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Tel.: 22006342/49706343, 22006343 | E-mail : aiftpho@gmail.com | Website : aiftponline.com

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CHIEF-EDITOR'S COMMUNIQUE

The 37th meeting of the GST Council took place earlier this month on 20th September. Various propositions have been made regarding reduction of rates in various service sectors and also for certain goods. Rates have been drastically reduced in certain service sectors like Hotels & outdoor catering services. Certain goods like semi-precious and precious stones, dried tamarind, etc have been reduced.
The government is working relentlessly to improve and ease out the procedures under GST to improve the functionality and make it more user-friendly. Various recommendations have also been made in this regard. It would be highly beneficial for the small scale business sector. It has been proposed to waive off the requirement of filing GSTR-9A for composition dealers. It has also been proposed that the dealers with a turnover below 2 crores would not be required to file GSTR-9. A committee shall review the simplification of GSTR-9 & GSTR-9C as the business fraternity is facing a lot of issues while filing their annual returns. The current format is confusing, complicated and unclear. The government has finally taken into consideration the plight of the business community and is now taking solid steps towards resolving the issues. We are hopeful in the coming months that the compliance regarding Annual Returns would be simplified further and the system would be more user-friendly.

In the recent past we have come across various instances of summons, notices etc. being issued by the CGST Department on small pretexts and without giving any description as to why the presence and / or statements are required. The power given to the officers under the CGST Act is to be acted upon cautiously and not arbitrarily. Even when the data has been asked for no information is provided as to why it has been asked for but on the contrary the authorities act in an arbitrary manner. The aim of the GST Act was never such and this is not how the department should function.

We invite Articles as well as your valuable suggestions for the improvement of the AIFTP Indirect Tax & Corporate Laws Journal.
Best Wishes

Regards,
PANKAJ GHIYA
Chief Editor & Vice-President (CZ)
9829013626

ALL INDIA FEDERATION OF TAX PRACTIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020
E-mail: aiftp@vsnl.com
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Zone	**Associate**	**Individual**	**Association**	**Corporate**	**Total**
Central	0	1059	25	0	**1084**
Eastern	6	1620	36	0	**1662**
Northern	0	1218	18	1	**1237**
Southern	1	1312	19	4	**1336**
Western	5	2393	37	6	**2441**
Total	**12**	**7602**	**135**	**11**	**7760**

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PRESIDENT'S COMMUNIQUE

Dear Friends,

The government is looking to control the downside in the economy and is announcing various economic measures to control the economic condition. A fantastic stimulus has been announced in the Direct taxes by cutting the Corporate Tax rate and also announcing other measures boosting the sentiments of the trade and industry. The government has also announced various reliefs in the GST Counsel Meeting held on 20th September, 2019. The major reliefs announced are as under:-

1. Waiver in filing of Annual Returns in GSTR-9A for composition taxpayers and making it optional to file Annual returns in GSTR-9 for those taxpayers who have aggregate turnover upto 2 crores.
2. Imposition of restriction on availment of ITC by the recipient where returns are not file by the outward supplier under section 37 of the CGST Act.
3. New return system to be introduced from April, 2020.
4. Issuance of circular for uniformity in following matters:
   a. Procedure to file refund in Form GST RFD – 01A
   b. Eligibility to file refund applicationwhere NIL refund application has already been file.
   c. Clarification regarding supply of information technology enabled services on his own account or as intermediary.
5. Integrated refund system with disbursal to be introduced from 24 September, 2019.
6. Reduced rate in hospitality and tourism industry.
7. To exempt services by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables etc.
8. To exempt services provided by intermediary to a supplier of goods or receipt of goods when both the supplier are located outside the taxable territory.

Various activities are going on in the AIFTP. We had travelled to Eastern Europe with around 135 persons. In Kolkata the AIFTP (EZ) organized Dr. B.P. Saraf National Moot Court competition in Association with the West BengalUniversity of Juridical Sciences. It was a great success.

AIFTP is having the next National Tax Conference and NEC Meeting at Varansi in November, 2019 and thereafter there will be Mumbai convention in December, 2019. All the Members are requested to join the programmes in large numbers.

Wish you all the best and a very happy Dusshera and Ram Navmi.

Wish you all the best.

DR. ASHOK SARAF
National President, AIFTP
9435009811
drashoksaraf@gmail.com

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RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg, Jaipur

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
31.08.2019	38/2019-CENTRAL TAX	Seeks to waive filing of FORM ITC-04 for F.Y. 2017-18 & 2018-19.
31.08.2019	39/2019-CENTRAL TAX	Seeks to bring Section 103 of the Finance (No. 2) Act, 2019 in to force.
31.08.2019	40/2019-CENTRAL TAX	Seeks to extend the last date in certain cases for furnishing GSTR-7 for the month of July, 2019.
31.08.2019	41/2019-CENTRAL TAX	Seeks to waive the late fees in certain cases for the month of July, 2019 for FORM GSTR-1 and GSTR-6 provided the said returns are furnished by 20.09.2019.
24.09.2019	42/2019-CENTRAL TAX	Seeks to bring rules 10, 11, 12 and 26 of the CGST (Fourth Amendment) Rules, 2019 in to force.

*****

TIMELINE - GST

Adv. Abhay Singla
Sangaria (Hanumangarh)

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		September, 2019	20th Oct 2019
			October, 2019	20th Nov 2019
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		July to Sep 2019	31st Oct 2019
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		September, 2019	10th Oct 2019
			October, 2019	10th Nov 2019
(iii)	Quarterly return for Composite taxable persons	CMP-08	July to Sep 2019	18th Oct 2019
(iv)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(v)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	

(vi)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	
(vii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	September 2019	10th Oct 2019
			October 2019	10th Nov 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	September 2019	10th Oct 2019
			October 2019	10th Nov 2019
(ix)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	30th Nov 2019

*****

TAXATION OF INTERMEDIARY SERVICES UNDER GST

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

I. Background

The taxability of intermediary can be traced back to the Finance Act, 1994 (service tax provision). The concept of intermediary was introduced in service tax provision effective 01.07.2012 when the basis of levy of service tax was shifted from 'selective principle' to 'negative list' based taxation. Initially, the definition of intermediary was limited to 'arranging or facilitating a provision of **service** between two or more persons'. Effective, 01.11.2014, the scope of intermediary was expanded to include **goods**. In the erstwhile service tax provision, the place of provision of service of intermediary service was the location of the service provider (Rule 9 of the Place of Provision of Services Rules, 2012); therefore services which would fall within the meaning of intermediary were liable to service tax if the service provider was located in India since it would tantamount to providing service within the taxable territory even if the location of recipient of service is outside India. The question of intermediary under the erstwhile service tax provision was discussed in the case Godaddy India Web Services Pvt. Ltd. - 2016 (3) TMI 355 Authority for Advance Ruling – The gist of the advance ruling is as under

'GoDaddy India Web Services Private Limited to provide support services in an integrated manner to assist GoDaddy US develop its brand in India, carry on its operations efficiently and serve customers in India. Various services proposed to be provided were (a) Marketing and promotion services (b) Offline Marketing (c) Supervision of quality of third party customer care center services and (d) Payment processing services - Various support services proposed to be provided by the Applicant to GoDaddy US are a "bundle of Services" being naturally bundled in the ordinary course of business and accordingly is a single service, being business support service, in terms of Section 66F of the Finance Act.

Proposed service to be provided by the applicant to GoDaddy US is business support service and not intermediary service in terms of Rule 2 (f) of POPS'

II. Central Goods and Services Tax Act, 2017

1. **Meaning of intermediary (Section 2 (13) of the Integrated Goods and Services Tax Act, 2017) –** Intermediary is defined to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.

   The definition is partly similar to the definition provided under the erstwhile Place of Provision of Services Rules, 2012.

2. In the context of intermediary, the question whether marketing services provided by a person located in India to a recipient outside India constitutes an intermediary has been a bone of contention under the GST law. Generally, marketing services provided would be of the following types:

   a. The registered person in India say 'XYZ Ltd' identifies prospective customers in India and provides the details to the person located outside India say 'ABC Inc'. Basis the details received, 'ABC Inc.' located outside India negotiates / concludes the contract with the customer in India. 'XYZ Ltd' receives a fixed fee for marketing services irrespective of whether any order is concluded by ABC Inc with a customer in India.

   b. The registered person in India say 'DEF Ltd.' identifies prospective customers in India and provides the details to the person located outside India say 'JKL Inc'. Basis the details received, the 'JKL Inc.' located outside India negotiates / concludes the contract with the customer in India. Only on conclusion of the order, 'DEF Ltd.' is entitled to fee.

   c. The registered person in India say 'PQR Ltd.' identifies prospective customers by conducting surveys in India and provides the details to the person located outside India say 'LMN Pte.' 'PQR Ltd.' also provides pre-delivery support services, post-delivery support service for 'LMN Pte.' and also collects money from the customers of 'LMN, Pte' in India and remit the same to 'LMN Pte.'. 'PQR Ltd.' receives a fixed fee for the services provided to 'LMN Pte' irrespective of whether any order is concluded by 'LMN Pte.' with a customer in India. 'LMN Pte' concludes the contract with the customer in India.

3. Marketing services, whether it falls within the meaning of intermediary services, will have to be determined based on facts and circumstances of each case and keeping in view which services in bundle of services provided is the principal / main supply. What needs to be determined is, whether there is a principal agent relationship between the supplier and recipient of service for service provided or whether the service provided by the suppliers is as an independent contractor.
   a. In the example given in paragraph 2(a) and 2(b) supra, the paper writers view is that 'XYZ Ltd' and 'DEF Ltd' in the respective example cannot be construed as an intermediary as they are independent contractors and not having principal agent relationship with the person outside India and also they do not conclude the contract on behalf of person located outside India.

   b. In the example given in paragraph 2(c) also, the paper writers view is that 'PQR Ltd' cannot be construed as an intermediary as he is independent contractors and not having principal agent relationship with the person outside India and also they do not conclude the contract on behalf of person located outside India. Even considering that 'PQR Ltd' also provides pre-delivery support services, post-delivery support service for 'LMN Pte' and also collects money from the customers of 'LMN Pte' in India, 'PQR Ltd' cannot be considered as an intermediary, since 'PQR Ltd' is providing a composite supply wherein marketing research service is principal and other services provided are naturally bundled with marketing research service.

   c. In the context of the above, the following advance rulings are relevant to be noted where there are contradictory rulings
      i. Toshniwal Brothers (SR) Private Limited - 2018 (10) TMI 597 - Authority for Advance Rulings, Karnataka:

         Held that the agreement copy provided by the applicant shows clearly that the price is negotiated by the applicant for the machinery or equipments and intimated to the overseas supplier. It is also seen that the Principal who is the overseas supplier reserves the right to conclude or reject or change the contract, but he shall inform the decisive reasons to the applicant - Even the agreement entered by the applicant with the Principal, call the applicant an agent and since he is facilitating the supply of goods between the overseas supplier who is the principal, and the customer, by soliciting the customers and also by negotiating the

prices, terms etc., the predominant nature of the transaction is of "intermediary" nature.

The above AAR was upheld by the Appellate Authority for Advance Ruling Toshniwal Brothers (SR) Private limited - 2019 (2) TMI 126 - Appellate Authority for Advance Ruling, Karnataka.

ii. Asahi Kasei India Private Limited - 2019 (1) TMI 1091 - Authority for Advance Rulings Maharashtra:

Whether the service supplied by the Applicant under the Marketing Services Agreement dated 1 December 2012 constitute a supply of "Support services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961 / 9962? - Held that:- The concept of intermediary under the GST Act is substantially identical to the concept of intermediary under the erst while service tax regime. This concept has been explained in the Education Guide issued by CBEC in the year 2012 - We find from the scrutiny of Marketing Services Agreement that the relationship between the parties is that of independent contractors meaning that the agreement does not intend to create relationship of principal and agent. The applicant in no way carries out activities such as conclusion of contracts, acceptance of sales orders, invoicing, determination of sales prices, rebate, discounts, resolution of customers complaints, or settlement of disputes with customers - thus, the proposed service ***would not*** fall to be classified as 'intermediary service'.

d. Circular No. 107/26/2019-GST dated 18.07.2019 – In the circular the following has been clarified

'The supplier of ITeS services supplies back end services, as listed in para 4 above, on his own account along with arranging or facilitating the supply of various support services during pre-delivery, delivery and post-delivery of supply for and on behalf of the client located abroad. In this case, the supplier is supplying two set of services, namely ITeS services and various support services to his client or to the customer of the client. Whether the supplier of such services would fall under the ambit of intermediary under sub-section (13) of section 2 of the IGST Act will depend on the facts and circumstances of each case. ***In other words, whether a supplier "A" supplying services listed in para 4 above as well***

as support services listed in Scenario -II above to his client "B" and / or to the customer "C" of his client is intermediary or not in terms of sub-section (13) of section 2 of the IGST Act would have to be determined in facts and circumstances of each case and would be determined keeping in view which set of services is the principal / main supply.

4. To determine whether a transaction tantamount to an intermediary, the following factors may be considered as mentioned in Asahi Kasei India Private Limited - 2019 (1) TMI 1091 - Authority for Advance Rulings Maharashtra:

   a. **Nature and value:** An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

   b. **Separation of value:** The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

   c. **Identity and title:** The service provided by the intermediary on behalf of the principal is clearly identifiable.

   In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services':
   (i) Travel Agent (any mode of travel)
   (ii) Tour Operator
   (iii) Commission agent for a service [an agent for buying or selling of goods is excluded]
   (iv) Recovery Agent

   Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would

have documentary evidence authorizing him to act on behalf of the provider of the 'main service'.

5. **Back office accounting and support services:**
   i. This service has been into contentions under the GST law as to whether the same tantamount to intermediary service. There have been conflicting advance rulings on this issue which are as under

   a. **Vservglobal Private Limited Authority for Advance Ruling – Maharashtra 2018 (11) TMI 959 –** The applicant was involved in back office support services, payroll processing, to maintain records of employee to overseas companies i.e. clients and after finalization of purchase / sale between the client and its customer. It was held as follows
   'The facts of the present case are different and not similar to facts of M/S GODADDY INDIA WEB SERVICES PVT. LTD. VERSUS COMMISSIONER OF SERVICE TAX, DELHI-IV [2016 (3) TMI 355 - AUTHORITY FOR ADVANCE RULINGS] - In case of GoDaddy the provision of support services was admittedly on principal to principal basis and were provided with sole intention of promoting the brand GoDaddy US in India for augmenting its business - In the present case, the activities undertaken by the applicant are for and on behalf of clients to facilitate supply of goods and services between the clients their customers.

   Ruling:- The aforesaid services as proposed to be rendered ***do not qualify*** as Zero Rated Supply in terms Of Section 16 of the integrated Goods & Service Tax Act, 2017.'

   The said ruling was upheld by the Appellate Authority for Advance Ruling - **Vservglobal Private Limited 2019 (4) TMI 1543**

   b. **Nes Global Specialist Engineering Services Private Limited - 2019 (3) TMI 594 AAR Maharashtra –**
   'Classification of supply - Zero Rated Supply or a Normal Supply? - export of service or not - Intermediary services or not - Place of provision of services - Accounting, Sales Invoicing, Purchase Invoicing, Cash receipt posting, Bank Payment entries, other receipt entries, Credit Control work, Support Assignment work; Payroll assistance, storing and scanning of data to the data storage disk and any other work - Held that:- We find from the agreement that

the services being provided to their client is in the form of Administrative and support services. It is further seen from the clause no.3.3 that NES India will provide general advice and assistance in relation to the Services, as required, from time to time and such services will be charged on a time and costs basis - thus, the applicant's transaction is in the nature of supply of services.

Intermediary service or not - Held that:- The relationship between the parties is that of independent contractors meaning that the agreement does not intend to create relationship of principal and agent. Thus we find that applicant is not a person who arranges or facilitate supply of services between two or more persons and therefore the proposed service ***would not fall*** to be classified as 'intermediary service'.

ii. Circular No. 107/26/2019-GST dated 18.07.2019 has clarified the doubts regarding issues related to supply of Information Technology enabled Services (hereinafter referred to as "ITeS services") such as call center, business process outsourcing services, etc. and "Intermediaries" to overseas entities under GST law and whether they qualify to be "export of services" or otherwise. The circular clarifies that the supplier of ITeS services supplies back end services listed in the circular ***will not*** fall under the ambit of intermediary under sub-section (13) of section 2 of the IGST Act where these services are provided on his own account by such supplier. Even where a supplier supplies ITeS services to customers of his clients on clients" behalf, but actually supplies these services on his own account, the supplier will not be categorized as intermediary.

In cases where backend service is provided along with support services, during pre-delivery, delivery and postdelivery of supply (such as order placement and delivery and logistical support, obtaining relevant Government clearances, transportation of goods, post-sales support and other services, etc.), it is clarified that such services will fall under the ambit of intermediary under sub-section (13) of section 2 of the IGST Act as these services are merely for arranging or facilitating the supply of goods or services or both between two or more persons

6. Place of Supply for an intermediary where location of supplier or location of recipient is outside India - Section 13(8) of the IGST Act, 2017 provides that

place of supply of intermediary service shall be the location of supplier of service.

7. Whether intermediary service will qualify as an export service, if the service provider is in India, recipient of service is outside India and consideration is received in convertible foreign exchange is discussed below:
   a. Section 2(6) of the IGST Act, 2017 defines export of service as under:
      Export of services means the supply of any service when, —
      (i) the supplier of service is located in India;
      (ii) the recipient of service is located outside India;
      (iii) ***the place of supply of service is outside India***;
      (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and
      (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

   b. Where a intermediary service provider located in India, the place of supply will be India and therefore, condition mentioned in export of service '***the place of supply of service is outside India'*** does not get fulfilled and therefore, service provided by an intermediary located in India will not qualify as an export service even if the recipient of service is outside India.

   Nature of tax to be charged where the intermediary service provider is located in India and recipient of service is located outside India – Section 8 of the IGST Act, 2017 provides that if the location of supplier and place of supply are in the same State, the supply of services would be an intra-State supply. In the instant case, as location of supplier (i.e. intermediary service provider') and place of supply (place of supply is the location of the supplier for intermediary service) would be in the same State, the intermediary service, in writers view, would be liable to CGST and SGST even though recipient of service is located outside India.

8. Intermediary service provided by a service provider located outside India and service is received by a person located in India – For discussion let us assume that 'EFG Inc.' located outside India provides intermediary service to 'EFG Pvt.

Ltd.' located in India. 'EFG Pvt. Ltd.' makes payment to 'EFG Inc.' in convertible foreign exchange. Whether this transaction liable to tax under reverse charge mechanism is discussed below

a. Section 2(11) defines import of service as under
Import of services means the supply of any service, where—
(i) the supplier of service is located outside India;
(ii) the recipient of service is located in India; and
(iii) **the place of supply of service is in India**

b. Place of Supply for an intermediary where location of supplier or location of recipient is outside India - Section 13(8) of the IGST Act, 2017 provides that place of supply of intermediary service shall be the location of supplier of service. In the illustration given supra, 'EFG Inc.' (intermediary service provider) is located outside India; therefore, the place of supply is outside India. As one of the conditions as provided in the meaning of import of service (i.e. place of service in India) is not fulfilled, 'EFG Pvt. Ltd.' will not be liable to pay service tax under reverse charge mechanism even though the service is received from a person located outside India.

There is no straight jacket answer which can be provided to determine what constitutes an intermediary service. In conclusion, to determine whether a supply tantamount to intermediary, one has to look at the contractual relationship between the parties to contract and anlayse whether it principal to principal or principal to agent, the terms of contract and nature of service to be provided to arrive at a conclusion.

An attempt has been made in this article to make a reader understand the impact of intermediary service under the GST law. This article is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views, would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion. The views written in this article is as on September 12, 2019.

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'SEVA BHOJ YOJANA' AND GST

P.V. Subba Rao, B.A., B.L., Advocate, Hyderabad
Shaik Yasin, Chartered Accountant, Hyderabad.

'***ANNAM PARABRAHMA SWAROOPAM'*** In Hindu scriptures, great importance is given to food ie. *ANNAM* and it is referred to as a form of *Brahman* ie. Almighty. Food is therefore God. The creation and its progression depend upon food. One who does *annadaanam* attains heaven in this Universe itself. That is the greatness of *annadaanam.*

1. Honourable President of India accorded sanction for launching of the 'Scheme of Financial Assistance under - Seva Bhoj Yojana-" from the financial year 2018-19, vide order in F.No. 13-1/2018-US (S&F) dated 31.5.2018 of the Ministry of Culture, Government of India in relation to providing reimbursement of CGST and IGST (to the extent of Central Government's share) paid on the purchase of specific items by charitable religious institutions for distributing free food to public.
2. In reference F. No.13-1/2018-US (S&F) dated 15.6. 2018, Ministry of Culture, Government of India (P Arts Bureau) issued guidelines on scheme for financial assistance.
3. Subsequently Government of India has issued guidelines for operation of the scheme, vide communication No.F.13-1/2018-US (S&F) dated 1.8.2018.
4. Thereafter CBIC has issued Circular No.75/49/2018-GST dated 27.12.2018 providing for guidelines for operation of the scheme by the departmental authorities**.**
5. Under the Scheme, CGST and GOI's share of IGST paid on the purchase of specific raw food items by Charitable Religious Institutions for distributing free food to public shall be reimbursed as Financial Assistance by the GOI.
6. Free 'prasad' or free food or free 'langar' / 'bhandara' (community kitchen) offered by charitable religious institutions like Gurudwaras, Temples, Dharmik Ashrams, Mosques, Dargahs, Churches, Maths, Monasteries, etc., are covered under the scheme. Financial Assistance will be provided on First-cum-First Serve basis of registration linked to fund available for the purpose in a Financial Year.
7. Financial Assistance is provided only in respect of the specified raw food items ie., i) Ghee, (ii) Edible oil (iii) Sugar / Burra / Jaggery, (iv) Rice, (v) Atta / Maida / Rava /Flour and (vi) Pulses
8. A Public Trust or society or body corporate or organisation or institution covered under the provisions of Section 10 (23BBA) of the Income Tax Act, 1961 (as amended from time to time) or registered under the provisions of Section 12AA of

the Income Tax Act, 1961, for religious and charitable purposes, or a Company formed and registered under the provisions of Section 8 of the Companies Act, 2013 or Section 25 of the Companies Act, 1956, as the case may be, for religious and charitable purposes, or a Public Trust registered as such for religious and charitable purposes under any Law for the time being in force, or a Society registered under the Societies Registration Act, 1860, for religious and charitable purposes are covered under the scheme.

9. These institutions/organizations should have been in existence for preceding three years before applying for assistance. They should not be in receipt of any Financial Assistance from the Central/State Government for the purpose of distributing free food. They shall serve free food to at least 5000 people in a calendar month. The Institution/Organization blacklisted under the provisions of Foreign Contribution Regulation Act (FCRA) or under the provisions of any Act/Rules of the Central/State Government shall not be eligible for Financial Assistance under the Scheme.
10. There shall be one time enrolment. The Ministry of Culture will enroll eligible Religious Institutions for a time period ending with Finance Commission period i.e. till 31.3.2020 and subsequently the enrolment may be reviewed/renewed by the Ministry, subject to the performance evaluation of the institutions. They must first register with Darpan portal of NITI Aayog and get Unique ID (UID). Thereafter, the institution shall enroll itself in CSMS Portal on the Ministry of Culture's website www.indiaculture.nic.in in a prescribed format. Thereafter, the Religious institution shall apply "online" in the prescribed application form and upload the following documents in CSMS Portal of Ministry of Culture's website www.indiaculture.nic.in.

(i) Copy of the valid Registration Certificate as per the provision contained in Para 6 (i) and (ii) of guidelines.

(ii) Copy of Memorandum of Association/Articles of Association/Charter of Activities of the organisation.

(iii) Copies of Audited Accounts for the last three years.

(iv) Copies of Annual Report, if any, for the last three years.

(v) List of Office bearers/Governing Body of the institution.

(vi) Name of the authorized signatory who will sign all documents with contact details and E-mail ID.

(vii) Self-certificate indicating that the institution is distributing free food for at-least past three years on the day of application and providing free food to at least 5000 people in a month.

(viii) Certificate from District Magistrate indicating that the institution is involved in charitable religious activities and is distributing free food to public/devotees etc. since last three years at least on daily/monthly basis.
(ix) PAN/ TAN Number of the institution/ organization.
(x) List of locations where free food is being distributed by the institution.
(xi) Number of persons being served free food by the Institution in previous year – self declaration.
(xii) Bank Authorization Letter as per prescribed format.

11. They shall maintain a separate account of the grant received from the GOI under the scheme. A separate account maintained by the Institution for distribution of Free Food shall be distinct from the accounts maintained for the purpose of Food/Prasad sold to public/devotees. The purchase invoices produced by the Institution for re-imbursement shall be mandatorily in the name of the registered religious Institution. The Institution shall provide total number of people/ persons provided free food very calendar month and shall maintain monthly purchase bills in this regard.
12. GOI shall notify one single nodal authority in every State / Union territory (UT) for all purposes of the scheme. After enrolling with the Ministry of Culture, the applicant shall submit an application in Form **SBY-01** (the claimant would be required to apply for a separate SBY-UIN for each State or Union territory in which they undertake the specified activity) along with a copy of the registration certificate issued by the Ministry of Culture to the nodal Central Tax officer in the State/UT. The nodal Central Tax officer on receipt of the application and registration certificate shall generate a Unique Identity Number (UIN) and communicate the same to the applicant, which is a unique ten digit SBY-UIN in FORM **SBY02** within seven days from the receipt of the complete application by the nodal officer. All applications for reimbursements shall be submitted on a quarterly basis in Form **SBY-0**3 before the expiry of six months from the last day of the quarter in which the purchases have been made. The nodal officer shall, within a period of fifteen days from the date of receipt of FORM SBY-03, scrutinize the same for its completeness and where the application is found to be complete in all respects issue an acknowledgement in FORM **SBY-04.**

13. The following documents shall be submitted along with the application form:
    • Self attested copies of the purchase invoices mentioning the unique enrolment number allotted by the Ministry of Culture and SBY-UIN.
    • **Chartered Accountant's Certificate certifying the following:**

a) Quantity, price and CGST, SGST/UTGST and IGST paid on purchase of the specified items during the claim period.
b) The Religious institution is involved in religious activities and specified items have been used for only distributing free food to public/devotees etc., during the claim period.
c) The reimbursements claimed in the current quarter / year is not more than the previous year's purchases in the corresponding quarter / year plus a maximum of 10% for the current year.
d) The religious institution is using the specified raw food items only for distributing free food to public/devotees etc. during the claim period.
(Note: The scheme itself came into force on 01-08-2018 and the guidelines for application for allotment of SBY-UIN were issued vide circular No. 75/49/2018 dated 27-12-2018. Hence, it was not possible to mention SBY-UIN on the purchase invoices issued up to 27.12.2018. Further UIN mentioned in Rule 46 of the CGST Rules, 2017 is different from SBY-UIN.)

14. The nodal officer may call for any document in case he has reason to believe that the information provided in the claim is incorrect or insufficient and further enquiry is required to be carried out before the sanction of the claim.

15. Upon examination of the application, if the nodal officer is satisfied that the claimant is eligible for the reimbursement of the claimed taxes, he shall issue an order in FORM **SBY-05** sanctioning the amount of reimbursement with full details of the Grant No. and the Functional Head (of Ministry of Culture) under which the amount is to be disbursed by the designated PAO. He shall also issue a payment advice in FORM **SBY-06** for the eligible amount based on First-cum-First-serve basis with regard to the date of receipt of the complete application in FORM SBY-01.

16. Where the nodal officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed is not payable to the claimant, he shall issue a notice detailing the reasons thereof and requiring the claimant to furnish a reply within a period of fifteen days from the date of receipt of such notice. After receiving the reply, the nodal officer shall process the application and issue an order in FORM SBY-05 either sanctioning or rejecting the amount of reimbursement claimed. No amount shall be rejected without giving the claimant a reasonable opportunity of being heard. The order in FORM SBY-05 shall be issued within a

period of sixty days from the date of issue of the acknowledgment in FORM SBY-04.

17. A Performance-cum-Achievement Report on the activity undertaken will be submitted in triplicate by the beneficiary institutions, at the beginning of next financial year, to the Ministry of Culture. Inspection would be carried out by the Ministry officials or its authorized representatives every year at least in 5% of the cases. The concerned State Govt/UTs Administration, District Collector/Dy Commissioner and State GST authorities will also monitor the scheme.

18. The members of the executive body of the entity /institution would be liable for recovery of misused grants. The organization /institution will also be blacklisted for misuse of funds, fake registration certificate, fake documents etc. All immovable and movable assets created from the Government grants would be taken over by local administration prescribed by the Ministry. The assistance provided by the Ministry of Culture shall be recovered with penal interest, apart from taking criminal action as per law.

19. In case of rejection of any claim for reimbursement, claimant may file appeal under the provisions of the CGST Act, 2017.

20. In respect of the SGST portion on the purchase of specified goods, if the concerned State Government has any such scheme of reimbursement, claims may be made in accordance with the conditions of such scheme only.

'***ANNADAATAA SUKHEEBHAVA'***

*****

IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata, FCA, DISA (ICAI)
Guwahati

1. Whether Head office can charge any price in the invoice, under second proviso to Rule 28 of the CGST Rules, to the branches even if "open market value" is available under Rule 28(a)?
Held: No

In the case of ***M/s Specsmakers Opticians Private Limited-AAR Tamil Nadu ,***the applicant imports as well as locally procure lenses, frames, sun glasses, contact lenses as well as reading glasses, complete spectacles and are engaged in re-selling them. They also have branches outside the state of Tamil Nadu and the goods imported are also transferred to their branches located outside the State for subsequent supply to ultimate customers. The question rose before the Authority is regarding the "value" to be adopted while supplying goods by the applicant to its branches outside the state.

The applicant stated that they are eligible under second proviso to Rule 28 of the CGST Rules. The second proviso to Rule 28 states that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. Although the open market value for the supply is known, the applicant wants to use the second proviso to Rule-28. It contended that they can skip Rule-28(a) and use the value under second proviso to Rule-28. They also submitted the orders of the West Bengal AAR and the Appellate Authority for Advance Ruling West Bengal in a similar issue in respect of M/s GKB Lens Private Limited.

The Authority stated that the supply between the applicant and the branches is considered as **supply between distinct persons** in terms of section-25 of the CGST Act. The value to be adopted for such supply is governed by rules prescribed as per Section 15(4) of CGST Act. As per Rule 28(a), it is clear that for supply between distinct persons, the value **shall** be the 'open market value'. There exists an 'open market value' for supplies being made by the applicant to distinct branches in different states/ Union territories. Thus, there is no necessity to go further down to Rule 28(b) or (c) as they are to be read sequentially and are also

applicable only when 'open market value' is not available. Rule 28 gives an option to the applicant, to adopt an amount equivalent to 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person as the value at which the supplier supplies to its distinct/ related branch in another state. If the applicant does not use this option for supplies to the recipient who further supplies to their customers as such, he has to supply at 'open market value' which is available as per Rule 28(a).There is a further proviso to Rule 28 which states that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. But the applicant cannot skip Rule-(a) and go directly to the second proviso as this would lead to a situation where the applicant may use a value much higher than the open market value to pass on input tax credit to his branch office outside the state or he may use a much lower value than even his cost price, which will lead to accumulation of input tax credit for the applicant, which is not the intention of a taxation based on value addition. Therefore, the applicant shall adopt the "open market value as per Rule 28(a) as the same is available for the supplies made to the distinct recipient outside the state. Instead of the available open market value, the applicant can also opt to value the same at 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person.

2. **Whether a branch is eligible to avail credit of input tax charged by Head office for the supply of cranes, where the payment is made through book adjustments and such cranes are further supplied by branch on hire charges?**
Held: No

In case of ***M/s Sanghvi Movers Ltd. –AAR Tamil Nadu,*** the applicant is a branch office of Sanghvi Movers Limited, engaged in the business of providing medium sized heavy duty cranes on rental/lease/hire basis to clients without transferring the right to use the cranes. The branch offices receive enquiries from various customers for supply of cranes on hire charges. The branch then receives final order from customers. The title and ownership of all the different types of cranes along with their components vest with Head office at Maharashtra. So the branches, upon receipt of final order from customers, raise internal work orders on the H.O to provide requisite cranes on hire charges along with appropriate support and assistance to various customers across India. To give effect this mechanism, the H.O has entered into a service arrangement with its branches wherein the H.O

has agreed to provide cranes and components to all branches on hire charges upon receipt of final work order. The branches in turn raises invoice on final customers. The H.O raises invoice on the branch and the value considered for levying GST is approximately 95% of the value charged to the customer by the branch.

The applicant has stated that as per section 12(2) of the IGST Act, the place of supply of service of leasing/ hire/ renting of cranes to a registered person shall be the location of such registered person. Accordingly, the H.O discharges IGST on the value of hire charges received from applicant branch. The branch avails the credit of the IGST charged by the H.O. Further, the supply of cranes between the H.O and the branch constitutes "taxable supply" under GST in terms of Circular No.21/21/2017-CGST dated 22.11.2017.The applicant contends that as per the proviso to Rule 37 of the CGST Rules, the condition to make actual payment to supplier within 180 days is not applicable to the applicant as they are making deemed payment by netting off receivable and payable in books of accounts.

The Authority stated that as per section-16(2)(d), where a recipient fail to pay to the supplier the amount towards the value of supply along with tax payable thereon within a period of 180 days, 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 in Rule-37. As per proviso to Section 16(2), the applicant will not be eligible for full input tax credit because they are not paying the full amount to their H.O, as the payments are netted off against receivables. The applicant stated that as per proviso to Rule 37, the condition to make actual payment to supplier within 180 days is not applicable to it. However, the proviso clearly states that, the value of supplies **"made without consideration"** as specified in Schedule I shall be deemed to have been paid as per second proviso to Section 16(2). However, the AAR held that in the applicant's case, there is a consideration to be paid by the applicant to HO (being, hire charges mentioned in the invoices). Hence, proviso to Rule 37 that is exemption from making full payment will not be applicable to the applicant. Accordingly, the applicant will not be eligible for the full ITC as per the inward supplies received from H.O as they would be required to reverse such ITC if taken as per second proviso Section 16(2) of CGST Act and Rule 37 of CGST Rules.

Comment: The above Advance ruling has opened the Pandora's Box and made the legal fraternity to think again on this aspect.

3. **Whether ITC on motor vehicles purchased for demonstration purpose can be availed as credit on capital goods and set-off against output tax payable under GST?**

Held: Yes

In case of ***M/s Chowgule Industries Private Limited-AAR Goa,*** the applicant is an authorized dealer for Maruti Suzuki India Ltd. for sale of motor vehicles and spares and for servicing as also for some other commercial vehicle manufacturers. It purchases vehicles against tax invoices which are capitalized in books of accounts. The vehicles are used as demo cars for providing trials to customers to understand the features of vehicle. The question on which ruling is sought is whether the applicant is eligible for input tax credit of the taxes paid on purchase of these demo cars?

The Authority stated that as per Section 16(1) of the CGST Act, every registered person shall be entitled to take input tax credit on every supply of goods or services or both which are used or intended to be used in the course or furtherance of business. The provisions of section 17(5) will not be applicable in the applicant's case as it does not prescribe the time limit within which further supply is to be effected. The availability of input tax credit shall be subject to the provisions of section 18(6) of the GST Act. In case of supply of capital goods on which ITC has been claimed, the registered person shall pay an amount equal to the ITC on the said capital goods reduced by such percentage of points as may be prescribed or the tax on transaction value of such capital goods determined as value of taxable supply, whichever is higher. In the applicant's case, the demo vehicle is indispensable tool for promotion of sale by providing trial runs to customers. The capital goods are used in the course or furtherance of business of the applicant. Hence, the applicant is entitled to avail the credit of input taxes paid on the purchase of demo cars.

4. Whether the Ex works plus freight and insurance to be treated as composite supplies? Whether showing and charging freight and insurance portion separately in invoice would attract different rate of GST?

Held: Yes, same rate as of the principal supply.

In the case of ***M/s. Aditya Birla Nuvo Limited -AAR Gujrat***, the applicant submitted that they are charging GST on freight and insurance in the bills raised to their client considering it as a composite supply. But their client M/s Power Grid contends that GST should not be charged on Freight and insurance and chargeability is on basic amount.

The applicant mentioned that under GST, a composite supply would mean 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. As per the said definition, supply of the product of the applicant is a principal supply and freight and insurance is part of composite supply. Applying the contention of naturally bundled product, it is not possible to sell the product without freight and insurance. If the applicant does not sell the goods, it would never charge freight and insurance.

The Authority referred to section-2(30) of the CGST Act, which defines composite supply. It stated that in section-2(30), it is specifically mentioned in the illustration that Goods packed and transported with insurance, then supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply.

Further, in C.B.E. & C. Flyer No. 4, dated 1-1-2018, it is clearly mentioned that the nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. In the case of the applicant, the ex works is principal supply and freight and insurance are incidental or ancillary services. Further, if freight and insurance portion are shown and charged separately in invoice, it would not change the fact that the supply is a composite supply and hence there cannot be different type of treatments of tax liability of supply of different goods/services naturally bundled together.

5. Whether GST will be chargeable on notional charges for financial assistance provided by a Government owned subsidiary to other Government owned entities?

Held: No

In the case of ***Gujarat State Financial Services Ltd.-AAR Gujrat,*** the applicant is a wholly owned subsidiary of Government of Gujarat has 100% holding and is registered with RBI as a Non-Banking Finance Company. It has been given the mandate by the State Government to manage the surplus funds of various state owned entities. The State Government has directed all the State Government

owned entities to park all their surplus funds with GSFS, the applicant. The funds received by GSFS from the Government entities are provided to the other Gujarat State owned entities as loans, which are in need of funds.

The applicant contended that as per Sl. no 27 of Notification No. 12/2017-Central Tax (Rate) under CGST Act 2017 services by way of extending deposits loan or advances in so far the consideration is represented by way of interest or discount (other than interest involved in credit card services) is exempted. It further stated that there is no specific RBI guideline that a Bank or Non-Banking Financial Institution has to compulsorily charge processing fees to clients on financial assistance provided.

The Authority stated that the applicant makes the supply of loan and for which consideration is only interest. As stated by the applicant there is no other consideration so even if the service is provided to related party the applicant will be eligible for exemption under sub entry (a) of entry 27 of Notification No. 12/2017-Central Tax (Rate) under CGST Act 2017.The said notification neither talks about related – unrelated party nor about notional consideration. Therefore, the question of charging GST on notional consideration does not arise.

6. Whether GST has to be paid under reverse charge mechanism on freight paid on transportation of cotton oil seed cake?

Held: Yes

In the case of ***M/s Sanjay Kumar Jain- AAR Rajasthan,*** the applicant is engaged in the business of cotton seed oil cake. The applicant contended that cotton seed oil cake is exempt under GST, so he is not liable to pay GST under reverse charge mechanism on freight paid on transportation of such goods.

The concerned jurisdictional officer stated that the services of GTA are falling under chapter heading 9967 and attracts GST @ 5%. Further, no exemption has been granted on transportation of cotton seed oil cake under Notification No.12/2017 dated 28.06.2017. Therefore, the applicant is liable to pay tax under RCM @ 5%.

The Authority stated that the applicant uses the services of GTA for transportation of cotton seed oil cake. Being, a recipient of service, the applicant is liable to pay tax as per Sr. No.1 (d) of the Notification No.13/2017. The Authority further stated that no specific exemption has been granted on transportation of cotton seed oil cake under Exemption Notification No.12/2017 dated 28.06.2017.

7. Whether Refundable Interest Free Deposit received could be treated as Supply under the provisions of Goods and Services Tax Act, 2017?
Held: Yes

In the case of ***M/s. Rajkot Nagarik Sahakari Bank Ltd-AAR Gujrat***, the applicant is providing various services under the category of Financial and Related Services classifiable under SAC 997112, 997113, 997119, 997139, 997159 & 997161 and is accordingly discharging its liability. Among other services is also providing service for operation of Demat account to various account holder as well as to the persons who intends to operate only their Demat account. In Rajkot Nagarik Free Scheme, account holder is getting some free services only because he is depositing some amount, interest free, as security and the applicant on his transactions in the Demat account. The applicant sought an advance ruling on the applicability of GST on refundable interest free security deposits.

The applicant contended that to attract GST the transactions should be treated as supply as defined under the provisions of Section 7 of Goods and Service Tax Act, 2017 and one of the important criteria is that there should be consideration. Admittedly, the Refundable Interest Free Deposits received is not a consideration for allowing any benefit under the said scheme inasmuch as the said amount is refundable at any time. However, while refunding such amount some amount is deducted being process charge on which RNSB is discharging GST.

The CGST Additional Commissioner (Tech), Rajkot stated that the issue pertains to applicability of tax on interest free deposits received for maintaining Demat accounts without any charge. The matter was settled in Pre-GST era in favor of Revenue. Since, the provisions of applicability of GST have been adopted from erstwhile Service Tax Acts and Rules and as the said services were chargeable to Service Tax under the erstwhile provisions of Service Tax era, GST related provisions being pari-*materia*; it is aptly applicable on such services/activities.

The Authority stated that to come within the scope of supply, it must come within the scope of consideration. The definition of "Consideration" specifically excludes the deposit from its ambit. However, the notional interest/monetary value of the act of providing refundable interest free deposit will be considered as consideration. It is covered in both the limbs of the definition of consideration.

1. "Any payment made or to be made, whether in money or otherwise". It is included in the phrase „or otherwise".
2. "The monetary value of any act or forbearance" It is included in the phrase, the monetary value of any act"

Further, it appeared that the Refundable Interest Free Deposit were an additional commercial consideration to cover risk of the Demat account. It appeared that the main purpose of the deposits was not only security but also collection of capital. Thus, the monetary value of the act of providing refundable interest free deposit is the consideration for the services provided by the RNSB and therefore the services provided by RNSB can be treat as supply and chargeable to tax in the hands of the applicant.

8. Whether Architectural and other services given to local authorities not involving any supply of goods are exempt under GST?

Held: Yes, if the supply satisfies the conditions of "Pure services"

In the case of ***Jayesh Anilkumar Dalal-AAR Gujarat,*** the applicant has been providing consultancy services in the field of structural, architectural and project management consultancy covered under (SAC 998331) intrastate within Gujarat as well as interstate. The recipients of the services are some departments and authorities. The applicant wants to know whether his services are exempted from CGST and Gujarat GST as per of Notification No. 12/2017 Central Tax (Rate) dated28/06/2017?

The applicant stated that in the context of the language used in the notification, supply of services without involving any supply of goods would be treated as supply of 'pure services'. The Notification also does not specifically name the services which are eligible for exemption and which are excluded.

The Authority stated that from the Notification No. 12/2017 Central Tax (Rate), it appears that the services are exempted from the CGST and SGST Tax if they are Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution. It appears that the services provided by them do not involve any supply of goods and hence the services appear to be falling in the definition of "Pure Services". However, the definition of pure services requires the verification of facts involved in the execution of contract. Similarly, whether the contract is related to the function covered under the Article 243G and 243W is to be interpreted as to how the Local Authority is going to utilize the services provided under the contract, it is also therefore the

question of interpretation of fact that the services provided by the applicant are actually utilized by the Local Authority for the function covered by Article 243G and 243W.

The services provided by the applicant is eligible for the exemption from Goods and Service Tax if they are pure services and are provided to the Central Government, State Government or Union territory or local authority or a Governmental authority by way of any activity to a Panchayat under article in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243 W of the Constitution.

9. Whether cattle feed in cake form is exempt from GST?
Held: Yes

In the case of ***M/s. Sree Adhi Trading Company -AAR West Tamil Nadu,*** the applicant is engaged in the manufacture of cattle feed in cake form.

The applicant stated that cattle feed is manufactured from the groundnut oil cake along with a list of ingredients. Cattle feed being sold is meant for domestic animals as an essential raise for the maintenance of life and also as feed which is supplied over and above the maintenance requirements for growth or fattening and for production purposes. They have also stated that right from the inception under the sales tax enactment, cattle feed in cake form manufactured by them were eligible for exemption under the TNGST Act 1959, under the TNVAT Act 2006. They submit that since the product manufactured by them could be used only as cattle feed meant for animals there cannot be any liability by way of tax under GST Act.

The Authority stated that as per the Explanation Notes to heading 2305 and 2309 of the Customs Tariff Act, it has been observed that the residue remaining after extraction of oil from groundnuts are to be classified under CTH 2305. It covers products of a kind used in animal feeding, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material. The product of the applicant is not merely groundnut oil cake/residue but is manufactured by combining groundnut oil cake with several ingredients. By applying the General rules for interpretation of Customs Tariff as applicable to GST Tariff, the product in hand is correctly classifiable under Chapter Heading 2309 of the GST Tariff as 'Preparation of a kind used in Animal Feeding'-'Compounded animal feed,23 09 90 10. The same is exempted in case of intra-state supplies vide sl.no. IO2 of Notification No. 21/2017-Central Tax (Rate) dated 28th

June 20I7 as amended and sl. no. 102 of Notification. No.II (2)/CTR/532(d-5)/2017 dated 29th June 20l7 as amended.

10. Whether printing of trade advertisement material for printing where the content is provided by the recipient is a supply of goods or service?
Held: Composite supply, where supply of service is predominant supply

In the case of ***Macro Media Digital Imaging (P.) Ltd-AAR West Bengal***, the applicant is engaged in the business of printing of trade advertisement material. It prints the content provided by the recipient on the base of polyvinyl chloride cloth, paper etc. The Applicant provides the printing ink and the base material. They seek a ruling on whether such printing is a supply of goods or service?

The applicant stated that 'service', as defined under section 2(102) of the GST Act, includes the residual transactions that cannot be treated as supply of goods, money or securities. lt means, leaving aside money and securities, every transaction should first be examined on the yardstick of 'goods', as defined under section 2(52) of the GST Act. If it fails the test, the transaction may qualify as a supply of 'service'. The essential condition to classify anything as 'goods' is that it should be a movable property and Printed trade advertising material, being a movable property, is to be treated as 'goods'. The Applicant argues that it is transferring the title to the goods as printed advertising material. The transaction, therefore, amounts to the supply of goods. It admits that the supply is a composite supply. The question pertains to what is the predominant element is the supply?

The Authority stated that the CBIC clarifies the treatment of various composite printing contracts. ln all these contracts, the recipient provides the content for printing and the printer supplier the physical inputs. In the applicant's case, the recipient provides on a digital media the content in the form of image/text/trade. The Applicant loads the content in a digital image printer, prints the image on the PVC material, and supplies the printed material. The goods so supplied have no utility other than displaying the printed content. Service of printing, therefore, is the predominant element of the composite supplies the Applicant is making. Thus, the applicant is making a composite supply, where the service of printing is the principal supply, the goods supplied having no use other than displaying the printed matter, is ancillary to the principal supply of printing.

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JUDICIAL PRECEDENTS

Mukul Gupta, Advocate,
Senior Partner
SHARNAM LEGAL
Ghaziabad

1. **Section 67 and Section 130(2) of the U.P. GST, 2017**
   Whether the search and seizure was carried out by observing the 'substantive due process' as well as the 'procedural due process.' The 'reasons to believe' should exist and should be based on reasonable material and should not be fanciful or arbitrary.
   It is also established that this Court in exercise of its powers under Article 226 cannot go into the sufficiency of the reasons and should not sit as an Appellate Court over the reasons recorded. It is also well established that the reasons may or may not be communicated to the assessee but the same should exist on record. Thus, we are inclined to hold that the Department had 'reasons to believe' and, in pursuance of the said reasons, the search and seizure operations were carried as such the writ petition fails as regards in sufficiency of material for carrying out the search and seizure.
   The petitioner has failed to even establish that the procedure followed during the search was illegal or tainted with *mala fides.* The writ petition fails and is dismissed.
   Rimjhim Ispat Limited vs. State of UP WRIT TAX No. - 619 of 2018; MANU/UP/5006/2018

2. **Section 132, 73 and 74 of CGST Act, 2017**
   When company claims ITC on the basis of fake invoices which is an offense under the Act, the department can proceed under against the Managing Director, who is responsible for activities of the company. Even though, if he was residing abroad and was not aware of the day-to-day activities, since he is receiving remuneration on the basis of being MD, he shall be the responsible one.
   Bharat Raj Punj vs Commissioner CGST - 2019-TIOL-678-HC-RAJ-GST; [2019] 104 taxmann.com 174 (Rajasthan)

3. **Section 130 , 2 (105), 122, 129 and 130 of CGST Act, 2017**
   For seizure and detention of goods or vehicle, If 'any person' transports any goods or stores any goods while they are "in transit" in contravention of the provisions of the Act or Rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and

conveyance shall be liable to detention or seizure and after detention or seizure shall be released on conditions as laid down in sub clauses (a), (b) and (c) of Sub Section (1) of Section 129 of Act, 2017. Such person need not be the owner of the business or the actual supplier.

Ashok Kumar Bhatia Vs State Of UP 2019-TIOL-679-HC-ALL-GST; WRIT TAX No. - 1660 of 2018

4. **Section 69 CGST Act, 2017**

Petitioners have made bogus billing and adjusted the amount without any transportation of the goods or sale of goods. Arrested the petitioner and denied their bail in GST fraud. Court held that allegation of bogus billings, adjustments of amount without any transportation or sale of goods, etc., and only paper transactions adjusted and wrongly claimed relief of more than Rs. 80 crores, are justifiable grounds to arrest the petitioners.

Vikas Goel and Another vs. CGST Commissionerate 2019-TIOL-445-HC-P&H-GST, MANU/PH/2304/2018

5. **Section 140, 164 CGST Act, 2017; Constitution Of India-Article 14**

Issue was whether rectification or revision of GST TRAN-2 form should be allowed or not. Taxing statutes are to be strictly construed but such interpretation should not lead to a reckless or a mindless mechanical application of the statute. Law permits a person to rectify or revise the Form, who voluntarily admits to have made a mistake in the form or admits to have submitted detail that is not true. The tax authorities have the right to retain original Form GST TRAN-2 for assessment purpose and they may ask the petitioner to provide proper explanation for such revision/rectification.

Optival Health Solutions Pvt Ltd vs. UOI W.P. No. 18879 (W) of 2018, MANU/WB/0754/2019

6. **Section 69, 70, 132 CGST Act, 2017**

Petitioner has been alleged of circular trading and evasion of taxes for claiming ITC on input never purchased. This ITC is passed to the companies to whom the supply has actually not been made. The petitioner was arrested and he raised the objection that there is no necessity to arrest a person for an alleged offence which is compoundable. The High court rejected the argument and dismissed the petition. The same was filed as an SLP in Supreme Court and was dismissed again.

P.V. Ramana Reddy Vs Union of India & Ors. 2019-TIOL-873-HC-TELENGANA-GST; WRIT PETITION Nos.4764, 4769, 4892, 5074, 5130, 5329, 6952 and 7583 of 2019; SC- 27.05.2019 SLP (CRL) 4430/ 2019

7. **Section 140(3) CGST Act, 2017**
   Petitioner uploaded TRAN-1 but credit ledger did not reflect the correct credits available and rather reflected no credit figure available to it at all. The court directed the respondent to either open the portal for the petitioner to file Tran-1 again or accept it manually.
   ***Bhargava Motors vs. Union of India [2019] 102 taxmann.com 127 (Delhi),* 2019-TIOL-1060-HC-DEL-GST**

8. **Rule 88(2) of CGST Rules, 2017**
   Petitioner after filing Form GSTR-3B faced technical issue and the portal system crashed. On trying to make entries again, the rows and columns showed zero entries. On informing Assistant Commissioner and then representing at the help desk, no progress from the department was made. Thus, the High Court allowed the petitioner to file manually Form GSTR-3B.
   Vishnu Aroma Pouching Pvt Ltd Vs. Union of India 2019-TIOL-1026-HC-AHM-GST, 2019 (5) TMI 784 Gujarat High Court

9. **Section 129, 130 IGST Act, 2017**
   Goods when intercepted at the border by the officers, were confiscated on demand of e-way bill, as the e-way bill was not produced. Goods and vehicle were seized. Court held Goods cannot be confiscated under section 130, without notice made under section 129. Goods and vehicle to be released immediately by depositing the amount of Rupees 3, 57,000/- to concerned department for not presenting e-way bill.
   Krishna traders Vs. State of Gujarat [2019] 13 TUD online 042 (Gujarat); 2019 TaxPub (GST) 0605 (Guj- HC)

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FOREIGN DIRECT INVESTMENT

C.A. Paresh Shah
C.A. Mitali Gandhi

1. Introduction

The previous article on Foreign Direct Investment (FDI) dealt with the overall regulations governing Foreign Investment in India under Notification No. FEMA 20(R)/ 2017-RB (hereinafter referred to as "Fema 20(R)") and Automatic route of Investment under FDI scheme by a person resident outside India (PROI) under schedule 1 of Fema 20(R). As mentioned in the previous article, we have divided the entire subject of foreign investment into several parts with series of articles, each part covering a different facet of foreign investment in India. In the current article we will be covering the following aspects of foreign investment.

i. Foreign Investment by non-resident Indian (NRI) or Overseas citizen of India (OCI) on a non-repatriation basis - Schedule 4 of Fema 20(R)
ii. Foreign Investment in a Limited Liability Partnership (LLP) - Schedule 6 of Fema 20(R)
iii. Investment by a Foreign Venture Capitalist – Schedule 7 of Fema 20(R)
iv. Foreign Investment in an Alternate Investment Fund - Schedule 8 of Fema 20(R)

2. Key definitions used in the article

i. Investment on repatriation basis: An investment, the sale/ maturity proceeds, net of taxes, are eligible to be repatriated out of India, and the expression 'Investment on non-repatriation basis', shall be construed accordingly.
ii. Non-resident Indian (NRI): An individual resident outside India who is citizen of India.
iii. Overseas citizen of India (OCI): An individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.
iv. Start- up company: Means a private company incorporated under the Companies Act, 2013 and recognised as such in accordance with notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, subject to the following conditions:
    a) Entity incorporate in India not prior to 7 years

b) Having an annual turnover of ≤ INR 25 crores in any preceding financial year.
c) Working towards innovation, development or improvement of products, processes or services, or if it's a scalable business with a high potential of employment generation or wealth creation.
d) Such entity should not be formed by splitting up or reconstruction of a business already in existence.

v. Convertible Note: An instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument;

vi. Real Estate Business: Means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Earning of rent income on lease of the property, not amounting to transfer, will not amount to real estate business.

vii. Performance linked conditions: FDI linked performance conditions are the sector specific conditions stipulated in regulation 16 of FEMA 20(R) for companies receiving foreign investment

3. Foreign Investment by NRI/OCI under Schedule 4 of Fema 20(R)

Investment by an NRI/OCI can be done on repatriation basis or on non-repatriation basis. Investment on Non repatriation basis is only permitted to an NRI/OCI and not to every PROI.

3.1. Permitted Investment under Schedule 4 of Fema 20 (R)

An NRI or OCI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs can invest on non – repatriation basis in:

i. Any capital instrument issued by a company without any limit either on the stock exchange or outside it.
ii. Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.
iii. The capital of a Limited Liability Partnership without any limit.
iv. Convertible notes issued by a start-up company.

The above investments will be deemed to be domestic investment at par with the investment made by residents.

v. Any proprietary concern or a firm in India by way of contribution to the capital.

3.2. Prohibited Investment under Schedule 4

NRI and OCI are prohibited to make any investments in:

i. Capital instruments or units of a Nidhi company

ii. A company engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

iii. Proprietary concern which is engaged in agriculture / plantation activities or print media or real estate business.

3.3. Transfer of shares held on non – repatriable basis

NRI and OCI holding investments under Schedule 4, may transfer the same by way of sale, gift or inheritance:

i. To any PROI who will hold it on repatriation basis (after fulfilment of pricing, reporting and sectoral cap conditions)

ii. To any person resident in India (PRII) or to an NRI/OCI on a non-repatriable basis.

**Transfer by way of gift to a PROI on repatriable basis is only permitted subject to conditions and with prior approval of RBI.

3.4. Mode of payment & Maturity proceeds

i. The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in Non-resident external account (NRE)/ Foreign currency non- resident bank account (FCNR(B))/Non-resident ordinary account (NRO).

ii. The maturity proceeds (net of applicable taxes) of capital instruments purchased or disinvestment proceeds of LLP/firm/proprietary concern

iii. Shall be credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid.

iv. Any capital appreciation on such investments is also not allowed to be repatriated abroad. **However, dividend and interest income will be freely allowed to be repatriated, being of current account in nature**

3.5. Benefits pertaining to investment under schedule 4

i. Since the investment under schedule 4 is considered at par with domestic investment by a resident Indian none of the conditions pertaining to

pricing, sectoral caps, reporting will be applicable which reduces the burden on investor and investee.

ii. Investment in a firm and sole proprietary firm is permitted only under schedule 4, as opposed to Schedule 1, where investment can be made only in an Indian company.

iii. There is no cap on the maximum amount of investment under schedule 4.

3.6. Issues pertaining to investment under schedule 4

i. There is no specific definition or clarification given as to what would construe as, a trust or a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs.

ii. Currently only NRIs and OCIs are permitted to repatriate up to USD 1Mn per year from their NRO account. This facility is not permitted for investments made by a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs.

iii. Another issue arises when an Investee company has investments on repatriation basis as well as non- repatriation basis, then in such a case it is required to disclose its shareholding pattern for various purposes under FEMA (such as in Form FC-GPR, Form FC-TRS, AFLA, etc.) as well as Company law (such as Annual Return, listing requirements, etc). In such cases, how would the NRI investment be disclosed? It may be included and clubbed with resident holding. Under Company law, the NR shareholder would be required to be disclosed under NR shareholding resulting in discrepancy.

3.7. Important observation

i. NRI and OCI are not permitted to invest in debt instruments on non-repatriable basis other than a few listed debt instruments as given in schedule 5 of Fema 20(R) and investment in Non-Convertible Debentures (NCD) as allowed under the Foreign Exchange Management (Borrowing and lending in rupees) Regulations, 2000, subject to conditions.

ii. Transfer of shares can be considered only to NRI/OCI, if transferee desires to hold it on a non -repatriation basis. Valuation and reporting will only be required when such shares are transferred on a repatriation basis.

iii. In a case where sectors in which only NRI/ OCI are permitted to invest, Transferee can only be NRI/OCI when sold on a repatriation or non-repatriation basis.

iv. Although it is deemed to be an investment at par with that of a resident, conditions of prohibited sector (paragraph 3.2) will still apply to the investment.

4. Foreign Investment in LLP – schedule 6 of Fema 20(R)

Limited Liability Partnership ("LLP") is a hybrid entity with advantage of a company and operational flexibility of a partnership. The concept was introduced by the Ministry of Corporate Affairs through Limited Liability Partnership Act, 2008. FDI in LLP was permitted in 2011 with a lot of restrictions which were then relaxed by RBI in 2015

4.1. FDI in LLP

i. FDI in LLP is only permitted in those sectors where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions.

ii. FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008

4.2. Eligible Investor

A PROI or an entity incorporated outside India, may invest, either by way of capital contribution or by way of acquisition/ transfer of profit shares of an LLP, except:

i. A citizen of Bangladesh or Pakistan or

ii. An entity incorporated in Bangladesh or Pakistan

iii. A Foreign Portfolio Investor (FPI) or

iv. A Foreign Venture Capital Investor (FVCI)

4.3. Modes of Investment and Pricing Guidelines

i. Payment towards capital contribution of an LLP shall be made by way of an inward remittance through banking channels or out of funds held in NRE or FCNR(B) account

ii. Investment in an LLP either by way of capital contribution or by way of acquisition/ transfer of profit shares, should not be less than the fair price worked out as per any internationally accepted valuation (Eg: Discounted cash flow, Net asset value method) norm based on valuation report from a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

iii. In case of transfer of capital contribution/ profit share from a PROI to a PRII, the transfer shall be for a consideration which is not more than the fair price of the capital contribution/ profit share of an LLP.

4.4. Downstream Investment (DI)

DI by an LLP/company in an Indian company/LLP is allowed subject to following conditions:

i. Indian company is operating in sectors where 100% FDI is permitted under automatic route
ii. There are no FDI linked performance conditions.
iii. Funds for investment need to be brought from abroad or through internal accruals

(Provisions of DI has been discussed at length in the previous article)

4.5. Conversion

i. Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route.
ii. Conversion of a company having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route.
iii. There are no reporting provisions mentioned in Fema 20(R) regarding conversion of LLP into company or vice versa. Probably in such cases filing of form FCTRS and form LLP may ideally be required simultaneously.

4.6. Disinvestment Proceeds

The disinvestment proceeds may be remitted outside India or may be credited to NRE or FCNR (B) account of the person concerned.

4.7. Transfer of Interest in LLP

i. Transfer of interest in LLP can be transferred by way of sale, subject to pricing, and reporting guidelines.
ii. Fema 20(R) does not mention anything regarding transfer of interest by way of inheritance but since inheritance is a right provided by the constitution of India, Fema regulations may not override the constitution and hence it will be permitted even if Fema 20(R) is silent on it.
iii. Fema 20(R) does not mention anything regarding transfer of interest by way of gift.

Relying on the general principle that Capital Account transactions are prohibited, unless specifically permitted, since the Regulations do not specifically permit it, gift of an interest in LLP to an NRI is not permitted at all.

This would be in contradiction of section 42 of Limited Liability Partnership Act, 2008 ("Partner's Transferable Interest"), the right of a partner to a share in profit is transferable in accordance with the LLP agreement and therefore, if the LLP agreement were to provide for transfer of interest in LLP, it would be allowable under the LLP Act but restricted as per the FEMA regulations.

4.8. Reporting requirements

i. Form LLP (I): Any amount received as consideration for capital contribution and acquisition of profit shares shall submit Form LLP (I) within 30 days from the date of receipt of consideration.

ii. Form LLP (II): The disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident and vice versa shall be reported in Form LLP(II) within 60 days from the date of receipt of funds

iii. Form DI: Reporting of downstream investment in a company or LLP within 30 days from the allotment of capital instrument.

iv. Form FLA: An LLP which has received investment by way of capital contribution in the previous year(s) including the current year, should submit form FLA to the Reserve Bank on or before the 15th day of July of each year

LLP structures are beneficial for professionals to come together under its umbrella and work seamlessly without being burdened with the compliance requirements of a company or the personal exposure involved in a partnership firm.

5. Investment by Foreign Venture Capitalist Investor (FVCI)- Schedule 7

5.1. Introduction

i. FVCI means an investor incorporated and established outside India and which proposes to invest money in Venture Capital Funds or Venture Capital Undertaking in India and is registered with SEBI.

ii. Venture Capital Undertaking (VCU): VCU means a company incorporated in India whose shares are not listed on a recognized stock exchange in India and which is not engaged in an activity specified under the negative list specified by the SEBI. VCU is generally a new born private company which is yet to establish itself and is in need of funds and experienced advice and support.

iii. Venture Capital Fund (VCF): It is a fund established in the form of a trust or a company including a body corporate and registered with SEBI under SEBI(Venture Capital Fund) Regulations 1996 and which has a dedicated pool of capital raised in manner specified in regulations and which invests in VCU in accordance with said regulations. A VCF is also allowed to make investments in VCU subject to provisions in SEBI(Venture Capital Fund) Regulations.

5.2. Key Eligibility Conditions for FVCI

i. The applicant should have a good track record, professional competence, financial soundness, general reputation of fairness and integrity.

ii. The applicant has been granted necessary approval by the Reserve Bank of India for making investments in India; (No prior RBI approval is required for investments under Schedule 7)

iii. The applicant is an investment company, investment trust, investment partnership, pension fund, mutual fund, endowment fund, university fund, charitable institution or an asset management company, investment manager or investment management company or any other investment vehicle incorporated outside India;

iv. Main objects should permit the fund to carry on the activity of venture capital

v. The applicant has not been refused a certificate by SEBI.

vi. The applicant should be a fit and proper person.

5.3. Permitted investments by FVCI

FVCI may purchase

i. Securities, issued by an Indian company engaged in any sector as mentioned below and whose securities are not listed on a recognised stock exchange at the time of issue of the said securities;

Following are the permitted sectors for investment by FVCI

a) Biotechnology
b) IT related to hardware and software development
c) Nanotechnology
d) Seed research and development
e) Research and development of new chemical entities in pharmaceutical sector
f) Dairy industry
g) Poultry industry

h) Production of bio-fuels
i) Hotel-cum-convention centres with seating capacity of more than three thousand.
j) Infrastructure sector

ii. Securities issued by a start- up;

iii. Units of a Venture Capital Fund (VCF) or of a Category I Alternative Investment Fund (Cat-I AIF) or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF (discussed later).

Provided if the investment is in capital instruments, then the sectoral caps, entry routes and attendant conditions shall apply.

5.4. Investment Criteria for FVCI

An FVCI registered with SEBI is permitted to make investments in following manner:

i. It has to invest at least 66.67% of its investible funds in unlisted equity shares or unlisted equity linked instruments (includes instruments convertible into equity share or share warrants, preference shares, debentures, cumolsirily or optionally convertible to equity) of VCU.

ii. It can invest only 33.33% of its funds (and not more), by-

a) Subscribing to initial public offer of VCU whose shares are proposed to be listed;

b)Investing in debt or debt instrument of the VCU provided it has already invested by way of equity in such a VCU;

c)Preferential allotment of equity shares of a listed company subject to lock in period of one year;

d)Investment by way of subscription or purchase in Special Purpose Vehicles created for the purpose of facilitating or promoting investment in accordance with these regulations.

iii. FVCI have a fixed life cycle. Every FVCI making investments in IVCU or VCF has to mandatorily disclose life cycle of its fund before making any investments. It has to further disclose all its investment strategies to the SEBI before it makes any investment in India.

5.5. Transfer/Purchase of securities by FVCI

i. FVCI can invest in eligible securities/ instruments either by way of private arrangement/purchase from third party or from the issuer of these securities or instruments.

ii. FVCI may invest in securities on a recognized stock exchange subject to the provisions of SEBI

iii. FVCI may transfer the securities/instruments to any PROI or any PRII at a mutually decided price (Pricing guidelines do not apply to a FVCI)

5.6. Mode of Investment

i. FVCI may open a foreign currency account and/or a rupee account with a designated branch of an Authorised Dealer for the purpose of making transactions only and exclusively under this Schedule.

ii. The consideration for all investment by an FVCI shall be paid out of inward remittance from abroad through normal banking channels or out of sale / maturity proceeds of or income generated from investment already made

5.7. Reporting by FVCI

Form FCGPR: An entity receiving foreign investment from an FVCI shall file form FCGPR within 30 days of receipt of money

6. Investment in Alternate Investment Fund (AIF)

6.1. Introduction

i. AIF means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which, is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors.

ii. AIFs are seen as private investment funds, and therefore, are not available through IPOs (initial public offerings) or other forms of a public issue which are applicable to Collective Investment Schemes and Mutual Funds that are registered with SEBI.

iii. Units of close ended Alternative Investment Fund may be listed on stock exchange subject to a minimum tradable lot of one crore rupees. Listing of AIF units shall be permitted only after final close of the fund or scheme.

iv. Every AIF has to mandatorily get itself registered with the Securities and Exchange Board of India (SEBI) before commencing any operations.

6.2. Types of AIF:

i. Category I: Venture Capital Funds, Start-up / Early stage funds, Infrastructure funds – These are those AIFs which are positive and beneficial to the Indian economy and enhance growth. Hence, these funds receive incentives or concessions by SEBI or the government of India. Such funds generally invest in start-ups or early-stage ventures, social ventures, SMEs, infrastructure or other sectors which are considered socially or economically important for the country.

ii. Category II: Private equity funds – Private equity (PE) funds, especially Real Estate PE funds, typically reduce the risk profile by offering diversified investment portfolios managed by experienced fund managers. Thus, it provides the dual benefit of a defensive investment alternative as well as a hedging mechanism by offering an alternative investment asset class.

iii. Category III: Hedge funds – Category III AIFs are a unique class of privately pooled funds that employ a range of complicated trading strategies including but not limited to arbitrage, margin trading, futures and derivatives trading, etc. to generate returns. This category of AIF is also allowed to utilise leverage in order to make investments in both unlisted and listed derivatives as specified by SEBI (Alternative Investment Funds) Regulation, 2012. Leading examples under this alternative investment fund category include PIPE Funds and Hedge Funds. **An AIF category III which has received any foreign investment shall make portfolio investment in only those securities or instruments in which a FPI is allowed to invest under FEMA.**

6.3. Eligible Investor

A PROI and an entity incorporated outside India (other than citizen of Pakistan and Bangladesh) is allowed to invest in an AIF in India.

6.4. Downstream Investment

If the Sponsor and Manager (both) are not owned and controlled by Indian resident citizens, or is owned or controlled by PROI then the AIF needs to follow FDI downstream investment norms.

Downstream investment by an AIF that is reckoned as foreign investment shall have to conform to the sectoral caps and conditions, if any, as applicable to the company in which the downstream investment is made.

6.5. Registration and Eligibility Criteria as per SEBI

i. An application for registration should be submitted in Form A with an application fee of Rs one lakh.
ii. MOA/Trust Deed/Partnership Deed permits carrying on the activity of AIF.
iii. Trust Deed/Partnership Deed to be registered under respective governing laws
iv. MOA/Trust Deed/Partnership Deed to prohibit making an invitation to the public to subscribe its securities.
v. The Applicant, Sponsor and Manager are "fit and proper" based on the criteria specified in Schedule II of the SEBI (Intermediaries) Regulations, 2008
vi. The key investment team of the investment manager of the AIF should have adequate experience with at least 1 (one) key personnel having not less than 5 years of relevant experience.
vii. Manager & Sponsor has the necessary infrastructure and manpower to discharge its activities.
viii. The Applicant to clearly describe investment objective, investment strategy, proposed corpus, tenure and target investors.

Thus, AIF can be framed either as company or LLP or Trust.

6.6. SEBI Guidelines Applicable to an AIF in India

i. Each AIF Scheme should have a corpus of at least Rs. 20 crores (Rs. 5 crores for Angel Fund)
ii. Each investor in AIF should commit to invest at least Rs. 1 crore
iii. An employee or director of the Manager of AIF is permitted to invest at least Rs. 25 lakhs
iv. The Manager/Sponsor shall have a continuing interest in the AIF of not less than two and half percent of the corpus or five crore rupees, whichever is lower, in the form of investment in the AIF and such interest shall not be through the waiver of management fees. An employee of the Manager participating in the profits/carry of the AIF need not make any investment.
v. No AIF Scheme can have more than 1000 investors (200 investors for Angel Fund).

vi. Cat-I AIF & Cat-II AIF shall be close ended and have a minimum tenue of 3 years (maximum 5 years for Angel Fund). Category III Alternative Investment Fund may be open ended or close ended.

vii. Category I and II AIF shall invest not more than twenty five percent of the investable funds in one Investee Company and Category III AIF shall invest not more than ten percent of the investable fund in one Investee company.

viii. Although Schedule 8 of Fema 20(R) permits a Foreign Portfolio Investor (FPI) to invest in units of all categories of AIF, SEBI permits FPI to invest only in AIF lll, not more than 25% .
Thus there are twin conditions as to who can invest in AIF and where AIF can invest.

6.7. Reporting under FEMA

i. Form InVi: AIFs receiving Foreign Investment will be required to submit Form InVi within 30 days from the date of issue of units.

ii. Form DI: AIFs with foreign owned and controlled sponsor, manager or investment manager, are also required submit Form DI for downstream investments in an Indian entity/securities within 30 days from the allotment of capital instruments

6.8. Reporting under SEBI

i. Cat-I AIF, Cat-II AIF and Cat-III AIF (that do not undertake leverage) are required to filed quarterly report with SEBI within 7 days of end of quarter. Cat-III AIF that undertakes leverage is required to file report with SEBI monthly.

ii. Compliance Test Report to be submitted by the Manager with Trustee within 30 days of end of the financial year and Trustee/Sponsor to report to SEBI any non-compliance observed.

6.9. AIF regime an Alternative to FPI regime for Debt Investment

i. RBI through its circular A.P. (DIR Series) Circular No. 24 dated 27th April 2018 has reviewed the norms for FPI investment. Under RBI's revised norms, FPI investment in debt issues is subject to caps on allotment, exposure and size. An FPI cannot be allotted more than 50 per cent of the securities in a single debt issuance. Further, no investment in a single corporate bond can exceed 20 per cent of an FPI's corporate debt portfolio.

ii. RBI curbs on FPI investment in debt issue do not apply to investment done through the AIF route and hence due to this nowadays a lot of FPI ore opting to invest in the debt market through the AIF route, which in turn has increased the number of AIFs in India with investments rising through the AIF route.

7. Conclusion

Foreign investment is one of the key drivers of economic growth. RBI has been introducing various reforms to attract foreign investment in India. In the current article we have covered all the reforms introduced by RBI under Fema 20(R) under Schedule 4,6,7 and 8. In the forthcoming articles we will be covering a different facet of foreign Investment in India.

It may be noted that notification is designed to cover various routes of investment through its schedule; each schedule is dedicated to either

i. Set of investors to whom it applies for example:
   a) For LLP, FVCI or FPI cannot invest; FPI can invest in AIF, restricted conditions on PRII and OCI to invest through FPI.
   b) Only NRI/OCI or entities owned by them can invest on non-repatriation basis.
   c) Proprietorship and Partnership are not considered for investment on repatriation basis.
   d) FPI can invest only in AIF lll
   e) FVCI can invest in AIF I and companies.
ii. It is a listed or unlisted capital instrument
iii. It is portfolio or direct investment
iv. It is a debt or capital instrument
v. Investment is done on repatriation or non-repatriation basis
vi. with Valuation or without valuation

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

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

CASE LAWS

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

SARVAPRIYA LEASING PVT. LTD. V/S M/S SRUSHTI SANGAM DEVELOPERS PVT. LTD.

The complainant booked commercial units with the respondents through 8 separate registered agreements. He alleged that he could not get possession of these commercial units. He further seeks directions to the respondent for early completion and possession of the project along with the occupancy certificate. The respondent submitted that the likely date of completion of the project as 1.09.2022. He argued that the complainant is not a genuine buyer, but an investor and therefore, he cannot take advantage of the provisions of RERA Act, 2016. A perusal of the agreement for sale shows clearly that the complainant is a buyer of commercial units. Although the word investor has been mentioned against his name, the entire reading of the agreement leaves no doubt, regarding his status as a buyer, who had acquired ownership of the shops and offices by virtue of executing the agreements? After taking into consideration the report submitted by the Senior Technical Consultant according to which 90% work is completed, the Authority directs the respondent developer to advance the date of completion of the project from 1-09-2022 to l-11-2019 and make necessary correction in the webpage of his registration with MahaRERA.

SUNITA PAWAR AND ORS. V/S RUPJI CONSTRUCTIONS

The complainants want to withdraw from the project alleging that the respondent has not handed over the possession of their apartments. They prayed that the respondents be directed to refund the total amount paid by them along with interest. The Learned Counsel for the respondent submitted that litigation is pending pertaining to the project in the Hon'ble High Court Bombay. Further, she

submitted that no construction activity is going on as of now and that the respondent is in the process of bringing another financer on board to complete the project.

In view of the above facts, in accordance with the principles of natural justice, since the project has been stalled for too long, the respondent is directed to refund the total amount paid by the complainants in accordance with the terms and conditions of the allotment letters/booking form, within 30 days.

UDAY KALGHUTKAR V/S WHEELABRATOR ALLOY CASTINGS LIMITED

The complainant alleged that even paying 54% of the consideration price, the respondents has failed to execute agreement for sale. Therefore he prayed that the respondents be directed to execute and register the agreement for sale with the possession date as August, 2019 or refund the amount paid along with interest. The respondents submitted that project got delayed for the reasons which were beyond his control but now construction is in full swing. He is willing to execute and register the agreement for sale with the date of possession as April 30th 2021 as stated in their MahaRERA registration.

As per the provisions of the rule 4 of the MahaRERA Rules, 2017 the revised date of possession for an ongoing project has to be commensurate with the extent of balance development. In view of the above facts, if the complainant is willing to continue in the project, the parties are directed to execute the agreement for sale as per the provisions of Sec 13 of RERA 2016 and the rules and regulations made thereunder within 30days with possession date before the period ending 30th December, 2020.

MANOHAR AND PARAMJEET KAUR SOHAL V/S MONARCH SOLITAIRE LLP

The Complainants alleged that the Respondent has failed to hand over possession of the said apartment till date and therefore they intend to withdraw from the project as per the provisions of section 18 of the RERA, 2016. The Complainants also showed their willingness in continuing in the said project provided the Respondent was willing to shift him in another building which may be completed earlier and is also a part of the same project. The Respondent argued that no date of possession is mentioned in the said agreement which was executed on 30th Dec 2014. Further, he argued that the construction work of the project could not be completed because of reasons which were beyond the control. Finally, he

submitted that the construction work is now in progress and possession of the said apartments will be handed over as per the timelines mentioned in their registration webpage.

After examining all the facts, the authority ordered Respondent shall, therefore, handover the possession of the said apartment, with Occupancy Certificate, to the Complainants before the period of March 31, 2020, failing which the Respondent shall be liable to pay interest to the complainant from April 1, 2020 till the actual date of possession on the entire amount paid by the Complainant to the Respondent.

BARODAWALA PROPERTIES PVT. LTD. V/S PENINSULA LAND LIMITED

The complainants prayed that the respondent should be directed to refund the entire amount paid by them along with interest and compensation as per the provisions of section 18 of the Real Estate (Regulation and Development) Act, 2016. as they proposed date of completion of the project as 31st December 2020 in their MahaRERA registration webpage instead of December 2018.

The advocate for the Respondent stated that they are willing to execute the agreement for sale and that the apartments will be handed over by December 2020 as stated in their MahaRERA registration webpage. As per the provisions of the Rule 4 of the Maharashtra Real Estate (Regulation and Development) Rules, 2017the revised date of possession for an ongoing project has to be commensurate with the extent of balance development and accordingly the timeline proposed by the Respondent is reasonable.

After hearing both the sides, the authority concluded that the Complainant is interested in continuing in the said project, are directed to execute the agreement for sale within 30 days from the date of this order. Also, The Respondent shall handover possession of the apartment, with Occupancy Certificate, to the Complainants before the period ending December 31st, 2020, failing which the Respondent shall be liable to pay interest to the Complainant from January 1, 2021 till the actual date of possession.

BIYANI FINANCIAL SERVICES PVT. LTD. V/S OMKAR DEVELOPERS AND ASSOCIATES & ORS.

The complainant has purchased office space on the 17th floor of the respondent's project vide registered agreement for sale dated June 12, 2010. Further, pursuant to discussions between the parties the allotment was shifted to the

25th floor. The complainant contends that respondent has failed to deliver the possession of the office space in time. The complainant seeks interest for the said delay in terms of section 18 of the Act.

The respondent contended that a fresh agreement for sale dated 31st March, 2016 was executed for the 25th floor which does not have date of possession mentioned due to the peculiar nature of the said project. Further he submitted that the said project is complete, ready for occupation and already occupied by many allottees. However due to non-receipt of occupancy certificate, the complainant has not taken possession for the same.

In view of the above facts, the respondent is given a period of one month time to obtain occupancy certificate and therefore, handover the possession the said apartment, with occupancy certificate, to the complainant before the period of 30th June, 2018, failing which the respondent will be liable to pay interest to the complainant from 1st July, 2018 till the actual date of possession, on the entire amount paid by the complainant.

PUNJAB REAL ESTATE REGULATORY AUTHORITY

GURSIMRAN KAUR V/S ESTATE OFFICER, PUDA

The complainant on account of delay in handing over the possession of plot measuring 250 sq yards which subsequently increased seeks refund of amount paid to the respondent along with interest and compensation. Further, it was alleged that the respondent was bound to complete the developmental work within 18 months from the date of issuance of allotment letter but were not completed as per technical approval report given by officials.

The allegations contained were vehemently denied by respondent and a stand was taken that the development work was complete as per the report of the Divisional Engineer (PH), Divisional Engineer (Elect.) and Divisional Engineer (C-1) of BDA Bathinda. The respondent has placed reliance upon completion letter dated 22.12.2017 showing the completion of the project. The complainant was informed vide letter dated 27.12.2017 to take the possession of the plot failing which; it was to be deemed that the allottee has taken the possession. It was the complainant who did not take the possession of the plot offered to her. Also, respondent contended that the extended date of completion of the project was 31.12.2019.

The authority after hearing both parties contended that the certificate issued by the three Engineers, but, not by competent authority which is the Chief Administrator/Additional Chief Administrator of the concerned development

authority. With this parameter, the certificate relied upon by the respondent stands negated. Moreover, the extended period has no relevance when the terms and conditions of the allotment letter are specific. Also, as per authority the extended period at the time of registration of the project has no relevance when the terms and conditions of allotment letter are specific. Therefore, it is held that the respondent has defaulted in the delivery of the possession of the plot and is liable to refund the principal amount along with interest to the complainant and also held entitled for compensation under all the heads i.e. mental agony and litigation expenses to the extent of Rs.25,000/-.

MADHYA PRADESH REAL ESTATE REGULATORY AUTHORITY

SUNIT AGARWAL V/S JETHAL CONSTRUCTION PVT. LTD.

The complainant mentioned that he has filed case in the consumer forum which has passed the order. But, respondent is not complying with that order and therefore, he has filed a case in RERA.

It was explained to the complainant that once the consumer forum has passed an order than no case can be filed before RERA on the similar facts and circumstances. In order to get the compliance of the order of consumer forum complainant has to apply to consumer forum only. As such complainant withdrew the case.

ASOTECH C. INFRASTRUCTURE PVT. LTD. V/S NITIN MANGAL AND SMT. ANITA MANGAL

The complainant filed an application against the respondent who has booked an apartment on 08.11.2011 for Rs. 1,06,60,000.The respondent paid Rs.58,00,000 between Nov 2011 to Jan 2013.Many cheques were dishonored and complainant issued many reminders for the payment but no payment was made by the respondent. The complainant requested the authority to cancel the allotment and allowed the complainant to refund the amount after deducting the cancellation amount as well as to instruct respondent to make the payments of interest on the delayed payments.

When respondent is defaulter for a long period, then the complainant is entitled to cancel the allotment and refund the amount after deduction. There is no need for separate order of authority in this respect. But it should be kept in mind of the complainant in case of cancellation of allotment no interest should be recovered from the respondent on account of delayed payment.

ASSOCIATION OF ALLOTEES CORAL WOODS PHASE I V/S GLOBUS HOUSING PVT. LTD.

The authority asked the applicants whether they were a registered Association or not? They answered in the negative, and admitted that they were an informal group of allottees who had styled themselves as 'Association of Allottees'.

The Authority pondered over the issue of whether to admit such an application or not. The implications of admitting such an application from a group of persons purporting to be representing the entire project, when in fact they are not a registered association was a matter of deep concern. If the Authority takes a decision with regard to the project on this application, it would become binding on all allottees and then if an allottee would approach the Authority and ask on what basis an order has been passed with regard to him without giving him adequate opportunity and without being heard, it would be difficult to answer him adequately.

Thus it is fraught with risk to admit an application from an informal group of persons who claim to represent the entire project. Therefore the Authority has decided not to admit the application in its present form and it is to be treated as withdrawn with an observation that the persons who have submitted this are at liberty to either apply in their personal capacity or through a registered Association of Allottees if they so desire.

NOTIFICATIONS/CIRCULARS

BIHAR REAL ESTATE REGULATORY AUTHORITY
LETTER NO.:RERA/Meeting/2018/53-343
DATE: 03.04.2019

NOTICE

The Real Estate (Regulation & Development) Act, 2016 (Act) provides for regulation as well as promotion of the real estate sector and to ensure that all transactions are made in an efficient and transparent manner. It also mandates to protect the interest of the consumers in real estate sector and to establish a speedy dispute redressal mechanism.

To implement the ethos of the Act, the Real Estate Regulatory Authority, (RERA) Bihar, has taken measures to provide assistance to such promoters as well as complainants who find it difficult to upload applications online and approach the Authority for assistance in uploading their applications online.

Presently, a token fee of Rs. 5000/- (Rs. Five thousand only) is charged from such promoters in uploading their application, online. Since a number of the complainants and promoters as well as agents are approaching this office seeking assistance in uploading their application online, it has , therefore, been decided to have a systematic arrangement for providing such facility as a welfare measure.

Now therefore, the Authority, informs all the concerned that the following arrangement has been made for uploading applications online for registration and uploading complaints to the Authority, with a fee payable to the Authority:-

Sr. No	Type	Fee per Application	Officer In charge
1	For uploading online application for registration of real estate Project	Rs. 50001- (Rs. Five thousand only)	Sri Roshan Kumar
2	For uploading application online for registration of an Agent	Rs. 1000/- (Rs. One thousand only)	Sri Vineet Kumar Sinha
3	For uploading application of complaint on line.	Rs. 500/- (Rs. Five hundred only)	Sri Vineet Kumar Sinha

The requisite fee should be submitted in favour of "RERA, Bihar", through a demand draft payable at Patna with a forwarding letter. The In charge dealing assistant, at the lime of receipt of fee, will allot and enter the date and time for online uploading in the respective register and a receipt will be given to applicant.

At the lime of uploading, the applicant needs to bring with him all the required documents in PDF and photograph in MEG format. Before uploading the same, the in charge dealing assistant will ensure that all the required documents are properly formatted and available with applicant.

This arrangement is made only for those complainants/promoters./ agents, who are not conversant or who face technical glitches in online facility and is not meant to be used in a routine fashion.

The Authority has limited resources for such facilities. All interested parties should submit their request at their own risk. The Authority will accept only limited number of applications for uploading every day. In case of delay due to technical reasons, the Authority will not be responsible for any collateral damages. Online submission facility would be available at 4th Floor of RERA, Bihar office with immediate effect.

The Authority will not be responsible for any wrong, incorrect information which is supplied in the application and uploaded on behalf of the applicant.

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JUDGMENTS

HIGH COURT OF GUJARAT

R/SPECIAL CIVIL APPLICATION NO: 11410 OF 2019
CIVIL APPLICATION (FOR STAY) NO. 1 OF 2019
JULY 3, 2019

INDIA COKE AND POWER (P.) LTD …. Petitioner
VERSUS
UNION OF INDIA …. Respondents

For the Petitioner (S): A.R. Madhav Rao, Maulik Nanavati, Mihir Gupta & Niyant R. Bhimani
For the Respondent (S):

Where assessee filed writ petition challenging vires of Notification No: 8/2017 - Integrated Tax (Rate), dated 28-6-2017 and also Entry No. 10 of Notification No. 10/2017 - Integrated Tax (Rate), dated 28-6-2017, registry was directed to issue notice returnable on 17-7-2019 on GST Authorities and in meanwhile no corrective steps shall be taken against assessee.

HON'BLE JUSTICE MS. HARSHA DEVANI
HON'BLE JUSTICE V.B. MAYANI

Ms. Harsha Devani, J. - Mr. A. R. Madhav Rao, learned advocate with Mr. Maulik Nanavati and Mr. Mihir Gupta, learned advocates for the petitioner invited the attention of the court to an order passed by this court in *Mohit Minerals (P.) Ltd.* v. *Union of India* Special Civil Application No.726 of 2018, dated 9th February, 2018 wherein the court has passed the order in the following terms:—

> "The petitioner has challenged vires of Notification No. 8/2017-Integrated Tax [Rate] dated 28th June 2017 and Entry 10 of the Notification No. 10/2017-Integrated Tax [Rate] also dated 28th June 2017. The petitioner is an importer of non-cooking coal and on such imports, the petitioner pays Custom duty, the value of which includes Ocean Freight. On the same valuation, the petitioner also pays tax under the Integrated Goods & Service Tax Act, 2017 ["IGST Act" for short]. The petitioner's grievance is that under the impugned Notifications, the petitioner is

asked to pay tax at the prescribed rate all over again on the ocean freight. The petitioner's challenge has principally three elements viz., [a] having paid the tax under IGST Act on the entire value of imports; inclusive of the ocean freight, the petitioner cannot be asked to pay tax on the ocean freight all over again under a different notification; [b] in case of CIF contracts, the service provider and service recipient both are outside the territory of India. No tax on such service can be collected even on reverse charge mechanism, and [c] in case of High Sea sales, the burden is cast on the petitioner as an importer whereas, the petitioner is not the recipient of the service at all. It is the petitioner's seller of goods on high sea basis who has received the services from the exporter/transporter. Counsel for the petitioner submitted that the impugned Notifications are ultra vires the Act and are in any case in exercise of excessive delegation of powers of subordinate legislation.

Notice and notice as to interim relief, returnable on 9th March 2018.

Direct service is permitted."

2. The attention of the court is also invited to the order dated 12.12.2018 passed by this court in the said writ petition, whereby the court has granted interim relief directing that no coercive steps shall be taken against the petitioner pursuant to the impugned notification in the meanwhile.

3. In the aforesaid premises, Issue Notice returnable on 17th July, 2019. In the meanwhile, no coercive steps shall be taken against the petitioner pursuant to the impugned notification.

Direct Service is permitted.

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HIGH COURT OF MADRAS

W.P. NOS. 14919, 21147 AND 21148 OF 2018
SEPTEMBER 20, 2019

REVENUE BAR ASSOCIATION …. Petitioner
VERSUS
UNION OF INDIA …. Respondents

For the Petitioner (S): Arvind Datar
For the Respondent (S): G. Rajagopalan

(i) Section 110(1)(b) of the CGST Act, 2017 excluding advocates from scope and view for consideration as members of GSTAT is not ultra vires to article 14 of constitution of India.
(ii) Section 110(b)(iii) which makes a member of the Indian Legal Service, eligible to be appointed as a Judicial Member of the appellate tribunal is contrary to the law laid down by the Hon'ble Supreme Court in Union of India v. R. Gandhi reported in 2010 (11) SCC and is to be struck down.
(iii) Section 109(3) and 109(9) of the CGST Act, 2017, which prescribes that the Tribunal shall, consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State) by which the administrative members outnumber the judicial member being violative of Articles 14 and 50 of the Constitution of India to be struck down.

HONOURABLE MR.JUSTICE S.MANIKUMAR
HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

Challenge in these writ petitions is to declare Sections 109 and 110 of the Central Goods and Services Tax Act, 2017 [in short CGST Act, 2017] and Tamil Nadu Goods and Services Tax Act, 2017 [in short TNGST Act, 2017], relating to the constitution of the Goods and Services Tax Appellate Tribunal and the qualification and appointment of members, as void, defective and unconstitutional, being violative of Articles 14, 21 and 50 of the Constitution of India and various judgments of the Hon'ble Supreme Court.

2. Article 246-A (Special provision with respect to goods and service tax) was inserted

in the Constitution of India, by the Constitution (One Hundred and First Amendment) Act, 2016. As per Article 246-A(1), notwithstanding anything contained in Articles 246 and 254, Parliament, and subject to clause (2), the Legislature of every State has the power to make laws with respect to goods and services tax imposed by the Union or the State.

3. Article 246-A(2) gives Parliament its exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
4. Article 366(12-A), which was also inserted by the Constitution (One Hundred and First Amendment) Act, 2016 defines, "goods and services tax" to mean any tax on supply of goods, or services or both, except taxes on the supply of alcoholic liquor for human consumption.
5. Chapter XVIII of the Central Goods and Services Tax Act, 2017 **[in short CGST Act, 2017]** and Chapter XVIII of the Tamil Nadu Goods and Services Tax Act, 2017 **[in short TNGST Act, 2017]** provides for hierarchy of authorities to adjudicate the disputes relating to Goods and Services Tax.
6. Sections 109 & 110 of the CGST Act, 2017 and **TNGST Act, 2017** which are under challenge reads as under.

109. Constitution of Appellate Tribunal and Benches thereof.

(1) The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

(2) The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as "Regional Benches"), State Bench and Benches thereof (hereafter in this Chapter referred to as "Area Benches").

(3) The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

(4) The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

(5) The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the

Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.

(6) The Government shall, by notification, specify for each State or Union territory, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as "State Bench") for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided further that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

(7) The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in sub-section (5).

(8) The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

(9) Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President.

(10) In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members:

Provided that any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member.

(11) If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the

Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

(12) The Government, in consultation with the President may, for the administrative convenience, transfer—

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

(13) The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

(14) No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

110. President and Members of Appellate Tribunal, their qualification, appointment, conditions of service, etc.

(1) A person shall not be qualified for appointment as—

(a) the President, unless he has been a Judge of the Supreme Court or is or has been the Chief Justice of a High Court, or is or has been a Judge of a High

(b) Court for a period not less than five years;

(c) a Judicial Member, unless he—

(i) has been a Judge of the High Court; or

(ii) is or has been a District Judge qualified to be appointed as a Judge of a High Court; or

(iii) is or has been a Member of Indian Legal Service and has held a post not less than Additional Secretary for three years;

(d) a Technical Member (Centre) unless he is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least fifteen years of service in Group A;

(e) a Technical Member (State) unless he is or has been an officer of

the State Government not below the rank of Additional Commissioner of Value Added Tax or the State goods and services tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with at least three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

(2) The President and the Judicial Members of the National Bench and the Regional Benches shall be appointed by the Government after consultation with the Chief Justice of India or his nominee:

Provided that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office:

Provided further that where the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes his duties.

(3) The Technical Member (Centre) and Technical Member (State) of the National Bench and Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed.

(4) The Judicial Member of the State Bench or Area Benches shall be appointed by the State Government after consultation with the Chief Justice of the High Court of the State or his nominee.

(5) The Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be prescribed.

(6) No appointment of the Members of the Appellate Tribunal shall be invalid merely by the reason of any vacancy or defect in the constitution of the Selection Committee.

(7) Before appointing any person as the President or Members of the Appellate Tribunal, the Central Government or, as the case may be, the State Government, shall satisfy itself that such person does not have any financial or other interests which are likely to prejudicially affect his functions as such President or Member.

The salary, allowances and other terms and conditions of service of the President, State President and the Members of the Appellate Tribunal shall be such as may be prescribed:

Provided that neither salary and allowances nor other terms and conditions of service of the President, State President or Members of the Appellate Tribunal shall be varied to their disadvantage after their appointment.

(8) The President of the Appellate Tribunal shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of seventy years, whichever is earlier and shall be eligible for reappointment.

(9) The Judicial Member of the Appellate Tribunal and the State President shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

(10) The Technical Member (Centre) or Technical Member (State) of the Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

(11) The President, State President or any Member may, by notice in writing under his hand addressed to the Central Government or, as the case may be, the State Government resign from his office:

Provided that the President, State President or Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government, or, as the case may be, the State Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is

the earliest.

(12) The Central Government may, after consultation with the Chief Justice of India, in case of the President, Judicial Members and Technical Members of the National Bench, Regional Benches or Technical Members (Centre) of the State Bench or Area Benches, and the State Government may, after consultation with the Chief Justice of High Court, in case of the State President, Judicial Members, Technical Members (State) of the State Bench or Area Benches, may remove from the office such President or Member, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of such Government involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, State President or Member; or

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

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

Provided that the President, State President or the Member shall not be removed on any of the grounds specified in clauses (d) and (e), unless he has been informed of the charges against him and has been given an opportunity of being heard.

(13) Without prejudice to the provisions of sub-section (13),—

(a) the President or a Judicial and Technical Member of the National Bench or Regional Benches, Technical Member (Centre) of the State Bench or Area Benches shall not be removed from their office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government and of which the President or the said Member had been given an opportunity of being heard;

the Judicial Member or Technical Member (State) of the State Bench or

(b) Area Benches shall not be removed from their office except by an order made by the State Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the concerned High Court nominated by the Chief Justice of the concerned High Court on a reference made to him by the State Government and of which the said Member had been given an opportunity of being heard.

(14) The Central Government, with the concurrence of the Chief Justice of India, may suspend from office, the President or a Judicial or Technical Members of the National Bench or the Regional Benches or the Technical Member (Centre) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (14).

(15) The State Government, with the concurrence of the Chief Justice of the High Court, may suspend from office, a Judicial Member or Technical Member (State) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the High Court under sub-section

(14).

(16) Subject to the provisions of article 220 of the Constitution, the President, State President or other Members, on ceasing to hold their office, shall not be eligible to appear, act or plead before the National Bench and the Regional Benches or the State Bench and the Area Benches thereof where he was the President or, as the case may be, a Member.

Sections 109 & 110 of the TNGST Act, 2017 reads as under

109. Appellate Tribunal and Benches thereof. *(1) Subject to the provisions of this Chapter, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.*

(2) The constitution and jurisdiction of the State Bench and the Area Benches located in the State shall be in accordance with the provisions of section 109 of the Central Goods and Services Tax Act or the rules made thereunder.

110. President and Members of Appellate Tribunal, their qualification, appointment, conditions of service, etc.: *The qualifications, appointment, salary and allowances, terms of office, resignation and removal of the President and Members of the State Bench and Area Benches shall be in accordance with the provisions of section 110 of the Central Goods and Services Tax Act.*

7. Section 109 of CGST Act, 2017 and TNGST Act, 2017 lays down the constitution of the Appellate Tribunal and the benches thereof and Section 110 prescribes the qualification of the President and the members of the Appellate Tribunal.
8. Section 109 of CGST Act, states that the Government shall, on the recommendations of the Council, constitute an Appellate Tribunal, known as the Goods and Services Tax Appellate Tribunal, for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.
9. An Appellate Authority hears appeals under Section 107 of the Act and such appeals are filed against any decision or order passed under CGST Act, 2017 or TNGST Act, 2017 or the Union Territory Goods and Services Tax Act, by an adjudicating authority. The powers of the Revisional Authority are laid down in Section 108 of the Act. The Goods and Services Tax Appellate Tribunals have been constituted to hear appeals against the orders passed by the Appellate Authority constituted under Section 107 of the CGST Act, 2017 or TNGST Act, 2017, as the case may be, or the Revisional Authority which is constituted under Section 108 of the CGST Act, 2017

or TNGST Act, 2017, as the case may be.

10. Section 109(2) provides that the powers of the Appellate Tribunal shall be exercised by the National Bench or the Regional Benches. Under the TNGST Act, the Appellate Tribunal is the State Bench or the Area Benches. The National Bench of the appellate tribunal is situated at Delhi, which will be presided over by the President and shall have two members viz., one Technical Member (Centre) and one Technical Member (State). The Government can also constitute the Regional Benches which shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).
11. Section 109(5) provides that the National Bench and the Regional Benches of the Appellate Tribunal has the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply.
12. Section 109(7) provides that the State Bench or the Area Benches shall have the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than the issue relating to the place of supply.
13. Section 109(11) provides that if the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.
14. Section 110 of the Act prescribes the qualification, appointment and conditions of service, etc., of the President and the members of the Appellate Tribunal. The President of the Appellate Tribunal, is a retired judge of the Supreme Court of India or a sitting or retired Chief Justice of any High Court or a Judge of a High Court or a retired Judge of a High Court, with not less than five years of service.
15. The qualification of the Judicial Member has been prescribed as a Judge of the High Court or a sitting or retired District Judge, qualified to be appointed as a Judge of a High Court or a member of the Indian Legal Service and has held a post not less than Additional Secretary for not less than three years
16. The Technical Member (Centre) is a serving or a retired member of the Indian Revenue (Customs and Central Excise) Service, Group-A, who has completed atleast

fifteen years of service in the Group–A.

17. The qualification of the Technical Member (State) is such a member, who is a serving or a retired officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State Goods and Services Tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with atleast three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.
18. Section 110(2) prescribes that the President and the Judicial Members of the National Bench and Revisional Benches shall be appointed by the Government of India after consultation with the Chief Justice of India or its nominee.
19. Section 110 (2) further provides that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, resumes office. Second proviso to Section 110(2) provides that if the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes office.
20. As stated supra, these writ petitions challenges the validity of Sections 109 and 110 of the CGST Act, 2017 and TNGST Act, 2017, more particularly the composition and qualification of the members to the Goods and Services Tax Appellate Tribunal.
21. The first challenge is to the vires of Section 110 (1)(b) of the CGST Act, on the ground of exclusion of lawyers from being eligible to be appointed as a Judicial Member of the tribunal. According to the petitioners, exclusion of lawyers from zone of consideration as a Judicial Member, is violative of Article 14 of the Constitution of India. It is the contention of the petitioners that the exclusion of lawyers from being considered to hold the post of Judicial Member of the tribunal is a departure from the existing practice. It is the case of the petitioners that Advocates are eligible to be considered as members of various tribunals and there is no justification or reason as to why they should be excluded from the zone of consideration of being appointed as Judicial Members under the CGST and TNGST Act. The petitioners state that in the Income Tax Appellate Tribunal, which is the oldest tribunal of India, CESTAT, the Sales Tax/VAT Tribunals, Advocates having more than ten years of experience were being considered for selection as Judicial Members. It is therefore stated that there is no valid explanation as to why the CGST Act, 2017 and the TNGST Act, 2017 excludes Advocates having more than 10 years of experience,

from being considered as Judicial Members of the tribunal.

22. It is the case of the petitioner that the Hon'ble Supreme Court in R.K.Jain Vs. Union of India, reported in 1993 (4) SCC 119 and some other cases has held that the tribunal members must have a judicial approach and expertise in that particular branch of Constitution, administrative and tax laws. It is therefore submitted that lawyers having more than ten years of experience in that branch of law should be considered for appointment as judicial members, as they have the legal expertise and judicial experience and are legally trained to understand, examine and adjudicate upon complex question of law, which would arise for consideration.
23. The petitioners in particular rely on an observation, at paragraph No.76 of R.K.Jain's case [cited supra] wherein the Hon'ble Supreme Court emphasis the need to recruit the members of the Bar to man the Tribunals. Similarly, it is contended that the Hon'ble Supreme Court in Madras Bar Association Vs. Union of India, reported in 2014 (10) SCC 1, also emphasises the need for the advocates to be eligible to be considered as Judicial Members. The petitioners state that lawyers having more than ten years experience, practising in the tax bar in the various tribunals is more competent to adjudicate the issues arising under the CGST Act. In fact it is submitted that they are more experienced than a District Judge, who might not have dealt with any tax case during his entire tenure.
24. Petitioners also challenge the consideration of a Member of the Indian Legal Services who is eligible for being appointed as a member of the Appellate Tribunal. It is the submitted that Members of the Indian Legal Services have been held not to be eligible for being appointed as members of NCLT and other tribunals in Union of India Vs. R.Gandhi reported in 2010(11) SCC 1, wherein the Hon'ble Supreme Court at para 120 (i) has observed as under.

> "Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial members. Persons who have held a Group A post or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in sub-sections (2) (c) and (d) of Section 10-FD. The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as

technical members."

25. The next challenge is to the composition of the Appellate Tribunal. The composition of the Appellate Tribunal of CGST or TNGST, as the case may be, under Section 109(3) and 109(9) of the CGST Act, 2017 prescribes that the tribunal will consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State). Thus, there are two Technical Members as against one Judicial Member. The two Technical Members therefore can overrule the Judicial Member who will be in minority.
26. The submission of the petitioner is that any tribunal where the Judicial Member is in the minority in a Bench is violative of Articles 14 and 50 of the Constitution of India. It is the plea that for independence, impartiality and to ensure public confidence in the justice delivery system, it is essentially incumbent that the administrative members should not be in majority in a Bench. The petitioners rely on Article 50 of the Constitution of India, which states that the State shall take steps to separate the judiciary from the executive, in the public services of the State. According to the petitioners, administrative members would only be the mouth piece of the Government and this will not instil confidence in the minds of the litigant. It is therefore contended that any tribunal in which the Government is always the party against whom the relief is sought for, the number of administrative members cannot be more than the judicial member in the Bench. Simply put, bureaucrats cannot overrule a Judicial Member, who is or has been a Judge. It is stated that the proceedings in the tribunal are judicial proceedings and the administrative members cannot overrule a Judge.
27. The next submission is that while for appointing a Judicial Member, the Chief Justice of the State has to be consulted, but, there is no provision for consultation with the Chief Justice of the State for appointment of the administrative members, who will be none other than the nominees of the Government and in such a scenario, the administrative members who are the nominees of the Government, cannot be more than the judicial member(s) on the Bench.
28. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would submit that Section 110(1)(b) of the CGST Act, 2017 which lays down the qualification for appointment of a Judicial Member for Appellate Tribunal excludes advocates. Sub sections (i) (ii)and (iii) of Section 110 (1)(b) provides that only a Judge of a High Court or a sitting or retired District Judge, qualified to be appointed as a Judge of a High Court or a member of the Indian Legal Service and has held a post not less than Additional Secretary for not less than three years alone are qualified to be appointed as a Judicial Member of the tribunal. Mr.Arvind Datar, learned Senior Counsel

would submit that it is a departure from the existing practice of making Advocates with ten years experience at Bar and Advocates qualified for appointment as a Judge of a High court, being considered as a Judicial Member of the tribunal. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would rely on the Constitution of the Income Tax Appellate Tribunal, CESTAT and other Sales Tax / VAT tribunals in all the States in the Country, where lawyers with 10 years of practice or Lawyers eligible to be appointed as Judge of the High Court are being considered for selection and are also selected as Judicial Members. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would submit that advocates who are practicing in that particular branch are experts in the field and would be very valuable and their experience will become very handy if they are selected as Judicial Members.

29. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners also places reliance on paragraph No.76 of the judgment of the Hon'ble Supreme Court in ***R.K.Jain Vs. Union of India,*** reported in **1993 (4) SCC 119**, wherein the Hon'ble Supreme Court emphasis on the need for recruitment of members of the Bar to man the tribunal which reads as under.

> *"Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice- Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Art. 136 to this Court also proves to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would as usage a growing feeling of injustice of those who can ill effort to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would make an indepth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income-tax Appellate*

Tribunal and to make appropriate urgent recommendations to the Govt. of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

30. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would state that a lawyer with 10 years experience in the subject would be in a better place to understand, appreciate and adjudicate the matters, which would be placed before the tribunal compared to a District Judge, who would not have experience at all for selection as a Judicial Member. He would place reliance on the judgment of the Hon'ble Supreme Court in ***Madras Bar Association Vs. Union of India***, reported in **2014 (10) SCC 1**, wherein the Hon'ble Supreme Court at paragraph No.97 has observed as under

> *"This issue was also considered in **S.P.Sampath Kumar v. Union of India (1987) 1 SCC 123** and it was held that where the prescription of qualification was found by the court, to be not proper and conducive for the proper functioning of the Tribunal, it will result in invalidation of the relevant provisions relating to the constitution of the Tribunal. If the qualifications/eligibility criteria for appointment fail to ensure that the members of the Tribunal are able to discharge judicial functions, the said provisions cannot pass the scrutiny of the higher Judiciary."*

31. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners, would say that apart from the fact that the legislation has not appreciated the need of the hour and the guidelines, as given by the Hon'ble Supreme Court, he would state that Section 110(1)(b) which excludes lawyers from being considered eligible for appointment as Judicial Member of the Tribunal is arbitrary of Article 14 of the Constitution of India. He would state that confining the eligibility of Judicial Member, to retired High Court Judges and retired District Judges who are qualified to be appointed as High Court Judges and Officer of the Indian legal Services, is not a valid classification. He would state that exclusion of Advocates and especially those Advocates who have good experience in the said subject does not have any nexus with the objects sought to be achieved and there is no need to depart from the existing practice, wherein lawyers are considered for being appointed as Judicial Members in the tribunal. As stated earlier, Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would reiterate that a District Judge even though be fit to be a Judge of High Court, might not be as oriented to deal with subjects, without

having any expertise in the taxation laws. He would state that an officer of the Indian Legal Services would also have no training in law or judicial expertise. Excluding lawyers from the ambit of consideration without any reason whatsoever makes the Section 110(1)(b) as violative of Article 14 of the Constitution of India.

32. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would place reliance on the judgment of the Hon'ble Supreme Court in ***Shayara Bano Vs. Union of India, reported in (2017) 9 SCC 1***, wherein the Hon'ble Supreme Court held that a law can be struck down for manifest arbitrariness. He would state that the Hon'ble Supreme Court has said that manifest arbitrariness, therefore, must be something done by the legislature, capriciously, irrationally and / or without adequate determining principle. It is urged by Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners that the practice of considering advocates for appointment to specialised tax tribunals have been continued without break from 1941 with the advent of the Income Tax Appellate Tribunal. He would state that denying the Advocates even the right of being considered will fall foul of the constitutional protection under Article 14 of the Constitution of India, as it would be capricious and irrational and more so, when there is no reason forthcoming from the respondents as to why lawyers are being excluded and why is there a departure from the norm of considering lawyers eligible to be appointed as Judicial Members of the tribunal.
33. The next challenge of Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners is to the eligibility of a member of the Indian Legal Service for being considered as Judicial Member. Reliance has been placed on paragraph No.120(i) of the judgment of the Hon'ble Supreme Court in ***Union of India Vs. R.Gandhi*** reported in **2010(11) SCC 1 [quoted supra],** to state that persons who have held a Group A post under Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members while dealing with Section 10-FD(2)(c) and (d) of the Companies Act, 2013. He would state that Section 110(b)(iii) is per se contrary to the law laid down by the Hon'ble Supreme Court in the said judgment and must be struck down.
34. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would state that the composition of the Benches in which the Technical Members would be majority is unconstitutional and he would state that Section 109 of the CGST Act, 2017, which prescribes that the tribunal shall consist of One Judicial Member, one Technical Member (Centre) and one Technical Member (State) i.e., two administrative members as against one judicial member is contrary to mandate of

Article 50 of the Constitution of India and such a composition would seriously affect the independence of judiciary.

35. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would rely on a judgment passed by a Hon'ble Division Bench of this Court in ***S.Manoharan Vs. The Deputy Registrar, Central Administrative Tribunal, Principal Bench, New Delhi & Others, reported in 2015 (2) Law Weekly 343,*** wherein this Court has considered the correctness of the judgment passed by the Central Administrative Tribunal, where the full bench consists of two Administrative Members and one Judicial Member and held that in a Bench of more than two members, the number of administrative members should not exceed the number of judicial members.
36. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would further submit that the Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India reported in 2017 SCC online Bom 9302,*** also came to the same conclusion and at paragraph no.339
37. held that two member bench of the Tribunal constituted under the Real Estate (Regulation and Development) Act, 2016 (in short the 'RERA'), shall always consists of a judicial member and that in the constitution of the Tribunal, majority of the members shall always be judicial members. He would state that the judgment of the Bombay High Court and the Madras High Court would be binding and that the composition of tribunal as prescribed in 109(3) and 109(9) of the GSTAT, is completely contrary to the said judgments. Mr.Arvind Datar, also relied on para 338 of the Bombay High Court in ***Neelkamal Realtor's*** case [cited supra], wherein it is held that the qualification for appointment of a Judicial Member as prescribed in Section 46(1)(b) in RERA as unconstitutional and was struck down.
38. Mr.Arvind Datar, would rely on Article 50 of the Constitution of India, which provides that State shall take steps to separate the judiciary from the executive in the public services of the State. He would state that if the majority of the tribunal consists of administrative members who are/were government servants, then there will be no confidence on the independence of such tribunal. He would further state that in all the cases, which come to the tribunal, the revenue is either respondent or the appellant and that any assessee would not be confident of getting justice because the composition of the tribunal is such, it would give a genuine impression that the tribunal might not be an independent body and that it will only carry out the orders of the Government. He would state that it is for the first time that a statute provides for a composition of a tribunal where the administrative members exceeds the judicial members. He would argue that this would be in direct contravention of the spirit of Article 50 of the Constitution of India. The purpose of Article 50 has to

separate the judiciary from the executive in the public services of the State. The underlying concept being that the executive must be kept away from discharging judicial functions. Mr.Arvind Datar, would place reliance on the judgment of the Hon'ble Supreme Court in ***Supreme Court Advocates on Record Association Vs. Union of India, reported in 1993 (4) SCC 441,*** wherein at paragraph No.81, Hon'ble Supreme Court has observed as under.

> *"According to this Article, the definition of the expression "the State" in Article 12 shall apply throughout Part IV, wherever that word is used. Therefore, it follows that the expression "the State" used in Article*
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> *50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and the Legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India. When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an analamous position that the Constitution does not emphasise the separation of higher judiciary from the executive. Indeed, the distinguished Judges of this Court, as pointed out earlier, in various decisions have referred to Article 50 while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principle and values underlying Article 50 in safeguarding the independence of the judiciary."*

39. Mr.Arvind Datar, would also rely on the decision of the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd., Vs. Union of India, reported in 2019(4) SCC 17*** wherein, the Hon'ble Supreme Court at paragraph No.29, 30, 31 and 36 observed as under.

> *Shri Rohatgi has argued that contrary to the judgments in Madras Bar Assn. (1)[Union of India v. Madras Bar Assn., (2010) 11 SCC 1] and Madras Bar Assn. (3) [Madras Bar Assn. v. Union of India, (2015) 8 SCC 583] , Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two judicial members of the Selection Committee get outweighed by three bureaucrats.*
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> *On 3-1-2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act,*

2013 was amended as follows:
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40. Mr.Arvind Datar, would state that Section 111 (4) of the CGST Act, 2017 makes it clear that the proceedings before the GSTAT are judicial proceedings. He would state that in such a scenario the administrative members who are government servants should not be in majority. Mr.Arvind Datar, would state that if the majority members in the bench are administrative members then Article 50 stands diluted. He would state that the expert members or the technical members are there only to aid and assist the Judicial Members, in coming to a just conclusion which is legally sustainable. He would state that the Judicial Member ensures impartiality, fairness and reasonableness in consideration. The Technical Member provides the expertise in technical aspects. He would state that a majority of the Technical Member, who are/were essentially government servants, would erode the impartiality of the tribunal or atleast the assessee will not be confident that the tribunal would be impartial.
41. Mr.Arvind Datar, would therefore state that as per Section 110(3) of the CGST Act, 2017 the Technical Member (Centre) and Technical Member (State) of the National Bench and the Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed. He would further state that as per Section 110 (5) of the Act, the Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be prescribed.
42. Mr.Arvind Datar, would submit that the revenue, which is a party to all tax litigation therefore appoint its technical members who will be majority in the tribunal and thus would completely erode the impartiality, which is expected from the tribunal.
43. On the other hand, Mr.G.Rajagopalan, the learned Additional Solicitor General and Mrs.Aparna Nandakumar, appearing for the Union of India, would contend that there is no fundamental right for an Advocate to be considered for appointment as a Judicial Member of the tribunal. The Advocates Act, 1961 permits only an advocate to practice in any Court. The Advocates Act, 1961 does not give any right to an Advocate, to be considered to be appointed as a Judge in a Tribunal and it is for the Government to decide as to whether an Advocate must or must not be considered to be eligible to be appointed as Judicial Member of the tribunal. In the absence of any right, no duty is cast on the government to consider the eligibility of advocates for being appointed as a member of the tribunal. It is stated that it is for the

employer to decide the qualification and mere right to be considered cannot be a statutory or constitutional right, in the absence of any rule, which makes advocates eligible to be considered for appointment. It is also stated that just because the Administrative Members are more in number in the bench, it does not mean that the composition of the tribunal is bad. It is contended that the entire argument of the petitioners proceeds on an apprehension that the judgment of an Administrative Member while overruling the Judicial Member would be wrong and therefore the Administrative Members at no point of time can outnumber the Judicial Member.

44. The Union of India would rely on the judgment of the Hon'ble Supreme Court in All India Bank Employees' Association Vs. National Industrial Tribunal & Others, reported in AIR 1962 SC 171, and submit that there can be a right to be considered only if there are rules, which permits such consideration. He would further submit that the fact that the lawyer has been kept out the scope of consideration cannot make the section bad. The fact that the lawyers have been considered for being appointed as Judicial Members in other tribunals would not mean that a right has been created in the lawyers to be considered for appointment. He would state that the present tribunal is not a substitute for the High Court.

45. The Union of India would also state that no citizen can claim as to who should be the Judge in his case. The fact that lawyers have been kept out form the eligible candidates to be appointed as a member of the GST Appellate Tribunal, it does not make the Section bad. In the absence of any rights to be considered laid down by in statutory rules, prior practice cannot amount to be a right to be considered for being appointed as a Judicial Member of the tribunal.

46. The Union of India states that there is no provision for advocates to become Member of the Tribunal. He further submitted that this is a prerogative of the Parliament. A Judge of Hon'ble High Court and a District Judge qualified to be appointed as a High Court judge are eligible to become judicial member. The law prior to GST also had provision of Member of Indian Legal Service with the similar qualification to become Member (Judicial) in the CESTAT. It is also emphasised that for reaching the level of Additional Secretary in the Ministry of Law, an Officer would have worked for 25-30 years and so he would be sufficiently trained on legal matters. Also, the cadre of Indian Legal Service has Advocates with experience of 7 years or more and sometimes district Judges also joined as an officer of the Indian Legal Service. The officers of the rank of Additional Secretaiy in Indian Legal Service are also discharging quasi-judicial function as Members of several other tribunals and are also working as arbitrators. The guideline that "A Technical Member' presupposes an experience in the field to which the Tribunal relates", has been

followed. The qualifications are the minimum qualifications, and during the process of selection, the Competent Authority would ensure that the officers of sufficient seniority and high level of competence are selected as members. It is also emphasised that the same qualification has been prescribed for the Member Technical (Accountant Member) in Income Tax Appellate Tribunal and this system has been smoothly functioning there, from many years.

47. The Union of India would state that the GSTAT is a creature of Article 246-A of the Constitution of India. The Appellate Tribunal constituted under Section 109 of the CGST Act, 2017 and the TNGST Act, 2017, have been created by virtue of the powers conferred on the parliament under Article 246-A of the Constitution of the India. They are not substitute to High Court and are therefore, not tribunal under Article 323 A and B of the Constitution of India. The Union of India would therefore submit that the judgments of the Hon'ble Supreme Court in ***S.P.Sampath Kumar and Ors. Vs. Union of India (UOI) and Ors, reported in 1987 (1) SCC 124, L.Chandrakumar Vs. Union of India, reported in 1997(3) SCC 261, Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India*****, reported in 2014 (10) SCC 1,** would not apply to the facts of this case, as all these decisions pertain to those tribunals, which have been created under Articles 323 A and B of the Constitution of India, wherein the powers of the High Court have been vested with the tribunal. It has been contended that where the legislature proposes to substitute a tribunal in the place of a High Court to exercise the jurisdiction which the High Court is exercising, the standards applied for appointment of such members should be as nearly as possible as those applicable to High Court Judges and in such cases, the legislature must take care to ensure that the qualifications are not diluted. For Specialised tribunals which are not substitute of High Courts and which are technical in nature, qualification can be prescribed by the legislature. The Union of India would contend that the composition of the tribunal, cannot be found fault with. Learned Additional Solicitor General, would state that the fact the administrative members are more in number, cannot lead to an automatic conclusion that the orders of the tribunal will not be just and fair. The mere apprehension of the petitioner cannot be a ground to strike down Section 109 (9) of the CGST Act.

48. Union of India would submit that the GSTAT is not a Tribunal established under Article 323A and Article 323B of the Constitution. It is also not a Judicial Tribunal which is a substitute for the High Court. The GSTAT is one established under Section 109 of the GST Act whose source of power is Article 246A read with Article 279A of the Constitution of India. It is submitted that both GSTAT and CESTAT

are creatures of statutes. Unlike GSTAT and CESTAT, Administrative Tribunals, have been established under Article 323A of the Constitution of India and an aggrieved person entitled to invoke the jurisdiction of the Hon'ble High Court under Article 226 of the Constitution of India can move the Administrative Tribunal instead of High Court. Similarly, NCLT/NCLAT, were also clothed with the jurisdiction which were exercised by the High Court. These GSTAT therefore, cannot be equated to NCLT or the Administrative Tribunal. It is submitted that time and again it has been held in the case of Appellate Tribunals created under statute like FEMA, Central Excise Act/ Customs Act, VAT Acts that the remedy available to the High Court or to the Apex court is available only as a statutory appeal on a question of law, wherein the High Court or Supreme Court is a statutory forum of appeal and these tribunals do not exercise original jurisdiction. The Union of India, relies upon the decisions of the Hon'ble Supreme Court in ***Raikumar Shivhare Vs. Assistant Director, Directorate of Enforcement and ors.,*** reported in **(2010) 4 SCC 772,** wherein, while answering a question as to whether a Writ Petition was maintainable as against the order of the Appellate Tribunal established under the Foreign Exchange Management Act, 1992 (FEMA), it was held that the right of appeal being always a creature of statute has to be determined to the statute itself. The Hon'ble Apex Court further held that:-

> *"34. When a statutory forum is created by law for redressal of grievance and that too in a fiscal state, a writ petition should not be entertained ignoring the statutory dispensation. In this case High Court is a statutory forum of appeal on a question of law. That should not be abdicted and given a go bye by a litigant for invoking the forum of judicial review of the High Court under Writ Jurisdiction. "*

49. Reliance was also placed on the decision of the Division Bench of Hon'ble Bombay High Court in ***Sales Tax Tribunal Bar Association and Ors v. The State of Maharashtra and Ors*** reported in **[2018] 50 GSTR 417 (Bom).** In this case Section 11 of the Maharashtra VAT Act which provided for the establishment of the Tribunal and Rule 6 of the Maharashtra VAT Rules which provided for the qualification of the members of the Tribunals was under challenge. It is stated that the contentions raised in that Writ Petition are similar to the contention raised in the present Writ Petition. The Hon'ble High Court of Bombay has held that the VAT Tribunal is not a Tribunal under the Article 323B and that the decisions of the Apex Court in the case of ***S.P.Sampath Kumar, L.Chandrakumar and Madras Bar Association*** [cited supra] may not have relevance as far as the challenge to the constitutional validity of Maharashtra VAT Tribunal is concerned. Having said that

the Hon'ble High Court of Bombay upheld the provisions of the MVAT Act with regard to appointment of Administrative Member of the Tribunal. In para 30 of the judgment, the Hon'ble High Court of Bombay has observed that in the appointment of administrative member not below the rank of Joint Commissioner it will be necessary that such Joint Commissioner should be legally qualified and judicially trained in the sense that they have a long experience of dealing with a quasi judicial proceedings involving adjudication of proceedings. In the concluding portion at para 41, the Hon'ble High Court has laid down that

1. A Bench of two or more members of MVAT Tribunal shall always be headed Judicial Member.
2. The matters to be required to be heard by the member sitting single should be placed only before the Judicial Member and if none of the judicial member is available in case of emergency, in which an interim relief is sought for, it can be placed before the single administrative member.
3. That in selection of Administrative member covered by clause d,e,f of Rule 6(1) of the Maharashtra VAT Rules, the State Government should constitute a proper Selection Committee headed by a retired judge.
4. The Administrative member eligible for appointment under clauses d,e,f should also be legally qualified and judicially trained in the sense that they have long experience in dealing with quasi judicial proceedings and with adjudication proceedings.

50. It is therefore contended on behalf of Union of India that the reliance made on the judgment of the Hon'ble Supreme Court in the case of ***Union of India Vs. R.Gandhi*** reported in ***2010(11) SCC 1***, ***Madras Bar Association Vs. Union of India,*** reported in ***2014 (10) SCC 1*** and ***L.Chandrakumar Vs. Union of India,*** reported in ***1997(3) SCC 261,*** is misplaced. The Union of India would state that just because Section 111(4) states that all proceedings shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, that does not lead to a conclusion that the tribunal is a Court. It is submitted that on a proper reading of Section 111 it is clear that the Appellate Tribunal is not bound by the procedure laid down in Civil Procedure Code but can regulate its own procedure. Further for the purpose of discharging its functions under the Act it has the power enumerated in clauses (a) to (h) of Sub Section 2 of Section 111 of the CGST Act. Section 193 and 228 of the Indian Penal Code are extracted

below:-

> *"193. Punishment for false evidence.—Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.*
>
> *Explanation 1.—A trial before a Court-martial2 ***is a judicial proceeding.*
>
> *Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.*
>
> *Illustration A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A as given false evidence.*
>
> *Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a*
> *Court of Justice.*
>
> *Illustration A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence"*
>
> *228. Intentional insult or interruption to public servant sitting in judicial proceeding - whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extent to six months, or with fine which may extend to one thousand rupees, or with both. "*

51. It is therefore submitted that all forums in which the proceedings are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the IPC, do not become Courts. It is submitted that Section 111(4) is only to ensure that the evidence given either oral or documentary have to bear the semblance of truth in it and to

ensure cooperation during investigations and enquiry. It is submitted that likewise Section 111(4) of the CGST Act lays down that the proceedings are deemed to be "judicial proceedings" only in the circumstances mentioned in Section 111(4) of the CGST Act and have limited powers of a Civil Court, as exhaustively laid down in Section 111(2) of the CGST Act. The GSTAT is only an appellate body placed in the second tier in the appeal hierarchy of the GST which discharges judicial functions and cannot be placed on par with a Court of law and definitely, they are not substitutes of the High Court. The respondents place reliance on the decisions of the Hon'ble Supreme Court in ***Harinagar Sugar Mills Ltd. V. Shyam Sundar Jhunjhunwala*** reported in (1962) 2 SCR 339 have laid down following principles:

a) The word "Courts" is used to designate those Tribunals which are set up in an organized state for the administration of justice.
b) Tribunals are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art. 136, 227, or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts.
c) The main and the basic test is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function.
d) Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included.
e) Tribunals are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which in described as judicial process.
f) But the authority to reach decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by quasi judicial bodies are similarly distinct and separate in character from judicial decisions pronounced by courts.

52. The Union of India would further state that the Appellate Tribunals like the VAT Tribunal, CESTAT and GSTAT can at best be described as forums meant for deciding assessment proceedings. The revenue places reliance on a Full bench

decision of this Court in the case of ***State of Tamil Nadu v, Arulmurugan and Company reported in (51 STC 381) 1982.*** The Full bench, while holding that the statutory 'C' Forms could be filed even at the second appellate stage viz the Appellate Tribunal has held that the function of the appellate authority is co existing with the assessing authority and the appellate proceedings are continuation of the assessment proceedings/adjudication proceedings. The Union of India therefore submits that the GSTAT is only an Appellate body discharging judicial functions and it is not a Court or Judicial Tribunal which has substituted the power of High Court. It has only the powers conferred by the statute.

53. The Union of India submitted that, since the minimum quorum of two members has already been prescribed under the GST Act, the apprehension entertained by the petitioner herein that there would be preponderance of technical members over judicial member is wholly untenable; That too in circumstances when the President or State President who are essentially judicial members have a say in the matter.
54. The Union of India further states that Section 110(3) of the CGST Act provides that the Technical Member of the National Bench/Regional Benches would be appointed by the Central Government on recommendation by Selection Committee. It is submitted that the President, Judicial Members and the Technical Members are yet to be appointed, the Selection Committee has also not being formed. It is therefore submitted that the apprehension entertained by the petitioner herein at this stage is premature and unwarranted. The revenue places reliance on a judgment of the High Court of Bombay in ***Sales Tax Tribunal Bar Association and Ors vs. The State of Maharashtra and Ors [2018] 50 GSTR 417 (Bom)*** which held that if the Technical Member are legally qualified and judicially trained in the sense that they have long experience dealing with quasi judicial proceeding/and or adjudication proceedings, the proceeding of the Tribunal would well qualify as judicial proceedings.
55. It is urged by the revenue that as per Section 110(2) of the CGST Act, the Judicial Members of the National Bench and the Regional Benches shall be appointed by the consultation with the Chief Justice of the High Court of the State or his nominee. As per Section 110(4) of the CGST Act, the Judicial Memebr of the State Bench or Area Benches shall be appointed by the State Government after consultation with the consultation with the Chief Justice of the High Court of the State or his nominee. It is stated that the Judicial Member are necessarily appointed after consultation with the Chief Justice of India or the Chief Justice of the High Court as the case may be. Therefore, to say that there is complete control and discretion of the Government in the process of these appointments, is devoid of merits. Under Section 109(12) of the CGST Act, the Government, in consultation with the President may, for the

administrative convenience, transfer—

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

56. Mr.Mohammed Shaffiq, learned Special Government Pleader (Taxes) appearing for the 4th respondent more or less adopted the arguments of the Union of India and stated that the judgment of the Hon'ble Supreme Court both the Madras Bar Association cases, is not applicable to tribunals which have not been constituted under Article 323-A and B of the Constitution of India. He would also submit that the tribunals in tax legislation are co- extensive/co-terminus with that of the assessing authority, in the exercise of quasi-judicial functions and thus may not be governed by Article 50 which deals with separation of judiciary from the executive. He would state that the limitation that the number of technical members shall not exceed the judicial members as laid down in the first Madras Bar Association case, is not an inviolable rule in law. He would argue that the constitution of the tribunal ought to be examined keeping in view the nature of the issues that may have to be adjudicated by the tribunal. He would state that if the nature of issues that are to be adjudicated are highly specialized requiring more technical members it may permissible to have greater number of technical members than judicial. He would submit that the composition of the tribunal would depend upon the nature of disputes that is to be adjudicated and there cannot be any straight jacket formula applied as suggested by the Petitioner. He would state that the GST is an amalgam of all the above fiscal legislations and the members need to be experts in the branch of taxation and therefore, the composition of the tribunal having more experts than the judicial member cannot be found fault with. It is therefore stated that in view of checks and balances in the form of appellate jurisdiction exercised by the High Court under Section 117 and by the Supreme Court under Section 118 of CGST Act and also the fact that the orders of the tribunal are subject to judicial review under Article 226 there are adequate safeguards and thus a mere existence of more numbers of nonjudicial members may not by itself result in invalidating the legislation.

57. Heard the learned counsel for the parties and perused the materials available on record.

58. The issues therefore, which arise for consideration are

(i) whether the exclusion of advocates from being considered for

appointment as a Judicial Member in GST Appellate Tribunal, is violative of Article 14 of the Constitution of India.

(ii) Whether Section 110 (b)(iii) which makes a member of the Indian Legal Service, eligible to be appointed as a Judicial Member of the appellate tribunal, contrary to the law laid down by the Hon'ble Supreme Court in ***Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1.**

(iii) whether the composition of the National Bench, Regional Benches, State Bench and Area Benches of the GST Appellate Tribunal, which consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), by which the administrative members outnumber the judicial member is violative of Articles 14 and 50 of the Constitution of India and the judgments of the Hon'ble Supreme Court of India.

59. The submission of Mr.Arvind Datar, learned senior counsel for the petitioners that since Section 110(1)(b) of the CGST Act, 2017 excludes the Advocates, from being considered for appointment as judicial member, Section 110 is violative of Article 14 of the Constitution of India, in as much as it even takes away the right of the Advocates from being considered to be appointed as a member of a tribunal, cannot be accepted. The Hon'ble Supreme Court has time and again held that the right to be considered arises only when the rules provide for the same. The right to be considered emanates from being eligible by virtue of an Act or any rule which gives such a right. In the absence of any right, one cannot contend that a person's right to be considered is taken away. The fact that Advocates were being considered for appointment to various tribunal does not mean that they have a constitutional / legal right to be considered for appointment as a member of any tribunal. The observations made in R.K.Jain's case were made only because the Act provided that the Advocates will be eligible to be considered for appointment as members of the tribunal. In the absence of any constitutional right, the vires of a section 110 (1)(b) cannot be struck down, because it does not include Advocates to be eligible to be appointed as Judicial Members. As stated earlier, there is no vested right for being considered for appointment to a post. Right to be considered is always subject to eligibility conditions prescribed from time to time. In ***P.Suseela Vs. UGC (2015 (8) SCC 129)***, the Hon'ble Supreme Court at paragraph No.16 has observed as under.

> "**16.** Similar is the case on facts here. A vested right would arise only if any of the appellants before us had actually been appointed to the post of Lecturer/Assistant Professors. Till that date, there is no vested right in any of the appellants. At the highest, the appellants could only

> contend that they have a right to be considered for the post of Lecturer/Assistant Professor. This right is always subject to minimum eligibility conditions, and till such time as the appellants are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition in the form of a NET test is laid down, it does not mean that any vested right of the appellants is affected, nor does it mean that the regulation laying down such minimum eligibility condition would be retrospective in operation. Such condition would only be prospective as it would apply only at the stage of appointment. It is clear, therefore, that the contentions of the private appellants before us must fail. "

60. The submission of the Union of India that the right of Advocates is only to practice in a Court or tribunal and the Advocates Act, 1961 does not guarantee any right to be considered for appointment. It is for the legislature to decide as to who should be considered as eligible for being appointed, as a member of any tribunal.

61. Even though the constitutional validity of Section 110(1)(b) cannot be struck down on the ground of non-inclusion of advocates as being eligible for being considered for appointment as Judicial Member to the Appellate Tribunal under the CGST or TNGST, yet this court is of the opinion that the Union of India must evaluate as to why it is making a departure from the existing practice. Advocates are eligible to be appointed as Judicial Members in the ITAT which is the oldest Tribunal in the country. Lawyers are eligible for appointment as Judicial Member in the Customs Excise Service Tax Appellate Tribunals. Mr.Arvind Datar is justified in contending that when the constitution provides that lawyers are eligible to be appointed as Judges of the High Court, then there is no reason to exclude them from being considered for appointment as Judicial Members. The Hon'ble Supreme Court in **R.K. Jain vs. Union of India's** case supra in paragraph 67 has held that the Members of the Tribunal must have a judicial approach and also knowledge and expertise in the particular branch of Law. A lawyer practising for 10 years in Taxation would definitely be well-equipped to grapple with the legal issues arising under the Act. It is to be noted that there is no reason given by the Union of India in their counter as to why lawyers have been excluded from the zone of consideration. For deciding the issues arising under the CGST Act and more particularly under Chapter III, it is necessary that the Judicial Member must have knowledge of various legal topics for which purpose a lawyer with sufficient experience and particularly with experience in Taxation Laws will be ideal to be appointed as a Judicial Member. Keeping in mind the existing practice in appointing lawyers to various

Tribunals as Judicial Members and the various issues that are likely to arise while adjudicating disputes under the CGST Act, we recommend that the Parliament should reconsider the issue regarding the eligibility of lawyers to be appointed as Judicial Members in the Appellate Tribunal.

62. The challenge to appointment of a person, who is or has been a member of Indian Legal Service and has held a post not less than Additional Secretary for a period of three years, is no longer res integra. The issue stands settled. Paragraph No.120 in ***Union of India Vs. R.Gandhi*** reported in **2010(11) SCC 1**, categorically states that a person who has held a position under the Indian Legal service cannot be considered for appointment as judicial members. The Hon'ble Supreme Court in paragraph No.112.6 and 112.7 observed as under.

> *"112.6. The next dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a National Company Law Tribunal with a President and a large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of National Company Law Tribunal which is a substitute for the High Court, for hearing winding up matters and other matters which were earlier heard by High Court. A member need not even be a Secretary or Addl. Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years (which means anyone belonging to Indian P&T Accounts & Finance Service, Indian Audit and Accounts Service, Indian Customs & Central Excise Service, Indian Defence Accounts Service, Indian Revenue Service, Indian Ordnances Factories Service, Indian Postal Service, Indian Civil Accounts Service, Indian Railway Traffic Service, Indian Railway Accounts Service, Indian Railway Personal Service, Indian Defence Estates Service, Indian Information Service, Indian Trade Services, or other Central or State Service) with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has `dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil services - Joint Secretary level officers or officers holding Group `A'*

> *posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group `A' posts to serve up to 65 years in Tribunals exercising judicial functions.*
>
> *112.7. The dilution of standards may not end here. The proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The speed at which the qualifications for appointment as Members is being diluted is, to say the least, a matter of great concern for the independence of the Judiciary."*

No doubt, the said observations have been made while deciding the qualifications of the members of NCLT & NCLAT, which exercises jurisdiction, previously exercised by the High Court. This dictum of the Hon'ble Supreme Court would apply to the appellate tribunal constituted under the CGST and TNGST also. The Members of Indian Legal Service cannot be considered for appointment as Judicial Members.

63. A perusal of the issues that are likely to arise with the tribunal shows that they are not merely technical matters, wherein which does not involve interpretation of law or adjudication on the basis of legal principles. The said tribunal is an appellate body against which an appeal, lies to Hon'ble Supreme Court. In this scenario it cannot be said that there is any difference from the standard applied to eligibility of members to be appointed to the NCLT / NCLAT and those members who have to be appointed to the GSTAT. In fact, the submission of the Union of India that the judgments of ***Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India*****, reported in 2014 (10) SCC 1,** would apply only to a tribunal which are formed under Articles 323 and 323 B, cannot be accepted.
64. The submissions made by Mr.Arvind P.Datar, learned senior counselthat even tribunals, which are not constituted under Article 323-B of the Constitution of India, there cannot be any difference in matters of appointment of members. All the tribunals regardless of the fact that they are tribunals constituted under Article 323-A, 323-B or under any statute, are a part of justice delivery system and for effective justice delivery system, there is a need of an independent impartial tribunal. As stated earlier all the cases coming before the CGSTAT or TNGSTAT deals with adjudication of cases against the State. In such circumstances to have more number

of members who are expert members (not Judges) will raise a reasonable apprehension in the minds of the assessee that they might not get fair justice and that the decision making, might be more oriented towards the State.

65. The Hon'ble Supreme Court of India, in ***R.K.Jain Vs. Union of India,*** reported in **1993 (4) SCC 119, *Union of India Vs. R.Gandhi* reported in 2010(11) SCC 1 and *Madras Bar Association Vs. Union of India*, reported in 2014 (10) SCC 1,** more or less echoed the same feelings.
66. Mr.Arvind Datar is correct in his submissions that the GSTAT, is replacing the CESTAT, Sales Tax / VAT Tribunals. The composition of GSTAT therefore, has to be on the same lines. In fact, Article 50 of the Constitution of India which provides for separation of the judiciary from the executive, must be interpreted in such a way that the dominance of the departmental / technical members, cannot overwhelmingly outweigh the judicial members.
67. The Court can take judicial notice of the fact that now the tribunals are taking over the subjects which were initially being dealt with / adjudicated by Courts. These subjects were adjudicated by Judicial Officers. Viewed in this angle, tribunals which primarily decide disputes between State and citizens cannot be run by a majority consisting of non-judicial members.
68. The Hon'ble Supreme Court in ***L.Chandrakumar Vs. Union of India, reported in 1997(3) SCC 261,*** after analysing the provisions in S.P.Sampath Kumar Vs. Union of India, reported in 1987 (1) SCC 124 and M.B.Majumdar Vs. Union of India, reported in 1990 (4) SCC 501, went on to hold that the tribunals created under Articles 323 and 323-B would not be a substitute for the High Court for the purpose of exercising Articles 226 & 227 of the Constitution of India. If that being so, then and in such of those cases, in order to maintain independency of judiciary, the expert members cannot outnumber the judicial members. Paragraph No.80 of the said judgment reads as under.

> *"80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:*

32. Remedies for enforcement of rights conferred by this Part.--
(1)..
(2) ..
(2) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2). Emphasis supplied)"

69. The Hon'ble Supreme Court in ***L.Chandra Kumar's case*** [quoted supra], has adverted to the Report of the Arrears Committee (1989-90), popularly known as and the Manlimath Committee, which has made recommendations regarding functions of tribunals. Para Nos.8.63 and 8.64 and 8.65 of the Report, has been reproduced in paragraph No.88 of the said judgment. It is specifically stated that the tribunals have not inspired confidence in the public mind and the foremost reason being lack of competence, objectivity and judicial approach. The next reason which is given by the Committee is the constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The committee has also stated that men of calibre are not being appointed as Presiding Officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. The Committee therefore has insisted that the tribunals must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. The Committee states that when a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members and value-discounting the judicial members would render the tribunals less effective and efficacious than the High Court. Paragraph 8.65 reads as under.

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value- discounting the judicial members

> *would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision making process, especially when the Government is a litigant in most of the cases coming before such tribunal. See S.P. Sampath Kumar v. Union of India reported in: (1987) ILLJ 128 SC. The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the Writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplant by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the frame work of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid."*

70. A perusal of the said paragraph though deals with tribunals, the said paragraph cannot be restricted only to the tribunals which substitute the High Court. As observed earlier, ***L.Chandrakumar's*** case [quoted supra] itself an authority for proposition that all the tribunals must be subject to the superintendence power of the High Court under Article 227 of the Constitution of India.
71. If that being so, the observations made in paragraph No.8.65, observed above, must also be applied to all the tribunals and more so such of the tribunals, whose decisions could be only challenged in the Hon'ble Supreme Court.
72. The tribunal consists of three members. Out of the three members, only one is a judicial member. The other two members are technical members, who would ordinarily possess little experience in law, though they might be otherwise adept in the understanding of the taxing statute. In these circumstances in a bench of 3 members, two of which would be technical members, there exists the possibility of the two technical members, arriving at a view, different from that of the Judicial member. Undoubtedly, mere possibility of the malafide exercise of power is no

ground to strike down an enactment, (Refer D.K. Trivedi & Sons, v State of Gujarat (1986) Supp SCC 20.), but in the instant case, the appropriateness of the tribunal discharging judicial function was in question. Naturally, in all GST related issues, the litigation shall be between an Assessee and the Govt. and this is yet another reason, that the presence of two members from the Govt. would create a further apprehension of bias, and lead an Assessee to believe, that perhaps the remedy itself is non-existent. This is of greater importance in view of the fact, that the Tribunal is discharging Judical Function.

73. It would be useful to refer to the provisions of the Income Tax, Act, 1961, qua a bench of the ITAT, which is extracted below:

> ***255. Procedure of Appellate Tribunal****.— (1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal from among the members thereof.*
>
> ***(2) Subject to the provisions contained in sub-section (3), a Bench shall consist of one judicial member and one accountant member.***

74. Thus, even under the Income Tax Act, 1961, the Parliament consciously chose to create a tribunal, which would comprise of a single judicial member, and a single accountant member. This would ensure that the matter before the ITAT, would have both a Judicial mind and an accountant mind applying to it, and both would have equal weight in the matter.

75. The position is that the Impugned Act is different. The issue regarding dominance of the technical members and constitutional validity of the same shall have to be examined keeping in mind the Judgements of the Hon'ble Supreme Court, relating to the importance of the independence of the Judiciary, as well as the manner in which the Parliament could establish Tribunals, to discharge what is essentially a Judicial Function.

76. In the case of ***Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1***, Justice K.K. Mathew, observed as under:

> ***318.*** *The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and, the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever-shifting tangle of human affairs. A large part of the effort of man over centuries has been expendedin seeking a solution of this great problem.* ***A region of law, in***

contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of the Government.If the lawmakers should also be the constant administrators and dispensers of law and justice, then, the people would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy*. And, in this age-old search of political philosophers for the secret of sound Government, combined with individual liberty, it was Montesquieu who first saw the light. He was the first among the political philosophers who saw the necessity of separating judicial power from the executive and legislative branches of Government. Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional principle which was universally valid. The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three watertight compartments.* ***Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation.***

319. *There can be no liberty where the legislative and executive powers are united in the same person or body of Magistrates, or, if the power of judging be not separated from the legislative and executive powers. Jefferson said:*

> *"All powers of Government — legislative, executive and judicial — result in the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic Government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy-three despots would surely be as oppressive as one."*
>
> *And, Montesquieu's own words would show that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental*

principles of a free Constitution are subverted. In Federalist No. 47, James Madison suggests that Montesquieu's doctrine did not mean that separate departments might have "no partial agency in or no control over the acts of each other". His meaning was, according to Madison, no more than that one department should not possess the whole power of another.

77. Similarly, the Supreme Court in the case of, ***Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193*****,** has explained the need for the independence of Judiciary**,** especially in a country like India, where the largest litigants are the States, as under:

50.Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for anyone to think otherwise. But this has been accomplished after a long fight culminating in the Act of Settlement, 1688. Prior to the enactment of that Act, a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the Judge did not deliver judgments to his liking. No less illustrious a Judge than Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ de non procedendo regeinconsulto commanding him to step or to delay proceedings in his Court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a Judge at pleasure by substituting "tenure during good behaviour" for "tenure at pleasure". The Judge could then say, as did Lord Bowen so eloquently:

"These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the

> *Bench, or move by one hair's breadth the even equipoise of the scales of justice."*

The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and ***the High Courts****. Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution-makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end.*

78. In the case of ***Ministry of Health & Welfare, Government of Maharashtra v. S.C. Malte, (2012) 13 SCC 118*****,** the Hon'ble Supreme Court observed as under.

> ***"30.*** *It is a known fact that a large part of the litigation in courts is generated from people being aggrieved against the governance, action and inaction of the Government including the executive and/or its instrumentalities. Thus, the courts must be kept free from any influence that the executive may be able to exercise by its actions, purely executive or even by its power of subordinate legislation. Where this Court refers to independence, fairness and reasonableness in decision- making as the hallmarks of judiciary, there it also states impartiality as one of its essentials.* ***Though, what is most important is the independence of judiciary, its freedom from interference and pressure from other organs of the State. The courts and Judges, thus, must be provided complete freedom to act, not to do what they like but to do what they are expected to do, legally and constitutionally and what the public at large expects of administration of justice****. If the State is able to exercise pressure on the Judges of the High Court by providing arbitrary or*

unreasonable conditions of service or altering them in an arbitrary manner, it would certainly be an act of impinging upon the independence of judiciary. Of course, what is put forward as part of the basic structure must be justified by reference to the provisions of the Constitution? When one looks into the scheme of our Constitution and the doctrine of separation of powers, there are many Articles, some of which I have already referred to, which clearly show that independence of the judiciary was of utmost concern with the Framers of the Constitution. Such intent of the Framers is not only ingrained into the ethos of our Constitution but is also explicitly provided for, even in the directive principles of the Constitution. Reference in this regard can usefully be made to Article 50 of the Constitution, which requires the State to separate the judiciary from the executive in public services of the State. This Article, with the passage of time, has turned into a constitutional mandate rather than a mere constitutional directive.

***31.** For the judiciary to be impartial and independent and to serve the constitutional goals, the Judges must act fairly, reasonably, free of fear and favour. The term "fear" as explained in various dictionaries, means "an unpleasant emotion caused by threat of danger, pain or harm; a feeling of anxiety regarding the likelihood of something unwelcome happening". (Concise Oxford English Dictionary, 11th Edn., Revised.) On the other hand, "favour" means "approval or liking; unfair preferential treatment, inclination, prejudice, predilection" (Concise Oxford English Dictionary, 11th Edn., Revised and Black's Law Dictionary, 8th Edn.).*

79. In the case of ***Brij Mohan Lal v. Union of India, (2012) 6 SCC 502*, at page 547,** it is observed as under

***"105.** The independence of the Indian judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution**. It has to be clearly understood that the State policies should neither defeat nor cause impediment in discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively**.*

80. In the case of ***S.P. Gupta v. Union of India, 1981 Supp SCC 87, the*** Hon'ble Supreme Court observed as under.

"334. *Dr Singhvi submitted that independence of judiciary comprises two fundamental and indispensable elements viz.* ***(1) independence of judiciary as an organ and as one of the three functionaries of the State, and (2) independence of the individual Judge.***

335.There can be no quarrel that this proposition is absolutely correct. Our Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method*—*

(1) by guaranteeing complete safety of tenure to Judges except removal in cases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one,

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive. Article 50 clearly provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. This important Directive Principle enshrined in Article 50 has been carried out by the Code of Criminal Procedure, 1973 which seeks to achieve complete separation of judiciary from the executive,

(3) so far as the subordinate judiciary is concerned the provisions

of Articles 233-36 vest full and complete control over them in the High Court. Only at the initial stage of the appointment of Munsifs or the District Judges, the Governor is the appointing authority and he is to act in consultation with the High Court but in all other matters like posting, promotion, etc., as interpreted by this Court in Samsher Singh case, the High Court exercises absolute and unstinted control over the subordinate judiciary. Promotion, holding of disciplinary inquiry, demotion, suspension of Sub-Judges lie with the High Court and the Governor has nothing to do with the same.

Hinting on the nature of the separation of powers brought about by our Constitution, this Court in Chandra Mohan v. State of U.P. made the following observations:

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue

writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction."

81. In the case of ***S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124 : (1987) 2 ATC 82*, at page 128 ,** Bhagwati C.J. (as he then was, remarked as under:)

> ***"3.*** *It is now well settled as a result of the decision of this Court in Minerva Mills Ltd. v. Union of India that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away.* ***If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is.*** *It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution.* ***Now a question may arise as to what are the powers of the executive and whether the executive has acted within the scope of its power. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action****. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power*

conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. That is why I observed in my judgment in Minerva Mills Ltd. case at p. 287 and 288: (SCC p. 678, para 87)

> *"I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no*

> *amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of the Article 368 is unconstitutional and void as damaging the basic structure of the Constitution."*
>
> *It is undoubtedly true that my judgment in Minerva Mills Ltd. case was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power,* ***Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court.*** *Then, instead of the High Court, it would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the rule of law.* ***Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.***

82. Thus, law has been settled by the Hon'ble Supreme Court, insofar, as the creation of

alternative institutions which would exercise judicial function, would be that the alternative institutional mechanism must not be less effective that the High Court. The Parliament, therefore only has the power to set up an alternative institutional mechanism, insofar as such institution offers an effective mechanism which is no less effective that a High Court. To be as effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent.

83. In the case of ***R.K. Jain v. Union of India, (1993) 4 SCC 119*****, at** the Hon'ble Supreme Court laid emphasis on the importance on the presence of judicial approach, in Tribunals constituted under Articles 323-A and 323-B, and the observations, are extracted as under:

> ***"67.*** *The tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers.* ***So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.***

84. In the case of ***Union of India v. Madras Bar Assn., (2010) 11 SCC 1*****,** the Hon'ble Supreme Court has remarked as under:

> ***"90. But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the***

***independence, security and capacity associated with courts**. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional.*

93.** If the Act provides for a tribunal with a judicial member and a technical member, does it mean that there are no limitations upon the power of the legislature to prescribe the qualifications for such technical member? The question will also be whether any limitations can be read into the competence of the legislature to prescribe the qualification for the judicial member? The answer, of course, depends upon the nature of jurisdiction that is being transferred from the courts to tribunals.* ***Logically and necessarily, depending upon whether the jurisdiction is being shifted from a High Court, or a District Court or a Civil Judge, the yardstick will differ. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees.

We may summarise the position as follows:

A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.

Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly, while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. ***If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary.*** *Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.*

120. *We may now tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:*

(xiii) Two-member Benches of the Tribunal should always have a judicial member. Whenever any larger or special Benches are constituted, the number of technical members shall not exceed the judicial members.

85. Thus, in the case of Madras Bar Association, one of the main defects found in the NCLAT by the Hon'ble Supreme Court, which ultimately had to be remedied by Parliament, was in respect of the Constitution of a Tribunal. It became necessary for the Tribunal to consist of at least one judicial member, and in the event that a larger bench was to be formed, such larger bench would necessarily require the present of judicial members at par, or in excess of the no. of technical members.

86. In the case of ***Madras Bar Assn. v. Union of India, (2014) 10 SCC 1,*** the Hon'ble Supreme Court observed as under:

> ***124.*** *One needs to also examine sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act, with pointed reference to the role of the Central Government in determining the sitting of the Benches of NTT. The Central Government has been authorised to notify the area in relation to which each Bench would exercise jurisdiction to determine the constitution of the Benches, and finally to exercise the power of transfer of Members of one Bench to another Bench.* ***One cannot lose sight of the fact that the Central Government will be a stakeholder in each and every appeal/case which would be filed before NTT. It cannot, therefore, be appropriate to allow the Central Government to play any role, with reference to the places where the Benches would be set up, the areas over which the Benches would exercise jurisdiction, the composition and the constitution of the Benches, as also, the transfer of the Members from one Bench to another.*** *It would be inappropriate for the Central Government to have any administrative dealings with NTT or its Members. In the jurisdictional High Courts, such power is exercised exclusively by the Chief Justice in the best interest of the administration of justice. Allowing the Central Government to participate in the aforestated administrative functioning of NTT, in our view, would impinge upon the independence and fairness of the Members of NTT.* ***For the NTT Act to be valid, the Chairperson and Members of NTT should be possessed of the same independence and security as the Judges of the jurisdictional High Courts (which NTT is mandated to substitute). Vesting of the power of determining the jurisdiction, and the postings of different Members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the Members of NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting****. An unsuitable/disadvantageous Chairperson or Member could be easily moved to an insignificant jurisdiction or to an inconvenient*

posting. This could be done to chastise him, to accept a position he would not voluntarily accede to. We are, therefore of the considered view, that Section 5 of the NTT Act is not sustainable in law as it does not ensure that the alternative adjudicatory authority is totally insulated from all forms of interference, pressure or influence from coordinate branches of Government. ***There is therefore no alternative but to hold that sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act are unconstitutional.***

126. *This Court has declared the position in this behalf in L. Chandra Kumar case and in Union of India v. Madras Bar Assn. case, that Technical Members could be appointed to the tribunals, where technical expertise is essential for disposal of matters, and not otherwise.* ***It has also been held that where the adjudicatory process transferred to a tribunal does not involve any specialised skill, knowledge or expertise, a provision for appointment of non-Judicial Members (in addition to, or in substitution of Judicial Members), would constitute a clear case of delusion and encroachment upon the "independence of judiciary", and the "rule of law".It is difficult to appreciate how Accountant Members and Technical Members would handle complicated questions of law relating to tax matters, and also questions of law on a variety of subjects (unconnected to tax), in exercise of the jurisdiction vested with NTT****. That in our view would be a tall order. An arduous and intimidating asking. Since the Chairperson/Members of NTT will be required to determine "substantial questions of law", arising out of decisions of the Appellate Tribunals, it is difficult to appreciate how an individual, well-versed only in accounts, would be able to discharge such functions. Likewise, it is also difficult for us to understand how Technical Members, who may not even possess the qualification of law, or may have no experience at all in the practice of law, would be able to deal with "substantial questions of law", for which alone, NTT has been constituted.*

87. In the case of ***State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412*****,** after analysing the provisions of the Consumer Protection Act, 1986, the Hon'ble Supreme Court upheld the validity of the Consumer Protection Act, for several reasons, including the fact that the tribunals had been established to provide consumers with an efficacious remedy, against big corporations. The Hon'ble Supreme Court however, after analysing the composition of the various fora, remarked as under:

"28. *Section 19 provides for an appeal from a decision of the State*

Commission to the National Commission. Section 20 deals with the composition of the National Commission, the President whereof would be a person who is or has been a Judge of the Supreme Court and such appointment shall be made only upon consultation with the Chief Justice of India. So far as the members of the National Commission are concerned, the same are also to be made on the recommendation of the Selection Committee, the Chairman whereof would be a person who is a Judge of the Supreme Court to be nominated by the Chief Justice of India. The tenure of the office of the National Commission is also fixed by reason of sub-section (3) of Section 20.

29. By reason of the provisions of the said Act, therefore, independent authorities have been created.

88. The Hon'ble Supreme Court laid great emphasis on the need and importance of independence of the fora, and was one of the factors in upholding the validity of the Act.While the observation of the Court might not in the strict sense be the *ratio* of the case, it certainly does follow the long line of Judgements of the Hon'ble Supreme Court, which have laid great emphasis on the need for independence in Tribunals, which are meant to exercise Judicial Function.

89. The Hon'ble Supreme Court in ***Columbia Sportswear Company Vs. Director of Income Tax***, reported in ***2012 (11) SCC 224,*** has observed as under:

"9. *The meaning of the expression "tribunal" in Article 136 and the expression "tribunals" in Article 227 of the Constitution has been explained by Hidayatullah, J., in Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala [AIR 1961 SC 1669] in para 32, relevant portion of which is quoted hereinbelow: (AIR p. 1680)*

"32. With the growth of civilisation and the problems of modern life, a large number of administrative tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts. When the Constitution speaks of 'courts' in Articles 136, 227 or 228 or in Articles 233 to 237 or in the Lists, it contemplates courts of civil

> *judicature but not tribunals other than such courts. This is the reason for using both the expressions in Articles 136 and 227.*
>
> *By 'courts' is meant courts of civil judicature and by 'tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established."*
>
> ***10.** Thus, the test for determining whether a body is a tribunal or not is to find out whether it is vested with the judicial power of the State by any law to pronounce upon rights or liabilities arising out of some special law and this test has been reiterated by this Court in Jaswant Sugar Mills Ltd. v. Lakshmi Chand [AIR 1963 SC 677] , Associated Cement Companies Ltd. v. P.N. Sharma [AIR 1965 SC 1595] and in the recent decision of the Constitution Bench in Union of India v. Madras Bar Assn. [(2010) 11 SCC 1] "*

90. The crux of the argument of the Union of India that since the Appellate Tribunal under CGST Act, 2017 and the TNGST Act, 2017 is not a substitute to the High Court, the principles laid down in ***L.Chandrakumar Vs. Union of India, reported in 1997(3) SCC 261, Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India*****, reported in 2014 (10) SCC 1,** cannot be made applicable to the facts of this case, cannot be accepted in the light of the pronouncements of the Court quoted supra.

91. The hierarchy of forums under the Act provides for an adjudicating authority. The adjudicating authority is defined in Section 2(4) of the CGST Act, which reads as under.

> *(4)* "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal;

92. The appellate authority is defined in Section 2(8) of the CGST Act, which reads as under:

"Appellate Authority" means an authority appointed or authorised to hear appeals as referred to in section 107;

93. The appellate tribunal is defined in Section 2(9) of the CGST Act, which reads as under:

    "Appellate Tribunal" means the Goods and Services Tax Appellate Tribunal constituted under section 109;

94. An appeal from the adjudicating authority lies to an appellate authority under Section 107 of the CGST Act. Section 107 (16) states that the order of the appellate authority, subject to the provisions of Section 108 or Section 113 or Section 117 or Section 118, is final.

95. The revisional authority is defined in Section 2(99) of the CGST Act, which reads as under.

    (*99*) "Revisional Authority" means an authority appointed or authorised for revision of decision or orders as referred to in section 108;

96. The revisional authority subject to the provisions of Section 121 and any rules made thereunder, may, on his own motion or upon information received by him or on request from the Commissioner of State tax, or the Commissioner of Union Territory Tax, shall call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Service tax Act or the Union Territory Goods and Services Tax Act, by any officer subordinate to him is erroneous and is prejudicial to the interest of revenue or it is illegal or improper or has not taken into account certain material facts, shall stay the operation of the order for such period as he deems fit and after giving the person concerned, an opportunity of being heard, can pass order as he thinks just and proper, including enhancing or modifying or annulling the said decision or order .

97. The order of the appellate authority and the order of the revisional authority, are taken to the appellate tribunal. The appellate tribunal is constituted under Section 109 of the CGST Act, quoted supra.

98. A perusal of Section 109 shows that it consists of a National Bench or the Regional Benches and State bench or the Area Benches. Section 109(5) provides that the National Bench and the Regional Benches, shall hear the appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply and order of the National Bench or the Regional Benches can be challenged only in the Hon'ble Supreme Court.

99. The orders of the National Bench or the Regional Benches are not subjected to any appellate jurisdiction of High Court. It is therefore similar to an order passed by a

Central Administrative Tribunal. It is a different question as to whether such an order would be subjected to Article 227 of the Constitution of India or not and we are not going into the controversy. This Court is aware of the fact that the National Tribunal cannot adjudicate the vires of the notifications issued under the Act or the constitutional validity of the notifications / regulations and the very consequences of the Act, but nevertheless, it cannot be said that the National Bench is only an extension of the mechanism to determine only the quantum of tax, which is only a subject matter of experts. The quantum of tax is determined on the interpretation of various sections and notifications. It also involves adjudication upon the orders of the appellate authority. It has to be borne in mind that the decision making process has to be scrutinised by the tribunal. In doing so, judicial principles have to be kept in mind. The criticism of the Manlimath Committee, that any weightage in favour of the service members or expert members and value- discounting the judicial members would render the tribunal less effective and efficacious than the High Court, would clearly apply to the Appellate Tribunal. It is well accepted that the tribunal must inspire confidence in the assessee for which purpose the members must have legal training, experience, judicial acumen, equipment and approach.

100. Similarly, even though the judgment of the State Bench or the Area Benches is subject to an appeal to High Court, it is well settled that while giving judicial decisions, Judges should be able to act impartially, objectively and without any bias. Infact the Hon'ble Supreme Court in ***Manak Lal (Shri), Advocate Vs. Prem Chand Singhvi and Others***, reported in **1957 SCR 575** has observed that when a tribunal or a Court decides the matter, the test is not whether in fact a bias has affected the judgment. The test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the tribunal.

101. The disputes which arise in these tribunals are between the assessee and the State. The technical members are nominees of the State government. In fact the Hon'ble Supreme Court in Manak Lal's case [quoted supra] has observed as under.

> *"4... In dealing with cases of bias attributed to members constituting Tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a Judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it*

is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. "The principle", says Halsburry, ***"nemo debet esse judex in causa propria sua*** *precludes a justice, who is interested in the subject-matter of a dispute, from acting as a justice therein". In our opinion, there is and can be no about about the validity of the principle and we are prepared to assume that this principle applies not only to the justices as mentioned by Halsbury but to all Tribunals and bodies which are given jurisdiction to determine judicially the rights of parties."*

102. Further as stated earlier, the appellate tribunal is constituted also to see whether the legal principles and the decision making process are correct and fair. The expert members, who are not well trained in law, cannot be permitted to overrule the judicial member on these aspects.

103. A Hon'ble Division Bench judgment of this Court in ***S.Manoharan Vs. The Deputy Registrar, Central Administrative Tribunal, Principal Bench, New Delhi & Others, reported in 2015 (2) Law Weekly 343,*** while considering an issue as to whether the number of administrative members can be more than the judicial members in the Central Administrative Tribunal, compared the composition of the National Green Tribunal constituted under the National Green Tribunal Act, 2010. Proviso to Section 4 (4)(c) of the National Green Tribunal Act provides that number of expert members shall be equal to number of judicial members. This Court in para 41 and 42 of the said judgment interpreted Section 21, Section 4(4) read with Section 35 of the National Green Tribunal Act, 2010 and Rule 3(1) of the National Green Tribunal (Practices and Procedure) Rules, 2011 and observed as under.

"41. But, Section 21 of the National Green Tribunal Act, 2010 contains a Catch-22 situation. It declares that the decision of the Tribunal by majority of members shall be binding. The First Proviso to Section 21 states that if there is a difference of opinion among the Members and the opinion is equally divided, the Chairperson shall hear such application and decide. The Second Proviso to Section 21 states that where the Chairperson himself has heard such application along with other Members and if the opinion among the Members is equally divided, he shall refer the matter to the other Members of the Tribunal. This is despite the fact that the Chairperson of the Tribunal, as per Section 5(1) of the Act, should have been either a Judge of the Supreme Court or the Chief Justice of a High Court. Perhaps, the situation contemplated by the

Second Proviso to Section 21 of the National Green Tribunal Act, 2010 has not so far arisen, where it is possible for an Expert Member to tilt the balance in favour of the one contrary to what one set of Members including the Chairperson had decided.

It appears that in exercise of the powers conferred by Section 4(4) read with Section 35 of the National Green Tribunal Act, 2010, the Central Government has issued a set of rules known as National Green Tribunal (Practices and Procedure) Rules, 2011. Rule 3(1) of these Rules empowers the Chairperson of the Tribunal to constitute a Bench of two or more Members consisting of at least one Judicial Member and one Expert Member. Under Rule 5(1), an application or appeal should be heard by the Tribunal consisting of at least one Judicial and one Expert Member. But, interestingly, Rule 5(2) is conspicuously silent about the ratio between Judicial and Expert Members. Therefore, one has to fall back upon the Proviso to Rule 4(4)(c) that mandates a Bench of more than two Members to be loaded with equal number of Judicial and Expert Members.

If we carefully analyse the scheme of Section 5(4)(d) of the Administrative Tribunals Act, 1985 and the Proviso thereunder, in the context of Section 4(4)(c) and the Proviso thereunder of the National Green Tribunal Act, 2010, in the backdrop of the development of law from S.P. Sampath Kumar to L. Chandra Kumar to R. Gandhi to Madras Bar Association, it will be clear that a Bench of more than three Members cannot be overloaded with Administrative Members. If substantial questions of law, as per the decision in the National Tax Tribunals Act case, cannot be decided by Tribunals loaded with Administrative Members, it is incomprehensible that a reference made to a larger Bench of an Administrative Tribunal, which would ordinarily require an exposition of a substantial question of law, can be decided by two Administrative Members, making the Judicial Member a minority. What John Marshall said in Marbury v. Madison [2 L Ed 60 : 5 US (1) Crunch 137 (1803)] could be of assistance in resolving the issue on hand and hence, it is extracted as follows

> *"It is emphatically the province and duty of the Judicial Department to say what the law is…. If two laws conflict with each other, the Courts must decide on the operation of each…"*

104. Ultimately, in paragraph no.44, the Hon'ble Division Bench came to the final

conclusion and observed as under.

> *"44. The Proviso to Section 5(4)(d) of the Administrative Tribunals Act, 1985 cannot be understood to mean that the Parliament contemplated a single Judicial Member to be a decorative piece in a Bench of more than two. Therefore, we are of the considered view that in a Bench of more than two Members constituted by the Chairperson of the Administrative Tribunal, the number of Administrative Members cannot exceed the number of Judicial Members."*

105. The principle which emerges is that while deciding issues as to whether the decision making process by the adjudicating authority or the appellate authority was just, fair and reasonable and to decide issues regarding interpretation of notifications and sections under the CGST Act a properly trained judicially mind is necessary which the experts will not have. The number of expert members therefore cannot exceed the number of judicial members on the bench.

106. In the result,

> *(i) Section 110(1)(b)(iii) of the CGST Act which states that a Member of the Indian Legal Services, who has held a post not less than Additional Secretary for three years, can be appointed as a Judicial Member in GSTAT, is struck down.*
>
> *(ii) Section 109(3) and 109(9) of the CGST Act, 2017, which prescribes that the tribunal shall consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), is struck down.*
>
> *(iii) The argument that Sections 109 & 110 of the CGST Act, 2017 and TNGST Act, 2017 are ultra vires, in so far as exclusion of lawyers from the scope and view for consideration as members of the tribunal, is rejected. However, we recommend that the Parliament must consider to amend section for including lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.*

107. The writ petitions are allowed to the above said extent. No Costs. Consequently, the connected writ miscellaneous petitions are closed.

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SUPREME COURT OF INDIA

Civil Appeal No. 7432 of 2019
SEPTEMBER 19, 2019

UNION OF INDIA …. Petitioner
VERSUS
UNICORN INDUSTRIES …. Respondents

For the Petitioner (S):
For the Respondent (S):

Withdrawal of exemption from excise duty to pan masala with tobacco and pan masala sans tobacco is in larger public interest. Doctrine of promissory estoppel could not have been invoked against such withdrawal. State could not be compelled to continue exemption, though it was satisfied that it was not in public interest to do so. Larger public interest would outweigh an individual loss, if any

HON'BLE JUSTICE ARUN MISHRA
HON'BLE JUSTICE M.R. SHAH
HON'BLE JUSTICE B.R. GAVAI

B.R. Gavai, J. - Leave granted in S.L.P.(C) No. 36926 of 2012.
2. The question of law that arises for consideration in these appeals is, 'as to whether, by invoking the doctrine of promissory estoppel, can the Union of India be estopped from withdrawing the exemption from payment of Excise Duty in respect of certain products, which exemption is granted by an earlier notification; when the Union of India finds that such a withdrawal is necessary in the public interest.
3. Since the factual position as well as the question of law arising in the present three appeals are common, they are heard together and disposed of by this common judgment. The appellant, Union of India, in exercise of powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1994) (hereinafter referred to as the "Central Excise Act") read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), being satisfied that it is necessary in the public interest, by Notification No. 71 of 2003 dated 09.09.2003, exempted the goods specified in the First Schedule and the

Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) other than the goods specified in Annexure-I to the said Notification, from the payment of duties under the said statutes. The notification provided that so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as was equivalent to the amount of duty paid by the manufacturer of the said goods, other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, was exempted. This exemption was available to the units located in Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, in the State of Sikkim, as specified in Annexure-II appended to the said notification. A procedure was also prescribed under the said notification for availing the benefit of exemption. Annexure-I thereto provides the list of the products which were not entitled for exemption. Clause 1 of the said Annexure reads thus:

"1. Tobacco and Tobacco products including Cigarettes/ Cigars/ Gutkha"

Similar notifications were issued by the Union of India being Notification Nos. 32 of 1999-CE and 33 of 1999-CE dated 08.07.1999 insofar as the State of Assam is concerned.

4. By Notification No. 21 of 2007-CE dated 25.04.2007, the earlier notifications issued by it were amended. The effect of the amendment was that the product 'pan masala' falling under Chapter 21 of the First Schedule of the Central Excise Tariff Act, 1985, the goods falling under Chapter 24 of said First Schedule, i.e., tobacco and manufactured tobacco substitutes and plastic carry bags of less than 20 microns were included in the negative list and as such were no longer entitled for exemption from the excise duty. Being aggrieved by the said notification, the respondent, namely, Unicorn Industries in the Civil Appeal arising out of Special Leave Petition (C) No. 36926 of 2012, approached the High Court of Sikkim by way of Writ Petition (C) No. 22 of 2007. The High Court of Sikkim vide its judgment and order dated 11.05.2012 allowed the writ petition and held that the petitioner therein was entitled to exemption from payment of excise duty on the manufacture of pan masala from its unit situated in the State of Sikkim for a period of 10 years from the date of commencement of the commercial production, i.e., 27.06.2006.

5. Similarly, the respondent in Civil Appeal No. 2346 of 2017, namely, M/s Dharampal Satyapal Ltd., which was a manufacturer of pan masala with tobacco and other tobacco products, approached the Gauhati High Court by way of a petition bearing No. PW(C) 749 of 2010. The said petition was with regard to withdrawal of exemption in respect of pan masala with tobacco. The Single Judge of the Gauhati High Court *vide* judgment and order dated 10.12.2010 found no substance in the petition and as such dismissed the

petition. Being aggrieved thereby, the said respondent filed Writ Appeal No. 81 of 2011 before the Appellate Bench of Gauhati High Court. Vide the judgment and order dated 20.04.2016, the Appellate Bench of the High Court allowed the appeal; set aside the judgment and order passed by the Single Judge dated 10.12.2010 and quashed Notification No. 11 of 2007-CE dated 01.03.2007. It further directed the Investment Appraisal Committee to give an opportunity of hearing to the appellant before it (respondent herein) so that it can prove the amount it had actually invested in the specified items for availing the benefits under the earlier notifications and further directed that if the appellant proves that it had actually invested the amount, the respondent authorities shall refund to the appellant so much of the excise duty to which the appellant therein would be entitled as per the earlier notifications.

6. The respondent in Civil Appeal No. 2345 of 2017, namely, M/s Dharampal Satyapal Ltd., had also filed another petition being Writ Petition (C) No. 749 of 2010 insofar as its product 'pan masala without tobacco', is concerned. The same was also dismissed by the learned Single Judge of the Gauhati High Court *vide* the common judgment and order dated 10.12.2010. It appears that the appeal arising from the said petition being Writ Appeal No. 223 of 2011 was separately heard by another Appellate Bench of the Gauhati High Court. However, noticing that the writ appeal arising out of the order of the Single Judge regarding the product of the appellant therein, i.e., 'pan masala containing tobacco' was already allowed by the Appellate Bench of the High Court by Order dated 20.04.2016, the said writ appeal was also allowed, by the judgment and order dated 25.05.2016 thereby setting aside the Order passed by the learned Single Judge in Writ Petition (C) No. 749 of 2010 so also the Notification dated 25.04.2007. The respondent therein was directed to refund the excise duty component to the appellant as is admissible under the law.

7. Being aggrieved by the aforesaid judgments and orders, one passed by the Sikkim High Court in the writ petition and the other two passed by the Gauhati High Court in the writ appeals, the Union of India is before this Court.

8. Mr. Dhruv Agrawal, learned senior counsel appearing on behalf of the appellants, submits that both, the Sikkim High Court as well as the Appellate Benches of the Gauhati High Court have grossly erred in allowing the writ petition and the writ appeals of the assessees. It is submitted that, though the Union of India had specifically contended before both the High Courts that the 2007 Notifications were issued in the public interest, the same has not been considered. It is submitted that the Union of India, in exercise of its delegated powers, is always empowered to modify and withdraw the exemptions granted by it under the earlier notification(s). It is submitted that the Union of India, taking into consideration the public interest, that the consumption of pan masala with

tobacco or pan masala without tobacco is hazardous to the human health and, therefore, for curbing its consumption, had issued the 2007 Notifications thereby including pan masala in Chapter 21 and all products contained in Chapter 24, i.e., tobacco and manufactured tobacco substitutes, in the negative list. It is submitted that, after taking into consideration that the 2007 Notification was issued in public interest, the Sikkim High Court ought not to have interfered with it. He further submitted that the reasoning given by the Sikkim High Court that pan masala is not hazardous and, therefore, the 2007 Notification cannot be said to be in the public interest is totally erroneous. It is further submitted that while doing so, the Sikkim High Court has assumed the role of an expert in the field and, therefore, travelled beyond its jurisdiction.

9. Insofar as the Gauhati High Court is concerned, the learned senior counsel submitted that the learned Single Judge of the Gauhati High Court had rightly dismissed the writ petitions, finding that in the conflict between the interest of an individual and the public interest, individual interest should give way to the larger public interest. It is submitted that, the Appellate Bench of the Gauhati High Court in its judgment dated 20.04.2016 has grossly erred in interfering with the reasoned order passed by the learned Single Judge. It is submitted that, in the said appeal, the product that fell for consideration before the Appellate Bench of the High Court was Zarda scented tobacco and pan masala containing tobacco. It is submitted that, the products containing tobacco are indisputably hazardous to health and, therefore, the Notification which withdraws exemption granted for the manufacture of the said products is undoubtedly in the larger public interest. However, overlooking this aspect, the appeals have been allowed. It is submitted that insofar as the other appeal is concerned, the another Appellate Bench has only relied upon the judgment by the earlier Appellate Bench and has observed that the only distinction in both the matters was that in the earlier matter, the issue was with regard to pan masala containing tobacco and in the matter before them, the issue was with regard to pan masala without tobacco and with these observation allowed the appeal.

10. The learned senior counsel relied on the following judgments of this Court in the cases of *Kasinka Trading* v. *Union of India* [1995] 1 SCC 274, *Darshan Oils (P) Ltd.* v. *Union of India* [1995] 1 SCC 345, *STO* v. *Shree Durga Oil Mills* [1998] 1 SCC 572, *Shrijee Sales Corpn.* v. *Union of India* [1997] 3 SCC 398, *State of Rajasthan* v. *Mahaveer Oil Industries* [1999] 4 SCC 357, *Shree Sidhbali Steels Ltd.* v. *State of U.P*. [2011] 3 SCC 193, *DG of Foreign Trade* v. *Kanak Exports* [2016] 2 SCC 226, *Pappu Sweets and Biscuits* v. *Commr. Of Trade Tax, U.P*. [1998] 7 SCC 228and *Commr. of Customs* v. *Dilip Kumar & Co.* [2018] 9 SCC 1,.

11. Shri Balbir Singh and Shri Nakul Dewan, learned senior counsel appearing on behalf of the respondents, have supported the impugned judgments and orders. It is submitted

that, the Sikkim High Court as well as the Appellate Benches of the Gauhati High Court have rightly relied upon the doctrine of promissory estoppel and allowed the appeals. It is submitted that, it is only on account of the representation given by the Union of India and the State Governments that the industries established in the notified areas of Sikkim as well as Assam would be entitled for 100% exemption from central excise, the writ petitioners before the High Court had established the industries in such remote areas. It is submitted that, the exemption notifications were issued in view of the industrial policy of the Union of India as well as the State Governments that on account of backwardness in these areas, the industrialisation in these areas should be promoted so that the economic development takes place. It is submitted that, only on the assurance of the Central as well as the State Governments, the writ petitioners have invested huge amount and, as such, now the Union of India could not be permitted in law to resile from the assurance given by them to the writ petitioners. It is submitted that, considering these principles, the Sikkim High Court and the Appellate Bench of the Gauhati High Court have granted relief to the writ petitioners. It is submitted that, this Court has consistently held that, if a party changes its position to its detriment, on account of a promise given by the other party, the other party cannot be permitted to resile from such a promise. It is submitted that the doctrine of promissory estoppel is equally applicable to the State and its functionaries. Reliance in this respect is placed on the following judgments of this Court. *M/s Motilal Padampat Sugar Mills Co. Ltd.* v. *State of Uttar Pradesh and Ors*. [1979] 2 SCC 409, *Union of India & Ors.* v. *Godfrey Philips India Ltd. & Ors*. [1985] 4 SCC 369 and *Pawan Alloys & Casting Pvt. Ltd.* v. *U.P. State Electricity Board & Ors*. [1997] 7 SCC 251.

12. The issue raised in these appeals is no more *res integra*. This Court in a catena of decisions has considered the issue with regard to inapplicability of the doctrine of promissory estoppel, when the larger public interest demands so. We will refer, in brief, to the earlier judgments of this Court.

13. In the case of *Kasinka Trading* (*supra*), this Court was considering the case of the appellant, who were manufacturing certain products, requiring PVC resin as one of the raw materials for its manufacturing process. By Notification No. 66 dated 15.03.1979 issued under Section 25 of the Customs Act, 1962 which is pari materia with Section 5A of the Central Excise Act, the PVC resin was exempted from basic import duty. The exemption was to be effective till 31.03.1981. However, by Notification No. 205 dated 16.10.1980 issued under Section 25 of the Customs Act, the exemption granted earlier came to be withdrawn. A challenge similar to the one which is raised herein was raised before this Court. This Court observed thus:

> **"12.** It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. **In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."**
>
> (emphasis supplied)

14. It could thus be seen that, this Court has clearly held that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to see all aspects including the objective to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principle of equity must forever be present in the mind of the Court while considering the applicability of the doctrine. It has been held that the doctrine of promissory estoppel must yield when the equity so demands and when it can be shown having regard to the facts and circumstances of the case, that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation. After considering the earlier judgments on the issue, which have been heavily relied upon by the assesses, this Court has observed thus:

> "21. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the

taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. **It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner.**"

(emphasis supplied)

15. It could thus be seen that, it has been held by this Court that an exemption notification does not make the items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty etc. subject to such conditions as may be laid down in the "public interest". It has further been held that, such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. It has been held that the supersession or revocation of an exemption notification in the public interest is an exercise of the statutory power by the State under the law itself. It has further been held that under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner.

16. This Court, after considering the objections that the exemption could not be withdrawn prior to the date prescribed in the notification granting exemption has observed thus:

"23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. **The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona**

> **fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act."**
> (emphasis supplied)

17. It has been observed, that the withdrawal of exemption in public interest is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the public interest. It has been held that, where the Government acts in public interest and neither any fraud or lack of bona fides is alleged much less established, it would not be appropriate for this Court to interfere with the same. Ultimately, this Court came to the conclusion that the withdrawal of the exemption was in the public interest and, therefore, refused to interfere with the order of the Delhi High Court dismissing the petitions.

18. In the case of Shree Durga Oil Mills (supra), the Government of Orissa had withdrawn the sales tax exemption which was granted earlier under the Orissa Sales Tax Act, 1947. Considering a similar challenge, while reversing the judgment and order of the High Court, this Court observed thus:

> "21. Moreover withdrawal of notification was done in public interest. The Court will not interfere with any action taken by the Government in public interest. Public interest must override any consideration of private loss or gain.
>
> 23. In the instant case, it has been stated on behalf of the State that various notifications granting sales tax exemptions to the dealers resulted in severe resource crunch. On reconsideration of the financial position, it was decided to limit the scope of the earlier exemption notifications issued under Section 6 of the Orissa Sales Tax Act. Because of this new perception of the economic scenario of the State, the scope of the earlier notifications had to be restricted. They were first abrogated altogether on 20-5-1977. Thereafter, it was decided to grant exemption at a limited scale.
>
> 24. In our opinion, the plea of change of policy trade on the basis of resource crunch should have been sufficient for dismissing the respondent's case based on the doctrine of promissory estoppel. Public interest demanded modification of the earlier IPR."

19. It could thus be seen that, it has been held that when withdrawal of the exemption is in public interest, the public interest must override any consideration of private loss or gain. In the said case, the change in policy and withdrawal of the exemption on the

ground of severe resource crunch have been found to be a valid ground and to be in public interest.

20. A similar issue came up for consideration before the Bench consisting three Judges of this Court in the case of *Shrijee Sales Corporation* (*supra*). The notification which came up for consideration was similar with the notifications that fell for consideration in the case of *Kasinka Trading* (*supra*). While considering the argument that when the notification prescribes a period during which the exemption would be available, such an exemption cannot be withdrawn till the end of the period prescribed, this Court observed thus:

> "**7.** The next question is whether the fact that the Notification No. 66 mentioned the period during which it was to remain in force, would make any difference to the situation. In other words, could it be said that an exemption notified without specifying the period within which the exemption would remain in force, would be withdrawn in public interest but not the one in which a period has been so specified? **Once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where a period has been indicated.** The Government is competent to resile from a promise even if there is no manifest public interest involved, provided, of course, no one is put in any adverse situation which cannot be rectified. To adopt the line of reasoning in *Emmanuel Ayodeji Ajayi* v. *Briscoe,* [1964] 3 All ER 556, quoted in M.P. Sugar Mills [*Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, [1979] 2 SCC 409, even where there is no such overriding public interest, it may still be within the competence of the Government to resile from the promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, provided, of course, it is possible for the promisee to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable."
> (emphasis supplied)

21. It could thus be seen that this Court observed that once public interest is accepted as a superior equity which can override an individual equity, the same principle should be applicable in such cases where the period is prescribed.

22. The another three Judges Bench of this Court in the case of *Mahavir Oil Industries* (*supra*) has taken a similar view. In the case of *Shree Sidhbali Steels Ltd.* (*supra*), this Court was considering the question with regard to validity of the notification which withdrew 33.33% of the hill development rebate, on the total amount of electricity bill, granted under the earlier notification. This Court while considering the similar challenge observed thus:

"33. Normally, the doctrine of promissory estoppel is being applied against the Government and defence based on executive necessity would not be accepted by the court. However, if it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the Government. **Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy in public interest.** However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law."
(emphasis supplied)

23. It could thus be seen that, this Court again reiterated the position that where public interest warrants, the principle of promissory estoppel cannot be invoked. Observing the aforesaid, the said challenge, as raised by the petitioner, came to be rejected.

24. In the case of *Kanak Exports* (*supra*), this Court again while considering the challenge for withdrawal of incentives to the exporters of some specified items held that, the incentive scheme in question was in the nature of concession or incentive which was a privilege of the Central Government. It was for the Government to take a decision to grant such a privilege or not. Grant of exemption, concession or incentive and modification thereof are the matters in the domain of public decisions of the Government. It further reiterated that when the withdrawal of such incentives was shown to have been done in public interest, the courts would not tinker with the policy decisions. This Court, after considering the materials on record as a matter of fact, held that withdrawal of exemption was in the public interest.

25. It could thus be seen that, it is more than well settled that the exemption granted, even when the notification granting exemption prescribes a particular period till which it is available, can be withdrawn by the State, if it is found that such a withdrawal is in the public interest. In such a case, the larger public interest would outweigh the individual interest, if any. In such a case, even the doctrine of promissory estoppel would not come to the rescue of the persons claiming exemptions and compel the State not to resile from its promise, if the act of the State is found to be in public interest to do so.

26. A judicial notice can be taken of the fact that by various scientific studies on betel quid and substitutes, tobacco and their substitutes, i.e., pan masala with tobacco and

without tobacco, these products have been found to be one of the main causes for oral cancer. A detailed study has been considered by three Experts, namely, Urmila Nair, Helmut Bartsch and Jagadeesan Nair in the Division of Toxicology and Cancer Risk Factors, German Cancer Research Centre (DKFZ), Heidelberg, Germany. The research paper is titled as "Alert for an epidemic of oral cancer due to use of the betel quid substitutes gutkha and pan masala: a review of agents and causative mechanisms [Mutagenesis Vol. 19 No. 4]". After considering the entire material in detail and considering the various earlier studies, the paper observes thus:

"**Perspectives**

Banning of gutkha and pan masala has been strongly advocated by oncologists as a preventive measure to reduce oral cavity cancers. Recently, a number of States in India have banned the manufacture and sale of both products and this should reduce the incidence rate. Similar regulations regarding other health-impairing tobacco products which have been on the market for centuries, together with cigarettes and bidis (an indigenous smoking product), should also be reinforced.

However, for those who are addicted to these products or are already affected by premalignant lesions, educational interventions to encourage stopping the habit are essential. Additionally, chemopreventive interventions are being explored. Retinoids, NSAIDS and green tea are among the promising agents (Garewal, 1994; IUSHNCC, 1997; Papadimitrakopoulou and Hong, 1997; Lin et al., 2002a). Although a large percentage of lesions did respond to treatment, recurrence after terminating the chemopreventive regime was also observed (Sankaranarayanan et al., 1997), perhaps due in part to continuation of the addictive habit.

As with all cancers, early diagnosis is important for successful treatment of oral cancer, as its prognosis is still very poor. There is, nowadays, a strong drive to apply proteomics technology to molecular diagnosis of cancer. Expression profiling of tumour tissues, molecular classification of tumours and identification of markers to allow early detection, sensitive diagnosis and effective treatment are now being explored for oral cancers. Genes with significant differences in expression levels between normal, dysplastic and tumour samples have been reported and this should help in better understanding the progression of oral squamous cell carcinoma (Kuo et al., 2002; Leethanakul et al., 2003).

DNA aneuploidy in oral leukoplakia in Caucasian tobacco users has been found to signal a very high risk for subsequent development of oral squamous cell carcinomas and associated mortality (Sudbo and Reith, 2003; Sudbo et al., 2004). A risk assessment model to predict progression of premalignant lesions that includes histology and a score combining chromosomal polysomy, expression and loss of

heterozygosity on 3p or 9p has also been described (Lee et al., 2000; Rosin et al., 2002). Once diagnosed, these premalignant lesions could be treated at a much earlier stage by chemo preventive agents, surgery, chemotherapy and/or intense radiotherapy to prevent new lesions and premalignant lesions from progressing to invasive cancer.

Conclusions

Gutkha and pan masala have flooded the Indian market as cheap and convenient BQ substitutes and become popular across all age groups wherever this habit is practised. There is sufficient evidence that chewing of tobacco with lime, BQ with tobacco, BQ without tobacco and areca nut are carcinogenic in humans (IARC, 1985, 2004). These evaluations in conjunction with the available evidence on the BQ substitutes gutkha and pan masala implicates them as potent carcinogenic mixtures that can cause oral cancer. Additionally, these products are addictive and enhance the early appearance of OSF, especially so in young users who could be more susceptible to the disease. Although recently some curbs have been put on the manufacture and sale of these products, urgent action needs be taken to permanently ban gutkha and pan masala, together with the other well-established oral cancer-causing tobacco products. Finally, as the consequences of these habits are significant and likely to intensify in the future, an emphasis on education aimed at reducing or eliminating the use of these products as well as home-made preparations should be accelerated."

27. Recently, the Department of Oral Medicines and Radiology, Dental Institute, Rajendra Institute of Medical Sciences, Ranchi has through its experts, namely, Anjani Kumar Shukla, Tanya Khaitan, Prashant Gupta and Shantala R. Naik conducted a study on the subject "Smokeless Tobacco and Its Adverse Effects on Hematological Parameters: A Cross-Sectional Study [Advances in Preventive Medicine 2019]". The study paper considered the consumption of smokeless tobacco (SLT) in various forms in India such as pan (betel quid) with tobacco, zarda, pan masala, khaini, areca nut. After conducting an in-depth analysis, the paper concludes and recommends as under"

"**Conclusion and Recommendation**

SLT use has severe adverse effects on hematological parameters. The present study might serve as an early diagnostic tool in any systemic diseases and be helpful in spreading awareness on the deleterious effect in the populace consuming SLT. Timely intervention among students can prevent the initial experimentations with tobacco from developing into addiction in adulthood. People should be counselled to avoid all habits of tobacco and undergo nicotine replacement therapy along with antioxidants. Knowledge and awareness about systemic and oral ill effects of

tobacco should be spread through tobacco control programs in the pursuit for a tobacco-free world."

28. It was sought to be argued on behalf of the manufacturers of pan masala without tobacco, that the pan masala without tobacco stands on a different pedestal than the pan masala with tobacco. It was sought to be argued that, pan masala without tobacco cannot be considered to be hazardous to health. The Department of Head and Neck Surgery, Tata Memorial Hospital, Mumbai through its experts Garg A, Chaturvedi P. Mishra A. and Datta S. had conducted a study on "*A review on Harmful Effects of Pan [Masala* Indian Journal of Cancer (October-December 2015) Volume 52, Issue 4] ". It is to be noted that this study is of 'pan masala without tobacco'. It will be apposite to refer to the following observations of the said report:

"**Policy Issues Concerning Pan Masala**

Pan masala use is rampant in India by all the sections and age groups of the society. It has emerged as a major cause of oral cancer in India. National Family Health Survey-2 showed that 21% of people over 15 years of age consumed PM or tobacco. Study in the state of Tamil Nadu showed that the age at which people start consuming areca nut products ranges from 12 to 70 years. 58% of the subjects chewed the products more than twice a day. Advertising tobacco products including PM containing tobacco is banned in India since May 1, 2004. To bypass this ban tobacco companies are advertising PM ostensibly without tobacco, heavily in all forms of media. PM is surrogate for tobacco products as the money spent on marketing, and advertising is many times of the revenue generated from the sale of PM. In Mumbai after the ban on PM and gutka the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively. The main reason of quitting and reduction in consumption was non availability of these products. In spite of the ban gutka was still available but in different forms or at increased cost. Strict law in the form of Cigarettes and other Tobacco Products Act 2003 has been made in India, but the enforcement and compliance is lax. There is a need for strong enforcement and compliance of laws throughout the country. The genotoxic, carcinogenic properties and numerous other harmful effects of PM need immediate and strict action by the government on PM without tobacco as it has banned PM with tobacco. The consumers should also be made aware of the harmful effects of PM as they are under a false impression that it is not harmful.

"**Conclusion**

Pan masala is widely used across all the strata of society and is freely available in many parts of the country. It is carcinogenic, genotoxic, and has harmful effects on

the oral cavity, liver, kidneys and reproductive organs. Government action is immediately required to restrict the consumption and to make the people aware about its harmful effects."

29. The study which has been conducted in 2004, found that gutkha and pan masala have been one of the major causes of oral cancer. The Oncologists as early as in 2004 had strongly advocated banning of gutkha and pan masala. They further find that banning the manufacture and sale of these products would reduce oral cancer incidence rates. It is found that gutkha and pan masala have flooded the Indian markets and become popular amongst all age groups. It is observed that pan masala with tobacco as well as without tobacco have been found to be having a potent carcinogenic mixtures that can cause oral cancer. It further found that, these products are an addictive and enhance the early appearance of oral sub-mucous fibrosis (OSMF). It is especially so in the young users who could be more susceptible to the disease.

30. The report further finds that, in the National Family Health Survey-2, it has been found that 21% of people over 15 years of age consumed pan masala or tobacco. The report finds that, though advertising tobacco products including pan masala containing tobacco is banned in India since 01.05.2004, to bypass this ban, tobacco companies are advertising pan masala ostensibly without tobacco, heavily in all forms of media. It has been found that, after the ban on pan masala and gutkha, the sale has come down. The 2016 report finds that, in Mumbai, after the ban on pan masala and gutkha, the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively.

31. It could thus be seen that, by a scientific research conducted by Experts in the field, it has been found that the consumption of pan masala with tobacco as well as pan masala sans tobacco is hazardous to health. It has further been found that, the percentage of teenagers consuming the hazardous product was very high and as such exposing a large chunk of young population of this Country to the risk of oral cancer. Taking into consideration this aspect, if the State has decided to withdraw the exemption granted for manufacture of such products, we fail to understand as to how it can be said to be not in the public interest.

32. The Sikkim High Court has observed that the appellant herein has been unable to establish any overriding public interest, which would make the doctrine of promissory estoppel inapplicable. It has further observed that, the pan masala has not been declared as hazardous to health by any notification or order of the Government of India or the State Government. It found that, no material or scientific report had been placed on record to demonstrate that the pan masala is a health hazard. We find that the reasoning arrived at by the Sikkim High Court is totally erroneous.

33. Insofar as the Gauhati High Court is concerned, the learned Single Judge by an elaborate reasoning had found that the notifications impugned before it was in the public interest and further observed that in view of the overriding public interest, the doctrine of promissory estoppel could not be invoked. Not only that, but the learned Single Judge in the judgment has specifically observed thus:

> "Having regard to the background that had preceded the Policy 2007 and the curtailment of the benefits of exemption earlier granted by the Policy 1997 through various instruments of law in the form of Section 154 of the Finance Act 2003 read with Schedule 9 thereto as well as the notifications under Section 5A of the Central Excise Act and other related legislations it would be in defiance of logic to conclude that all these notwithstanding, with the specific intention of excluding the industries engaged in the manufacture of goods under Chapter 24 and pan masala under Chapter 21 of the First Schedule to the Tariff Act, 1985, these would still continue to avail the benefits/incentives under the Policy 1997 only because the units concerned had commenced commercial production on and from 31/3/2007."

34. The learned Single Judge has also specifically observed in his judgment that the vires of Section 154 of the Finance Act, 2003 *vide* which the exemption granted to the manufacturers of cigarette was rescinded with retrospective effect, has been upheld by this Court in the case of *R.C. Tobacco (P) Ltd. and Another v. Union of India and Another*, reported in 2005(7)SCC 725. We are surprised at the approach of the Appellate Bench of the Gauhati High Court. It is pertinent to note that the contention of the learned A.S.G. appearing on behalf of the Union of India to the following effect have been specifically recorded by the Judges of the Appellate Bench of the High Court in paragraph 14 of the judgment, which reads thus:

> "that the legality of the withdrawal of the benefit granted to the tobacco manufacturing units such as the appellant under the 1997 Industrial Policy by Section 154 of the Finance Act, 2003 was already upheld the Apex Court in *R. C. Tobacco (P) Ltd.* v. *Union of India,* [2005]7 SCC 725."

35. The Appellate Bench of the High Court observed that some of the notifications providing modalities for exemption were issued subsequent to the enactment of Section 154 of the Finance Act, 2003 and, therefore, Section 154 of the Finance Act, 2003 has no relevance in the said case. However, the Appellate Bench does not find it necessary to even make a reference to the judgment of this Court which was relied on by the learned Single Judge while dismissing the writ petitions and which is specifically put in service by the Union of India. We are unable to appreciate as to how the Appellate Bench of the Gauhati High Court finds that withdrawal of exemption in respect of 'pan masala with tobacco' is not in the public interest. The legislative policy as reflected in Section 154 of

the Finance Act was to withdraw the exemption granted to the manufacturers of cigarettes as well as pan masala with tobacco and that too with retrospective effect. Apart from the fact that, it is a common knowledge that tobacco is highly hazardous, the legislative intent was also unambiguous. In these circumstances, the finding of the High Court that the withdrawal of exemption for tobacco products was not in the public interest, to say the least is shocking. We find that the approach of the Appellate Bench of the High Court was totally unsustainable.

36. As already discussed hereinabove, we have no hesitation to hold that the withdrawal of the exemption to the pan masala with tobacco and pan masala sans tobacco is in the larger public interest. As such, the doctrine of promissory estoppel could not have been invoked in the present matter. The State could not be compelled to continue the exemption, though it was satisfied that it was not in the public interest to do so. The larger public interest would outweigh an individual loss, if any. In that view of the matter we find that the appeals deserve to be allowed.

Civil Appeal arising out of S.L.P.(C) No. 36926 of 2012:

37. The appeal is allowed. The judgment and order passed by the High Court of Sikkim dated 11.05.2012 is quashed and set aside.

38. No order as to costs.

Civil Appeal Nos. 2345 of 2017 and 2346 of 2017:

39. The appeals are allowed. The judgments and orders passed by the Appellate Bench of the Gauhati High Court dated 20.04.2016 and 25.05.2016 are quashed and set aside. The Order passed by the learned Single Judge dated 10.12.2010 dismissing the writ petitions is upheld.

40. No order as to costs.

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COMMERCIAL NEWS

CA Ribhav Ghiya
Jaipur

- **37TH GST COUNCIL MEETING | HIGHLIGHTS: CESS CUT TO 12%ON 1,500CC DIESEL, 1,200 CC PETROL VEHICLES**

The following are the highlights of the 37th GST Council meeting held in Panaji on September 20, 2019. Amid clamour for rate cut by various industries, the all powerful GST Council held a crucial meeting on September 20 to decide on tax moderation, keeping in mind the revenue position and the need to boost sagging economic growth.

The GST Council, headed by Union Finance Minister Nirmala Sitharaman and comprising representatives of all States and Union Territories (UTs), had its 37th meeting in Goa in the backdrop of economic growth hitting a six-yearlow of 5% forthe first quarter of the current fiscal.

There have been demands pouring in from various sectors — from biscuits to automobiles and FMCG to hotels — to reduce tax rates in the wake of economic slowdown.

The following are the highlights of the 37th GST Council meeting held in Panaji on September 20, 2019. All these rate changes will be effective from October 1 2019.

>> GST Council recommends lower 12% cess on 1,500 cc diesel, 1,200 cc petrol vehicles with capacity to carry up to 13 people.

>> Group insurance schemes for paramilitary forces underthe Home Affairs ministry to be exempted from GST.

>> GST rate on caffeinated beverages raised from 18% to 28% with 12% compensation cess.

>> Uniform GST rate of 12% to be levied on polypropylene bags and sacks used for packing of goods

>> GST exempted on specified defence goods not manufactured in India

>> Rate levied on cut and polished semi precious stones has been dropped from 3% to 0.25%.

>> Jewellery exports to now attract zero GST.

>> GST on fishmeal used by fishermen being exempted from July 2017 to September 30 this year. There was lack of clarity on their GST coverage and no tax was collected so that has been resolved.

>> Aerated drink manufacturers shall not be underthe composition scheme anymore.
>> Uniform GST rate of 12% to be levied on polypropylene bags and sacks used for packing of goods.
>> GST rate hiked on railway wagon, coaches from 5% to 12%.
>> Rate reduction on hotel accommodation services.
>> For Transaction value per unit per day of 1000 orless, will attract nil GST. For 1001 upto 7500, now the tax rate will be 12%. Anything above 7501 will attract 18%. It was 28% till now.
>> Job work services related to diamonds reduced from 5% to 1.5%. For machine job works in engineering industry, GST down from 18 to 12. But bus body building works still taxed at 1
Reported by the Hindu on 20th September, 2019

- **NIRAV MODI TO APPEAR VIA VIDEOLINK FOR UK REMAND HEARING**

LONDON: Fugitive diamantaire Nirav Modi, wanted in connection with the nearly $2 billion Punjab National Bank (PNB) fraud and money laundering case, will appear before a UK court via videolink from his London prison on Thursday for a routine "call-over" remand hearing.
The 48-year-old, who is fighting extradition to India at Westminster Magistrates' court, is expected to be given a confirmed date for his trial, expected in May next year.
"No progress today, I'm afraid," Judge Tan Ikram said at the last call-over hearing on August 22, as he gave directions for the court clerk to seek a confirmation of the proposed five-day extradition trial to start on May 11, 2020.
There is also likely to be a case management hearing in the matter ahead of the extradition trial in February next year. Nirav Modi has been lodged at Wandsworth prison in south-west London, one of England's most overcrowded jails, since his arrest in March on an extradition warrant executed by Scotland Yard on charges brought by the Indian government, being represented by the UK's Crown Prosecution Service (CPS) in court.
Under the UK law, Nirav Modi is expected to be produced before the court within a 28-day period during his judicial custody pending trial. Since his arrest, his legal team, led by solicitor Anand Doobay and barrister Clare Montgomery, have made four bail applications, which have been rejected each time due to Modi being deemed a flight risk.
In her judgment handed down at the Royal Courts of Justice in London on his last bail appeal in June, Justice Ingrid Simler had concluded there were "substantial grounds" to

believe that Nirav Modi would fail to surrender as he does possess the means to "abscond".

Reiterating similar concerns as those previously raised by Westminster Magistrates' court during earlier bail attempts, Judge Simler ruled that after considering all the material "carefully", she had found strong evidence to suggest there had been interference with witnesses and destruction of evidence in the case and concluded it can still occur.

"The applicant has access to considerable financial resources, supported by an increased [bail bond security] offer of GBP 2 million," the judge noted.

The high court judge stressed that while it was not for her to take a "definitive view" on the evidence, she had proceeded on the basis that the government of India has acted in good faith in what is "undoubtedly" a serious case and a "sophisticated international conspiracy" to defraud, together with money laundering.

Nirav Modi was arrested by uniformed Scotland Yard officers on an extradition warrant on March 19 and has been in prison since. During subsequent hearings, Westminster Magistrates' court was told that Nirav Modi was the "principal beneficiary" of the fraudulent issuance of letters of undertaking (LoUs) as part of a conspiracy to defraud PNB and then laundering the proceeds of crime.

Reported by The Times of India on 19th September, 2019

- **NCLAT ORDERS REVIEW OF MCDONALD'S, VIKRAM BAKSHI SETTLEMENT**

NEW DELHI: The NCLAT on Wednesday said it will review the settlement between food major McDonald's and its estranged Indian partner Vikram Bakshi over the sale of his shares in Connaught Plaza Restaurants.

A two-member NCLAT bench headed by chairperson Justice S J Mukhopadhaya also asked Bakshi not to leave the country without its permission. The appellate tribunal said the settlement reached between McDonald's and Vikram Bakshi was "prima facie" violation of the Debt Recovery Tribunal order.

"We find that parties (Bakshi and McDonald's) have reached agreement …. Which is prima facie against the interim order of DRT. "We are of the view that parties should not implement such agreement nor leave the country without intimating DRT or this tribunal," said the NCLAT.

When contacted, Bakshi said: "We have yet to see the order. Once it is available my legal team shall review it and thereafter we shall take a considered decision." The appellate tribunal was hearing an intervention plea by HUDCO, claiming dues of Rs 195 crore from Bakshi.

On August 22, the NCLAT had granted Bakshi a "last chance" to settle his dispute with state-owned HUDCO, which is claiming Rs 195-crore dues from him. The NCLAT had admitted HUDCO's plea on May 15, 2019 in the ongoing cases of Bakshi and McDonald's India Pvt Ltd (MIPL).

After reaching an out-of-court settlement for an undisclosed amount, Bakshi and MIPL had approached the NCLAT to withdraw cases filed against each other for management control of CPRL. However, HUDCO had opposed their settlement, saying Bakshi and his related entities owed Rs 194.98 crore, which Debt Recovery Tribunal had also directed Bakshi to pay.

In July this year, the NCLAT had directed Bakshi to file an affidavit within a week detailing the amount he has received from the sale of his shares in CPRL as part of his settlement with the US-based fast food chain.

Reported by The Times of India on 18th September, 2019

- **UNION CABINET APPROVES BAN ON E-CIGARETTES: NIRMALA SITHARAMAN**

NEW DELHI: The Union Cabinet on Wednesday gave approval to ban sale, production, import and distribution of e-cigarettes or electronic cigarettes.

Announcing the decision, finance minister Nirmala Sitharaman stated that "the Cabinet decided to ban e-cigarettes and similar products as they pose health risk to people, especially the youth." She said "reports say that there are some people who are probably getting into the habit as e-cigarettes seems cool."

The finance minister added that "there are more than 400 brands, none of which is manufactured yet in India and they come in over 150 flavours." Sitharaman also stated that e-cigarettes were becoming an increasing health risk as they were being used as a "style statement", and not as a tobacco cessation product. More than 9,00,000 people die each year in the country due to tobacco-related illnesses.

But India has 106 million adult smokers, second only to China in the world, making it a lucrative market for companies such as Juul and Philip Morris. The move is similar to what New York and Michigan have already done. New York became the second US state to ban flavored e-cigarettes on Tuesday, following several vaping-linked deaths that have raised fears about a product long promoted as less harmful than smoking.

Michigan was the first US state to declare a ban earlier this month, but that law has yet to be implemented. United States President Donald Trump's administration announced last week that it would soon ban flavored e-cigarette products to stem a rising tide of youth users.

The step could later be extended to an outright prohibition of vaping if adolescents migrate to tobacco flavors, seen as more legitimate products that help smokers quit their habit, said the Food and Drug Administration (FDA), which regulates ecigarettes.

New York's health department found very high levels of vitamin E oil in cannabis cartridges used by dozens of people in the state who had fallen ill after using e-cigarettes. Vitamin E is a commonly used nutritional supplement but is dangerous when inhaled.

San Francisco, the home of market leader Juul Labs, became the first American city to ban e-cigarettes in June last year. The FDA has warned Juul to stop advertising itself as a less harmful alternative to smoking, noting in particular the company's attempts to attract young people.

Reported by The Times of India on 18th September, 2019

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Himayathnagar, Hyderabad-500029
Phone : 040-23228474, 23227574 (P)
Roaming Mobile : 09849004423, 09873249122
Email : mvkmoorthy59@gmail.com
Email : krismurthy65@rediffmail.com

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