ETHICS EDUCATION EXCELLENCE

AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

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

AIFTP NATIONAL EXECUTIVE COMMITTEE 2019

MEMBERS

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PRESIDENT'S COMMUNIQUE

The New Financial year 2019-20 has started and we all expect that this year would be a good year for Indian Economy and particularly for small and medium sector. The start of the financial year has also coincided with the General Elections in the Country for the Parliament. AIFTP has already launched a campaign to educate about the importance of voting and requested all its Members to compulsorily vote.

The Ranchi Conference was a grand success and it saw a participation of over 700 delegates. The arrangements and technical sessions were excellent. The discussion and deliberations in the technical sessions was appreciated by the delegates. The NEC Meeting also took various decisions particularly regarding the AIFTP Awards and disciplinary Rules. The New Award rules was finalized and approved and the disciplinary rules were also approved.

The AIFTP indirect tax and Corporate Law Journal has been well received and appreciated by the Members. From the March issue we had experimented of adding Judicial Decisions in the Journal and it was liked by all.

AIFTP is organizing National Tax Conference at Pune on 10th& 11th May, 2019 along with other organizations. Thereafter on 22-23 June, 2019 the National Tax Conference and NEC Meeting is being organized at Tirupati. We expect that large number of Members will attend and take benefit of the technical discussion and the learned speakers who are expert in their field. Representations etc. on the direct and indirect taxes are regularly been sent by AIFTP and Members are requested to send their suggestions / grievances etc. to the Head office at Mumbai, so that appropriate action can be taken on them.

Members are also requested to update their details for receiving proper communication on the website of AIFTP i.e. www.aiftponline.org. Option for getting hard copy of this Journal may also be taken on the same website.

I wish all the Members a very prosperous New Financial Year, 2019-20.

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Membership of All India Federation of Tax Practitionersas on 16th, February 2019					
Life Members					
Zone	**Associate**	**Individual**	**Association**	**Corporate**	**Total**
Central	0	1048	25	0	**1073**
Eastern	6	1567	36	0	**1609**
Northern	0	1194	18	1	**1213**
Southern	1	1280	19	4	**1304**
Western	5	2332	37	5	**2379**
Total	**12**	**7421**	**135**	**10**	**7578**

CHIEF-EDITOR'S COMMUNIQUE

There has been lot of changes in the Indirect tax law and particularly in GST with the start of the New Financial year 2019-20. Major changes have been made applicable w.e.f. 1st April, 2019. The Real Estate Sector will see a different concept in GST w.e.f. 1st April, 2019. The new scheme has been notified and made mandatory for the new projects and for the ongoing projects different options has been provided to the builders and developers. Similarly new return forms have been notified and also it is time for the Annual Return and GST Audit for the financial year 2017-18.

This issue of the Journal covers various topics of Journal importance to all Professional members including the time lines, Judicial Precedents, Annual Return, and Article on Real Estate Sector. In addition to the other Articles on GST the issue also covers important updates and Judicial Decision on RERA and specific Article on arrest provisions under Customs Act.

We had covered important judicial decisions also in this issue. We invite all the Professionals to send their suggestions for further improvement in the Journal and any other topics to be covered in it. Articles etc. written by the professional Members may be sent for publication in the Journal.

The task is regarding the working on the complex provision of GST. The complete system is not working and even the annual return and GST Audit Form has been provided / made available on the website including the offline utility but major doubts still remain. Some of the announcement of GST Council has not been notified and the tax authorities are not inclined to follow the GST Council announcement unless they are notified. This is the law also but the government should take care that all the decisions made in the GST Council are notified immediately so that no confusions remain.

We look forward to your patronage and support and wish you a very happy and prosperous New Financial Year 2019-20.

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AIFTP FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
22.06.2019	National Executive Committee Meeting	Tirupathi
23.06.2019	National Tax Conference	Tirupathi
04.08.2019	One Day Seminar	Patna
26.08.2019 to 04.09.2019	International Study Tour, 2019	Europe
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

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AIFTP Indirect Tax & Corporate Laws Journal

(A Unique Journal on GST, Company Law, RERA, FEMA, PF,ESI & Allied Laws)

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RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg
Jaipur

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
28.03.2019	15/2019-CENTRAL TAX	Section 168 Of The Central Goods And Services Tax Act, 2017 – FORM GST ITC-04 – Furnishing Of – Time Limit For Furnishing Form GST ITC-04 – July,2017-March,2019 – supersede notification No. 78/2018 - Central Tax dated 31.12.2017
29.03.2019	16/2019-CENTRAL TAX	Section 164 Of The Central Goods And Services Tax Act, 2017 – Second Amendment – CGST Rules
10.04.2019	17/2019-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 - March,2019
10.04.2019	18/2019-CENTRAL TAX	Section 39, read with Section 168 Of The Central Goods And Services Tax Act, 2017 – Return – Furnishing Of – Time Limit For Furnishing Return In Form GSTR-7 - March,2019
22.04.2019	19/2019-Central TAX	Seeks to extend the due date for furnishing of returns in FORM GSTR-3B for the Month of March, 2019 for three days (i.e. from 20.04.2019 to 23.04.2019).
23.04.2019	20/2019-Central Tax	Seeks to make Third amendment, 2019 to the CGST Rules.
23.04.2019	21/2019-Central TAX	Seeks to notify procedure for quarterly tax payment and annual filing of return for taxpayers availing the benefit of Notification No. 02/2019– Central Tax (Rate), dated the 7th March, 2019
23.04.2019	22/2019-Central TAX	Seeks to notify the provisions of rule 138E of the CGST Rules w.e.f 21st June, 2019.

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
07.03.2019	03/2019-CENTRAL TAX (RATE)	Section 9, read with Section 15, read with Section 16, read with Section 148 of the CGST Act, 2017 – Amend Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017 – CGST Rate – Goods – Real Estate Sector
29.03.2019	04/2019-CENTRAL TAX (RATE)	Section 11 Of The Central Goods And Services Tax Act, 2017 – Amend Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 – Exempt – Services – Real Estate Sector
29.03.2019	05/2019-CENTRAL TAX (RATE)	Section 9 Of The Central Goods And Services Tax Act, 2017 – Amend Notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017 – RCM – Services – Real Estate Sector
29.03.2019	06/2019-CENTRAL TAX (RATE)	Section 148 Of The Central Goods And Services Tax Act, 2017 – Notifying Certain Class of Person
29.03.2019	07/2019-CENTRAL TAX (RATE)	Section 9 Of The Central Goods And Services Tax Act, 2017 – RCM – Services – Real Estate Sector
29.03.2019	08/2019-CENTRAL TAX (RATE)	Section 9, read with Section 15 of the CGST Act, 2017 – Amend Notification No. 01/2017 – Central Tax (Rate) dated 28.06.2017 – CGST Rate – Goods – Real Estate Sector
29.03.2019	09/2019-CENTRAL TAX (RATE)	Section 9, read with Section 16 of the CGST Act, 2017 – Amend Notification No. 02/2019 – Central Tax (Rate) dated 07.03.2019 – Application of Composition Rules

CIRCULARS

DATE	CIRCULAR	REMARKS
28.03.2019	94/2019	Clarification on refund related issues under GST.
28.03.2019	95/2019	Clarification on verification for grant of new registration.
28.03.2019	96/2019	Clarification on transfer of input tax credit in case of death of sole proprietor.
05.04.2019	97/2019	Clarification on exercise of option to pay tax under notification No. 2/2019- CT(R) dt 07.03.2019 issued.
23.04.2019	98/2019	Seeks to clarify the manner of utilization of input tax credit post insertion of the rule 88A of the CGST Rules.
23.04.2019	99/2019	Seeks to clarify the extension in time under sub-section (1) of section 30 of the Act to provide a one time opportunity to apply for revocation of cancellation of registration on or before the 22nd July, 2019 for the specified class of persons for whom cancellation order has been passed up to 31st March, 2019.

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TIMELINE - GST

Adv. Rajesh Joshi

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		April, 2019	20th May 2019
			May, 2019	20th June 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
			April to June 2019	31st July 2019
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		April, 2019	11th May 2019
			May, 2019	11th June 2019
(iii)	Quarterly return for Composite taxable persons	GSTR-4	April to June 2019	18th July 2019
(iv)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(v)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	
(vi)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	
(vii)	Return to be filed by the persons who are required to	GSTR-7	April 2019	10th May 2019

	deduct TDS (Tax deducted at source) under GST.		May 2019	10th June 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	April 2019	10th May 2019
			May 2019	10th June 2019
(ix)	Details of inputs/capital goods sent for job-work. Quarterly Form	GST ITC-04	July 2017 to March 2019	30th June 2019
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	30th June 2019

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"SUPPLY" ISSUES THEREUNDER

Sh. P.C. Joshi
Advocate

IMPACT OF CONSTITUTIONAL AMENDMENTS

In order to undertake the historical reform in indirect taxes 101st Constitution (Amendment) Act, 2016 was adopted by the Parliament. The said amending Act was notified on 16th Sept, 2016. Passing of the said amendment to the Constitution heralded, the new GST Regime under which, the separation of powers under Article 246 between the Parliament and the State legislature, earmarked till then; was altered by insertion of Article 246A, whereunder both the Centre and State, were empowered to levy tax on supply of goods as well as services. It may be noted herein that Article 246A override the provisions of Article 246, concurrent power was conferred on both Parliament and the State Legislatures, for collection of GST both on the intra-State supply as well as inter-State supply of goods as well as services.

Article 248 of the Constitution that provide for the residuary power of legislation to the Parliament, would also be subject to the provisions of Article 246A. Article 246A (2) enable the legislation in regard to inter-State supplies. Article 366 is a definition article which was also amended by insertion of sub-clause (12A) so as to define the phrase "*goods and service tax*" to mean tax on supply of goods or services or both except the tax on the supply of alcoholic liquor for human consumption. Correspondingly clause (26A) dealt with the definition of the term '*services*' to mean anything other than goods.

It is surprising the note that Article 366(29A), which provided for as many as six types of non-sales transactions as *'deemed sale'* remained unchanged by the 101st Amendment of Constitution, however in view of the fact that entry 54 in list II (State list) of the Seventh Schedule appended to the Constitution, was drastically restricted to only taxes on sale of petroleum products as well as alcoholic liquor for human consumption, Article 366(29A) in my view, would have very limited application only to clause (f) thereof relating to tax on the supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply of the service is for valuable consideration. Such a situation have led to consumption of liquor with snacks supplied freely, though can be considered to be in the nature of '*mixed supply'* as defined in section 2(74) of CGST Act, no tax can be levied because liquor is outside the purview of the Act, and snacks though taxable were supplied free without any separate consideration. Such anomalies are required to be resolved at the earliest for the ultimate success of the tax reform.

Article 286 which placed restrictions on the power of the State legislature to levy tax on sale or purchase of goods when the nature of the transaction, happen to be between two States. In other words the State from where the movement commenced was entitled to provide for levy inter-State tax under the provisions of section 9(2) of Central Sales Tax Act, 1956.

Consequent to the amendment of Article 286 by the 101st Constitution (Amendment) Act, the inter-State nature of transactions both of supply of goods as well as services, when it take place in the course of Inter-State trade or commerce; will now be covered by the Parliamentary law under the name of *'Integrated Goods and Service Tax Act, 2017'*, while the intra-State supplies will be under Central Goods & Service Tax Act, 2017 as well as the State Goods and Service Tax Act, 2017. Simply put, the rate of GST under IGST will be CGST plus SGST.

The restriction on the rate of tax on goods of special importance contained in Article 286(3) was omitted; with the result, the items like Hides and Skin, Coal, Oil seeds, crude oil and iron and steel etc., would be on par with other goods.

Our nation being of federal nature, 29 States were enjoying the power to levy tax on supply of goods, while Parliament by Finance Act, 1994 with the periodical changes, was levying Service Tax. After great deal of efforts and exchange of views between the States and the Centre, it was ultimately decided to have the uniform provisions throughout the nation in regard to the levy of tax on supply of goods, services or both. The question of division of revenue was decided by enactment of Central Goods and Service Tax, Integrated Goods and Service Tax for inter-State and import supplies, while each State was directed to enact its own Separate GST Act with uniform provisions more or less on the basis of CGST provisions.

ENACTMENT OF NEW LAWS

The respective enactments, were brought into force from 1st July, 2017, however on a hurried glance at the new enactments, even the experts / professionals found it to be very complex and difficult to gulp with the basics of law embedded in their mind in relation to the earlier laws relating to tax on sale or purchase of goods or rendering of services *in-separatim.* It was uniformly echoed in all directions, that we have to unlearn what was learnt in the past and try to understand the implication of the *'terms'* used in the new law, relating to supply (not sale) of Goods and / or Services or both.

ESSENTIAL ELEMENTS FOR A VALID LAW

At this Juncture of understanding Goods and / or Service tax enactments, it would be worthwhile to note the apt observations of the Supreme Court as back as on 26th April, 1985 in the case of *Govind Saran Ganga Saran Vs. Commissioner of Sales Tax & Ors 60 STC 01 (SC)* as under:

> "*The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of*

law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity".

It is worthwhile to note that during the period of last 21 months, the GST council has shown its willingness to change, by reducing the number of rates on several items of mass consumption. Ultimately as on today the supply of items liable to the highest rate of 28% is reduced to a great extent. I hope our country also would fall under the category of other nations having one single rate of GST and that would tantamount to attaining the ultimate goal of '*One Nation One Tax'.*

With the above short background I would proceed to consider some of the issues.

Salient features of GST:

"The salient features of GST are these:

(i) GST applies on "supply" of goods or services as against the earlier concept of the manufacture of goods, or the sale of goods, or the provision of services.

(ii) GST is based on the principle of destination-based consumption taxation, as against the earlier principle of origin-based taxation.

(iii) It is a dual GST with the Centre and the States simultaneously levying a tax on a common base. GST to be levied by the Centre is called Central GST (CGST) and that to be levied by the States called State GST (SGST).

(iv) An Integrated GST (IGST) is levied on inter-State supply (including stock transfers) of goods or services. This shall be levied and collected by the Government of India, and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by Law on the recommendation of the GST Council.

(v) Imports of goods or services are treated as inter-State supplies and are subject to IGST, besides the applicable customs duties.

(vi) Exports would be zero-rated supplies. Thus, goods or services that are exported would not suffer input taxes or taxes on finished products.

From a study of the provisions of all the three new laws namely CGST, SGST and IGST, it would be noticed that by and large the provisions of CGST have been adopted under the other two allied laws.

SCOPE OF SUPPLY

I refrain herein to refer all the relevant definitions under CGST Act; however we should first consider the taxable event that would raise the liability under GST. In my view, Section 7 of CGST Act, provide for the *"scope of supply*" with a very wide area by adopting an inclusive provision to cover all forms of supply of goods or services or both. The provision further illustrate the hitherto known categories of commercial transactions such as sale, transfer, barter, exchange licence, rental and lease, however all such inclusive transactions should be in the course of or in furtherance of the business. In other words for a valid levy of GST, the presence of three requirements are essential or are

required to be fulfilled before the transaction can be considered to be covered by the provision of section 7 read with section 9 which happens to be a charging section. Such essential ingredients are:

i*) There should be existence of goods or services which is required to be supplied by A to B.*

ii) There should be in reality a supply from A to B for a consideration.

iii) All such supplies should be in the course of one's business or for the purpose of continuing or attaining a target set for the business in question.

Absence of any of the above three elements will take the transaction outside the scope of GST Regime and therefore not amenable to the levy of GST.

Taking all the three elements together, the GST is a law which provide for levy of tax both under CGST as well as SGST on the supply of goods and / or services by A to B for a consideration with the intention of carrying on the business or in the course thereof and or in furtherance thereof.

GOODS AND SERVICES

The term 'goods' have been defined u/s.2(52) to mean every kind of movable property including actionable claim, growing crop etc., while the term 'services' as defined in section 2(102) to mean anything other than goods, money and securities but include the activities relating to the use of money from one firm to another for a separate consideration. It also include the services of facilitating or arranging a transaction in securities, even though securities are not included under the term '*goods' or 'services'*.

SERVICES

The moot question in this regard is as to whether the definition of the term *'services'* is valid or otherwise by insertion of activities and not the term *'supply of services'* in the context of the provisions of *(Constitution (101st) Amendment Act 2016*.

TAX ACTIVITIES ?

The said Constitution Amendment Act, refer only to the expressions *'Supply of Goods or Services'* in all the amended Articles including Union list and State list nowhere does it refer to the enabling power of the Parliament to provide for the tax on activities, as is sought to be included in the above definition. An activity would mean the combination of operations undertaken by an individual whether it is for a business profession or trade whether of commercial nature or not. It may be a charitable activity or a voluntary help. An educational institution or a charitable trust can also be said to be having an activity in furtherance of its object but that is not for carrying on any business of commercial nature. So considered, in my view, the correct scope of CGST cannot cover the activities of every nature, other than those in the nature of business and that too for a consideration, therefore the question of granting exemption to any activity which cannot be termed as a commercial activity can never arise.

COURSE OF BUSINESS

It is by now well established that the expression "the course of business" have a definite connotation well settled by several judgements both by High Courts as well as the Supreme Court. In nutshell the course of business contemplates an idea of gradual or continuous flow, progress for the desired object of earning profit therefrom. It may be the case of a manufacturer, trader, profession or services. In all such transactions, a common thread that is involved is the presence of 'consideration'.

BUSINESS - CONSIDERATION

It may be of interest to recall that under the provisions of MVAT Act, the term 'business' was defined in the very vide manner so as to include a transaction which is debited or credited with the profit and loss account or a transaction in connection with or commencement or closure of the business. While the term *'sale'* covered a transaction of sale of goods for cash or deferred payment or other valuable consideration. The expression used in CGST though widely termed does not cover several such transactions which are now kept outside the scope of defined terms '*business'*, '*services' and goods*.'

Reverting back to the definition of the term 'services' to include activities relating to use of money. It inherently narrow down, the scope of services or transactions for money consideration. That is also made clear by definition of the term 'consideration' which also restricts its application to the supply of goods or services for any payment made or promised in monetary value and not otherwise. It is very important to note here that a deposit obtained or paid for future supply of goods or services is expressly kept out of the definition of the term '*consideration*' till such time as the same is adjusted for the supply of services or goods.

The above discussion leads to the only conclusion that though the expression used is *'consideration'* and not '*valuable consideration'* any object / action which cannot be relatable to money consideration, will continue to be outside the purview of the law.

SCOPE OF SECTION 7

Yet another aspect of the matter which needs to be highlighted is the proper scope of section 7 and 9. When both the sections are read together alongwith the entire Scheme of the Act, what is required to be always considered before any activity or transaction is sought to be roped in for the purpose of levying tax, is that to ascertain the real nature thereof. If that is not commercial it would not be covered by the wide tax net.

SCHEDULE - I

Schedule I appended to the Act, specify certain activities which for the purpose of the Act are to be treated as supply even when such transactions are completed without consideration.

Serial No.2 under the said Schedule require our attention in greater details since it relate to supplies between related persons or between a non-resident taxable person and casual taxable person who receive shorter period for obtaining registration. The

expression *"related person"* have not been defined under the Act but Explanation under section 15(5), which relate to the computation or value of taxable supply refer certain persons to be treated as related persons for the purposes of the Act. It must be noted here again that such supplies even if to be treated as such, the same should be in the course or furtherance of business that is made clear in the concluding portion of Entry 2 of Schedule I. When one considers any activity with the touch stone of the above principles, the services by an employee to an employer or any his customers, would not be treated as liable to tax because when an employee is under service of an advocate or a Chartered Accountant he would obviously render the professional services without any consideration of any nature qua the customer or client. Such supplies of services by the employee's *per-se* in my view cannot be considered to be covered by the scope of entry 2 of Schedule I but the professional services as such by the Advocate or CA will be considered to be supply of services.

In this connection I may refer to certain decisions by Advance Ruling Authorities or its appellate authority. The first decision pertains to popularly known as *'cross charge'* in accounting terminology.

CROSS CHARGES

The case before Karnataka Appellate Authority for Advance Ruling arose in an appeal filed by *M/s. Colombia Asia Hospitals Pvt. Ltd., decided on 12th December, 2018*. In that case, the employees in the State of Karnataka at the corporate office, in the course of their services to the legal entity (employer) also maintained certain records pertaining to accounts and other administrative activities carried on by their units located in other States. There was no separate relationship of employer employee…qua such units and the employee concerned was duty bound as part of his service conditions, required to maintain the records in the course of the employment, during the office hours at the corporate office. In other words, the employees who maintained such separate records were not expected to work beyond the office hours for maintainace of such records of units in other States. For the purpose of determining the financial status periodically qua the functions at those units separately, the expenses of salaries and other overhead expenses were apportioned on the basis of the volume of activities.

The question arose as to whether allocation of expenses can be considered to be for the supply of services to those units simply because under the provisions of section 25(4) each such unit was required to be separately registered, especially keeping in mind the entry 2 of Schedule 1 referred to above read as a whole with the provisions of section 7.

SCHEDULE III

The assessee relying on entry 1 of Schedule III of CGST Act, contended that the services by the employee to the employer in the course of employment was not a supply and therefore no GST was leviable on such payments. The appellate authority rejected the submissions that the analogy of ISD (Input Service Distributor) concept u/s.20 should

be considered for holding that the distribution of expenses cannot amount to supply contemplated u/s.7 r/w. other relevant provisions. The reasoning given by the appellate authority in my view is not correct because the separate registration u/s.25(4) is procedural aspect which cannot create taxable events contemplated between two distinct persons for a consideration as discussed hereinabove. The appellate authority seems to have overlooked the statutory provision that section 7(1)(a) necessarily require the presence of a consideration, in furtherance or in the course of business. The business contemplated should be specifically for the supply which is sought to be taxed. When the accounts and other records are maintained at the corporate office, the employee does not render any service to the units in other States especially because the corporate office can never be considered to be carrying on the business of maintaining, the administrative records of outsiders for a specified consideration.

SCHEDULE I ENTRY 2

Entry 2 of Schedule 1 is also worded in accordance with the above position in law. That also seems to have been lost sight of by the appellate authority. In my view, the special provision in respect of services by an employee to the employer by way of entry I of Schedule III would prevail over the general provision under entry 2 of Schedule I on the basis of settled law that special prevail over general. It may also be noted that sub-clause (d) of section 7(1) have been omitted retrospectively from 1st July 2017, so as to clarify that while considering the scope of supply, the activities specified in Schedule II will not be considered for determining whether a particular transaction is a supply or not but simultaneous insertion of section (1A) in section 7 made it clear that the scope is restricted only for determining whether a particular supply, if it all that can be so considered, is that of goods or services. Thus the earlier ambiguity of treating the activities in Schedule II to be that of supply even when such an activity did not constitute '*supply'* under the main provisions of the Act have ben removed. Furthermore, I may point out that when there is conflict between the main provisions of the Act and the entries in Schedule, the provisions would prevail *M/s.Alphali Pharmaceuticals Ltd Vs. State of Maharashtra AIR 1989 SC 2227 at 2239* especially because the entries *per-se* cannot be considered as a charging provision on par with section 9 of the CGST Act, because Schedule II is attached to only section 7. It is interesting to note that the appellate authority have observed in para 33 that the decisions under the service tax provisions would not be applicable to GST as in its view the taxable events under both the enactments are vastly different. I agree to that settled principle of law.

LIQUIDATED DAMAGES

Yet another decision of the Advance Ruling Authority on the above aspect is of the State of Maharashtra which is reported as the case of *Zaver Shankarlal Bhanushali (2019) 61 GSTR 189 (AAR) (Mah).*

The facts in nutshell in that case were in relation to the supplies by the developer pursuant to an agreement for re-development of the premises between the owner of the

land and the developer. A separate agreement with the tenants of old premises, for vacating the same, was also executed. The questions before the AAR were (i) whether the compensation paid to the tenant by the developer / owner was liable to GST and (ii) whether in case of delay in handing over, the redeveloped premises within the stipulated period, the damages payable to the tenant by the developer / owner whether liable to GST

The Advance Ruling Authority held in favour of the Revenue on both the counts overlooking a basic principle that for treating a receipt in the hands of the tenants there was nothing that can be said to have been supplied to the developer. In the present scenario where the possession of the duly constructed agreed premises much after the full payment of consideration is delayed for no fault of the allottee-allotment letter holder, the inference of supply by him to the developer in my view is far-fetched.

Simple common sense meaning of the term; supply would mean that the supplier must possess something which can be passed on to another person. That the delayed possession is perforce tolerated but in no case such tolerance can ever be intended to be covered by entry 5(e) of Schedule II.

In regard to damages for delay in returning the redeveloped premises, the AAR referred to entry 5(e) of Schedule II appended to CGST Act which reads as under:

5. Supply of services

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

(a) (b) (c) (d) ……

(e) agreeing to the obligation to refrain from an act, or to tolerate an act of situation, or to do an act;"

OMISSION OF SECTION 7(1)(d)

The order in question is dated 20th May, 2018 in which the concerned authority referred to the scope of supply as it then prevailed however we should notice that on 29th August, 2018 by Act No.31 of 2018 certain provisions under CGST Act, 2017 were amended. Section 3 of the said Amendment Act (retrospectively w.e.f. 1st July, 2017) omitted clause (d) of sub-section (1) of section 7 and simultaneously inserted sub-section (1A) thereunder. The Parliament has thus removed the ambiguity *visa-a-vis* the activity listed in Schedule II of the CGST Act. The pre-existing sub-clause (d) having been omitted right from the beginning of the Act, it is made clear that the scope of Schedule II is restricted only to determine whether a particular supply is the supply of goods or services and not whether a transaction is in the nature of supply or not even if it does not amount to be that of supply on the basis of other provisions of the Act. The supposition of deemed supply even when the activity did not constitute a supply is now resolved in favour of the tax payers, therefore the aforesaid decision suffer from the vice of '*per-incuriam'*.

Liquidated damages paid by developer / owner to the tenants for delay in giving back the redeveloped premises have to be understood in a commercial manner. It is a measure to compensate the sufferer.

The reasoning of the authority seems to be on the basis of interpretation of clause (e) under entry 5 (2) of Schedule II which relate to "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*". The reasoning given by me while commenting on the appellate decision from Karnataka, would equally apply to the present case decided by Maharashtra Advance Ruling Authority. In addition thereto we should always bear in mind, the basic principle about the proper connotation of the term *'supply'*. I may recall that three necessary elements or ingredients have to be shown to be present before a transaction can be considered to be that of supply. In the present case, where the tenant is receiving the compensation for delay in re-possession of redeveloped premises it does not involve any element of service by the tenant nor any supply by the tenant can be inferred to the developer for which it can be said that the consideration passed on from developer to the tenant. Secondly no supply was ever made by the tenant because it cannot be inferred to be in the course of business of tolerating the delay and that too for a consideration. The later retrospective amendment by Act 31 of 2018 with effect from 1st July, 2017, also support my view that for a valid transaction of supply all the ingredients necessarily have to be first established for application of sub-section (1) of section 7 and thereafter the provision of sub-section (1A), inserted simultaneously to ascertain as to whether the transaction is that of supply of goods or services can be applied. In my view therefore the decision of AAR Maharashtra referred to above, is required to be challenged before the appellate authority and if required before the Higher Forums. On this aspect of matter, we may gainfully refer to several complaints submitted before the designated Real Estate Regulatory Authority Constituted under Real Estate (Regulation and Development) Act, 2016.

FREE SUPPLY – "BUY ONE TAKE TWO"

Several promotion Schemes are quite often offered in various business lines especially by manufacturers of Pharmaceuticals of Drugs and medicines, manufacturers of readymade garments and electronic goods as promotion Schemes under which, with a view to increase the volume of sale and / or to attract the customers to new products; public announcements are made for example *'buy one take two'*, buy one on easy EMI or supply free samples to medical doctors who in their turn may prescribe such new medicines to their patients. The question for valuation of such supply and the revenue thereon was found to be difficult especially while determining or apportioning the claim of ITC in the hands of the suppliers vis-à-vis such free distributions. The Central Board of Indirect taxes and Customs have recently issued its circular No.92/11/2019-GST on 7th March, 2019 by which the Board have clarified various doubts in regard to free samples and gifts involving samples of drugs and medicines as also the promotional Scheme of buy one get one free offers as well as discounts for purchases above a particular quantity, in weight or by numbers.

After considering the provisions of the CGST Act, it has been clarified that samples supplied free of cost without any consideration do not qualify as *'supply'* under GST, however where the activity of distribution of gifts and free supply of samples are

covered by the scope of supply under Schedule I, the supplier would continue to be eligible for ITC otherwise not. The discount known as quantity discount or secondary discount offered by the supplier to the customer will have to be excluded while determining the value of supply.

In view of the abovementioned statutory clarification u/s.168(1) of the CGST Act, I am of the view that the said clarifications would take care of all doubts in relation to free supply and no more problems would ensue on that counts in future. The clarification so made is binding on all authorities therefore the litigations on that aspect has been pre-empted.

CONCLUSION

There are several other aspects which remain to be dealt with but because of paucity of time at my disposal I would deal with it sometime in future.

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LEVY OF CGST ON REAL ESTATE SECTOR – CHANGES BROUGHT FROM 01.04.2019 THROUGH NOTIFICATIONS & RULES

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By the issue of Notification No.11/2017-Central Tax (Rate) dated 28.6.2017, rates of CGST have been notified for the intra-State supply of services. In the Table therein, Serial No.3 dealt with the Heading 9954 (Construction services) and the **item (i)** thereunder dealt with construction of a complex, building, civil structure etc. CGST rate of 9% has been specified by allowing deduction of one third of the total amount charged for such supply towards cost of the land, as per para 2 in the Notification. No condition has been attached. Supplier can claim eligible Input Tax Credit (ITC). Notification No 4/2018 Central Tax (Rate) Dated 25th January, 2018 permitted registered person supplying development rights to a developer etc., and the registered person supplying construction service of complex etc., to pay tax at the time when the said developer, builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter).

Pursuant to the decisions taken in the 34th meeting of the GST Council held on 19.3.2019, several Notifications have been issued providing for a new tax structure to the Real Estate Sector. Notification No.3/2019-Central Tax (Rate) dated 29.3.2019 brought many amendments to N. No.11/2017-Central Tax Rate dated 28.6.2017. These amendments shall come into force with effect from 1.4.2019.

Notification No.3/2019-Central Tax (Rate) dated 29.3.2019

Item (i) of Serial No.3 has been substituted.

Item (i)

This item relates to 'Construction of **AFFORDABLE RESIDENTIAL APARTMENTS** by a promoter in a Residential Real Estate Project (**RREP)**'.

'Affordable residential apartment' has been defined in clause (xvi) of paragraph 4 relating to Explanation under N. No.11/2017-Central Tax Rate.

'Promoter' has been defined in clause (xvii) ibid.

Definition of 'promoter' from Section 2 (zk) of Real Estate (Regulation and Development) Act, 2016

"(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of—
(a) Buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;"

RREP has been defined in clause (xix).

"(xix) the term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the ***commercial apartments*** *is not more than 15 per cent of the total carpet area of all the apartments in the REP;"*

'Carpet area' is defined in Para 4 (xxvi) –'shall have the same meaning assigned to in clause (k) of Section 2 of the RERA, 2016'.

"2 (k) ***"carpet area"*** *means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.*

Explanation— For the purpose of this clause, the expression "exclusive balcony or verandah area" means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and "exclusive open terrace area" means the area of open terrace which is

appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;"

Under Item (i), it could be either a project, which commenced on or after 1.4.2019 or an ongoing project, in respect of which the promoter **has not exercised option** to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), intended for sale to a buyer, wholly or partly.

This item does not apply to a situation 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.

For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).

The rate of CGST is 0.75%.

The following conditions mentioned in Column 5 (8 Provisos) shall apply to items (i) to (id):-

As per the ***first Proviso***, central tax shall be paid in cash, by debiting the electronic cash ledger only.

As per the ***second Proviso***, credit of input tax charged on goods and services used in supplying the service has not been taken **except** to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP.

As per the ***third Proviso***, the registered person shall pay, by debit in the electronic credit ledger or electronic cash ledger, an amount equivalent to the input tax credit attributable to construction in a project, time of supply of which is on or after 1st April, 2019, which shall be calculated in the manner as prescribed in the Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;

'REP' is defined in clause (xviii) ibid.

Definition of REP from Section 2 (zn) of Real Estate (Regulation and Development) Act, 2016

> *"(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"*

Annexure-I in N. No.3/2019 specifies the procedure for computing ITC before the due date for furnishing of the return for the month of September following the end of the FY 2018-19 in respect of REP other than RREP. Also please see Illustrations 1 and 2 thereunder.

Annexure-II in N. No.3/2019 specifies the procedure for computing ITC before the due date for furnishing of the return for the month of September following the end of the FY 2018-19 in respect of RREP. Also please see Illustrations 1 and 2 thereunder.

Fourth Proviso reads as follows:-

"Provided also that where a registered person (landowner- promoter) who transfers development right or FSI (including additional FSI) to a promoter (developer-promoter) against consideration, wholly or partly, in the form of construction of apartments, -

(i) the developer- promoter shall pay tax on supply of construction of apartments to the landowner- promoter, and

(ii) such landowner – promoter shall be eligible for credit of taxes charged from him by the developer promoter towards the supply of construction of apartments by developer-promoter to him, provided the landowner- promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the developer- promoter.

Explanation - (i) "developer- promoter" is a promoter, who constructs or converts a building into apartments or develops a plot for sale,

(ii) "landowner- promoter" is a promoter who transfers the land or development rights or FSI to a developer- promoter for construction of apartments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently."

Fifth Proviso is extracted below:-

"Provided also that eighty percent of value of input and input services, [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas], used in supplying the service shall be received from registered supplier only;"

Sixth Proviso reads as follows:-

"Provided also that inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;"

Seventh Proviso reads as follows:-

"Provided also that where value of input and input services received from registered suppliers during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier) falls short of the said threshold of 80 per cent., tax shall be paid by the promoter on value of input and input services comprising such shortfall at the rate of eighteen percent on reverse charge basis and all the provisions of the Central Goods and Services Tax Act,

2017 (12 of 2017) shall apply to him as if he is the person liable for paying the tax in relation to the supply of such goods or services or both;"

Eighth Proviso is extracted below:-

"Provided also that notwithstanding anything contained herein above, where cement is received from an unregistered person, the promoter shall pay tax on supply of such cement at the applicable rates on reverse charge basis and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017), shall apply to him as if he is the person liable for paying the tax in relation to such supply of cement;"

(Please refer to the easy illustrations in Annexure III)

Explanation -

1. The promoter shall maintain project wise account of inward supplies from registered and unregistered supplier and calculate tax payments on the shortfall at the end of the financial year and shall submit the same in the prescribed form electronically on the common portal by end of the quarter following the financial year. The tax liability on the shortfall of inward supplies from unregistered person so determined shall be added to his output tax liability in the month not later than the month of June following the end of the financial year.
2. Notwithstanding anything contained in Explanation 1 above, tax on cement received from unregistered person shall be paid in the month in which cement is received.
3. Input Tax Credit not availed shall be reported every month by reporting the same as ineligible credit in GSTR-3B [Row No. 4 (D) (2)]."

Annexure-III contains three illustrations.

Item (ia):-

This item relates to '**Construction of** RESIDENTIAL APARTMENTS **OTHER THAN AFFORDABLE RESIDENTIAL APARTMENTS** by a promoter in a Residential Real Estate Project (**RREP**)'.

It could be either a project, which commenced on or after 1.4.2019 or an ongoing project, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), intended for sale to a buyer, wholly or partly.

This item does not apply to a situation 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.

For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).

The rate of CGST is 3.75%.

Item (ib)
This item relates to construction of **COMMERCIAL APARTMENTS** (shops, offices, godowns, etc.) by a promoter in **RREP**.
It could be either a project, which commenced on or after 1.4.2019 or an ongoing project, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), intended for sale to a buyer, wholly or partly.
This item does not apply to a situation 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.
For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).
The rate of CGST is 3.75%.

Item (ic)
This item relates to construction of **AFFORDABLE RESIDENTIAL APARTMENTS** by a promoter in **REP** other than RREP.
It could be either a project, which commenced on or after 1.4.2019 or an ongoing project, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), intended for sale to a buyer, wholly or partly.
This item does not apply to a situation 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.
For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).
The rate of CGST is 0.75%.

Item (id)
This item relates to construction of **RESIDENTIAL APARTMENTS** other than affordable residential apartments by a promoter in **REP** other than a RREP.
It could be either a project, which commenced on or after 1.4.2019 or an ongoing project, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), intended for sale to a buyer, wholly or partly.
This does not apply to a situation 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.

For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).
The rate of CGST is 3.75%.
The following conditions mentioned in Column 5 (Provisos) of the Table shall apply to items (ie) and (if) against Sl. No.3:-
As per the **first Proviso,** in the case of ongoing project, the registered person **shall exercise one time option** in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the **10th of May, 2019;**
Annexure-IV is the option form.
As per the **second Proviso,** where the **option is not exercised** in Form at annexure IV by the **10th of May, 2019**, option to pay tax at the rates as applicable to item (i) or (ia) or (ib) or (ic) or (id) above, as the case may be, **shall be deemed to have been exercised;**
As per the **third Proviso, invoices for supply of the service** can be issued during the period from **the 1st April 2019 to 10th May 2019 before exercising the option, but such invoices shall be in accordance with the option to be exercised.;**

Item (ie)
This item relates to construction of an **apartment** in an **ongoing project** under any of the schemes specified in sub-item (b), sub-item (c), sub item (d), sub-item (da) and sub-item (db) of **item (iv);** sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of **item (v);** and sub-item (c) of item (vi), against serial number 3 of the Table, **in respect of which the promoter has exercised option to pay central tax** on construction of apartments at the rates as specified for this item.
Please see enclosure for the above sub items.
For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).
The rate of CGST is 6%.

Item (if)
This relates to construction of a complex, building, civil structure or a part thereof, including,- (i) commercial apartments (shops, offices, godowns etc.) by a promoter in a **REP** other than RREP, (ii) residential apartments in an ongoing project, **other than affordable residential apartments**, in respect of which the promoter **has exercised option** to pay central tax on construction of apartments at the rates as specified for this item in the manner prescribed herein, but excluding supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) above 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.

Explanation -For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.
For the purpose of valuation of this service, provisions of para 2 of N. No.11/2017 would apply (deduction of one third of the total amount charged for such supply towards value of land).
The rate of CGST is 9%

Item (ii) and the entries relating thereto in columns (3), (4) and (5) in N. No.11/2017 are omitted. The following was the extract of item (ii).
"(ii) Composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.
The rate of CGST is 9%.
In item (iv) of N. No.11/2017, services mentioned at items (i), (ia), (ib), (ic), (id), (ie) and (if) are excluded.
In item (v) of N. No.11/2017, services mentioned at items (i), (ia), (ib), (ic), (id), (ie) and (if) are excluded.
New item (va) has been inserted after item (v) as follows:-
"(va) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of **affordable residential apartments** covered by sub- clause (a) of clause (xvi) of paragraph 4 below, in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), as the case may be, in the manner prescribed therein,
CGST Rate is 6%."
The following conditions are made:-

Provided that **carpet area** of the **affordable residential apartments** as specified in the entry in column (3) relating to this item, is **not less than 50 per cent of the total carpet area** of all the apartments in the project;

Provided also that for the purpose of determining whether the apartments at the time of supply of the service are affordable residential apartments covered by sub- clause (a) of clause (xvi) of paragraph 4 below or not, **value of the apartments shall be the value of similar apartments booked nearest to the date of signing of the contract** for supply of the service specified in the entry in column (3) relating to this item;

Provided also that in case it finally turns out that the carpet area of the affordable residential apartments booked or sold before or after completion, for which gross amount actually charged was **forty five lakhs rupees or less and the actual carpet area was within the limits prescribed in sub- clause (a) of clause (xvi) of paragraph 4 below,**

was less than 50 per cent. of the total carpet area of all the apartments in the project, the recipient of the service, that is, the promoter shall be liable to pay such amount of tax on reverse charge basis as is equal to the difference between the tax payable on the service at the applicable rate but for the rate prescribed herein and the tax actually paid at the rate prescribed herein";

In item (vi) of N. No.11/2017, services mentioned at items (i), (ia), (ib), (ic), (id), (ie) and (if) are excluded.

Item (xii) is the residuary entry. The following entry shall be substituted:-

"(xii) Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above."

However, as per the Explanation under item (xii), supply by way of services specified at items (i), (ia), (ib), (ic), (id), (ie) and (if) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5). Tax shall not be levied at the rate as specified under this entry.

Item 16 in N. No.11/2017 reads as follows:-

"Heading 9972 Real estate services -----CGST Rate 9%"

Pre-amended item (ii) column (3) read as follows:-

"(ii) Supply of land or undivided share of land by way of lease or sub lease where such supply is a part of composite supply of construction of flats, etc. specified in the entry in column (3), against serial number 3, at item (i); sub-item (b), sub-item (c), subitem (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and subitem (c) of item (vi)." (NIL rate of tax)

The above item has been amended as follows:-

"against serial number 16,in item (ii) in column (3), for the word, brackets and letters "sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item(d) and sub-item (da)of item (v); and sub-item (c) of item (vi)", the word, brackets figures and letters " (i) (ia), (ib), (ic), (id), (ie) and (if)" shall be substituted;"

New entry 39 has been inserted

"39. Chapter 99 ---Supply of services other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI) by an unregistered person to a promoter for construction of a project on which tax is payable by the recipient of the services under sub- section 4 of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), as prescribed in notification No. 07 / 2019- Central Tax (Rate), dated 29th March, 2019, published in Gazette of India vide G.S.R. No. _, dated 29th March, 2019.

Explanation –

This entry is to be taken to apply to all services which satisfy the conditions prescribed herein, even though they may be covered by a more specific chapter, section or heading elsewhere in this notification.

Rate of CGST – 9%

Para 2 of N. No.11/2017 has been amended.

Pre-amended para

"2. In case of supply of service specified in column (3), in item (i); sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply."

Amendment:-

"for the words, brackets, letters and figures "sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi)," the word, brackets, letters and figures " (i) (ia), (ib), (ic), (id), (ie) and (if)" shall be substituted;

Pre amended Explanation:-

"Explanation –For the purposes of this paragraph, "total amount" means the sum total of,- (a) consideration charged for aforesaid service; and (b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease."

Amendment:-

"in the Explanation, after the words "this paragraph" the words "and paragraph 2A below" shall be inserted;"

New Paragraph 2A:-

"2A. Where a registered person transfers development right or FSI (including additional FSI) to a promoter against consideration, wholly or partly, in the form of construction of apartments, the value of construction service in respect of such apartments shall be deemed to be equal to the Total Amount charged for similar apartments in the project from the independent buyers, other than the person transferring the development right or FSI (including additional FSI), nearest to the date on which such development right or FSI (including additional FSI) is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 above."

In Paragraph 4 relating to explanation after clause (xii), new clauses (xiii) to (xxxi) have been inserted.

Heading of Paragraph 4:-

"4.Explanation.-For the purposes of this notification,-

Mostly the new clauses are definitions to the words used in the Notification.

STATUS OF TDR AND FSI IN GST FROM 01.04.2019
(N. No.4/2019-CT (R) dated 29.3.2019.)

In Notification No.4/2018-Central Tax (Rate) dated 25.1.2018, the Government, while considering supply of development rights and supply of construction complex as '**supply of services'** had set out that the tax liability on TDRs arises at the time when the developer transfers possession or the right in the constructed complex/building to landlord by entering into a conveyance deed or giving an allotment letter to the person transferring development rights, ie., land owner. Since then, this has become a burning issue in the real estate sector. Pursuant to the decision of the GST Council in its 34th meeting to the effect that the **tax on development rights** would be exempt, only for the **residential projects,** Government has issued **Notification No.4/2019 Central Tax (Rate) dated 29.3.2019.**

1. This Notification shall come into force wef 1.4.2019.
2. It amends N. No.12/2017 CT-R dated 28.6.2017.
3. By amending opening paragraph, power to grant exemption from payment of tax has also been exercised under Section 9 (3) and (4), Section 15 (5) and Section 148, in addition to Section 11 (1), originally contemplated.
4. New Entry 41 A has been inserted for Heading 9972. Exemption has been provided in respect of the **service by way of TDR or FSI including additional FSI** on or after 1.4.2019 for construction of **RESIDENTIAL APARTMENTS** by a promoter in a project, intended for sale to a buyer, wholly or partly. The amount of GST exemption in relation to residential apartments has to be computed by applying the following formula:-
   GST payable on TDR or FSI including additional FSI or both for construction of the project x carpet area of the residential apartments in the project /Total carpet area of the residential and commercial apartments in the project.
5. This exemption is subject to the condition (first Proviso in Column 5) that the promoter shall pay tax at the applicable rate on RCM basis on such proportion of value of TDR or FSI including additional FSI or both, as is attributable to the residential apartments, **which remain un-booked** on the date of issuance of completion certificate, or first occupation of the project, as the case may be, (for short 'said date') as per the following formula:-
   GST payable on TDR or FSI including additional FSI or both but for the exemption granted x carpet area of the residential apartments which remain un-booked on the said date/total carpet area of the residential apartments.
6. As per the second Proviso, the said tax shall not exceed 0.5% of the value in the case of affordable residential apartments and 2.5% of the value in the case of residential apartments, other than affordable residential apartments, remaining un-booked on the said date. The liability to pay the said tax shall arise on the said date.
7. New Entry 41B has been inserted for Heading 9972. Exemption has been provided on the **upfront amount** (called as premium, salami, cost, price,

development charges or by any other name) payable in respect of service by way of granting of long term lease of THIRTY YEARS, or more, on or after 1.4.2019, for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly.

8. This exemption is subject to the condition (first Proviso in Column 5) that the promoter shall pay tax at the applicable rate on RCM basis on such proportion of the said upfront payment paid for long term lease of land, as is attributable to the residential apartments, **which remain un-booked** on the date of issuance of completion certificate, or first occupation of the project, as the case may be, (for short 'said date') as per the following formula:-
   GST payable on the said upfront amount but for the exemption granted x carpet area of the residential apartments which remain un-booked on the said date/total carpet area of the residential apartments in the project.
9. As per the second Proviso, the said tax shall not exceed 0.5% of the value in case of affordable residential apartments and 2.5% of the value in the case of residential apartments other than affordable residential apartments remaining un-booked on the said date. The liability to pay the said tax shall arise on the said date.
10. New paragraphs 1A and 1B have been inserted as follows to compute the value of supply of service of TDRs and value of un-booked property:-
    "1A. Value of supply of **service** by way of transfer of development rights or FSI by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.
    1B. Value of portion of residential or commercial apartments remaining **un-booked** on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be."
11. In paragraph 3 relating to Explanation, the following clauses have been inserted:-
    (v)-The term 'apartment' has been defined. It has the same meaning as assigned at Section 2 (e) of RERA.
    (vi)- 'Affordable residential apartment'--same meaning as assigned to it in N. No.11/2017 CT (R) dt. 28.6.2017
    (vii)- 'Promoter'- same meaning as assigned at Section 2 (zk) of RERA.
    (viii)- 'project'— means a Real Estate Project (REP) or a Residential Real Estate Project (RREP).
    (ix)-'REP'—same meaning as assigned at Section 2 (zn) of RERA.
    (x)-'RREP'—means a REP in which the carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments in the REP.
    (xi)- 'carpet area'—same meaning as assigned at Section 2 (k) of RERA.

(xii)-'an apartment booked on or before the date of issuance of completion certificate or first occupation of the project; shall mean an apartment which meets all the following three conditions, namely—

(a) Part of supply of construction of the apartment service has time of supply on or before the said date; and

(b) Consideration equal to at least one instalment has been credited to the bank account of the registered person on or before the said date; and

(c) An allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the said date'.

(xiii)- 'floor space index (FSI)'—means the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.

PAYMENT OF TAX ON REVERSE CHARGE BASIS
(Notification No.5/2019-CT (R) dated 29.3.2019)

Notification No.13/2017- CT (R) dated 28.6.2017 notified the categories of supply of services under Section 9 (3) of the CGST Act, 2017 in respect of which tax is to be paid on reverse charge basis. By the issue of **N. No.5/2019- CT (R) dated 29.03.2019**; N. No.13/2017 has been amended by inserting new entries 5B and 5C.

1. Entry 5B provides for payment of tax on RCM basis by the recipient ie., promotor in respect of the services supplied by any person **by way of TDRs or FSL including additional FSI** for construction of a project by a promoter.
2. Entry 5C provides for payment of tax on RCM basis by the recipient ie., promoter in respect of the services supplied by any person **in the nature of long term lease of land** (30 years or more) against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.

In the Explanation, clauses (i) to (n) have been inserted providing for the definitions of 'apartment', 'project', 'REP', 'RREP' and 'FSI'. These definitions are the same as herein above stated.

DATE ON WHICH LIABILITY TO PAY TAX ARISES.
(Notification No.6/2019-CT (R) dated 29.3.2019.)

Earlier N. No.4/2018- CT (R) dated 25.1.2018 has been issued notifying the persons, who are liable to pay tax and when such liability to pay tax would arise in relation to TDRs and construction service. Similarly, N. No.6/2019 has been issued for such purpose.

1. A promoter, who receives TDRs or FSI including additional FSI on or after 1.4.2019 for construction of a project against consideration payable or paid by

him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash; and

2. a promoter, who receives long term lease of land on or after 1.4.2019 for construction of residential apartments in a project against consideration payable or paid by him, in the form of upfront amount (called as premium, salami, cost, price, development charges or aby any other name)

Following are the registered persons, who are liable to pay tax on the

(a) consideration paid by him in the form of construction service of commercial or residential apartments in the project for supply of TDRs or FSI including additional FSI,

(b) monetary consideration paid by him, for supply of TDRS or FSI including additional FSI relatable to construction of residential apartments in project

(c) said upfront amount paid by him for long term lease of land relatable to construction of residential apartments in the project and

(d) supply of construction service by him against consideration in the form of TDRs or FSI including additional FSI

On the date of issuance of completion certificate for the project, where required, by the competent authority or on its first occupation, whichever is earlier?

It must be noted that as per clause (vii) under Explanation, the said tax on the services received **is required to be paid under reverse charge basis** in accordance with N. No.13/2017- CT (R) dated 28.6.2017, as amended.

In the Explanation, clauses (i) to (vi) have been inserted providing for the definitions of 'apartment', 'promoter', 'project', 'REP', 'RREP' and 'FSI'. These definitions are the same as herein above stated.

PAYMENT OF TAX ON REVERSE CHARGE BASIS ON GOODS & SERVICES OR BOTH BY THE PROMOTER.
(Notification No.7/2019-CT (R) dated 29.3.2019)

By the issue of N. No.3/2019 – CT (R) dated 29.3.2019, Government has provided lower rates of CGST in respect of affordable and other than affordable residential apartments subject to some conditions mentioned in Column 5 of the table therein. Inter alia, the following are the conditions relevant to the present context:-

Seventh Proviso in column 5 of the Table reads as follows:-

"Provided also that where value of input and input services received from registered suppliers during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier) falls short of the said threshold of 80 per cent., **tax shall be paid** by the promoter on value of input and input services comprising such **shortfall** at the rate of eighteen percent on **reverse charge basis** and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017) shall apply to him as if he is the person liable for paying the tax in relation to the supply of such goods or services or both;"

Eighth Proviso in column 5 of the Table is extracted below:-

"Provided also that notwithstanding anything contained herein above, where **cement** is received from an unregistered person, the promoter **shall pay tax** on supply of such cement at the applicable rates on **reverse charge basis** and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017), shall apply to him as if he is the person liable for paying the tax in relation to such supply of cement;"

To effectuate the said two Provisos, N. No.7/2019 CT (R) dated 29.3.2019 has been issued.

In respect of the shortfall mentioned above in the Seventh Proviso, tax has to be paid by the promoter under Section 9 (4) of the CGST Act on reverse charge basis.

In respect of cement mentioned above in the Eighth Proviso, tax has to be paid by the promoter under Section 9 (4) of the CGST Act on reverse charge basis.

In respect of Capital goods also, tax has to be paid by the promoter under Section 9 (4) of the CGST Act on reverse charge basis, if tax is payable or paid at the rate prescribed for items (i), (ia), (ib), (ic) and (id) against Sl. No.3 in the Table in N. NO.11/2017- CT (R) dated 28.6.2017.

As per the Explanation in N. No.7/2019 the terms 'promoter', 'project', 'REF', 'RREP and 'FSI' are defined at clauses (i) to (v).

RATE OF TAX ON GOODS OTHER THAN CAPITAL GOODS AND CEMENT (Notification No.8/2019-CT (R) dated 29.3.2019)

By N. No.1/2017 CT (R) dated 28.6.2017 rates of tax in relation to supply of goods have been notified. In that, Schedule III goods are taxable @ 9% CGST.

In view of the conditions contained in the seventh and eighth provisos mentioned in column 5 of the Table against Sl. No.3 (i) to (id) of N. No.11/2017, tax has been directed to be paid on reverse charge basis in respect of other than excluded goods and services or both, cement and capital goods by the promoter vide N. No.7/2019-CT (R) dated 29.3.2019 on reverse charge basis.

By N. No.8/2019- CT (R) dated 29.3.2019, 'supply of any goods other than capital goods and cement by an unregistered person to a promoter for construction of the project on which tax is payable by the promoter as recipient of goods under Section 9 (4) of the CGST Act' is made taxable at the rate of 9% CGST by inserting Entry 452 Q in Schedule III in N. No.1/2017 CT (R) dated 28.6.2017. In short, if the promoter purchases any goods other than capital goods and cement from an unregistered person, he has to pay CGST @ 9% on RCM basis.

N. No.8/2019 also has an Explanation defining 'promoter', 'project', 'REP' and 'RREP against clauses (i) to (iv).

As per clause (v) under Explanation, this entry 452Q has to be applied to all goods, which satisfy the conditions prescribed therein, even though they may be covered by a more specific chapter/heading/sub heading or tariff item elsewhere in this notification. It means, this entry overrides any other entry covering the goods purchased by a promoter from an unregistered person.

AMENDMENTS TO THE CGST RULES, 2017
(Notification No.16/2019-Central Tax dated 29.3.2019)

By the issue of N. No.16/2019-CT dated 29.3.2019, CGST Rules, 2017 have been amended. The following are the relevant amendments concerning Real Estate sector, pursuant to the Central Tax-Rate Notifications issued on 29.3.2019.

Amendment to Rule 42 (manner of determination of ITC in respect of inputs or input services and reversal thereof):-

With effect from the 1st April, 2019, the following Explanation has been inserted in clause (f) of sub Rule (1) of Rule 42: -

"Explanation: For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date."

Proviso, along with Explanations 1 and 2 has been inserted in clause (i) of sub Rule (1) of Rule 42 of the Rules to provide for calculations in tune with the amendments made to item (i) against Serial No.3 in Notification No.11/2017-CT ® dated 28.6.2017.

Similarly clauses (l) and (m) have also been amended for the same purpose.

Sub Rule (2) has also been amended.

Sub Rule (3) has been inserted, requiring calculation of ITC for each ongoing project or project, which commences on or after the 1st April, 2019.

Sub Rule (4) has been inserted requiring calculation for commercial portion in each project, other than residential RREP.

Sub Rules (5) and (6) have also been inserted to deal with the same subject.

Amendment to Rule 43 (manner of determination of ITC in respect of capital goods and reversal thereof in certain cases):-

With effect from the 1st April, 2019, the following Explanation has been inserted after clause (b) of sub Rule (1) of Rule 43: -

"Explanation: For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the said Act, the amount of input tax in respect of capital goods used or intended to be used exclusively for effecting supplies other than exempted supplies but including zero rated supplies, shall be zero during the construction phase because capital goods will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date.";

Clause (g) has been amended for the same purpose. Proviso has been inserted.

New clause (i) has been inserted.

Sub Rule (2) has been substituted.

Sub Rules (3), (4) and (5) have been added.

Present Explanation has been numbered as 'Explanation 1' and Explanation 2 has been inserted. As per Explanation 2, certain terms (apartment, project, REP, RREP, promoter, etc.) have been defined for the purposes of Rules 42 and 43, from clauses (i) to (xiii).

Enclosure

List of projects as specified under Notification No 11/2017 – Central Tax (Rate) as amended.		
Item	**Type – Construction of**	**Under the scheme**
(iv)(b)	a civil structure or any other original works	Jawaharlal Nehru National Urban Renewal Mission or Rajiv AwaasYojana
(iv)(c)	a civil structure or any other original works pertaining to the "ln-situ redevelopment of existing slums using land as a resource	Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban)
(iv)(d)	a civil structure or any other original works	"Beneficiary led individual house construction / enhancement" under the Housing for All (Urban) Mission/Pradhan MantriAwasYojana
(iv)(da)	a civil structure or any other original works	"Economically Weaker Section (EWS) houses" constructed under the Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban)
(iv)(db)	a civil structure or any other original works	"houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/ Lower Income Group (LIG)/ Middle Income Group-1 (MlG-1)/ Middle Income Group-2 (MlG-2)" under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban)
(v)(b)	single residential unit otherwise than as a part of a residential complex	----
(v)(c)	low-cost houses up to a carpet area of 60	In a housing project approved by competent authority empowered under the 'Scheme of

	square metres per house	Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India.
(v)(d)	low cost houses up to a carpet area of 60 square metres per house	In a housing project approved by the competent authority under- (1) the "Affordable Housing in Partnership" component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana; (2) any housing scheme of a State Government.
(v)(da)	low-cost houses up to a carpet area of 60 square metres per house	In an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March, 2017.
(vi)(c)	a residential complex predominantly meant for self-use or the use of their employees or other persons specified under para 3 of the Schedule III of the CGST Act.	Specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017.

Note: This is for academic understanding of the new tax structure only. Readers are advised to go through the relevant Notifications and Rules, before taking any decision.

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MOVING TOWARDS FUTURE - INTELLIGENT AND INTEGRATED SOLUTION: GST AND E-WAY BILL- IT'S IMPLICATION

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The seamless movement of consignments from source to destination in an efficient manner is the key for development and success of economy and also one of the objects of GST. Infrastructure as well as facilities involved for multimodal transport in the commercial world in India needs to be supported by the robust digital infrastructure for seamless movement of consignments and recording of transactions as well as their intelligent verification ensuring compliance of law. Proper recording of every transaction is a need for healthy competitive business where there is no scope of unhealthy competition due to possibility of tax evasion. The integrated solution is also necessary for the collection of the proper and correct taxes essentially needed for the citizens of the country.

The 'Goods & Service Tax' no doubt has been planned with this objective and probably after initial hick-ups it may stabilize and very soon achieve the goals. The "self-policing mechanism" i.e. matching of Outward supply with the Inward supply and consequently ensuring correct claim of ITC as well as due payment of tax by one and all was proclaimed as one of the effective advantage of GST. During the planning stage for GST it was propagated by the policy makers that all the checkposts on the boarders of the states will go away and there would be seamless movement of goods from one corner to another corner of the country. This idea was well received not only by Trade & Industry but more so by the Transport and Logistic sector, it was expected that in the GST regime the system of movement of goods and doing business in the country is going to tremendously change. Everybody of us was in great hope……, but this hope have shattered as some of the states could not accept this idea, as the state administration of Commercial Tax Department was not able to garner the required trust of business and industry to implement GST without 'E-Way Bill'.

Suddenly, the idea of 'National E-Way Bill' cropped-up and hurriedly legal provisions now contained in Section 68 of CGST Act, 2017 and Rule 138 to 138-D of the CGST Rules 2018 were framed and incorporated into draft GST law just before the start of so called very short public debate. At that time also the policy makers and law framers re-assured the Trade & Industry including Transport and Logistics sector that the new system of GST would ensure hassle free and seamless movement of goods throughout the country.

The question that arise 'Why E-Way Bills?'

The ideal situation as well as one of the prime aims of introduction of GST in the country as "Tax Reform" was to make movement of goods easy and hassle free without any need of personal intervention by the Officers of the Tax Check Posts or on Road by the Officers of Mobile Squad.

Since, E-way bill is introduced by Rule 138 of the CGST Rule, 2018 the other provisions such as following comes into play:

Rule 138-A which prescribe - Documents and Devices to be carried by a person-in-charge of the conveyance or

Rule 138-B which prescribe - Verification of documents and conveyance or

Rule 138-C which prescribe - Inspection and verification of goods or

Rule 138-D which prescribes - Uploading of information regarding detention of vehicle etc.

Without these gripping provisions under GST Act there is no point for prescribing 'E-Way Bill'. Thus, once these draconian provisions has been placed on the statute whereby total tax alongwith equivalent amount of penalty i.e. 200% of the basic tax amount is required to be forcefully deposited for release of the consignment and vehicle, such powers are bound to be misused by inspectors or officers on road in the Mobile Squad due to the discretion and availability of opportunity of personal interaction. Removing the check posts in GST be than just an eye wash and nothing more.

If the harsh attitude and impractical approach continues in GST regime by same set Administrative Officers who were earlier responsible to check the consignments in the erstwhile Trade Tax or VAT regime then probably one of the major objective of implementation of GST will be frustrated and the positive effects will not be available to the Indian economy. Not only Central Government, but every State needs to frame such law and procedures, so that it could not be mis-used by anybody including the officials in the larger interest of the economy and nation.

The requirement and system of 'E-Way Bill' could be dispensed with if "GSTN IT platform" of the Government ensures the correct matching of 'Tax Invoices' as recorded by the outward supplier and the inward recipient of the goods. Unfortunately, due to the reasons known to the Government in spite of GST in place for more than eight months, GSTN system has not yet taken any information of inward supply i.e. purchases etc. including Input Tax Credit in GSTR-2. Probably the in-efficiency of the Government IT Platform is forcing the requirement of introduction of the system of 'National E-Way Bill'. Unfortunately, it is at the detriment of honest & fully complied Tax payers.

Had there been a mandatory requirement as envisaged in GST Law of additionally uploading of "Tax Invoice" through Official Web Portal of the Government then there would have been no distinct need of creation of 'E-Way Bill'. This will not only eliminate the burden on the official web portal for separately issuing 'E Way Bill' for every transaction of Rs.50,000/- or more for which 'Tax Invoice' has already been issued and recorded by the supplier. This will also save the precious time consumed by

the employees of Trade & Industry including Transporters avoiding duplicacy of work and possibility of wrong punching of any information while generating 'E-way Bill'. Further it will also save time and burden of again uploading of invoice data on web portal at the time of furnishing monthly returns i.e. GSTR-1 which will also relive burden on IT platform making it comparatively free during the last days of return filing.

To my mind the advantages as claimed by bureaucracy in favor of the requirement of 'E Way Bill' are much less than the dis-advantages in the shape of repetition of work as well as enhanced burden on IT Platform. Every action entails some cost to the stake-holder which is an avoidable burden on economy making transection more cost effective, this should be considered by the policy makers in the larger interest of competitive business.

The biggest advantage as assumed and propagated by the administration is to stop the multiple re-use of the same 'Tax Invoice' on the same day for movement of more than one set of similar goods specially for the short distances across the borders of the states as the consignment is covered under 'E-Way bill', but my strong apprehension is that the procedure prescribed under Rule 138 to 138-D under Notification No. 12/2018 – Central Tax dated 7.03.2018 this aim could not be achieved as this notification provides that the cancellation of 'E-way Bill' is possible within 24 hours by the supplier as well as rejection of 'E-Way Bill' by the recipient within 72 hours, this unscrupulous method may be adopted to hide the multiple transaction, so the aim to check the repeated movement of goods under one set of documents cannot be achieved by the newly designed system of 'E-Way Bill'.

It is required that the fast and efficient digitally supported system should be put in place under which the transaction is automatically verified through RFID Tag for the individual consignment or group of consignments loaded in any mode of transportation without physical intervention or stoppage of vehicle.

The most important issue in GST concerning the 'E-Way Bill' is that this system is adversely impacting the basic philosophy of the Government of minimal interaction between tax payer and the tax controller/tax inspectors. The philosophy of the present Government of minimal contact to avoid corruption seems to be not achieved; this may be against the roadmap of corruption free India.

Apart from this issue, the Government with open heart has considered many suggestions of Trade & Industry including Transporters & Logistics Sector to provide better and un-ambiguous procedures in the re-introduced 'National E-way Bill' system under certain eventualities which may avoid many practical difficulties.

In the era of multimodal transportation the Government has already envisaged the practical requirement that consignments may take various modes like Road, Rail, Water-ways, Sea or Air during its transportation from source to destination and thus provided in 'Rule 138A(1)(b) proviso' that there is no requirement of 'E-way bill' in physical form or 'E-way Bill' number in electronic form or 'E-way bill' mapped on RFID device embedded on the conveyance when the goods are moving by rail or air or vessel. So, only E-way bill is required to be kept by the in-charge of the vehicle when the

goods are transported on road. The railway has been placed under responsibility to deliver the goods only when the recipient furnishes the valid copy of 'E-way Bill' for the consignment. Further the responsibility of generation of 'E-way Bill' has not been casted on the shoulders of railways or airways or vessel companies while a transporter in addition to a registered person being the supplier or the recipient may generate 'E-way Bill' if authorized in that respect.

Further, the Transporter needs to be enrolled or registered on the 'E-way Bill Portal' of the Government to update details of mode/conveyance of transport in Part–B of E-way Bill 01 in respect of the transection under movement, each transporter will be allotted a TRANSID (a unique number like GSTIN) for identification, it is important to note that the transporter must declare the details of all the warehouses and offices on the 'E-way Bill Portal' at time of obtaining TRANSID at GST Portal, this is necessary in order to avoid harassment from tax authorities during verification raids conducted at the warehouses or offices of the transport companies.

The well designed intelligent and integrated system of reporting and verification of commercial transactions based on a robust Information Technology Platform could be a great help for faster and smoother movement of goods in the era of multimodal transportation.

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ANNUAL RETURN UNDER GST

Adv. Sandeep Goyal
Adv. Pranav Jain

MEANING

GSTR 9, under the provisions of the GST ACT 2017, is the annual return. It is a form of compilation return which in its purview includes all the transactions related to thebusiness done for the particular Financial Year. It consists of details about the supplies made and received during the year under the different tax heads i.e., CGST, SGST, and IGST. The purpose of the GSTR-9 is to consolidate information previously furnished in the monthly or quarterly returns.

All the monthly and quarterly returns must be filed before filing the annual return. The Annual Return in Form GSTR-9 is not a rectification return but a consolidation return, which requires that data provided in monthly and quarterly returns must match the data on the GSTR-9 exactly.

DIFFERENT TYPES OF ANNUAL RETURN

GSTR 9: It is the Annual return for registered persons under the regular scheme.

GSTR-9A: This is the Annual Return to be filed by registered taxpayers under the composition scheme. It is a summary of all quarterly returns previously filed by the composition taxpayer.

GSTR-9B: This is the Annual Return for the E-Commerce operators who have filed GSTR-8 during the previous financial year. It is basically an audited, annual account, duly certified by competent authority.

GSTR-9C: This is a reconciliation statement to be filed by taxpayers whose annual **turnover exceeds INR 2 crores** during the financial year. All such taxpayers are required to have their accounts audited by a Chartered Accountant, or Cost Accountant, and file a copy of their audited annual accounts. It is also necessary to file a reconciliation statement of tax already paid and details of tax payable as per audited accounts, along with this return.

CATEGORY OF PERSONS WHO HAVE TO FILE ANNUAL RETURN

All the taxable persons (registered) are responsible for filing a GSTR-9 return, regardless of the fact that whether there were business operations during the year or not (i.e., even when the returns during the period were NIL, a Nil Annual Return has to be filed). Even in the case of cancellation of registration this annual return is required to be filed.

However, as per **Section 44(1) of the CGST Act, 2017** the following persons are not required to file GSTR-9:

- Persons paying tax under section 51 or 52 (i.e., persons paying TDS).
- Non-resident taxable persons
- Input service distributors

- Casual taxable persons
- Taxpayers opting Composition scheme as they must file GSTR-9A

It is also a matter of fact that a registered person who has switched from regular to composition, or from composition to regular, is required to file both GSTR-9 &GSTR-9A for the relevant period.

DETAILS REQUIRED IN ANNUAL RETURN FORM GSTR-9

GSTR-9 is divided into **6 parts** and **19 tables**

Part I: Basic details of the taxpayer like GSTIN, legal and trade names, financial year etc. These details will be auto-populated in the form.

Part II: Details of Outward and Inward supplies declared during the financial year(FY). This detail must be picked up by consolidating summary from all GST returns filed in previous FY.

Part III: Details of the Input Tax Credit (ITC) as declared in returns filed during the financial year. Part III also asks for details of the ITC reversed and ineligible ITC as declared in individual returns.

Part IV: Here, taxpayers will input details of taxes paid as declared in returns filed previously during the fiscal year.

Part V: The transaction particulars of the previous fiscal year, declared in returns from April to September of the current fiscal year, or up to the date annual returns of previous fiscal year were filed, whichever is earlier. Additional or omitted entries belonging to the previous fiscal year, but reported in current fiscal year, are to be declared here as well.

Part VI: Other Information comprising details of:

- Segregation of inward supplies received from different categories of taxpayers like Composition dealers, deemed supply and goods supplied on approval basis.
- Demands and Refunds under GST.
- HSN wise summary information of the quantity of goods supplied and received with its corresponding Tax details against each HSN code.
- Details of Late fees paid or payable.

SIMPLIFICATION OF FORM GSTR-9 & GSTR-9C

As per 31st GST Council Meeting held on 22nd December 2018 Form **GSTR 9** was recommended to be simplified by the incorporation of following points:

- HSN code may be declared only for those inward supplies whose value independently accounts for 10% or more of the total value of inward supplies.
- If any additional payments are to be made they can be done through the FORM GST DRC-03 in cash.
- ITC cannot be availed through FORM GSTR-9 and FORM GSTR-9C.
- Verification by a taxpayer who is uploading the reconciliation statement would also be included in FORM GSTR-9C.
- All monthly/quarterly GST Returns must be filed before filing Annual returnsOutward or Inward supplies to be declared in the Annual returns to be

'supplies made during the financial year' and not 'supplies, as declared in GST returns filed'

- Value of 'No Supply' can be declared under Exempt supplies section at Table 5D, 5E or 5F of GSTR-9
- In GSTR-9, Table 8A-ITC as per GSTR-2A – auto-populates all invoices related to FY 2017-18 irrespective of the month of filing GSTR-1 by suppliers

DUE DATE FOR FILLING OF GSTR 9

As per the 31st GST Council Meeting held on 22nd December 2018 the due date for filing various GSTR-9 forms for FY 2017-18 **has been extended to 30th June, 2019** which earlier was 31.03.2019.

PENALTY FOR LATE FILING

Delayed or non-filing of GSTR-9 returns under this provision would result in a penalty of Rs. 200 (100 each for SGST and CGST) for each day of default. The penal charges will continue until the taxpayer makes the remittance, though the total charges wouldn't exceed Rs. 5,000.

COMPARISON OF GSTR-9 & GSTR-9C

Points of comparison	**GSTR-9 Annual Return**	**GSTR-9C Reconciliation Statement**
Filling by Whom	GST Registered taxpayer	GST registered taxpayer to whom **GST AUDIT** is applicable.
Non – Applicability	• Casual Taxable Person • Non-Resident Taxable Person • Input Service Distributor • Unique Identification Number Holders • Online Information & Database Access Retrieval Service providers • Composition Dealers • Persons subject to TCS or TDS provisions	Those mentioned under GSTR-9 but also a registered person whose aggregate turnover in an FY is less than Rs. 2 Crores
Nature	Informational, a consolidation of all **GST Returns**	Analytical statement on GST returns certified by GST Auditor/ CA/CMA for GST authorities to take necessary action

Late fees & penalty	Late fees of Rs 200 per day of delay subject to a maximum cap of an amount of 5000	No specific provision, Hence, subject to a general penalty of Rs 25,000
Format of the return	Consolidated summary details of the turnover, ITC and tax paid, late fees as per the GST returns filed between July 2017 and March 2018 along with its amendments made between April 2018 and September 2018. Further, declaration of demands/ refunds, supplies from composition dealers, Job works, and goods sent on an approval basis, HSN wise summary of outward and inward supplies, late fees payable is required.	**Part-A** -Reporting of reconciliation needed between turnover, tax paid and ITC. Report on Auditor's recommendation of any additional tax liability. **Part -B** -Certificate by GST Auditor/ CA/ CMA
Certification	No certification required by CA/CMA but must be attested by the taxpayer using a digital signature	Certification of GST Auditor is required who is either a CA/CMA through digital signature and must be attested by the taxpayer using a digital signature
Annexures	No annexures to be attached	Annexure of Audited financial statement is required

GSTR -9C

GSTR -9C consists of two main parts:

Part A – Reconciliation Statement

Part B – Certification

Part A of GSTR 9C further is divided into **5 basic parts** and the same is summarized here under:

PART -1 comprises of Basic Details like Financial Year for which GSTR 9C is being filed, GSTIN Number, Legal Name and Trade Name of the Entity.

The reconciliation statement is to be filed for every GSTIN Separately. Distinction between a trade name and a legal name must be clearly understood and borne out in clause 3A and 3B of Part I. Attention must be paid to the fact that the trade name and legal name are not used interchangeably.The reference to current financial year in this statement is the financial year for which the reconciliation statement is being filed for

PART -2 Reconciliation of turnover declared in audited Annual Financial Statement with turnover declared in Annual Return (GSTR9)

Part 2 consists of reconciliation of the annual turnover declared in the audited Annual Financial Statement with the turnover as declared in the Annual Return furnished in FORM GSTR-9 for this GSTIN

PART -3 Reconciliation of tax paid
Payment of taxes cannot be made while filing GSTR 9C. Declaring additional turnover/Taxes while filing GSTR 9 or Annual Return would simply mean informing proper officer on voluntary basis that you have not paid tax. In such cases one FORM GST DRC-03 (for making payment of taxes and interest) is needed to be filed and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC–04.

PART -4 Reconciliation of Input Tax Credit (ITC)
ITC availed (after reversals) as per the audited Annual Financial Statement shall be declared in this part. There may be cases where multiple GSTINs (State- wise) registrations exist on the same PAN. This is common for entities with presence over multiple States. Such entities will have to internally derive their ITC for each individual GSTIN and declare the same in this part. It may be noted that reference to audited Annual Financial Statement includes reference to books of accounts in case of persons / entities having presence over multiple States.Any ITC which was booked in the audited Annual Financial Statement of earlier financial year(s) but availed in the ITC ledger in the financial year for which the reconciliation statement is being filed for shall be declared here in this part along with any ITC which has been booked in the audited Annual Financial Statement of the current financial year but the same has not been credited to the ITC ledger for the said financial year.

PART-5 Auditor's recommendation on additional Liability due to non-reconciliation
Part 5 consists of the auditor's recommendation on the additional liability to be discharged by the taxpayer due to non-reconciliation of turnover or non-reconciliation of input tax the auditor shall also recommend if there is any other amount to be paid for supplies not included in the Annual Return. Any refund which has been erroneously taken and shall be paid back to the Government shall also be declared in this table. Lastly, any other outstanding demand which is recommended to be settled by the auditor shall be declared in this Table. Towards, the end of the reconciliation statement taxpayers shall be given an option to pay their taxes as recommended by the auditor.

Part B – Certification
Reconciliation statement (FORM GSTR-9C) can be drawn up and certification can be done by the person who had conducted the audit of Accounts or it can be done by someone who has not conducted the audit of Accounts. Format of Certification are different in both the cases.

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SEVA BHOJ YOJANA – REIMBURSEMENT OF GST PAID ON PURCHASE OF RAW FOOD ITEMS

Ms. Priyamvada Joshi
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The Ministry of Culture along with the Department of Revenue has introduced a scheme by the name of "Seva Bhoj Yojana" by way of which the charitable / religious institutions can claim refund of the CGST and the Central Government's share of IGST paid at the time of purchase of certain raw food items used in the preparation of food articles which is distributed free of cost to the devotes or general public. The said scheme was introduced by way of an Order dated 31st May, 2018 and guidelines vide F. No. 13-1/2018-US (S&F) dated 01.08.2018 was issued in this regard. The scheme has been made operational from 01.08.2018. The raw food items for which the scheme is available are as under:

1. Ghee
2. Edible oil
3. Sugar / Jaggery / Bura
4. Rice
5. Atta / Maida / Rava / Flour
6. Pulses

The guidelines enlist certain conditions on fulfillment of which a charitable organization becomes eligible to apply for refund under the Seva Bhoj Yojana which are as under:

1. The organization must be covered under the provisions of Section 10 (23BBA) of the Income Tax Act, 1961 or registered under the provision of Section 12AA of the Income Tax Act, 1961 or must be a Company registered or formed under Section 25 of the Companies Act, 1956 or Section 8 of the Companies Act, 2013 or a society registered under the Societies Registration Act, 1860 for religious / charitable purposes.
2. Such an organization must be involved in such charitable / religious activities by way of free or philanthropic distribution of food items / bhandara / langar / Prasad free of cost
3. The organization must be in existence for preceding 3 years before applying for financial aid.
4. The organization has to provide such services of offering free food for at least a period of three years prior to the date of application. Self certificate is to be furnished in this regard.
5. The organization must not receive any other financial aid from any Government for the distribution of free food.
6. They should provide free food to at least 5000 people in a calendar month.

7. The institutions blacklisted under Foreign Contribution Regulation Act (FCRA) or under the provisions of any Act/Rules of the Central/State Government are not eligible for the financial assistance.

There shall be a onetime enrollment till 31.03.2020 after which the enrollment shall be reviewed and then renewed. The charitable / religious institution has to first register on "Darpan portal" and get a Unique ID after which the institute shall enroll itself in CSMS Portal on the Ministry of Culture website. The application has to be made online and requisite documents as mentioned in the Guidelines are to be submitted along with the Application on the Portal. After the enrollment on the CSMS Portal, the organization shall submit an application in the format prescribed with a copy of the registration certificate issued by the Ministry of Culture to the Nodal Central Tax Officer in the state / UT. He shall then generate a Unique Identity Number (UIN).

The maximum amount of financial assistance which can be claimed in the Financial Year 2019-2020 is limited to the amount of financial assistance in 2018-19 plus 10% of that amount. A separate Account is to be maintained by the institution for the grant received from Central Government under this Scheme.

There shall be a single (nodal) Central Tax Officer for all purposes of the Scheme. The refund applications are to be furnished on quarterly basis within a period of six months from the last date of the quarter in which the purchases are made. Documents to be submitted along with the application are as under:

1. Purchase invoices
2. Unique Enrollment Number issued by Ministry of Culture and UIN issued by Central Tax Officer.
3. CA Certificate certifying the following:
   a. Quantity, price and tax paid on specified items during the claim period.
   b. Involvement in charitable activities and distribution of free food.
   c. Claim is not more than previous year's / quarter's claim plus 10% for the current year / quarter.
   d. Raw food purchased is used only for distribution of free food in the period of claim.
   e. The institution fulfills all the eligibility criteria as listed earlier.

However, such Scheme is not to be misused as Inspection and monitoring will be carried out at least once a year in 5% of the cases and in case of misuse the organizations would be liable for recovery of the misused grant. The institution will be blacklisted. All movable and immovable assets created from the use of such grant will be taken over by the Government and the financial aid will be recovered with penal interest apart from criminal action under the law.

Note: For further clarification kindly refer to The Guidelines Issued by the Ministry of Culture on 01.08.2018 and Circular No. 75/49/2018-GST dated 27.12.2018 issued by the Department of Revenue.

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TREATMENT OF INTEREST UNDER GST

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When drafting the laws about the Goods and Services Tax, the GST Council set tax rates on hundreds of services and supplies, and even interest is on the list. Many suppliers require their customers to make payment for supplies by a certain date. If the payment is not made, the supplier charges Interest on the amount due from the customer. If you charge interest to your customers, you may want to understand how that works with the new GST system.

INTEREST ON DELAYED PAYMENT DUE FROM CUSTOMER UNDER GST

The Section 15 of the CGST Act, 2017 deals with the **"Value of Taxable Supply"** which is as follows:

> *15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*
>
> *(2) The value of supply shall include——*
>
> *(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;*
>
> *(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;*
>
> *(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;*
>
> ***(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and***
>
> *(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.*

Explanation.—For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) The value of the supply shall not include any discount which is given—

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if—

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this Act,—

(a) persons shall be deemed to be "related persons" if—

(i) such persons are officers or directors of one another's businesses;

(ii) such persons are legally recognised partners in business;

(iii) such persons are employer and employee;

(iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.

As per Section 15(2)(d), interest or late fee or penalty for delayed payment of any consideration for any supply will be included in the value of supply.

So, the above provision clearly states that any interest or late fee or penalty for delayed payment of consideration for any supply of goods or services will be included in the value of supply of that goods or services.

At what rate GST will be applicable on interest?

As the provision makes it clear that any interest received for delayed payment of consideration for any supply will be included in value of supply so the interest will be also charged at same rate at for which the customer has delayed the payment. The same can be understood from the following Illustration:

Mr. A in Rajasthan supplies Wall Paper for value of Rs. 500000.00 to Mr. B in Gujarat on 1st November 2018. The terms of payment are that Mr. B should make payment for the supply by 15th November 2018 and if Mr. B defaults in payment, interest @ 12% per annum will be applicable for every day of default in payment. Mr. B makes the payment on 15th December 2018.

Here, Mr. B defaults in payment by 30 days. Hence, Mr. A charges interest @ 12% for 30 days on Rs. 500000.00, which will amount to Rs. 5000. The rate of GST applicable to Wall Paper is 18%. Since this is an interstate supply, IGST @ 18% will be applicable on interest amount of Rs. 5,000. Hence, IGST of Rs. 900 will be applicable.

When will be GST liable to be paid on interest?

When supplier charges interest to customers, you don't have to report or pay the GST until you receive the interest from your customer. The liability to pay GST on interest arises on the day the customer pays the interest, not on the day the interest becomes due. For example, in the above case, the liability to pay GST on interest arises when Mr. B makes the interest payment on 15th December 2018, not when it becomes due on 16th November 2018. For the same Mr. A will issue debit note in favour of Mr. B.

CONCLUSION:

Hence, GST on interest received from debtors of a business will be applicable. In other words, interest charged and collected by a supplier on a supply has to be included in the transaction value as it is part of vale of supply under Section 15(2)(d) of CGST Act, 2017 and it needs to be accounted and disclosed in GST Returns accordingly.

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ANTI-PROFITEERING FOR CONSTRUCTION SECTOR- 'A NEBULOUS LAW'

CA Anuj Bansal

Anti profiteering authorities have created menace in industry and fear is to the extent that every sector is worried when 'sword of domicile' will fall on it. Specifically the kind of recent orders passed by the anti-profiteering authorities in case of works contract have created unease amongst the construction companies. The orders have been passed without following the intention of the law and applying mind which have eventually created havoc. In this article, I am discussing provisions relating to Anti profiteering and synopsis of a recent case law specifically related to construction companies.

Legal Provisions relating to Anti-Profiteering:

Anti-profiteering provisions has been introduced under CGST Act 2017 vide Section 171. Intention of this law is to pass on any benefit accrued due to introduction of GST to final customers. Benefit can accrue due to two reasons. First, due to reduction of rate of tax on supply of goods or services and the other due to additional Input Tax Credit. Benefit can be passed on by reduction in prices to final customers. Chapter XV of CGST Rules 2017 contains provisions related to Anti-profiteering.

To administer the provisions of law, four-tier authority is formulated. All applications will be screened by State level Standing Committee. Upon being satisfied that the supplier has contravened the provisions of Section 171 of CGST Act, 2017, then it shall forward the application with its recommendations to the Standing Committee for further action. Where Standing Committee is satisfied that benefit has not been passed to final customers, it shall refer the matter to the Director General of Anti-profiteering (DGAP) for detailed investigation. DGAP on completion of investigation, furnish its report to National Anti-profiteering Authority (NAPA). NAPA shall be the final authority to pass the order as to whether benefit of reduction of prices or input tax credit has been passed to final customers. As per Rule 126 of CGST Rules 2017, NAPA may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices.

The whole contention starts with this rule as there is no concrete method prescribed under law for calculation of the benefit. In recent orders passed by NAPA, it is observed that huge amount of unjustifiable liability has been imposed on assesses. It is also observed that in couple of rulings, the Assesses filed writ petition before the High Courts against the order of NAPA. Therefore, it has become a standard process that in most of the rulings the Assesses are filing writs and seeking the relief from the High

Courts. Eventually, High Courts are becoming an authority for determining the profit pocketed by the Assesses.

Anti-profiteering and Works Contract:-

The department in order to keep a vouch for a reduction in prices relating to works contract also issued a **Circular No. 296/07/2017-CX9 dated 15/06/17** wherein the department has categorically mentioned that there has been reductions in the overall cost by abolition on various taxes which were forming part of the cost like excise duty, entry tax, etc. and accordingly, benefit of such reduction has to be passed on to the customers by the builders otherwise it would amount to Anti profiteering.

2018 (9) TMI 1107- National Anti-Profiteering Authority in RE: Pyramid Infratech Pvt. Ltd.

As I have stated above, my article is more specific to Anti profiteering rulings taken place of works contract, therefore, I am discussing the landmark ruling i.e. Re: Pyramid Infratech Pvt. Ltd. wherein a process has been determined by the authorities and which are blindly applied in case of other works contracts including in the order of Gurukripa Developers & Infrastructures Pvt. Ltd.

In the above order, the Applicants filed an application before Anti Profiteering Authority alleging that respondent (builder) has not passed on the benefit of reduction in cost on account of additional ITC available. The authorities have simply considered the credits which were availed Pre-Gst & credit availed Post-Gst and the differential amount is considered as the ITC pocketed by the builder. Accordingly, the ITC determined Pre-Gst was Rs. 3.30 Cr and ITC determined Post-Gst was 8.69 Cr. The differential amount of Rs.5.39 Cr is considered as benefit under Anti-profiteering.

	Pre-Gst	**Post-Gst**
ITC (In Rs.)	**33034350**	**86950611**
Turnover (In Rs.)	**3001890643**	**1207806878**
Ratio	**1.10%**	**7.20%**

Thus, the department has determined the additional benefit of ITC to the tune of 6.10% (7.20% - 1.10%). Accordingly, the respondent was required to pass on the benefit of 6.10% of the taxable turnover to the applicants by the way of commensurate reduction in the prices of flats. Therefore, 6.10% is applied on the base price of the flat i.e. Rs. 4000 per sq ft. and the respondent was directed to reduce the price of the flat in commensurate of the same. The respondent was also directed to pay interest as well as penalty to the buyers. Similar view has also been taken in Gurukripa Developers & Infrastructures Pvt. Ltd.

We may also like to state that the above Anti profiteering order has been challenged before the Delhi High Court in Writ petition(C) No. 109999 of 2018 and the

Honorable Mr. Justice, Sanjiv Khana and Honorable Mr. Justice Anoop Jairam Bhanbani, as an interim arrangement, directed the petitioners to deposit the amount of Rs. 5.11 Cr with the respondent authorities which would be converted to an interest bearing FDRs for nine months.

In my view, the order passed by the Anti profiteering Authority is not correct and is not in the ratio, as law intended. As per Section 171, the intention of the law is simply to determine the taxes which were forming part of the cost Pre-Gst and which are available as additional credit Post-Gst. The method prescribed in Pyramid is in no way following the above section and therefore, is contrary to the provisions of the law. Accordingly, in my view, the High Court may prescribe some concrete resolution to the newly raised controversy.

Concluding the above discussion, it is suggested that a suo moto action may be taken by all the works contractor/builders by determining the effect of Anti profiteering and pass on the benefit of same to the customers.

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AUTHORITY OF ADVERSE RULINGS: DIS-COUNTING DISCOUNTS

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CA Janak Vaghani

Chapter XVII of the Central Goods & Services Tax Act, 2017 lays down the provisions of Advance Ruling as may be sought by a taxpayer for obtaining clarification regarding the classification of goods or services, determination of time and value of supply, admissibility of input tax credit etc. The power to constitute the Authority for Advance Ruling ("AAR") under this Chapter has been vested with the State Government. Section 96 of the CGST Act / SGST Act provides for the constitution of the AAR. There has been widespread criticism amongst the indirect tax practitioners and litigators regarding the constitution of this Authority by the various State Governments, as most of these Authorities consist of Central and State Tax Revenue Officers. It has been noted that most of these Authorities approach the Advance Ruling applications with a pro-revenue mindset, which also reflects in their final Rulings.

One would assume that the taxpayer would have a remedy in case the Ruling is found to be deficient or unsatisfactory. There does exist, in fact, a remedy in the form of Appellate Authority for Advance Ruling ("AAAR"). The irony is, even the Appellate Authority consists of the Commissioner of Central & State Tax, both of whom are Revenue Officers, in all the States! Rarely has there been a case so far where the AAR has given a Ruling which has been overturned by the AAAR. To make matters worse, there is currently no option available to taxpayers to appeal against the Ruling by the Appellate Authority.

I would like to discuss a recent advance ruling given by the Tamil Nadu AAR in the case of M/s. MRF Limited ("the applicant"). The brief facts of the case are given below –

- The Applicant intends to enter into an agreement with a payment platform C2F0 to streamline the invoicing and payments operations
- This platform works by automatically offering discounts to the customers on early payment to the suppliers, which may be at a fixed percentage or determined on case to case basis
- Since the discount is given post-sale, the applicant submitted that this cash discount cannot be excluded from the value of supply as per the provisions of Section 15 of the CGST Act, 2017
- By virtue of the above, the applicant is required to pay GST on the total undiscounted net invoice value. Thus, the gross payment by the applicant to its vendors would be the discounted net amount plus the GST on the undiscounted net amount.

- The applicant wished to obtain a Ruling on the eligibility of input tax credit ("ITC") of the entire GST amount paid to the vendor even if the payment was made net of discount but with full GST on undiscounted value.

It is common practice in the industry to offer cash discounts to customers on account of early payments. It helps the entities meet their working capital requirements and save the cost of borrowing thereof, which is passed on to the customers as discount. By forgoing the amount of discount, the entities are in fact taking a hit to their profit margin. It is an age-old tradition, so to speak, and is being followed religiously all over the world. It is an accepted thumb rule that when an amount is paid net of cash discount, it has been paid towards the entire invoice value and the transaction is complete.

The crux of the GST law lies on the definition of "supply" contained in Section 7. For the sake of brevity, I will restrict to the basic definition of supply which is supply of goods or services or both by way of sale, transfer, barter, etc. for a consideration and in the course or furtherance of business. Also, the charging Section for GST is Section 9 of the CGST Act, which says that GST shall be levied "…on the value determined under Section 15…". Hence, once a transaction is classified to be a "supply of goods or services or both", one would turn to Section 15 of the CGST Act for determining the value of such supply. Let us analyse the relevant provisions of Section 15 for our discussion. The same are reproduced below –

> *"(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*
>
> *……..*
>
> *(3) The value of the supply shall not include any discount which is given—*
>
> *(a) Before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and*
>
> *(b) After the supply has been affected, if—*
>
> *(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and*
>
> *(ii) Input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply."*

Sub-section (1) above lays down the basic value of supply to be considered for determining the taxable value of supply for the purpose of Section 9. It mentions that the transaction value shall be the value of supply, which is the price paid or payable for the supply of goods or services or both. Further, sub-section (2) and (3) go on to illustrate which amounts shall be included and excluded from the transaction value to determine the final value of supply. For our discussion, we shall focus on sub-section (3) of Section 15.

Sub-section (3) starts with the words "the value of supply shall **not include any discount……**" This means that the value of discount shall be reduced from the value of supply to determine the final taxable value, if the conditions provided in clauses (a) and

(b) are fulfilled. Clause (a) allows for reduction of discount amount from value of supply if this discount is duly recorded on the invoice to arrive at the net value. This is also commonly known as on-invoice discount. Sub-clause (i) of Clause (b) allows for reduction of discount amount from the value of supply if such discount is pre-agreed between the parties or forms part of the agreement between the parties before the time of supply and it should be linked to specific invoices. In addition to sub-clause (i), the input tax credit availed by the recipient of supply should be reduced to the extent of discount offered by the supplier to be eligible for reduction of discount from value of supply under clause (b). Only under the above 2 scenarios, the supplier shall be eligible to reduce the discount amount from the value of supply.

In the case of M/s. MRF Limited, the applicant shall receive the proposed discount if the payment is made before the amount is due, as agreed between the suppliers and recipient. It is at the option of the recipient to accept the discount or go ahead with the original credit period. Therefore, this discount can not form part of the invoice, as the invoice shall be raised as per the terms of the contract much before it is uploaded on to the C2F0 platform. This excludes our case from clause (a) of Section 15(3) and the discount can not be reduced from the invoice value under this clause. Since the discount received by the applicant is not pre-agreed, the cash discount offered can not be excluded from the value of supply under Clause (b) either. Hence, the applicant has correctly submitted that they are not covered under Section 15(3) and the discount received by them can not be excluded from the value of supply. The suppliers shall, thus, also charge GST on the entire contract value without considering the cash discount offered to the recipient. In consequence, the recipient shall pay the discounted contract value along with the GST on the entire non-discounted contract value to the supplier.

Now, the question that was raised before the Authority was whether the entire amount of GST, which was paid to the supplier and subsequently to the Government, on the entire contract value, would be eligible as ITC to the recipient of goods or services. The Authority relied on Section 16 of the CGST Act to provide the Ruling. To avoid unnecessary lengthening, let us analyse only the relevant provisions of Section 16 of the CGST Act, reproduced below –

> *"16. (1) ……*
>
> *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—*
>
> *……..*
>
> *(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and*
>
> *……..*
>
> *Provided that ……..*
>
> *Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse*

charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

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

Sub-section (2) of Section 16 lays down the eligibility criteria for claim of ITC under the GST Act. It is assumed that Clause (a), (b) & (d) of Section 16(2) and other sub-sections are met by the applicant as the tax invoices have been received, goods or services have also been received and returns have been filed. Clause (c) of this Section 16(2) states that the tax charged in respect of the supplies should be actually paid to the Government, either by cash or by ITC. The applicant has submitted that the suppliers shall charge tax on the entire undiscounted contract value. It is presumed that the amount shall also be paid to the Government by the supplier in the ordinary course. Therefore, the entire amount of tax charged and paid to the supplier shall qualify as ITC under Section 16(2)(c). Since the conditions under all the Clauses of Section 16(2) and other sub-sections are met, the GST amount paid by the applicant qualifies as ITC under Section 16. The Authority, in the case under discussion, seems to have conveniently ignored deliberation on the conditions of Section 16(2) altogether.

In the text of the Advance Ruling released in the public domain, the Authority has solely relied on the second proviso to Section 16(2) while Ruling against the applicant. The second proviso to this Section states that if the recipient fails to make the **payment towards the value of supply** within 180 days from the date of invoice, the ITC availed by the recipient shall be added to his output tax liability. The Authority has ruled that since the amount of discount shall not be paid by the applicant within 180 days or at all, they shall not be entitled to ITC of the GST amount proportionate to the value of discount under this proviso. In my view, the Authority has also failed to deliberate on and appreciate the meaning of the words used in the statute. I believe there is a specific reason that the statute mentions the phrase "payment towards" instead of "payment of" the value of supply. "Towards" is a preposition which is generally used in the language to portray a relation. The Merriam-Webster Dictionary gives one of the definitions of "towards" as "for the partial payment of". Even generally, "payment towards" would be understood by a layman as a direction where the funds shall be utilised. It is used to denote a contribution, which may or may not be the full and total amount. If the words used in the statute were "*payment of* value of supply", it would be interpreted as the ITC being limited to the exact amount of value of supply to be paid, which could also be controversial but in a different light.

Also, Section 15 artificially excludes the post-sale discount for the purpose of calculation of taxable value. It can be said that the value of supply derived under Section 15 is only relevant for the calculation of tax liability under the GST law. In the present

case, the liability is being discharged as per the value determined under Section 15. Post meeting this criterion, any payment made against the invoice, even if partial or in full and final settlement, should be counted as a payment towards the value of supply only. It would be absurd to assume that despite being offered a cash discount, the recipient would opt to pay the entire contract value and increase his cost. It is an agreement between the supplier and the recipient as to how much consideration shall be paid for full and final settlement of the contract.

Before the introduction of the GST law, the Excise, VAT and Service Tax laws were in force in our country. All of these laws were introduced with a view to avoid double taxation and allow the taxpayers to avail credit of the tax already paid and the concept of input tax credit was, therefore, introduced. This effectively resulted in taxing only the value addition done at every stage of the supply chain. GST law was introduced to further streamline the cascading effect of taxes and bring the indirect taxation across the country at par. In the case under discussion, the Government is receiving the tax from the supplier on the undiscounted contract value. Hence, the ITC of this tax should be fully available to the recipient making further taxable supplies, in keeping up with the spirit of GST. If any part of this ITC is denied to him, it would unnecessarily increase the cost for the recipient, which shall be passed on in the supply chain and in turn, shall artificially increase the cost to the ultimate consumer. This would be against the very spirit of introduction of GST and would also result in unjust enrichment to the Government.

In view of the above arguments, I firmly believe that the Authority should have deliberated the issue presented by the applicant in depth and given a Ruling keeping in view the most basic aspects of GST. If a taxpayer is approaching the Authority with an issue which requires clarity, it is the duty of the Authority to examine the issue in the light of all the relevant provisions of the law and not only the ones which it deems beneficial to the Government Revenue. This farce, however, is a product of the law itself, which vests the power of constitution of these Authorities with the Revenue itself. I am sure the applicant has mulled over an appeal to the Appellate Authority with little hope. After all, the AAAR is also the Revenue in disguise, who shall approach the Revenue-favourable Ruling by the lower Authority with the same mindset and narrow view.

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SOME IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata,
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1. **Whether supply of medicines and allied items through the pharmacy of a hospital (run by the hospital itself) attracts tax liability under GST?**
   Held: Yes
   In case of ***M/s Ernakulam Medical Centre Private Ltd.-AAAR Kerala,*** the applicant runs a hospital, which is rendering medical services with professionals like doctors, nursing staff etc. In GST, health care services by a clinical establishment has been exempted vide Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. Accordingly the applicant contended that the medicines and surgical items supplied through the pharmacy of the hospital were entitled to exemption being health care services. The pharmacy was meant exclusively for dispensing medicines and consumables to inpatients or outpatients. The Appelate Authority for Advanced Ruling held that as far as inpatient is concerned, hospital is expected to provide lodging, care, medicine and food as a part of treatment under supervision till discharge from hospital**. Hence medicines or other allied goods supplied to inpatient are indispensible items and it is a composite supply to facilitate health care services and is not taxable**.

   Whereas in case of outpatient, the hospital gives only a prescription which is advisory in nature. The outpatient is at liberty to procure the medicines either from the hospital's pharmacy or any other pharmacy. **Therefore the pharmacy run by hospital dispensing medicines to outpatient can be treated as individual supply and not covered under the health care services. Hence, such supply is taxable under GST.**

2. **Whether the conduct of marathon events by a Trust through which donations are raised for charity is an exempted service under GST?**
   Held: No
   In the case of ***M/s. Dream Runners Foundation Limited –AAR Tamil Nadu***, the applicant is a Trust registered under sec-12AA of the Income Tax Act, 1961. It stated that the principle object of the trust is to organize events like Marathon, Blood Donation Camp, Organ Donation Camp, Eye Donation Camp, Health Awareness Camp etc and utilize the funds raised from such events for Charitable Cause like funding to Non-Governmental Organizations (NGOs), Hospitals, Trusts and other

Charitable Organizations. The Applicant has also stated that none of the objects involve carrying of any business, trade or any activity for profit.

The Applicant collects an amount from participants registered for the marathon, treating them as donation and from these collected amounts, the expenses of paying the registration partner, event management expenses, prize money, are met and some portion of the balance is given as donation. The activity in question is the organizing of the Marathon. This is advertised as Dream Runners Marathon where a large number of persons participate. Though the money collected from the participants may be donated or used for further charitable activities, organizing marathon itself is a separate supply of service by the Applicant for the various participants, individuals or runner groups etc.

As per Section 2(31) of CGST Act, " (31) *"consideration" in relation to the supply of goods or services or both includes- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;"* The money collected by the Applicant, from the participants in the Marathon is used for the expenses of organizing the Marathon in terms of paying the registration partner, event management charges, prize money, publicity, other organizing expenses such as T-shirts, banners and other related materials etc. as seen in their balance sheets. Therefore, the money collected from the participants is a consideration towards the supply of service of organizing and conducting the marathon for the participant's conduct of marathon event and the same is liable to GST

Therefore the money collected from the participants is a consideration [as per sec-2(31)] towards the supply of service of organizing and conducting the marathon for the participants and the same is liable to GST

3. **Whether a land owner is liable to pay GST on premises allotted to him by the developer?**

Held: Yes

In case of ***Sri Patrick Bernardinz D'Sa-AAR Karnataka*** the applicant is a land owner. He entered into an agreement with M/s Nforce Infrastructure India Pvt. Ltd. Builders and Developer. The developer offered to develop and promote a multistoried residential apartment cum commercial building in the applicant's land out of which, for his contribution of land, the applicant gets a share of 50% of total flats and also 50% share out of a specified area of commercial construction. The applicant raised a question whether he is liable to pay GST on the premises allotted to him by the concerned developer?

In context of the question raised by the applicant "whether he is liable to pay GST?" the reference to the Notification No.4/2018-Central Tax (Rate) dated 25.01.2018 was made by the authority. The said notification notifies a person or

persons who supply development rights to a developer/builder etc. against a consideration which may be in the form of construction service is liable to be registered under GST Act and is liable to pay tax central tax on the said supply.

Thus in the above case it is seen that the applicant is supplying development rights to a developer and in return, he has been allotted premises in the form of consideration.

Therefore the applicant who has supplied development rights to a developer in respect of his land is liable to registration and payment of tax in light of the said notification.

4. **Whether two or more supplies of goods or services which are naturally bundled in which the principal supply is exempt and others are taxable can be treated as "composite supply"?**

Held: Yes

In case of ***M/s Columbia Asia Hospitals Private Limited-AAR Karnataka*** the applicant is a private limited company, engaged in providing health care services categorizing them as 'In patients' and 'Out patients'. It is also engaged in supply of medicines to in-patients and out-patients. Along with these, it also operates Restaurant/ Canteen services in its premises which are used for supplying food and other eatable items to its patients and their attendants. The applicant raised a question before the authority whether two or more supplies of goods or services or both which are naturally bundled in which the principal supply is exempt and other supplies are taxable can be treated as 'composite supply'? (In the given case, 'supply of medicines' constitute principal supply and 'supply of food items' are other supplies)

The applicant states that as per the definition of "composite supply" it can be inferred from the word "taxable supply" included in the definition of composite supply that it covers only such supplies which are subject to GST and not the exempt supplies.

The Authority held that as per sub sec (30) of section-2 of the CGST Act ***"composite supply" means a supply made by a taxable person to recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply."*** This definition should be read with the definition of taxable supply and exempt supply. As per section-2(108) of the CGST Act *"taxable supply" means a supply of goods or services or both which is* ***leviable to tax*** *under this Act."* The term **"leviable"** used in the definition of taxable supply includes the supplies of goods which are leviable to tax and chosen to be exempted under section-11 and hence the exempt supplies also fall under the category of taxable supply. Accordingly, the healthcare services (supply of medicines and other allied items) which are exempt service along with other taxable supplies (supply of food) will be termed as composite supply with healthcare service as principal supply. It will be exempt composite supply.

5. Whether the Hotel Accommodation & Restaurant services provided within the premises of the Hotel, to the employees & guests of SEZ units, be treated as supply of goods & services to SEZ units or not ?

Held: No

In case of ***M/s Gogte Infrastructure Development Corporation Limited- AAR Karnataka*** the applicant is having a Hotel in Belagavi (Karnataka) by the name 'Fairfield Marriott', in which he is providing restaurant and lodging services to all his guests/customers. These customers include the employees, customers, visitors and guests of SEZ Units in Karnataka. They are charging SGST & CGST at the applicable rates. The SEZ units contended that the services are being supplied / rendered to SEZ units only and hence rate of GST is NIL as per provisions of Section 16(1) (b) of IGST Act, 2017. The applicant is desirous to know whether the transaction of providing restaurant services and lodging services provided within the premises of Hotel to employees and guests of SEZ Units can be treated as supply of services to SEZ Units situated in Karnataka.

The Authority held that Supply of goods or services or both to a Special Economic Zone developer or Special Economic Zone units are treated as, "Zero Rated Supply" in terms of Section 16(1) (b) of IGST Act, 2017. Further Rule 46 of CGST Rules 2017 stipulates that the invoice shall carry an endorsement "Supply meant for export / Supply to SEZ unit or SEZ Developer for authorized operations on payment of Integrated Tax" or "Supply meant for Export / Supply to SEZ unit or SEZ Developer for authorized operations under Bond or Letter of Undertaking without payment of Integrated Tax" as the case may be. Therefore on reading Section 16(1) (b) of IGST Act, 2017 & Rule 46 of CGST Rules 2017 together it is clearly evident that the supplies of goods or services or both towards the **authorized operations** only shall be treated as Supplies to SEZ Developer / SEZ Unit. Further, the place of supply of the services by way of lodging accommodation by a hotel, shall be the location at which the immovable property (hotel) is located or intended to be located, as per Section 12 (3)(b) of the Integrated Goods and Services Tax Act, 2017. In the instant case, admittedly, the applicant is located outside the SEZ. Therefore the services rendered by the applicant are neither the part of authorized operations nor consumed inside the SEZ.

Hence, services being provided by the Applicant, within the premises of the Hotel, to the employees & guests of SEZ units, cannot be treated as supply of goods & services to SEZ units and it is intra state supply.

6. Whether the supply of solar rooftop power plant along with design, erection, commissioning and installation is a "composite supply"?

Held: Yes

In case of ***M/s Premier Solar Systems (P) Limited-AAR Uttarakhand*** it was held that for a supply to be called a "composite supply", the following conditions must be satisfied-

(a) Supplies of two or more goods/services which are inseparable from each other in the ordinary course of business or complementary to each other,
(b) Supplies which are ancillary to the principal supply of goods or services,
(c) Supplies which are dependent on each other.

Further a supply can be called "mixed supply" if-
(a) Supplies of two or more goods/services which are inseparable from each other in the ordinary course of business or complementary to each other, not dependent on each other.
(b) Goods or services which can be supplied individually.

The applicant was engaged in the manufacture of "solar power generating system" which also includes service elements i.e. designing, erection, commissioning, etc. Also the provision of service in the said supply constitutes less than 10% of the total cost of the same. The supply of goods represents 'principal supply'. So the supply shall be treated as 'composite supply' and not as 'mixed supply' as-
(a) Goods and services both are involved in supply,
(b) Service element is ancillary to principal supply of goods,
(c) Both supplies are dependent upon each other since goods supplied can be put to use only after erection, commissioning & installation of the same and in reverse position erection, commissioning and installation can be done only if goods are available.

Hence, the Authority held that the supply shall be treated as "composite supply" in light of above provisions. The applicable rate of tax will be 5%.

7. Whether hostel accommodation provided by Trusts to students is covered within the definition of Charitable Activities and thus exempt under Sl. No. 1 of Notification No. 12/2017-CT (Rate)?

Held: No

In case of ***Student's Welfare Association-AAR Maharashtra*** the applicant is a registered charitable Trust under section-12AA and having 80G certificate of exemption under Income Tax Act, 1961. It provides lodging and boarding facilities besides compulsory personality development training to students from poor families and also physically handicapped for which they charge a consolidated fee of `22,250. The students have no option to choose the activities. The applicant stated that circular no. 354/17/2018-TRU dated 12th Feb 2018 gives a clarification regarding hostel accommodation wherein it is stated that **hostel accommodation shall be treated at par with hotel accommodation and accordingly chargeable @18%.** However the applicant contented that vide Notification No. 12/2017-Central Tax (Rate) Entry/Clause 14, where services by a hotel, inn, guest house, club or campsite by whatever name called, for residential or lodging purposes, having declared tariff of a unit of accommodation below one thousand rupees per day or equivalent, these services are exempt. The issue involved is that whether hostel accommodation

provided by the applicant to the students is covered within the meaning of "charitable activities" and thus exempt? The applicant has a concern that the matter has been clarified by circular no. 354/17/2018-TRU dated 12th Feb 2018 which is incorporating an item not specified in the Notification No. 12/2017-Central Tax (Rate). As a circular cannot override a notification, the concerned matter was referred to Authority for Advance Ruling.

The Authority made reference to the Notification No. 12/2017-Central Tax (Rate) which defines charitable activities as-

*"**Charitable activities" means activities relating to –***

(i) Public health by way of,-

(A) Care or counseling of

a) terminally ill persons or persons with severe physical or mental disability;

b) Persons afflicted with HIV or AIDS;

c) Persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or

(B) Public awareness of preventive health, family planning or prevention of HIV infection;

(ii) Advancement of religion, spirituality or yoga;

(iii) Advancement of educational programmes or skill development relating to,-

(A) Abandoned, orphaned or homeless children;

(B) Physically or mentally abused and traumatized persons;

(C) Prisoners; or

(D) Persons over the age of 65 years residing in a rural area;

(iv) preservation of environment including watershed, forests and wildlife"

It has been clarified that the hostel accommodation services do not fall within the ambit of charitable activities as per the above notification. This conclusion of the authority is in conformity with Circular No.32/06/2018 GST dated 12th February 2018.

Thus the Authority held that as per the meaning assigned to the expression "charitable activities" the activities of the Trusts in providing hostel accommodation facilities to the students do not fall within the ambit of charitable activities. Hence the services are liable to GST @ 18%.

8. Whether rendering of repair and maintenance services on assets owned by others is a job work as per section-2(68)?

Held: No

In case of ***Alok Bhanuka-AAR West Bengal***, the applicant is engaged in repairing and servicing of transformers owned by WBSEDCL. The Applicant transports the defective and damaged transformers from WBSEDCL, dismantles them, and removes the burnt coil and other damaged parts and accessories that require replacement/repair. The repaired transformers are tested and delivered to WBSEDCL. Being the principal insurer, WBSEDCL reimburses the expense on account of transport, fire and burglary

insurance. The applicant is of the view that repair/servicing of transformers is job-work as defined under section 2(68) of the GST Act, and should to be treated as supply of service in terms of Para 3 of Schedule II to the GST Act.

The Applicant refers to Notification No. 5050-F(Y) dated 16/08/2017 of the Government of West Bengal. It has clarified that works involving supply of taxable goods along with labour to any movable property (e.g. servicing of motor vehicles with motor parts, AMC for computers or AC machines or generator, repair of furniture etc.) are composite supplies, as the supply of goods and labour are naturally bundled and made in conjunction with one another. The principal supply, according to the said notification, is determined by the pre-dominant nature of the contract.

Following the above notification, the Applicant argues that repair/servicing of transformers is a composite supply, where the pre-dominant nature of the contract remains that of 'service', classifiable as under SAC 9987, and taxable under Sl No. 25(ii) of Notification No. 11/2017 – CT (Rate) dated 28/06/2017

The Authority referred section-2(68) of the GST Acts and observed that Job work has been defined under section 2(68) of the GST Act as any treatment or process undertaken by a person on goods belonging to another registered person. Rule 2(h) of the Cenvat Credit Rules, 2004 defines job work as processing or working upon raw materials or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the afore-mentioned process. In course of repairing the defective transformers the Applicant replaces the worn out or burnt materials. The process, therefore, involves transfer of property in goods. The Applicant's contribution is, therefore, not limited to labour and skill done with the help of his own tools, gadgets or machinery. Repairing and servicing of defective transformers signify working on something which is already in existence. It involves supply of goods, but not as chattels. The goods, namely the spare parts that have replaced the defective ones, are embedded or fixed to the transformer already in existence so that the defects get removed. The contract is not for the supply of the spare parts, but for the treatment or process for maintenance and removal of the defects from the transformers that belong to WBSEDCL. The predominant element of the supply, therefore, is not transfer of title to the goods, but service in terms of para 3 of Schedule II to the GST Act, and supply of spare parts is ancillary to such supply. The process is not, therefore, job work, as defined under section 2(68) of the GST Act.

The Authority ruled that repairing and servicing of transformers owned by another person is not job work as defined under section 2(68) of the GST Act.

9. Whether the execution of "Livelihood for Artists and Local Art Hubs" as an administrative agency fall under the taxable service as per the provisions of GST?

Held: No

In the case of ***Uralungal Labour Contract Co-op Society Ltd-AAR Kerala*** the applicant is a labour contract co-operative society registered under Kerala Co-operative Societies Act, 1969. It is primarily engaged in construction of roads, bridges and other public infrastructure for Government and other institutions and accredited agency for Government of Kerala.

The Department of Cultural Affairs, Govt. of Kerala has initiated a programme "Livelihood for Artists and Local Art Hubs**"** to empower the skills of rural artists and artisans. The applicant has been appointed as an administrative agency for the said programme by the Government of Kerala. The applicant wants to know whether the supply of service by the applicant as an administrative agency to the Government of Kerala falls within the ambit of taxable supplies.

The Authority held that the activities carried out by the society is to establish rural art and handicraft groups, empower the artists by improving the skills of rural artists and artisans, conduct of exhibition of art products, connecting them with markets without involving middleman etc. come under the classification of "pure service" as per Sl. No.3 of Notification No.12/2017 CT (Rate).

Hence the execution of "Livelihood for Artists and Local Art Hubs" as an administrative agency falls under the category of 'pure service' and are exempt from GST.

10. Whether services related to providing coaching for entrance exam will come in ambit of GST?

Held: Yes

In the case of ***Simple Rajendra Shukla-AAR Maharashtra***, the applicant runs a tutorial and is engaged in providing the service of teaching to the students of class-XI and class-XII of science. This activity prepares the students for entrance exams related to MBBS, Engineering and other science related examinations. The applicant is of the view that the said activity is covered by Notification No. 12/2017-Central Tax(Rate) dated 28/06/2017 where the services of " educational institutions" are taxed at NIL rate. The applicant argues that as per the dictionary meaning of Education means "Imparting of knowledge." The word institution as per dictionary meaning means an organization formed to provide services. Hence in layman's language an educational institution is an organization formed to impart educational services.

The Authority find that there is a specific definition for educational institution in clause 2 (y) of Notification No. 12/2017-Central Tax(Rate) dated 28/06/2017.

2. Definitions- For the purpose of this notification, unless the context otherwise requires,-

(y) "Educational institution" means an institution providing services by way of-

(i) Pre-school education and education up to higher secondary school or equivalent;

(ii) ***Education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force****;*

(iii) Education as a part of an approved vocational education course;

In light of the above definition, it has been observed that the applicant runs a private tutorial. **The private institution does not have any specific curriculum and does not conduct any examination or reward any qualification recognized by any law which could be covered in the above notification.**

Hence the applicant is in no way covered in the definition of Educational institution as given in the above notification. Therefore the services are liable to GST @ 18%.

11. Whether toll charges reimbursed by the clients to a person acting as 'pure agent' of the client are eligible for deduction u/s 33 from the value of supply?

Held: No

In the case of ***Premier Vigilance & Security Pvt Ltd-AAR West Bengal*** the applicant provides security service to the Banks. The Applicant also transports cash/coins/bullion in specially built vehicles or Customized Cash vans (CCVs). In course of such transportation, the vehicles move along National and State Highways and the Applicant pays toll charges to both NHAI and State Authority, which is reimbursed by the client Banks. Now, the petitioner raised a question as whether reimbursement of toll charges by the client Bank is liable to GST?

The AAR touched upon rule 33 of the GST Rules which states that:-

Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, if all the following conditions are satisfied, namely,-

(i) The supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorization by such recipient;

(ii) The payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

(iii) The supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

The agreements submitted by the applicant mentioned that toll charges will be paid on the actual amount. But the Banks do not specifically authorize the Applicant as a "pure agent" or acknowledge payment of the toll charges as their own liability.

The Applicant, being the owner of the vehicles, is the recipient of the service provisioned on payment of toll. The Applicant admittedly is the beneficiary and liable to pay the toll, which is compulsorily levied on the vehicles. The expenses so incurred are, therefore, cost of the service provided to the Banks. Reimbursement of such cost is no disbursement, but merely the recovery of a portion of the value of supply made to the Banks. The Applicant is, therefore, not acting in the capacity of a "pure agent" of the Bank while paying toll charges. Such charges are costs incurred, so that his vehicles can access roads/bridges to provide security services to the recipient. The Authority ruled that Toll charges paid are not to be excluded from the value of supply

under Rule 33. GST shall, therefore, be payable at the applicable rate on the entire value of the supply, including toll charges paid.

12. Whether supplies of power solutions, including UPS, servo stabilizer, batteries etc. can be treated as Composite Supply within the meaning of Section 2(30) of the GST Act?

Held: No

In the case of ***Switching Avo Electro Power Ltd-AAR West Bengal*** the Authority held that as per section-2(30) of the GST Act, a composite supply means *"a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof , which* ***are naturally bundled and supplied in conjunction with each other in the ordinary course of business****, one of which is a principal supply*".

Principal Supply is defined under Section 2(90) of the GST Act as "*the supply of goods/services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary".*

Note 3 to Section XVI of the Tariff Act defines a composite machine as the one consisting of two or more machines fitted together to form a whole. Such machines, as well as other machines designed for the purpose of performing two or more complementary or alternative functions, are to be classified as if consisting only of that component or as being that machine, which performs the principal function.

The UPS serves no purpose if the battery is not supplied or removed. It cannot function as a UPS unless the battery is attached. However, what needs to be considered is whether or not these two items are "naturally bundled". When a UPS is supplied with built-in batteries so that supply of the battery is inseparable from supply of the UPS, it should be treated as a composite supply and as a composite machine in terms of Note 3. But a standalone UPS and a battery **can be separately supplied in retail set up.** A person can purchase a standalone UPS and a battery from different vendors. The applicant himself admits that he supplies the battery and UPS as separate machines as well as UPS with battery. It is, therefore, obvious that the UPS and the battery have separate commercial values as goods and should be taxed under the respective tariff heads when supplied separately.

Therefore the supply of UPS and Battery is to be considered as Mixed Supply within the meaning of Section 2(74) of the GST Act, as they are supplied under a single contract at a combined single price.

13. Whether the money paid by the customer to the driver of the cab for the services of the trip is liable to GST and whether the applicant company is liable to pay GST on this amount?

Held: Yes

In the case of ***M/s Opta Cabs Private Limited-AAR Karnataka*** the applicant is engaged in the business of Taxi Aggregation Service and Taxi Service. He states that the billing is done in the name of the Taxi Driver who provides the service for the particular trip and the taxi driver would collect the amount from the customer on the completion of the trip. The applicant shall not collect the amount on behalf of the taxi driver. The applicant is not collecting any charges including trip commission, but only collects service charges for usage of IT services which he would have provided from his end i.e. Mobile App and Billing related services. The applicant is collecting and paying GST on the service charges collected by taxi drivers. Customers pay directly to the drivers, whose turnover may not be more than Rs.12 Lakh per annum and the applicant is of the opinion that he may not be required GST to be levied on the trip amount. The application is of the view that the taxes applicable would be payable by the drivers and users and not to be collected and paid by him as the amount is not routed through him and he is only providing service of invoicing.

The Authority made a reference to section-9(5) of the GST Act. Sub-section (5) of section 9 of the Central Goods and Services Tax Act, 2017 states as under : *"(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable to pay tax in relation to the supply of such service.*" Notification No.17/2017 – Central Tax (Rate) dated 28th June, 2017 notifies the *services by way of transportation of passengers by a radio-taxi, motor cab, maxi cab and motor cycle as the category of services, the tax on intra-State supplies on which shall be paid by the electronic commerce operator as per the provisions of sub-section (5) of section 9 of the Central Goods and Services Tax Act, 2017.*

Hence from the above it may be concluded that the electronic commerce operator shall be liable to pay tax on the services provided by a motor cab or maxi cab or motor cycle or radio-taxi, by way of transportation of passengers, if such services are supplied through it and it shall be deemed that the electronic commerce operator is deemed to be supplier in such cases.

Hence The applicant is liable to tax on the amounts billed by him on behalf of the taxi operators for the service provided in the nature of transportation of passengers through it, in accordance with the provisions of sub-section (5) of section 9 of the Central Goods and Services Tax Act 2017 read with Notification No. 17/2017 –Central Tax (Rate) dated 28.06.2017.

14. Whether mixing of rubber compound on the materials supplied by the principal and returning the finished product to the principal will come under Sl. No.26 (i)(b) of Notification No.11/2017 CT(Rate) and SRO No.370/2017?
Held: Yes

In the case of ***Estera Polymers-AAR Kerala*** the applicant is a manufacturer and supplier of rubber backed mats and mattings for laying on the floor. It also supply rubber backed mats and mattings on job work for which the materials including moulds are supplied by the principal. For executing job works, the applicant procure rubber, reclaimed rubber, tyre / rubber waste powder, China clay powder, process oil, rubber chemicals and other consumables from registered dealers. The other materials like textiles, carpets, coir are supplied by the principal for executing the job work along with moulds in required designs. The applicant's question is that whether mixing rubber compound with textile provided by the principal will be treated as Services by way of job work in relation to Textile yarns (other than of man-made fibers) and textile fabrics?

It was held that manufacturing services on physical inputs owned by others is treated as service by way of job work. As such these services are covered under SAC 9988, Textiles and textile products products falling under Chapter 50 to 63 in the First Schedule to the Customs Tariff Act, 1975 are taxable @5% GST.

As per the circular no. 38/12/2018 dated 26/03/2018 issued by CBEC it is clarified that, in addition to goods received by principal, the job worker can use his own goods for providing the services of job work. Under job work, the output is not owned by the unit providing this service. Therefore the value of the services is based on the service charge paid, not on the value of goods manufactured. The value of service would include not only the service charges but also the value of any goods or services used by job worker for supplying the job work service, if recovered from the principal.

The materials supplied for execution of job work are falling under Chapter 50 to 63 in the First Schedule of the Customs Tariff Act, 1975. The materials were supplied by the principal. **Therefore the job work services applied on such goods will squarely come under Sl. No.26 (i) (b) of Notification No.11/2017 and are taxable @ 5% in GST.**

15. Whether consideration for delayed payment of an exempted supply is exempt under GST?

Held: Yes

In the case of ***Tata Power Ajmer Distribution Ltd.-AAR Rajasthan*** the Applicant is supplying electricity to industrial and domestic consumers. It has raised an invoice on the customers for the same under which in addition to the energy and distribution charges, it also recovers some non-tariff charges from customers which are charges for meters, cheque dishonour fees, delayed payment charges, etc. The Applicant has sought advance ruling to determine whether various non-tariff charges recovered by it from the customers are exempt as per exemption notification under GST?

The Authority for Advance Ruling, Rajasthan held that non-tariff charges are leviable to GST.

It filed an appeal before the Appellate Authority for Advance Ruling, Rajasthan to determine the taxability of delayed payment charges under GST.

The Appellate Authority for Advance Ruling, Rajasthan observed that the provisions of the value of supply of the CGST Act, 2017 state that the value of supply shall include interest or late fee or penalty for delayed payment for consideration of any supply. The value of supply is the consideration charged by the Appellant from the consumers for the consumption of electricity. The supply of electricity has been exempted under GST and delayed payment charges should form part of value of electricity.

Therefore, no GST is chargeable on delayed payment charges collected from customers.

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JUDICIAL PRECEDENTS UNDER GST LAW

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1. Section 29 of the Central Goods and Services Tax Act, 2017 : Annapurna International vs. State of U.P. & 5 Others

Cancellation of registration under GST cannot take place without issuing any notice or providing an opportunity of being heard as the GST law provides for the procedure to be followed for cancellation of registration. [2017 (11) TMI 1021 – Allahabad High Court]

2. Section 15(2) of the CGST ACT: PSN automobile Pvt. Ltd. V. UOI & CBIC

The amount of 1% that the dealer collects from the purchaser of a car worth more than ten lakhs under Section 206C (1F) of the Income Tax Act, cannot be treated as an integral part of the value of the goods and services supplied by the petitioner. But this is to be taken care by department in its notification. Department needs to issue clarification in this regard. [WP (C} No.680/2019 – High Court of Kerala at Ernakulum]

Note: Indirect Tax (GST) Representation Committee, AIFTP has filed representation which has been accepted and the matter is now resolved. Circular has been issued to clarify this issue by Corrigendum to Circular No. 76/50/2018-GST, F.No. 20/16/04/2018 -GST dated 7th March 2019.

3. Section 122 Central Goods and Services Tax Act, 2017: Manu International vs State of U.P.

Department shall not initiate penal action against the assesse for not filing the return and payment of taxes as the assesse was unable to file the returns and pay the taxes for technical issues relating to migration. [2018 (2) TMI 39 - Allahabad High Court]

4. Section 129 (4) of the CGST Act: Bright Road Logistics (P) Ltd vs Commercial Tax Officer, Bengaluru

It is apparent that the contention raised by the learned counsel for the petitioner, that no opportunity has been afforded under Section 129 (4) of the CGST Act stands falsified. Court held that it is apparent that the alleged owners have waived the right of hearing and have consented, levy of tax and penalty and have undertaken to pay as per the provisions of Section 129(1)(a) of the CGST Act. Despite the same, the petitioner

has been heard in the matter. As stated earlier, the matter requires adjudication of facts, which are seriously disputed by the parties. This Court in exercise of supervisory jurisdiction cannot enter upon and adjudicate factual issues under Article 226 of the Constitution of India, in the light of availability of an alternative remedy. [2019] 101 taxmann.com 371 (Karnataka)]

5. Section 17(5) of Custom Act, 1975, Section 2 (91) 59,73 of CGST Act, 2017: Jaap Auto Distributors vs The Assistant Commissioner of Customs

The petitioner has raised several grounds for classification of goods. Writ cannot make a 'fact-finding' view. Classification of goods to be done by the appellate authority as it is factual exercise. The High Court cannot decide an issue relating to classification of goods. Writ court cannot entertain the writ petition involving classification of goods issue. [WP. No. 25415 of 2017; 2017 (10) TMI 881 – Madras High Court]

6. Section 129 of the Uttar Pradesh Goods and Services Tax Act, 2017: Commissioner, Goods & Service Tax Act, UP v. Aneja Cargo

Transported two consignments of different goods from Sonipat to Jhansi on 21.09.2018 and again on 24.09.2018 (disputed transaction). Discrepancy in quantity of goods has been found to be established and, therefore, in his submission, the first Appellate Authority has erred in overlooking that vital aspect of the matter and in deleting the penalty. Goods remained in the custody of the department.

Since the tribunal is not established, going to High court under writ becomes the only available remedy after the adverse finding of the appellate tribunal. Learned counsel for the assesse (respondent) may file counter affidavit within four weeks. Rejoinder affidavit may be filed within two weeks thereafter. In the meanwhile, subject to the respondent depositing Rs. 4,00,000/- in cash and furnishing security, other than cash and bank guarantee, for another Rs. 4,00,000/-, the goods in question along with vehicle shall be released in favour of the respondent. [{2019} 101 taxmann.com 126 (Allahabad)]

7. Rule 138A of the CGST Rules 2017, Section 129 of the CGST / SGST Act, 2017: Ramdev Trading Company and another Vs State of U.P.

Mere absence of TDF without an intention to evade taxes is purely a technical breach and therefore penalty is not sustainable on the said grounds. Penalty and seizure is not sustainable for movement of goods without Transit Declaration Form (TDF) unless there exists malafide intention to evade taxes. [2017 (12) TMI 341 - Allahabad High Court]

8. Section 9 of the CGST Act, 2017, Section 11 of the CGST Act, 2017: K.K. Ramesh (Petitioner) vs. The Union of India, The Secretary, Office of the GST Council Secretariat, New Delhi and The Commissioner, Commercial Tax Officer, Cheupakkam, Chennai (Respondent)

The Petitioner preferred this Public-Interest-Litigation (PIL) on the grounds that IGST / CGST Act are implemented with an objective of 'One Nation One Tax' and accordingly, petrol and diesel should be brought within the ambit of the said law. This apart, the Petitioner also stated that the price of the petrol and diesel is fixed on a daily basis and has reached an all-time high. Court held Policy decision can be interfered with only if the same is arbitrary or based on an irrelevant consideration or malafide or against any statutory provisions. Policy formulation in relation to bringing petroleum and diesel within the ambit of GST is beyond the jurisdiction of the High Court and it is the prerogative of the Goods and Service Tax Council as it is well settled in law that it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy or particular decision taken in the fulfilment of that policy is fair and a policy decision can be interfered with only if it is found to be arbitrary. The Government may notify the levy of GST on petroleum crude oil, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel on the recommendation of the GST Council. This being a policy matter, courts cannot interfere. **[**2018 (3) TMI 1451 - Madras High Court]

9. Section 22 Central GST Act, 2017: Radhey Lal Jaiprakash Neadarganj, Dadri vs State of U.P.

Where the application for GST registration was not filed by the assesse in stipulated time, it was held that since the User ID and Password of the assesse was not working, no coercive action would be taken against the petitioner for not filing the GST return within the time stipulated**. [**(2017) 11 TMI 1022; 6 GSTC 234 (Allahabad)]

10. Manual filing of Advance Ruling: Sanjeev Sharma vs Union of India

Where no facility for advance ruling was made available under GST, it was held that Department must accept manually application for advance ruling under GST since web portal would not be ready to accept the same till January, 2018. [(2017) 6 GSTL 261; 9 TMI 1357 (Delhi)]

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INCREASED THRESHOLD LIMIT OF RUPEES 40 LACS – APPLICABILITY

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At the time of introduction of GST, the law makers decided on a threshold limit of Aggregate Turnover to the extent of which a taxpayer was not required to get himself registered under the provisions of GST Act. The same was the case in earlier regime as well, for instance an Assessee was required to register under the provisions of VAT Act where the turnover in a financial year exceeded Rs. 10 lakhs and under Service Tax Act where the aggregate turnover of Services exceeded Rs. 10 Lakhs, etc.

Threshold limit under the GST Act has been prescribed under Section 22 of the CGST Act, 2017 which states that a taxpayer is compulsorily required to get himself registered where he makes taxable supplies and his aggregate turnover in a financial year exceeds Rs. 20 lakhs. In case of special category states, the aggregate turnover must not exceed Rs. 10 lakhs.

Threshold limit is dependent upon the term "Aggregate Turnover" and the said term is defined under Section 2(6) of the CGST Act, 2017 as under:
"aggregate turnover" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

The term aggregate turnover includes all supplies, be it goods or services or both. It even includes exports, exempt supplies and inter-state supplies of persons having same PAN. However, it excludes inward supplies where tax is payable under Reverse Charge Mechanism.
However, the law makers by way of Notification No. 10/2019-Central Tax dated 07.03.2019 in exercise of the power conferred under Section 23(2) of the CGST Act, 2017 regarding exempting certain categories of persons from obtaining

registration, has increased the threshold limit of Rs. 20 lakhs mentioned under Section 22 to Rs. 40 Lakhs. There is a lot of confusion regarding this increase in the threshold limit. A widespread misconception is that the limit has been increased to cover all taxpayers, which is not the case.

On a closer look at the Notification, it can very well be seen that the Notification is issued in exercise of the powers of Section 23(2) and there is no amendment in Section 22 where a blanket threshold exemption is given. The words used in the Notification are reproduced hereunder for clarification:

G.S.R (E).- In exercise of the powers conferred by sub-section (2) of section 23 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter referred to as the "said Act"), the Central Government, on the recommendations of the Council, hereby specifies the following category of persons, as the category of persons exempt from obtaining registration under the said Act, namely,-

Any person, who is engaged in exclusive supply of goods and whose aggregate turnover in the financial year does not exceed forty lakh rupees, …..

The power under Section 23(2) has been utilized to grant exemption only to the EXCLUSIVE SUPPLIER OF GOODS and a Supplier of Services or Goods and Services both are not covered under the increased threshold limit. Therefore, it can be deduced that only an exclusive Supplier of Goods who does not fall in any of the exceptions mentioned.

However, certain exceptions are given therein where the taxpayer is not eligible to claim exemption under the said Notification, like:

a) He is not required to take compulsory registration u/s. 24 of the Act.
b) Persons engaged in making Supplies of ice cream and other edible ice whether or not containing cocoa, pan masala, all goods covered under Chapter 24 i.e. Tobacco and manufactured tobacco substitutes.
c) Persons engaged in making intra-State supplies in the States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura, Uttarakhand;
d) Persons opting for voluntary registration though not required to be registered under Section 22 or 24 or person already registered who intends to continue with their registration.

Section 24 under the CGST Act, 2017 enumerates a list of persons required to be registered compulsorily which are as under:

1. Person making inter-state taxable supplies

2. Casual Taxable Persons making taxable Supply
3. Person required to pay tax under reverse Charge Mechanism
4. Person required to pay tax under Section 9(5) of the Act
5. Non-resident taxable person making taxable Supply
6. Person required to deduct tax u/s. 51 of the Act
7. Person making taxable Supply on behalf of other taxable person whether as an agent or otherwise.
8. Input Service Distributor
9. Person supplying goods or services or both, other than supplies specified u/s. 9(5), through E-commerce operators required to collect tax at source u/s. 52.
10. Every E-commerce operator
11. Every person supplying OIDAR Services to a person in India other than a registered person
12. Such other person or class of persons notified by the Government.

On a conjoint reading of Section 22, 23, 24 and 25 of CGST Act, 2017 and Notification No. 10/2019-CGST dated 07.03.2019 it can be deduced that only an exclusive Supplier of Goods having aggregate turnover of not more than 40 Lakhs in a financial year and who does not fall in any of the exceptions mentioned in the said Notification and Section 24, 25 of the Act only is eligible to claim exemption from registration under GST.

Therefore, this limit of Rs. 40 lakhs is applicable only for Supply of Goods subject to exceptions and is not applicable for a Supplier of Services or Supplier of both goods and services and for them the threshold limit remains Rs. 20 Lakhs only subject to exceptions.

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PROVISIONS OF ARREST UNDER THE CUSTOMS ACT, 1962

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Introduction

The provision to arrest any duty (Customs) evader has been the focus of attention in the Indian jurisprudence. The arrest provision in any civil law is not new. It has been enumerated in various other civil laws. The power to arrest duty evader is envisaged in Section 104 of the Customs Act, 1962. This provision of arrest was previously enlisted under Section 173, 174 and 175 of Sea Customs Act, 1878 (now repealed). Enlisting arrest provisions in civil offences has always been a debatable subject but nonetheless these deterrent provisions in Customs Law have always been a key for Investigation agencies in cracking evasions of duty. However, on the other hand, these provisions are often used as a tool to harass law abiding citizens.

Section 104 of the Act talks about the power of arrest granted to the Department in case of evasion (of duty). The basic ingredients of this section are:

- The Officer who is making the arrest must have a general or specific order from the Principal Commissioner or Commissioner of Customs.
- The Officer making the arrest must have a reason to believe that the arrestee has committed an offence under Section 132 or 133 or 135 or 135A or 136.
- The arrestee should be informed about his grounds of arrest immediately and shall be taken to Magistrate.
- The offences other than Section 135 shall be bailable and non-cognizable.
- The offences under Section 135 shall be non-bailable subject to some conditions.

Reasons to believe

Sufficient subjective satisfaction of the Officer in charge is considered to be the 'reason to believe'. Section 2(26) of the Indian Penal Code, 1860, defines Reason to believe, according to which, a person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. Also, in *Phool Chand Bajrang Lal v. ITO*[1], the Supreme Court in the context of the Income Tax Act, 1961, explained the said expression as under:

[1] [1993] 203 ITR 456 (SC)

> "*Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona-fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief.*"

In *Union of India v. Mohan Lal Kapoor*[1], the Supreme Court of India opined that reasons to believe cannot be a rubber stamp already formed by someone else.

Also, it was rightly observed by the Supreme Court that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Customs Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.[2]

Amendments in Section 104

The most drastic and substantive amendment came in this section via Section 73 of the Finance Act, 2013[3]. Vide this amendment; some of the offences under the Customs Law were made cognizable and non-bailable. The offences under Section 135 with some exceptions were made non-bailable. Largely, where the evasion is Rs. 50 lakhs or more, or where in any fraudulent trade where the market value of the goods is more than one crore are made non – bailable. All other offences remained bailable[4]. Also, offences under Section 135, where the proposed imprisonment is more than 3 years shall be non – cognizable. It may be noted that before this amendment, the Supreme Court has held that the offences covered by Section 104 of the Customs Act, 1962 is bailable and hence non-cognizable[5].

[1] (1973) 2 SCC 836
[2] Union of India versus Padam Narain Aggarwal, (AIR 2009 S.C. 254)
[3] Act 17 of 2013
[4] Section 104(7) of the Customs Act, 1962
[5] Om Prakash v Union of India [2011 (272) ELT 321 (SC)]

Rights of an arrestee

Right to know about the ground of his arrest is one of the important and necessary right of an arrestee. The same is envisaged under Section 104(1) of the Customs Act, 1962. Right to know the ground of arrest is conferred the status of fundamental right under article 22(1) of the Constitution of India. It is also necessary to communicate the ground in language understood to the arrestee. Further, the accused has right to inform his friend or relative of his arrest. Arrest of a person is a denial of an individual's liberty which is fundamental to one's existence. Non compliance of this procedure is itself sufficient ground to grant bail.[1] The arrestee must be taken within 24 hours of his arrest to the nearest magistrate. Nearest Magistrate means judicial magistrate as under Section 167 of the Cr.P.C. The practice of showing arrest later is very much significant in India in cases of Customs and Narcotic Drug & Psychotropic Substances Act, 1985. The practice of apprehending the accused and showing the arrest later is bad in law and is giving a bad example of the Investigation Agencies. This practice is not only violating the provisions of Section 57 and 167 of the CrPC but also mandating the provisions of Article 21 and 22 of the Constitution of India[2]. The Supreme Court[3] has upheld its view that it is necessary for the investigation agencies to bear in mind the statutory provisions of Article 21 and 22 of the Constitution and ensure that utmost care is taken to comply with the same. Moreover, the authorities are bind to follow guidelines issued by the Supreme Court in *D.K. Basu versus State of West Bengal*. For the sake of brevity, the guidelines are reproduced below:

I. *The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation. The particular of all such personnel who handle interrogation of the arrestee must be recorded in a register.*

II. *That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.*

III. *A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is*

[1] Re: Directorate of Revenue Intelligence, Calcutta Zonal Unit [2014 SCC OnLine Cal 10481]
[2] T. P. Mukherjee, Commentary on Customs Act, Vol 1 (2018) pg. 733
[3] Mohd. Shaid versus Union of India, 1995 (60) E.C.R.

being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

IV. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aids Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

V. The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

VI. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclosed the name of the next friend of the person who has been informed of the arrest and the names land particulars of the police officials in whose custody the arrestee is.

VII. The arrestee should, where he so requests, be also examines at the time of his arrest and major and minor injuries, if any present on his /her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

VIII. The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctor appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

IX. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

X. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

XI. A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Custom Officials are not Police Officers

This is a well-known principle which is settled that Custom Officers discharging their duty under the Customs Act are not Police Officers. It has already been held by the Hon'ble Supreme Court[1], that Customs Officer under the Sea Customs Act (Now Customs Act) was not a police officer within the definition of Section 25 of the Evidence Act. A Customs Officer only has the power of search, seizure and arrest as of a police officer, but does not have the power to submit the charge sheet under Section 173 of the

[1] State of Punjab versus Barkat Ram [AIR 1962 S.C. 276]

CrPC, thus cannot be regarded as Police Officer within the meaning of Section 457 of CrPC[1]. Further, the statements recorded under Section 108 of the Act are distinct and different from statements recorded by the police officers during the course of investigation under the CrPC[2].

Bail for the individuals arrested under Customs Act

'Bail is a rule, jail is an exception' is the principle followed by Indian Criminal jurisprudence. But, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer period. This does not do any good to our criminal jurisprudence or to our society[3].

Person arrested under Section 104(1) of the Customs Act will also synchronized thorough Sub-Section (2) & (3) of Section 167 of the CrPC. There is no doubt about this and is a well settled principle[4].

This Magistrate (First Class) has the jurisdiction to try offence under this legislature, where he has all the power enumerated under Section 167 of CrPc. As settled, Customs Officer are not Police Officers, though he has the power to arrest. Even though Customs Officer are not police officer, but they will come under the ambit of Officer-in-Charge under Section 167 of CrPC, thus it necessary to follow the procedures laid down in said Section[5].

The Magistrate does have the right to reject or accept the bail application. There is no provision under the Customs Act that the person charged with Section 135 shall not be released on bail. Section 104 confers wide power to the Customs Authorities but the provision to produce the arrestee before the Magistrate before 24 hours is a mandate and cannot be tampered with. Also, Customs Act does not enlist any procedure for grant or refusal of bail, thus, undoubtedly, section 4(2) of the CrPc shall be attracted under such circumstances.

Section 4(2) of the CrPC states that all offences under any other laws other than Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Refusing or granting bail cannot be a fuzzy or vague order, it must be supported by reasons. The High Court of Bombay rightly observed that order of bail cannot be cryptic. The reasons, if given, either for granting or refusing bail, will help/assist the superior

[1] Assistant Collector of Customs, New Delhi versus Tilak Raj Shiv Dayal, [AIR 1969 Delhi 301]
[2] Union of India v. Padam Narain Aggarwal, (2008) 13 SCC 305
[3] Dataram Singh vs State of Uttar Pradesh & Anr. (CRIMINAL APPEAL NO.227 /2018)
[4] Ayoob M.K. versus Superintendent, Customs Intelligence Unit, Cochin, 1984 Cr. L.J. 949
[5] Nagendra Prasad versus State 1987 Cr. L.J. 215

Courts to arrive in a finding the merits of the case[1]. Also, the offences enumerated under sub-section (4) of Section 104 are non-bailable and is cognizable. The said sub-section is *non obstante* clause which clearly provides that the offences shall be non – cognizable, notwithstanding anything contained in the CrPC[2].

Conclusion

The Customs Act has provided limited scope of arrest for the evaders of the provisions of this Act. More or less, the provisions of arrest are being misused rigorously, resulting the acquittal due to paucity of concrete reason to arrest which turns into bringing embarrassing situation for the Customs Authorities. Settled provisions like producing arrestee before the Magistrate within 24 hours of the arrest are not being followed practically. It is now essential that the Customs Authorities realizes that apprehending someone with absolute restriction on one's movements also comes under the ambit of arrest. Thus, showing arrest later reflects inappropriate and arbitrariness of the authorities.

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[1] Prashant Kumar, Asst. Collector versus Mancharlal Bhagatram Bhatia, 1988 (37) E.L.T. 3
[2] Subhash Chaudhary versus Deepak Jyala, 1005 (179) E.L.T. 532

ESTABLISHMENT OF LIAISON / BRANCH / PROJECT OFFICE IN INDIA BY FOREIGN ENTITIES

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1. Introduction

Establishment of Branch office/ Liaison office / Project office or any other place of business in India by foreign entities is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification No. FEMA 22(R)/2016-RB dated March 31, 2016 ("Ntf. FEMA 22").

Section 6(6) of FEMA provides that "Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business".

According to section 2(v)(iii) of FEMA, "Person resident in India means an office, branch or agency in India owned or controlled by a person resident outside India". This implies that Branch or Project Office in India owned or controlled by a person resident outside India shall become persons resident in India.

The said Ntf. FEMA 22(R) defines a 'Foreign company' as a body corporate incorporated outside India and includes a firm or other association of individuals. As the definition includes a firm, a foreign Limited Liability Partnership is also eligible to establish Branch office/ Liaison office / Project office in India. All the terms, conditions and procedures that are applicable to a foreign company as specified in Ntf. FEMA 22 are therefore applicable to a Foreign LLP, partnership firm and other association of individuals.

Branch Offices (referred to as **"BO")** in relation to a company means any establishment described as such by the company. A branch can be opened for specific purposes; it should be engaged in the same activities as the parent company. It can undertake activity like Export / Import of goods, rendering professional or consultancy services, rendering technical support to the products supplied by parent/group companies.

The Liaison Office (referred to as **"LO")** can undertake only liaison activities, i.e. it can act as a channel of communication between Head Office abroad and parties in India, which does not undertake any commercial/trading/industrial activity in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India.

Foreign Companies planning to execute EPC/turnkey projects in India can set up temporary project/site offices (referred to as **"PO")** in India. Project office is a

place of business to represent the interest of the foreign company executing a project in India. Site office means a sub – office of the Project office established at the site of a project where major work like construction, installation, erection, supervision and commissioning is to be carried out.

2. Prior Approval of RBI / Regulators

2.1 Any person resident outside India, desirous of opening a Liaison Office (LO) / Branch Office (BO) / Project Offices (PO) in India shall require prior approval of RBI in following cases:

a. The applicant is a citizen of or is registered / incorporated in Pakistan;
b. The applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a liaison, branch or project office in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
c. The principal business of the applicant falls in the four sectors namely Defense, Telecom, Private Security and Information and Broadcasting. However, as modified vide Notification No. FEMA 22(R)(2) dated January 21, 2019 and AP (DIR Series) Circular No. 27 dated March 28, 2019, prior approval of Reserve Bank of India shall not be required in cases where Government approval or license/permission by the concerned Ministry/Regulator has already been granted. Further, in the case of proposal for opening a PO relating to defence sector, no separate reference or approval of Government of India shall be required if the said non-resident applicant has been awarded a contract by/ entered into an agreement with Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings.
d. The applicant is a Non-Government Organization, Non-Profit Organization, Body/ Agency/ Department of a foreign government. However, as modified vide Notification No. FEMA 22(R)(1)/2018-RB dated August 31, 2018 and AP (DIR Series) Circular No 20 dated February 27, 2019, if such entity is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010 (FCRA), they shall obtain a certificate of registration under the said Act and shall not seek permission under FEMA 22(R).

2.2 Foreign Insurance companies do not require any approval under Ntf. FEMA 22 for establishing any office in India if such company has obtained approval from Insurance regulatory and development authority (IRDA).

2.3 Foreign banks do not require any approval under Ntf. FEMA 22 for establishing Branch/Liaison Offices in India if such company has obtained necessary approval under the provisions of the Banking Regulation Act, 1949.

2.4 A company resident outside India does not require any approval under Ntf. FEMA 22 to establish a branch office in the Special Economic Zones (SEZs) to undertake manufacturing and service activities, subject to the conditions that:

a. such branch offices are functioning in those sectors where 100% FDI is permitted;
b. such branch offices comply with Chapter XXII of the Companies Act, 2013; and
c. such branch offices function on a stand-alone basis.

3. Application Procedure

3.1 The application for establishing BO/LO/PO in India is to be submitted by the non-resident entity in **Form FNC** to a designated AD bank along with the prescribed documents. The AD bank shall after exercising due diligence in respect of the applicant's background and satisfying itself as regards adherence to the **eligibility criteria** for establishing Branch/Liaison/Project Office and compliance with the extant KYC norms, grant approval to the foreign entity for establishing BO/LO/PO in India.

However, before issuing the approval letter to the applicant, the AD Category-I bank is required to forward a copy of the Form FNC along with the details of the approval proposed to be granted by it to the General Manager, Reserve Bank of India, CO Cell, New Delhi, for allotment of Unique Identification Number (UIN) to each BO/LO. After receipt of the UIN from the Reserve Bank, the AD Category-I bank shall issue the approval letter to the non-resident entity for establishing BO/LO in India. This is in order to enable the Reserve Bank to keep, maintain and upload up-to-date list of all foreign entities which have been granted permission for establishing BO/LO in India, on its website.

3.2 Summary of Documents to be submitted for Application:

Particulars	**LO**	**BO**	**PO**
Formation / Incorporation documents (notarized in home country)	✓	✓	✓
Financial Statements	✓	✓	×
Banker's Report	✓	✓	✓
Power of Attorney	✓	✓	✓

3.3 Registration with State Police Authorities:- Select Countries

Applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan opening a Branch / Liaison /Project office in India shall have to register with the concerned State Police Authorities. Copy of approval letter shall be marked by the AD bank to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi.

4. Eligibility Criteria

4.1 Track record:

The non-resident entity applying for a BO/LO in India should have a financially sound track record viz:

a. Track Record of Profits

Branch Office should have a profit making track record during the immediately preceding five financial years in the home country. A Liaison office should have a profit making track record during the immediately preceding three financial years in the home country.

b. Track Record of Net Worth

For Branch Office Net worth should not be less than USD 100,000 or its equivalent.

For Liaison Office Net worth should not be less than USD 50,000 or its equivalent.

Net Worth is defined as total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name called.

c. An applicant that is not financially sound and is a subsidiary of another company may submit a Letter of Comfort (LOC) from its parent/ group company, subject to the condition that the parent/ group company satisfies the prescribed criteria for net worth and profit.

4.2 For Project Office in India:

4.2.1 Regulation 4f(I) of Ntf. FEMA 22 grants General Permission to a foreign company to set up Project Office in India, subject to specified conditions.

4.2.2 If the specified conditions are not met, the foreign entity has to approach RBI for approval and these are:

a. PO has secured from Indian Company a contract to execute project in India, and

b. (i) Project is funded by inward remittances from abroad, or

(ii) Project is funded by bilateral or multilateral International Finance Agency (i.e. World Bank, IMF or similar other body), or

(iii) Project is cleared by appropriate authority, or

(iv) Company / Entity in India awarding contract been granted Term Loan by Public Financial Institution or bank for the project

4.3 Thus, in any case, BO / LO / PO requires application to be made to AD Bank in Form FNC and same may be approved by the AD Bank under the delegated powers by RBI. This is known as Automatic Route.

If the eligibility criteria as described in this Paragraph are not satisfied, then in such case RBI approval route is applicable. Also in cases mentioned in Para 2.1 above, applications for prior RBI approval would be required in Form FNC to RBI.

In case of PO, AD-Bank is not required to generate any UIN as referred in Paragraph 3.1 above

5. Other Conditions including related to approval

5.1 The validity period of an LO is generally for three years, except in the case of Non-Banking Finance Companies (NBFCs) and those entities engaged in construction and development sectors, for whom the validity period is two years only. The validity period of the project office is for the tenure of the project.

5.2 In case the BO/LO/PO for which approval has been granted is not opened within six months from the date of the approval letter, the approval shall lapse. In cases where the non-resident entity is not able to open the office within the stipulated time frame due to reasons beyond its control, the AD Category-I bank may consider granting extension of time for a further period of six months for setting up the office. Any further extension of time shall require prior approval of Reserve Bank of India.

5.3 All applications for establishing a BO/LO in India by foreign banks and insurance companies are to be directly received and examined by the Department of Banking Regulation (DBR), Reserve Bank of India, Central Office and the Insurance Regulatory and Development Authority (IRDA), respectively. No UIN for such representative offices is required from the Foreign Exchange Department, Reserve Bank of India.

5.4 A BO/LO/PO or any other place of business by whatever name called is required to register with the Registrar of Companies (ROCs) once it establishes a place of business in India if such registration is required under the Companies Act, 2013.

5.5 The BOs / LOs shall obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up of their office in India and report the same in the AACs. The existing PAN and bank accounts can be continued when an LO is permitted to upgrade into a BO.

5.6 Each BO/ LO/PO are required to transact through one designated AD Category-I bank only who shall be responsible for the due diligence and KYC norms of the BO/LO/PO. BO/LO/PO, present in multiple locations, is required to transact through their designated AD. However, the AD of the nodal office is required to comply with all the reporting norms.

5.7 As per section 6 (3) (h) of the Foreign Exchange Management Act, 1999, BOs/LOs/POs have general permission to carry out permitted/ incidental activities from leased property subject to lease period not exceeding five years.

6. Permitted Activities

6.1 Liaison Offices can consider following activities:

a. Representing in India the parent company / group companies.
b. Promoting export / import from / to India.
c. Promoting technical/financial collaborations between parent/group companies and companies in India.

d. Acting as a communication channel between the parent company and Indian companies.

6.2 Branch Offices can consider following activities:

a. Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.
b. Export / Import of goods.
c. Rendering professional or consultancy services.
d. Carrying out research work, in areas in which the parent company is engaged.
e. Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
f. Representing the parent company in India and acting as buying / selling agent in India.
g. Rendering services in information technology and development of software in India.
h. Rendering technical support to the products supplied by parent/group companies.
i. Foreign airline / shipping company.

6.2.1 Activities not permitted for Branch office:

a. Retail trading activities of any nature is not allowed for a Branch Office in India.
b. A Branch Office is not allowed to carry out manufacturing or processing activities in India, directly or indirectly

6.3 Project Office can consider following activities:

a. To execute a contract/project in India secured from an Indian company and activities related to execution of the project.
b. To render service during the warranty period and after sales service as per the Contract terms.

7. Opening of Bank Account

7.1 Liaison offices:

LO may open an account with the designated AD category I Bank in India for receiving remittances from its Head Office outside India. It may be noted that LO shall not maintain more than one bank account at any given time without the prior permission of Reserve Bank of India.

The permitted Credits to the account shall be:

a. Funds received from Head Office through normal banking channels for meeting the expenses of the office.
b. Refund of security deposits paid from LO's account or paid directly by the Head Office through normal banking channels.
c. Refund of taxes, duties etc., paid from LO's bank account.
d. Sale proceeds of assets of the LO.

The permitted Debits to the account shall only be for meeting the local expenses of the office.

7.2 Branch offices:

BO may open an account with the designated AD category I Bank in India for its business operations in India. Credits to the account should represent the funds received from Head Office through normal banking channels for meeting the expenses of the office and any legitimate receivables arising in the process of its business operations. Debits to this account shall be for the expenses incurred by the BO and towards remittance of profit/winding up proceeds.

7.3 Project offices:

Any foreign entity except an entity from Pakistan who has been awarded a contract for a project by the Government authority/Public Sector Undertaking or is permitted by the AD bank to operate in India may open a bank account without any prior approval of the RBI.

AD bank can open non-interest bearing Foreign Currency Account for PO in India subject to the following:

a. The PO has been established in India, with General/Specific permission of RBI, having the requisite approval from the concerned Project Sanctioning Authority.
b. The contract governing the project specifically provides for payment in foreign currency.
c. Each PO can open 2 Foreign Currency Accounts – usually one denominated in USD and the other one in home currency provided both are maintained with the same AD bank.
d. The permissible debits to the account shall be payment of project related expenditure and credits shall be foreign currency receipts from the Project Sanctioning Authority and remittances from parent company/group Company abroad or bilateral/multilateral international financing agency.
e. AD bank shall ensure that only approved debits and credits are allowed in the foreign currency account. Further, the accounts shall be subject to 100 per cent scrutiny by the Concurrent Auditor of the respective Bank.
f. The foreign currency accounts have to be closed at the completion of the Project.

8. Term deposit account by Branch/Liaison/Project Office

AD Category-I bank can allow term deposit account for a period not exceeding 6 months in favour of a BO/LO /PO provided the bank is satisfied that the term deposit is out of temporary surplus funds and the BO/LO/PO furnishes an undertaking that the maturity proceeds of the term deposit will be utilised for their business in India within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.

9. Validity & extension of LO & PO

Requests for extension of time for LOs may be submitted before the expiry of the validity of the approval, to the AD Category-I bank concerned under whose

jurisdiction the LO/Nodal office is located. The validity of an LO is generally for three years except in the case of Non-Banking Finance Companies (NBFCs) and those entities engaged in construction and development sectors, for whom the validity is two years only. LOs opened by such entities (excluding infrastructure development companies) shall not be allowed any extension of time. Upon expiry of the validity period, the LOs shall have to either close down or be converted into a Joint Venture / Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy.

The validity period of the project office is for tenure of the project.

There is no such validity period for Branch offices.

10. Shifting of LO / BO

The shifting of existing BO/LO to another city in India shall require prior approval from the AD Category-I bank. However, no permission is required if the LO/BO is shifted to another place in the same city subject to the condition that the new address is intimated to the designated AD Category-I bank.

11. Opening of Additional Offices

The Additional BO/LO may be permitted to be opened by tendering fresh Form FNC. However, the documents mentioned in form FNC need not be resubmitted, if there are no changes to the documents already submitted earlier. The applicant may identify one of its offices in India as the Nodal Office, which will coordinate the activities of all of its offices in India.

If the number of offices exceeds 4 (i.e. one BO / LO in each zone viz; East, West, North and South), the applicant has to justify the need for additional office/s and it shall require prior approval of the Reserve Bank.

12. Intermittent Remittances by Project Office

12.1 AD bank can permit intermittent remittances by Project Offices pending winding up / completion of the project provided they are satisfied with the bonafides of the transaction, subject to the following:

a. The Project Office submits an Auditors' / Chartered Accountants' Certificate to the effect that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.
b. An undertaking from the Project Office that the remittance will not, in any way, affect the completion of the Project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

12.2 Inter-Project transfer of funds requires prior permission of RBI under whose jurisdiction the PO is situated.

13. Reporting Requirements

13.1 Reporting to AD Category – I Bank:

13.1.1 The Annual Activity Certificate (AAC) as at the end of March 31 each year along with the documents laid down needs to be submitted by the following:

a. In case of a sole BO/ LO, by the BO/LO concerned;
b. In case of multiple BOs / LOs, a combined AAC in respect of all the offices in India by the nodal office of the BOs / LOs.
c. Project offices – Showing Project Status and certifying that the accounts of the Project Office have been audited and the activities undertaken are in conformity with the General/Specific permission by RBI

13.1.2 The BO/LO needs to submit the AAC to the designated AD Category -I bank as well as Director General of Income Tax (International Taxation), New Delhi whereas the PO needs to submit the AAC only to the designated AD Category -I bank.

13.1.3 Summary of reporting Requirements as per FEMA:

Particulars	**LO**	**BO**	**PO**
AAC to AD	✓	✓	
Financial statements	✓	✓	
Receipt & Payment A/c	✓	✓	
AAC to show Project Status			✓

13.2 Annual Compliances under the Companies Act, 2013:

As per Companies Act, 2013, every foreign Company must file the following documents with ROC:

i. Balance sheet, P&L Account, Annual Return, Compliance certificate, statement of related party transactions, statement of repatriation of profits, statement of transfer of funds (including Dividend, if any) along with the e-form.
ii. Documents relating to latest consolidated financial statements of the parent foreign company, Where the Central Government has specified different documents for any foreign company or a class of foreign companies, then documents as specified shall be submitted
iii. A copy of a list in form FC.3 of all places of business established by the company in India as at the date of the Balance sheet.
iv. Receipt and Payments Account

13.3 Reporting requirements as per Income Tax Act, 1961:

i. As per Sec 139 of I.T Act, every company (including a foreign company) is required to file tax returns in India. This would be applicable to a Branch and Project office.
ii. AAC also needs to be filed with DGIT (Intl Tax), New Delhi
iii. As per Sec 285 read with rule 114DA, it is mandatory for the liaison office only to file an annual statement of their activities in India within 60 days from the end of the financial year. The Annual statement is required to be filed in form No 49C
iv. Above form shall be duly verified by the Chartered Accountant, and uploaded in e-form

14. Acquisition and Transfer of Immovable Property

14.1 As per FEMA Ntf. 21(R) dated March 26, 2018 which governs Acquisition and transfer of Immovable property in India under FEMA Act, 1999, a branch or office in India established by a person resident outside India, other than a liaison office, can acquire any immovable property in India for their own use only for permitted/incidental activities subject to filing of declaration in Form IPI within 90 days from the date of such acquisition.

14.2 It may be noted that as per Section 6(3)(i) of the FEMA Act, 1999, Persons resident outside India have general permission to acquire and transfer immovable property in India under lease subject to lease period not exceeding five years.

14.3 Such acquired property can be transferred by way of mortgage to an AD bank as a security for any borrowings.

14.4 However, acquisition of immovable property in India by persons of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) origin/ nationality/ ownership, other than on lease not exceeding five years, requires the prior approval of the Reserve Bank.

14.5 Subject to certain other conditions, remittance of funds on sale/transfer of property is allowed after paying all applicable taxes in India.

15. Remittance of Profits / Surplus

Branch Offices are permitted to remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the Authorised Dealer through whom the remittance is affected -

a. A Certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year
b. A Chartered Accountant's certificate certifying:
   i. the manner of arriving at the remittable profit
   ii. that the entire remittable profit has been earned by undertaking the permitted activities
   iii. that the profit does not include any profit on revaluation of the assets of the branch.

16. <u>Winding up / Closure of Branch / Liaison / Project Offices</u>

Requests for closure of the BO / LO/ PO and for remittance of winding-up proceeds may be submitted to the designated AD Category - I bank by the BO/ LO/PO or their nodal office, as the case may be along with the following documents:

a. Copy of the RBI approval for establishing the BO/LO/PO.
b. Auditor's certificate :
    i. Indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant and indicating the manner of disposal of assets;
    ii. Confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for; and
    iii. Confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India.
c. Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance.
d. A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the BO /LO in India, wherever applicable.
e. The designated AD Category - I banks has to ensure that the BO / LO/ PO had filed their respective AACs.
f. Any other documents, specified by RBI/AD Category-I bank while granting approval.

17. <u>Transfer of Asset / Conversion of BO into Company</u>

A PROI who has been granted the permission to establish a BO/LO/PO may apply to the concerned AD bank for transfer of assets to JV or wholly owned subsidiary in India. Such transfer of assets may be permitted subject to following conditions:

i. Submission of AACs (up to the current financial year) at regular annual intervals;
ii. Obtained PAN from IT Authorities
iii. Registered with ROC under the Companies Act 2013, if necessary.
iv. Non-resident entity intends to close their BO/LO/PO operations in India.
v. Submission of statutory auditor certificate furnishing details of assets to be transferred with relevant particulars.
vi. The assets should have been acquired by the BO/LO/PO from inward remittances or profit/surplus generated in case of BO/PO and no intangible assets such as good will, pre-operative expenses should be included.
vii. Revenue expenses such as lease hold improvements incurred by the BO/LO cannot be capitalised and transferred to JV/WOS.
viii. Payment of applicable taxes

18. Donation by LO / BO / PO

Donation by BO/LO/PO of old furniture, vehicles, computers and other office items etc. to NGOs or other not-for-profit organisations may be permitted by the AD Category-I banks after satisfying themselves about the bonafides of the transaction.

19. Summary - Comparison of LO / BO / PO

	Liaison Office	**Branch Office**	**Project Office**
Eligibility	FDI sectors, Net-worth, Country of Incorporation / registration, NGO, Foreign Govt., etc.		
Documents	Charter documents, POA, Certificate of net-worth / Letter of Comfort (other than for PO)		
Activities/Purpose	Only liaison activities i.e. act as channel of communication between head office abroad and parties in India	▪ Export / Import ▪ Render professional / consulting services ▪ Conduct research ▪ Render technical support to products supplied by F.Co. ▪ Acting as buying/selling agent of parent Co. Can earn income in India	▪ Execution of project involving ▪ Onshore supply of goods and / or services ▪ Offshore supply of goods and / or services Can earn income in India
Bank accounts	Only one	Only one	Max. two

Prohibited Activities	▪ No Commercial Activities ▪ Meet Expenses through inward remittance	Manufacturing & Processing except in SEZ	Can only engage in execution of Project
Acquire Immovable Property	Cannot acquire, hold, transfer any property in India without RBI prior approval	Yes for their own use and to carry out permitted / incidental activities	Yes for their own use and to carry out permitted / incidental activities
Track Record & Net worth	▪ 3 yrs ▪ US$ 50,000	▪ 5 yrs ▪ US$ 100,000	No stipulation
Taxability	Not Liable to Tax	▪ Taxable as Non-resident ▪ Can qualify as PE under tax treaties and claim treaty benefits	▪ Taxable as Non-resident ▪ Can qualify as PE under tax treaties and claim treaty benefits
Reporting for LO / BO	To AD Bank, Tax authorities, Registrar of Companies for AAC, additional places of Business, change of place of business within city		
Prior approval	Change of activity, more than 4 offices, more than specified Bank accounts, change of office outside the city, purchase of immovable properties by companies incorporated / registered in specified countries, Banking account of PO of company incorporated in Pakistan, establishment of BO/LO/Po by companies of specified countries, etc.		

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FUNCTIONS AND DUTIES OF A PROMOTER AND REAL ESTATE AGENTS[1]

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This is the third article in the series written on RERA, all readers are requested to read the previous 2 articles also to fully appreciate the sequence of the statutory provisions

Part A

The responsibility cast on the 'Promoter' is humongous which is justifiable keeping in mind the interest and welfare of the home buyers. Section 11 to 18 of Chapter III of RERA Act 2016 contains the functions and duties of a 'Promoter' which he is required to discharge diligently under the provisions of the Act. We will discuss the salient features of the relevant provisions in the following paragraphs.

Bringing in **Section 11** to our light of discussion, some very pertinent and interest do's and don'ts are provided

1. The promoter shall upon receiving his login Id and password create his web page on the website of Authority and enter all the details of the proposed project as provided under sub-section (2) of Section 4 in all the fields as provided, for public viewing, which shall contain the following details:
    - details of the registration granted by the authority
    - quarterly up-to-date the list of number and types of apartments or plots as the case may be booked
    - quarterly up to date the list of number of garages booked
    - quarterly up to date the list of approvals taken and the approval which are pending subsequent to commencement certificate
    - quarterly up to date status of the project and
    - such other information and documents as may be specified by the regulations made by the Authority.
2. The advertisement or prospectus issued by the promoter shall mention prominently the website address of the authority, wherein all the details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.
3. The promoter at the time of booking and issue of allotment letter shall make available to the allottee copies of sanctioned plans, layout plans, along with

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specifications, approval by the competent authority, by display at the site or such other place as may be specified in the regulations.

4. The Promoter in addition to other things will also be responsible for all the obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings as the case may be to the allottees or the common areas to the association of allottees or the competent authority as the case may be.
5. It is worth mentioning here that the responsibility of the promoter regarding structural defect or any other defect in the workmanship quality or provision of services shall continue for a further period of five years from the date of handing over the possession to the allottee.
6. The promoter would be liable to obtain completion certificate or the occupancy certificate or both as applicable from the relevant competent authority as per local laws and make them available to the allottees. The promoter shall be liable to obtain the lease certificate in case the real estate project is developed on a leasehold land.
7. The promoter shall be responsible for providing and maintaining the essential services on reasonable charges till the taking over of the maintenance of the project by the association of the allottees.
8. The promoter shall enable the formation of an association or society or cooperative society or a federation of the same under the applicable laws.
9. The promoter shall arrange to execute a registered conveyance deed of the apartment plot or building as the case may be in favour of the allottees along with the undivided proportionate title in the common areas to the association of allottees of competent authority as the case may be as provided under Section 17 of the Act.
10. The promoter shall pay all the outgoings until he transfers the physical possession of the real estate project to the allottees or the association of allottees as the case may be.

    The promoter after executing an agreement for sale for any apartment plot or building shall not mortgage or create a charge on such apartment, plot or building.
11. The promoter shall cancel the allotment only as per terms of the agreement for sale.
12. The promoter shall prepare and maintain all such other details as may be specified from time to time by regulations made by the authority.

Now, we need to discuss the provisions of Section 12 to understand the veracity of the advertisement or prospectus issue in respect of the project.

Section 12 says that the promoter has to state the truth and facts in the advertisement or prospectus of the project because if any person makes an advance or deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner provided in the Act

which includes payment of interest along with the entire investment of the allottee in case of withdrawal from the project.

Section 13 further talks about no deposit or advance to be taken by promoter without prior agreement for sale.

No promoter shall accept a sum more than 10% the cost of the apartment, plot or building as the case may be as an advance payment or an application fee unless he does the following;

a) Enters into written agreement for sale with the proposed allottee,
b) Registers the agreement for sale,
c) The written agreement shall be in the manner as prescribed and shall also contain complete details and particulars about the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payment towards the cost of the apartment, plot or building as the case may be, are to be made by the allottee and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default and such other particulars as may be prescribed.

Section 14 contains the provisions regarding adherence to sanctioned plans and project specifications by the promoter.

The promoter shall develop and complete the project in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. The promoter shall disclose complete details and specifications as approved by the competent authority pertaining to nature of fixtures and fittings, amenities and common areas, of the apartment, plot or building to the person who agrees to take one or more of the said apartment, plot or building.

The Promoter shall not make any addition or alternations in the sanctioned plans, layout plans and specifications and nature of fixtures and fittings, amenities described therein in respect of the apartment, plot or building as the case may be which are agreed to be taken without the previous consent of the person. However, the promoters can make minor alterations or additions as required by the allottee or such minor changes or alterations duly recommended by the authorised architect or engineer.

Section 15 provides obligations of promoter in case of transfer of a real estate project to a third party.

The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the authority.

Section 16 further provides obligations of promoters regarding insurance of real estate project.

The Promoter shall obtain all such insurances as may be notified by the appropriate government including but not limited to insurance in respect of the title of the land and building and construction of the real estate project and shall keep the insurance coverage

active at all times during the construction and on formation of association of allottees the promoter shall hand over all the documents pertaining to the insurance to them.

Section 17 deals with one of the most important issues concerning the home buyer i.e. 'Transfer of Title'.

The Promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common area to the association of allottees or the competent authority and hand over the physical possession of the plot, apartment or building as the case may be to the allottees and the common areas to the association of the allottees and hand over the title documents pertaining thereto within the specified period as per sanctioned plans as provided under the local laws. In the absence of any local law the promoter shall execute the conveyance deed within a period of 3 months from the date of issue of the occupancy certificate. All the documents, plans, pertaining to the project should also be handed over to the allottees at the time of conveyance of the property.

Section 18 talks about return of amount and compensation. In case the promoter is not able to complete or is unable to give possession of the project in accordance with the terms of the agreement for sale than the promoter is liable on demand to the allottees in case the allottee wishes to withdraw to return amount received by him along with the interest at such rates as may be prescribed in addition to the compensation in the manner provided in the Act. In case the allottee does not intend to withdraw from the project the promoter shall pay interest for every month of delay till the handing over of the possession at such rate as may be prescribed.

Part B

Real Estate Agents are now an integral & important part of the Real-Estate industry. There was once a time where Real Estate Agents were contacted only through reference. There was no official channel or a legal mechanism to keep a check on their validity, work and keeping a check on Real Estate Agents.

The RERA Act mandatorily prescribes Real Estate Agent to get itself registered under Sec 9. The main responsibility of Real Estate Agent is to facilitate purchase or sale of plots of land, building or apartment.

Other than these responsibilities under Section 10 are given.

Functions of Real Estate Agent – Sec. 10

Every Real Estate Agent registered u/s 9 shall:-

a) Not facilitate the sale or purchase of any plot, apartment or building, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority,

b) Maintain and preserve such books of account, records and documents as may be prescribed,

c) Not involve him in any unfair trade practices,

d) Facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building,

e) Discharge such other functions as may be prescribed

"*Unfair trade Practice*" means a practice of:

A. Making any written or visible or oral statement which:

i. Falsely represents that services are of particular standard or grade;

ii. Represents that promoter has approval or affiliation which he does not have;

iii. Makes false or misleading representation concerning services.

B. Allowing publication of any advertisement or prospectus in newspaper or otherwise of services that are not intended to be offered.

A real estate agent is now an integral part of the industry and must take care of its responsibilities and duties. This has been able to regularise and also uplift the position of Real- Estate agent in the market. There is more reliability on the brokers and agents by the retailers after enactment of the RERA statute.

Interplay between RERA and GST Enactments

Before concluding we would like discuss some of the very recent and interesting developments which have taken place in GST Law resulting in active interplay between both the enactments i.e. RERA and GST. Tax consultants and professionals may please note that significant changes have been made in GST Acts and Rules on 29.03.2019 by the Central Government on the recommendations of the GST council in its 33rd and 34th meeting which were held to address the problems and concerns of the Real Estate Sector and to boost the sector.

An in-depth reading of the above changes, it clearly prove the active interplay between RERA and GST enactments. This is substantiated by the fact that in the GST Notifications and Rules recently issued on 29.03.2019 many definitions and explanations contained in the RERA Act have been incorporated or referred in GST Law. To give an example the GST Notifications have adopted the definition of the term "promoter", "project" and 'Real Estate Project" as defined in RERA Act which have been adopted verbatim in the GST Notifications. Going forward tax professionals while giving advice to the clients or representing them have to be aware of this interplaying and should not act in isolation.

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

CA Sanjay Ghiya
CA Ashish Ghiya

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

GREEN SPACE DEVELOPERS V/S PARAG PRADIP MANTRI

The appellant felt aggrieved by the order dated 05.02.2018.The grievance of the complainant was that the project was not registered with MahaRERA and hence there was contravention of Sec. 3 of RERA.As noticed by the Ld. Member and AO, MahaRERA, that the appellant has constructed the building, however, some common areas and agreed amenities were left to be adhered to and there is wanting of Completion Certificate on the date of commencement of RERA. The Ld. AO has assigned reasons to indicate as to whether the project is an ongoing project and needs registration. The finding recorded is in affirmative. It is an academic issue as the Appellant has affected registration with MahaRERA on 20.03.2018. The Ld. Counsel for the appellant has said that it was honest and bona-fide intention of the appellant to get the project registered but misconception of information led to confusion of not registering it. The Ld. Counsel has urged either to waive the penalty of Rs.50, 000/- or to reduce it. The Tribunal also noticed that non-compliance with mandatory provisions contemplate penal action in terms of sec. 59 of the Act and it was in this situation the Ld. AO instead of putting it to 10% cost of real estate project, reduce it to Rs.50,000/-. However, since the order / direction are complied with, the penalty imposed of Rs.50, 000shall not be a stigma against the appellant developer.

Hence, the authority ordered that no interference in the directions and the order of AO, MahaRERA except reduction in payment of cost to Rs.15, 000/- to be deposited with MahaRERA up to 5thof April 2018.

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

NITIN PRABHAKAR BHAGWAT V/S PRATEEK OMPRAKASH AGRAWAL

The complainant has filed this complaint under Section 18 of Real Estate (Regulation & Development) Act, 2016 contending therein that he booked flat No. B-4, 101, Village Residency-III of the respondent's project situated at Pune, Hingoli. The respondent agreed to give the possession of the said flat on tentative date 15.01.2017 by writing it on theallotment letter itself. Thereafter, the respondent by his email dated

28.12.2016 informed the complainant that the possession of the flat shall be given on or before 31st March 2017. The complainant has paid the respondent Rs. 20, 00,000/- towards consideration. Therefore, the complainant withdraws from the project and seeks the refund of the amount paid by him with interest. The respondent has failed to appear on 03.11.17 and 04.12.17 despite the notices of appearance has been issued. He has to appear on these days. Hence, the matter precedes ex-parte against him.

Heard the complainant in person, he brings to my notice the allotment letter in which it is clearly mentioned by the respondent that tentative date of possession would be 15.01.2017. He has brought to notice of authority, an email of respondent dated 18.12.2016 showing that the possession of the flat would be given on or before 31.03.2017 but till the date, the possession of the flat has not been given. Hence, the respondent has failed to deliver the possession of the flat booked by the complainant on the agreed date. So far as the payment of Rs. 20, 00,000/- is concerned; the complainant relies upon the receipt issued by the respondent dated 10.09.2013 and on bank statement. Therefore, the complainant is entitled to get this amount back from the respondent with interest from 10.09.2013 at MCLR of interest of SBI which is currently 8.05 %+ 2 % p.a. till the realization of the amount.

The complainant brings to notice that when he booked the flat in the year 2013, the rate in the said area as per the ready reckoner issued by the Government authority was Rs. 25,000/- per sq. mtrs and now in the year 2017, the rate as per the ready reckoner is Rs. 31,360/- per sq. mtrs. He will have to pay higher price as he books a flat in the same area. Therefore, according to him, he has sustained the loss of Rs. 2, 86,581/-, due to loss of opportunity. The authority agrees with him. The complainant is also entitled to get Rs. 10,000/- towards the cost of complaint.

SHAILESH PARDIKAR & ors. V/S SIGMA ONE SHILP VENTURES & ors.

The complainants booked flats in the project of respondents. They alleged that the respondents have failed to handover the possession of these flats on agreed date and hence the complainants are claiming the refund of their amount along with the interest and/or compensation.The respondents in their argument contended that project got delayed due to reasons beyond their control as recommendation from Assisting Director of Town Planning and grant of permission from the Collector, Pune to use the land for non- agricultural purposes got delayed and thereafter the respondents got the approval of revised construction plan. And due to above, they have mentioned that the project will be completed by 31st March 2018 while registering the project.The authority concluded that on verifying the sale agreements, it is evident that the respondents were required to hand over the possession of the complainant's flats on agreed date. In context with the reasons submitted by the respondents, the court cannot re-write the contracts of the parties. Therefore, authority held that respondents have failed to deliver the possession. Accordingly, the respondents are directed to refund the amount of complainants along with interest and compensation in addition to cost of complaint borne by the complainants.

MAHENDRA J. TIWARI V/S PALAVA DWELLERS PVT. LTD.

The complainant seeks directions to pay interest on amount paid to the respondent on their failing to handover the possession of the flat to the complainant till date.The respondent disputed the claim on the ground of maintainability of the complaint and stated that agreed date along with the grace period of 1 year as per agreement is yet to come.The authority on verifying the facts as per registered agreement held that the agreed date of possession is not yet over considering the grace period provided in the agreement. Therefore, the respondent is not at default and complainant is not entitled to any interest. Accordingly, complaint is dismissed.

AKSHAY RAHEJA & ors. V/S COURTYARD REAL ESTATE PVT. LTD.

The complainants alleged that the Legal Title Report uploaded by the respondent at the time of registration on the RERA website is misleading and incomplete. Therefore, they prayed that registration of respondent be revoked/ suspended and respondent be directed to inform all allottees, admitting the misrepresentation and appropriate penalties to be imposed.The respondent pleaded not guilty and argued that the complainants had no locus standi in the project as they are not the aggrieved party to the said case.On view of the above, the authority decides that the complainants are a party to the case. However, a detailed disclosure in such report, of all the reliefs sought in the suit, is not mandatory. Thereby, disclosures made by respondent in Legal Title Report are sufficient. Accordingly, the matter is disposed of.

RAMESH SINGH & Ors V/S AKSHAR SPACE PVT. LTD.

The complainants prayed for the directions from the authority to the respondent under section 18 of the Act to pay them interest for the delayed period of possession in respect of their flats in the project. It was further argued by the complainants that the respondent has not obtained the necessary approvals in place before launching of the project and the homebuyers were kept in dark. The respondent disputed the claim and argued that the project got delayed due to reasons beyond his control as inspite of the fact that the application for the environment clearance was filed in the year 2010, the clearance was given in July, 2013. Further he argued that the project got delayed also for want of water and electricity supply which was finally provided by competent authority in November, 2017.

After hearing the rival arguments of both the parties and on perusal of the documents submitted, the authority observed that though the sufficient efforts were made by the respondent, as and when necessary, yet the competent authority issued the NOC in 2013. For this the authority summoned the officers of competent authority to verify the delay and found that delay has happened at the level of competent authority. In context to the other factor mentioned by the respondent for delay in project, the same can't be justified. Also, it has been clarified as per agreement that the date of possession would be extended if the project gets delayed due to force majeure and reasons beyond control of

the promoter. Therefore, date of possession is extended upto 30th June 2017 and the respondent is directed to pay interest to the complainants from 1st July 2017 till the actual date of possession. Accordingly the complaint is disposed of.

PUNJAB REAL ESTATE REGULATORY AUTHORITY

SANGEETA SHARMA V/S M/S BARNALA BUILDERS & PROPERTY CONSULTANT

The complainant alleged that despite making all the payments, respondent didn't offer possession of flat; also respondent has wrongly made communications with her on Panchkula address while she was actually residing in Singapore. Further, she was forced to change her flat with another 3 BHK flat in Maya Garden City on account of lack of development work in the proposed complex.

Respondent has contested the allegations made by the complainant and has alleged that complaint has been initiated to take revenge on account of some personal reasons. The respondent has also contested the claim of complainant in regard to allotment of flatNo.101 in B-1 Block in Maya Garden City, which was changed to another flat in Maya Garden Phase-III on 29.09.2012 on the request of complainant herself. Respondent has claimed that the entire project has been completed and all the required facilities have been provided and further claimed that the possession of flat was offered on the completion of the same but the complainant has been refusing to take possession on one technical ground or the other. In view of the facts mentioned above, the authority decided that the complainant is free to take possession of the flat. The promoter shall not levy any penal interest for the delay in taking possession, as she has already made complete payment towards cost of the flat.

SURJIT KAUR V/S M/s OMAXE CHANDIGARH EXTENSION DEVELOPERS Pvt. Ltd.

This order will decide the objection to maintainability of the complaint under Section 31 of RERA (Act), filed by the complainant. The contents of the complaint are that the possession of the unit allotted had not been delivered within the stipulated time and has sought that either the possession should be delivered, or the amount paid should be refunded along with interest. It was contended by the respondent in the reply that because of the presence of the arbitration clause, the present compliant could not be maintained and had to be dismissed. Counsel submitted that the Hon'ble Supreme Court in its judgment in Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi (1996) 6 SCC 385 had held that the Consumer Forum to be a judicial authority within the meaning of this section. He submitted that though it was not judicially settled that this Authority was also a judicial authority for the purposes of Section 8, yet it was on a similar footing as the Consumer Forum under the Consumer Protection Act, 1986 and hence could be treated as judicial authority. He continued that they had raised the objection regarding presence of arbitration agreement at the first stage itself, and hence there was no option

with this Authority except to refer the matter to the arbitration, rather than deciding it. In line of the facts in this case, the authority concluded, it may be noted that Section 79 of the Act, bars the jurisdiction of Civil Courts about any matter which falls within the purview of this Authority, or the Real Estate Appellate Tribunal. The jurisdiction conferred by this provision cannot be fettered by the existence of an arbitration clause in any agreement in my opinion. There is no merit in the preliminary objection raised on behalf of the respondent. The objection is accordingly dismissed.

NOTIFICATIONS/CIRCULARS

PUNJAB REAL ESTATE REGULATORY AUTHORITY
NO.: RERA/Pb/ENF-13
DATE: 26.10.2018
CLARIFICATIONS REGARDING "OCCUPATION CERTIFICATE", "PARTIAL COM LETION CERTIFICATE" AND "COMPLETION CERTIFICATE

While dealing with the cases of registration of Real Estate Projects as well as the complaints filed by the allottees, it has been noted that there is a lack of clarification regarding the "Occupation Certificate", "Partial Completion Certificate" and "Completion Certificate". It was noted that some clarification had been sought from Government in this behalf, but was still awaited. It was felt that in view of the urgency of the matter, the Authority should take a decision to guide the staff in dealing with such matters. The matter was accordingly discussed in detail, and it has been decided as follows:-

1. In the case of Group Housing Projects a Partial Completion Certificate for a particular part (say a tower) would be considered valid only if the promoter could prove that the supporting infrastructure relevant to that particular part was also complete.
2. An "Occupation Certificate" would be valid only if the project in which it was located had been granted a "Completion Certificate", or in the case of "Partial Completion Certificate" the condition prescribed in (I) above was complied with. This would be in line with the instructions issued by the Department of Housing and Urban Development *vide* its reference No.4966-CTP (Pb)/P-458 dated 02.09.2014.

These decisions would operate till a clarification is received from the Government and would be reconsidered thereafter, if necessary.
All concerned to please note for compliance.

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ALLIED JUDGMENTS

HIGH COURT OF RAJASTHAN AT JAIPUR BENCH

S.B. CRIMINAL WRIT NO: 76/2019- Order dated: 12.03.2019

BHARAT RAJ PUNJ & ORS .... Petitioner
VERSUS
COMMISSIONER OF CENTRAL GOODS & SERVICE TAX .... Respondent

For the Petitioner (S) : Mr. R.N. Mathur, Sr. Adv. with Mr. Vijay Choudhary, Mr. Aseem Chaturvedi, Mr. Anant Priya Jain

For the Respondent (S) : Mr. Siddharth Ranka

Writ Petition filed for quashing of summons under CGST Act- matter related to claim of ITC on fake invoices- Held officers under section 32 is made out and summons rightly issued. Under Sec.-70 writ petition dismissed with cost.

HONBLE MR. JUSTICE PANKAJ BHANDARI

1. Petitioners have preferred this Writ Petition seeking quashing and setting aside of summons issued by the Commissioner of Central Goods and Service Tax Department, Jaipur and Alwar and a further prayer that the authorities be directed not to take any coercive action against the Petitioners.
2. Succinctly stated facts of the case are that the Petitioner No.1 is the Managing Director of M/s Leel Electricals Limited, Petitioner No.2. The Central Goods And Service Tax Department conducted a raid on 17.01.2019, at the premises of the Petitioners' Company at Bhiwadi, Rajasthan. Senior Officials of the company, Shri Mukut Bihari Sharma, Director and Chief Financial Officer (CFO) and Shri Shobhan Singh Bhandari were asked to remain present at the premises of the Company. Summons under Section 70 of the Goods and Services Tax Act were served upon them. The raid continued till 19.01.2019. After recording of the statements of Officials of Company, they were arrested. As per the case of the Department, the Company had fraudulently availed input tax credit of Rs.40.53 crores by issuance of fictitious sale invoices and sister concerns of company and Petitioner-Company had fraudulently availed input tax credit of Rs.328 crores.
3. It is contended by counsel for the Petitioners that the Petitioner No.1 was residing in United States of America. It was only after demise of his father that he returned to India in November, 2017. He was appointed as M.D. on 30.05.2018 after demise

of his father-Shri Brij Raj Punj. He has all apprehension that if he appears, in pursuance of the notice issued under Section 70 of the Goods and Services Tax Act by the Department, he would be arrested, as has been the fate of Senior Officials of the Company.

4. It is contended that Petitioner has deposited GST to the tune of Rs.7,15,06,124/- from 18.01.2019 till 02.02.2019, which goes to show that Petitioner is a law abiding citizen. If any coercive action is taken by the Department against the Petitioner, it would seriously hamper his reputation.
5. Counsel for the Petitioners has placed reliance on ***"Make My Trip (India) Pvt. Ltd. vs. Union of India"*** 2016 SCC online Del.4951, wherein the Delhi High Court held that Section 70 of the Goods and Services Tax Act does not permit the Sale Tax Department to by pass procedure before going ahead with arrest of a person. Decision to arrest a person must not be taken on whimsical grounds, it must be based on 'credible material'.
6. It is contended by counsel for the Petitioners that the judgment passed by the Delhi High Court was affirmed by the Apex Court in Civil Appeal No.8080/2018 ***"Union of India & Ors. vs. Make My Trip (India) Pvt. Ltd."*** decided on 23.01.2019, wherein the Apex Court has affirmed the judgment of the Delhi High Court and held that it is mandatory to follow the procedure contained in Section 73-A(3) & (4) of the Finance Act, 1994 before going ahead with the arrest of a person under Sections 90 & 91 of the Act.
7. Reliance has also been placed on ***"Meghraj Moolchand Burad vs. Directorate General of GST (Intelligence), Pune and Anr."*** SLP (Criminal) No(s). 244/2019 dated 13.12.2018 of the Apex Court, wherein the Apex Court granted protection to the Petitioner from arrest and permitted the Petitioner to appear before the Directorate General of GST (Intelligence). Reliance has also been placed on ***"Rakesh Kumar Chaubey vs. Union of India & Ors."*** wherein the Uttrakhand High Court permitted the Petitioner to appear before the concerned Authority and tender all support to the investigation. The Court restrained the authority from arresting the Petitioner except with the leave of the Court.
8. It is contended by counsel for the Petitioner that the tax has not been determined in accordance with Section 73 and 74 of the Act and till the tax is determined, Department has no right to summon the Petitioner or arrest the Petitioner under Section 69 of the Act. It is also contended that fake invoices of CR Sheet/Coils were issued without any physical movement/transaction of the goods.
9. Counsel for the Central Goods and Service Tax Department has opposed the writ petition.
10. It is contended that a detailed reply has been submitted by the Department. The details of related/sister concerns of the Company at Jaipur and the amount of fraudulent input tax credit availed by such related/sister concerns is detailed out in the reply. As per which, around Rs.328 crores input tax credit has been fraudulently claimed by the Petitioner and its sister concerns. The fraudulent claim of input tax

credit by the Petitioner No.2 is to the tune of Rs.40 crore 53 lakh.

11. It is contended that Section 70 of the Goods and Services Tax (hereinafter referred to as the 'Act'), Act gives powers to the proper officer to summon any person whose attendance is necessary either to give evidence or to produce document or any other thing in any inquiry. It is argued that notices have been issued and Petitioner is bound by the law to appear before the Proper Officer. It is also contended that though power of arrest is available under Section 69 of the Act, but the same depends on all the facts of each case and it is only when the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.
12. It is also contended that the Officials of the company were arrested as there was reasonable ground to believe that they have committed offence under clause (b) or clause (c) or clause (d) Sub-section (1) of Section 132 of the Act. It is argued that even bail applications of the officials stand rejected by the Court who goes to show that the company was involved in fraudulent claiming of input tax credit by furnishing fake invoices. It is also contended that though Petitioner No.1 was residing at United States of America, he was the Director of the company from August, 2012 and was receiving managerial remuneration from the company to the tune of about Rs.60 lakh per annum. Hence, he cannot shake off his responsibilities from the criminal act committed by him and the company.
13. With regard to the judgment referred to by the counsel for the Petitioners ***"Make My Trip (India) Pvt. Ltd. vs. Union of India"*** (supra), it is contended that facts of that case are entirely different in "Make My Trip (India) Pvt. Ltd. vs. Union of India" case. Make my trip collected amount with GST but the GST was not deposited. The amount was passed on to the hotels alongwith GST after retaining commission, no effort was made by the Department to collect evidence from the hotels, as to whether, they had deposited GST with the Department.
14. It is also contended that from the evidence of the Officials of Petitioner No.2, Company, it is revealed that M/s Leel Electricals Limited, Petitioner No.2, and its various group/sister/related companies, as per the statutory disclosure of related party mentioned in Note 40 of the Balance Sheet, availed fraudulent input tax credit to the tune of Rs.328 crores 36 lakhs. It is contended that till date six summonses have been issued to the Petitioner but he has failed to appear before the Authorities.
15. It is contended that determination of tax is not necessary when input tax credit has been availed fraudulently, as is clear from the plain reading of Section 73 of the Act. It is contended that Sections 73 & 74 of the Act are not applicable and no determination is to be done in a case where offence under Section 132 of the Act is committed by a person.

16. It is contended that the judgment referred to by the counsel for Petitioner has no applicability to the facts of the case as there is fraudulent availment of input tax credit to the tune of Rs.328 crores against the Petitioner No.2 and other related firms which were working as a syndicate to defraud the Government Exchequer by issuing fake invoices and availing and utilizing fraudulent input tax credit.
17. I have considered the contentions.
18. It is pertinent to note that it is clear case of the Department that the Petitioner and its sisters concerns have availed input tax credit to the tune of Rs.328,36,73,701/- on the basis of fake invoices, out of which Rs.40,53,58,772/- is the fraudulent input tax credit claimed by Petitioner No.2 of which Petitioner No.1 is the Managing Director. This fact is not controverted by the Petitioner, nor there any pleading or counter pleadings on behalf of the Petitioner in the Writ Petition that a wrong allegation has been levelled by the Goods and Services Tax Department.
19. The Petitioners' Writ Petition is confined to technicalities as also to the fact that the Petitioner No.1 was residing abroad and was not involved in day to day affairs of the company. This Court is not convinced by the arguments advanced by the counsel for the Petitioner for the very reason that Petitioner No.1 is the Director of the company since 08.08.2012 and has been receiving managerial remuneration from the company to the tune of about Rs.60 lakh per annum. Petitioner No.1 became the Managing Director of Petitioner No.2 on 30.05.2018, hence contention of counsel for the Petitioner that he was not involved in day to day affairs of the company, cannot be accepted.
20. The case set up by the Department is that the Petitioner has claimed input tax credit on fake invoices, which fact is not controverted by the Petitioner. Hence, Department has all rights to take any action permissible by law.
21. The contention that the tax is to be first determined under Section 73 & 74 of the Act does not have any force for the very reason that in an offence committed under Section 132 of the Act determination of tax is not required and the Department can proceed straight away by issuing summons or if reasonable grounds are available by arresting the offender.
22. It is clear case of the Department that a raid was conducted at the premises of the Petitioner company at Bhiwadi and two officials and Petitioners were summoned and their statements were recorded and from the statements, it is revealed that from July, 2017, company has not done any business and that fake sale purchase bills were prepared and only trading activities were shown. All the trading activities were conducted without any banking transaction or movement of goods. It was also revealed from the statements that input tax credit was wrongly claimed to the tune of more than Rs.40 crores and 53 lakhs by the Petitioner No.2.
23. From investigation, it is also revealed that no manufacturing process was conducted at Bhiwadi and CR Sheet/Coils and Iron Sheets were not used in the manufacturing process at Bhiwadi. It was also revealed that M/S Fedders Electric

and Engineering Ltd, M/S PSL Engineering Pvt. Ltd, M/S Air Serco Pvt. Ltd., M/S Perfect Radiators Pvt. Ltd. & M/S Punj Engineering are related companies to Petitioner No.2 and the total input credit wrongly claimed by the company and its sister concerns is to the tune of Rs.328 crores.

24. From searches, it was revealed that the company had taken input tax credit on bills issued by other concerns, whereas CR Sheet/Coils and iron sheets mentioned in the bills never reached the unit. Petitioner No.2 issued exit pass even when they had not received the goods, the company had thus shown fake purchase of Rs.225.90 crores and had wrongly claimed input credit to the tune of Rs.40.53 crores.
25. The judgment referred to by the counsel for the Petitioners ***"Make My Trip (India) Pvt. Ltd. vs. Union of India"*** (supra) has no applicability to the facts of this case as in make my trip, the company collected money from the travellers including service tax, the service tax was paid to the hotels and the responsibility to pay service tax was on the hotels. The Court held that officers of Make My Trip were wrongly arrested and Provisions of Finance Act, 1994 were not followed. The case was thus of collection of the tax and its non-deposition with the Government, whereas in the present case, false input credit was claimed on fake invoices without conducting any trading activities.
26. ***"Meghraj Moolchand Burad vs. Directorate General of GST (Intelligence), Pune and Anr."*** (supra) also does not have any applicability as Meghraj Moolchand Burad case pertains to Anticipatory Bail and the facts are not relevant to present case. Petitioner in the present case has not disputed the factum of fraudulent availing of input tax on basis of fakeinvoices.
27. Since offence under Section 132 is made out and Senior Officials of Company are behind bars, Petitioner being Managing Director is responsible and Department has the right to proceed under Section 69 and 70 of the Act.
28. I do not find any force in the Writ Petition. Petitioners have claimed tax input credit on the basis of fake invoices hence Writ Petition is dismissed with cost of Rs.1,00,000/- only.
29. The cost amount be deposited with the Rajasthan High Court Legal Services Authority within four weeks of the date of this order and proof thereof, be submitted with the Registrar (Judicial). If the proof of depositing of amount is not submitted, let the matter be listed before the Court for appropriate course of action.
30. Stay application also stands disposed of.

Appeal disposed of.

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HIGH COURT OF PUNJAB & HARYANA

CRR No.9872-2018(O&M)- Dated: 04.04.2019

M/S. GINNI GARMENTS & ORS ..... Petitioner
VERSUS
M/S. SETHI GARMENTS .....Respondent

Negotiable instrument Act- Applicability of Sec. 143A & 148 Requirement of Payment of amount of 20% or less in pending trials- whether procedural or substantive.

HONBLE MR. JUSTICE RAJBIR SEHRAWAT

This Order shall dispose of a bunch of 14 petitions, challenging the Orders passed by the Trial Courts in the trials under Section 138 of the Negotiable Instruments Act 1881 (hereinafter referred to as 'the Act') whereby the Trial Courts have ordered the accused/petitioners to pay 20% or less of the cheque amount to the complainant under Section 143-A of the Act, as well as the petitions challenging the Orders passed by the Appellate Courts directing the convicts/appellants/petitioners herein to deposit 20% or more of amount of fine or compensation awarded by the Trial Court, during the pendency of the appeal, by exercising powers under Section 148 of the Act.

CRM-M-13039-2019,CRM-M-13892-2019,CRM-M-14462- 2019 CRR-9872-2018 are the petitions wherein the Orders passed by the Trial Court under Section 143-A of the Act are under challenge and the CRM-M-49024-2018, CRM-M-49216-2018, CRM-M-49054-2018, CRM- M-49055-2018, CRM-M-49182-2018, CRM-M-12625-2019, CRM-M- 15297-2019, CRM-M-61716-2018, CRR-721-2019, CRR-746-2019 are the petitions where in the Orders passed by the Appellate Court under Section 148 of the Act are under challenge.

It deserves to be noted that there is no dispute on facts of the case in either of the petitions. The Orders have been impugned in all these petitions only on purely legal ground that under Section 143-A and Section 148 of the Act, the Courts below cannot be deemed to have any authority, retrospectively, to pass the Order imposing the liability of payment of the amounts, mentioned in the impugned orders, in the pending trial or in the pending appeals.

Another aspect which deserves to be clarified at the outset is that the Orders impugned in these petitions have been passed by the Courts below by virtue of the powers conferred under Section 143-A of the Act during the trial, and under Section 148 of the Act during the pendency of appeal. Both these sections were not in existence in the Act earlier. Both these sections were added vide Amendment No.20 of 2018. In

none of the petitions, the vires of these provisions are under challenge. Hence, this Court is proceeding on the presumption that the sections introduced by the Amendment Act, are validly operating law.

The only challenge raised by the respective petitioners, in all these petitions, is that since the Amendment Act has been enforced with effect from 02.08.2018, therefore, these provisions cannot be made applicable to the cases, where the trials for offence under Section 138 of the Act were already pending or where the appeals have arisen from such trials, which were pending on the date of the enforcement of these provisions. Hence, in essence, the grounds for challenge, in all the petitions, is that applying these provisions to the cases already pending before the Courts would tantamount to giving these provisions retrospective operation, although, the Amendment Act does not prescribe for retrospectivity in application of these provisions.

Before proceeding further, it is apposite to take note of the provisions, which have been introduced by Section 143-A and Section 148 of the Act, which are as reproduced herein below:-

*"**143-A. Power to direct interim compensation---**(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant--*

- *(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and*
- *(b) in any other case, upon framing of charge.*

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial years, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973(2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.

***148. Power of Appellate Court to order payment pending appeal against conviction-----** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), in an appeal by the drawer against conviction under section 138, the*

Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court: Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub- section(1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal.
Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."

As stated above, the above said provisions were added to the Negotiable Instruments Act by Amendment Act No.20 of 2018. Section 1(2) of the above said Amendment Act read as under:-

(2) It shall come into force on such date as the Central Government may, by the notification in the Official Gazette, appoint.

The Central Government had published this amendment in the notification dated 02.08.2018; after the same having received assent of the President of India on the same date.

The Statement of Objects and Reasons of the above said amendment reads as under:-

"The Negotiable Instruments Act, 1881 (the Act) was enacted to define and amend the law relating to Promissory Notes, bill of exchange and Cheques. The said Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of dishonor of cheques. However, the Central Government has been receiving several representations from the public including trading community relating to pendency of cheque dishonor cases. This is because of delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realize the value of the cheque. Such delays compromise the sanctity of cheque transactions.

2. It is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy.

3. *It is, therefore, proposed to introduce the Negotiable Instruments(Amendement) Bill, 2017 to provide, inter alia, for the following, namely:-*
   (i) *to insert a new section 143A in the said Act to provide that the Court trying an offence under Section 138, may order that drawer of the cheque to pay interim compensation to the complainant, in a summary trial or a summons case, where he plead not guilty to the accusation made in the complaint; and in any other case, upon framing of charge. The interim compensation so payable shall be such sum not exceeding twenty per cent of the amount of the cheque; and*
   (ii) *to insert a new section 148 in the said Act so as to provide that in an appeal by the drawer against conviction under Section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial court.*
4. *The Bill seeks to achieve the above objectives."*

A bare perusal of the newly added Sections 143-A and 148 of the Act would show that these sections have been added with 'Non- Obstante' clause qua the provisions of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'). The provisions of both these Sections have common elements of; giving power to the Trial Court and the Appellate Court to order compensation in favour of the complainant/holder of the cheque in due course. Further, common element in both these sections is that; in case the accused is acquitted then the complainant would be required to return the amount so obtained through the court orders, with Bank rate interest. However, there are certain striking differences between the provisions as contained in these two sections. Whereas Section 143-A of the Act gives power to the Trial Court to direct the accused to 'pay' an interim compensation which cannot be more than 20% of the 'cheque amount', at the same time Section 148 of the Act empowers the Appellate Court to direct the accused/appellant to 'deposit' minimum of 20% of 'fine' or 'compensation' awarded by the Trial Court. Hence, whereas the Trial Court cannot award more than 20% of the cheque amount, the Appellate Court is ordained to award not less than 20% of the fine or compensation. Furthermore, under Section 143-A of the Act, the Trial Court is required to order the accused to pay the said amount as interim compensation directly to the complainant. Under Section 148 of the Act, the Appellate Court is required to direct the accused/appellant to 'deposit' the said amount with the Court, which the court may subsequently order disbursal to the complainant/holder of the cheque in due course. As per the provision of Section 148 of the Act, the amount ordered by the Appellate Court shall be in addition to any interim compensation already paid by the accused under the order of the Trial Court. Still further, difference between these two provisions is that under Section 143-A of the Act, the amount of interim compensation awarded by the Trial Court is prescribed to be recovered under Section 421 of Cr.P.C, if not paid within specified time, whereas there is no such corresponding provision in Section 148 of the Act. Section 148 of the Act does not prescribe any mode of recovery of amount of interim compensation awarded by Appellate Court.

Further, a perusal of the statement of object and reasons for introducing these provisions also shows that the provisions are being added with a view to address the issue of undue delay in final resolution of the cheque dishonor cases and to provide interim relief to the holder of the cheque in due course, as well as, to discourage the frivolous and unnecessary litigation; besides strengthening the credibility of the cheques as mode of payment; so as to help the trade and commerce in general and the lending institutions and the banks in particular in extending financial facilities to productive sectors of economy. It is in this gamut of statutory provisions; that the present petitions have arisen.

While arguing the case, Mr. Ferry Sofat, learned counsel for the petitioners have submitted that since the newly added provision of Section 143-A of the Act is not specifically made retrospective in operation by the Amendment Act and it casts a new '*obligation'* upon the accused and this obligation is substantive in nature, therefore, the provision cannot be made applicable to the trials in pending cases. Learned counsel has relied upon the judgment rendered in ***RE; School Board Election For the Parish of Pulborouogh***;**1894 Queen's Bench Division(725),** to support his contention that any law; which seeks to impose any new obligation or liability upon a party; cannot be made applicable to the proceedings already pending before the Court before introduction of such a provision. To support his arguments he has also relied upon the judgment of the Hon'ble Supreme Court rendered in ***Hitendra Vishnu Thakur and others etc versus State of Maharashtra and other; AIR 1994 Supreme Court 2623, Maharaja Chintamani Saran Nath Chahdeo versus State of Bihar; 1994 (4) R.C.R. (Civil) 715*** and another judgment of Hon'ble Supreme Court rendered in ***Nani Gopal Mitra versus State of Bihar; AIR 1970 Supreme Court 1636.*** Explaining his argument further learned counsel has further submitted that since the liability imposed upon the petitioner, by the newly introduced provision, is in the nature of legally enforceable liability, therefore, it is a new and substantive obligation as per the law and not merely a part of the procedure. Learned counsel has submitted that had the present provision been procedural in nature then the same may have been applied to the pending cases, however, since it affects the substantive rights of the accused/petitioners, therefore, it cannot be applied to the pending cases; by giving retrospectivity to this provision.

Mr. Dinesh Arora, learned counsel who is appearing for the petitioners in the cases arising out of the appeals, has submitted that any law which creates a new responsibility upon the appellant during the appeal can also not be applied retrospectively. Hence the provision contained in newly added Section 148 of the Act cannot be applied to the appeals which were pending on the date of enforcement of the amendment, or to the appeals filed in those cases where the trials were pending on the date of enforcement of the amended provision. To substantiate that this provision casts a new substantive obligation upon appellant, the counsel has submitted that although at the conclusion of trial, the Trial Court can award a compensation in favour of the holder of the cheque in due course, however, since appeal is in continuation of the trial, therefore, fine or the compensation awarded by the Trial Court cannot be taken as final. However, under the new provision the fine or compensation awarded by the Trial Court have been given

attributes of finality. Under the amended provisions, it has been provided that the compensation ordered by the Trial Court or the Appellate Court under provision of Section 143-A of the Act or Section 148 of the Act, would be recoverable as per the procedure prescribed for recovery of fine. Hence, the *'interim compensation'* has been raised to the level of *'finality of the fine'* which can be recovered under Section 421 of Cr.P.C. This tantamounts to treating the petitioners as guilty even before finalization of their trials and the appeals and thus subjects the appellant to the rigour of Section 421 Cr.P.C; for the purpose of recovery of the interim compensation. However, section 421 Cr.P.C itself invites drastic and substantive measures qua the person against who fine has been imposed, including attachment and sale of his properties. Therefore, since; even property right of the petitioners have been subjected to final consequences; even during pendency of the appeal against their conviction, therefore the provision has the effect of infringing upon the substantive rights of the petitioners. Therefore, the consequence of application of this section is in the nature of *'punishment'*. Hence, such a provision cannot be made applicable to the appeals arising from conviction for a transaction of cheque default, which had taken place before enforcement of the Amendment Act. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court rendered in ***T.Barai versus Henry Ah Hoe and another;*** **1983 AIR (SC) 150,** ***Dayal Singh versus State of Rajasthan; 2004 AIR SCC 2608*****,** ***Basheer @ N.P.Basheer versus State of Kerala;2004(1) R.C.R (Criminal)1008*****.** Learned counsel has further argued that the object and reasons of the Act as well as the parliamentary debates, which had taken place at the time of enacting these provisions, also shows that the provision is not procedural in nature. The debates and the objects and reasons; would show that the idea behind this amendment was not to streamline any procedure. Rather the idea is to grant relief to the complainant/holder of the cheque in due course; during the trial itself, at the cost of the accused, even before the latter is held guilty of the offence. Hence, application of this provision to pending appeals is introducing a kind of presumpting punishment in retrospectivity, which is prohibited by Article 20 of the Constitution of India.

Mr. Manoj Pundir, learned counsel for another petitioner has relied upon the judgment of the Hon'ble Supreme Court rendered in ***Anil Kumar Goel versus Kishan Chand Kaura;2008(1)R.C.R(Criminal)290*** to submit that in case of another provision of the same Act, whereby the power was sought to be given to the Magistrate to extend the time period for filing of the complaint, Hon'ble Supreme Court has held such a provision to be substantive in nature and the same was held inapplicable to the cases where time of 30 days for filing complaint had already expired before that amendment. The same is the situation qua the present amendment also since this also; affects the substantive right of the petitioners. Hence, being a substantive provision, the provision of Section 143-A and Section 148 of the Act cannot be made applicable restrospectively; to the cases which were already pending on the date of enforcement of these provisions.

The other learned counsels appearing for the petitioners have also argued on the similar lines; by emphasizing that any provision which has the potential of affecting the substantive right of a litigant cannot be applied to the pending cases so as to give

retrospectivity to the same unless the same is made retrospective by the Act itself. It is further pointed out by the learned counsels that the Courts below have passed the conditional orders of granting bail during pendency of the appeal; subject to deposit of the amounts ordered by the Appellate Court. This kind of condition is violative of the right of the appellant to seek suspension of sentence. Hence, the petitioners could not be subjected to this kind of onerous condition by introducing a new provision during pendency of the trial or the appeal arising therefrom. It is submitted by them that the Hon'ble Supreme Court has already held in some of the cases that even though the Appellate Court may impose condition of deposit of some amount for suspending of the sentence, however, such an amount has to be reasonable and not excessive. By virtue of the present amendments the petitioners have been subjected to payment of compensation upto 40-50% of the cheque amount or of the compensation, only for suspension of their sentence. Therefore, the provision creating this kind of unreasonable condition could not have been applied retrospectively. It is further argued by the counsels that even at the stage of trial, the amount ordered by the Trial Court to be paid as interim compensation, in a given case, can be such an excessive and prohibitive amount that the accused may not be able to arrange for the same. In such a situation, the accused would not be left with any alternative but to suffer in silence the consequences of coercive procedure of recovery of the amount as fine, as prescribed under Section 421 Cr.P.C. Hence, the provision being extremely substantive in nature could not have been applied by the Courts below to the pending cases; so as to confer retrospectivity upon it.

On the other hand, Mr. Rajesh Sethi**,** learned counsel, appearing for the complainant/respondent in revision petitions arising from the Orders passed in appeals, have submitted that, in the first instance, the provision introduced by Section 143-A and 148 of the Act are not substantive in nature. These provisions have been created only as steps in procedure to streamline the same, so as to cut the unnecessary delays in conclusion of the trials. This is so specifically stated as well, in the objects and reasons of the amendment. While interpreting such a provision, the Court should adopt a purposive interpretation, to give effect to the intention of the legislator, which in the present case is to curb the delay in trial and to discourage default in Negotiable Instruments. Learned counsel has further submitted that to arrive at a correct purposive interpretation, the Court can very well take help of the internal aids of interpretation, such as language, title and positional sequence of the provision and the external aid of interpretation like the objects and reasons and the parliamentary debates. If all these things are commulatively seen in the present case; then the only predominant intention of the legislator is to curb the delay in procedures. Hence, the amendment is only procedural in nature. It is further submitted that the fact that the provisions are procedural in nature is also clear from the fact that these sections have been added in the statute at a place after the sections defining the penal provisions, and has been put alongwith the provisions dealing with the procedure. Learned counsel has further submitted that even if the provision is taken to be affecting some aspect of right of party to the lis; still the same can be applied to the pending proceedings. Every provision affecting some part of right of party to the lis cannot be

taken to be a provision affecting the substantive right of the party. Referring to the judgment of the Hon'ble Supreme Court rendered in ***Shyam Sunder and another versus Ram Kumar and another; 2001 AIR (SC)2472;*** learned counsel has submitted that in that case the right of the co-sharer under Punjab Pre-emption Act was abolished by way of Amendment Act. The same was upheld and made applicable even to the pending cases, except to those where the right of such a co-sharer had already crystalised by way of decree of the Court. Hence, unless a right is a vested right; by way of decree of the Court or made so by the provision of the Act, the applicability of the amendment qua such right cannot be questioned only on the ground that some aspect of such right of the party is taken away by the amendment. To buttress his argument further, learned counsel for the respondent has proceeded further that if after filing of the suit the Court fees is enhanced by amending an Act, the applicability of such a provision to the appeal arising from the suit cannot be excluded merely on the ground that the amendment to the Court Fee Act was made during pendency of the suit. Still further it is submitted by learned counsel that if a provision essentially relates to the procedure then merely because it can, collaterally, has some effect on substantivity, cannot be precluded from application to the appeals; which are already pending. Citing an another example, learned counsel for the respondent has submitted that Section 100 of Civil Procedure Code was amended to provide that second appeal would lie only in those cases which involves substantial questions of law. This provision was held applicable even to the pending cases by the Hon'ble Supreme Court, despite the fact that it had the effect of summary dismissal of the appeal in those cases where no such substantial question of law was involved. In such a situation, the appellant cannot claim that his right to file appeal has been adversely affected; therefore, such a provision should not be applied to the pending cases.

Having heard the learned counsel for the parties and perusing the documents on record, it is clear that the dispute between the parties is relating to the applicability of Section 143-A and Section 148 of the Act, introduced vide Amendment dated 02.08.2018, to the cases which were already pending at the stage of the trial; or to the appeals arising from such trials, whether filed before or after the enforcement of the above-said provisions. Another significant aspect to be noted is that the Amendment Act has not specifically made the amendment to be applicable retrospectively. The notification of the amendment also does not specify any other date for the amendment to come in operation. In such a situation, Section 5 of the General Clauses Act would be of some help, which is reproduced below:-

5 Coming into operation of enactments:

(1) Where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent,

a) In case of Central Act made before the commencement of the Constitution, of the Governor-General, and,

b) In the case of an Act of Parliament, of the President.

(3) Unless the contrary is expressed, a [Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

A bare perusal of this provision would make it clear that any Act of Parliament shall come into operation on the day on which it receives the assent of the President. Unless it is expressed to become operational on any other date and unless a contrary intention is expressed, the Act shall come into effect qua all cases on the day of its commencement. In the present case, the Act of Parliament has specified that it shall come into operation on the date specified in the notification. The notification has been issued by the Parliament on 02.08.2018. It is stated to have received the assent of the President on 02.08.2018 only. Hence, the same can be safely taken to be operational with effect from 02.08.2018. As stated above, the vires of the provision are not under challenge in these petitions, therefore, for the purpose of the present petitions, this Court has to assume that the Amendment Act, and the provisions contained therein, has validly come into operation on 02.08.2018.

This Court finds that the Supreme Court has amply clarified the legal proposition that all substantive laws have to be prospective in nature and applicability; unless prescribed to be retrospective, whereas all procedural laws have to be applicable to all cases immediately on their coming into operation, including the pending cases. It is appropriate to have reference to the law pronounced by the Hon'ble Supreme Court in the judgment rendered in Anil Kumar Goel versus Kishan Chand Kaura; 2008(1)R.C.R.(Criminal)290, which reads as under:-

"8. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: ***M/s Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors., 1984(1) RCR (Rent) 168)"***

Clarifying further, the Supreme Court has held that all those laws which affect the substantive and vested rights of the parties have to be taken as substantive law, whereas any provision of law dealing with the form of the trial, mechanism of the trial or procedure thereof, has to be treated as procedural in nature. The relevant part of the judgment of the Hon'ble Supreme Court in case of ***Thirumalai Chemicals Ltd. vs. Union of India and others; 2011(6) SCC 739*** is as follows:-

"14. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an

order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statue is prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right; and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective, meaning thereby that it will apply even to acts or transactions under the repealed Act."

Therefore, the next question to be considered by this Court, in the present case is whether the provisions contained in Section 143-A and Section 148 of the Act are substantive in nature or the procedural one. If the provisions are substantive in nature then the same cannot be applied retrospectively to the pending cases. However, if the same are procedural in nature then the same has to be applied to all the cases, including the one pending before the Court on the date, the amendment was enforced.

The substantive right of a person is the entitlement which is available to him by virtue of his very existence or which relates to his being, belongings or the estates. Such rights can be human rights, constitutional rights or statutory rights. Such substantive rights can have variety of facets; depending upon the factual situation in which such right is to be considered. The substantive rights can be governed by the constitutional or statutory provisions. The statutory provisions created by the competent legislature can prescribed certain conditions for crystallizing the substantive right of the person. In such a situation, once the conditions prescribed for crystallizing such right are fulfilled, such substantive right of a person becomes vested right as well. So all substantive rights are not vested rights but all vested rights are substantive rights.

On the other hand, statute can prescribe the procedure for protection, determination or regulation of the substantive rights as well. The procedure would, essentially, be relating to providing remedy, form of adjudication of such a remedy, procedure to be followed by adjudicatory a forum or the mechanism prescribed for enforcement of decision of such forum. Hence, a law which essentially deals with forums of adjudication, procedure of adjudication and the mechanism for enforcement of result of such adjudication would essentially be procedural in nature. All rights granted by procedural law would be only procedural rights. As a corollary to this, no procedural right can be either substantive or vested right.

Coming to the facts of the present case, the provisions of Section 143-A and Section 148 of the Act reveals that these Sections of the Act start with a *non-obstante* clause against Code of Criminal Procedure. However, the Hon'ble Supreme Court has already clarified in judgment rendered in ***Central Bank of India vs. State of Kerala and others***; ***2010(8) RCR (Civil) 3195*** that *non-obstante* clause, used in provision of a law has

to be given only a contextual interpretation and not to be taken as an absolute exclusion or over-riding of the law contained in provisions qua which the *non-obstante* clause has been used. In this regard, it is relevant to have a reference to the observation made by Hon'ble Supreme Court in paragraph Nos. 28 and 29 of above-said judgment, which are reproduced herein below:-

> *28. A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. This rule of interpretation has been applied in several decisions. In State of West Bengal v. Union of India [(1964) 1 SCR 371], it was observed that the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs.*
>
> *29. In Madhav Rao Jivaji Rao Scindia v. Union of India and another [(1971) 1 SCC 85] Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but for that reason alone we must determine the scope of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determining which provision answers the description and which does not.*

Hence Section 143-A of the Act, for that matter Section 148 of the Act have to be read along-with the relevant and applicable provisions of Cr.P.C, as modified/supplemented by provisions of these two sections. Otherwise also, Section 5 of Cr.P.C provides that nothing in the Code shall effect the provisions contained in any other special law. Therefore, these two sections shall be taken to have effected the provisions of Cr.P.C only to the limited extent, to which the specific provision has been made in these sections, qua the aspect mentioned herein. Otherwise, even the aspect mentioned in these provisions, beyond what is specifically prescribed for in these two sections, have to be followed only as provided in the Cr.P.C. Hence, all the provisions relating to punishment, execution thereof, fine and compensation and recovery thereof, as contained in the Cr.P.C, has to be read in conjunction and in harmony with Section 143-A and Section 148 of the Act.

A bare perusal of Section 143-A of the Act shows that this section has given power to the Trial Court to order the drawer of the cheque/accused in the trial, to pay interim compensation to the complainant, where the accused has not pleaded guilty of the acquisition made against him. Still further, although a limit of '*20% of cheque amount'* has been imposed upon power of the Court for ordering interim compensation, however,

it has also been provided that if it is not paid within 60 days from the order or within the time, extended by the Court, if any, then the interim compensation shall be recovered under Section 421 Cr.P.C, as if it were a *'fine'* imposed upon the accused. Although this Section also provide return of the said amount, in case the accused is acquitted, and for adjustment of the said amount of interim compensation towards final compensation or fine; in case of his conviction, however, till any final order is passed, the accused remains liable for recovery of this amount under Section 421 of Cr.P.C. It would be beneficial to have reference to Section 421 Cr.P.C which is reproduced as under:-

421 ***Warrant for levy of fine***

1. *When an offender has been sentenced to pay a fine the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may*
   - *(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;*
   - *(b) issue a warrant to the collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both of the defaulter:*

   Provided *that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.*
2. *The State Government may make rules regulating the manner in which warrants under clause (a) of Sub-Section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.*
3. *Where the Court issues a warrant to the Collector under clause (b) of Sub-Section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:* ***Provided*** *that no such warrant shall be executed by the arrest or detention in prison of the offender."*

A perusal of Section 421 Cr.P.C shows that this provision is meant for those persons, who have already been sentenced to pay fine. Still further the amount of interim compensation, deemed as fine under Section 143-A of the Act, can be recovered under Section 421 Cr.P.C by attachment and sale of movable and immovable properties of the accused. The same can also be recovered as amounts of arrears of land revenue from movable or immovable property or both, of the accused. Hence, application of this provision has a drastic effect upon the property rights of the accused, and makes him liable for sale of his properties for recovery of amounts, despite the fact that it is yet to be finally determined whether he is guilty of the offence, and as such liable to pay any

compensation to the complainant or not. Accordingly, since the amended provision provides for enforcement of recovery of interim compensation by way of coercive procedure, it is nothing but an obligation imposed upon the accused. Section 3 of the Specific Relief Act has clarified the meaning of term '***obligation'*** by defining that any duty enforceable under law is an obligation. As per General Clauses Act, this definition has to be read in all Central Acts unless defined otherwise in the relevant Act. Such an *'obligation'* having consequences qua the property rights of the accused cannot; but be treated; as substantive provision effecting his substantive right by casting a substantive obligation upon him, to make the payment of money; and if not paid, making him subject to legal deprivement/disability qua his properties. Therefore, it has to be held that Section 143-A of the Act cast a substantive obligation upon the accused and thereby effect the substantive right of the accused. Since the Amendment Act has not made the provision applicable retrospectively, specifically, to pending cases, hence, it cannot be applied retrospectively, to pending cases; which arose from the default of the accused which has taken place before coming into force of this provision.

Another aspect which is clear from Section 143-A of the Act, and which shows that the provision is not procedural, is that this provision is not shown to be as a step toward furtherance of the procedure of trial. The provision is not contemplated as one more step governing, simplifying, or modifying the steps in the trial of the accused by the Court. Accordingly, this section does not authorize the Trial Court to pass any order, having consequences against the accused qua the steps of the trial; in case of non- payment of interim compensation. This section does not authorize the Court to close the defense or to take any other step for speeding up the trial as such. On the contrary, this provision is intended to create a *'stand alone liability'* which has to be discharged independent of the trial and which shall have consequences outside the trial only. Hence, by no means, this provision can be taken as procedural in nature. Needless to say that everything prescribed as part of procedural provision or every order of Trial Court, passed during the trial cannot, necessarily, be termed as procedural in nature. The test for determining the substantive or procedural nature of the provision or order of the Court would be the consequences; which the affected party invites under such a procedure or order. If the consequences are in furtherance or in commensurance with the proceedings and steps of the trial, the provision/order can be taken as a procedural. On the other hand, if the consequences of provision or the order passed by the Court has nothing to do with the proceedings or steps of the trial, rather, have independent consequences; outside the scope of the trial, and at the same time affects the existential or property rights of the accused, then it has to be taken as a substantive provision only.

There is still another reason why the provision of Section 143- A of the Act cannot be applied to the pending cases. Section 53 of the Indian Penal Code(hereinafter referred to as 'IPC') prescribes only six kinds of punishments, though for the purpose of offences under IPC, which are punishment of death, punishment for imprisonment for life, imprisonment for a term, which can be simple or rigorous, punishment of forfeiture of property and the punishment of fine. Therefore, under the provisions of IPC forfeiture of property is one of the punishments. Furthermore, there is no provision of imposing sentence of awarding of compensation against an accused and in favour of the complainant. Even if the compensation is awarded that is not the part of the sentence. Even under the Negotiable Instruments Act, Section 138 does not prescribe any sentence other than the imprisonment and the sentence of

fine. Hence compensation is not to be awarded as a part of sentence. Although, the fine, provided to be imposed as sentence, ranges upto twice the amount of the cheque, which can be appropriated as compensation in favour of the complainant, however, there is no provision for independently awarding compensation by the Trial Court under the Negotiable Instruments Act. Hence, it is clear that by Section 143- A of the Act, the Trial Court has been permitted to inflict a liability upon accused, as an interim measure, although as a final order, it cannot pass the order of award of compensation as part of sentence. But this interim measure, if enforced through Section 421 Cr.P.C leads to loss of properties by accused, which is a kin to forfeiture of his properties. Hence, essentially the provision enhances the scope and degree of punishment to be awarded to an accused; by awarding compensation and then making the same liable to be recovered as a fine. After all the punishment is nothing but an eclipse or clog upon right to life and liberty of a person or upon right to belongings and estates of such a person, imposed as per the mandate of law. However, under the provisions of Constitution of India, the person cannot be subjected to sentence more than what he was liable to on the date when he conducted himself in a manner which has made him liable for such a sentence. It would be no consolation to the rights of accused to say that the compensation awarded by the Trial Court is only interim measure and that the accused would get the same back with interest if he is acquitted. By virtue of sheer amount of '*interim compensation'*, which may work out in a particular case in crores of rupees, for a person who is not having means of more than few lakhs of rupees, the consequence under this Section can be totally devastating, irrecoverable and irreparable. Therefore, this provision can at the best be applicable prospectively where prospective accused would be aware of such consequences in advance, and it cannot be applied to the cases where the trial has already commenced qua a default which was suffered; when this provision was not in-existence.

Although the provision of Section 143-A of the Act cannot be applied to the pending trials, however, this Court finds that the situation regarding Section 148 of the Act is drastically different. As observed above, this provision also has to be read in conjunction with the relevant provisions of the Cr.P.C. Further, this Court also finds substance in the argument of learned counsel for the respondent that although '*Right to Appeal', per se,* is a substantive right, however, no person have a substantive or vested right to claim that he would file and prosecute appeal only in accordance with any particular provision. The *Right to Appeal,* being a statutory right, has to be availed only within the parameters provided by the said provision. Therefore, if any provision relating to dealing with the appeal by the Appellate Court is altered, the said provision has to be treated as a procedural provision only. Considering the provision of Section 148 of the Act, this Court finds substance in the argument of learned counsel for the petitioners that the said provision does not, in any way, affects the substantive right of the accused, to defend him or to prosecute his appeal. The provision categorically provides that in case the accused/appellant is acquitted by the Appellate Court; then the amount awarded by the Appellate Court as interim compensation shall be returned to him; by the complainant, along-with interest. No other disqualification is to be inflicted upon the accused/applicant qua defense or prosecution of appeal by him.

However, still the essential question to be considered is *whether the provision authorizing the Appellate Court to Order the appellant to deposit a minimum of 20% of the fine or compensation awarded by the Trial Court; a procedural step or a provision is*

affecting the substantive right of the appellant. In this regard, it deserves to be noted that when the case reaches before the Appellate Court, the appellant/accused has already acquired a status of '*convict'*, who has already been found guilty of his conduct and sentenced by the Trial Court. In case the Trial Court imposes a fine then making him to pay that amount does not affect his substantive right. Rather it is a matter of procedure only. In case of conviction of an accused, the Trial Court may not impose any fine upon the convict/appellant at all. In such a situation, the Appellate Court would not be able to order the appellant to deposit any amount; because under the provision, Appellate Court is authorized to order deposit of 20% of '*fine'* or '*compensation'* awarded by the Trial Court. If there is no order of fine or compensation then there cannot be any order of deposit of any amount at the appellate stage. In case the Trial Court imposes a fine, which can be up to twice the amount of the cheque and which can be treated as compensation to be paid to the complainant, in that situation, liability of the accused/appellant has already been determined by the Trial Court. The liability to pay the amount to the complainant already exists at the time when the appellant comes before the Appellate Court. It is discretion of the Appellate Court *whether to suspend the order of imposition of fine or compensation or not*. In case the fine is not stayed by the Appellate Court then the entire amount of fine or compensation, otherwise also, becomes recoverable from the accused/appellant as per the procedure prescribed under Section 421 of Cr.P.C. Hence, if the lower Appellate Court has passed the order of deposit of 20% of amount, then although Section 148 of the Act does not specifically mention that amount ordered to be deposited by the Appellate Court would be recoverable under Section 421 Cr.P.C, however, otherwise being part of fine; the same is liable to be recovered only under Section 421 Cr.P.C. Hence, if the Appellate Court passes the order of deposit of 20% or more of amount of fine or compensation that in fact, is a beneficial order for the accused/appellant; because that would mean that the amount of fine or compensation imposed by Trial Court, beyond that 20%, as ordered by the Appellate Court, is *ipso facto,* being stayed during the pendency of the appeal. Hence instead of prejudicing any substantial right of the appellant this provision is beneficial provision in favour of the accused. Still further there can be a situation where a Trial Court passes sentence of only fine or compensation up to twice the amount of the cheque, without any sentence of imprisonment. In that situation, the fine becomes recoverable immediately. However, Section 424 of Cr.P.C provides that the amount shall be payable in full within 30 days from the date of order of the Trial Court, or at the best in three installments, starting from within 30 days from the order of the Trial Court, and the remaining two installments being paid at the interval of 30 days each. Hence the payment of entire amount of fine or compensation has to be completed within 90 days. The provision of Section 424 Cr.P.C is reproduced below:-

424. Suspension of execution of sentence of imprisonment.

(1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may-
(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days;

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub- section (1) shall be applicable also in any case in which an order for the payment of money has been made on non- recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub- section, fails to do so, the Court may at once pass sentence of imprisonment."

The above-said provision does authorize the Court to suspend the execution of the sentence of '*default imprisonment*', if the convict submits bond for payment of the amount on the dates, as ordered by the Court. However, this section also provides the consequences for non- payment of the amount of fine or compensation as well, which can be cancellation of bond of the accused/convict and sending him to custody, which can be by withdrawal of the order of suspension of sentence, leading the appellants/convict to be landed in jail. From this point also the provision of Section 148 of the Act is far-far beneficial for the accused/convict/appellant in the sense that it permits the Appellate Court to order the convict to deposit only 20% of the fine or compensation, leaving the remaining amount to be paid beyond a period of 90 days; or not to be paid even till conclusion of the appeal.

In view of the above discussion, it is quite clear that the procedure of recovery of fine or compensation from a convict-appellant of pending appeal already existed in CR.P.C; before advent of the provision as contained in Section 148 of the Act. Hence, no new aspect of coercive recovery of fine or compensation from the appellant is being created through this amended provision. On the contrary, this provision provides more breathing space to the convict/appellant; as compared to the other procedures of recovery, as contemplated under Sections 421 and 424 of Cr.P.C, which is for more onerous in terms of time limit and the consequences. Since the provisions for recovery of fine or compensation from the appellant/convict already existed in the existing procedure relating to the recovery, therefore, the provision introduced vide Section 148 of the Act; which relates only to recovery of amount partly, as interim measure, has to be treated purely procedural only, which is otherwise also beneficial for the appellant as compared to the pre-existing provisions. Hence it has to be held that provision of Section 148 of the Act shall govern all the appeals pending on date of enforcement of this provision or filed thereafter.

This Court does not find any substance in argument of learned counsel for the petitioners that since the object and reasons for introducing the amendment relate to giving benefit to the complainant and do not relate to the procedure of the appeal, therefore, it cannot be treated to be a procedural step. As is noted above irrespective of the object and reasons of the act, the bare language of the provision only authorizes the Court to pass an interim order, which is only in modification of the procedure of recovery which already existed in the

general provision of law relating to recovery of fine or compensation. Hence, for obvious reasons, the rationale qua objects and reasons of the Act, which is applicable at the stage of trial; cannot be imported to the stage of appeal? As mentioned above, at the stage of trial, the provision of Section 143-A of the Act has created a new '*obligation'* against the accused, which was not contemplated by the existing law and which created a substantive liability upon him, whereas the provision of Section 148 of the Act only reiterated; and to some extent modified in favour of the appellant, the procedure of recovery already existing in the statute book. Still further, this Court does not find any force in the argument of the learned counsels for the appellants that Appellate Court could not have made the suspension of sentence of the petitioners conditional upon deposit of amount of interim compensation as ordered by Appellate Court. It deserves to be noted here that even suspension of sentence is in the judicial discretion of the Appellate Court. If the Appellate Court makes such judicial discretion subject to a statutory provision relating to deposit of interim compensation, then no fault could be found with such exercise of discretion. Moreover such a course of action even forms part of procedure prescribed under Section 424 Cr.P.C, though relating to a different type of suspension of sentence. But it shows that if the Appellate Court makes suspension of sentence subject to payment of statutory interim compensation or fine then such an order is in commensurance with the statutory provisions contained in Cr.P.C and the intention of legislatures as contained in Section 148 of the Act.

Accordingly all the petitions, wherein the order of the Trial Courts, directing the accused to deposit up to 20% of the cheque amount as interim compensation; are challenged, are allowed. Consequently, the Orders challenged in those petitions are set-aside.

The petitions where the challenge is to the order of the Appellate Court, directing the appellant to deposit 20% or more of the amount of fine or compensation as awarded by the Trial Court, are dismissed. Consequently, the Orders impugned in these petitions are upheld.

Lest anymore unnecessary litigation should arise under above- said provisions of Section 143-A and Section 148 of the Negotiable Instruments Act, it would be appropriate that the Trial Courts/Appellate Courts are made aware of the above-said interpretation of these two provisions. Accordingly, the Registrar General of this Court is directed to ensure that a copy of this judgment is sent through e-mail, forthwith, to all the judicial officers in the States of Punjab and Haryana and in U.T. Chandigarh, dealing with cases under the Negotiable Instruments Act, 1881.

TELANGANA HIGH COURT AT HYDERABAD

WRIT PETITION NO.44517 OF 2018- DATED: 18.04.2019

M/S. MEGHA ENGINEERING & INFRASTRUCTURES LTD. ..... Petitioner
VERSUS
THE COMMISSIONER OF CENTRAL TAX, HYDERABAD & ORS
....Respondent

HON'BLE MR. JUSTIC V. RAMA SUBRAMANIAN
HON'BLE MR. JUSTIC P. KESHAVA RAO

Sec. 50 of CGST Act- Interest payable on Gross Tax liability under GST.

Order:

Aggrieved by a demand made by the respondent for payment of interest on the ITC portion of the tax paid for the months of July, 2017 to May, 2018, the petitioner has come up with the above writ petition.

2. Heard Mr. Gandra Mohan Rao, learned counsel for the petitioner and Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the Department.

3. The petitioner is engaged in the manufacture of MS Pipes and in the execution of infrastructure projects. After the enactment of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act, 2017'), the petitioner registered themselves as a dealer under the Act and they claim to be regularly filing returns and paying taxes.

4. Under the CGST Act, 2017, the registration of dealers, input tax credit, filing of returns, payment of duty and issue of notices, all happen only on-line. All Assesses are required to log into the GST Portal for payment of duty and for filing of returns. The Assesses are required under the Act to file a return in Form GSTR - 3B on or before the 20th of every month, for the discharge of their liability of the previous month. The GST liability is permitted to be discharged by utilizing the ITC available. An electronic ledger is maintained, showing the amount available to the account of an assessee through the ITC.

5. The case of the petitioner is that the GST Portal is designed in such a manner that unless the entire tax liability is charged by the assessee, the system will not accept the return in GSTR - 3B Form. As a result, even if an Assessee was entitled to set off, to the extent of 95%, by utilizing the ITC, the return cannot be filed unless the remaining 5% is also paid.

6. It appears that there was a delay on the part of the petitioner in filing the returns in GSTR - 3B Forms, for the period from October, 2017 to May, 2018. This was due to the shortage of ITC, available to off-set the entire tax liability. According to the petitioner, the delay in filing the returns was also not huge. The returns for the months of October and November, 2017 and February and May, 2018 were filed with a delay of only one day. The return for December, 2017 was filed with a delay of three days. The return for

January, 2018 was filed with a delay of seventeen days, the return for April, 2018 was filed with a delay of nineteen days and the return for March, 2018 was filed with a delay of twenty nine days.

7. According to the petitioner, the total tax liability of the petitioner for the period from July, 2017 to May, 2018 was Rs.1014,02,89,385/- and the ITC available to the credit of the petitioner during this period was Rs.968,58,86,133/-.

8. Thus, there was a short fall to the extent of 45,44,03,252/-, which the petitioner was obliged to pay by way of cash. According to the petitioner, they could not make payment and file the return within time due to certain constraints. However, the entire liability was wiped out in May, 2018.

9. After the petitioner discharged the entire tax liability, the Superintendent of Central Tax issued letters dated 29.06.2018 and 06.07.2018 demanding interest at 18%, in terms of Section 50 of the CGST Act, 2017. The Assistant Commissioner also issued a letter dated 04.10.2018 demanding payment of interest.

10. In response, the petitioner sent a letter dated 15.10.2018, pointing out that interest is to be calculated only on the net tax liability after deducting ITC from the total tax liability. The petitioner also paid an amount of Rs.30,92,522/- towards interest on their net tax liability.

11. However, the Department demanded interest on the total tax liability and hence the petitioner has come up with the above writ petition.

12. The respondents have filed a counter affidavit contending *inter alia* that under Section 39(7), every registered person, who is required to furnish a return, should have paid to the Government, the tax due as per such return, not later than the last date on which he is required to furnish such return; that Section 50 of the Act imposes a burden in the form of interest, upon every person who is liable to pay tax, but failed to pay the same; that the liability to pay interest under Section 50 (1), is a statutory obligation which the registered persons are obliged to comply on their own accord; that Section 50 (1) is not confined only to the cash component of the tax payable; that the claim of the petitioner is based upon the wrong presumption as though ITC amount was lying with the Government Treasury; and that since the liability under Section 50 is not penal in nature, the petitioner cannot escape liability.

13. From the pleadings, the only issue that arises for consideration is as to whether the liability to pay interest under Section 50 of the CGST Act, 2017 is confined only to the net tax liability or whether interest is payable on the total tax liability including a portion of which is liable to be set-off against ITC?

14. For finding an answer to the said question, we may have to look at (i) the procedure for filing of returns and payment of tax; (ii) the eligibility and conditions for taking input tax credit and (iii) the wording of Section 50.

FILING OF RETURNS:

15. Under Section 40 of the CGST Act, 2017, the procedure for filing of the first return, corresponding to the period between the dates on which the dealer became liable to registration, till the date on which registration is granted, is prescribed.

16. Under Section 39, a detailed procedure is stipulated for the filing of the monthly returns. In brief, the Scheme of Section 39 is as follows:

i) Every registered person should furnish for every Calendar Month or part thereof, a return, electronically, of inward and outward supplies of goods or services, ITC availed, tax payable, tax paid etc., on or before the 20th day of the succeeding calendar month;

ii) The Commissioner is empowered to extend, by notification, for reasons to be recorded in writing, the time limit for furnishing the returns, for such Class of registered persons;

iii) Every registered person, who is required to furnish a return, should pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return;

iv) If a registered person discovers any omission or incorrect particulars in the return already filed by him, he shall rectify such omission or incorrect particulars in the return to be furnished.

17. We should point out that what we have indicated in the preceding paragraph as the essence of Section 39, are confined only to every registered person other than an input service distributor or a non-resident taxable person or a person paying tax under Section 10/51/52.

CLAIM OF ITC:

18. Section 41 deals with the claim of ITC and the provisional acceptance thereof. Under this provision, every registered person is entitled to take the credit of eligible input tax, as self-assessed in his return. The amount so claimed shall be credited on a provisional basis to his electronic credit ledger. But, this credit can be utilized only for payment of self- assessed out-put tax as per the return.

19. While Section 41 deals with the claim of ITC and provisional acceptance, Section 16 deals with the eligibility and conditions for taking ITC. Under Section 16 (1), every registered person shall be entitled to take credit of input tax charged on any supply of goods or services, which are used or intended to be used in the course of his business. The amount should be credited to the electronic credit ledger of such a person. But, the entitlement to take credit of input tax is subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49.

20. Sub-section (2) of Section 16 lays down four conditions subject to which a registered person will be entitled to the credit of any input tax. These conditions are (i) he should be in possession of a tax invoice or debit note issued by a supplier registered under the Act; (ii) he should have received the goods or services; (iii) the tax charged in respect of such supply should have been actually paid to the Government, either in cash or through utilisation of ITC; and (iv) he should have filed the return under Section 39.

21. Section 49 of the Act, which deals with payment of tax, also speaks about the manner in which ITC shall be credited. Sub-section (2) of Section 49 stipulates that the input tax credit as self-assessed in the return of a registered person should be credited to his electronic credit ledger in accordance with Section 41. The amount available in the

electronic credit ledger may be used by virtue of Sub-section (4) of Section 49, for making any payment towards output tax under the Act.

22. Thus, the broad scheme of Section 39 which deals with the filing of returns, Section 41 which deals with the claim of ITC and its provisional acceptance, Section 16 which deals with the conditions and eligibility for taking ITC and Section 49 which deals with payment of tax, make it clear that the moment all the four conditions stipulated in Sub-section (2) of Section 16 are complied with, a person becomes entitle to take credit of ITC. Once a person takes credit of ITC, the amount gets credited on a provisional basis to his electronic credit ledger under Section 41 (1).

23. In other words, Section 16 (2) makes a registered person entitled to take credit of input tax. Section 41 (1) provides for a credit entry to be made on a provisional basis in the electronic credit ledger. But, the time at which this credit is made under Section 41 (1) is important. Section 41 reads as follows:

> ***"41. Claim of input tax credit and provisional acceptance thereof***
>
> *1. Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.*
>
> *2. The credit referred to in sub-section (1) shall be utilized only for payment of self-assessed output tax as per the return referred to in the said sub-section."*

24. It is seen from Section 41 (1) that a person gets credited with the input tax, in his electronic credit ledger, only upon his filing of the return on self-assessment basis. Till a return is filed, no credit becomes available to his electronic credit ledger.

25. It is only after a credit becomes available in the electronic credit ledger that the utilization of the same for payment of self-assessed out-put tax, arises under Section 41 (2).

26. Thus, the scheme of the Act makes a distinction between (i) the entitlement to take credit which comes first; (ii) the actual entry of credit in the electronic credit ledger, which comes next; and (iii) the actual payment from out of the credit, which comes last.

27. There can be no doubt about the fact that **even in respect of the input tax credit available in the electronic credit ledger, there is a necessity to make payment**. Section 41(2) talks about utilization of the credit available in the electronic credit ledger, for payment of the self- assessed output tax. Section 49(2) also confirms the stage at which a credit entry is made and Section 49(4) enables a registered person to make payment from out of the credit so available in the electronic credit ledger. Therefore, for finding an answer to the dispute on hand, **one must find out**

(i) when a credit entry is entered in the electronic credit ledger of the registered person; and (ii) when payment out of the same is made in lieu of cash. Once it is statutorily prescribed that payment can be made either by way of cash or from out of the credit available in the electronic credit ledger, the date of payment in respect of both assumes significance for determining the liability to pay interest.

Wording of section 50

28. Having thus seen the scheme of Sections 39, 41, 16 and 49, let us now take a look at Section 50 about which present dispute revolves, which reads as under:

> ***50. Interest on delayed payment of tax-*** *(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.*
>
> *(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.*
>
> *(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council."*

29. It is seen from Sub-section (1) of Section 50 that the liability to pay interest arises automatically, when a person who is liable to pay tax, fails to pay the tax to the Government within the period prescribed. The liability to pay interest is in respect of the period for which the tax remains unpaid. In fact, the liability to pay interest under Section 50 (1) arises even without any assessment, as the person is required to pay such interest "***on his own***".

30. While Sub-Section (1) of Section 50 speaks about the liability to pay interest under one contingency, viz., the failure to pay tax within the period prescribed, Sub-Section (3) of Section 50 speaks about the liability to pay interest under a different contingency. Whenever an undue or excess claim of ITC is made or whenever an undue or excess reduction in out-put tax liability is made, a liability to pay interest arises under Sub-section (3). The words "on his own" used in Sub-section (1), are not used in Sub-section (3) of Section 50.

31. Therefore, it is clear that the liability to pay interest under Section 50 (1) is self-imposed and also automatic, without any determination by any one. Hence, the stand taken by the department that the liability is compensatory in nature, appears to be correct.

32. Once it is clear that the liability to pay interest arises for non- payment within the period prescribed, we should see; (i) what is the period prescribed for payment of tax and (ii) the mode of such payment. Under Section 39 (7), every registered person (other than an Input Service Distributor or a Non-resident taxable person or a person paying tax under Sections 10/51/52) is obliged to pay to the Government, the tax due

as per such return, not later than the date on which he is required to furnish such return. Sub-sections (1) and (7) of Section 39 read as follows:

> *"**39. Furnishing of Returns-** (1) Every registered person, other than an Input Service Distributor or a non- resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form, manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed on or before the twentieth day of the month succeeding such calendar month or part thereof.*
>
> *XXXX*
>
> *(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub- section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.*
>
> *(10)x x x x"*

33. Therefore, the period prescribed for payment of tax in respect of every month is on or before the 20th day of the succeeding calendar month.

34. The mode of payment is stipulated in Section 49. Section 49 reads as follows:

> *"**49. Payment of tax, interest, penalty and other amounts-** (1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.*
>
> *(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41; to be maintained in such manner as may be prescribed.*
>
> *(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.*
>
> *(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act, 2017 (Act No.13 of 2017) in such manner and subject to such conditions and within such time as may be prescribed.*
>
> *(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of,–*

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union Territory tax, in that order;

(b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

(d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

(7) All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

(8) Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely:–

(a) self-assessed tax, and other dues related to returns of previous tax periods;

(b) self-assessed tax, and other dues related to the return of the current tax period;

(c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

(9) Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.

***Explanation**:- For the purposes of this section,-*

(a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;

(b) the expression,—

- *"tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and*
- *"other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder."*

35. It is seen from Sub-section (2) of Section 49 that a credit entry is made in the electronic credit ledger of a registered person, only when the ITC, as self-assessed, is found in the return of a registered person. After a credit entry is made in the electronic credit ledger, the same becomes available for making payment. This is clear from Sub-section (3) of Section 49. If after payment, a balance is still available in the electronic credit ledger, the same is liable to be refunded in accordance with Section 54.

36. Therefore, in the entire scheme of the Act three things are of importance. They are; (i) the entitlement of a person to take credit of eligible in-put tax, as assessed in his return; (ii) the credit of such eligible in-put tax in his electronic credit ledger on a provisional basis under Section 41 (1) and on a regular basis under Section 49 (2); and (iii) the utilization of credit so available in the electronic credit ledger for making payment of tax, interest and penalty etc., under Section 49 (3).

37. In other words, **until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger take place**. As a consequence, no payment can be made from out of such a credit entry. **It is true that the tax paid on the inputs charged on any supply of goods and/services, is always available. But, it is available in the air or cloud. Just as information is available in the server and it gets displayed on the screens of our computers only after connectivity is established, the tax already paid on the inputs, is available in the cloud. Such tax becomes an in-put tax credit only when a claim is made in the returns filed as self-assessed. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger. It is only after a credit is entered in the electronic credit ledger that payment could be made, even though the payment is only by way of paper entries.**

38. If we take a common example of banking transactions, this can be illustrated much better. **An amount available in the account of a person, though available with the bank itself, is not taken to be the money available for the benefit of the bank. Money available with the bank is different from money available for the bank till the bank is allowed to appropriate it to itself**. Similarly, the tax already paid on the in-puts of supplies of goods or services, available somewhere in the air, should be tapped and brought in the form of a credit entry into the electronic credit ledger and payment has to be made from out of the same. If no payment is made, the mere availability of the same, there in the cloud, will not tantamount to actual payment.

39. Admittedly, the petitioner filed returns belatedly, for whatever reasons. As a consequence, the payment of the tax liability, partly in cash and partly in the form of claim for ITC was made beyond the period prescribed. Therefore, the liability to pay interest under Section 50 (1) arose automatically. The petitioner cannot, therefore,

escape from this liability.

40. Let us look at it from another angle. Suppose a registered person under the Act purchases goods, which have suffered tax, to be used as inputs in the goods to be sold by him. Let us assume that the purchase is made in January and hence the same is reflected in the return filed by February 20. While filing the return in February, the dealer could have taken credit and it is possible that the credit is available in the electronic credit ledger for the month of February. If after some kind of processing, the goods are sold in March, the output tax becomes payable while filing the return by April 20. This payment can be either by way of cash or by way of adjustment against the claim for ITC. The payment is made by way of cheque in the case of the former and by way of a claim made in the return by way of an entry. Only when the payment is so made, the Government gets a right over the money available in the ledger. Since ownership of such money is with the dealer till the time of actual payment, the Government become entitled to interest upto the date of their entitlement to appropriate it.

41. Mr. Gandra Mohan Rao, learned counsel relied upon an approval made in principle by the GST Council for the amendment of the Act. The Press release of the Ministry of Finance in this regard reads as follows:

> "The GST Council in its 31st meeting held today at New Delhi gave in principle approval to the following amendments in the GST Acts:
>
> 1. Creation of a Centralised Appellate Authority for Advance Ruling (AAAR) to deal with cases of conflicting decisions by two or more State Appellate Advance Ruling Authorities on the same issue.
> 2. Amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.
>
> The above recommendations of the Council will be made effective only after the necessary amendments in the GST Acts are carried out."

42. But, unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment.

43. The learned counsel for the petitioner relied upon two decisions of the Gujarat High Court, one in **State of Gujarat v. Dashmesh Hydraulic Machinery, dated 19.01.2015**, and another in **State of Gujarat v. Nishi Communication, dated 29.01.2015**.

44. But, both the above decisions arose out of Gujarat Value Added Tax Act. The VAT regime and the GST regime differ from each other substantially. Therefore, these decisions do not go to the rescue of the petitioner.

45. In view of the above, the claim made by the respondents for interest on the ITC portion of the tax cannot be found fault with. Hence, the Writ Petition is dismissed. However, in the circumstances, there shall be no order as to costs.

46. As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition, shall stand closed.

MADRAS HIGH COURT

CIVIL MISCELLANEOUS APPEAL NO.3443 OF 2009, Dated: 07.03.2019

THE COMMISSIONER OF CUSTOMS (IMPORTS) ..... Appellant
VERSUS
M/S. SYMRISE PRIVATE LIMITED & ORS ..... Respondent

A two-judge bench of the Madras High Court has held that a mistake committed by the importer can be corrected under Section 154 of Customs Act by the assessing officer and not by the refund authority.

ORDER

This appeal, filed by the Revenue under Section 130 of the Customs Act, 1962 (hereinafter referred to as the Act), is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity the Tribunal) in Final Order No.701/2009, dated 03.06.2009.

2. The above appeal was admitted on 22.12.2009, on the following substantial questions of law:-
   (i) Whether the error committed by the importer in the Bill of Entry No.303606 dated 25.09.2006 can be corrected / rectified using the provision of the Section 154 of the Customs Act, 1962? and
   (ii) Even presuming that the error committed by the importer could be rectified under Section 154 ibid, is it lawful to rectify the mistake by the Refund Authority itself for the purpose of refund of excess duty without considering the law laid down by the Hon'ble Supreme Court in the case of Commissioner of Central Excise v. Flock India 2000 (120) ELT 285 SC and of Priya Blue Industries Limited v. Commissioner of Customs (Preventing) 2004 (172) ELT 145 SC?
3. Heard Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant/Revenue; and Mr.Hari Radhakrishnan, learned counsel for the first respondent/assessee.
4. The assessee filed a bill of entry on 25.09.2006 for clearance of automatic chemicals imported by them and paid duty of RS.19,90,572/-. This duty was assessed on the amount covered by nine invoices. However, what were imported under the said bill of entry were covered only in respect of eight invoices and so far as the 9th invoice is concerned, it was erroneously included and duty has been assessed and remitted by the assessee. Insofar as the 9th invoice is concerned, it was covered in a separate bill of entry dated 27.09.2006, which was permitted to be cleared on payment of duty. Thus, the assessee claimed that for the same invoice, the assessee has paid duty twice and the balance amount requires to be refunded. In this regard, a representation was

submitted on 29.09.2006 to the Assistant Commissioner of Customs (Refunds), that is, within three days from the date on which the excess duty was paid against the bill of entry dated 25.09.2006.

5. The Assistant Commissioner of Customs (Refunds) by order dated 07.11.2006, informed the assessee that they have claimed refund of excess duty paid against the said bill of entry covered under invoice dated 17.08.2006, which was wrongly included in the bill of entry and subsequently, they were cleared under another bill of entry, on payment of duty. It appears that considering the genuineness of the claim made by the assessee, the Refunds officer advised them to get the order of assessment of the bill of entry dated 25.09.2006 reviewed by the concerned apprising group or modified by way of an appeal to the Commissioner (Appeals) under Section 128 of the Act, and file a refund claim, if the review/modification is in favour of the assessee. Pursuant there to, the assessee filed an application before the Assessing Officer, viz., the Assistant Commissioner of Customs, Group 2, and dated 14.12.2006.
6. We may note that assuming the assessee had filed an appeal before the Commissioner (Appeals) on the very same day; the appeal would have been within limitation. Be that as it may, the assessee chose one of the options as suggested by the Refunds officer and sought for review before the Assessing Officer, vide representation dated 14.12.2006 and requested for re-assessment of the bill of entry http://www.judis.nic.in dated 25.09.2006. This was rejected by the Assessing Officer on the ground that the refund claim is not maintainable, when the assessee did not challenge the assessment order. In this regard, the Assessing Officer referred to the decision of the Hon'ble Supreme court in the case of M/s.Super Cassette Industries vs. Commissioner of Customs, 2004 (163) E.L.T. A116 (SC).
7. The assessee filed appeal before the Commissioner (Appeals) challenging the said order. Before the first appellate authority, the assessee contended that the said invoice was erroneously included in the bill of entry, it was a clerical error which requires to be corrected by invoking the power under Section 154 of the Act and the assessee was not aware that there is a procedure to file an appeal and hence, they straight away filed the refund claim and only after the correct legal position was pointed out by the Refunds officer, they had sought for re-assessment of the bill of entry on account of the error which has occurred.
8. The first appellate authority framed three questions for consideration as to whether a refund claim can be filed under Section 27 of the Act against an order of assessment made in a bill of entry http://www.judis.nic.in without filing an appeal against the said order; whether an error committed by the assessee would be covered under the scope of Section 154 of the Act; whether the appeal would be hit on the point of limitation.
9. The fact which was not disputed by the Revenue was that the assessee paid duty twice in respect of the same invoice. On the second time, the same invoice, which is subject matter of bill of entry, was assessed to tax and cleared by the assessee. However, neither the Assessing Officer, nor the first appellate authority made an endeavour

to consider the undisputed factual position. Both the Assessing Officer and the first appellate authority were only guided by the legal principles without even looking into the factual position.

10. In our considered view, there would be no necessity for the Assessing Officer to refer to the various decisions, nor for the first appellate authority to refer to the decisions in the case of Priya Blue Industries Limited v. Commissioner of Customs (Preventing), 2004 (172) ELT 145 (SC); Commissioner of Central Excise v. Flock India, 2000 (120) ELT 285 (SC); and Super Cassette Industries (supra), since all that was required to be considered by the Department was whether an error has occurred from any accidental slip or omission. Therefore, the first appellate authority held that without filing an appeal against the assessment of the bill of entry, the question of maintaining the refund claim does not arise.

11. With regard to the power under Section 154 of the Act, the first appellate authority held that unless the error is committed by the Department, the same cannot be rectified. The assessee filed appeal before the Tribunal. The Tribunal after considering the submissions made by the assessee and the Revenue, took note of Section 154 of the Act, the decision of the Delhi Tribunal in the case of Cannon India Pvt. Ltd., vs. CC, 2006 (200) ELT 83 (Tri.Del), the decision of the Mumbai Tribunal in the case of Goa Shipyard vs. CC., ACC Sahar, 2006 (72) RLT 479 (Tri.Mum) and held that clerical error or arithmetical error could be rectified suo motu under Section 154 of the Act and refund could be allowed to importer as a consequence of correction of clerical error under Section 154 of the Act, when the importer had not filed refund claim under Section 27 of the Act.

12. The facts of the case in Cannon India Pvt. Ltd. (supra) was taken into consideration whether excess payment was occurred due to http://www.judis.nic.in clerical error committed by the importer and not by the authority, yet the Tribunal held that the same can be corrected. Thus, the Tribunal concluded that the interpretation given by the first appellate authority to Section 154 of the Act was incorrect. Ultimately, the Tribunal allowed the appeal and issued consequential direction to refund the excess duty paid on correction of the error in the assessment subject to scrutiny from the angle of unjust enrichment.

13. While we agree with the stand taken by the Tribunal that the scope of Section 154 of the Act should not be restricted, for which we shall assign reasons little later, we do not agree with the penultimate portion of the direction issued by the Tribunal in making a positive observation that the assessee will be entitled to refund of excess duty paid on correction of the error in the assessment subject to scrutiny from the angle of unjust enrichment.

14. With regard to the power under Section 154 of the Act, the Tribunal relied on the decisions of the Delhi and Mumbai Tribunal, yet held that, that power can be exercised suo motu. As pointed out by us earlier, the Refunds officer is aware of what was the mistake which had occurred and it is primarily a mistake committed by the assessee. Yet http://www.judis.nic.in the assessee consciously pointed out the same to

the Refunds officer, that is, within three days from the date on which the bill entry was assessed and tax was paid. The Refunds officer acted in a fair manner and informed the assessee that he should get the bill of entry reviewed or file an appeal before the Commissioner (Appeals). The assessee chose one of the options and approached the Assessing Officer, who without even going into the aspect as to whether a mistake has occurred or not, rejected the claim on the ground that the assessee has not challenged the assessment order when the fact remained that the assessee was before the Assessing Officer requesting for reassessment and this request was made well within the appealable time available to the assessee.

15. At the first instance, a reading of Section 154 of the Act gives us an impression that clerical or arithmetical error which has occurred in orders passed by the Government Board or any officers of that Department, or errors arising from such order due to accidental slip or omission alone can be corrected. However, what is to be borne in mind is the procedure prescribed for amendment of bills of entry or for amendment of export documents which are documents originating from the exporter or importer. However, so far as the orders to be http://www.judis.nic.in passed under the provisions of the Act is concerned, the power to correct the same can vest only with the authorities. Therefore, Section 154 of the Act specifically deals with such a power. The said provision does not in any manner restrict the exercise of power when a clerical or arithmetical mistake is pointed out by the importer or exporter for reasons attributable to the importer or exporter. Therefore, the interpretation given by the first appellate authority as well as the Revenue, before us, if given, would undoubtedly, restrict the power of Section 154 of the Act which is impermissible.

16. In the instant case, the assessee cannot correct the order, but the fact remains, an invoice which did not form part of the bill of entry was inadvertently included, assessed to tax and tax was also paid. The same invoice was subject matter of another bill of entry which was assessed to tax and tax was cleared. Therefore, the error is apparent on the face of the order. All that was required to be done was to verify the bill of entry and if that has been done, the entire time lost in this litigation could have been avoided. Therefore, in our considered view, this would be the right interpretation of Section 154 of the Act in addition to what was held by the Delhi and Mumbai Tribunals in the aforementioned decisions.

17. Thus, for the above reasons, the appeal filed by the Revenue is partly allowed, the direction, finding rendered by the Tribunal that the assessee is entitled to refund of excise duty paid is set aside and the matter is remanded to the Assessing Officer to consider the appellant's request, take note of the facts and exercise power under Section 154 of the Act and proceed to pass orders in accordance with law. Considering that the matter is of the year 2006, the Assessing Officer is directed to conclude the proceedings after affording an opportunity of personal hearing to the assessee within a period of 12 WEEKS' from the date on which the assessee approaches the Assessing officer with a representation along with a copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

COMMERCIAL NEWS

CA Ribhav Ghiya
Jaipur

1. Zomato, Swiggy Face GST Hiccup, Govt Execs Look For A Solution

Foodtech companies are unable to show tax collected at source. The problem arises from the small restaurants which come under the GST composition scheme Under the scheme, small restaurants are not allowed to avail any input tax credits Foodtech companies such as Zomato, Swiggy and UberEats are reportedly facing issues in complying with the goods and services tax.

The food aggregators are not being able to show tax collected at source (TCS) from restaurants using their platform, which is preventing the partner restaurants from claiming credits.

In response to the problems pointed out by the companies, the central government has transferred this issue for review to a law committee under the GST Council.

In response to Inc42's query, Zomato declined to comment on the matter

According to an ET report, the problem has stemmed from the bar on goods and services composition dealers from registering themselves on the ecommerce platforms. Due to this, the companies are not able to file TCS collected from partner eateries which are under the composition scheme on the GSTN portal.

Under the GST composition scheme, small businesses are allowed to opt for a fixed rate of tax on their turnover without tedious paperwork. The tax is fixed at 5% in the case of restaurants. However, under this rule, the restaurants cannot avail any input tax credit (ITC). This prevents the recording of the TCS in the GSTN portal due to which the restaurants cannot claim their returns.

Gunjan Mishra, a partner at Luthra and Luthra Law Offices, Delhi, explained that presently, the GST laws require online food aggregator to deduct tax collected at source before making payment to restaurants. The companies have to file their return on the GSTN portal providing details of TCS. The restaurants are permitted to take credit of TCS based on the return furnished by the aggregator.

"The challenge faced by restaurants stem from the fact that composition dealers are not permitted to supply goods through ecommerce platform. While restaurants are permitted, by way of an exception, to register as composition dealers, food aggregators are unable to furnish return with details of TCS portal collected from vendors who have opted for composition levy. As a result, restaurants are unable to claim credit of the TCS collected and deposited by food aggregators," said Mishra.

What Is GST Composition Scheme?

In order to help small businesses comply with the GST rules, the composition scheme allows small businesses to pay tax at a prescribed percentage of turnover every quarter. Restaurants are to pay the tax at a concessional rate of 5% on the turnover.
Restaurants who can apply for the composition scheme:
Its turnover cannot exceed INR 1.5 Cr
Will not be engaged in any services other than restaurant
They will not be allowed to make inter state outward supply of goods
Will not supply any items exempt under GST
Will not be allowed to avail any input tax credit
Will not be allowed to collect taxes from the customer
How Is GST Affecting Food Business In India?
The Goods and Services Tax Act was passed in the Parliament in March 2017 and it came into effect from July 2017.
Under this act, GST had been explained as an indirect tax which is levied on the supply of goods and services and has also replaced certain indirect tax laws that existed before GST implementation.
The issue had been highlighted earlier as well. Prior to GST implementation, the online food delivery platforms were charging a 20% commission to the restaurants with 18% GST. This allowed the partner restaurants to levy 3.5% ITC on the GST for input services from these delivery platforms.
However, since the ITC provision was removed under the composition scheme, restaurants had been either increasing the food prices or asking the companies to reduce the commission rates.
"Given the cash flow issue faced by restaurants, the GST Council should take immediate steps to either rectify the compliance challenge faced by the aggregators or better still do away with the TCS requirement altogether as it would reduce the compliance burden currently faced by these aggregators," said Mishra.
Reported by inc42 on 8th April, 2019

2. BJP vows to rejig tax slabs, simplify GST

NEW DELHI: BJP is looking to revise the tax slabs in an effort to lower the burden on the middle-class and simplify the goods and services tax (GST) if voted back to power.
"Our economic policy has been guided by the principle of lowering the tax rate and improving compliance, thereby broadening the tax base... We will continue with our policy in the similar manner — lowering of tax rate thereby rewarding honest tax payers and improving compliance," the party said in its manifesto, released on Monday.
On GST, too, BJP said, lower rates had helped improve tax collections, especially for the states.
The idea of lower income tax is to ensure more cash with consumers, which increases their purchasing power, a statement that PM Modi and finance minister Arun Jaitley have repeatedly made in the past five years. In fact, the panel to rewrite the IT laws has been

tasked with reviewing the slabs. In the interim budget, the government had decided to leave those earning up to Rs 5 lakh out of tax net.

Apart from its promise on reducing taxes, BJP appeared to be taking credit for navigating the economy out of the 'Fragile Five' bracket in 2014 and making it a "bright spot", with macroeconomic stability and fastest growing major economy tag. The government has faced repeated attacks from the opposition for its economic policies and is accused of not creating enough jobs.

The manifesto takes credit for the government's term seeing the most rapid growth in the post-liberalisation period, while maintaining fiscal prudence. A separate section mentions India will be the third largest economy by 2030 and its size treble to $10 trillion by 2032.

It will use tourism and cluster services as vehicles for creating employment. All Unesco heritage sites in the country will be upgraded to international level facilities.

It promised to make India a global manufacturing hub. As part of this, it endeavours to be in top 50 of the Ease of Doing Business index, strengthen the Companies Act, unveil a new industrial policy and follow a network approach for growth.

Reported by Times of India on 9th April, 2019

3. Service providers can opt for GST composition scheme by April 30: CBIC

The tax department has given service providers with turnover of up to Rs 50 lakh time till April 30 to opt for the composition scheme and pay 6 per cent GST.

The option to pay Goods and Services Tax (GST) at reduced rate of 6 per cent would be effective from the beginning of the financial year or from the date of obtaining new registration during the financial year.

Service providers opting for the composition scheme can charge a lower tax rate of 6 per cent from customers, as against the higher rates of 12 and 18 per cent for most services under GST.

In a circular, the Central Board of Indirect Taxes and Customs (CBIC) said suppliers who want to opt for composition scheme would have to file Form GST CMP-02 by selecting 'Any other supplier eligible for composition levy' latest by April 30, 2019.

Businesses which apply for new registration may avail the said benefit in Form GST REG- 01 at the time of filing application for registration.

AMRG & Associates Partner Rajat Mohan said "numerous service providers tried to file this intimation opting composition scheme recently but were denied due to a legal embargo. Now with this clarification, GSTN would start accepting the intimations soon".

The GST Council headed by Finance Minister Arun Jaitley and comprising state ministers, in its meeting on January 10 had permitted service providers and those dealing in both goods and services with a turnover of up to Rs 50 lakh to opt for composition scheme with effect from April 1.

The GST composition scheme was so far available to traders and manufacturers of goods with an annual turnover of up to Rs 1 crore.

This threshold too has increased to Rs 1.5 crore from April 1.
Under the scheme, traders and manufacturers are required to pay only 1 per cent GST on goods which otherwise attract a higher levy of 5, 12 or 18 per cent. Such dealers are also not permitted to charge GST from the purchaser.
Of the 1.20 crore businesses registered under GST, about 20 lakh have so far opted for the composition scheme.
Reported by The Economic Times on 7th April, 2019

4. Huge burden for players in farm produce as warehouses comes under GST net

Collateral management firms working on rented warehouse model hit as they cannot avail input credit, given that farm commodities themselves are outside the GST net
The move by the government to bring warehouses under the Goods and Services Tax (GST) net is likely to have a major impact on players in the organised sector who take warehouses on rent as part of their collateral management business. They see a huge burden especially when they deal in farm commodities.
Agri commodities collateral management business has flourished the past few years as companies in this space help farmers and processors get finance from banks and non-banking institutions. The new government decision means that they have to pay now 18 per cent GST on the rent they pay for the warehouses in which their collateral commodities are stored. In many cases, such companies themselves finance farmers or their group NBFCs finances them against collateral commodities. Hence these collateral management companies cannot get input credit of the GST they pay on rent because the commodities in which they deal are agri commodities, which do not attract GST. This is a big burden on them.
"If agri commodities are fully exempt from GST, all products and services linked to them should also have been exempted. The entire channel either needs to be taxed or exempted. We, therefore, consider the current structure of GST levy as an element of business risk. We provide a variety of services to our customers in a package which help us make even a small segment of our business viable," said Ramesh Doraiswami, Managing Director, National Bulk Handling Corporation (NBHC).
Smaller warehouses with annual rent income of below Rs 20 lakh are however exempted from GST. This is a major relief as, according to CARE research report, approximately 90 per cent of the warehousing space controlled by unorganised sector players and are less than 10,000 square feet.
But this causes another problem when their services are used by collateral management services companies.
"Most of the private warehouse service providers like StarAgri create a network of warehouses for rendering storage services by leasing-in or renting warehouses from small service providers on an individual basis. This service arrangement was not liable to

service tax, since, the small service providers were below the threshold limit during the service tax regime. Agriculture sector remains largely exempt from GST. Thus, any input taxes levied on input products or services used will contribute to increas in output prices," said Amith Agarwal, Executive Director, Star Agriwarehousing and Collateral Management Ltd.

Another relief is that reverse charge mechanism has been suspended. Under RCM, if service provider is not registered in GST, the service user has to pay the tax on their behalf. "Reverse charge implementation is suspended till further orders. This has given a major relief to all warehouses with income less than Rs 20 lakhs. For the income more than Rs 20 lakhs, 18 per cent GST is applicable which we have to incur and for which we have no input tax credit available as agriculture produce is exempt from GST," said Sanjay Kaul, Managing Director, National Collateral Management Services Ltd (NCML).

STORAGE CAPACITY FOR CENTRAL POOL FOOD STOCKS

In lakh MT

■ FCI ■ Other agencies

			Total
FY11	316.1	291.3	607.4
FY12	336.0	341.4	677.4
FY13	377.4	354.3	731.6
FY14	368.9	379.2	748.1
FY15	356.6	352.6	709.2
FY16	357.9	457.0	814.8
FY17	352.7	420.2	772.9
FY18	362.5	480.5	843.0

Source: FCI

To address this issue, many players in warehousing sector, meanwhile, have also started focusing on innovative technology to monitor entire logistic issues to avoid demurrage and also the delay in loading and unloading to cut down their cost of warehousing and transportation.

"In a bid to bring about automation into the entire supply chain model enabling everyone to have direct access to the dashboards that can be customized as per the business needs. The whole objective is to transform how transportation currently done by corporate and shippers in the country. Transport Hub provides end to end solutions from picking the goods by the shipper to delivering the goods, tyre management, fuel management amongst others. This customized technology saves the cost of transportation immensely," said Rohit Chaturvedi, managing director, Transport Hub.

Meanwhile, large units have started rendering other allied services including trade finance, fumigation, maintenance and advisory services along with the core business of warehousing to set off their loss in reverse charge (paid by organized sector players on the services availed from unorganized sector players).

For commodity exchange registered warehouses, however, tax recovery from other services has become a herculean task. The government has levied 5 per cent of GST on trading as against 18 per cent on rented warehouses above the threshold and exemption on unprocessed agri commodities. Thus, the warehousing sector faces tax anomalies in every channel.

Reported by Business Standard on 08.04.2019

5. GST officers ask cos to clarify mismatch in sales returns, e-way bill data

Touted as an anti-evasion measure, e-way bill system was rolled out on April 1, 2018, for moving goods worth over Rs 50,000 from one state to another

GST officers have started seeking clarification from companies whose tax payments did not match with the e-way bills generated, as revenue authorities start matching supplies data to check tax evasion, sources said.

Touted as an anti-evasion measure, e-way bill system was rolled out on April 1, 2018, for moving goods worth over Rs 50,000 from one state to another. The same for intra or within the state movement was rolled out in a phased manner from April 15, 2018.

Following this, it has come to the notice of tax officers that some transporters are doing multiple trips by generating only a single e-way bill or not reflecting e-way bill invoices while filing sales return. It has also come to the notice that certain businesses are not generating e-way bills even as supplies are being made.

Goods and Services Tax Network (GSTN), the company which handles the technology backbone for GST, has started sharing details of e-way bills vis-a-vis taxes paid to help tax officers identify any discrepancy, sources added.

In one of the letters issued by Ghaziabad GST commissionerate, a taxpayer has been asked to provide "clarification" within three days on the difference between taxes paid and the liability which the tax officer has ascertained after analysing sales return GSTR-3B and e-way bill data for the period October 2018 and January 2019.

Matching of invoices of e-way bills with the sales shown in sales returns helps taxmen in assessing whether the supplies have been accurately shown in the returns and GST paid on the same.

GSTN has also provided the facility to businesses to include details of e-way bills generated while filing the final monthly sales return under GSTR-1 to avoid double data entry.

The government is banking on anti-evasion measures to meet its GST collection target for the current fiscal.

For fiscal 2019-20, the government proposes to collect Rs 6.10 lakh crore from Central GST and Rs 1.01 lakh crore as compensation cess. The Integrated GST balance has been pegged at Rs 50,000 crore.

AMRG & Associates Partner Rajat Mohan said tax officers have started using the pile of GSTN data retrieved through return filings and e-way bill mechanics to carve out a summary reconciliation statement of estimated tax liability, compelling businesses to justify the outward tax liabilities in a comprehensive manner.

"Tax authorities would be at fault if they presume that reconciliation difference is due to tax evasion only. There be other reasons for this difference like clerical errors, cut off supplies and pre-delivery expiry of e-way bills," Mohan added.

To further streamline the e-way bill system, GSTN is planning some changes, including auto calculation of route distance based on PIN code and blocking of generation of multiple e-way bills on one invoice/document.

The matching of e-way bill data with that of tax payment is in addition to analysis being done by GSTN by matching taxes paid in summary sales return GSTR-3B and final returns GSTR-1.

Also, businesses whose GSTR-1 did not match with GSTR-2A, which is a purchase return auto-generated by system from the seller's return, have been flagged by GSTN systems.

Based on this, last year tax officers sent scrutiny notices to taxpayers seeking explanation for the reason for the discrepancies.

Reported by Business Standard on 07.04.2019

6. Businesses with turnover over Rs 2 cr can now file FY18 GST audit reports

The audit report for 2017-18, the first year of the goods and services tax implementation, is to be filed by June 30

Businesses with an annual turnover of over Rs 2 crore can now start filing GST audit reports for fiscal 2017-18 as GST Network (GSTN) has made its format available on its portal.

The audit report for 2017-18, the first year of the goods and services tax (GST) implementation, is to be filed by June 30.

The ministry on December 31, 2018, notified the annual returns forms GSTR-9, GSTR-9A and GSTR-9C. The GST Council in December extended the last date for filing these forms by three months to June 30.

GSTN has now made available offline utility of GSTR-9C which can be filled up by taxpayer and uploaded on the portal.

GSTR-9 is the annual return form for all taxpayers registered under GST, GSTR-9A is for composition taxpayers.

GSTR-9C is a reconciliation statement, duly verified and signed by a chartered accountant or a cost accountant, and required to be furnished along with filing of annual return by the taxpayer whose turnover is above Rs 2 crore during a financial year.

EY Tax Partner Abhishek Jain said the industry was long awaiting the offline utility and the mechanics of filing the GSTR-9C online.

"Clarifications like digital signature of auditor being required, balance sheet and profit/loss account being attached, etc, should help businesses plan well for executing this compliance," Jain said.

AMRG & Associates Partner Rajat Mohan said timely availability of the utility for filing GST annual audit report is a great assistance to taxpayers, especially those having multi-locational places of business.

"Taxpayers have more than 75 days to file GST annual audit reports and in case they start early then there would be no need for any extensions on the last day," Mohan added.
Reported by Business Standard on 15.04.2019

7. IL&FS Payment Crisis: Former MD & CEO of the Company Ramesh Bawa arrested by SFIO

On Saturday, the Serious Fraud Investigation Office (SFIO) arrested former IL&FS Financial Services (IFIN) MD & CEO, Ramesh Bawa in the case. **This is the second arrest made by the investigation arm of the Ministry of Corporate Affairs (MCA).**
According to a source, Bawa was arrested late last night in Delhi. This, after the Supreme Court (SC) recently refused to extend relief of granting him protection from arrest.
Earlier this month, the Agency had arrested Hari Sankaran, the former vice chairman of IL&FS. He is currently lodged in Mumbai's Byculla district jail.
Like Sankaran, Bawa too has been arrested under ***Section 447 of the Companies Act*** that empowers the agency to make an arrest for committing fraud.
In a recent press conference, the incumbent government appointed IL&FS board had said that IFIN has a total exposure of ***₹18,800 crore,*** out of which ***₹10,700 crore*** is to external agencies while the remainder is with group companies.
Other than SFIO, the Enforcement Directorate is also probing the alleged irregularities in IFIN. In Feb the central agency had registered a money laundering case against ILFS Rail Ltd, ILF Transportation Networks Ltd, Ravi Parthasarthy, former chairman and managing director of IL&FS and Hari Sankaran and Bawa.
According to ED the accused in this case floated bogus/shell companies to award work contract with vague details, siphoned off ***₹74 crore*** which was used by purchase individual assets.
The bogus/ shell companies were given a commission of 0.5% of the amount routed by them. While the present case deals with subsidiaries of IL&FS, sources add that the ED would eventually probe IL&FS and its entire debt burden of ***₹91,000 crore.***
In Nov, SFIO had placed an interim report detailing out the alleged irregularities surrounding IL&FS. It recommended that the assets of the key managerial individuals may be considered for restrainment under the provision of the ***Companies Act, 2013*** by the Central Govt.
Reported by www.latestlaws.com on 13th April, 2019

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(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

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