2.1 According to Sec 2 (e) of FEMA - Capital Account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6

3.2.2 Capital account transactions are generally prohibited unless permitted. They are regulated by RBI.

3.2.3 Section 6(3) contains ten sub clauses covering a wide range of transactions. For each of such categories RBI has issued separate notifications.

No.	Transactions specified under Sec 6(3)	Notf.No
1	Transfer/Issue of Foreign Security by a PRII	Notf.No.120
2	Transfer/Issue of Foreign Security by a PROI	Notf.No.20(R)
3	Transfer/Issue of Security/Foreign security by branch, office or agency in India by PROI	Notf.No.2
4	Borrowing/Lending in Foreign currency in whatever	Notf.No.3(R)

	form or by whatever name called	
5	Borrowing/Lending in Rupees in whatever form or by whatever name called between a PRII and a PROI	Notf.No.4
6	Deposits between PRII and PROI	Notf.No.5 (R)
7	Export, Import or holding of currency or currency notes	Notf.No.6 (R)
8	Transfer of Immovable property outside India, other than a lease ≤ 5 years, by PRII	Notf.No.7 (R)
9	Acquisition/Transfer of Immovable property in India, other than a lease ≤ 5 years by PROI	Notf.No.21 (R)
10	Giving of a guarantee/surety in respect of any debt, obligation or other liability incurred: 1)By PRII owed to PROI or 2) By PROI	Notf.No.8

*PROI – Person Resident outside India; PRII – Person resident in India

These are also notified through Notification FEMA 1, segregating the transactions of residents and non-residents as Schedule I & Schedule II respectively as discussed in the upcoming paragraphs.

About 25 Notifications have been issued by RBI to deal with the manner in which permissible Capital Account Transactions can be carried out.

3.2.4 Notification No. FEMA 1 /2000-RB dated 3rd May 2000 "Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000".

Permissible Capital Account Transactions are as under:

a. Transactions, specified in **Schedule I**, of a person resident In India.
b. Transactions, specified in **Schedule II**, of a person resident outside India.

Schedule I - Classes of capital account transactions of persons resident in India (PRII)

i. Investment by a PRII in foreign securities.
ii. Foreign currency loans raised in India and abroad by a PRII.
iii. Transfer of immovable property outside India by a PRII.
iv. Guarantees issued by a PRII in favour of a person resident outside India.
v. Export, import and holding of currency/currency notes.
vi. Loans and overdrafts (borrowings) by a PRII from a PROI.
vii. Maintenance of foreign currency accounts in India and outside India by a PRII.
viii. Taking out of insurance policy by a PRII from an insurance company outside India.
ix. Loans and overdrafts by a PRII to a PROI.
x. Remittance outside India of capital assets of a PRII.
xi. Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a PRII.

Schedule II - Classes of capital account transactions of person's resident outside India (PROI)

i. Investment in India by a PROI, that is to say: a) Issue of security by a body corporate or an entity in India and investment therein by a PROI; and b) Investment by way of contribution by a PROI to the capital of a firm or a proprietorship concern or an association of persons in India.
ii. Acquisition and transfer of immovable property in India by a PROI.

iii. Guarantee by a PROI in favor of, or on behalf of, a person resident in India.
iv. Import and export of currency/currency notes into/from India by a PROI.
v. Deposits between a PRII and a PROI.
vi. Foreign currency accounts in India of a PROI.
vii. Remittance outside India of capital assets in India of a PROI.

3.2.5 No person resident outside India shall make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage –

- in the business of chit fund, or
- as Nidhi Company , or
- in agricultural or plantation activities or
- in real estate business, or construction of farm houses or
- in trading in Transferable Development Rights (TDRs).

Explanation: For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential/commercial premises, roads or bridges.

3.3 **Current Account Transactions:**

3.3.1 According to section 2(j) Current account transaction means a transaction other than a capital account transaction. Such transaction includes:-

i. Payments due in connection to foreign trade, other current business, services and other short-term banking facilities in the ordinary course of business.
ii. Payments due as interest on loans and as net income from investments.
iii. Remittances for living expenses of parents, spouse and children residing Abroad.
iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

3.3.2 As provided under Section 5 of FEMA, any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction; Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

3.3.3 Current Account transactions are freely permitted, unless prohibited. They are regulated by Central Government and the same is discussed in the upcoming paragraphs.

3.3.4 As per Rule 3 of FEM (CAT) Rules, 2000, drawal of foreign exchange by any person for the following purpose is prohibited, namely:-

a. Transaction specified in the Schedule I; or
b. Travel to Nepal and/or Bhutan; or
c. Transaction with a person resident in Nepal or Bhutan;

Provided that the prohibition in clause (c) may be exempted by RBI subject to such terms and conditions as it may consider necessary to stipulate by special or general order.

3.3.5 Current account transaction are divided into 3 Schedules under Current Account Transaction rules:

Schedule I -Transactions which are prohibited

Schedule II -Transactions which require prior approval of the Central Government

Schedule III- Transactions which require prior approval of the RBI

Schedule I -Transactions which are prohibited

i. Remittance out of lottery winnings.
ii. Remittance of income from racing/riding, etc., or any other hobby.
iii. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
iv. Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
v. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
vi. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
vii. Payment related to "Call Back Services" of telephones.
viii. Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

Schedule II -Transactions which require prior approval of the Central Government

No.	**Purpose of Remittance**	**Ministry/Department of Govt. of India whose approval is required**
1.	Cultural Tours	Ministry of Human Resources Development (Department of Education and culture)
2.	Advertisement in foreign print Media for the purposes other than promotion of tourism, foreign Investments & International bidding (exceeding USD 10,000) by a state government & its public sector undertaking	Ministry of Finance, (Department of Economic Affairs)
3.	Remittance of freight of vessel chartered by a PSU	Ministry of surface Transport, (Charter wing)
4.	Payment of import through ocean transport by a Govt. department or PSU on c.i.f basis	Ministry of Surface Transport (chartering wing)
5.	Multi Modal transport operators making remittance to their agents Abroad	Registration certificate from the Director General of shipping
6.	Remittance of hiring charges of transponders by a) T.V. channels b) Internet Service Providers	a) Ministry of Information & Broadcasting b) Ministry of Communication & Information Technology
7.	Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8.	Omitted	

9.	Remittance of prize money/sponsorship of sports activity Abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US$ 100,0000	Ministry of Human Resources Development (Department of Youth Affairs & Sports)
10.	Omitted	
11.	Remittance of Membership of P& I club	Ministry of Finance (Insurance Division)

Schedule III - Transactions which require prior approval of the RBI

Facilities for individuals—

1. Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2, 50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

(i)		Private visits to any country (except Nepal and Bhutan).
(ii)		Gift or donation.
(iii)		Going abroad for employment.
(iv)		Emigration.
(v)		Maintenance of close relatives abroad.
(vi)		Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.
(vii)		Expenses in connection with medical treatment abroad.
(viii)		Studies abroad.
(ix)		Any other current account transaction:

Providedthat for the purposes mentioned in item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (hereinafter referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Provided furtherthat if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Provided alsothat for a person who is resident but not permanently resident in India and—

(a)		is a citizen of a foreign State other than Pakistan; or
(b)		is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

May make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation : For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident :

Provided alsothat a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

Facilities for persons other than individual—

2. The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

(i) Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for—

(a)		creation of Chairs in reputed educational institutes;
(b)		contribution to funds (not being an investment fund) promoted by educational institutes;
(c)		Contribution to a technical institution or body or association in the field of activity of the donor Company.

(ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever more is.

(iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

Explanation:—For the purposes of this sub-paragraph, the expression "infrastructure" shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000- RB, dated the May 3, 2000.

(iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

3.3.6 Thus, individuals can draw foreign exchange up to US$ 250,000 and if such amount is not sufficient, then for the purposes of emigration, maintenance of close relatives and medical & allied cost, additional foreign exchange can be drawn irrespective of the amount not exceeding the actuals.

3.3.7 Also, individuals who are resident of India can undertake any current account transactions of any value and request for the drawal of the foreign exchange from

AD Bank for remittance abroad if it is not covered in any of the above Schedules to the FEM (CAT) Rules, 2000.

Non-individuals have as such no restrictions under Schedule III except as stated above in paragraph 2 of Schedule III. It may also be mentioned that non-individuals, say Companies, if required to depute their employees for foreign travel, then above limit applicable to individuals of US$ 250,000 shall not apply and the company can remit any amount during the year as required by it for the purposes of its business.

4. Residential Status under FEMA

4.1 Under FEMA, residential status is of two types:

i. Person Resident in India
ii. Person Resident Outside India

4.2 As Per sec 2(v) person resident in India" means-

A) A person residing in India for more than one hundred and eighty- two days during the course of the preceding financial year but does not include-

a) A person who has gone out of India or who stays outside India, in either case-

- For or on taking up employment outside India, or
- For carrying on outside India a business or vocation outside India, or
- For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.

b) A person who has come to or stays in India, in either case, otherwise than-

- For or on taking up employment in India, or
- For carrying on in India a business or vocation in India, or
- For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

B) Any person or body corporate registered or incorporated in India.

C) An office, branch or agency in India owned or controlled by a person resident outside India.

D) An office, branch or agency outside India owned or controlled by a person resident in India.

4.3 Thus, in a case where a person goes abroad for one of the purposes as stated in A(a) above, he will become PROI from the day he has accepted / exercised such employment and vice versa, becomes PRII when he comes to India or such purposes as stated in A(b) above.

5. Liberalised Remittance Scheme (LRS)

5.1 The Reserve Bank of India had announced a Liberalised Remittance Scheme (the Scheme) in February 2004 as a step towards further simplification and liberalization of the foreign exchange facilities available to resident individuals. As per the Scheme, resident individuals may remit up to USD 2, 50,000 per financial year for any permitted capital and current account transactions or a combination of both. All resident individuals, including minors are eligible to avail of the facility under the scheme.

5.2 Prohibited Items under the scheme:

i. Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any

item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000.

ii. Remittance from India for margins or margin calls to overseas exchanges / overseas counterparty.

iii. Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market.

iv. Remittance for trading in foreign exchange abroad.

v. Remittances directly or indirectly to countries identified by the Financial Action Task Force (FATF) as "non-co-operative countries and territories", from time to time.

vi. Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

vii. Remittances directly or indirectly to Bhutan, Nepal, Mauritius and Pakistan.

5.3 Eligible Items under the scheme:

i. Acquire and hold shares or debt instruments or any other asset outside India without prior approval of the Reserve Bank

ii. Purchasing objects of art subject to the provisions of other applicable laws such as the extant Foreign Trade Policy of the Government of India.

iii. Gift in rupee to his NRI/PIO close relative under LRS and credit the same to his NRO A/c

iv. Purposes under FEM (CAT) Amendment Rules, 2015

5.4 The facility under the Scheme is in addition to those already available for private travel, business travel, studies, medical treatment, etc., as described in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. However, remittances for gift and donation cannot be made separately and are subsumed under the limit available under this LRS.

5.5 For undertaking transactions under the Scheme, resident individuals may use the application-cum-Declaration Form and it is mandatory to have PAN number to make remittances under the Scheme.

5.6 Thus, LRS is an exception for PRII to carry out all the specified as well as residual current account transactions and any capital account transactions up to the value of US$ 250,000 even if it is not possible under the specific Notification or permissible capital account transaction e.g. PRII may not be able to purchase immovable properties outside India for a value above US$ as specified therein, but he can do so under LRS.

6. Banking accounts of Persons resident outside India

6.1 Acceptance of Deposits from PROI is a capital account transaction referred to in section 6(3)(f) and sub-section (2) of S. 47 of the Foreign Exchange Management Act, 1999 and is governed under the Foreign Exchange Management (Deposit) Regulations, 2016 issued vide Notification No. FEMA 5(R)/2016-RB

6.2 Under the Notification, RBI has put restrictions on acceptance of any deposit from, or make any deposit with, a person resident outside India if the same is not permitted under the Notification or specifically approved or exempted by it.

6.3 Non-Residents are permitted to invest their money in India with banks, companies, firms or proprietary concerns subject to certain conditions. Acceptance of deposits by

an authorized dealer/bank from persons resident outside India would be under the following three bank deposit accounts in operation called Non-resident Ordinary (NRO) Account, Non- Resident External (NRE) Account and Non Resident Foreign Currency (Bank's Scheme) -FCNR(B) Account.

6.4 The comparative provisions of such bank accounts are given in table below:

Particulars	**Non-Resident (External) Rupee Account Scheme [NRE Account]**	**Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]**	**Non-Resident Ordinary Rupee Account Scheme [NRO Account]**
(1)	**(2)**	**(3)**	**(4)**
Who can open an account	NRIs and PIOs himself Individual/entities of Pakistan and Bangladesh shall requires prior approval of the Reserve Bank of India		Any person resident outside India himself for putting through bonafide transactions in rupees. Individuals/ entities of Pakistan nationality/ origin and entities of Bangladesh origin require the prior approval of the Reserve Bank of India. Post Offices in India may maintain savings bank accounts in the names of person's resident outside India and allow operations on these accounts subject to the same terms and conditions as are applicable to NRO accounts maintained with an authorised dealer/ authorised bank.
Joint account	May be held jointly in the names of two or more NRIs/ PIOs. NRIs/ PIOs can hold jointly with a resident relative on 'former or survivor' basis (relative as defined in Companies Act, 2013). The resident relative can operate the account as a Power of Attorney holder during the life time of the NRI/ PIO account holder.		May be held jointly in the names of two or more NRIs/ PIOs. May be held jointly with residents on 'former or survivor' basis.
Currency	Indian Rupees	Any permitted currency i.e. a foreign currency which is freely convertible	Indian Rupees

Type of Account	Savings, Current, Recurring, Fixed Deposit	Term Deposit only	Savings, Current, Recurring, Fixed Deposit
Period for fixed deposits	From one to three years, However, banks are allowed to accept NRE deposits above three years from their Asset-Liability point of view	For terms not less than 1 year and not more than 5 years	As applicable to resident accounts.
Permissible Credits	Credits permitted to this account are inward remittance from outside India, interest accruing on the account, interest on investment, transfer from other NRE/ FCNR(B) accounts, maturity proceeds of investments (if such investments were made from this account or through inward remittance). Current income like rent, dividend, pension, interest etc. will be construed as a permissible credit to the NRE account. Care: Only those credits which have not lost repatriable character Foreign Currency and traveler's cheque can be deposited only by account holder during his temporary visit to India subject to Currency declaration Form.		Inward remittances from outside India, legitimate dues in India and transfers from other NRO accounts are permissible credits to NRO account. Rupee gift/ loan made by a resident to a NRI/ PIO relative within the limits prescribed under the Liberalised Remittance Scheme may be credited to the latter's NRO account.
Permissible Debits	Permissible debits are local disbursements, remittance outside India, transfer to other NRE/ FCNR (B) accounts and investments in India.		The account can be debited for the purpose of local payments, transfers to other NRO accounts or remittance of current income abroad. Apart from these, balances in the NRO account cannot be repatriated abroad except by NRIs and PIOs up to USD 1 million, subject to conditions specified in Foreign Exchange Management (Remittance of Assets) Regulations, 2016. Funds can be transferred to NRE account within this USD 1 Million facility.
Repatriablity	Repatriable		Not repatriable except for all current income. Balances in an NRO account of NRIs/

		PIOs are remittable up to USD 1 (one) million per financial year (April-March) along with their other eligible assets.
Taxability	Income earned in the accounts is exempt from income tax and balances exempt from wealth tax	Taxable
Loans in India	AD can sanction loans in India to the account holder/ third parties without any limit, subject to usual margin requirements. These loans cannot be repatriated outside India and can be used in India only for the purposes specified in the regulations. In case of loans sanctioned to a third party, there should be no direct or indirect foreign exchange consideration for the non-resident depositor agreeing to pledge his deposits to enable the resident individual/ firm/ company to obtain such facilities. In case of the loan sanctioned to the account holder, it can be repaid either by adjusting the deposits or through inward remittances from outside India through banking channels or out of balances held in the NRO account of the account holder. The facility for premature withdrawal of deposits will not be available where loans against such deposits are availed of. The term "loan" shall include all types of fund based/ non-fund based facilities.	Loans against the deposits can be granted in India to the account holder or third party subject to usual norms and margin requirement. The loan amount cannot be used for relending, carrying on agricultural/ plantation activities or investment in real estate. The term "loan" shall include all types of fund based/ non-fund based facilities.
Loans outside India	Authorised Dealers may allow their branches/ correspondents outside India to grant loans to or in favour of non-resident depositor or to third parties at the request of depositor for bona fide purpose against the security of funds held in the NRE/ FCNR (B) accounts in India, subject to usual margin requirements. The term "loan" shall include all types of fund based/ non-fund based facilities	Not permitted
Rate of Interest	As per guidelines issued by the Department of Banking Regulations	
Operations by Power of	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible	Operations in the account in terms of Power of Attorney is

Attorney in favour of a resident	local payments or remittance to the account holder himself through normal banking channels.But not to any other account outside India or to another NRE Account or any Gift to Resident.		restricted to withdrawals for permissible local payments in rupees, remittance of current income to the account holder outside India or remittance to the account holder himself through normal banking channel but not to any other account outside India or to another NRE Account or any Gift to Resident. While making remittances, the limits and conditions of repatriability will apply.
Change in residential status from Non-resident to resident	NRE accounts should be designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts, at the option of the account holder, immediately upon the return of the account holder to India for taking up employment or on change in the residential status.	On change in residential status, FCNR (B) deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by the account holder. Authorised dealers should convert the FCNR (B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder.	NRO accounts may be designated as resident accounts on the return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period. Likewise, when a resident Indian becomes a person resident outside India, his existing resident account should be designated as NRO account.

6.5 Thus, for PROI, all the transactions whether Capital or Current, can be carried out only as per their Banking account in India.

7. <u>Hospitability to PROI by PRII</u>

7.1 Under Notification No. FEMA 16/2000-RB, dated 3rd May 2000 which deals with 'Receipt from and payment to a person resident outside India', general permission is given to residents to spend on non-resident guest on account of boarding, lodging and services related thereto and or travel within India.

7.2 Indian firms and companies are allowed to pay for cost of to and fro passage fare of their Non-Resident directors, foreign technicians, etc. coming to India for official business purposes. Similarly, Indian companies are permitted to make payment in rupees to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India.

7.3 Loan by Resident individual in rupees is also permitted in favour of the NRI relative subject to compliance with Foreign Exchange Management (Borrowing and Lending

in Rupees) Regulations, 2000 (Notification No. FEMA 4/2000-RB dated 3rd May, 2000), as amended from time to time.

8. <u>Export & Import of Goods and Services:</u>

8.1 Imports:

8.1.1 Persons Resident in India can import goods and services as permitted under Section 5 of FEMA read with Foreign Exchange Management (Current Account Transaction) Rules, 200 and by complying with other procedures under EXIM Policy & Customs Act. The FED Master Direction – Import of Goods and Services DT. 01.01.2016 provide for the detailed provisions relating to import of goods & services.

8.1.2 Import of goods can be freely made unless they are included in the negative list requiring licence under the Foreign Trade Policy in force. Where foreign exchange acquired has been utilised for import of goods into India, the AD Category-I bank is required to ensure that the importer furnishes evidence of import in Import Data Processing and Monitoring System ('IDPMS'), Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself that goods equivalent to the value of remittance have been imported.

8.1.3 Payments for imports should be made within six months from the date of shipment except in cases where amounts are withheld towards guarantee of performance etc. Deferred payment arrangements can be made including suppliers and buyers credit providing for payments beyond a period of six months from date of shipment up to a period of less than three years. Such trade credits are permitted under Automatic route for imports into India up to USD 50 million per import transaction for import of all items (permissible under the Foreign Trade Policy) with a maturity period (from the date of shipment) up to one year (in case of non-capital goods or operating cycle whichever is less) and up to three years (in case of import of capital goods).

8.2 Exports:

8.2.1 Provisions relating to export of goods & services are specified in the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 issued under Notification No. FEMA 23(R)/2015-RB dt. 12.01.2016

8.2.2 Export u/s. 2(1) of FEMA 1999 means, with its grammatical variations and cognate expressions, the

i) Taking out of India to place outside India any goods,

ii) Provisions of services from India to any person outside India.

Broadly stated, the supply of goods & services outside India shall be treated as Exports. However it is pertinent to note the definition of services. It has been defined u/s. 2(zb) of FEMA as under:

"Service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Notification No. FEMA 23(R) also defines "Export' under its regulation No.2(iv)

as including the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire purchase, or under any other arrangement by whatever name called and in the case of software, also includes transmission through electronic media.

8.2.3 The period of realization and repatriation of export proceeds of goods/software/services shall be nine months from the date of export for all exporters including Units in Special Economic Zones (SEZs), Status Holder Exporters, Export Oriented Units (EOUs), Units in Electronic Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) & Bio-Technology Parks (BTPs) until further notice.

For goods exported to a warehouse established outside India, the proceeds shall be realized within fifteen months from the date of shipment of goods.

8.2.4 The declaration form along with the prescribed export documents are to be submitted to an authorized dealer within 21 days from the date of export or within such extended time as is permitted by the authorised dealer.

Authorised dealer requires the documents for various purposes, inter alia, for monitoring the receipt of payment of the full value of goods exported. After the documents have been negotiated/sent for collection, the AD shall report the transaction through Export Data Processing and Monitoring System (EDPMS) to the Reserve Bank and retain the documents at their end.

8.2.5 An exporter is permitted to receive advance payment from a buyer/third party named in the export declaration made by the exporter, outside India subject to the following conditions:

i) The shipment of goods is made within one year from the date of receipt of advance payment; however, where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment, an exporter may receive advance payment.

ii) The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points;

iii) The documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

iv) In the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

8.3 It may be noted that PROI is not eligible to Import or Export unless they are authorised by the RBI under Notification No. FEMA 22(R) dealing with Liaison Office / Branch Office / Project Office.

9. Facilitation of Business for individuals – overriding provisions of Overseas Investments:

9.1 Regulation relating to overseas investment is notified by RBI as Notification No. FEMA 120/RB dated 7-7-2004 (the notification) as amended from time-to-time. Accordingly, an Indian Party is eligible to make overseas direct investment under the

Automatic Route. An Indian Party is a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act 1932 or a Limited Liability Partnership (LLP) incorporated under the LLP Act, 2008 and any other entity in India as may be notified by the Reserve Bank.

9.2 With effect from August 05, 2013, as provided by Regn. 20A of FEMA 120, a resident individual (single or in association with another resident individual or with an 'Indian Party' as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. Such investment shall be within the overall limit prescribed under the provisions of Liberalised Remittance Scheme.

9.3 The LRS Scheme is a parallel code to FEMA Ntf. 120 and hence no further recourse to provisions of FEMA Ntf. 120 is required or necessary. It may be noted that portfolio investment is outside the purview of FEMA Ntf. 120 and therefore unutilized limit of LRS may be used for other than direct investments e.g. portfolio investments

9.4 The salient conditions for direct overseas investment by individuals are as under:

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

ii. The JV or WOS abroad shall be engaged in *bona fide* business activity.

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

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

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

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

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

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

9.5 Investment by resident individuals in an overseas venture other than by way of direct investment are permitted as follows under Ntf. FEMA 120 –

9.5.1 Acquire shares of foreign company (under General permission of RBI) by way of:

(a) Gift from Person Resident outside India

(b) Cashless Employees Stock Option Scheme issued by company

outside India.

(c) Inheritance from any person Resident in India or outside India

(d) Subscription of shares of such foreign parent company offered under its ESOP Schemes, irrespective of the percentage of the direct or indirect equity stake in the Indian company. Subscription of such shares is permitted to an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle. The consideration payable by resident Indian maybe borne either by foreign company issuing shares or its Indian branch or office or subsidiary or the company in India in which foreign equity holding is not less than 51%.

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

9.5.2 Indian Resident can acquire the shares of foreign company under general permission:

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

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

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

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

10. <u>Penalties & Compounding:</u>

10.1 The Adjudicating authority appointed by the Central Govt. under section 16 of the FEMA, 1999 may impose penalty provided u/s. 13 of the FEMA, 1999 on the person who have committed contravention of any rules, regulations, act or directions issued under FEMA. As provided u/s. 16(6) of the FEMA, 1999 every adjudicating authority shall deal with the complaint as expeditiously as possible and dispose of the same within a period of one year from the date of receipt of the complaint. In

case of compounding by RBI, a period of 6 months is specified under section 15 on compounding.

10.2 In terms of Section 13(1), if any person contravenes any provision of FEMA, 1999, or any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where the amount is quantifiable or up to Rs. 2 lakhs, where the amount is not directly quantifiable and where the contravention is a continuing one, further penalty which may extend to Rs. 5,000 for every day after the first day during which the contravention continues.

10.3 Contraventions cannot be compounded which have been finally adjudicated and disposed of by the Adjudicating Authority. Application may be filed for compounding any contravention either during the course of investigation or when the complaint is made including those which are under adjudication process, until they are not disposed of.

10.4 Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal in form of compounding.

Section 15 of FEMA permit compounding of contraventions as defined under section 13 of FEMA except the contravention under section 3(a) of FEMA for a specified sum after offering an opportunity of personal hearing to the contravener. For this purpose, an application is required to be made by the person committing such contravention, either before or after the institution of Adjudication Proceedings. The Government of India has notified Foreign Exchange (Compounding Proceedings) Rules, 2000 for guiding on compounding of contravention. The detailed process for compounding is laid down in FED Master Direction No. 4/2015-16 dated 1-1-2016 as amended from time to time.

Wilful, malafide and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank. Further, in terms of the proviso to rule 8 (2) of Foreign Exchange (Compounding Proceedings) Rules, 2000 inserted vide GOI notification dated February 20, 2017, if the Enforcement Directorate is of the view that the compounding proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, such cases will not be compounded by the Reserve Bank.

10.5 Seizure of Assets:

10.5.1 Section 37A of FEMA stipulates special provisions relating to assets outside India in contravention of Section 4. Accordingly, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property. However, no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

10.5.2 The order of seizure along with relevant material shall be placed before the Competent Authority within a period of thirty days from the date of such seizure.

The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure either by confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person. While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

10.5.3 The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure. However, if, at any stage of the proceedings, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure.

11. Special relationship with Nepal & Bhutan:

11.1 A special rupee territory status is allocated to Nepal and Bhutan by virtue of which:

i. Overseas investment in Nepal & Bhutan is allowed in Rupees only
ii. Indian currency is allowed to be exported & imported to & from Nepal and Bhutan irrespective of limit (limit is Rs. 25,000 for other countries)
iii. Rupee is freely convertible within Nepal and Bhutan with the local currency of Nepal and Bhutan respectively
iv. Current account payments by PRII is allowed without any limit but only in Rupees and no foreign exchange can be drawn.

12. Conclusion:

This Article is only to explain the basis and concepts under FEMA. The important transactions of Foreign Direct Investment (FDI), External Commercial Borrowings (ECB), Borrowing in Rupees, Immovable properties in India and outside India, opening of Branch in India and outside India, amount of currency that can be possessed, etc. may be discussed in subsequent Journal along with developments and jurisprudence.

*****

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

CA. ANIL MATHUR
Jaipur

CASE LAWS

UNION OF INDIA
VERSUS
PREMIER LTD.
CIVIL APPEAL NO. 3529 OF 2008, SUPREME COURT OF INDIA, 29.01.2019

Applicable Sections:

Section 19, read with section 49, of the Foreign Exchange Management Act, 1999/Section 52, read with section 81, of the Foreign Exchange Regulation Act, 1973.

Decision:

If Adjudicating Officer had passed order under section 51 of FERA prior to 1-6-2000 when FERA was in force, appeal against such order was maintainable only under section 52(2) before Appellate Board under FERA. If such appeal had remained pending before Appellate Board on 1-6-2000, same would have been transferred to Appellate Tribunal constituted under FEMA in terms of section 49(5)(b) of FEMA for its disposal. Any appeal filed after 1-6-2000 against order of Adjudicating Officer passed under section 51 of FERA in proceedings initiated under FERA would lie before Appellate Tribunal under section 19 of FEMA and appeal against order dated 5-12-2003 passed by Deputy Director of Enforcement (Adjudicating Officer) under section 51 of FERA, would lie only to Appellate Tribunal under section 19 and not before Special Director (Appeals) under section 17.

S. RAMESH POTHY
VERSUS
DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT, CHENNAI
MP-PMLA-3106 (CHN) OF 2017 (MISC); FPA-PMLA-1624 TO 1630 (CHN) OF 2017, 11.01.2019

Applicable Sections:

Section 5 of the Prevention of Money Laundering Act, 2002

Decision:

Appellants were carrying on textile business in form of a private limited company. They purchased a property from one 'D' for purpose of their business. Father of 'D' was facing criminal prosecution for offences committed under provisions of Act. He expired during pendency of appeal. Enforcement Directorate took a view that appellants purchased said property from accused's daughter out of proceeds of crime. Department thus passed a provisional attachment order of property in question. Adjudicating Authority confirmed said attachment order. It was noted that there was no material on record showing that appellants had any knowledge of FIR against accused i.e. father of 'D'. Moreover,

appellants had filed a detailed reply to notice issued by respondent in order to prove that they were bona fide purchasers and amount paid was not proceeds of crime. However, nothing had been discussed in impugned order. It was also noticed that appellants had produced documents such as bank statement and also individual income tax returns before Adjudicating Authority to show means of funds for purchase of subject property.It could be concluded that appellants were bona fide purchasers and they were not involved in any crime relating to money laundering under Act therefore, impugned provisional order of attachment of property was to be set aside.

BANK OF BARODA
VERSUS
DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT, MUMBAI
FPA-PMLA/2115, 2117, 2189/MUM/2017, 12.12.2018

Applicable Sections:

Section 5 of the Prevention of Money Laundering Act, 2002

Decision:

Appellant-bank was involved in financing large scale projects both on an individual level, and as part of multi bank consortiums. It sanctioned various loan facilities to a company namely "SVLL". Various properties were mortgaged by borrower with appellant bank as security for loan. On account of non-payment of secured debts, appellant took measures under SARFAESI Act, 2002 and took over symbolic possession of properties mortgaged with it. While proceedings for recovery of dues under SARFAESI Act were pending, CBI registered an FIR invoking sections 420,468, 471, 120 (B) of Indian Penal Code, 1860 and 13(2), read with section 13(1)(d) of Prevention of Corruption Act 1988 against SVLL and its Directors. Subsequently, a provisional attachment order was passed by respondent in respect of properties mortgaged by SVLL with appellant-bank. Adjudicating Authority confirmed said attachment order. It was noted that mortgaged properties were acquired by owners, i.e., SVLL, much before alleged fraud committed by accused persons and, therefore, it could not be concluded that said properties were bought out of proceeds of crime as defined under section 2(1)(u). Moreover, in terms of SARFAESI Act, 2002 appellant bank being a secured creditor, would have priority over rights of Central or State Government or any other local authority. In view of aforesaid, impugned provisional attachment order, so far asproperties mortgaged with applicant bank were concerned, was liable to be quashed.

AASMA MOHAMMED FAROOQ
VERSUS
UNION OF INDIA
W.P. (C) NO. 12494 OF 2018, CM. NOS. 48492 & 48493 OF 2018, 05.12.2018

Applicable Sections:

Section 42, read with sections 5 and 8 of the Prevention of Money Laundering Act, 2002

Decision:

Petitioner filed instant petition seeking quashing of provisional attachment order of property and show cause notice issued by adjudicating authority under section

8.According to petitioner, since show cause notice had been issued by adjudicating authority, based in Delhi, a part of cause of action arose in Delhi andtherefore Delhi High Court had jurisdiction to entertain instant petition. A preliminary objection was taken by respondent on maintainability of petition on ground that Court would not like to entertain petition as same would militate against principles of forum convenience. According to respondent property was situated in Mumbai, petitioner was also based in Mumbai and provisional attachment order was also passed in Mumbai. Moreover, if an order was passed by appellate authority, it would be Mumbai High Court, whichwould have jurisdiction against said order. In view of aforesaid, objection raised by respondent was to be accepted and, instant petition was to be dismissed with a liberty to petitioner to approach Mumbai High Court for appropriate relief.

CIRCULARS

1. **CIRCULAR NO. 17: RBI/2018-19/109 DATED 16.01.2019**
   External Commercial Borrowings (ECB) Policy - New ECB Framework

2. **CIRCULAR NO. 18: DATED 07.02.2019**
   External Commercial Borrowings (ECB) policy - ECB facility for resolution applicants under Corporate Insolvency Resolution process

3. **CIRCULAR NO.19: RBI/2018-19/123 DATED 15.02.2019**
   Investment by Foreign Portfolio Investors (FPI) in debt

4. **CIRCULAR NO. 20 DATED 27.02.2019**
   Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) or any other place of business in India by Foreign Entities

NOTIFICATIONS

1. **NOTIFICATION NO. G.S.R. 78(E) [NO. FEMA.20 (R) (6) / 2019– RB (F.NO.1 / 22 / EM / 2016)], DATED 31-1-2019**
   Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (5th Amendment) Regulation, 2019 - Amendment in Regulation 16.B

2. **NOTIFICATION NO. G.S.R. 151 (E) [NO. FEMA 6 (R)/(1)/2019-RB], DATED 26-2-2019**
   Foreign Exchange Management (Export and Import of Currency) (Amendment) Regulations, 2019 - Amendment in Regulation 8

3. **NOTIFICATION NO. GSR 161 (E) [NO.FEMA 390/2019-RB], DATED 26-2-2019**
   Foreign Exchange Management (Foreign Exchange Derivative Contracts) (Amendment) Regulation, 2019 - Amendment in Schedule-II

4. **NOTIFICATION NO. GSR 162 (E) [NO.FEMA 391/2019-RB], DATED 26-2-2019**
   Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2019 - Amendment in Regulation 2, Schedule-I and Schedule -II

5. **NOTIFICATION NO. GSR 163 (E) [NO.FEMA 3(R)1/2019-RB], DATED 26-2-2019**
   Foreign Exchange Management (Borrowing and Lending) (Amendment) Regulations, 2019 - Insertion of Regulation-7A

6. **NOTIFICATION NO. GSR 164 (E) [NO.FEMA 20(R)5/2019-RB], DATED 26-2-2019**
   Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Amendment) Regulations, 2019 - Amendment in Regulation 5.

7. **NOTIFICATION NO. G.S.R. 160(E) [NO. FEMA 10(R)(2)/2019-RB], DATED 27-2-2019**
   Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) (Amendment) Regulations, 2019-Amendment in Regulation 4

*****

SALIENT FEATURES OF THE RERA ACT 2016 RELATING TO REGISTRATION OF THE 'REAL ESTATE PROJECT' AS WELL AS THE REGISTRATION OF THE 'REAL ESTATE AGENTS'[1]

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

Nainshree Goyal, Adv.
Associate Lawyer
SHARNAM LEGAL

The enactment and notification of Real Estate (Regulation and Development) Act 2016made on 1.05.2016 isa watershed developmentfor the Real Estate sector in Independent India. Real Estate sector inspite of a major contributor to the country's GDP was unregulated and plagued by rampant distortions and lack of protection to the homebuyers who are the contributor and beneficiary at the same time. It was high time that the country needed a Central Act to regulate this sector on pan India basis which was finally passed by the Parliament in 2016.

The RERA Act 2016 as popularly known is a Central Act and will be implemented by the State Governments by notifying the Rules, Regulations and Procedures to implement the same. This is because 'Land' is a State subject andlisted in Entry no 18 of State List II of Schedule 7 of the Constitution of India which reads as follows:

"Land, that is to say, right in or over land, land tenure including the relation of landlord and tenant, and the collection of rents; transfer and alimentation of agricultural land; land improvements and agricultural loans; colonization."

RERA Act 2016 consists of 10Chapters and 92 Sections. Section 84 of the Act vests the "appropriate government" (in case of the State, the State government and in case of Union Territory without Legislature the Central government) the power to make Rules and Section 85 of the Act provides the power to make Regulations for the implementation of the Act.

The Act would be implemented through the Regulatory Authority (Real EstateRegulatory Authority-RERA), Central Advisory Council and Quasi-Judicial Appellate Tribunal (Real EstateAppellate Tribunal) for settlement of disputes and appeals.

RERA has been primarily legislated to protect the interest of the home buyers and with this basic objective in mind, the Act has cast lot of duties and responsibilities on the "promoter" right from the inception of the 'project' till the completion of the 'project'

[1] This is the Article 2 in the series on RERA :-Series (2/2019)

and even after the completion of the 'project' for a period of 5 years from the date of handing over of the possession.

In this second Article of the series of Articles on the subject, let us now broadlydiscuss the important statutory provision relating to Registration of the 'Real Estate Project' as well as the Registration of the 'Real Estate Agents' underRERA Act 2016.

Prior Registration of the Project to be obtained by the Promoter:

Section 3 mandates that every promoter shall complete prior registration with the RERA established by the respective State or Union Territory under this Act where he proposes to launch the project. Thus no project can even be launched without prior registration with the RERA. Similarly Section 9 of the Act mandates that every Real EstateAgent intending to facilitate any Real Estate transaction of any project launched by the promoter has also to compulsorily register himself with the RERA.

So prior registration of both the Promoter and Real EstateAgent is a sin-qua-non (anivaryasharth) for the commencement of the 'Project'. The strict norms and requirements for registration would certainly eliminate unwanted and un-scrupulous registration of projects and agents which will help to create an atmosphere of trust amongst the home buyers.

The Registration of the project consists of exhaustive due diligence of the promoter which is conducted on the basis of detailed information/documents/approvals to be submitted by the promoter along with the registration application form. The list of documents/approvals to be submittedare prescribed in Section 4 (2) (a) to (l).Taking help of digital platform the application has to be submitted on line on the web portal of the respective RERA's constituted by the appropriate government.

One very important declaration to be made by the promoter along with the application is that seventy percent of the amount realised for the Real EstateProject from the allottees, from time to time shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction including the land cost and shall be used only for that purpose.

The application for registration has to be accompanied by theregistration fee which will be based on the area to be developed under the concerned Urban Development Act.

After a detailed scrutiny of the application form and the information &details contained there-in the RERA Authority shall grant the registration certificate for the project which shall be valid for a period declared by the promoter. The registration certificate shall be project specific only and where the project involves development in phases than each such phase has to be separately registered with the authority.

In accordance to Section 5 the authority shall grant a registration number to the promoter along with login ID and password which would enable the promoter to access the web-site of the authority and also to create his web page on the portal of the authority.

Validity of the Certificate:

The validity of the registration certificate can be extended by the authority on an application by the promoter due to *force majeure* on payment of prescribed fee. As per Section 6 the extension may be granted based on the facts in each case and is based purely on the discretion of the authority.

Revocation of the Certificate:

Section 7 of the RERA Act prescribes that the registration certificate can be revoked by the authority either *suo-motu*or on a compliant received by it. The reason for the revocation will include amongst others the noncompliance by the promoter in doing anything required under the Act andor the promoter violates any of the terms or conditions of approval given by the authority or the promoter is involved in any kind of unfair practice or irregularities.

To involve the concerned Government the interesting provision under Section 8 has been made where-in, upon lapse or revocation of the certificate of registration the authority may consult the appropriate government to such actions as it may deem fit including the completion of the remaining development work for the successful completion of the project.

Exemption from applying for Registration:

The requirement to obtain prior registration with the promoter is dispensed with in the following situations:

1. Where the project proposed to be developed does not exceed 500 sq.mtrs or the number of apartments proposed to be developed does not exceed eight including all phases.
2. Where the promoter is already in possession of a completion certificate prior to the commencement of this Act.
3. Where the proposed activity is only for renovation or repair or re-development and does not involve marketing, advertising, selling or new allotment of any apartment plot or building as the case may be under the Real EstateProject.

Registration of Real EstateAgents:

Every Real EstateAgent intending to facilitate the sale or purchase of any plot, building or apartment as the case may be in a Real Estate project or part of it which is a part of the Real Estate project registered under Section 3 supra has to compulsorily register himself with the Authority as prescribed in Section 9 of the RERA Act.

One single registration certificate shall be granted to the Real Estate agent for the entire State or Union Territory as the case may be. The authority shall grant a registration number which shall be invariably quoted by the Real Estate Agent in every sale facilitated by him.

The registration certificate shall be valid for the period mentioned in the certificate which could be renewed for a period in such manner as prescribed in the rules and on payment ofprescribed fee.

The registration certificate can be revoked by the authority due to any irregularity committed by the Real EstateAgent or where the authority is convinced that the registration has been obtained by the Real EstateAgent through misrepresentation or fraud.

Thus we can see that the RERA Act has sufficient pre-cautioner in-built mechanism to protect the interest of the home buyer's right from the beginning of the project till the completion of the project.

In our next article we shall discuss about the functions and duties of the Promoter and Real EstateAgent.

*****

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

GRJ DISTRIBUTORS AND DEVELOPERS PRIVATE LIMITED
VERSUS
UNION OF INDIA & ORS
D.B. CIVIL WRITS NO. 14186/2018, HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

These writ petitions have been filed to challenge the Notifications dated 17th February, 2017 and 15th May, 2017 issued by the Urban Development Department, Government of Rajasthan.

The first Notification was issued for the constitution of designated Real Estate Regulatory Authority (for short "the Authority") and second for designated Real Estate Regulatory Authority Appellate Tribunal (for short "the Tribunal"). A further challenge has been made to the orders passed by the Authority beyond the period of one year from the date of coming into force of the Real Estate (Regulation and Development) Act, 2016 (for short "the Act of 2016").

A reference of Sections 20 to 43 of the Act of 2016 has been given to show that the Authority so as the Tribunal were required to be constituted within the period of one year from the date of coming into force of the Act of 2016. In the instant case, the respondents failed to constitute the Authority so as the Tribunal within the period of one year, rather, they have issued Notification to designate the Authority so as the Tribunal to exercise jurisdiction beyond the period of one year. It is pursuant to the third proviso of Section 20 of the Act of 2016. The Notification and continuance of jurisdiction of the Authority was in ignorance of the fact that proviso cannot overrule the main provision. When the main provision provides for constitution of the Authority so as the Tribunal within the period of one year from the date of coming into force of the Act of 2016, any notification or continuance of jurisdiction of the Authority under the Notification is illegal and, accordingly, a prayer is made to set aside the order passed by the Authority.

Reference of Section 43 of the Act of 2016 has also been given. It is regarding constitution of the Tribunal. It was also to be constituted within a period of one year from the date of coming into force of the Act of 2016. For the period of one year, the legislature permitted arrangements given under the third proviso of Section 20 of the Act of 2016 and first proviso to Section 43 of the Act of 2016. An interim arrangement for a period of one year was permitted, as constitution of the Authority and the Tribunal was likely to take time but the proviso could not overrule the main provision so as to allow

the interim arrangement of one year in perpetuation or beyond the period given under Sections 20 and 43 of the Act of 2016.

In the instant case, the respondents issued two Notifications to designate the Authority as well as the Tribunal and while issuing the Notifications, they had not taken care that the period left out as per Sections 20 and 43 of the Act of 2016 is of few months for the Authority and no time for designating the Tribunal. It is also stated that the Authority and the Tribunal have to be constituted in the manner given under the Act of 2016. The Authority is to consist of three members as per Sections 21 of the Act of 2016. The process for constitution of the Authority has been given under Section 22 of the Act of 2016. The designated Authority pursuant to the impugned Notifications was of one member and it heard and decided the matters against the petitioners beyond the period of one year. A challenge to the order was made while challenging the validity of the Notifications issued by the State of Rajasthan.

Learned counsel submits that during pendency of the writ petitions, a direction was given by this Court to constitute the Authority as well the Tribunal as per the provisions of the Act of 2016. The State Government has already initiated the process for constitution of the Authority so as the Tribunal but the process could not be completed due to assembly election during the intervening period.

Learned counsel, appearing for the State Government, submits that the process would now be completed soon. There would be duly constituted Authority so as the Tribunal. Accordingly, a prayer is made to save the Notifications challenged by the petitioners.

Learned counsel, appearing for the complainants, submit that adjudication of the complaints has already been made by the Authority, thus the prayer made in the writ petitions may not be accepted. The petitioners can challenge the order by approaching the Tribunal and it can be after due constitution as per the provisions of the Act of 2016 and till then they would have protection in the shape of stay order, thus the Notifications and the order/s may not be interfered. It would balance the equities between the parties and save further adjudication by the same Authority.

Learned counsel for the petitioners submits that apart from challenge to the Notifications and order/s in reference to the period of one year, there is another aspect of the matter. In the instant case, an order was passed by the Authority after hearing the parties but thereupon another order was passed without a notice to the petitioners, thus second order was even in violation of the principles of natural justice apart from violation of the procedure given under the Act of 2016. The aforesaid aspect has not been touched at the initial stage, as the prayer was to remand the matters to the Authority and it may be heard by it after its due constitution.

Learned counsel for the complainants submits that the matters may be remanded to the Authority with certain directions so that grievance of the complainants may be redressed at the earliest. The first direction should be to the State Government to constitute the Authority and the Tribunal within a period of two months from the date of receipt of copy of this order. It is moreso when, process for it has already been initiated.

The second direction should be for expeditious hearing and disposal of the complaints by the Authority after its constitution and it should be within the period of three months from the first date fixed by the Authority.

Since, we find that the process for constitution of the Authority as well as Tribunal has already been initiated by the State Government, though, it could not be completed due to assembly election in between but now with the declaration of result of assembly election, the process can be continued and be completed within the period of two months from the date of receipt of copy of this order.

Accordingly, the Authority would be constituted as per the Act of 2016 within two months from the date of receipt of the copy of this order and, for that, Sections 21 and 22 of the Act of 2016 would be taken note of.

The reference of Section 71 of the Act of 2016 would be relevant at this stage because after constitution of the Authority, they have to designate the Adjudicating Officer and accordingly, we further direct that immediately after constitution of the Authority, the process would be taken up by them for designating Adjudicating Officer as per Sections 71 and 72 of the Act of 2016. The aforesaid aspect has been taken by this Court looking to the fact that as per the procedure given under the Act of 2016, whenever the matter is brought before the Authority, it may be sent to the Adjudicating Officer for determination of the compensation, if any and not otherwise.

The respondents would further constitute the designated Real Estate Regulatory Authority Appellate Tribunal within the period of three months from the date of receipt of copy of this order. The process for it has already been taken up, thus would be completed within the period given above.

We have given directions for constitution of the Authority and the Tribunal. The challenge to the Notifications is yet to be seen. We find that beyond the period of one year from the date of coming into force of the Act of 2016, such Notifications cannot have effect. The proviso to Sections 20 and 43 of the Act of 2016 cannot be read de hors the main provision. Accordingly, the directions in reference to the Notifications under challenge need to be given. The Notifications under challenge would not operate beyond a period of one year from the date of coming into force of the Act of 2016. As the impugned orders have been passed by the Authority beyond the period of one year, the same are set aside with remand of the matter to the Authority, as agreed by learned counsel for the parties. The Authority would hear and decide the matter on remand within the period of three months after its constitution and the first date fixed by them. Both the parties are directed to co-operate with the Authority to complete the proceedings within the period given above.

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

SAGAR SARJERAO NIKAM & ORS.
VERSUS
M/S SPENTA BUILDERS PVT.LTD.

The appellant contended that respondent has failed to deliver the possession of flats booked by the complainants in time. The respondent argued that Public Interest Litigation being no. 86of 2014 directing the concerned Planning Authority to maintain status quo and not to issue Occupation Certificate to some projects was one of the reasons.

The reasons assigned of stay by Hon. High Court will not be a cause to circumvent the obligation cast on the developer to complete the project in a time schedule. The Hon'ble Lordships of High Court in Writ Petition No. '1737 of 2017 in Neelkamal vs. State indicated that the Court litigation or any stay will not be any excuse for extension of time to be entertained by the Authority. Hence, the authority ordered that Appeal is partly allowed and the Respondent /Developer shall pay interest to the Appellant / Purchaser effective from 1st April, 2017 till possession of the said flat is handed over.

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

HARISH SHARMA
VERSUS
RIJVITA DEVELOPERS PVT. LTD

The complainant contends that respondent has failed to deliver the possession of flats bookedby the complainant in time. The complainant seeks interest for the said delay in terms ofsection 18 of the Act.The respondent contended that he had specifically put March, 2015 as the date of possession in the said agreement because the complainant had requested him to do so to be eligible for certain capital gains under the Income Tax Act. He further added that the Competent PlanningAuthority approval for the said project has been received only in the year 2017. He also submitted that he has been paying rent to the complainant for the period beyond March 2015 as was agreed between them for which complainant agreed.

It is concluded that the period beyond March 2015 cannot be treated as delay in accordance with Section 18 of the Real Estate (Regulation and Development) Act, 2O16, as the possession date for the said apartment was mutually agreed by the parties specifically for the benefit of the complainant. Moreover, the approval for the project has been received only in 2017.The respondent shall handover possession of the said apartment with Occupancy Certificate, to the Complainant before the period ending December 31, 2018, failing which the respondent shall be liable to pay interest to the complainant from January 1, 2019 till the actual date of possession on the entire amount paid by the complainant to the respondent.After examination of all the facts, the authority decided that the respondent shall handover possession of the apartments, with Occupancy Certificate, to the complainant before the period ending January 1, 2019, failing which the respondent shall be liable to pay to the complainant, interest on delay, post the end of the said period till the actual date of possession, on the entire amount paid by the complainant.

BALRAM SANSOYE & ORS.
VERSUS
SHIVTARA MERIDIAN ASSOCIATES & ORS

The complainants alleged that respondent have failed to deliver the possession of flats booked by the complainants in time, therefore, have sought interestand compensation and also the rent from the respondents.The respondents denied the allegations made by the complainants claiming that the project got delayed due to the reasons like drought in

2015 and heavy rain in June, 2017, and also demonetization and change of planning authority.They further submitted that the project would be completed by July, 2018, which is six months earlier than the proposed date of completion given in the MahaRERA registration.

After the arguments of both sides, the authority has noticed that the date would vary depending upon the date of agreement executed between the complainants and the respondents. After considering period of six months as a reasonable time for the respondent to overcome the difficulties pointed out by him this authority directs the respondents to pay interest to the complainant for delay after calculating the date of possession for each complainant i.e. two years from the date of agreement and on extension of six months till the date of actual possession of the flats to the complainants.The complainant's payment of rent is not considered in terms of the provisions of the RERA Act and Rules.

UMESH MAGAR & ORS.
VERSUS
KUL DEVELOPERS PVT LTD

Complainants contended that they booked flats in phase 1 of the project of respondent. The respondent agreed to deliver the possession within 5 years from the date of agreement but the same has not been handed over. They alleged that while registering the project with RERA, the respondent has mentioned a possession date beyond the date as agreed. They further alleged that respondent has not enclosed the commencement certificate nor the respondent has formed association/society of the allottees even after the booking of majority of flats. Also, the respondent has submitted false information at the time of registration with RERA.

The respondent completely opposed the claim of the complainant and pleaded not guilty.

On hearing both the sides, the authority concluded that it is necessary to enclose commencement certificate along with registration. Further, the authority decides that as held in the decision of Hon'ble Bombay HC in Neelkamal Realtors Suburban Pvt Ltd V/S UOI in writ petition no. 2737, the respondents cannot be said to have contravened the provisions of RERA where they furnished the dates of completion of the project at time of registration of project different from those to the allottees who already booked the flats before registration. Such allottees shall be governed by their respective agreement for sale.

In context of registration of separate towers, the authority after considering the provisions held that respondent has not contravened the provisions of RERA by registering the towers separately. The allegation made by complainants that the respondent has ditched the complainants with earlier advertisements and brochures of the project is not correct as the agreement for sale duly executed between the parties provides that such agreement supersedes and cancels all previous agreement, negotiations and representations.

The authority in its final order also held that the promoter/respondent was liable to form an association/society of allottees within the prescribed time of 4 months where

more than 50% of apartments/flats in the registered project have been booked. Hence, suitable directions were issued by the authority to meet the ends of justice.

SACHIN ARUN SIDDHE & ORS.
VERSUS
ARK PREM CONTRUCTIONS

The complainants seek the refund of amount paid by them to the respondent with interest and compensation on failure of respondent to deliver the possession of booked flat on agreed date.Respondent opposed the claim by contending that the possession was already handed over vide letter dated 5th April 2015 itself.On reading of the said letter, the authority clears that the letter as stated provides the possession of flat to the complainant for the purpose of 'Furniture & Renovation' and not for occupying it or residing in it. The actual possession has not been handed over as the occupancy certificate is still awaited. Therefore, the complainants are entitled to their right to claim refund of their amount along with interest.

NAIM KAMARUDDIN & ORS.
VERSUS
JVPD PROPERTIES PVT LTD

The complainants contend that respondent has failed to deliver the possession offlats booked by the complainants in time. The complainants seek the refund of their money under section 18 of the Act. They further pleaded for the amount of interest and compensation under the relevant provisions of the said Act.

On perusal of the complaint the authority found that as the agreement for sale has not been executed by the parties the above complaints are not maintainable. Accordingly, complaints were dismissed.

MADHYA PRADESH REAL ESTATE REGULATORY AUTHORITY

ANIL KUMAR DUBEY
VERSUS
BALAJI INFRASTRUCTURES CO.

The applicant booked a flat with the non – applicant in year 2013. As per the agreement, the possession of the flat was to be provided in year 2016 but the non-applicant has failed to deliver the possession in time. Therefore, the applicant alleged for execution of the sale deed & earliest possession of the flat along with compensation of Rs. 5, 00,000.

The non – applicant contended that the applicant has not made the balance payment for acquisition of the booked flat. He further argued that the claim for the compensation is against the terms of allotment.

The authority ordered a physical verification of the flat to be done through commission along with the applicant & non - applicant to confirm the status of completion of the flat. On verification, the officer found that the construction of Road, sideways railing & electrical fitting up to some extent was pending.

On report made by the commission, the authority held that the applicant has not made the balance payment as compared to the work done. Thus, is not entitled to any compensation and directed to pay remaining amount within 15 days. Further, as the non – applicant has delayed the possession, thereby directed to complete the construction within 30 days of this Order. Hence, complaint dismissed.

CHANDAN CHAURASIYA
VERSUS
SVS BUILDCON PVT LTD

The applicant contends that he booked a flat with the respondent against which a total sum of Rs. 9, 00,000 has been paid by him to the respondent. Later, in 2016, the applicant cancelled the booking of the said flat and calls for refund of the amount. But the respondent has failed to honor the payment as agreed. Therefore, the applicant claims the refund of amount along with interest.The respondent contends that the relation between the allottee and the respondent has been diluted as the booking was cancelled by the complainant before coming into force of the Act. Hence, RERA has no jurisdiction over such complaint.After analyzing the facts of the case, the authority held that as the promoter has not refunded the amount of the complainant on cancellation of the booked flat, therefore, the issue between the promoter-allottee is retained. Further, in context to prayer of the complainant for the interest on amount, the authority concludes that the complainant is entitled for interest as agreed in M.O.U. executed between the promoter and the allottee. Hence, the respondent was directed to return the amount along with the interest at the rate as prescribed by the rules.

NOTIFICATIONS/CIRCULARS

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

1. In the Government Order first read above the Government has notified the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 in order to implement the Central Act. Accordingly, the Real Estate Regulatory Authority has been established on 22.06.2017.
2. Under section 3(1) of The Real Estate (Regulation and Development) Act, 2016 "No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act" and hence Registration with Tamil Nadu Real Estate Regulatory Authority is mandatory for all the projects. Tamil Nadu Real Estate Regulatory Authority has taken several steps to make the Promoters to register their project with Real Estate Regulatory Authority.
3. A clause has also been included in the final approval letter issued by Chennai Metropolitan Development Authority and Directorate of Town and Country Planning wherein it was stated that the Promoters should register their projects with Tamil Nadu

Real Estate Regulatory Authority before commencing any booking or selling. Inspite of several measures taken by this Authority, still certain Promoters have not registered their projects with Tamil Nadu Real Estate Regulatory Authority which ought to be registered.

4. Hence, in the letter 2nd read above, the Chairperson, Tamil Nadu Real Estate Regulatory Authority has requested the Government to issue necessary orders making mandatory to produce TNRERA Registration Certificate for issue of Completion Certificate by Chennai Metropolitan Development Authority, Directorate of Town and Country Planning, Local Planning Authorities and Local Bodies where the area of and proposed to be developed exceeds 500 square meter or the number of apartments proposed to be developed exceeds 8 inclusive of all phases in the proposed Common Building Rules as Completion Certificate guidelines.
5. The Government carefully examined the request of the Chairperson, TNRERA in para 4 above and direct the Member Secretary, Chennai Metropolitan Development Authority and Commissioner of Town and Country Planning to include the registration of projects with TNRERA as one of the conditions in the planning permission and its compliance is a pre-requisite for issue of Completion Certificate, where the area of land proposed to be developed exceeds 500 square meters or the number of apartments proposed to be developed exceeds 8 inclusive of all phases. Compliance of this condition shall also be checked and ensured before issue of Completion Certificate. This condition is also to be incorporated in the Tamil Nadu Combined Development Regulations and Building Rules, 2018.
6. The Principal Secretary / Member Secretary, Chennai Metropolitan Development Authority and the Commissioner of Town and Country Planning are directed to pursue action accordingly.

*****

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

Adv. ARPIT MATHUR
Jaipur

CASE LAWS

K. SASHIDHAR
VERSUS
INDIAN OVERSEAS
SUPREME COURT OF INDIA, FEBRUARY 5, 2019, CIVIL APPEAL NOS. 10673, 10719 AND 10971 OF 2018

Relevant Sections: -Section 33, 34 and 30 (4) of Insolvency & Bankruptcy Code, 2016
Judgement: - Where resolution plan of concerned corporate debtor(s) had not been approved by requisite percent of voting share of financial creditors, i.e., 75 per cent as in October 2017 and no alternative resolution plan was presented within statutory period of 270 days, proposed resolution plan was to be disapproved and amendment to section 30(4) which came into force w.e.f. 6-6-2018 substituting threshold requirement of 75 per cent to 66 per cent would not be applicable and, therefore, liquidation process under section 33 was to be initiated.

RELIANCE COMMUNICATION LTD.
VERSUS
STATE BANK OF INDIA
FEBRUARY 20, 2019WRIT PETITION (CIVIL) NO. 845 OF 2018
CONTEMPT PETN. NOS. 1838 OF 2018 & 55 & 185 OF 2019

Relevant Sections:-Section 9 of the Insolvency and Bankruptcy Code, 2016, read with section 12 of the Contempt of Courts Act, 1971
Judgement:-Three Reliance Companies (R Com group) had given undertakings to Court to pay off debts due to Ericsson for a sum of Rs. 550 crores without depending upon any act or omission of third party but had willfully failed to pay same and thus breached undertakings given to Court. They were to be held guilty of contempt of Court. Undertakings given on footing that amount of Rs. 550 crores would be paid only out of sale of assets was false to knowledge of three Reliance Companies as sum of Rs. 550 crores was to be paid without there being any linkage to sale of assets, as separately stated in order. R Com group was to be directed to purge contempt of Court by payment of sum of Rs. 453 crores to Ericsson, in addition to Rs. 118 crores made to Registry of Court and in default of such payment, Chairmen of these Companies, who had given undertakings to Court would suffer three months imprisonment.

TATA STEEL LTD.
VERSUS
LIBERTY HOUSE GROUP (P.) LTD.
(NCLAT- NEW DELHI)COMPANY APPEAL (AT) (INSOLVENCY) NO. 198 OF 2018, 4 FEBRUARY 2019

Relevant Sections:-Section 29(A), 30, 31, 30 (4) and 25 (2) of Insolvency & Bankruptcy Code, 2016
Judgement:-Prior to 'Committee of Creditors' voting upon 'Resolution Plan', it is open to 'Committee of Creditors' to call for and consider 'improved financial offer(s)' in accordance with statutory mandate to ensure value maximization. 'Process Document' for 'Corporate Insolvency Resolution Process' of 'Corporate Debtor' does not curtail powers of 'Committee of Creditors' to maximize value. 'Committee of Creditors' have right to negotiate better terms with 'Compliant Resolution Applicant(s)'. The 'Resolution Professional' in consultation with 'Committee of Creditors' can extend timelines at its sole discretion if expedient for obtaining best 'Resolution Plan' for Company. Therefore, granting more opportunity to all eligible 'Resolution Applicants' to revise its 'financial offers', even by giving more opportunity, is permissible in Law. However, all such processshould complete within time frame.
Adjudicating Authority had only allowed 'Committee of Creditors' to consider 'Resolution Plan' submitted by 'Liberty House', that did not mean that 'Resolution Plan' submitted by 'Liberty House' had been approved. Hence, challenge to order passed by Adjudicating Authority by applicant 'Tata Steel Limited', one of 'Resolution Applicants' for 'Bhushan Power & Steel Limited' (Corporate Debtor) being premature, uncalled for, in absence of final decision taken by Authority under section 31, would not be maintainable.

APPOLO PIPES LTD.
VERSUS
SHRI HARI INFRAPROJECTS (P.) LTD.
(NCLT-JAIPUR)IB NO. 20/9/JPR/2018 IN TA NO. 99/2018FEB 1, 2019

Relevant Sections:-Section 5(6) and9 of the Insolvency and Bankruptcy Code, 2016
Judgement:-Corporate debtor placed a purchase order on operational creditor for supply of PVC pipes of different dimensions and for its testing. Terms and conditions of purchase order contained clause related to quality of pipes to be supplied. In response to demand notice under section 8, corporate debtor brought to notice of operational creditor about existence of dispute pertaining to quality of goods supplied by operational creditor. According to corporate debtor dispute could be resolved amicably once quality issue was sorted out and that balance payment would be released thereafter. It was held that where much prior to issue of demand notice under section 8, corporate debtor raised a dispute regarding quality of goods supplied by operational creditor, there was a pre-existence of dispute and hence, application under section 9 was to be rejected.

PUSHTI IMPEX
VERSUS
SHREE SATYANARAYAN INDUSTRIAL SUPPLIERS (P.) LTD.
(NCLAT NEW DELHI)COMPANY APPEAL (AT) (INSOLVENCY) NO. 435/2018, JANUARY 30, 2019

Relevant Sections:-Section 9, read with section 8, of the Insolvency and Bankruptcy Code, 2016 and rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Judgement:-Operational creditor filed petition for winding up of respondent corporate debtor. Pursuant to rule 5 of Companies (Transfer of pending proceedings) Rules, 2016, said petition was transferred to Adjudicating Authority. After transfer of case, operational creditor had neither issued demand notice nor furnished necessary informations in terms of rule 6 of Application to Adjudicating Authority Rule as stipulated in rule 5 of Companies (Transfer of pending proceeding) Rules, 2016. It was held that where petition for winding up of company was transferred to NCLT, but as desired in application under section 9 to Adjudicating Authority Rules, after transfer of case operational creditor neither issued demand notice under section 8 nor furnished necessary information as desired in rule 5 of Companies (Transfer of pending proceeding) Rules, same was to be abated.

BANK OF INDIA
VERSUS
N.K. LOUHA UDYOG (P.) LTD.
CP (IB) NO. 344/KB/2018JANUARY 17, 2019

Relevant Sections:-Section 238, read with section 7, of the Insolvency and Bankruptcy Code, 2016

Judgement:-Where respondent resisted application filed under section 7 on ground that applicant having filed recovery proceeding in DRT, could not file instant application on same cause of action, in view of fact that as per section 238, provisions of Code supersede any other law when it comes to resolution of corporate debtor, objection so raised was to be set aside

IBBI'S PRESS RELEASE, DATED 24-1-2019

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA AMENDS THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016

The Insolvency and Bankruptcy Code, 2016 provides for corporate insolvency resolution process for invitation, receipt, and consideration of resolution plans; and approval of a resolution plan to resolve insolvency of the corporate debtor. It envisages that a resolution plan, once approved, must be implemented. In furtherance of this, the Insolvency and Bankruptcy Board of India has notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment)

Regulations, 2019 today to discourage persons, other than genuine, capable and credible resolution applicants, to submit resolution plans.

2. The amendment mandates that the request for resolution plans shall require the resolution applicant, in case its resolution plan is approved by the committee of creditors, to provide a performance security. Performance security means security of such nature, value, duration and source, as may be approved by the committee of creditors, having regard to the nature of resolution plan and business of the corporate debtor.

3. The Resolution Professional shall attach the evidence of receipt of performance security while submitting the resolution plan to the Adjudicating Authority for approval. Such performance security shall be forfeited if the resolution applicant of such plan, after its approval by the adjudicating authority, fails to implement or contributes to the failure of implementation of the plan.

4. The amendment also requires that the resolution plan shall include a statement as to whether the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any resolution plan approved by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 at any time in the past.

5. The amendment enables a creditor, who is aggrieved by non-implementation of a resolution plan approved by the Adjudicating Authority, to apply to the Adjudicating Authority for appropriate directions.

6. The amendment Regulations are effective from today. These are available at www.mca.gov.in and www.ibbi.gov.in.

*****

SUPREME COURT RULING ON EPF

CA Keshav Pareek

"Allowances that are universally, ordinarily and necessarily paid to all shall be considered as a part of a Basic Wages", Supreme Court Rules

A bench of justice Arun mishra and Navin sinha of the Hon'ble SC vide judgment Dt. 28 Feb in the case of The Regional Provident Fund Commissioner (II) West Bengal Vs Vivekananda Vidyamandir and others has delivered the long awaiting judgment regarding deduction of Provident Fund on special allowances paid by an establishment to its employees. The SC while answering the common question of law regarding deduction of PF on allowances paid by various nomenclature has laid down ***Principal of Universality,*** *i.e.* all allowances which are paid universally, necessarily to all employee would form part of basic wages and will be considered for computing employer and employees share of contribution for purpose of EPF & MP Act 1952.

BACKGROUND OF SC JUDGEMENT

As per EPF & MP Act 1952 Employers are required to deduct 12% (in some cases 10%) of EPF on Wages paid to employees. Simultaneously employer is required to make matching contribution towards provident fund.

This is a common tendency among employers to split their wages into various nomenclatures like Special allowance, Night shift allowance, attendance allowance, children education allowance etc to reduce their burden of Employer's share of EPF. Departmental authorities, while making inspection used to question splitting of wages and used to make assessments of employers by raising demand of unpaid dues and Damages and interest on amount of allowances paid universally and necessarily to all employees.

The relevant provisions of the EPF & MP Act 1952 which are required to be necessarily referred are reproduced as under:

Section 2(b) of the Act:

"(b) 'basic wages' means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case] in accordance with the terms of the contract of employment and which are paid or payable in cash to him, ***but does not include***:

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer;"

Section 6 of the Act:

"6. Contributions and matters which may be provided for in the Scheme
The contribution which shall be paid by the employer to the Fund shall be [ten per cent] of the basic wages, [dearness allowance and retaining allowance (if any)], for the time being payable to each of the employees [(whether employed by him directly or by or through a contractor)] and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, [if any employee so desires be an amount not exceeding [ten per cent] of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]:
[PROVIDED that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words [ten per cent], at both the places where they occur, the words [twelve per cent] shall be substituted]:
[PROVIDED FURTHER that] where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.
Explanation [11 : For the purposes of this [section], dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.
[Explanation 2 : For the purposes of this [section], "retaining allowance" means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.]"

Since as per section 2(b) of EPF & MP Act 1952 basic wages do not include DA, HRA, Overtime allowance, bonus, commission etc., employers are not required to make contribution on HRA, commission, Bonus or any other similar allowances. Employers used to reduce the component of Basic wages and DA by inflating the amount of HRA, Travelling allowance, conveyance allowance, special allowance etc in gross salary of an employee and artificially reducing the amount of PF contribution. Departmental authorities used to object such splitting of wages into various components and thus resulting in huge litigation across the country. Later the issue came before the SC.

.

FINDINGS AND CONCLUSIONS BY COURT

This judgment of the Hon'ble Supreme Court has been long awaited because there were great ambiguities that prevailed in determining the scope of "Basic Wages" as defined under the EPF & MP Act 1952. The SC while answering the common question of law regarding the splitting of wages into various components has laid down ***Principal of Universality,*** *i.e.* all allowances which are paid ***universally***, ***necessarily*** and ***regularly*** to all employee would form part of basic wages and will be considered for computing employer and employees share of contribution for purpose of EPF & MP Act 1952, only

such allowances not payable uniformly by all concerns and which may not be earned by all employees of the concern would stand excluded from the definition of "Basic Wages". However if the allowances are not being paid across the board to all employees or it is **variable** or linked to any **incentive for production** or linked to any **greater output**, then these allowances will stand excluded from "Basic wages". It is only such allowances not payable to all employees or may not be earned by all employees of establishment that would stand excluded from deduction***. For an amount to be excluded from Basic wages it must arise out of Extra output which has direct linkage with the output by eligible worker.*** When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage. The test adopted to determine if any payment was to be excluded from the basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. ***The crucial test is of universality***. Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "Basic wages".

COMMENTS

The judgment of SC will require almost all employers to redesign their Human resource policies and restructure wages policy. It is clear from judgment of SC that splitting of wages will not be considered and the liability of employer's share of EPF will be on whole amount of basic wages and allowances if allowances are being paid to all employees universally, necessarily and regularly and there is no valid justification of allowances offered from employers.

*****

ALLIED JUDGMENTS

Adv. ABHAY SINGLA
Sangaria (Hanumangarh)

THE REGIONAL PROVIDENT FUND COMM. (II) WEST BENGAL VERSUS VIVEKANANDA VIDYAMANDIR AND OTHERS CIVIL APPEAL NO(s). 6221 OF 2011, SUPREME COURT OF INDIA, 28.02.2019

Where allowances paid by establishment to its employees were essentially a part of basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to provident fund account of employees, order of authority under Employees' Provident Fund and Miscellaneous Provisions Act, 1952 that special allowance was to be included in basic wage for deduction of provident fund was justified

Facts

• Respondent, an unaided school, was giving special allowance by way of incentive to teaching and non-teaching staff pursuant to an agreement between staff and the management. The authority under Employees' Providing Fund and Miscellaneous Provisions Act, 1952 held that the special allowance was to be included in basic wage for deduction of provident fund.

• ***Held*** that no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what was the norm of work prescribed for those workmen during the relevant period. It is, therefore, not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund of the employees. The concurrent conclusions of facts that special allowances paid by an establishment to its employees would fall within

expression 'basic wages' under section 2(b)(ii) read with section 6 for computation of deduction towards Provident Fund is not interfered with.

JUDGMENT

NAVIN SINHA, J.

The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

2. It is considered appropriate to briefly set out the individual facts of each appeal for better appreciation.

Civil Appeal No. 6221 of 2011: The respondent is Anunaided School giving special allowance by way of incentive to teaching and non-teaching staff pursuant to an agreement between the staff and the management. The incentive was reviewed from time to time upon enhancement of the tuition fees of the students. The authority under the Act held that the special allowance was to be included in basic wage for deduction of provident fund. The Single Judge set aside the order. The Division Bench initially after examining the salary structure allowed the appeal on 13.01.2005 holding that the special allowance was a part of dearness allowance liable to deduction. The order was recalled on 16.01.2007 at the behest of the respondent as none had appeared on its behalf. The subsequent Division Bench dismissed the appeal holding that the special allowance was not linked to the consumer price index, and therefore did not fall within the definition of basic wage, thus not liable to deduction.

Civil Appeal Nos. 3965-66 of 2013: The appellant was payingbasic wage + variable dearness allowance (VDA) + house rent allowance (HRA) + travel allowance + canteen allowance + lunch incentive. The special allowances not having been included in basic wage, deduction for provident fund was not made from the same. The authority under the Act held that only washing allowance was to be excluded from basic wage. The High Court partially allowed the writ petition by excluding lunch incentive from basic wage. A review petition against the same by the appellant was dismissed.

Civil Appeal Nos. 3969-70 of 2013: The appellant was notdeducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the allowances had to be taken into account as basic wage for deduction. The High Court dismissed the writ petition and the review petition filed by the appellant.

Civil Appeal Nos. 3967-68 of 2013: The appellant companywas not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the special allowances formed part of basic wage and was liable to deduction. The writ petition and review petition filed by the appellant were dismissed.

Transfer Case (C) No.19 of 2019 (arising out of T.P. (C) No. 1273 of 2013): The petitioner filed W.P. No. 25443 of 2010against the show cause notice issued by the authority under the Act calling for records to determine if conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentives and city compensatory allowance constituted part of basic wage. The writ petition was dismissed being against a show cause notice and the statutory remedy available under the Act, including an appeal. A Writ Appeal (Civil) No.1026 of 2011 was preferred against the same and which has been transferred to this Court at the request of the petitioner even before a final adjudication of liability.

3. We have heard learned Additional Solicitor General, Shri Vikramajit Banerjee and Shri Sanjay Kumar Jain appearing for the Regional Provident Fund Commisioner and Shri Ranjit Kumar, learned Senior Counsel who made the lead arguments on behalf of the Establishment-appellants, and also Mr. AnandGopalan, learned counsel appearing for the petitioner in the transfer petition.
4. Shri Vikramajit Banerjee, learned Additional Solicitor General appearing for the appellant in Civil Appeal No. 6221 of 2011, submitted that the special allowance paid to the teaching and non-teaching staff of the respondent school was nothing but camouflaged dearness allowance liable to deduction as part of basic wage. Section 2(b)(ii) defined dearness allowance as all cash payment by whatever name called paid to an employee on account of a rise in the cost of living. The allowance shall therefore fall within the term dearness allowance, irrespective of the nomenclature, it being paid to all employees on account of rise in the cost of living. The special allowance had all the indices of a dearness allowance. A bare perusal of the breakup of the different ingredients of the salary noticed in the earlier order of the Division Bench dated 13.01.2005 makes it apparent that it formed part of the component of pay falling within dearness allowance. The special allowance was also subject to increment on a time scale. The Act was a social beneficial welfare legislation meant for protection of the weaker sections of the society, i.e. the workmen, and was therefore, required to be interpreted in a manner to sub-serve and advance the purpose of the legislation. Under Section 6 of the Act, the appellant was liable to pay contribution to the provident fund on basic wages, dearness allowance, and retaining allowance (if any). To exclude any incentive wage from basic wage, it should have a direct nexus and linkage with the amount of extra output. Relying on ***Bridge and Roof Co. (India) Ltd. vs. Union of India***, (1963) 3SCR 978, it was submitted that whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under Section 6 of the Act. It is only such allowances not payable by all concerns or may not be earned by all employees of the concern that would stand excluded from deduction. It is only when a worker produces beyond the base standard, what he earns would not be a basic wage but a production bonus or incentive wage which would then fall outside the purview of basic wage under Section 2(b) of the Act. Since the special allowance was earned by all teaching and non-teaching staff of the respondent school, it has to be included for the purpose of deduction under Section 6 of the Act. The special allowance in the present case was a part of the salary breakup payable to all employees and did not have any nexus with extra output produced by the employee out of his allowance, and thus it fell within the definition of "basic wage".

5. The common submission on behalf of the appellants in the remaining appeals was that basic wages defined under Section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in Section 6 and exclusion in Section 2(b)(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6. But whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages. Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in Section 6. But, house rent allowance is not paid in many concerns and sometimes in the same concern, it is paid to some employees but not to others, and would therefore stand excluded from basic wage. Likewise overtime allowance though in force in all concerns, is not earned by all employees and would again stand excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The statute itself excludes certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution.

6. Attendance incentive was not paid in terms of the contract of employment and was not legally enforceable by an employee. It would therefore not fall within basic wage as it was not paid to all employees of the concern. Likewise, transport/conveyance allowance was similar to house rent allowance, as it was reimbursement to an employee. Such payments are ordinarily not made universally, ordinarily and necessarily to all employees and therefore will not fall within the definition of basic wage. To hold that canteen allowance was paid only to some employees, being optional was not to be included in basic wage while conveyance allowance was paid to all employees without any proof in respect thereof was unsustainable.

7. Basic wage, would not *ipso-facto* take within its ambit the salary breakup structure to hold it liable for provident fund deductions when it was paid as special incentive or production bonus given to more meritorious workmen who put in extra output which has a direct nexus and linkage with the output by the eligible workmen. When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage.

8. We have considered the submissions on behalf of the parties. To consider the common question of law, it will be necessary to set out the relevant provisions of the Act for purposes of the present controversy.

"Section 2 (b): "Basic Wages" means all emoluments which are earned by an employee while on duty or (on leave or on holidays with

wages in either case) in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

a) The cash value of any food concession;

b) Any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment.

c) Any presents made by the employer;

Section 6: Contributions and matters which may be provided for in Schemes. – The contribution which shall be paid by the employer to the Fund shall be ten percent. Of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten percent", at both the places where they occur, the words "12 percent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

Explanation I – For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation II. – For the purposes of this section, "retaining allowance" means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

9. Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein.

But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection. The aforesaid provisions fell fo detailed consideration by this Court in ***Bridge & Roof*** (supra) when it was observed as follows:

> *"7. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.*

7. *Then we come to clause (ii). It excludes dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is*

clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 6; but house-rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in

clause (ii) are the other exceptions beside dearness allowance, which has been included through S. 6."

10. Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in ***Muir Mills Co. Ltd., Kanpur Vs. Its Workmen,*** AIR 1960 SC 985 observing:

> *"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"..."*

11. In ***Manipal Academy of Higher Education vs. Provident Fund Commissioner***, (2008) 5 SCC 428, relying upon Bridge Roof's case it was observed:

> *"10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:*
> *(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.*
> *(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.*
> *(c) Conversely, any payment by way of a special incentive or work is not basic wages."*

12. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in ***Kichha Sugar Company Limited through General Manager vs. TaraiChini Mill Majdoor Union, Uttarakhand***, (2014) 4 SCC 37, it was observed as follows:

> *"9. According to http://www.merriam- webster.com (Merriam Webster Dictionary) the word 'basic wage' means as follows:*
> *1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay*
> *2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.*

> *1. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."*

13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was consideredin***The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90***.

14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to showwhat were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

15. Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 3965-66 of 2013, Civil Appeal Nos. 3967-68 of 2013, Civil Appeal Nos. 3969-70 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

JAI BALAJI INDUSTRIES LTD.
VERSUS
STATE BANK OF INDIA
CIVIL APPEAL NO. 1929 OF 2019, SUPREME COURT OF INDIA, 08.03.2019

Stipulation of service of notice on other side, pursuant to issuance of notice by National Company Law Appellate Tribunal in an appeal, has to be complied with, regardless of supply of advance copy of appeal paper book prior to issuance of notice by NCLAT

• Instant appeal was directed against order passed by NCLAT whereby order of NCLT was set aside and NCLT was directed to admit application filed by respondent bank against company, under section 7 of Insolvency and Bankruptcy Code. On appeal by company before Apex court it was observed that since no notice was served upon company before NCLAT as stipulated under rules, and its right to be heard, audi alteram partem, had been violated, matter was to be remnded back to NCLAT for fresh consideration.

N.V. Ramana, J.

1. This appeal is directed against order dated 08.02.2019, passed by the National Company Law Appellate Tribunal, New Delhi ["the NCLAT"], in Company Appeal (AT) (Insolvency) No.788 of 2018, whereby the order of the National Company Law Tribunal, Calcutta ["the NCLT"] dated 10.10.2018 was set aside and the NCLT was directed to admit the application filed by respondent no. 1 against the appellant under Section 7, IBC.
2. Aggrieved by the said order, the appellant has preferred the instant appeal.
3. Mr. Kapil Sibal, learned senior counsel appearing on behalf of the appellant, assiduously urged that the appellant's right to be heard, *audi alteram partem,* one of the principles of natural justice, has been violated in as much as the appellant has neither been served with notice of appeal before the NCLAT nor been given a hearing before it. The learned senior counsel further submitted that the impugned order passed by the NCLAT is contrary to law as it failed to comply with the procedure laid down under the NCLAT Rules, 2016 ["NCLAT Rules"], specifically Rule 48, which clearly provides that pursuant to issuance of notice by the NCLAT, the copy of the appeal and documents filed therewith, if any, shall be served along with the notice on the other side. He further submitted that though notice was directed to be issued by the NCLAT, the same was never received by the appellant herein and the NCLAT passed order without hearing the appellant, erroneously noting that it has heard all the parties.
4. On the other hand, Mr. Mukul Rohatgi, learned senior counsel appearing on behalf of respondent No.1, vehemently contested the above-mentioned submissions of appellant. He submitted that the advance copy of the appeal paperbook filed by respondent no.1 in NCLAT was duly delivered by post at the registered office of the

appellant, wherein it showed intent to challenge the order of the NCLT. Despite this, the counsel for the appellant did not appear before the NCLAT. He referred to the proceedings before the Calcutta High Court to show that the appellant has been employing delay tactics to stall the insolvency proceedings, which assertion was denied by the learned senior counsel for the appellant.

5. Having heard the learned senior counsel for the parties, we have also perused the materials placed before us. We find that in the instant case, the NCLAT, vide order dated 02.01.2019, issued notice both on the question of limitation as well as on the merit of the appeal. Subsequently, judgment was reserved *vide* order dated 08.01.2019. On 08.02.2019, the judgment was pronounced noting:

   "*17. For the reasons aforesaid, we set aside the impugned order dated 10th October, 2018 and remit the matter to the Adjudicating Authority, Kolkata Bench, Kolkata with direction to admit the application under Section 7.* ***Before such admission, intimation to be given to the 'Corporate Debtor', but no further hearing is required to be given to any person, this Appellate Tribunal having heard all the parties and having held that it is a fit case for admission***."

6. It is to be noted that in the rejoinder affidavit before us the appellant has submitted that, pursuant to issuance of notice *vide* order dated 02.01.2019, neither did respondent no. 1 file process fee for issuance of summons in terms of the said order, nor was the same served upon the appellant. Thus the judgment which was reserved on 08.01.2019 by the NCLAT, and consequently pronounced, was done without hearing the appellant and the observation of the NCLAT that all the parties were heard is erroneous. In fact, even the impugned order does not note the appearance of the counsels on behalf of appellant herein.

7. While the respondent no. 1 has submitted that an advanced copy of the appeal was served on the appellant, the same cannot be treated as service of notice as stipulated under Rule 48 of the NCLAT Rules which, *inter alia*, provides:

   "*48. Issue of notice-*

   (1) *Where notice of an appeal or petition or interlocutory application is issued by the Appellate Tribunal, copies of the same, the affidavit in support thereof and if so ordered by the Appellate Tribunal the copy of other documents filed therewith, if any, shall be served along with the notice on the other side*."

8. Rule 48 of the NCLAT Rules clearly stipulates service of notice on the other side, pursuant to issuance of notice by the NCLAT in the appeal, regardless of supply of advance copy of appeal paperbook prior to the issuance of notice by NCLAT.

9. Further, Rule 52 of the NCLAT Rules categorically states that the judicial section of the registry of the NCLAT shall record, in the "*Notes of the Registry*" column in the order sheet, the details regarding completion of service of notice on the respondents. It notes:

   "*52. Entries regarding service of notice or process.-The Judicial Section of the Registry shall record in the column in the order sheet 'Notes of the Registry', the details regarding completion of service of notice on the respondents, such as date of issue of notice, date of service, date of return of notice, if unserved, steps taken for issuing fresh notice and date of completion of services etc*."

10. However, it is pertinent to note that the material placed before us do not indicate that the aforementioned stipulation has been complied with. As per the rejoinder affidavit

filed on behalf of the appellant, the counsel for the appellant had undertaken a search of the register of process fee and summons, and the concerned file in the office of the NCLAT on 28.02.2019. However, no record of respondent no. 1 having paid the process fee for issuance and service of notice to the appellant was found.

11. Thus, in view of the above position, it is abundantly clear that no notice was served upon the appellant before the NCLAT as stipulated under the rules, and the right of the appellant to be heard, *audi alteram partem*, has been violated [*See: Ghaziabad Development Authority* v. *Machhla Devi*, 2018 SCC OnLine SC 2178].
12. In the facts and circumstances of the case, we are of the considered opinion that the instant appeal can be disposed of by setting aside the order of NCLAT and remanding the matter back to the NCLAT for fresh consideration. Accordingly, we set aside the impugned order dated 08.02.2019 passed by the NCLAT and remand the matter back to NCLAT with a direction to dispose of the matter as expeditiously as possible after affording an opportunity of hearing to the parties.
13. The appellant and the respondents are also directed to approach the NCLAT on March 13, 2019 with a prayer for early listing of the matter. It is clarified that there is no necessity for the NCLAT to issue any fresh notice to the appellant herein.
14. Before parting with the matter, we make it clear that we have not expressed any opinion on the merits of the case. Needless to say, the NCLAT will adjudicate the matter on its own merits uninfluenced by any of the observations made hereinabove.
15. The appeal stands disposed of in the above terms. Pending applications, if any, shall also stand disposed of. No costs.

SHEEN GOLDEN JEWELS (INDIA) Pvt. Ltd. & Ors.
VERSUS
THE STATE TAX OFFICER (IB)-I & Ors.
WP(C) NO. 40646 of 2018, HIGH COURT OF KERALA, 11.01.2019

CGST: State has legislative competent to enact section 174 of the Kerala Goods and Services Tax Act, 2017, which is a saving provision brought about by State Legislature to save transactions under State's various pre-GST enactments, including the Kerala Value Added Tax Act.

Introduction:

1. The lure of lucre and the power of purse are too seductive to be resisted—be it for an individual, or an institution, or even a nation. Internationally, the rhetoric of freedom, fraternity, comity, and human rights apart, the nations are guided by naked economic compulsions. The latter part of the last century dedicated itself to dismantling walls around the nations; this century has begun, it seems, determined to raise a few. At the national level, this clamour for economic hegemony is felt acutely, at least, institutionally.

2. Granted, federalism is the pinnacle of a democracy's political maturity; sharing the power signifies its wisdom. But there, too, fiscal discipline demands a watertight division. Our Constitution has, as a case in point, kept the fiscal legislative powers in

water-tight divisions —either in List I or in List II. None in List III. In a federal polity, good legislative fences make good political neighbours. A vigilant policeman always guards a thief's virtue, anywhere; as the constitution prevents federal fiscal turf wars.

3. To be explicit, constitutionally, fiscal powers between the Centre and the States stand demarcated. The legislative scheme admits of almost no overlap between the respective domains. The Centre has the powers to levy a tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics, and so on); the States, on the other hand, have the powers to levy a tax on the sale of goods. With inter-state sales, the Centre has the powers to levy a tax (the Central Sales Tax). But the tax is collected and retained entirely by the originating States. As for services, it is the Centre alone that is empowered to levy Service Tax.

4. Since the States had the legislative competence to impose a sales tax, under Entry 54, List II, indiscriminate tax rates were applied by the respective States resulting in tax wars, tax holidays, deferrals, incentives, and concessions. Each State started to offer attractive schemes to invite investments into its States. When the Central levies such as the Customs Duty and the Excise Duties remained the same throughout the Country, Sales Tax rates varied among States.

5. To avoid a lopsided or imbalanced growth, the Union Government took steps, beginning with constituting Empowered Committees, to usher in further tax reforms. Besides that, then the Sales Tax, in its original form, was invariably a single tax levy, imposed at the first stage of the sale. The subsequent resale and its value addition were not captured to tax. This and other shortcomings made the Sales Tax give way to the Value Added Tax; the sale at every stage till the point of consumption got taxed, and the taxes paid in the previous stages were subsumed as Input Tax Credit. ----------

8. Section 174 of the Kerala Goods and Services Act, 2017, is a saving provision brought about by the State Legislature to save the transactions under the State's various pre-GST enactments, including the KVAT Act. About that provision, the petitioners, first, maintain that Section 19 of the CA Act has repealed all the State laws inconsistent with the GST Laws. And they also, second, insist that the States have been denuded of the legislative power to enact Section 174 because of the amendment to Entry 54 of List II.

9. So the question, the Core Question as the petitioners put it, is does the State have the legislative competence to enact section 174 and save the past taxation events—comprising levy, assessment, and recovery—when Entry 54, List II, which is the field of legislation empowering the State, stood omitted permanently with effect from 16.09.2017? Of course, this core question engenders a few collateral questions. We will answer them all.

Facts:

17. The petitioner challenges these orders as *ultra vires* of the authorities—constitutionally invalid.

18. The petitioner, a registered dealer under the KVAT Act, is a Government Electrical Contractor. He filed all returns and remitted tax under the KVAT Act for the AYs 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17. The Assessing Officer accepted all the returns filed and the tax paid, with no demur. So the assessments for the years are deemed to have been completed under Section 21 of the KVAT Act.

19. But recently, on 23.11.2018, the Assessing Officer served on the petitioner the pre-assessment notices under Section 25(1) of the KVAT Act 2003, proposing to assess an alleged escapement of turnover for all the above years. So the petitioner challenges those notices on the premise that the Assessing Officer has no jurisdiction to invoke the KVAT Act, for it stood repealed with the 101st Constitutional Amendment ("the CA Act"). ------

22. The main reason for the Assessing Officer to resort to the best judgment assessment is that after his verifying the petitioner's sales and purchases through the KVATIS module, he found certain unaccounted transactions. The additional reason is that theIntelligence Wing of the Department has imposed a penalty upon the Petitioner under Section 47 (6) of the KVAT Act for the offence of attempted evasion of tax while his transporting goods. So the petitioner has assailed the Assessment Orders as unconstitutional and without jurisdiction.

Submissions: --------- Petitioners': The Summary of the Petitioners' Submissions:

About the 101st Constitution Amendment Act:

- On and from 16.09.2016, Article 246 yielded legislative ground to the newly engrafted Article 246A. Thus, Article 246 stood amended and modified in its operation. Consequently, a few items in both List I and List II suffered significant schematic changes. Article 246A, an enabling legislative provision, contains no concomitant schedule or iteration.
- Entry 54 of List II stands substituted by 16.09.2016; the Constitutional Amendment does not save it. So the pre-amended Entry 54 of List II has ceased to exist. Instead, what reigns is the substituted Entry 54.
- Section 19 of the Amendment Act is the transitional provision, besides being the saving provision. Nothing from the pre-existing legislative regime saves itself from or transits across what is set out in Section 19—a sunset clause.
- First, Entry 54 abrogated, from 16.09.2016 the States have been denuded of the power of taxation. Second, the interim or transitional existence of the unamended Entry 54, if ever, could have survived only up to 16.09.2017, as per Section 19.
- Any judicial effort to save or resurrect the erstwhile Entry 54 beyond 16.09.2017 renders Section 19 of the Amendment Act otiose, meaningless, and insignificant.
- Section 19 of the Amendment Act itself provides for the repeal, for the savings, and for the consequences, too. So there remains no more power or authority for the State to have a further repeal and saving, as provided—erroneously though—in Section 174 of the SGST Act. Pithily put, Section 174 of the SGST Act cannot travel beyond Section 19 of the Amendment Act.
- A law under Article 246A cannot be the source of power to save legislation under List II of Entry 54 at all.

Article 367 & General Clauses Act:

- Article 367, too, does not apply, as the constitutional command of repeal is explicit
- Neither KSGST nor CGST provides for repeal or re-enactment.
- So, primarily, the General Clauses Act cannot resurrect or rescue the repealed enactments, even if its Sections 6 and Section 24 are invoked.
- The State stands protected for the Centre undertakes to reimburse its losses.
- The clear and unequivocal legislative intent of Section 19 of the Amendment Act is to stop the operation of KVAT, 2003, from 16.09.2017.

- A Statutory saving-provision, such as Section 174 of KSGST, emanating from the State's legislative power, cannot nullify the constitutional mandate of Section 19 of the Amendment Act, emanating from the Parliament's constituent power

Section 174 – Absence of Legislative Power:

- Article 367 does not apply because repealing enactment itself provides explicitly for transition and saving. In other words, only in the absence of the repeal or saving is the General Clauses Act attracted.
- Section 24 of the General Clauses Act saves the subordinate legislation and applies if there are repeals and re-enactments. Here neither is present. So machinery provisions are not saved. Then follows the well-accepted proposition: there is no tax without machinery provisions.

Respondents':

- By the CA Act, the Parliament never intended that dealers or assessees should escape the tax network, letting the society or exchequer suffer.
- The Parliament has enacted the Goods and Services Tax (Compensation to States) Act, 2017, empowered by Section 18 of the Amendment Act, on the recommendation of the GST Council, though. This enactment is, however, does not derive its legitimacy from any legislative entry or field of legislation enumerated in the Central List.
- Similarly, Section 19 of the Amendment Act empowers the State Legislature to amend or repeal provisions of any existing law which are inconstant with the Constitution as amended by the amending Act.
- The *non-obstante* Clause in Section 19 mandates that such legislation can be made notwithstanding anything contained in the Amendment Act. So the Entry 54, as it originally stood before the Amendment Act, remains available for the State, under Article 246 of the Constitution
- In the alternative, without Entry 54 as it originally stood, the newly introduced Article 246-A as per Section 2 of the Amending Act read with Section 19 of the amending Act, by itself gives power to the state legislature to enact the impugned provisions in the State GST Act.
- A transitional provision in a Constitution Amendment Act has a higher status and better legal impact than a transitional provision in ordinary legislation. So Section 19 of the CA Act, read with Article 246-A, without any doubt, empowers the State Legislature to enact Section 174(b) and (c) of the KSGST Act, 2017.
- The Legislature does not derive its power to legislate from the Entries in the three lists of the 7th Schedule; therefore, the substitution of an entry in any List of the 7th Schedule does not affect the State's lawmaking power.
- The Amendment Act is only prospective, and the constitutional amendment does not in any way deal with the past transactions or any rights and liabilities accrued.
- The provisions contained in Sections 173 and 174 of the State Act are not inconsistent with the provisions contained in the Amendment Act.

On the General Clauses Act and Its Application:

- Every latter enactment which supersedes an earlier one or puts an end to a previous state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment.

- This interpretative presumption could be negated only if there were sufficient indications express or implied in the later enactment designed to obliterate the earlier state of the law.
- If the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded, there could be no incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used.
- Where an intention to effect repeal is attributed to a legislature, then the same would attract the incidence of the saving found in Section 6 of the General Clauses Act.
- The power to make a law regarding a tax comprehends, within its power, how to levy that tax and determine the persons who are liable to pay such tax, the rate at which such tax is to be paid, and the event which will attract the liability regarding such tax.
- The liability to pay the tax was not dependent upon assessment or demand but was an obligation to pay the tax either annually, quarterly, or monthly as the case may be.

DISCUSSION: GST – Introduction:

29. To put the concept in perspective, GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the later stage of value addition. This process makes GST a tax on value addition at each stage. The consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

30. In other words, the focus was shifted from taxable event to destination-based taxation. It avoids the evil of cascading taxation or tax on tax trouble. So goes the motto: One Nation-One Market-One Tax.

31. A nascent enactment in a nebulous field of taxation will have many teething troubles. GST is no exception. In its path to perfection, GST has much dust to settle—legislatively and judicially. These are the days of confusion and cacophony: many views, many interpretations, and many jurisprudential mumblings.

43. As we shall see, the CA Act inserts, repeals, and amends certain parts of the Constitution. Repealed is the Article 268A, inserted are the Articles 246A, 269A, and 279A; amended are Articles 248, 249, 250, 268, 269, 270, 271, 286, 366, and 279A. Besides that, the Sixth and the Seventh Schedules, too, have been amended.

44. Article 246A, inserted through Section 2 of the Amendment Act, is a marvel of the federal fiscal mechanism. By this Article, the State Legislatures now have the power to make laws regarding GST tax imposed by the Union or by that State and to implement them in intra-state trade. The Centre, of course, continues to have exclusive power to make GST laws regarding inter-state trade. Both the Union and States in India now have simultaneous powers to make law on the goods and services.

Kerala Enactment:

55. Kerala State Goods and Services Tax Act, 2017 (Act 20 of 2017) received the Governor's assent on the 16th day of September 2017. It provides for, as the preamble suggests, levy and collection of tax on intra-State supply of goods or services, or both by the State of Kerala. As it is in *pari materi*a with the Central Goods and Services Tax Act, it needs no much elaboration, but for one provision: Section 174, the customary 'repeal and saving' provision.

174. **Repeal and saving**.—

1) ----------

2) The repeal of the said Acts and the amendment of the Acts specified in section 173 ("such amendment" or "amended Act", as the case may be) to the extent mentioned in sub-section (1) or section 173 *shall not,—*

a) revive anything not in force or existing at the time of such amendment or repeal; or

b) affect the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder; or

c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Acts or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

d) affect any tax, surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Acts or repealed Acts; or

e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed.

(3) *The mention of the particular matters referred to in section 173 and sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 4 of the Interpretation and General Clauses Act, 1125 (Act VII of 1125) with regard to the effect of repeal.*

(4) The Kerala Goods and Services Tax Ordinance, 2017 (11 of 2017) is hereby repealed.

(5) Notwithstanding the repeal of the Kerala Goods and Services Tax Ordinance, 2017 (11 of 2017) anything done or any action taken under the said Ordinance, shall be deemed to have been done or taken under this Act.

(f) affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed day under the said amended Acts or repealed Acts and such proceedings shall be continued under the said amended Acts or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

Constitutional Invalidity:

56. This Court is called upon to examine the constitutional validity of Section 174 of the KSGST Act. Its invalidity is set up in the face of Section 19 of the CA Act. The petitioners argue, among other things, the State has no legislative power to override Section 19 of the CA Act.

57. A statute may be unconstitutional if it is enacted in the absence of legislative competence, in violation of Fundamental Rights guaranteed to the citizens of India,

or in contravention of other constitutional constraints. For the Constitution is the fundamental or basic law to which all the laws must conform. It is superior even to the will of the legislature. Dr. C. D. Jha in his illuminating *Judicial Review of Legislative Acts*enumerates five forms of unconstitutionality:

i. Legislative incompetence arising out of the distribution of powers;
ii. a delegation of essential legislative functions by the Legislature to the Executive;
iii. violation of fundamental rights guaranted in Part III of the Constitution
iv. violation of other constitutional restrictions, prohibitions, and the limitations affecting legislative competence and jurisdiction, and
v. Infringement of the principles of natural justice.

While determining the constitutionality of a provision or an Act, the Court looks at these aspects:

(a) Has the Legislature been constitutionally empowered to pass the legislative Act?

(b) Has the legislative act got the territorial nexus?

(c) Are there any other connotational constraints or limitations which put fetters on the power of the Legislature?

58. In *State of Bihar v. Bihar Distillery Ltd,*the Supreme Court has laid down certain principles on how to judge the constitutionality of an enactment: the Court should (a) try to sustain the validity of the impugned law to the extent possible; (b) should not approach the enactment with a view to picking holes or to ferreting out defects of drafting or for the language employed; (c) should consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with; (d) can strike down the Act only when the unconstitutionality is plainly andclearly established; (e) and may recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.

59. Here, it is a plain case of legislative competence. Let us see how Section 174 of the KSGST Act fares *vis-a-vis* the Amendment Act in general and Section 19 of it in particular. As it is a matter of *vires* and legislative competence, we must trace the source of power.

How to judge the constitutionality of an enactment?

60. When faced with a challenge to interpret laws, Courts have to discharge a duty. The Judge cannot act, holds the Supreme Court in *Bhanumati v. State of UP*, like a phonographic recorder, but he must act as an interpreter of the social context articulated in the legal text. The Judge must be, in the words of Justice Krishna Iyer, "animated by a goal-oriented approach" because the judiciary is not a "mere umpire, as some assume, but an active catalyst in the Constitutional scheme". Then, referring to *Bihar Distillery Ltd.,* the Court invokes Lord Denning's observations in *Seaford Court EstatesLtd Vs. Asher:* the job of a Judge in construing a statute must proceed on the constructive task of finding the intention of Parliament and this must be done (a) not only from the language of the Statute but also (b) upon consideration of the social conditions which gave rise to it, (c) and also of the mischief to remedy which the statute was passed; and if necessary, (d) the Judge must supplement the written word to give 'force and life' to the intention of the legislature.

Constitution was prospective in its operation:

62. *State of Orissa v. M.A. Tulloch and Co.*, after quoting *Keshavan Madhava Menon,* elaborates on the doctrine ofrepugnancy: the test of two enactments containing contradictory provisions is not, however, the only criterion of repugnancy. If a competent legislature with a superior efficacy expressly or impliedly evinces its legislative intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overturned on the ground of repugnance.

63. Every statute is, according to *Kesavan v. State of Bombay, prima facie* prospective unless it is expressly or by necessaryimplications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for interpreting our Constitution, and a constitutional amendment, too.

Presumption in favour of constitutionality:

64. To reiterate the well-known judicial assertion, I may refer to the Supreme Court's observations in *Karnataka Bank Ltd v. State ofA.P.* The rules that guide the Constitutional Courts in dischargingtheir solemn duty to declare laws passed by a legislature unconstitutional are well-known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity. Where the validity of a statute is questioned, and there are two interpretations one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld".

65. Even otherwise, the question of repugnancy would arise only when both the laws are enacted on the same entry, as is held in *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector.*

84. I must acknowledge that the petitioners' counsel have laid much emphasis on the sunset clause and nuanced their arguments to drive home their contention that Section 19 is a sunset clause and, so, the General Clauses Act does not apply. So the concept of sunset clause, I reckon, needs more elaboration

Sunset Clauses:

85. Sunset clauses are statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature. The use of a sunset clause, observes A.E. Kouroutakis in *The Constitutional Value of Sunset Clauses: An historical and normative analysis*, wasexpected to create an incentive for the periodic and comprehensive executive and legislative evaluation of agencies. Sunset clauses— as temporary laws—have the potential, from the perspective of separation of powers, to enhance the role of the legislature and support its monitoring task over the administration.

86. Sunset clauses have, A.E. Kouroutakis further observes, two major legal effects. First, unless re-authorised by the legislature, it brings about the expiration of a law on a prescribed date. Expiration, as brought about by a sunset clause, differs from repeal. Second, if a clause prescribes that a statute should expire from a certain date, then it is reasonable to assume that it is not valid unless re-enacted. But in practice, there are exceptions in each instance. To begin with, the expiration, or 'sunset', of an act has the same consequences as if itwere repealed.Yet, as Broom remarks, there is a difference between statutes which expire and statutes which are repealed. Although 'the latter become as if they had never existed (except so far as they relate to transactions already completed under them), yet with respect to the former, the

extent of the restrictions imposed, and the duration of the provisions, are matters of construction'.

87. Indeed, there are many sunset clauses, such as the 'entire' sunset clause compared to the 'sectional'; the 'conditional' compared to the 'unconditional'; the 'direct' compared to the 'indirect'. Confining our discussion to the issue on hand, we may note that a sunset clause is direct when it prescribes the termination of the whole or part of the act which is embodied, indirect where it refers to a different act. Here, I reckon, if we accept the petitioners' contention, then Section 19 of the CA Act amounts to an indirect sunset clause —at best.

88. In this context, A.E. Kouroutakis observes that while a plethora of direct sunset clauses is recorded in the statute books, indirect sunset clauses are mainly recorded in constitutional documents. Therefore, the common utility of indirect sunset clauses is recorded in constitutional orders with codified constitutions and a hierarchy of norms. Sunset clauses do not obliterate legislation as if it never existed. That said, the legal effect of automatic expiration due to a sunset clause, emphasises the learned author, is not identical to the repeal of an act. Furthermore, "although the reasonable expectation is that an act will sunset after a certain period, in practice the construction of a clause, and therefore the expiration of an act, depends on various factors which influence its interpretation. These marginal differences make such clause a distinctive tool in the legislative drafting process."

89. Under the heading "Rule of Law and Sunset Clauses", A.E. Kouroutakis observes, there are two distinct categories of temporary laws in times of normality. First, laws adopted in times of crisis; their force is extended in times beyond the exigency. And second are laws enacted in times of normality. Considering Justice Holmes's dicta, Vermeule characterised the invalidation of legislation with sunset clauses before the expiry date as 'ex post sunsetting', in contrast to the 'ex ante sunsetting' of legislation, which occurs when legislation sunsets due to the lapse of time.

Interim Constitutions: In the constitutional context, affirmative action policies aim to regulate and correct a given deficiency; as soon as the deficiency is eliminated, such policies have no reason to stay in force. Thus a sunset clause is desirable to make them expire. Jackson, as quoted in *The Constitutional Value ofSunset Clauses*, discussing constitution making, explores theidea of 'transitional constitution making' by adding a sunset clause and points out that they may shed new light on the advantages and disadvantages of constitutional 'sunset' clauses– that is, "requirement of reconsideration in plenary form after a set period of years, far enough into the future to allow time for developing some authoritative institutions of politics and governance".

91. There are several constitutional documents that are recorded as temporary. These constitutions are often categorised as transitional and are commonly created because of a major national crisis: for example, (after the War of American Independence), the Constitution of South Carolina and the Constitution of New Hampshire. In the more modern era, the preamble of the Constitution of the Republic of South Africa in 1993, described it as the 'Interim Constitution'. It has a two-year sunset clause.

Sunset Clauses and Constitutional Design:

92. A.E. Kouroutakis, in the chapter named as above, quotes a very interesting stance Jefferson has taken. The third American President, regarded as the US progenitor of

sunset laws, in the pre-constitutional days, was concerned with the perpetuity of the constitution. He suggested to Madison about sunsetting on any statute after nineteen years. According to him, "no society can make a perpetual constitution or even a perpetual law. The earth belongs always to the living generation. […] Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."

Pragmatic Injustice and Sunset Clauses:

93. Finally, we may consider the sunset clauses in the context of pragmatic injustice. Pragmatic injustice, according to Roscoe Pound, exists when the reality is far from the ideal, which is prescribed in the law books. Currently, although equality is the default rule and it is emphatically recognised in constitutional and international documents, the law in action is far from the ideal. So the nations take recourse to affirmative action policies to regulate and correct a given deficiency. Once the deficiency is eliminated, the policies, introduced out of turn, have no reason to stay in force. Thus, a sunset clause is desirable to make them expire.

94. Indeed, sunset clauses have been frequently used in India in fiscal and tax laws. Tax holidays and exchange control regulations are the best examples. The Constitution itself provides for a 10-year sunset for reservations to Parliament and legislative assembly seats (Article 334).

95. Section 6 of the General Clauses Act will not apply to temporary statutes. For this proposition, the petitioners have relied on *District Mining Officer v. Tata Iron and Steel Co.,* and *State of Punjab v. Mohar Singh.* Section 6 of the General Clause Act, according to them, applies only to repeal and not to omissions. It is a well-settled principle, according to them, that invocation of Section 6 of the General Clause Act is available only with repeal and not with omissions.

Transitional Provisions:

96. When one legislative system ends and another begins, it is commonly necessary to enact special rules for actual cases that straddle the transaction. Sometimes the old law is continued for transitional cases, and sometimes the new law is applied; in either event, modifications may be necessary. In other words, as Craies observes in his treatise *On Legislation,* legislation does not necessarily have effect as law immediately after being passed or made. It may take effect under these circumstances: (1) immediately upon being passed or made; (2) at a point in the future that is specified upon the legislation being passed or made, or that can be determined under criteria specified upon the legislation being passed or made; (3) only if some future event occurs (which may be a real-world event or an event such as making an order-designed to commence the legislation); (4) with retrospective effect from a past time; or (5) "not at a particular point in time, but in relation to things done or events occurring during a period specified upon the legislation being passed or made, with it being possible to specify either a single period for all purposes or different period for different purposes."

97. Transitional provisions, the learned author continues to observe, may be relatively unimportant, in that by definition they affect relatively few cases, but they are extremely complicated; and they can be important to the cases affected. Thornton in his *Legislative Drafting* acknowledges the difficulty in describing what constitutes a transitional provision. According to him, the function of a savings provision in the

legislation is to preserve or 'save' a law, a right, a privilege, or an obligation otherwise repealed or ceased to have an effect.

98. The function of a transitional provision, Thorntonadds, is to make special provisions for applying legislation to the circumstances which exist when that legislation comes into force. Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a water-tight distinction between them. But the distinguishing criterion is the focus of the intent of the drafter: if time is the focus, then the drafter must title and express the provision as transitional; if the focus is on exception, then the drafter must title and express the provision as a saving. At the end of the day, the drafter's pen will identify the nature of the provisions, and there is a great benefit in doing so clearly and accurately. Lumping transitional and savings provisions in a single section is never a good idea.

99. The learned author finally notes that the necessity for savings and transitional provisions is a consequence of a change in the law, whether the change is caused by new statute law or by the repeal, repeal and substitution, or modification, of existing statute law. Consideration of whether special savings or transitional provisions are necessary is an important part of every drafting exercise.

Saving Clause:

100. A saving clause is used to preserve what already exists; it cannot create new rights or obligations. Such a provision has no application to transactions complete at the time the savings provision comes into force. A savings provision is frequently included in legislation to establish beyond doubt that the provisions of that legislation are to be construed as additional to and not in derogation of existing law. The possibility of repeal by implication is thus excluded. And the operation of the common law is saved.

101. Thornton gives this as an example of transitional provision:

In so far as an instrument made or having effect as if made, or any other thing done or having effect as if done, under any enactment repealed by this section, could have been made or done under a corresponding provision of this Act, it shall, if effective immediately before the coming into force of this Act, have effect subsequently as if it had been made or done under that corresponding provisions.

Saving Clause & Legal Proceedings under an Expired Statute:

102. A question often arises, as it does here, about the legal proceedings about matters connected with a temporary Act: whether they can be continued or initiated after the Act has expired. The answer to such a question, *G. P. Singh* observes, again depends upon constructing the Act as a whole. The Legislature very often enacts in the temporary Act a saving provision similar in effect to section 6 of the general Clause Act, 1897.

103. The question before the Supreme Court in *Tata Ironand Steel Co.* was whether because of the Validation Act theState could retain only the cess and taxes already collected before the date of validation or whether they also could collect the cess and taxes due till that date of validation. *Tata Iron andSteel* has held that the Validation Act did not enable the Stateto collect the cess and taxes not collected till the date of validation. One of the reasons it assigned was that the Validation Act contained no saving clause and section 6 of the General Clauses Act, too, would not affect a

temporary statute. So there could be no recovery and collection of cess and taxes which may have become due but had not been collected till the date of validation.

104. That said, *Tata Iron and Steel* has gone on to observe that a temporary statute on its expiry is not dead for all purposes, even in the absence of a saving provision like section 6 of the General Clauses Act. The question is, as stressed earlier, essentially one of construction of the Act. The nature of the right and obligation resulting from the provisions of the temporary Act and their character may have to be regarded as determinative of whether the said right or obligation is enduring or not.

105. We have, first, considered what a temporary statute is, amply aided by *Craies's* and *G. P. Singh's* commentaries. The next question is, which is the temporary statute here? The Constitutional Amendment Act has affected a few central enactments, as well as a few state enactments. Then, can we call them all —that is, the repealed ones or those getting repealed— temporary statutes? For "any provision of any law relating to tax on goods or services or on both" inconsistent with the Amendment Act cannot last beyond one year? Of course, before that one year, those inconsistent laws can be amended to render them compatible or altogether repealed. I am afraid the answer is a "No".

106. We will also examine a converse situation. Sometimes, a repealing statute, the latter one, can be a temporary one. Again, Section 6(a) of the General Clauses Act does not apply on the expiry of the "temporary" repealing statute; so held the Supreme Court in *Om Prakash v. State ofU.P.* Then, can we call the Constitutional Amendment Act atemporary one? I am afraid this question, too, gets the same answer: No. Section 19 of the Amendment Act, at best, is a transitional provision.

107. Here the petitioners have argued that the enactments —Central or State— inconsistent with the Amendment Act have rendered themselves temporary statutes and perished on the temporal altar of one year. If this logic is accepted, every succeeding act renders the previous act a temporary one, obliterates its impact beyond a specified date, and avoids Section 6 of the General Clauses Act from applying itself. One enactment will not, rather cannot, make another enactment a temporary one; the same enactment can, for various reasons, render itself a temporary one. So a later enactment, inconsistent with the previous one, repeals that previous one either expressly or impliedly. Now, it is time we examined what repeal is and how it affects these cases before us.

Repeal of Statutes:

108. We must acknowledge that a total repeal obliterates statutes, "except as to transactions past and closed." "When an Act of Parliament is repealed," said Lord Tenterden in *Surtees vs Ellison*, "it must be considered (except as to transactions pastand closed) as if it had never existed. That is the general rule.'' Tindal C.J. stated the exception more widely. He said, "The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never beenpassed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law".

109. To decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was completed when the Act was repealed. Thus, if an Act gives a right to do anything, the thing to be done, if

only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left in *status quo*. So, under some statute, if a right becomes vested upon the completion of some certain transaction but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is completed.

110. Repeal of statute results in nullification of the subordinate legislation the repealed statute has engendered. That is, when a statute is repealed, any by-law or statutory instrument made under that statue ceases to be operative unlessthere is a saving clause in the new statute preserving the old by-law or statutory instrument.

111. We may acknowledge there lies a difference between the repealing of an entire Act and that of, say, a single clause in an Act. A statute repealed, we must reckon as if it had never been enacted. Partial repeal, however, does not entail such drastic consequences as we would have on the total repeal. In fact, we need to look at the repealed portion of an Act to see what remains of the Act and what it means. For "an Act of Parliament, which at one time had one meaning, would by the repeal of some clause in it have some other meaning.''

112. That said, we must also acknowledge that if a right has once been acquired under some statute, that right will not be taken away by the repeal of the statute under which it was acquired.

113. Therefore, more often than not, when an Act is repealed, a clause is expressly engrafted in the repealing Act that "this repeal shall not affect any right or liability acquired, accrued, or incurred.'' But the rule of law has been well entrenched on this point; so such a clause is apparently unnecessary, and only inserted *ex abundanti cautela.*

114. Succinctly stated, repeal is not a matter of mere form but one of substance, depending upon the legislative intent. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or *pro tanto* repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to repeal. After referring to many standard commentaries on statutory interpretation, the Supreme Court in *Udai Singh Dagar v. Union of India*,[42] reemphasises that the principal object of a repealing and amending Act is to 'excise dead matter, prune off superfluities, and reject clearly inconsistent enactments'.

Application of the General Clauses Act:

115. Resounding is the judicial assertion: it is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. That is the assertion of Chief Justice Marshall in *Marbury v. Madison*. Again he famously declared in *McCulloch v. Maryland*, "We must never forget that it is a constitution we are expounding."

116. To begin with, generally, the predominant approach of the Indian Judiciary, according to M.P. Jain, was positivist; that is, to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to interpreting ordinary statutes. To some extent, the Constitution

itself incorporates the principle of statutory construction. Article 367 provides that the General Clauses Act, 1897, shall apply for interpreting the Constitution as it applies for interpreting legislative enactments. The courts have held that not only the 'general definitions' in the General Clauses Act, but also the "general rules of construction" in the Act, apply to the Constitution.

117. The General Clauses Act can be amended by Parliament. Article 367 thus means that interpretation of many words and phrases used in the Constitution can be modified by Parliamentary legislation without amending the Constitution. From its initial days of literal, restrictive interpretation, the Constitutional Courts have shifted towards liberal, purposive interpretation. The liberal approach is designed to give a creative and purposive interpretation to the Constitution "with insight into social values, and with the suppleness of adaptation to changing needs.

118. Since the General Clause Act is an Act of Parliament, it is competent for Parliament to control or modify the view taken by the highest Court, by simply amending the General Clause Act. After observing thus, D. D. Basunotes "it is for this reason that judicial review cannot have that free play in India as in the USA". In India, the Constitution has to be interpreted, the learned author observes, like a statute. Indeed, he acknowledges that since 1973 the Supreme Court has been struggling to shatter the shackles of statutory interpretation to jump into the freedom of 'purposive interpretation'. For this interpretative freedom, the Supreme Court has invoked the doctrine that the Constitution is a statute of a special kind—that is, to govern the country—and should therefore be liberally interpreted, having regard to its object.

119. The petitioners' counsel have quoted a profusion of precedents on the interpretative impact of General Clauses Act *vis-a-vis* the constitutional provisions.The Constitution (OneHundred and First Amendment) Act, 2016 could have adopted the language, they contend, similar to Section 174 KSGST Act, 2017, and Section 6 of the General Clauses Act. But it has deliberately and consciously not done so because it has not intended the KVAT Act to operate beyond 16.09.2017.

120. Section 6 of the General Clauses Act and Section 4 of the Kerala Interpretation and General Clauses Act are analogous. Here, as we consider the State enactments, Section 4 of the State Act may have to be considered. And it reads:

> 4. **Effect of repeal.** —Where any Act repeals any enactmenthitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not —
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty,

> forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

121. Indeed, we can refer to the precedents on Section 6 of the General Clauses Act to appreciate how the repeal of an enactment affects the pending cases or proceedings under that repealed enactment. In *Ambalal Sarabhai Enterprises Ltd. v.Amrit Lal & Co.* the Supreme Court has observed that as ageneral rule, in view of Section 6, the repeal of a statute, which is not retrospective in operation, does not prima facie affect the pending proceedings which may be continued as if the repealed enactment were still in force. In other words, such repeal does not affect the pending cases which would be decided as if the enactment were not repealed. In fact, when a *lis* commences, all rights and obligations of the parties get crystallised on that date. The mandate of Section 6 of the General Clauses Act is simply to leave unaffected the pending proceedings which commenced under the unrepealed provisions unless a contrary intention is expressed. Clause (c) of Section 6 refers to the words "any right, privilege, obligation … acquired or accrued"; accordingly, the repealing statute would not affect those rights, privileges, obligations. *Ambalal Sarabhai Enterprises*, however, hastens to clarify that mere existence of a right not being "acquired" or "accrued" on the date of the repeal would not get the protection of Section 6 of the General Clauses Act.

122. The principle encapsulated, the effect of repeal without a saving clause and without Section 6 of the General Clauses Act applying is that the repealed provision is obliterated as completely from the records as if it had never existed except for those actions which were commenced, prosecuted, and concluded while it still existed in law. There is, indeed, no question of any principle in common law or otherwise applying on the lines incorporated in Section 6 of the General Clauses Act. So holds the Supreme Court in *Kolhapur Cane Sugar Works Ltd. v. Union of India.*

In Perspective:

123. Most cases concern the Kerala Value Added Tax Act (KVAT); so we will examine the chronology of statutory events in the backdrop of that Act. With effect from 01.04. 2005 came KVAT Act into force. Then, on 08.09.2016 the CA Act was enacted. But it came into effect only from 16.09.2016. Section 19 of the CA Act saved a host of statutes holding field by then; those enactments include the KVAT Act. And the saving was for one year: 16.09.2017.

124. On 22.06.2017, the State of Kerala issued the Kerala State Goods and Services Tax Ordinance; it has heralded the new State GST regime. On 16.09.2017 came the Kerala State Goods and Services Tax Act, 2017 ("KSGST Act"). It has replaced the KSGST Ordinance. On the same day, however, the saving period prescribed under Section 19 of the CA Act, too, ended.

125. But, as a way out, the KSGST Act has its own Saving Clause: Section 174. So we must examine the relative, sometimes overlapping, concepts of transition and saving, besides those of repeal, sunset, amendment, omission, and substitution.

126. A bill may contain provisions that limit, modify, or destroy individual rights and privileges. Then, on the Bill's enforcement as an Act, the Legislature may desire to

consider a saving clause, to protect those who have acted as per the law till then existing. The means for providing this protection is the saving clause. Black's Law Dictionary defines "Saving Clause" in a statute as an exception of a special thing out of the general things mentioned in that statute; it is ordinarily a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, and so on, from annihilation that would result from an unrestricted repeal. In other words, "a saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost."

127. Benion in his *Statutory Interpretation*defines a saving as a provision "the intention of which narrows the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation". According to the learned author, a saving resembles a proviso, except that it has no particular form. A saving often begins with the words 'Nothing in this [Act shall ….' A saving may be qualified or conditional. Indeed, a saving is taken not to be intended to confer any right which did not exist already.

128. The saving clause, according to Crawford, is used to exempt something from immediate interference or destruction. It is generally used in repealing statues to prevent them from affecting rights accrued, penalties incurred, duties imposed, or proceedings started under the statute sought to be repealed. Its position or verbal form is unimportant. But if it conflicts with the body of the statute of which it is a part, it is ineffective, or void. And whether the saving clause should receive a strict or liberal construction, is a matter upon which there seems to be some conflict of opinion. Perhaps the best rule would make, Crawford continues, the nature of constructing the saving clause depend upon the nature of the statute involved for example whether it was remedial, penal, or procedural.

129. If the saving clause is a general one, that is, applicable to all repealing acts, it is merely declaratory of a rule of construction, notes Crawford. But whether they are general or not, they are regarded as much a part of every repealing act as if written therein. Nevertheless, they are, Crawford stresses, subject to repeal by subsequent acts; that is, they will not save from repeal any provision whose repeal is clearly intended by the legislature by the later act. To hold otherwise would abridge or limit the legislative power of the various late legislatures, by the enactment of irrepealable legislation.

130. A saving, to me, is a device that preserves accrued, acquired rights and incurred liabilities under a statute that no longer exists. If the new statute that repeals an old one contains no saving clause, General Clauses Act steps in; Section 6 plays the role of a protector of the rights and liabilities under the repealed act.

131. Here I must observe that Section 19 is not a saving clause; any saving clause starts to operate from the day the previous Act is dead. Here, the CA Act has allowed various enactments—those that contradict it—to coexist. Here, the repeal did not take place on 16.09.2016, when the CA Act came into force, but on 16.09.2017, when the one-year period ended. Saving Clause, in fact, if available, was needed from then on, not before. Indeed, Section 19 of the CA Act saves nothing beyond 16.09.2017.

134. The CA Act examined, we can notice that from 16.09.2016, Article 246 stood amended and modified in its operation; Article 246A was introduced. Section 2 of

the CA Act signifies a drastic constitutional shift in the division of legislative powers: instead of division, it fosters amalgamation. Article 246A has no schedules.

135. And the scheme of the CA Act further examined, Entry 54 of List II stands substituted. So comes the assertion from the petitioners that Entry 54 abrogated (it is not, though), the States have been denuded of the power of taxation from 16.9.2016 on the items that stand deleted. For them, the interim or temporary continuation is only up to 16.09.2017, as per Section19 of the CA Act. They also argue that if the State wants to sustain "taxes under Entry 54, then there is no necessity to abrogate the erstwhile Entry 54 on 16.09.2016. Read otherwise, Section 19 would be rendered otiose, meaningless, and would have no significant purpose at all."

136. Unfortunately, the whole argument is sought to be erected on a slippery slope. There is no denudation of legislative power, no obliteration of Entry 54 of List II. An entry's abrogation, as it were, would not *ipso facto* lead to the legislative denudation. I will elaborate on that, later.

137. Then follows from the petitioners the collateral attack: Section 173 is "merely a manifestation of the repeal of the laws under the Entries already occurred. It only excises and prunes out the dead matter." This assertion, too, must fail. The GST (Compensation to States) Act, recompenses the States; so, they argue, "no difficulty needs to be perceived by the State" on the financial front.

138. If we examine Section 173 of the KSGST Act, the State has amended a few taxing statutes that now stand affected by the CA Act. It has brought them in harmony with the Goods and Services Tax regime. On the other hand, Section 174 repealed and saved certain statutes----------

139. We can see the KVAT Act, the focal enactment for our discussion, finds a place in the table on both sides: amendment and repeal. The same enactment could not have been amended and repealed simultaneously; if so, it proves the idiom "have the cake and eat it too." We can either keep the cake or eat it; so is the case with an enactment: it can either be amended or repealed. For the amendment and repeal are mutually exclusive. Yet, paradoxical as it may sound, the distinction between amendment and repeal, notes Vepa P. Sarathi in his *Interpretation of Statutes* is one of degree.

140. In fact, the KVAT Act stands repealed "except in respect of goods included in entry 54 of the State List of the Seventh Schedule to the Constitution, including the Goods to which the Kerala General Sales Tax Act, 1963" applies as per the KVAT Act.

141. Now, let us examine both Section 19 of the CA Act and Section 174 of the KSGST Act. Section 19 mandates that any inconsistent law relating to tax on goods and services in force in any State before 16.09.2016 (the commencement of the CA Act) shall continue to be in force "until amended or repealed by a competent Legislature or other competent authority". So the States were, first, required to amend the inconsistent laws to bring them in harmony with the CA Act. Otherwise, the States must repeal them. And they were given one year for achieving this. If the States do neither, those inconsistent acts stand repealed.

142. Here, the States acted; they amended a few inconsistent Acts. They also repealed a few more. As with the KVAT Act, the repeal, if it were, has not resulted in its abrogation or annihilation. So the operation of the so-called sunset clause (as

provided in Section 19) has not denuded the State's power to enforce the KVAT Act in its amended form. The Act remained, with its remit reduced, though. Thus goes out of reckoning the petitioners' another assertion: that with the repeal of the enactments, the procedural mechanism has disappeared. It has not. The prospectivity of the amendment undisputed, what remains to be examined is the State's power to save what had happened before the CA Act came into force or, more precisely, until one year after that Act came into force. Indeed, the CA Act allowed the State Acts in the same legislative field to coexist for one year: the window period.

143. So I must hold that Section 19 of the CA Act is— transitional as it may have been—a repealing clause simpliciter, not a saving clause. Nothing more. That job of saving is done by Section 174 of the KSGST Act. Well and truly. So the repeal has not, as Section 174 elaborates, affected "the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder." In other words, the repeal has not affected "any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Acts or repealed Acts or orders under such repealed or amended Acts." Nor has it affected "any tax, surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Acts or repealed Acts"

144. In other words, the repeal has not affected "any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication, and any other legal proceedings or recovery arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed."

145. Collaterally it follows that all the judicial and quasi-judicial proceedings arising from the above contingencies, too, stand saved.

146. Of course, in most cases, the question is, as the petitioners put it, whether Section 174 (2) (a) "revives" the KVAT Act, 2003 for the authorities to issue notices under that Act beyond 16.09.2017. The petitioners contend that revival presupposes the pre-existence of something valid. For them, the KVAT Act had ceased to operate completely on 16.09.2017. Legally it died that day, they assert. To support this contention, they have relied on *Ambalal Sarabhai Enterprises.*

147. *Ambalal Sarabhai Enterprises* examined, pending atenancy dispute before a rent-control court, through amendment, its jurisdiction is taken away because of the changed threshold limit of the rent. Then, among other things, the Court had to answer these questions: (a) can a ground of eviction, say illegal subletting, be claimed by a landlord as a vested right? And (b) if "protection given to a tenant under the Rent Act is said to be not a vested right and if that protection is withdrawn, can a landlord claim any ground of eviction under the Rent Act to be his vested right?

148. The Supreme Court, on facts, has first held that Section 6 of the General Clauses Act would apply. Second, as it is the landlord's accrued right, he can take advantage of sub-section (c) of Section 6. That sub-section, holds *AmbalalSarabhai Enterprises*, refers to "any right", which need not be avested right, but can be a mere accrued right. To be explicit, the words 'any right accrued' in Section 6(c) is wide enough to include landlord's right to evict a tenant in case proceeding was pending when repeal came in. I am afraid *Ambalal SarabhaiEnterprises* does not help the petitioners.

Statutory Changes: the Impact on Taxation—a Sovereign Power: Levy, Assessment, and Collection:

149. Time and again, Courts have held that tax imposition will encompass all the three elements: levy, assessment, and collection. A mere Legislation to tax cannot result in fructifying a tax imposition. In other words, for a tax to be imposed, it requires a taxable event to trigger the levy and a taxable person to discharge it.

150. Lord Dunedin pointed out in *Whitney v. Inland Revenue Commissioners* that there are three stages in theimposition of a tax: (1) there is the declaration of liability that is the part of the statute which determines what persons in respect of what property are liable. (2) Next, there is the assessment. Liability does not depend on assessment. That, *exhypothesi*, has already been fixed. But assessment particularisesthe exact sum which a person liable has to pay. And (3) lastly comes the methods of recovery, if the person taxed does not voluntarily pay.

151. *Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors,* approves of this view. Moreover, theConstitutional Bench endorses it in *Mathuram Agarwal v. State of MP*. Section 17 of the CA Act has substituted Entry54 with effect from16.09.2016, and Section 19, the petitioners argue, extended its transitional life by one year. That extended period ended on 15.09.2017. It is, therefore, mandatory for levy, assessment, and collection, the petitioners assert, to have been completed before 15.09.2017, for any VAT issues under the pre-GST regime lost their relevance beyond 30.06.2017.

152. In *Somaiya Organics (India) Ltd. and Ors. Vs. State of UP* the case concerns U.P. Excise Act, 1910. The questionto be considered was this: the vend fee, though levied under an appropriate state enactment, was not collected when that enactment was in force. It was prospectively declared *ultra vires*. Once the source of power disappeared, can the authorities collect the vend fee levied when the act was in force? The Supreme Court has held that the vend fee levied but not collected previously cannot be collected then.

153. In *Manattitillah Krishnan Thangal v. State of Kerala,* this Court has held that the content of a valid lawunder Article 265 is that it should provide for the levy, assessment, and collection of tax. The words "levied or collected" in Article 265 are of comprehensive to include all the three stages in imposing a tax. The word 'levied" in Article 265 of the Constitution is therefore used to include the first two stages: the levy or the declaration of the liability and the assessment or the determination of the amount of the tax. The Full Bench relies on the dictum in *Raja Jagannath Baksh Singhv Sate of U.P*

> "If a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves

> it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the Courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1) (f)."

154. In *Supreme-Court-Advocates-on-Record Association v. Union of India*, a Constitution Bench of the SupremeCourt has held that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word substitution is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally ineffective to leave intact what was sought to be displaced. That seems to be the ordinary and natural meaning of the words shall be substituted.

155. On facts, the Court has held that there is no intention to repeal without a substitution was deducible. In other words, there could be no repeal if substitution failed. The two were part and parcel of a single indivisible process and not bits of a disjointed operation.

156. The Court also observes that repeal is not a matter of mere form but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, were to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or *pro tanto* repeal. On the other hand, if the intention were merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to repeal

157. Because of Art. 265, if every tax has to be imposed by "law" it would appear, observes the Supreme Court in *Chhotabhai Jethabhai Patel & Co. v. Union of India*, tofollow that it could only be imposed by a law which is valid. The law should be (1) within the legislative competence of the legislature; (2) the law should not be prohibited by any particular provision of the Constitution such as, for example, Arts. 276(2), 286 and so on; and (3) the law or its relevant portion should not be invalid under Art.13 being repugnant to those freedoms which are guaranteed by Part III of the Constitution.

158. In *Commissioner of Income Tax, Bhopal vs. Shelly Products*, the Tribunal nullified the assessment orders on theground of jurisdiction. On facts, it was found that the authorities could not frame a fresh assessment. Then the question was whether the respondents could have the refund of income tax paid by them by way of advance tax and self-assessment tax. The Court, first, has held that liability to pay income-tax does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. It has, then, observed that in the face of a nullified assessment if the assessing authority cannot make a fresh assessment in accordance with the law, it amounts to

deemed acceptance of the assessee's return of income. In such a case, the assessing authority is denuded of its authority to verify the correctness and completeness of the return. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred.

159. To sum up, for any tax to be imposed, it requires a taxable event triggering the levy and a taxable person to discharge it. So the petitioners contend that the levy, assessment, and collection must have been completed before 15.09.2017 under any tax regime which has been "subsumed" by the GST regime. Then, the question is, have GST laws under the CA Act subsumed all the State tax enactments, which earlier drew their legitimacy from the unamended Entry 54?

160. Repeal and Omission: Clause 17 of the Constitution (One Hundred and First Amendment) Act has omitted, the petitioners maintain, Entries 92, 92C of List I and Entries 52, 55of List II and substituted Entry 84 of List I and Entries 54 and 62 of List II.

161. In *Rayala Corporation (P) Ltd. and Ors. vs Director of Enforcement, New Delhi,* and the Supreme Court hasheld that Section 6 only applies to repeal and not to omissions. Granted, *Rayala Corporation*, a Constitution Bench decision, has not elaborated on how "repeal" and "omission" differ, but it has, nevertheless, laid down the law that "repeal" differs from "omission" and Section 6 of the General Clauses Act would apply only for "repeal" and not "omissions". *Kolhapur Cane Sugar Works Ltd. v. Union of India,* another Constitution Bench decision, has followed *Rayala Corporation*. This decision, too, has elaborated on neither thesemantic significance nor the supposedly distinct legal impact of these two expressions.

162. But *Kolhapur Cane Sugar Works* stresses that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed. To this rule, an exception is engrafted by Section 6(1) of the General Clauses Act. If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position.

163. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. Sometimes, a particular provision in a statute may be omitted, and in its place another provision dealing with the same contingency is introduced. Moreover, that can be without a saving clause in favour of pending proceedings. Then, as can reasonably be inferred, the legislative intention is that the pending proceedings shall not continue, but fresh proceedings for the same purpose may be initiated under the new provision.

164. Indeed, in *Shree Bhagwati Steel Rolling Mills v. CCE*, a two-Judge Bench though, has elaborated on not onlyon "deletion" and "omission" but also on "repeal". It has cited *Halsbury's Laws of England* the *Legal Thesaurus* (DeluxeEdition) by William C. Burton to unearth semantic distinctions, if any, of those expressions. Then, *Shree BhagwatiSteel Rolling Mills* has held that on a conjoint reading of thethree expressions "delete", "omit", and "repeal", it becomes clear that "delete" and "omit" are used interchangeably, so that when the expression "repeal" refers to "delete", it would necessarily take within its ken an omission as well. It finds no substance in the

argument that a "repeal" amounts to an obliteration from the very beginning, whereas an "omission" is only *in futuro*.

165. If the expression "delete" would amount, *ShreeBhagwati Steel Rolling Mills* further holds, to a "repeal", it is clear that a conjoint reading of *Halsbury's Laws of England* and the *Legal Thesaurus* leads to the same result: an "omission", a form of repeal, is tantamount to a "deletion". Interpreting *Fibre Boards (P) Ltd. v. CIT*, in the statutory backdrop of Section 6-A of the General Clauses Act, *ShreeBhagwati Steel Rolling Mills* affirms that repeal would includerepeal by way of an express omission. Indeed, it declares, after elaborate reasoning, that the observations in *RayalaCorporation* on "repeal" and "omission" are *obiter*.

166. The precedential force of an avalanche of authorities cited at the Bar remains undisputed. That said, I must add, on facts, that the petitioners' contention that the State has lost legislative power to enact a saving clause—Section 174—in the KSGST Act does not stand the judicial gaze. That power preserved, the concept of repeal, the scope of Section 19 of the CA Act, and the relevance of Section 6 of the General Clauses Act or Section 4 of the Kerala Interpretation and General Clauses Act pale into insignificance. And any discussion, as we have already undertaken, turns out to be an academic exercise.

167. Limitation: The petitioner in one writ petition has argued that on the date when the first ever Show Cause Notice, dated 15.03.2018, under Section 8 (f) (iv), read with Section 25, of KVAT Act was issued, KSGST, 2017 had been in operation for almost six months. And the KVAT, 2003 stood expired.

168. The impugned Notices have been issued for the alleged assessment of the escaped turnover. All the notices, the petitioners have maintained, pertain to the AYs 2010-2011 and 2011-2012, but were issued in March 2018 and beyond. The time for an assessment under Section 25 is five years for the relevant assessment years; so the notices are barred by time. Section 42(3) of the KVAT Act, according to them, does not save the limitation under Section 25 of the Act. They have also contended that composite notices are illegal and impermissible.

169. To sustain their plea, the petitioners, among other things, have argued that on the assessees' filing the returns under Section 20, the assessment stands completed on "the self-assessment" basis, by the mandate of Section 21. Therefore, the assessments are deemed to have been completed.

170. The authorities had done nothing, the petitioners have asserted, before the repeal or at any time after 16.09.2016, to assess the petitioners; no proceedings were initiated to claim that they "proceeded to determine" the turnover. Nor were any proceedings pending when the repeal was effected. Hence nothing remains saved. The mere right, they conclude, to conduct an assessment is not a vested or an accrued right. They have cited a few authorities to support these contentions. But limitation is not an issue that deserves a decision under Article 226.

171. To summarise, they have argued thus: (a) The Constitution Amendment Act is in itself an amending act as well as a repealing enactment. Of that Act, Section 19 is the transitional provision, as also the saving one. But Article 367 does not apply because repealing enactment itself specifically provides for transition and savings. Only in the absence of the repeal or saving, is the General Clauses is attracted; here the General Clauses Act does not apply; (b) Article 367 does not apply to constitutional

amendments; the General Clauses Act is only for understanding and for interpreting words not defined and specifically available in the Constitution including Article 366 (12); (c) Specific repeal and saving under KSGST and also the application of the General Clauses Act as per S.174 (3) is self-contradicting. In any view, S.174 (2) and 174 (3) are by themselves self-contradicting; (d) Section 24 of the General Clauses Act is the saving of subordinate legislation and applies when there are repeal and re-enactment. The present is not a case of repeal and re-enactment. So Section 24 is not attracted. In other words, machinery provisions are not saved. Then, there can be no tax without machinery provisions.

172. Fallacy: Indeed, on most counts, the petitioners' assertions can be accepted. Done so, does that mean the adjudication results or stands resolved in their favour?

173. Section 6 of the General Clauses Act does not apply to sunset clauses or temporary statutes. Agreed. Repeal and Omission are different. They are not. *Shree Bhagwati SteelRolling Mills* dispels this myth. Yet, even if we accept it to beso, still that does not alter the outcome in any way.

174. First, we must acknowledge one thing: none of the provisions repealed through the CA Act is central legislation. Each one is state legislation. And the General Clauses Act does not apply to the State Legislation. But, perhaps, Section 4 of the Kerala Interpretation and General Clauses Act could be roped in, if ever we need anything to be saved under a repealed enactment. We can, however, also accept here that neither act needs to be invoked.

175. Though the General Clauses Act applies to repeals, it does not apply to repeal occasioned by a Constitutional Amendment. This proposition, too, needs no contradiction.

176. What does Section 19 of the CA Act do? It repeals or omits, for instance, a congeries of state statutes. And, indeed, the whole Amendment Act is prospective. So these repealed state acts failed to survive beyond the date mentioned in Section 19. They perished. First, prospectively, no State Legislature could trifle with the constitutional mandate under the Amendment Act. But, prospective as the Amendment Act is, could the State have saved the causes and the consequences flowing from the past enactments—enactments once legitimate and living.

177. We have found that the General Clauses Act is unavailable; and that is unavailable on more than on ground: (a) Omission; (b) repeal by a Constitutional Act; (c) the alternative theory of sunset clause, if it were; (d) the inapplicability of the General Clauses Act to the State enactments.

178. We have noted that the States could do nothing to affect the Constitutional Act prospectively. But could it have done—as it has actually done—anything in its legislative scope only to save the events of taxation that emanated from the repealed statutes to run their full course and culminate?

179. No aid forthcoming from Section 6 of the General Clauses Act, there could be no saving or transition beyond, to repeat, the date mentioned in Section 19. To have a saving clause of its own, the State Government needed legislative power. Does it have the power?

180. The petitioners argue that the CA Act has disrupted the federal demarcations; the State's legislative fields under Entry 54 of the Second Schedule have been truncated. Thus, the State has no longer the power to legislate on the files that have been taken

away from it. Have the State's legislative power on the items once available for it under the Entry 52 taken away? We will see.

181. First, the State's legislative powers have not been taken away; they have been, on the contrary, constitutionally permitted to be shared with the Union Government. What is gone is the State's exclusivity. To the legislative fields of exclusivity and concurrency, what has been added is the simultaneity—novel as it may sound.

182. To encapsulate, I may observe that all the petitioners have advanced one common argument: the State has been denuded of its legislative power to enact Section 174 of the Kerala State Goods and Services Act, 2017. The obvious prop for this assertion comes from the 101st Constitutional Amendment—that is, the attenuated or modified Entry 54 of the List II, the State List.

183. All the petitioners contend that the KSGST Act came into being because of the Constitutional Amendment. And that very Constitutional Amendment has put paid to many other enactments—for example, the Kerala Value Added Tax Act, 2003. So with the Entry 54 of List II unavailable for the State to incorporate Section 174 of the KSGST Act, the whole saving mechanism *vis-à-vis* transactions before 16.09.2017 crumbles.

184. I am afraid it is a fallacy on the petitioners' part to contend that the State lacks the legislative power to enact Section 174 of the KSGST Act. Article 246A is the special provision (if it can be called a provision) on the Goods and Services Tax. It empowers, as rightly contended by the learned Senior Counsel Shri Venkataraman, both the Union and the State, for the first time, to have simultaneous—not concurrent— powers to legislate on certain items. Indeed, concurrency yields to the doctrine of repugnancy, but simultaneous legislative power does not. That is, both the legislatures, say one from the Union and the other from the State, coexist—operate in the same sphere, subject to other constitutional safeguards.

185. In *Synthetics and Chemicals Ltd.,* the Supreme Court has held that the power to legislate does not flow from a single Article of the Constitution. To articulate this assertion and to elaborate on it, *Bimolangshu Roy* observes that besides the declaration in Article 246, there are various other Articles in the Constitution which confer authority on the Parliament or on a State legislature to legislate, under various circumstances.

185. Indeed the State legislatures are assigned only specified fields of legislation, the residuary legislative powers lying with the Parliament. But taxing entries are distinct from the general entries. So comes a federal constitutional experiment in the fiscal field: the 101st Constitutional Amendment.

186. Article 246 generally stipulates the competence of the Parliament and the state legislatures on the various fields of legislation. But Articles 249, 250 and 252 contain provisions which enable the Parliament to legislate on any matter enumerated in List II in the exigencies specified in those Articles. The Scheme of Entries, such as 52 and 54 and the corresponding Entries in the List-II, *Bimolangshu Roy* underlines, is nothing but another instance of special arrangement akin to the one made in Articles 249, 250 and 252 To conclude, *Bimolangshu Roy* reminds us that a great deal of schematic examination of the entire Constitution is essential for us to interpret each Entry in the three Lists of the Seventh Schedule. And no Rule with a universal application on interpreting all entries in the 7th Schedule can be postulated.

187. So I reject the petitioners' plea that the State lacks the vires to engraft Section 174 into Kerala State Goods and Services Act, 2017. I have already rejected as inapplicable the petitioners' other propositions: the survival of the sunset clause, the impact of a temporary statute, and inapplicability of Section 6 of the General Clause Act *vis-à-vis* a repealed enactment. They need neither repetition nor reiteration.

188. Result: I find no merit in the writ petitions; accordingly, I dismiss all the writ petitions.

189. Yet I clarify: In all these writ petitions various issues arise—constitutionality is only one of them. Even a single issue has many shades of a challenge. I have touched none save the constitutional question. And I answered that in the negative. All other issues—including limitation—remain untouched. After all, the limitation is a mixed question of fact and law. I reckon, in that context, that the petitioners have efficacious alternative remedies under the relevant statutes.

190. Granted, the petitioners have *bona fide* pursued these writ petitions; so, now, in a few cases, the petitioners may face the question of limitation. To adjust equities, I observe that if any petitioner approaches a statutory authority on an issue arising out of a writ petition which now stands disposed of in this batch, the authority will exclude for limitation the period it has spent before this Court.

191. If any petitioner files in thirty days after its receiving a copy of the judgment, a statutory appeal or takes out any other legally sustainable proceedings against the orders under challenge, the statutory authority will entertain the appeal or the proceedings as having been filed in time. And to enable the petitioners to approach the appellate authorities, the Department will defer coercive steps by thirty days, from the date of their receiving a copy of the judgment. If the appeals involve limitation, the assessee concerned may place before the appellate authority all its defences, including the judgment of this Court in W.A.No.230 of 2017. In the cases of mere notices which ought to be replied to, the petitioners will have 15 days to do so. The 15 days' time, too, must be reckoned from the day the petitioners received a copy of the judgment.

No order on costs.

VINOD P.A., M/S.SKYLITE ROOFINGS, ERNAKULAM
VERSUS
ASSISTANT STATE TAX OFFICER, STATE GOODS AND SERVICES TAX DEPARTMENT AND ORS.
WP(C).No. 73 of 2019, HIGH COURT OF KERALA, 03.01.2019

JUDGMENT

The petitioner transported certain goods from Tamil Nadu to Perinthalmanna. When the authorities checked the documents carried along with the goods, they found the documents to be defective. Suspecting tax evasion, the authorities detained the goods and demanded penalty, as well as tax. Aggrieved, the petitioner filed W.P. (C) No.36238 of 2018 for the release of goods and for the expeditious completion of adjudication.

2. In terms of the judgment in W.P. (C) No.36238 of 2018, the petitioner furnished Bank Guarantee for the entire amount demanded, and had the goods released.
3. Later, the primary authority completed the adjudication and issued the order imposing penalty, and appropriating the Bank Guarantee, too. The petitioner filed the Appeal u/s.107 of SGST Act against that order. But he apprehends that the authorities, in the meanwhile, may encash the Bank Guarantee.
4. Heard the counsel for the petitioner and the Government Pleader.
5. I reckon that, in the interest of justice, the authorities will keep the Bank Guarantee untouched till the Appeal u/s.107 of SGST Act is considered.

With these observations, I dispose of the writ petition.

M/S H.M. INDUSTRIAL PVT. LTD
VERSUS
THE COMMISSIONER, CGST AND CENTRAL EXCISE
R/SPECIAL CIVIL APPLICATION NO. 1160 OF 2019, HIGH COURT OF GUJARAT, 07.02.2019

Where Competent Authority for recovery of dues from assessee, a private company, had provisionally attached bank accounts of directors, impugned order was without any authority of law and Competent Authority was directed to release attachment of bank accounts of directors

JUDGMENT

1. By the impugned orders of provisional attachment of the property under section 83 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act"), the respondent has, *inter alia,* attached the bank accounts of the directors of the petitioner-company. A perusal of the provisions of section 83 of the CGST Act shows that the same empowers the Commissioner, if the circumstances therein are satisfied, to attach provisionally any property, including bank account, belonging to the taxable person, in such manner as may be prescribed. The term "taxable person" has been defined under sub-section (107) of section 2 of the CGST Act to mean a person who is registered or liable to be registered under section 22 or section 24 of that Act. In the present case, it is the petitioner-company which is registered under the provisions of the CGST Act and is, therefore, the taxable person. Under the circumstances, if at all, the provisions of section 83 of the CGST Act could have been invoked against the petitioner herein, however, under no circumstances, the same could have been invoked against the directors of the petitioner-company.
2. On behalf of the respondents, reliance has been placed upon the provisions of section 89 of the CGST Act to submit that the same permits recovery of the dues of the private company from its directors in case such amount cannot be recovered from the company. In the opinion of this court, reliance placed upon section 89 of the Act is thoroughly misconceived inasmuch the same relates to recovery of any tax, interest or penalty due from a private company in respect of supply of goods or services. Moreover, even if such amount cannot be recovered from the private company, the directors of the company do

not *ipso facto* become liable to pay such amount and it is only if the director fails to prove that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company, that the same can be invoked. However, in any case, at this stage, section 83 of the Act does not apply to the directors of the private company. Under the circumstances, the impugned orders of attachment, to the extent the same attach the bank accounts of the directors, as set out in the statement at page 8 and 9 of the petition, at serial No. 1, 2, 3, 4, 5, 10 and 11 are concerned, are totally without any authority of law. In these circumstances, the respondents are directed to forthwith release the attachment of the following bank accounts.

ACCOUNT NO.	NAME OF BANK	NAME & TYPE OF ACCOUNT
50100183156858	HDFC	Jigar Kumar Pareshbhai Patel; Saving Account
07481000002985	HDFC	Hardik Kumar Paresh Kumar Patel; Saving Account
02950100018863	BANK OF BARODA	Jigar Paresh Kumar Patel; Saving Account
02950200000513	BANK OF BARODA	HardikPareshbhai Patel; Current Account
02950300028287	BANK OF BARODA	HardikPareshbhai Patel; Term Deposit Account
02950100009696	BANK OF BARODA	Paresh Kumar Hargovvindas Patel; Saving Account
02950600021500	BANK OF BARODA	Paresh Kumar Hargovvindas Patel; Loan Account

3. On request made by the learned advocate for the petitioner, stand over to 14.2.2019.

AVINASH ARADHYA
VERSUS
COMMISSIONER OF CENTRAL TAX
CRIMINAL PETITION NOS. 497 AND 498 OF 2019, HIGH COURT OF KARNATAKA, 18.02.2019

Where a complaint had been filed against petitioners for offence punishable under section 137 for indulging in continuous issuance of fake invoices without actual supply of goods with an intention to enable them to fraudulently avail input tax credit, it was held that said

offences are compoundable by Commissioner on payment and maximum punishment of five years and, therefore, petitioners were ordered to be released on bail by imposing some stringent conditions

JUDGMENT

1. These two petitions have been filed by petitioners – accused under Section 438 of Cr.P.C to release them on anticipatory bail in the event of their arrest in O.R.No.40/2018-19 by the respondent for the offence punishable under Section 137 of Goods and Services Tax Act, 2017 (Hereinafter it has been used as 'GST Act' for short).

2. I have heard learned senior counsel Sri C.V. Nagesh for petitioners and learned standing counsel Sri Jeevan J. Neeralgi for respondent and perused the record.

3. Before going to consider the submission made by the learned counsel appearing for the parties, I feel it just and proper to mention in brief the gist of the complaint. Companies of Aradhya group along with M/s. Spiegel Enterprises Pvt. Ltd., M/s BhavasteelMetalalloys Pvt. Ltd., M/s Infocert Enterprises, M/s Bhavani Steel Corporation, M/s Vijayalakshmi Industries were indulging in continuous issuance of fake invoices without actual supply of goods with an intention to enable them fraudulently avail the input tax credit.

4. It is further case of the prosecution that invoices are issued and circulated among the companies M/s Spiegel Enterprises Pvt. Ltd., M/s BhavasteelMetalalloys Pvt. Ltd., M/s Infocert Enterprises, M/s Bhavani Steel Corporation, M/s Vijayalakshmi Industries till they reach back to the originating companies i.e., M/s Aradhya Groups without actual movement of goods, thereby transferring the irregular input credit to the originating companies for payment of GST and sales tax. It is further alleged that the act is an offence and it is criminal in nature. On the basis of the same, complaint was registered.

5. It is submitted by the learned senior counsel that as per the GST Act, maximum punishment which is liable to be imposed even if an offence has been made out and convicted is five years and even as per Section 138 of the GST Act, the said offence is compoundable before the Commissioner on payment. He further submitted that even there is no irregularity no loss of revenue has been caused to the State or Central Government. He further submitted that they have paid the GST by creating invoice. It is further submitted that the accused have not availed any loan or not raised any amount from the bank, even in the input tax, the credit has also been given and that has not been deducted or claimed from the State or Central Government. It is submitted that they are ready to co-operate with the investigation. He further submitted that in the preamble it is made clear that it is intended to levy and collect tax. It has not been defected by the accused. The Learned counsel further submitted that they are apprehending their arrest and even the objection which has been filed by the respondent to the present petition itself clearly goes to show that there is an apprehension of arrest. He further submitted that they are not defaulter to the bank or to the State. It is further submitted that the only allegations which has been alleged as against the petitioners – accused is that they have given only inflated transaction, therefore, he submitted that input tax credit and the sale is not an offence under the said Act. He further submitted that liberty of the person is also involved in this case. They are ready to abide by the terms and conditions to be imposed by this Court and ready to offer surety. On these grounds, both petitioners pray to allow the petition and to release them on bail.

6. Per contra, learned standing counsel on behalf of the respondent vehemently argued and submitted, if the entire case is looked into without there being any movement of goods, the petitioners have claimed input tax credit and thereby without payment of any tax by them, they claimed input tax credit. In that event the economy of the country is going to be affected. He further submitted that though it is the contention of the petitioner – accused that the input tax credit has been paid, but actually, no tax has been paid to anybody. It is only a paper transaction and it is going to affect the trade transfer of the nation and in the State. He further submitted that it is a scam and if it is allowed to be continued then it will be having its own cumulative effect on the economy as a whole. He further submitted that still investigation is in progress and if the petitioners – accused are released on bail, it is going to affect the entire investigation and they may tamper with the prosecution case. On these grounds, he prays to dismiss the petition.

7. I have carefully and cautiously gone through the contents of the complaint and other materials, which has been produced in this behalf.

8. Though several contentions have been raised with reference to the initiation of the action under the GST Act, since the scope of these petitions is limited only to consider the bail application, in that light, the other points which have been raised have not been dealt with in these petitions.

9. Before going to consider the submission made by the learned counsels appearing for the parties, I feel it just and proper to extract Sections 132, 137 and 138 of the GST Act which reads as under:

> ***132. Punishment for certain offences**.—(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;*
>
> *(c) Avails input tax credit using such invoice or bill referred to in clause (b);*
>
> *(d) Collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;*
>
> *(e) Evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);*
>
> *(f) Falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;*
>
> *(g) Obstructs or prevents any officer in the discharge of his duties under this Act;*
>
> *(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;*
>
> *(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;*
>
> *(j) tampers with or destroys any material evidence or documents;*

(k) Fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) Attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section, shall be punishable –

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

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 (2 of 1974), 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.

***137. Offences by companies**: — (1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.*

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis, apply to such persons.

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

***138. Compounding of offences**.—(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:*

Provided that nothing contained in this section shall apply to –

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;

(b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;

(c) A person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;

(d) A person who has been convicted for an offence under this Act by a court;

(e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (l) of Section 132; and

(f) Any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ten thousand rupees or fifty percent of the tax involved whichever is higher, and the

maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

10. By going through the above provision, question which arises before the Court is whether the alleged offences are non cognizable or cognizable. This aspect has been dealt with by the Hon'ble Apex Court in the case of *Om Prakash &Anr*. v. *Union of India &Anr*. reported in AIR 2012 SC 545 at paragraph Nos. 24 to 27, it has been held as under:

(24) As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question. Sub-section (1) of Section 9A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr.Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable. The expression "bailable offence" has been defined in Section 2(a) of the code and set out hereinabove in paragraph 3 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part I and Part II. While Part I deals with offences under the Indian Penal Code, Part II deals with offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offence indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part II could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable.

(25) This leads us to the next question as to meaning of the expression "non-cognizable"

(26) Section 2(i), Cr.P.C. defines a non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non-cognizable" have been included in Part I of the First Schedule to the Code as

being non-bailable. For example, Sections 194, 195, 466, 467, 476, 477 and 505 deal with non-cognizable offences which are yet non-bailable. Of course, here we are concerned with offences under a specific Statute which falls in Part II of the First Schedule to the Code. However, the language of the Scheme of 1944 Act seem to suggest that the main object of the enactment of the said Act was the recovery of excise duties and not really to punish for infringement of its provisions. The introduction of Section 9A into the 1944 Act by way of amendment reveals the thinking of the legislature that offences under the 1944 Act should be non-cognizable and, therefore, bailable. From Part 1 of the First Schedule to the Code, it will be clear that as a general rule all non-cognizable offences are bailable, except those indicated hereinabove. The said provisions, which are excluded from the normal rule, relate to grave offences which are likely to affect the safety and security of the nation are lead to a consequence which cannot be revoked. One example of such a case would be the evidence of a witness on whose false evidence a person may be sent to the gallows.

(27) In our view, the definition of "non-cognizable offence" in Section 2(1) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognizable offence" in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an Excise Officer, will have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant.

11. A close glancing of the above proposition of law with present Act, the punishment imposed is five years. In that light, the alleged offences are non-cognizable offences. By keeping the above proposition of law and on plain reading of all these sections together, one thing in the case is clear that the said offences are compoundable by the commissioner on payment and maximum punishment of five years with fine and they are not punishable with death or imprisonment for life. When the maximum punishment which can be imposed is only up to five years with fine, will throw light on the seriousness of the offence. Though it is argued during the course of the argument made by the learned standing counsel for the respondent that the activities involved by the petitioners would have a cumulative effect and if the accused – petitioners are allowed to act in the manner in which they are doing, ultimately economy of the country is going to be affected. In this context no material is produced to show the magnitude of the loss of revenue going to be caused and the manner in which it will affect the economy of the country. But anyhow that is a matter which has to be considered and appreciated only when the entire investigation is completed and full charge sheet is filed. Now this Court is dealing with only anticipatory bail application, what are the parameters which can be taken into consideration has been elaborately discussed by the Hon'ble Apex Court in the case of *SiddharamSatlingappaMhetre*v. *State of Maharashtra and others,* reported in

(2011) 1 SCC 694. At paragraph-112 ofthe said decision, it has been observed as to what are the parameters that can be considered into while dealing with the bail application, which read thus:-

"112. the following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or other offences;

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

12. In the light of the above proposition of law, by taking into consideration the gravity of the offence and punishment which is liable to be involved, I am of the considered opinion that by imposing some stringent conditions, if accused – petitioners are ordered to be released on bail, it will meet the ends of justice.

13. In that light, petitions are allowed and the petitioners/accused are ordered to be enlarged on anticipatory bail in the event of their arrest in O.R. No.40/2018-19 for the offence punishable under Section 137 of GST Act, 2017 subject to the following conditions:

(a) Each of the petitioners shall execute a personal bond for a sum of Rs.5,00,000/-(Rupees Five Lakh Only) with two sureties for the like

sum to the satisfaction of the apprehending authority / authorized officer

(b) They shall surrender before the Investigating Officer within 15 days from today.

(c) They shall not tamper with the prosecution evidence or any documents whichever is required for the purpose of investigation.

(d) They shall co-operate during the course of investigation and they shall not leave the country without prior permission of Special Court for Economical Offences.

(e) They shall not indulge in similar type of criminal activities covered under the said Act.

In view of the disposal of the petitions, I.A.No.1/2019 filed in both petitions for interim bail does not survive for consideration and is disposed of accordingly.

■■

COMMERCIAL NEWS

MS. PRIYAMVADA JOSHI
Advocate, Jaipur

• Abbott fined Rs 96 lakh for profiteering from GST

Mumbai: The anti-profiteering body has held that US pharmaceutical company Abbott Healthcare did not pass on the benefits of the goods and services tax to customers after the new regime started in July 2017 and the rate was further reduced in November that year.

Abbott had instead increased the price of a cream after GST became effective, the National Anti-profiteering Authority (NAA) said in an order on its website on Tuesday, fining the company and a pharmacy 96.59 lakh for profiteering from GST.

Although the order pertains to only one product, the NAA will now investigate all products sold by Abbott, as per the order.

"DGAP (Director General of Anti-Profiteering) is directed to further investigate the quantum of profiteering on all the products including the present product which respondent (Abbott) is supplying," NAA said in the order.

"This situation is a difference of interpretation of the GST rules and we are looking at next steps," an Abbott spokesperson said in response to ET's queries on the matter.

Tax experts said the order is set to open a Pandora's Box for the pharmaceutical sector. ET first reported on June 22 that the NAA had started probing drug companies for not passing on the benefits of lower taxes under the GST regime to customers. They said even manufacturing companies and pharmacies will come under the investigator's lens.

Reported by Economic Times on 6th March, 2019

• Shell-shocked: Companies cutting deals to launder money face Supreme Court heat

MUMBAI: The Supreme Court has dealt a blow to companies which cut dubious deals with shell firms to launder money and escape tax.

Over decades, businesses have perfected the art of transferring cash to paper firms which invest or lend the funds back into the companies to legitimise the latter's 'black', or undisclosed, money.

According to a recent ruling by SC, if the taxman can back up its claim with sufficient investigation and the company receiving funds as share capital fails to prove the genuineness of the deal and creditworthiness of the investor, the company will have to pay tax on the amount.

The ruling, issued on Tuesday, relates to a dispute between the income tax (I-T) department and NRA Iron & Steel Pvt Ltd, a Delhi-based company that had issued shares to 19 entities which either gave incorrect address, or failed to justify their investments, or did not respond to the tax department's queries.

"The verdict may open the floodgates to litigations on the issue of testing creditworthiness for share capital," said senior chartered accountant Dilip Lakhani.

TAX TRIBUNAL, HIGH COURT RULED IN FAVOUR OF TAXPAYER

"It would apply to other cases with similar facts. Significantly, the amendment to Section 68 dealing with share capital became effective from assessment year (AY) 2013 -14 while the present case pertains to AY 2008-09," said Lakhani. According to Rajesh H Gandhi, partner at Deloitte, "The fact that all appellate authorities up to high court ruled in favour of the taxpayer makes the ruling more interesting… It could be used by tax authorities to probe deeper into share issue deals — more so, with wider powers now available under the amended Section 68 of the I-T Act."

The upshot of the verdict is that PAN of investors, proof of address, tax returns, and routing investment through a bank may not be sufficient to authenticate a transaction and demonstrate investors' creditworthiness. Indeed, in this case, the assessee, NRA Iron, had produced such information that satisfied the tax tribunal and even the HC which dismissed the tax department's appeal. However, the Supreme Court upheld the taxman's appeal as extensive probe carried out by the I-T department put several question marks on the investor firms (based in Kolkata, Guwahati and Mumbai) which subscribed to NRA Iron shares.

In her ruling, Justice Indu Malhotra said, "The lower appellate authorities appear to have ignored the detailed findings of the AO (tax assessing officer) from the field enquiry and investigations carried out by his office."

"The practice of conversion of unaccounted money through the cloak of share capital/ premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee," said the apex court.

The ruling, however, would not directly influence the ongoing disputes between many startup companies and the tax department which has invoked another section of the I-T Act to question the disparity between stock subscription price and the fair value of startups. "For startups, the main issue relates to whether the share premium is 'excessive', which is taxable under Section 56(2) (viib). While there is some overlap between these two sections, this judgment by the Supreme Court should not per se have an adverse effect on startups receiving genuine angel investments," said Sanjay Sanghvi, partner at the law firm Khaitan& Co.

Here, the taxman won the day as the investee company could neither prove the creditworthiness of its investors and genuineness of share premium nor counter the findings of the tax department. Earlier, the burden on proof was largely on the company issuing shares. Since AY 2013-14, Section 68 was amended and investors are required to convince the assessing officer. "In this particular case, no one represented the assessee in the SC. Also, no one pointed out before the court that the investors' responsibility to prove to the satisfaction of the AO became effective only in 2013-14," said Lakhani.

Reported by The Economic Times on 7th March, 2019

- ## GST authority finds Haryana-based S3 Infra Reality guilty of profiteering

NEW DELHI: The anti-profiteering authority has found Haryana-based real estate developer S3 Infra Reality guilty of not passing GST rate cut benefit totalling Rs 1.48 crore to its buyers of residential and commercial properties.

The authority has also asked the realty firm to pass on Rs 57.76 lakh to the buyers of 'Auric City Homes' project as the company has already admitted lapses and passed on Rs 90.84 lakh to the purchasers.

The investigation by the Directorate General of Anti Profiteering has found that in respect of 651 residential units, the realty firm has profiteered over Rs 1.45 crore.

With regard to 13 commercial units sold in the said project, the company profiteered to the tune of Rs 3.01 lakh.

"Accordingly, out of the total profiteered amount of Rs 1,48,60,874, an amount of Rs 90,84,264 has already been passed on... The balance amount of over Rs 57,76,610 is to be passed on to the identified buyers...," the National Anti-Profiteering Authority (NAA) said in an order.

The ruling was passed on a complaint filed before the Haryana State Screening Committee on Anti-Profiteering on April 4, 2018. The applicant had alleged that the realty firm did not pass on the input tax credit benefit to the buyers by way of commensurate reduction in prices after Goods and Services Tax (GST) roll out.

The GST rate during the investigation period July 1, 2017 to Janaury 24, 2018, was 12 per cent and was reduced to 8 per cent for January 25, 2018 to August 31, 2018.

"It is evident that the respondent (S3 Infra Reality) has denied benefit of ITC to the buyers of the flats being constructed by him... and has thus realised more price from them than he was entitied to collect and has also compelled them to pay more GST than that they were required to pay by issuing incorrect tax invoices and hence he has committed an offence and is liable for imposition of penalty," the NAA said.

The authority has also issued a show cause notice to the realty developer directing him to explain why penalty should not be imposed on him.

Reported by The Economic Times on 6th March, 2019

- ## GST support: Some states get central compensation despite revenue growth

The formula for compensating the state governments for their goods and services tax (GST) revenue shortfall is proving to be quite liberal, with many states that have reported big jumps in revenue growth this fiscal continuing to be eligible for the succor.

Bihar's monthly average GST collection grew nearly 50% year-on-year this fiscal but it has still received a compensation of about `2,000 crore in April-December period; similar are the cases of Madhya Pradesh, Rajasthan and West Bengal, among others (see chart). Also, it is increasingly becoming clear that 'consumer states' report higher rates of growth in GST collections than those known for their manufacturing industries. Had the GST not been launched and the state-level value-added tax (VAT) system continued, these states would not have achieved the current revenue growth rates, going by the historical trend.

According to GST compensation law, the states are guaranteed a revenue growth of 14% on the FY16 base.

Under this the monthly state GST (SGST) target for all states in FY18 was `42,979 crore and this is `48,999 crore for the current fiscal. The states with very high y-o-y revenue increases continue to receive compensation because in the first year of GST (FY18), the growth rates have been minimal or negative due to the initial glitches faced by the comprehensive indirect tax.

Most major states were reporting average own tax revenue (OTR) growth of below 10% during the FY 15-FY 17 period, the three years prior to GST's launch, growing at an average of below 10% during FY15-FY17 period. (Of OTR, about 60% used to come from levies like state VAT, entry tax, octroi, purchase tax, luxury tax etc that are now subsumed in the GST).

While the GST revenue deficit for all states combined was 20% in the last fiscal, it halved in the April-December period this fiscal. "The expansion of the revenue base in every state consequent to the reasonable tax rates across the board now would take care of their revenue concerns possibly after a brief time lag," Deloitte India partner MS Mani said.

In the eight months of FY18 when GST existed, states were given compensation of `48,178 crore to bridge the gap assured revenue and actual collections. For the current fiscal, `48,202 crore has been disbursed to states for the April-December period as compensation.

The GST is now helping the consumption-led states to report revenue growth much higher than manufacturing states. "This is probably a result of better compliance in states that have traditionally lagged in infrastructure to enforce and collect taxes," AMRG & Associates partner Rajat Mohan said.

"The structure adopted for GST was intended to move revenues from manufacturing states as it was a destination-based consumption tax and this would become more prominent in future as consuming states grow their markets further," Mani said.

Reported by The Financial Express on 4th march, 2019

- # JF Asset Management settles case with SEBI

JF Asset Management, the subsidiary of JP Morgan Asset Management, has settled a case with SEBI regarding the alleged delay in submitting application for acquiring shares in Multi Commodity Exchange (MCX).

The company paid Rs 5.15 lakh to settle the case with the markets regulator, according to an order.

The regulator, on examination, "prima-facie" found that during January 2017, JF Asset along with persons acting in concert like JP Morgan Eastern Smaller Companies Fund, JP Morgan Indian Investment Company (Mauritius) Ltd, JF India Active Open Mother Fund, among others, acquired certain number of shares in MCX.

The acquisition increased JF Asset's shareholding in the commodity exchange beyond 2 per cent, Securities and Exchange Board of India (SEBI) said.

Post acquisition, the company was required to apply for approval of SEBI within 15 days. However, the application was forwarded only after a period of more than one year on March 8, 2018, and thereby violated Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, SEBI said.

Before initiating proceedings, the regulator issued notice of summary settlement to the company in January 2019 intimating that the defaults may be settled and disposed of under settlement mechanism by paying Rs 5.15 lakh.

Following this the company filed application to settle the defaults without admitting or denying the findings and paid Rs 5.15 lakh as settlement charges in February 2019.

Accordingly, "the proposed proceedings that could have been initiated for the default...are settled," SEBI said in an order dated March 5.

Reported by Business Today on 6th March, 2019

- **Jindal Stainless Ltd gets nod from Odisha government for private industrial estate**

Odisha government has approved a proposal of Jindal Stainless Ltd (JSL) for setting up a private industrial estate near Kalinga Nagar in Jajpur district.

A high-level meeting chaired by Chief Secretary A P Padhi gave a go-ahead to the proposal on March 7. Padhi asked the concerned authorities to complete the work in the first phase within three years from the date of land allotment.

The industrial estate will be developed in two phases.

Chairman-cum-managing director (CMD) of Industrial Infrastructure Development Corporation (IDCO) Sanjay Singh said the downstream cluster will manufacture and supply stainless steel products, including construction materials, architectural designs, pipes, industrial goods, lifestyle consumables, kitchen wares and others.

A Special Purpose Vehicle for the purpose has already been formed, they said.

Meanwhile, the IDCO has identified around 300 acres of land to be allotted for the industrial estate. Water requirement of 2.54 MLD (million litre per day) will be sourced from the intake well of JSL in river Bramhani.

The power requirement for the proposed estate is around 40.58 MW, which will be met both from the CPP of JSL and the NESCO grid.

The industrial estate envisages an investment of around Rs 1,532 crore with an employment potential of 19,000 persons, official sources said.

As per preliminary estimates, around Rs 168 crore will be invested for infrastructural development and creation of common facility centres. JSL will be the anchor investor.

Reported by Money Control on 7th March, 2019

- **GST officials detect tax fraud of Rs 224 cr by 8 companies**

Officials of the Central GST have unearthed an alleged tax fraud of Rs 224 crore and detected fake invoices worth Rs 1,289 crore by a group of eight companies involved in the trade of iron and steel products.

A key suspect involved in the racket has been arrested and Rs 19.75 crore was recovered from him, a press release from the Hyderabad Central GST Commissionerate said Tuesday night.

Several documents were recovered during the simultaneous searches conducted at the residential and business premises of these companies on Tuesday night.

The companies have been generating fake invoices without actual supply of TMT bars, MS bars, MS flat products among others, and were passing on the input tax credit to other tax payers within the same group, besides some other taxpayers since July, 2017, it said.

The fake invoices generated by them involved about Rs 1,289 crore of value and input tax credit of about Rs 224 crore.

"Five out of these taxpayers are operating from the same address and many of the Directors/Partners/Proprietors of these firms/companies, are common," the release said.

These companies were also found to be indulging in circular fake trading to inflate their turnover, besides supplying such fake invoices and e-way bills to some others, the GST officials said.

"Investigation also, prima facie, reveals that the above modus operandi is also being adopted to defraud the Banks for claiming ineligible credit facilities or Letters of Credit (LCs), without any collateral securities," it added.

Reported by The Economic Times on 13th March, 2019

- ## Mastermind behind GST fake invoice fraud worth Rs 400 crore held by DGGI Vishakapatnam

HYDERABAD: Director General of GST Intelligence sleuths of Vishakapatnam on Tuesday arrested a mastermind behind fake invoices fraud to the tune of Rs 400 crore. The accused identified as Vennapusa Venkata Subba Reddy floated 70 shell firms and issued fake invoices to the tune of around Rs 400 crore and availed Rs 60 crore worth fraudulent input tax credit without an actual supply of goods.

DGGI Joint Director Mayank Sharma said that this is one of the biggest GST frauds detected in recent times by GGGI Vishakapatnam.

DGGI Vizag in coordination with officers of Hyderabad conducted searches in Hyderabad, Bhimavaram and Guntur and seized signed blank cheque books of 30 dummy firms, fake invoices and bank account details.

The accused VV Subba Reddy confessed to GST sleuths that he facilitated the raising of fake invoices using the shell fears and generated illegal input tax credit without supply or receipt of goods.

“The dummy firms are registered based on PAN and Aadhaar details of known acquittance of accuse. After obtained GST registration in their names, massive amounts of the transaction had taken place on a paper basis. The accused opened and operated several bank accounts of the dummy firms form a single branch in Guntur. More than 30 bank accounts and two lockers were attached for safeguarding the government revenue,” said Mayank Sharma.

Reported by the Times of India dated 13th march, 2019.

*****

ALL INDIA FEDERATION OF TAX PRACTIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020
E-mail: aiftp@vsnl.com
Website: www.aiftponline.org

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**

FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
24.03.2019	Tax Seminar	Siliguri
06.04.2019	National Executive Committee Meeting	Ranchi
06 & 07.04.2019	National Tax Conference	Ranchi
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
06 to 08.09.2019	National Tax Conference	Shimla
12.10.2019	National Executive Committee Meeting	Udaipur
12 & 13.10.2019	National Tax Conference	Udaipur
11, 12.11.2019	One Day Seminar & Darshan of Lord Viswanath, Ganga Arti and Dev Deepavali	Varanasi

Stop Press

Decisions taken by the GST Council in the 34th meeting held on 19th March, 2019 regarding GST rate on real estate sector

1. Decisions taken by the GST Council in the 34th meeting held on 19th March, 2019 regarding GST rate on Real Estate Sector GST Council in the 34th meeting held on 19th March, 2019 at New Delhi discussed the operational details for implementation of the recommendations made by the council in its 33rd meeting for lower effective GST rate of 1% in case of affordable houses and 5% on construction of houses other than affordable house. The council decided the modalities of the transition as follows.

Option in respect of ongoing projects:

2. The promoters shall be given a one -time option to continue to pay tax at the old rates (effective rate of 8% or 12% with ITC) on ongoing projects (buildings where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019.
3. The option shall be exercised once within a prescribed time frame and where the option is not exercised within the prescribed time limit, new rates shall apply.

New tax rates:

4. The new tax rates which shall be applicable to new projects or ongoing projects which have exercised the above option to pay tax in the new regime are as follows.

(i) New rate of 1% without input tax credit (ITC) on construction of affordable houses shall be available for,
   (a) all houses which meet the definition of affordable houses as decided by GSTC (area 60 sqm in non- metros / 90 sqm in metros and value upto RS. 45 lakhs), and
   (b) affordable houses being constructed in ongoing projects under the existing central and state housing schemes presently eligible for concessional rate of 8% GST (after 1/3rd land abatement).

(ii) New rate of 5% without input tax creditshall be applicable on construction of,-
   (a) all houses other than affordable houses in ongoing projects whether booked prior to or after 01.04.2019. In case of houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.
   (b) all houses other than affordable houses in new projects.
   (c) commercial apartments such as shops, offices etc. in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments.

Conditions for the new tax rates:

5. The new tax rates of 1% (on construction of affordable) and 5% (on other than affordable houses) shall be available subject to following conditions,-
   (a) Input tax credit shall not be available,
   (b) 80% of inputs and input services (other than capital goods, TDR/ JDA, FSI, long term lease (premiums)) shall be purchased from registered persons. On shortfall of purchases from 80%, tax shall be paid by the builder @ 18% on RCM basis. However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.

Transition for ongoing projects opting for the new tax rate:

6.1 Ongoing projects (buildings where construction and booking both had started before 01.04.2019) and have not been completed by 31.03.2019 opting for new tax rates shall transition the ITC as per the prescribed method.

6.2 The transition formula approved by the GST Council, for residential projects (refer to para 4(ii)) extrapolates ITC taken for percentage completion of construction as on 01.04.2019 to arrive at ITC for the entire project. Then based on percentage booking of flats and percentage invoicing, ITC eligibility is determined. Thus, transition would thus be on pro-rata basis based on a simple formula such that credit in proportion to booking of the flat and invoicing done for the booked flat is available subject to a few safeguards.

6.3 For a mixed project transition shall also allow ITC on pro-rata basis in proportion to carpet area of the commercial portion in the ongoing projects (on which tax will be payable @ 12% with ITC even after 1.4.2019) to the total carpet area of the project.

Treatment of TDR/ FSI and Long term lease for projects commencing after 01.04.2019

7. The following treatment shall apply to TDR/ FSI and Long term lease for projects commencing after 01.04.2019.

7.1 Supply of TDR, FSI, long term lease (premium) of land by a landowner to a developer shall be exempted subject to the condition that the constructed flats are sold before issuance of completion certificate and tax is paid on them. Exemption of TDR, FSI, long term lease (premium) shall be withdrawn in case of flats sold after issue of completion certificate, but such withdrawal shall be limited to 1% of value in case of affordable houses and 5% of value in case of other than affordable houses. This will achieve a fair degree of taxation parity between under construction and ready to move property.

7.2 The liability to pay tax on TDR, FSI, long term lease (premium) shall be shifted from land owner to builder underthe reverse charge mechanism (RCM).

7.3 The date on which builder shall be liable to pay tax on TDR, FSI, long term lease (premium) of land under RCM in respect of flats sold after completion certificate is being shifted to date of issue of completion certificate.

7.4 The liability of builder to pay tax on construction of houses given to land owner in a JDA is also being shifted to the date of completion. Decisions from para 7.1 to 7.4 are expected to address the problem of cash flow in the sector.

Amendment to ITC Rules:

8. ITC rules shall be amended to bring greater clarity on monthly and final determination of ITC and reversal thereof in real estate projects. The change would clearly provide procedure for availing input tax credit in relation to commercial units as such units would continue to be eligible for input tax credit in a mixed project.
9. The decisions of the GST Council have been presented in this note in simple language for easy understanding. The same would be given effect to through Gazette notifications/circulars which alone shall have force of law.

Detail Article in next issue

(MEMBERSHIP FEES)

Life Membership (Type 1)	
2,600 for Life Membership	
100/- for ID Card	
486/- for GST @ 18%	3,186
Life Membership (Type 2)	
2,600 for Life Membership	
100/- for ID Card	
486/- for GST @ 18%	
1000/- for one-year subscription (April to March)	4186
Life Membership (Type 3) 2,600 for Life Membership	
100/- for ID Card	
486/- for GST @ 18%	
2,600/- for Three years subscription (April to March)	5,786
Corporate Membership	
Corporate Membership – 5 Years - (Type 1)	
550 for Admission	
5000 for Subscription	
99/- for GST on Admission @ 18%	5649
Corporate Membership – 10 Years - (Type 2)	
550 for Admission	
7500 for Subscription	
99/- for GST on Admission @ 18%	8149
Corporate Membership – 15 Years - (Type 3)	
550 for Admission	
11500 for Subscription	
99/- for GST on Admission @ 18%	12149
Corporate Membership – 20 Years - (Type 4)	
550 for Admission	
15000 for Subscription	
99/- for GST on Admission @ 18%	15649

Subscribe Today...

AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

(A Unique Journal on GST, Company Law, RERA, FEMA, PF, ESI & Allied Laws)

Annual Subscription - ₹2000/-

For Non AIFTP Members

Printed by : Pankaj Ghiya, Published by : Pankaj Ghiya on behalf of All India Federation of Tax Practitioners (name of owner) & Printed at Vee Arr Printers, Bandari Ka Nasik, Subhash Chowk, Jaipur (Name of the Printing Press & Address) and Published at All India Federation of Tax Practitioners, Jaipur • Editor : Pankaj Ghiya • **PUBLISHED ON 25TH EVERY MONTH.**

All India Federation of Tax Practitioners

215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020