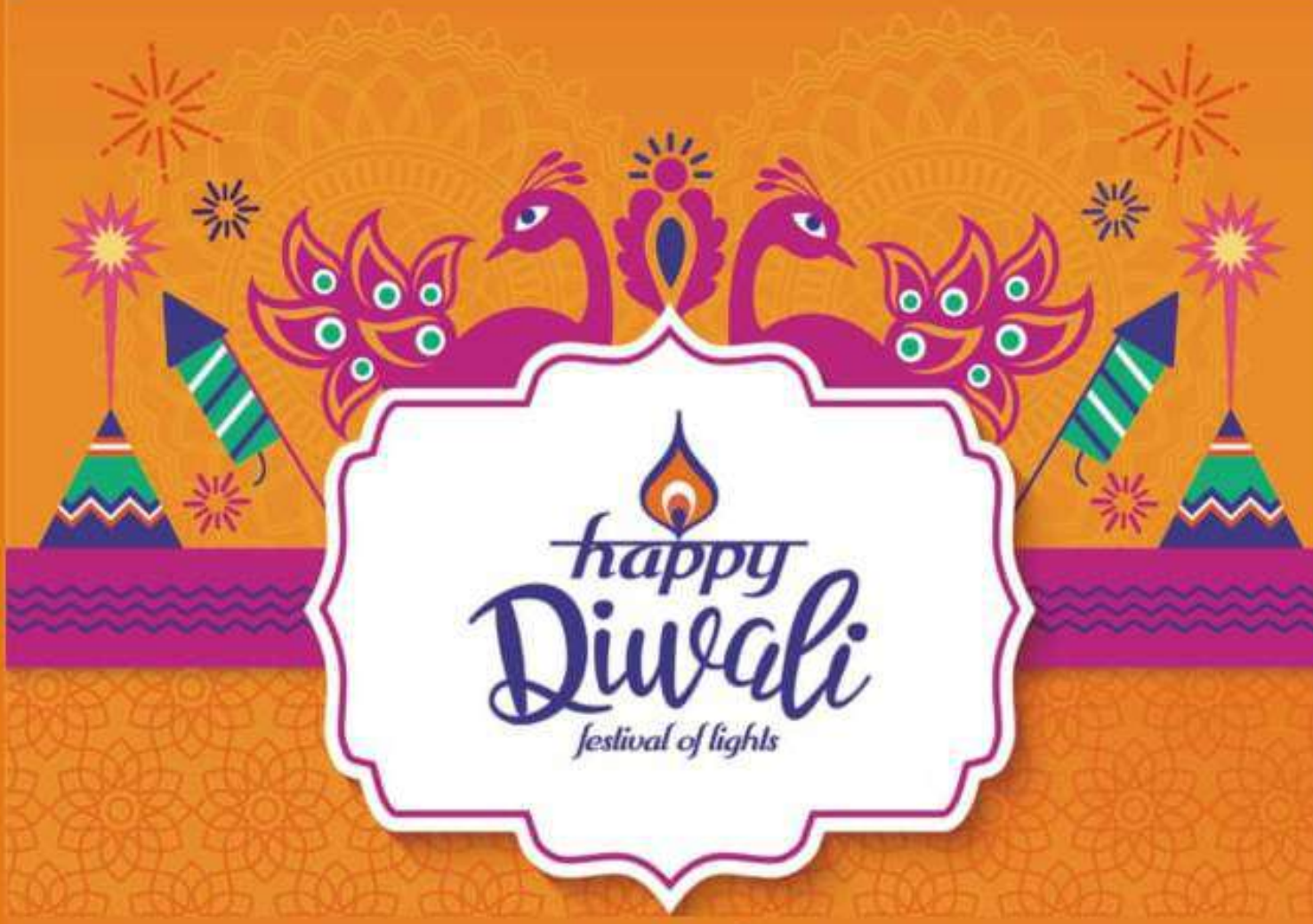
AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

ETHICS EDUCATION EXCELLENCE

Volume-1 | Part-9 | October-2019



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Happy & Prosperous Diwali

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For Non AIFTP Members

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CHIEF-EDITOR'S COMMUNIQUE

This issue of AIFTP Indirect Tax & Corporate Laws Journals covers all the regular Articles and judgements and also the commercial News. The special efforts has been made to report the judgments particularly on the GST at the earliest so that the benefit can be taken by all. This issue is also important as it is a Diwali issue and on behalf of the team we wish you a very happy and prosperous Diwali.

In the recent times we have seen a flurry of notifications under Income Tax and GST on various aspects. Most of the Notifications are relating to the benefits given by way of reduction in the Rate of tax or concessions or simplification of certain provisions. However some issues like curtailments of ITC under GST to 20% subject to the conditions are controversial issues and in fact shows the failure of the Government in not having a proper return or GSTN Network and for the failure of the government the dealers are being punished. It is also amazing that only the professinal organizations are making representations regarding the complex tax issues but no trade organization is taking up the issue with Finance Department or Finance Ministry. Representations are filed by the Professionals Organizations but in absence of the follow-up or representation from the Trade Organization some critical issues are not considered by the Central / State Governments or GST Council.

The recent Election Results has shown that the Indian Public is also having the opinion on the situation of the Economy. The slow down of the economy has taken its toll and in both the States of Maharstra and Haryana we have seen mixed poll results. We Except that the government would notice and correct its path relating to the Taxation and the Tax terriosm. Almost in the all the Acts the penalties and prosecutions has been increased multifold in the last few years and this has resulted in a fear atmospheres. The threat of prosecution and arrest for the

businessman in minor fiscal offences is also a major factor in slow down of economy. Some corrections has recently been made where in relaxations has been given in the Income Tax with a certain threat hold and even in the Companies Act proposals for reduction in penalty and prosecutions has been made. But more has to be done. The tax authorities are behaving in a very bad manner with the taxpayer as well as the Tax Professionals. Certain guidelines required to be issued by the government. Threat of arrest on small matters should be reconsidered under the various Acts. It is surprising that the arrest under the Tax Act can be made even without making out of the case and only on presumptions as the authority have been vested with the power to arrest even without issuing a show cause notice or considering the reply to the show cause notice. The issue needs consideration.

Simplification of the tax laws and return filing procedures always result in more compliance and proper Tax payment. It is high time the government realizes it. The government should also consider taking the support of expert advice and to involve organizations like AIFTP in the mechanism for simplification. Not only GST but Income Tax, RERA, Companies Act also requires reconsideration relating to certain provisions. We are following with the various authorities in the government for it.

We look forward for the active participation of the Members in the Forthcoming programmes of the Federation in Varansi and Mumbai.

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Best Wishes

Regards,

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

PRESIDENT'S COMMUNIQUE

Dear Friends,

The main worry is the situation of the economy and looking to various parameters it is clear that the economy is shrinking and its effect is being faced by the Small and Medium Enterprise. We have seen that the financial mess created because of the failure of IL&FS, DHFL and other NBFC and also the failure of some big companies due to mismanagement or heavy debt has resulted in a very difficult situation. The banking sector is under stress and the loans for the small and MSME Sector are not easy. On the contrary the banks are pushing hard for recovery of the existing loans and are not extending the new credit line. The Union Finance Minister has announced various measures to boost the economy and we can say that some of the measures are working. The relaxation in the corporate tax rate, other incentives in the Income Tax, simplification in the GST including the reduction in the rate of tax on luxury hotels etc. has given boost to the economy. The guidance regarding the MSME loans by the Reserve Bank of India and further relaxations in certain parameters to the banks by the RBI has being the major support decisions for pushing the economy. It is a well timed decision by the Union Government and we feel that some more relaxations in the Income Tax and the GST are required immediately to continue to push the economy which is slowly gathering pace. The relaxations in the Income Tax is now required for the personal Income Tax wherein the tax rate should be reduced and other deductions should be enhanced. The benefits in the GST particularly regarding the simplification of return procedure is a urgent required and if done in correct manner can result in a very healthy moment for the economy. We have seen that the GST collections on YOY basis for the last two months are lower and this trend if continues can be bad for the economy.

The Diwali Festival is being celebrated throughout India and on behalf of all the AIFTP Family I wish all the Members a very happy and prosperous Diwali. This is the time to celebrate the festival with the family Members.

The month of October and November are very busy months at present for the Tax Professionals. The Income Tax Audit returns are to be filed by 31st October, 2019 and the GST Audit returns and Annual return are to be filed by 30th November, 2019 in addition to the other compliances under various Act including the Companies Act.

AIFTP is Organizing many programmes in the coming months and all information are being circulated by mail / sms / Whatsapp and is also available on the website of AIFTP i.e. www.aiftponline.org. I request all the Members to join the Confereences / Seminars / functions organized by AIFTP regularly and also motivate their friends in profession to join AIFTP and be part of this great Federation.

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

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Abhay Singla
Sangaria (Hanumangarh)

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
30.09.2019	43/2019-CENTRAL TAX	Seeks to amend notification No 14/2019-Central Tax dated 7.3.2019 so as to exclude manufacturers of aerated waters from the purview of composition scheme.
09.10.2019	44/2019-CENTRAL TAX	Seeks to prescribe the due date for furnishing of return in FORM GSTR-3B for the months of October, 2019 to March, 2020
09.10.2019	45/2019-CENTRAL TAX	Seeks to prescribe the due date for furnishing FORM GSTR-1 for registered persons having aggregate turnover of up to 1.5 crore rupees for the quarters from October, 2019 to March, 2020.
09.10.2019	46/2019-CENTRAL TAX	Seeks to prescribe the due date for furnishing of return in FORM GSTR-1 for registered persons having aggregate turnover more than 1.5 crore rupees for the months of October, 2019 to March, 2020.
09.10.2019	47/2019-CENTRAL TAX	Seeks to make filing of annual return under section 44 (1) of CGST Act for F.Y. 2017-18 and 2018-19 optional for small taxpayers whose aggregate turnover is less than Rs 2 crores and who have not filed the said return before the due date.
09.10.2019	48/2019-CENTRAL TAX	Seeks to amend notification No. 41/2019 – Central Tax, dated the 31st August, 2019.

09.10.2019	49/2019-CENTRAL TAX	Seeks to carry out changes in the CGST Rules, 2017.

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
03.10.2019	110/2019	Seeks to clarify the eligibility to file a refund application in FORM GST RFD-01 for a period and category.
03.10.2019	111/2019	Seeks to clarify procedure to claim refund in FORM GST RFD-01 subsequent to favourable order in appeal or any other forum.
03.10.2019	112/2019	Seeks to withdraw Circular No. 105/24/2019-GST dated 28.06.2019.
11.10.2019	113/2019	Clarification regarding GST rates & classification (goods) Circular–reg
11.10.2019	114/2019	Clarification on scope of support services to exploration, mining or drilling of petroleum crude or natural gas or both.
11.10.2019	115/2019	Clarification on issue of GST on Airport levies
11.10.2019	116/2019	Levy of GST on the service of display of name or placing of name plates of the donor in the premises of charitable organisations receiving donation or gifts by individual donors.
11.10.2019	117/2019	Clarification on applicability of GST exemption to the DG Shipping approved maritime courses conducted by Maritime Training Institutes of India.
11.10.2019	118/2019	Clarification regarding determination of place of supply in case of software/design services related to Electronics Semi-

		conductor and Design Manufacturing (ESDM) industry.
11.10.2019	119/2019	Clarification regarding taxability of supply of securities under Securities Lending Scheme, 1997.
11.10.2019	120/2019	Clarification on the effective date of explanation inserted in notification No. 11/2017- CTR dated 28.06.2017, Sr. No. 3(vi).
11.10.2019	121/2019	Clarification related to supply of grant of alcoholic liquor license.

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
30.09.2019	14/2019-CENTRAL TAX (RATE)	Seeks to amend notification No 1/2017-Central Tax (Rate) dated 28.6.2017 so as to specify effective CGST rates for specified goods, to give effect to the recommendations of the GST Council in its 37th meeting dated 20.09.2019.
30.09.2019	15/2019-CENTRAL TAX (RATE)	Seeks to amend notification No 2/2017-Central Tax (Rate) dated 28.6.2017 so as to grant exemption to dried tamarind and cups, plates made of leaves, bark and flowers of plants.
30.09.2019	16/2019-CENTRAL TAX (RATE)	Seeks to amend notification No 3/2017-Central Tax (Rate) dated 28.6.2017 so as to extend concessional CGST rates to specified projects under HELP/OALP, and other changes.
30.09.2019	17/2019-CENTRAL TAX (RATE)	Seeks to amend notification No 26/2018-Central Tax (Rate) dated 31.12.2018, so as to exempt CGST on supplies of silver and platinum by nominated agencies to

		registered persons.
30.09.2019	18/2019-CENTRAL TAX (RATE)	Seeks to amend notification No 2/2019-Central Tax (Rate) dated 7.3.2019 so as to exclude manufacturers of aerated waters from the purview of composition scheme.
30.09.2019	19/2019-CENTRAL TAX (RATE)	Seeks to exempt supply of goods for specified projects under FAO
30.09.2019	20/2019-CENTRAL TAX (RATE)	Seeks to amend notification No. 11/2017-Central Tax (Rate) so as to notify CGST rates of various services as recommended by GST Council in its 37th meeting held on 20.09.2019.
30.09.2019	21/2019-CENTRAL TAX (RATE)	Seeks to amend notification No. 12/2017-Central Tax (Rate) to exempt services as recommended by GST Council in its 37th meeting held on 20.09.2019.
30.09.2019	22/2019-CENTRAL TAX (RATE)	Seeks to amend notification No. 13/2017-Central Tax (Rate) so as to notify services under reverse charge mechanism (RCM) as recommended by GST Council in its 37th meeting held on 20.09.2019.
30.09.2019	23/2019-CENTRAL TAX (RATE)	Seeks to amend notification No. 4/2018 - Central Tax (Rate), dated the 25th January, 2018, by adding an explanation on the applicability of provisions related to supply of development rights.
30.09.2019	24/2019-CENTRAL TAX (RATE)	Seeks to amend notification No. 7/2019 - Central Tax (Rate), dated the 29th March, 2019 by amending the entry related to cement.
30.09.2019	25/2019-CENTRAL TAX (RATE)	Seeks to notify the grant of alcoholic liquor licence neither a supply of goods nor a supply of service as per Section 7(2) of CGST Act, 2017.

NOTIFICATIONS - INTEGRATED TAX

DATE	NOTIFICATION NO.	REMARKS
30.09.2019	4/2019-INTEGRATED TAX	Seeks to notify the place of supply of R&D services related to pharmaceutical sector as per Section 13(13) of IGST Act, as recommended by GST Council in its 37th meeting held on 20.09.2019.

NOTIFICATIONS – COMPENSATION CESS (RATE)

DATE	NOTIFICATION NO.	REMARKS
30.09.2019	02/2019-COMPENSATION CESS (RATE)	Seeks to amend notification No. 1/2017-Compensation Cess (Rate), dated 28.6.2017 on the recommendations of the GST Council in its 37th meeting dated 20.09.2019.
30.09.2019	03/2019-COMPENSATION CESS (RATE)	Seeks to disallow the refund of compensation cess in case of inverted duty structure for tobacco and manufactured tobacco substitutes.

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TIMELINE - GST

Adv. Deepak Garg, Jaipur

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		October, 2019	20th Nov 2019
			November, 2019	20th Dec 2019
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		Oct to Dec 2019	31st Jan 2020
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		October, 2019	11th Nov 2019
			November, 2019	11th Dec 2019
(iii)	Quarterly return for Composite taxable persons	CMP-08	Oct to Dec 2019	18th Jan 2020
(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	October 2019	10th Nov 2019
			November 2019	10th Dec 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	October 2019	10th Nov 2019
			November 2019	10th Dec 2019
(ix)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	30th Nov 2019

*****

SEARCH, SURVEY, SUMMONS & ARREST UNDER GST

Adv. Pankaj Ghiya, Jaipur
Adv. Priyamvada Joshi, Jaipur

BACKGROUND

In the recent times it has been observed that there has been a steep rise in the number of cases where Inspection / search are being conducted by the Goods & Services Tax Officials. Specific provisions regarding the Search, Survey, Summons and Arrest has been incorporated under the GST Act. The said provisions have been introduced to safeguard the interest of the Government and also act as a deterrent by checking evasion.

INSPECTION

As per Section 67 of the Central Goods & Services Tax Act, 2017 Inspection can be carried out only after a written authorization by an officer of the rank of Joint Commissioner or above. He will give such authorization when he has reasons to believe that the person has done any of the following acts:

1. Suppression of transaction relating to Supply or stock in hand
2. Claimed excess ITC
3. Contravention of any provisions of the Act
4. Where a transporter or Warehouse keeper has kept goods which has escaped payment of tax or manipulating accounts which may
5. Issues regarding Reverse Charge Mechanism

SEARCH

The provisions of Search are stricter than that of the Inspection and have serious consequences. Where in pursuance to the inspection the proper officer, not below the rank of Joint commissioner is satisfied that there is any information or goods in possession of the Assessee which can prove to be useful in the investigation so initiated, he may authorize any other officer to conduct search and seize.

While conducting search the officer authorized has been conferred with the powers of a police officer conducting search under the provisions of Code of Criminal Procedure, 1973. Section 100 prescribes the procedure for search under CrPC.

COMMON REASONS FOR SEARCH / SURVEY

The common cases where search is being conducted are:

1. Claiming false ITC through fake invoices / bogus bills
2. Mismatch of Invoices
3. Non-filing of Returns and consequential non-payment of GST
4. Refund claim of exports made with payment of IGST
5. Issues relating to Reverse Charge Mechanism.
6. Excess claim of Input Tax Credit

Recently we have seen a lot of cases where Search, seizure, etc. are being conducted and the Assessees are being interrogated after being summoned by the GST officials. It is observed that the Tax payers are making a lot of mistakes while handling such situations. They are unaware as to how to respond to the Summons / notices issued against them and how to testify at the time of hearing when their statements are recorded by the authorities. Most of the tax payers today are not aware as to the provisions of the newly introduced GST law and how to deal with it. Therefore, it has become very important to discuss the provisions of the new law governing the whole procedure from inspection to the conclusion of proceedings against a tax defaulter.

INITIATION OF PROCEEDINGS

The first step taken against an Assessee is Inspection u/s. 67 as discussed above in detail. It is unlike the inspection or search conducted under the earlier law. The provisions under the present law are quite clear and are being strictly followed. In cases where a strong input is received, prompt action is taken after making proper investigation.

Once the Officer not below the rank of Joint Commissioner is satisfied or has reasons to believe that there are any goods / documents / books secreted at a place which may be useful for the investigation, they may authorize search. The search conducted by the GST officials is done only on the basis of credible information received / gathered and only after thorough research has been conducted by them.

The term "reasons to believe" holds prime importance in initiation of any proceedings against an Assessee. It has been defined under Section 26 of the Indian Evidence Act as follows:

"A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."

It means if a person had knowledge of certain facts it would reasonably cause him to draw a certain conclusion in a particular situation and not otherwise. So where the Officer has reasons to believe that a person might have evaded tax or has claimed excess

ITC or has contravened the provisions of the Act, by way of any information received or incriminating document / records they may initiate search against the said Assessee.
At the time of issue of Search Warrant the competent officer should record in writing as to the reasons for such belief and that only on the basis of that belief the search is being conducted. If possible, documents, records, etc. may also be referred to.
There are certain norms to be followed while conducting Search operations. In case of deficiency, the Assessee may object to the same. Some of them are listed below:

1. The officers must have a search warrant issued by proper officer.
2. At least 2 witnesses should be present at the time of search operation. The signatures of the person present at the premises as well as the witnesses should be obtained. The witnesses must belong to the same locality.
3. They must show their identification before entering the premises.
4. A *panchanama* must be duly prepared enlisting all the details of the search operation. A list of all the documents and articles seized from the premises must also be prepared. The original must be duly signed by the person present or the owner and the witnesses present at the time of search operation. A copy of the same must be given to the person present at the premises or the owner.
5. After the search is over the warrant must be returned to the authority issuing the same.

DEFICIENCY FOUND: Practically, where the departmental officials unearth an evasion, they may pressurize the Assessee to confess the same in the statements recorded by the department and require the Assessee to pay their dues or refund the excess ITC if available in the electronic credit ledger at the time of search itself.

WILFUL & NON-WILFUL DEFAULT

The Central Goods & Services Tax Act, 2017 have classified the default by an Assessee into 2 parts;

a) Non-willful default; and
b) Willful default

NON-WILFUL DEFAULT: Section 73 of the CGST Act, 2017 covers non-willful default. After the conduct of search where the proper officer is satisfied that there is either tax evasion or excess Input Tax credit has been claimed erroneously but there is no fraud or mis-representation or suppression on part of the Assessee in that case a Show Cause Notice in Form DRC-01 maybe issued to the Assessee on the GST portal proposing to levy tax, interest and penalty to explain his case. Common grounds for

issuing of Show Cause Notice under this Section are non-registration under GST, Non-filing or delay in Returns, claiming of wrong refund, etc. These are commonly arising issues and normally there is no intent of the Assessee to defraud the Department.

Sub-Section (5) & (6) of Section 73 contemplates a situation where the Assessee realizes / believes after self assessment that the demand being ascertained by the authorities is legitimate and he is liable to pay tax. In such situation if he deposits the tax and the Interest as per Section 50, then no Show Cause Notice will be issued against the Assessee. After the issue of Show Cause Notice, Sub-Section (8) gives an option to the Assessee to avoid payment of penalty where the tax and interest payable under Section 50 is paid within 30 days of issue of Show Cause Notice.

Such Notices has to be issued at least 3 months prior to the limitation for passing of an order under the said section, which is 3 years from the due date of furnishing of Annual Returns for the period to which the tax / refund claim relates.

In such cases the department may require the Assessee to deposit the tax at the time of discovery of default only before the issue of notice. If the tax and interest applicable is deposited then the Show Cause Notice is not issued and the proceedings are deemed to be concluded. No penalty is attracted in such cases. Even after the issue of Show Cause Notice, if the deposit is made within 30 days of issue of Notice then one need not pay the penalty as proposed.

NON-WILLFUL DEFAULT: Section 74 of the CGST Act, 2017 covers the cases of Willful default where the evasion or wrongful claim of ITC or Refund is accompanied with an intention to defraud or mis-state or suppress facts which may be incriminating. The proper officer may issue a Show Cause notice in this regard on the GST Portal proposing to levy tax, interest and penalty. The notice issued under section 74 has more grave consequences as compared to that of 73.

Sub-Section (5) & (6) of Section 74 also contemplates a situation where the Assessee realizes / believes after self assessment that the demand being ascertained by the authorities is legitimate and he is liable to pay tax. In such situation if he deposits the tax, Interest as per Section 50 and penalty of 15% of the self assessed tax, then no Show Cause Notice will be issued against the Assessee.

After the issue of Show Cause Notice, Sub-Section (8) gives an option to the Assessee to avoid payment of full penalty where the tax, interest and 25% of the proposed penalty in the Notice payable under Section 50 is paid within 30 days of issue of Show Cause Notice.

The notice is to be issued 6 months prior to the limitation for issuing an order under this Section, which is 5 years from the due date of furnishing of Annual Returns for the period to which the tax / refund claim relates.

Similar to Section 73, where the Assessee pays off the tax, interest and 15% penalty as determined before the issue of Show Cause Notice or pays off the tax, interest and 25% of the penalty within a period of 30 days from the date of issue of Show Cause Notice then all proceedings shall be deemed to be concluded. Such payment would amount to voluntary disclosure and the Assessee may lose the right to object to the same later.

To determine whether the case of the Assessee falls under Section 73 or 74 the intention of the Assessee from his conduct during the proceedings is to be seen and also the type of offence committed. For instance, where a person willfully submits wrong information during the GST registration process or generates fake invoices and circulates them to wrongfully claim Input Tax credit or where during the proceedings does not co-operate or submits false details it shows that a person has mala fide intentions and has committed the offence under the CGST Act, 2017 to defraud the Government.

The term "suppression" has also been defined under the Act in Explanation 2 of Section 74 as "non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made there under, or failure to furnish any information on being asked for, in writing, by the proper officer."

In fact where a person who is required to furnish information, fails to furnish the same or willfully submits false information is liable to penalty of Rs. 10000.00 and in case of continuing offence, Rs. 100 per day subject to maximum of Rs. 25000.00.

Where an Assessee is being tried under the Act for an offence which requires a culpable mental state, such state would be presumed and the burden of proof would be on the Assessee to prove otherwise.

ISSUING NOTICE & SUMMONS

Once it is determined as to what offence the Assessee has committed and if the payment of tax and interest is not made, then Show Cause Notice is issued under the respective Section and proceedings is initiated against the Assessee.

Summons is issued under the provisions of Section 70 and the Assessee is asked to give their statements and submit specific documents as required by the proper officer. It is seen normally, that a very casual approach is being adopted while responding to the summons and notices requiring the Assessee to submit documents.

It is important to note here that the proceedings undertaken under the provisions of Section 70 i.e. summoning a person to produce documents and give evidence are deemed to be "judicial proceedings" within the meaning of Section 193 and 228 of Indian Penal Code. Section 193 and 228 makes the act of giving false statements and insulting / interrupting a public servant in a judicial proceeding respectively an offence and punishable with fine and / or imprisonment. Thereby making the procedure of summoning, taking evidence and documents a judicial procedure.

As the process undertaken is Quasi-judicial in nature one shall be careful while giving statements before the proper officer as they have evidentiary value. Any inculpatory statement given at the time of appearance can be highly detrimental to the case of the Assessee. It may even amount to confession / admission under section 26 / 17 of the Indian Evidence Act and leave the Assessee defenseless later. This however, is a debatable issue and is to be examined more closely.

It is very important to do your homework, read and prepare well after going through all the documents in hand. One should attend the hearing only after making sure as to what is to be stated on record at the time of hearing before the proper officer.

RESTRICTION OF ITC: Where any amount of tax has been quantified against an Assessee after passing an Order and the amount is subsequently paid off by the Assessee, a restriction under Section 17(5) arises as to the claim of Input Tax Credit on the same. Section 17(5) has blocked the Input Tax Credit for the tax paid off in pursuance to the Order passed under Section 74. Even when the amount is determined under Section 129 or 130, the Input Tax Credit of such tax is not available to be utilized.

ARREST

There are strict provisions under GST pertaining to tax evasion. When the quantum of tax evaded is as high as prescribed in the Statute it would attract the provisions of Arrest under Section 69. Where the Commissioner is satisfied that a person has committed an offence under Section 132(1) (a), (b), (c), (d) and which is punishable under clause (i) or (ii) or Section 132(2) he can authorize an officer to arrest such offender.

The following provision implies that when a taxpayer supplies goods / services without issue of invoice or issues fake invoices without any supply for wrongful availment of ITC or refund, avails such ITC or collects tax without any intention of depositing the same or abets any of it and the quantum so involved is more than Rs. 1 crore, or where he is a repeat offender; in such cases an order for his arrest can be given by the Commissioner.

It is to be noted that as per Section 132 of CGST Act in cases where any of the following Offences has been committed:

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

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

(iii) avails input tax credit using such invoice or bill referred to above;

(iv) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

And where the quantum is more than 5 crores such an offence would be non-bailable and cognizable. However, if the amount is less than Rs. 5 crores even though any of the 4 categories of offences listed above are committed or if any of the other offences listed in Section 132 are committed even if the quantum is more than 5 crores, it would be a bailable and non-cognizable offence.

Such arrest can be either made immediately at the time of search or when the person appears in compliance of the summons or later. Generally due to the fear of eloping, the arrest is made as quickly as possible when evasion is unearthed in huge quantum.

RECOURSE:

The first step to be taken in case of arrest is to file for a bail application under the provisions of CrPC before the jurisdictional magistrate. The quantum of the tax involved is also to be seen and in case it is beyond the pecuniary jurisdiction of the Judicial magistrate one needs to file for a Bail before the Sessions Judge.

In case the same is rejected, one needs to file a bail application before the respective High Court under Section 439 of the CrPC.

Proper advice should be taken before taking any steps as it is a sensitive situation and severe Jail terms have been prescribed for the offences, minimum being at least 6 months. Some advice on applying for anticipatory bail when they have a fear of being arrested but in most cases the same has worked against the Assessee and has mostly been rejected by most of the High Courts in the country. The said practice has been discouraged in light of the decision of the Hon'ble Supreme Court and should be deterred from.

JUDICIAL DECISIONS

After the introduction of GST the Government is taking strong steps to curb evasion of tax and has formulated stricter provisions for implementation of the law which is the need of the hour. There have been numerous cases of evasion of tax in huge quantum being unearthed by the Department where arrests have been made under GST a few of which are being discussed herein below for a better understanding of the current situation:

- **Jayachandran Alloys (P.) Ltd. v. Superintendent of GST & Central Excise, Salem [2019] 105 taxmann.com 245 (Madras):**
  MADRAS HIGH COURT Order dated 04.04.2019:
  Writ Petition is allowed. The interim protection sought for to prevent the respondents from invoking the powers under section 69 read with section 132 thereof in respect of petitioner is liable to be granted, and was answered in favour of the petitioner.
  Remarks: Whether act of committal of offence is to be fixed first before punishment is imposed - Held, yes - Whether thus, power to punish set out in section 132 would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of demand due from an assessee, that itself has to necessarily follow process of an assessment - Held, yes

- **C. Pradeep vs. Commissioner of GST & Central Excise Selam & Anr.:**
  Supreme Court of India Interim Order dt. 06.08.2019:
  Interim protection (Anticipatory Bail) granted till the disposal of SLP.

- **Rakesh Kumar Khandelwal vs. Union of India:**
  Rajasthan High Court Order dt. 14.10.2019
  Normal Bail Application under Section 439 of the CrPC. Bail rejected by Session Judge, Jaipur.
  High Court allowed the Bail Application on furnishing of personal bond of Rs. 1000000.00

- **Namrata Jain & Anr. Vs. Union of India & Anr. :**
  Supreme Court Of India Interim Order dt. 30.09.2019:
  Anticipatory bail allowed. No coercive steps shall be taken against the Petitioners in the meanwhile.

- **Sapna Jain vs. Union of India:**

Bombay High Court Interim Order dt. 11.04.2019:
Anticipatory Bail allowed. *{No coercive action shall be taken against the petitioner till the next date}*

- **Union of India vs. Sapna Jain (SLP Filed by the Government):**
  Supreme Court of India Order dt. 29.05.2019:
  No interference with the Order of the High Court as to privilege of Pre-arrest bail.
  However, remarks were made: ***As different High Courts of the country have taken divergent views in the matter, we are of the view that the position in law should be clarified by this Court.*** *However, we make it clear that the High Courts while entertaining such request in future, will keep in mind that this Court by order dated 27.5.2019 passed in SLP(Crl.) No. 4430/2019 had dismissed the special leave petition filed against the judgment and order of the Telangana High Court in a similar matter, wherein the High Court of Telangana had taken a view contrary to what has been held by the High Court in the present case.*

- **Sapna Jain vs. Union of India**:
  Bombay High Court Interim Order dt. 08.07.2019:
  Ad-interim relief to continue
  Remarks: *Since the Apex Court has proposed to decide the issue in question by referring it to the Bench of three Judges, awaiting the decision of Apex Court, we continue the ad-interim relief granted earlier till further orders.*

- **Sapna Jain vs. Union of India**:
  Bombay High Court Interim Order dt. 26.08.2019:
  Ad-interim relief to continue

- **Vimal YashwantGiri Goswami vs. State of Gujarat:**
  Gujarat High Court Order dt. 07.08.2019:
  Anticipatory Bail granted.
  Remarks: The powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is "liable to a penalty". Till that point of time, theentire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to

above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme Court in the case of D.K. Basu vs. State of West Bengal reported in 1997 (1) SCC 416. In the meantime, no coercive steps of arrest shall be taken against the writ applicant.

CONCLUSION

The Provisions are strict and the enforcement of the same by the the CGST Department is also very harsh. The bonafide purchasers are suffering due to the lapses of the department as they could not check the registrations being granted by them or the issue of fake / bogus bills. However, for the non action on the part of the CGST Department the bonafide purchasers are suffering. There are also situations where there is a connivance of the dealers to avoid or evade GST or to get unwarranted refunds. This practice also needs to be deprecated.

In this article we had tried to summarize the provisions relating to search, survey, summons and arrest with judicial decisions in a simple layman language.

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SOFTWARE AND 'INTERNET ECONOMY' ENTERPRISES, IMPERILLED BY GST

S Venkataramani, Chartered Accountant, Bangalore
Jatin Christopher, Chartered Accountant, Bengaluru

Introduction

One cannot accept promoters' explanation of the business of the enterprise because of divergence in perspective. 'Please explain your business' means different things to different people. VC looks at size of market, promoter looks at disruption, developer looks at data science and marketer looks at product-reach; but tax advisor takes curiosity to whole new level.

Contract involving 'standing crop' and 'growing crop', what is the object of supply in each case? As a tax expert, you would know that 'standing crop' is fully grown and fit for harvest but 'growing crop' is not yet ready to yield anything worthy. By this reasoning, standing crop that's fit for harvest, comes within definition of 'goods' in section 2(52) of CGST Act but growing crop that's not-yet-fit for harvest, falls outside this definition and lands itself in the definition of 'services' in section 2(102).

So, the short point about enquiry into business, is that tax treatment requires a very different perspective and that's why tax advisors would do well undertake independent inquiry and not accept promoters' version of the business of their enterprise.

Software classification

Software lies in everything from every BIOS in any electronic device all the way to form of data stored. Information technology software in packaged form is very specific 'goods obtained by exercise of skill'. Guided by TCS' decision delivered by Justice SN Variava, these 'goods' will find their classification under 8523 and when just licences are supplied, their classification shifts to 4907.

GST permits a fiction in schedule II to 'treat' certain transactions involving goods, as a 'supply of services'. This fiction for 'treatment' and not of 'supply'. So, supply must itself be examined under section 7(1) before examining special mentions in schedule II, if any. Also, entire schedule II is not fiction. Parliament in its wisdom has listed some obvious ones too, perhaps to dispel any penchant to contest supply itself. So, para 5(d) covers only those transactions that are not already covered by 8523 or 4907. Because if it's admitted to be goods, it can't be services.

What's 'not' e-Commerce?

Every internet-economy enterprise is not 'e-commerce'. And 'website or app' is NOT a pre-requisite to constitute e-Commerce enterprise. Internet is often used only as means to access information in a database. 'Anytime-anywhere access' is key advantage of permitting that access via internet. Merely because 'information' is accessible, doesn't make it e-Commerce. And 'e-Commerce' is a generic expression and only a sub-set of transactions qualify definition in section 2(44) of CGST Act.

More than 80 percent of internet-based transactions are NOT e-Commerce. There're portals that merely furnish information and one must exit this portal in order to actually make a purchase (or transaction). Then there's e-banking where in addition to information access, settlement limb of an offline transaction is carried out online. And then there're transactions where only the part relating to, offer or acceptance (or both) are carried out online, but actual fulfilment is still left to offline modes.

Care must be taken to correctly identify whether a given transaction comes within the operation of section 2(44) or not. An enterprise may enable online channel for customers to trade and this too, is not e-Commerce.

Various expressions are liberally used that tax advisors are too embarrassed to admit their unfamiliarity with the meaning. As a result, true meaning is found out the hard way just like information that spider is not an insect. Of course, you knew that, because insects have three pairs of legs and spiders have four which makes them an arachnid. And when promoters give their non-tax perspectives, tax advisors don't readily admit but investigate into the real nature of business of the enterprise, especially when it's an internet-economy enterprise. Nature of business means principal source of revenue not area of expertise.

Turnover Rs.300 cr, loss Rs.400 cr.??

Statutory audit engagement of one such enterprise was readily accepted simply out of curiosity to take a closer look at what makes someone spend Rs.700 cr. Then, on what did they blow-up that much of money and most importantly why in the world. Insights gained were immense leaving. It was interesting that that much money was spent partly to pay for stocks sold below cost and the rest on technology that did not sit well with AS26 and got charged off, without much resistance from promoter and investor.

GST does not object to an enterprise selling below cost and full input tax credit is admissible. But the issue is when that loss occurs when the enterprise did not even make the sale on its own. That's because, consideration for sale (by another) is being contributed partially by the enterprise. Consideration (for supply) liable to tax is not total amount paid by Buyer, but total amount received by Seller. And although only one who

is party to the contract can sue under it, stranger to the contract is free to contribute towards its consideration. As to 'why' any stranger would contribute is another matter, but the fact is that it is indubitably allowed for the reason that:

(a) between Buyer and this Stranger, there's yet another contract (could be express but usually implied) under which Stranger owed Buyer which is now settled by discharging Buyer's dues to Seller; or
(b) Stranger is making voluntary or gratuitous contribution to improve Seller's business.

There's no other reason why anyone would do such a thing and the words *".....by the recipient or any other person....."* appearing in section 2(31) makes it abundantly clear that stranger to a contract (of supply) could also contribute towards total consideration that is *".....in respect of, in response to, or for the inducement of, the supply....."*.

If payment is enforceable, then it is not voluntary and therefore it must be 'earned' somehow (and this needs more investigation). If not enforceable, GST is not interested in discussing any further. This spend will now reside as an expenditure in that Stranger's books and it's expenses like these that added up to loss of Rs.700 cr.

All expenditure, 'inward supply'?

It's well understood that tax applies on all taxable supplies made that are not specifically exempt. Although 'new' section 9(4) came into force from 1 Feb 2019, importance of examining inward supplies still remains for two reasons, that is, its involvement in a further outward supply and admissibility of input tax credit thereon.

Unless capitalized, every inward supply is an expenditure. Every inward supply must come from a registered person. If not, self-invoice is still required even though tax need not be paid (between 13 Oct 2017 to 31 Jan 2019). It's visible that GST strives to discourage enterprises that stay outside of the system.

So, once an inward supply occurs it remains to be examined, what became of that inward supply. Did it get consumed and go into the pricing of an outward supply (and get taxed)? Does it remain as inventory so that one day it will be an outward supply (and still get taxed)? Inward supplies don't get extinguished just like that. They leave a trail for inquiry. It's this 'post-spend inquiry' that seems to have got extinguished in our minds.

For example, where 'cashback' allowed by 'A' bank for using credit card to purchase fuel (even petrol or diesel), is it really discount for fuel purchased or reward for patronizing 'A' bank's credit card. Accounting rules even permit this registered person (Consumer of fuel-cum-cardholder) to record the expense net of cashback credited in monthly statement.

But GST is less charitable and being a registered person, demands that that Consumer report cashback credited as an outward supply. And when section 2(93) says

that 'one who pays consideration' is the recipient, by implication, 'one who receives consideration' is got to be the supplier. Not only has this outward supply gone unreported, it has been tucked away in an expense account. So, outward supplies not only lie in an income account but also in an expense account. Inquiry into inward supplies is a must to identify, whether there's been an outward supply *therefrom* and whether tax has been suitably discharged *thereon*, if any.

While it might seem complex to explain how exactly every inward supply actually became an outward supply, it is actually very simple to call out inward supplies that were omitted to be reported. For example, a multi-locational enterprise (with multiple registrations) or business house comprising of more than one legal entities (all duly registered under GST), may not duplicate support functions such as travel-desk, network maintenance, legal, accounting-payroll process and even senior management, at all locations or entities. The absence of such support functions in all locations or entities itself indicates requirement to cross-charge such support from where these functions are carried out.

Commencement of business

Business has been given an expansive definition in GST law. And input tax credit is admissible in respect of taxes paid 'in furtherance of business'. Clearly, section 16(1) does not state that credit is admissible 'from date of incorporation of entity'. Please consider, whether it's possible that there's be some 'interval of time' between date of incorporation and date of commencement of business. And if any expenditure is incurred during this interval and GST is paid, given that business is not yet commenced, would credit claimed come in for questioning or not, because credit is admissible only 'in furtherance of business'.

Section 2(17)(d) brings out this point but in a positive tone when it states that business includes 'supply or acquisition "in connection with" commencement or closure of business'. Now, section 3 and 28 of Income-tax Act contain wealth of authorities on the question of 'date of setting-up' (not too far from the words used in GST). Starting from Western India Vegetables and Tuticorin Alkali which was contrasted in Bongaigaon Railway and Karnal Co-op, where revenue expenditure was held 'not to be in connection with business' and disallowed any carry forward. Internet-economy enterprises spend large amounts of money before they're able to 'monetize' which is old-school expression for 'commencement of business'.

Heads of expense all look routine, namely, rent, consultancy charges, G&A expenses, et al. and it's only 'negative list of credits' that go by heads of expense in section 17(5), not 'positive list of credits' which simply test for 'end use' of inward

supplies to be 'in furtherance of business'. Of course, this is a 'subjective test' and is open to interpretation. Remember, the spend did not meet the rigours of AS26 and got expensed. Now, it's not possible to claim that even though it's expensed, 'end use' of these inward supplies satisfy positive list test in section 16(1) of CGST Act. At least not without the 'possibility of challenge' by tax authorities.

Export or not?

Would every billing in convertible forex be an export? What if billing is in forex but payment is not realized within time permitted under FEMA? And if billing (in forex) is repatriated in INR due to currency translation carried out outside India and bank confirms INR received?

Everyone's got a 'common sense' understanding of the definition of exports and provisions of Customs Act don't readily come to mind while thinking 'exports'. 'Repatriation' and 'repatriation currency', occupies mind-space so much that no answers are forthcoming to posers above. If that's the state of mind, promoters can't be expected to think differently.

Look at the decisions (no. 10 and 11 in Rate of Services) taken in 37th GST Council meeting where contract (pharma) research and chip-design services by Indian outsourced industry 'will be' considered export.

Any ITeS enterprise that operates on a mark-up that steers away from the safe-harbour rate of 17 per cent, causes concern in Income-tax and service exports under GST come in for scrutiny when mark-up is 'high'. Acceptance of high margin by customers (more so if its's associated enterprise) is an indicator that the services exported could well be in the nature of 'R&D' and the supply involved could move from 'location of recipient' to 'location where services are actually performed'.

Conclusion

Software industry may be three decades old and internet-based technology enterprises may be nearing their first decade in India, but GST is just two years old and is riddled with areas of concern capable of testing the limits of understanding about this industry as well as the law on GST.

Care must be taken to go back to first principles and apply it to facts that are freshly gathered without giving in to popular notions or understanding. GST incidence is on the taxable person who's the judge, jury and executioner in this self-assessment-based tax regime. And, that's why one cannot accept promoters' explanation of the business of the enterprise!

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RENT, LEASE, HIRE AND TRANSFER OF RIGHT IN GST

P.V. Subba Rao, B.A., B.L., Advocate, Hyderabad
T. Ramakrishna, B.Com., CMA (US), Hyderabad

Many times, we feel that some English words have exactly the same meaning. But they do not have the same meaning. GST Act and the Notifications issued thereunder, use the words 'rent', 'hire', 'lease', 'letting out', 'lending' and 'transfer of right.' If all these words carry the same meaning, why all the words have been used in different entries, instead of only one, is a question to be answered by the draftsman. The following is the extract from a decision in the case of Central Bank Of India vs Ravindra And Ors on 18 October, 2001 (2001 AIR 3095) decided by the Honourable Supreme Court.

"Ordinarily, a word or expression used at several places in one enactment should be assigned the same meaning so as to avoid "a head-on clash" between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that "Parliament had given with one hand what it took away with the other" [See - Principles of Statutory Interpretation, Justice G.P. Singh, 7th Edition 1999, p.1 13]. That construction is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. While embarking upon interpretation of words and expressions used in a Statute it is possible to find a situation when the same word or expression may have somewhat different meaning at different places depending on the subject or context. This is however an exception which can be resorted to only in the event of repugnancy in the subject or context being spelled out. It has been the consistent view of Supreme Court that when the Legislature used same word or expression in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout. More correct statement of the rule is, as held by House of Lords in Farrell v. Alexander, [1976] 2 All E.R. 721, 736, "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning".

That was in connection with a situation, where the same word or expression has been used at several places in one enactment. But in the GST Act different words have been used to make one believe that they carry the same meaning, but appears to be not. In the case of J.C.I.T. vs. Saheli Leasing and Industries Ltd. (2010) 324-ITR-170, the Honourable Supreme Court held as follows:-

"A particular word occurring in one Section of the Act, having a particular object cannot carry the same meaning when used in different Section of the same Act, which is enacted for different object. In other words, one word occurring in different Sections of the Act can have different meaning, if the objects of the two Sections are different and when both operate in different fields."

In the case of Commissioner of Customs and CE Vs. Sachin Malhotra and others (2015—80 VST 157), the Uttarakhand High Court held as follows:-

"But, what is of fundamental importance and constitutes the distinguishing feature between "rent-a-cab" and "hiring" is that, in the case of "hiring", undoubtedly, the owner of the vehicle retains control and possession; he either drives the vehicle himself or employs somebody else to drive the vehicle; and the customer merely makes use of the vehicle by travelling in the vehicle on the basis of a contract that he will pay the requisite hire charges for the period he uses the vehicle. Unlike the same, in the case of rent-a-cab, as is provided in the Motor Vehicles Act, the person is enabled to take the vehicle with him wherever he pleases, subject, no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to his paying the rent. **Though both, rent and hire, may, in a different context, have the same connotation; in the context of the Rent-a-Cab Scheme and hiring, we are of the view that they signify two different transactions.** What the lawgiver has chosen fit to tax by way of imposition of service tax is only transaction relating to business of renting of cabs. It is also pertinent to bear in mind that, in the case of hiring, the hirer may refuse to provide the service to the prospective customer."

Section 2 (83) of the CGST Act, 2017 defines 'outward supply', to mean, inter alia, 'rental and lease'. It reads as follows:-

"2 (83) "outward supply" in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, **rental, lease** or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;"

Section 7 dealing with the inclusive definition of 'supply' is also to the same effect. It reads as follows:-

"7. (1) For the purposes of this Act, the expression "supply" includes— (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, **rental, lease** or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;"

Para 2 in Schedule II to the CGST Act also mentions 'lease' as follows:-

"2. Land and Building

(a) any **lease**, tenancy, easement, licence to occupy land is a supply of services;
(b) any **lease** or **letting out** of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services."

The word 'hire' is not used in the CGST Act. However the word 'hire' has been used at Sl. Nos.15 and 22 in Notification No.12/2017 CTR dated 28.6.2017.

In Notification No.11/2017 CTR dated 28.6.2017 at Sl.No.10, 'RENTAL' service of motor vehicles has been mentioned. At Sl. Nos.17 and 24 also, 'renting' of agro machinery etc., has been mentioned. However at Sl. No.15, 'LEASING' of motor vehicles has been mentioned. Sl. Nos.15 and 22 of Notification No.12/2017 CTR dated 28.6.2017 mention 'HIRE' of motor vehicles. We have to therefore deal with 'rent' of motor vehicles, 'lease' of motor vehicles and 'hire' of motor vehicles for the purposes of levy or exemption under GST law. In the absence of official clarity as regards what is 'rent', 'lease' and 'hire', tax payers are bound to face problems, as the Revenue would always interpret any entry in its favour. Any help taken from Dictionaries, case law, etc., may not solve the problem. What are the circumstances in which a motor vehicle is said to have been given on rent or lease or hire could not be known. For pure academic interest, we may now make a brief discussion.

'Lease' is generally understood as a long term agreement between the lessor and lessee in contrast to 'renting', which is a short term agreement between the owner and the tenant. The line of demarcation is thin between the two. In the case of lease, generally the lessee undertakes the responsibility of maintenance, which is absent in the case of a rental. Hire is generally understood as 'hiring a bike' or 'hiring a bicycle'. What are the various scenarios in which one can definitely say (a) when a motor vehicle has been given on hire, (b) when a motor vehicle has been given on lease, (c) when a motor vehicle has been given on rent and (d) when there is transfer of right to use the motor vehicle. Whether all these words mean the same or is there possibility to assign different meanings, especially by the authorities. Would it be possible for the less-educated owner of a motor car or goods vehicle to understand whether he has given it for hire or on rent or on lease. In the Advance Ruling issued in the case of SST Sustainable Transport Solutions India Private Limited, Nagpur in No. GST-ARA-04/2018-19/B-60 dated 9.7.2018, it has been held by the Maharashtra AAR as follows:-

"From the above it is clearly seen that NMC is providing transportation services to the passengers and the applicant, for such transportation, is supplying to NMC Buses along with drivers, fuels, maintenance, etc. In effect we find that there is no connection between the applicant and the passengers. We find that the applicant is just hiring out these AC Buses to NMC and we also find that the effective control is with the applicant

so far as the Buses are concerned which are provided to NMC. We also find the Bus Routes are decided by NMC as also the Bus Fares, which are collected from the passengers. Hence it is crystal clear that in the subject case the transaction would be of the nature of transfer of right to use any goods and the amounts received by them on kilometer basis would be considered as hiring charges."

It has been observed in the above Ruling that the amounts received are 'hiring charges' and that the transaction is in the nature of transfer of right to use any goods. The intention in writing this article is to throw open a discussion to find out the real intention of the draftsman. In the interests of tax payers and professionals, the need of the hour is to issue a detailed official clarification on the use of all these words in the statute and Notifications and whether all these are synonyms or are to be understood differently. For the convenience of member-professionals, SACs and Entries where these words appear are mentioned below.

The following are the Service Accounting Codes (SAC) relevant to the present subject:-

9963	Services by way of **renting** of residential dwelling for use as residence.
9966	**Renting** of motor cab (motor vehicle designed to carry passengers
9972	Services by way of **renting** of residential dwelling for use as residence.
9964	Transport of passengers, with or without accompanied belongings, by – (b) non-air conditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or **hire**; or
9966	Services by way of giving on **hire** (a) to a state transport undertaking, a motor vehicle meant to carry more than 12 passengers;
9971	**Leasing** of motor vehicles purchased and leased prior to 1st July 2017;
9972	(ii) Supply of land or undivided share of land by way of **lease** or sub lease where such supply is a part of composite supply of construction of flats, etc.
997211	**Rental** or **leasing** services involving own or leased residential property
9971	Any **transfer of right** in goods or of undivided share in goods without the transfer of title thereof
9971	**Transfer of the right to use any goods** for any purpose (whether or not for a specified period)

The following are the entries in various notifications in relation to the said words:-

Notification No.11/2017---Central Tax (Rate) dated 28.6.2017.

Entries where the words 'rent', 'rental' and 'renting' are used:-

"7 Heading 9963 (Accommodation, food and beverage services)
Explanation 3.- "declared tariff" includes charges for all amenities provided in the unit of accommodation (given on **rent** for stay) like furniture, air conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit."
"8 Heading 9964 (Passenger transport services)
(vi) Transport of passengers by any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient.
Provided that credit of input tax charged on goods and services used in supplying the service, other than the input tax credit of input service in the same line of business (i.e. service procured from another service provider of transporting passengers in a motor vehicle or **renting** of a motor vehicle), has not been taken."
"10 Heading 9966 (**Rental** services of transport vehicles)
(i)**Renting** of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient."
"14 Section 7 Financial and related services; real estate services; and **rental** and leasing services."
"17 Heading 9973 (Leasing or **rental** services, with or without operator"
"24 Heading 9986
(i)(d) **renting** or leasing of agro machinery or vacant land with or without a structure incidental to its use."

Entries where the words 'lease' and 'leasing' are used.

"15 Heading 9971
(v) **Leasing** of motor vehicles purchased and leased prior to 1st July 2017;"
"16 Heading 9972
(i) Services by the Central Government, State Government, Union territory or local authority to governmental authority or government entity, by way of **lease** of land.
(ii) Supply of land or undivided share of land by way of **lease** or sub **lease** where such supply is a part of composite supply of construction of flats, etc. specified in the entry in column (3), against serial number 3,"

Entries where the words 'transfer of right' are used.

"15 Heading 9971 (Financial and related services)

(iii) Any **transfer of right in goods** or of undivided share in goods without the transfer of title thereof.
(iv) Any **transfer of right in goods** or of undivided share in goods without the transfer of title thereof."

Notification No.12/2017---Central Tax (Rate) dated 28.6.2017.

Entries where the word 'renting' is used.
"7 Chapter 99
(b) services by way of **renting** of immovable property."
"12 Heading 9963 or Heading 9972
Services by way of **renting** of residential dwelling for use as residence"
"13 Heading 9963
(b) **renting** of precincts of a religious place meant for general public,….."
"Definitions:-
(zz) "**renting** in relation to immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property;"

Entries where the word 'hire' is ued.
"15 Heading 9964
(b) non-air conditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or **hire**; or"
"22 Heading 9966 or Heading 9973
Services by way of giving on **hire** –
(a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or"

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SOME IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata, FCA, DISA (ICAI)
Guwahati

1. Whether recovery of 50% amount of Parental Health Insurance premium from employees amounts to supply of services under GST?

Held: No.

In the case of ***M/s Jotun India Private Limited-AAR Maharashtra,*** the applicant is a manufacturer, supplier and exporter of paints and powder coatings. It has introduced an optional parental insurance scheme under which it initially pays the entire premium along with taxes to the Insurance Company. In case of the employees who opt for the scheme, the applicant recovers 50% of the premium in one to three installments from the salary and the balance 50% is borne by the applicant. The moot point before the Authority is that whether GST is payable on recovery of such 50% of the premium from the salary of employees?

The applicant mentioned that in order to constitute "supply" under GST, the following elements are required to be satisfied-

a) There should be supply of 'goods' or 'services' or both,
b) Supply is for consideration, and
c) Supply is made 'in the course or furtherance of business'

The applicant stated that it is engaged in manufacture of paints and powder coatings. Providing parental medical insurance service is not the business of it. The service of insurance is actually provided by the Insurance Company for which it is charging GST. Secondly, providing parental insurance cover is not a mandatory requirement under any law for the time being in force and therefore, non-providing of parental insurance cover would not affect its business. Therefore, the activity of recovery of 50% of the cost of insurance premium cannot be treated as supply in terms of supply.

The Authority stated that section-7 of the GST Act defines the scope of supply. From a plain reading of the section, it is clear that the activity undertaken by the applicant like providing of parental insurance policy through insurance company does not satisfy the conditions of section-7 of the GST Act. Further, it is not covered under the term "business" of section-2(17) of the GST Act.

Hence, the recovery of 50% of parental health insurance premium from employees does not amounts to 'supply of service' under GST.

2. Whether receipt of prize money from horse race conducting entities, in the event horse owned by the applicant wins the race, amounts to supply under GST and if it is supply, then whether taxable or not?

Held: Yes

In case of ***M/s Vijay Baburao Shirke –AAR Maharashtra,*** the applicant owns horses which are participated in races organized at different clubs. The applicant under the erstwhile law paid service tax on the amount of stake/ prize money. The applicant continued paying taxes under GST under bona fide belief the stake/ prize money qualifies as supply under GST and also utilized input tax credit as available. The applicants now advised that no GST is payable and other competitors are also not paying. Thus he put a question- Whether stake/ prize money won in horse races are liable to GST or not?

The applicant is of the view that in order to constitute "supply" under GST, the following elements are required to be satisfied-

a) Supply is made by one person to another,
b) Supply is for consideration, and
c) Supply is made 'in the course or furtherance of business'

According to the applicant, all the ingredients are satisfied to qualify as supply under GST.

The Authority contented that the race club/ organizer is the recipient of the horses for participating in the race. If the horse wins, a consideration in the form of money is paid to the applicant for participating and winning the race. Hence, activity of applicant enables the organizer to arrange an event which the public may attend and media undertakings may broadcast. These horses are well trained and maintained in a specific manner. Thus the activity of the applicant is providing the services of specialized and trained horses for race. Both the race organizer and the horse owner receive a direct and individual benefit from this activity. The Authority made a reference of section -7 and section-2(17) of the GST Act and accordingly concluded that the activity of the applicant falls within the ambit of "supply" under GST as the prize money received by the applicant is nothing but a consideration for the service and also the activity falls within the definition of "business" [clause (a) of section-2(17)]. Hence, the activity of the applicant is a supply of services. Also, it is taxable

under GST @ 18% as it is not covered under the Exemption Notification No. 12/2017 CT (Rate).

3. To what extent and in what proportion, ITC is admissible on capital goods used for both taxable & exempt supplies?

Held: In the manner prescribed under Rule 43 of the CGST Act.

In case of ***M/s Metro Dairy Ltd.-AAR West Bengal,*** the applicant has set up a manufacturing facility for UHT milk, milkshake, curd and lassi. Some of the goods are taxable, and others exempted under the GST Act. The applicant has procured capital goods and input services that are common to the production of both taxable and exempted goods. The Applicant wants to know to what extent and in what proportion the input tax credit is admissible on such capital goods and input services?

The Applicant submitted that the apportionment of input tax credit should be based on the provisions under section 17(2) & (3) of the GST Act read with rules 42 and 43 of the GST Rules. The input tax credit is, therefore, restricted to the credit attributable to taxable supplies and its determination is prescribed in rule 43. The useful life of capital goods is taken as five years from the date of invoice under rule 43(1)(c) of the GST Rules. The applicant submitted that the formula prescribed under rule 43 of the GST Rules is applicable only after the commencement of commercial production. The useful life of the capital goods should, therefore, be calculated from the date of the beginning of the commercial production. In terms of rule 42(1)(i) of the GST Rules, the amount of input tax credit attributable to exempt supplies shall be computed every month. After that, the input tax credit for the financial year shall be finally calculated in terms of rule 42(2) of the GST Rules before the due date for furnishing return for the month of September following the end of the financial year to which such credit relates.

The concerned officer from the Revenue submits that apportionment of the input tax credit on the capital goods used for manufacture of both the taxable and the exempted goods should be made in the manner prescribed under proviso to rule 43(1)(d) of the GST Rules and other related clauses of rule 43(1). The Applicant purchased capital goods that were used for producing taxable goods UHT milk. On a subsequent date the same capital goods are going to be used for manufacturing both taxable and non-taxable goods. The amount of input tax on each of such capital goods is denoted by 'A' and shall be credited to the electronic credit ledger in terms of rule 43(1)(c) of the GST Rules. The value of 'A' is arrived at by reducing the input tax at 5% rate for every quarter or part thereof. In other words, input tax on such capital

goods as were initially used for producing taxable goods only, but subsequently used for manufacturing both taxable and exempted goods, are to be attributed at 5% rate for every quarter or part thereof to production of taxable goods during the period when they were used for production of taxable goods only. The balance amount, if any, available when the production of exempted goods begins, will be the amount 'A'. The aggregate of the amounts of 'A' are added to the corpus of input tax called 'Tc' for apportionment in accordance with rule 43(1)(e), (f) & (g) of the GST Rules. It submitted that input tax credit on input services should be apportioned in the manner prescribed under rule 42 of the GST Rules. The Applicant is eligible for credit of the entire input tax on input services till the production of exempted goods begins.

The Authority agrees with the concerned officer from the Revenue on the mechanism for apportionment of input tax credit on capital goods that were used for manufacturing taxable goods but are going to be used subsequently for production of both taxable and exempted goods. The amount of input tax on each of such capital goods shall be credited to the electronic credit ledger in terms of rule 43(1)(c) of the GST Rules, which also prescribes sixty months from the date of invoice as the useful life of such capital goods. Rule 43(1) provides the mechanism for apportionment of the input tax available in the corpus Tc over the balance period of the useful life. The Proviso to rule 43(1)(d) of the GST Rules answers how much of the input tax credit should be attributed to the period when such capital goods were used for manufacturing taxable goods and Rule 43(1)(e), (f) and (g) of the GST Rules answer how the balance amount of the input tax should be apportioned after production of the exempted goods commences.

4. Whether a Co-operative Society which is not established by any government is liable to deduct TDS under GST?

Held: No.

In the case of ***M/s. Karnataka Co-operative Milk Producers Federation Limited-AAR Karnataka,*** the applicant is a registered society under Co-operative Societies Act, 1959 and is engaged in processing of milk and milk products. The applicant sought an advance ruling on whether they are liable to deduct TDS under GST on payments made to suppliers?

The applicant stated that the Govt. of Karnataka or any other State or Central Govt. does not hold any shares or holding with the applicant. It is of the presumptions that since few of the directors are from government, they would be coming under the purview of section-51 of GST Act. It also stated that it is not established by the

Central Government or State Government or a local authority under Societies Registration Act, 1860.

The Authority stated that the applicant was formed and registered under Co-operative Societies Act, 1959 where District Co-operative Milk Unions are shareholders of the applicant organization. It is not a department or an establishment of Central Govt./ State Govt./ local authority. Hence, the applicant is not covered under clauses (a) & (b) of section-51(1) of the GST Act. It is also not a notified person under clause (d) of section-51(1). Also the applicant has not been established under national, regional or local governments but is registered under Co-operative Society Act, 1959, which mandates certain supervisory / participation from the relevant department of Karnataka State Government. The applicant has not been tasked with any responsibilities by the Govt. of Karnataka. The Directors have been nominated only to safeguard the funds of the said society. Therefore, the applicant is not covered under clause (c) of section-51(1) of the GST Act.

Hence, the applicant is not liable to deduct TDS under section-51(1) of the GST Act on payments made to suppliers.

5. Whether GST is applicable on the job work charges charged for manufacturing of cattle feed/ poultry feed on job work basis?

Held: Yes, taxable @ 5%

In the case of ***Gupta Steel Udyog-AAR Punjab,*** the applicant is engaged in manufacturing of cattle feed and poultry feed on job work basis. The total raw materials are supplied by the Principal Manufacturer.

The applicant made a reference to the Notification No.11/2017 CT (Rate) wherein the support services to agriculture, forestry, animal husbandry are NIL rated and activity of the applicant is falling under it. Further they also submitted that carrying out an intermediate production process as job work in relation to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food , fiber , fuel , raw materials or other similar products or agriculture produce is also NIL rated.

The Authority stated that the applicant undertakes the supply of services by way of processing the goods supplied by the principal for a consideration and hence, the same is covered under supply. The Authority also stated that the crucial term which determines the issue is "intermediate production process" used in the Notification No.11/2017 CT(Rate). The applicant's activity of manufacturing of cattle feed and poultry feed is not an activity of carrying out an intermediate production process as

job work in relation to cultivation plants and/or rearing of all life forms. The services of the applicant are not covered under SAC 9986. The activity carried out by the applicant falls under Heading 9988 and not under 9986 as contended by the applicant. In such a case, the applicant has the liability to pay any tax liable on the job work charges.

Thus, the activity of manufacturing of cattle feed and poultry feed on job work basis is not 'Support services to agriculture, forestry, fishing, animal husbandry.' It is thus taxable @ 5% under GST.

6. Whether service of loading and unloading of imported raw whole yellow peas is exempt under Sl No.54(e) of the Exemption Notification?

Held: No

In the case of ***M/s TP Roy Chowdhury & Company Pvt. Ltd- AAR West Bengal,*** the applicant is acting as a stevedore and handles imported raw whole yellow peas. It seeks a ruling on whether such imported yellow peas are 'agricultural produce' and services by way of handling of it is eligible for exemption under Sl No. 54(e) of Notification No. 12/2017 - Central Tax (Rate) dated 28.06.2017?

The applicant submitted that it handles imported raw whole yellow peas in bulk that contains 1.45% broken grain and 10.86% split kernel. The Applicant argues that the percentage of broken grain or split kernel is insignificant and occurred in the course of the handling of the cargo and does not alter its character as raw whole yellow peas. It should, therefore, be treated as 'agricultural produce' as defined in clause 2(d) of the Exemption Notification and, therefore, the service of loading and unloading of the cargo should be exempt in terms of Sl No. 54(e) of the Exemption Notification.

The Authority stated that Services relating to the cultivation of plants, inter alia, for agricultural produce are exempt under Sl No. 54 of the Exemption Notification and classified under SAC 9986. They include, among others, loading, unloading, packing, storage or warehousing of agricultural produce[clause 54(e) of the Exemption Notification]. The agricultural produce means any produce out of cultivation of plants etc. "for food, fiber, fuel, raw material or other similar products on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market. The scope of such support services extends to post-harvest crop services such as preparation of crops for the primary markets. ln sync with it 'agricultural produce' is so defined as to include processes as may be done

to make the produce marketable in the primary market without altering its essential characteristics. Circular No. 16/16/2017-GST dated 1511112017 of CBIC clarifies that the process of dehusking or splitting of pulses is usually not carried out by farmers or at the farm level but by the pulse millers and, therefore, such products are not to be considered 'agricultural produce'. The emphasis, therefore, is on the processes and services that are applied till the goods are at the farmer's hand. As soon as they leave the farmer's hand and the primary market, the services rendered thereafter are not to be considered related to cultivation of the plant and classifiable under SAC 9986.

Hence, the supply of service by way of service of loading and unloading of imported raw whole yellow peas is not covered under the Exemption Notification and accordingly, it is a taxable supply.

7. Whether printing of advertising material is supply of service or supply of goods?

Held: Composite supply, service of printing is the principal supply.

In the case of ***M/s. Macro Media Digital lmaging Pvt 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. It seeks a ruling on whether such printing is a supply of goods or service?

The applicant argued 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. It 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. lf 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 argued that it is transferring the title to the goods as printed advertising material. The transaction, therefore, amounts to the supply of goods. The Applicant admitted that printed advertising material is a composite supply. It includes the supply of goods in the form of printed PVC material and supply of the service of printing the content provided by the recipient. The question of what constitutes the predominant element of the composite supply? The Applicant further argued that the element of printing is ancillary to the supply of goods in the form of trade advertisement. The Applicant merely loads the content in the digital image printer, which does not involve any special skill or artwork.

The Authority stated that Applicant's supply is a composite contract - a transaction involving both services and transfer of property in goods, and the two are inseparable in the execution of the contract. ln its Circular No. 1111l2017-GST dated20l1Ol2O17, 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. All the printed goods are classifiable under Chapters 48 and 49 of the Tariff Act. The difference, however, lies in the customer contemplating or not separate rights and use arising out of the supply of the goods. ln case of printing of books, pamphlets, annual reports, etc., the goods have no-better utility than carrying the printed matter. The recipient provides on a digital media the content in the form of image/text/trade monogram and retains usage right on such intangible inputs. 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.

Hence, 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.

8. Whether accommodation services to employees of SEZ units are liable to CGST and SGST or IGST? If the accommodation services to SEZ are covered under IGST Act, could these be treated as zero rated supplies?

Held: IGST, Zero rated supply

In the case of ***M/s Carnation Hotels Pv.t Ltd.-AAR Karnataka,*** the applicant proposed to operate hotels and rent out rooms to the employees of the SEZ units. The services rendered by the applicant are entirely consumed at the premises itself.

The applicant contended that section-12(3) of the IGST Act, 2017 provides that the place of supply of service by the way of lodging accommodation of the hotel shall be the location at which immovable property located. Since, supplier being hotel, the location of the supply is also the location of the hotel. Services rendered by the hotels are intra-state as the location of the supplier and the place of supply is in the same state. Accordingly, accommodation services attract CGST and SGST, irrespective of the fact that the receiver of the service is located in the same state or other than the state where the hotel is located. Further, the applicant stated that section-7(5)(b) of the IGST Act provides that supplies of goods or services or both to SEZ will be treated as IGST supplies and proviso to section-8(2) states that Intra state supply of services

shall not include services to SEZ developer or unit. Accordingly, services rendered to SEZ will be treated as interstate supplies and liable to IGST u/s 5(1) of the IGST Act and not u/s 9(1) of the CGST Act. Therefore, the applicant sought an advance ruling on whether the accommodation services to employees of SEZ units are liable to CGST and SGST or IGST and if the accommodation services to SEZ are covered under IGST Act, could these be treated as zero rated supplies?

The Authority stated that on a plain reading of section-16(1)(b) of the IGST Act and Rule-46 of the CGST Act, it becomes clear that the supply of goods or services or both towards the authorized operations only shall be treated as supplies to SEZ developers/ SEZ units. The Authority made a reference to the Circular issued by the Central Government bearing No.48/22/2018 dated 14.06.2018 in which it is clarified that as per section-7(5)(b) of the IGST Act, supplies of goods or services or both to SEZ will be treated as IGST supplies. It is also clarified in the same circular that in case of apparent conflict between two provisions, *the specific provision shall prevail over the general provision*. In the applicant's case, section-7(5)(b) is the specific provision relating to supplies of goods or services or both made to a SEZ developer/unit and section-12 of the CGST Act is a general provision. It is therefore clear that the accommodation service proposed to be provided to SEZ units or developers shall be treated as interstate supply. Also as per conjoint reading of the provisions of section-16(1) and 16(3) of the IGST Act, it becomes clear that supplies to a SEZ developer/ unit shall be treated as zero rated supply and the supplier shall be eligible for refund of unutilized input tax credit or IGST paid, as the case may be, only if such supplies have been received by the SEZ developer or unit for authorized operations.

Hence, the accommodation service proposed to be provided to SEZ units or developers shall be treated as interstate supply and it is a zero rated supply.

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JUDICIAL PRECEDENTS

Mukul Gupta, Advocate,
Senior Partner
SHARNAM LEGAL
Ghaziabad

1. **Rule 11,3,6 of CENVAT Credit rules 2004**

   In this case, the taxpayer availed full credit on input services used for construction of property for which completion certificate was not issued since it was providing only taxable service. It reversed proportionate credit on goods and services used for construction of property for which completion certificate was issued. The department contended that credit availed on goods and services even before issuance of completion certificate should be treated as common credit and subject to proportionate credit reversal. Court said that the entitlement to credit needs to be seen at the time of receipt of input services. Once an input service was received at a time when output service was taxable and the said credit was availed legitimately, the same cannot be subsequently denied unless there are specific machinery provisions to this effect.
   Principal Commissioner v. Alembic Limited 2019-VIL-335-GST-ST; 2019-TIOL-1495-HC-AHM-ST

2. **Section 16(4), Section 39 CGST Act 2017**

   Court held that GSTR- 3B is not a return in lieu of return required to be filed in form GSTR-3, it is only a stop gap arrangement till due date of filing return in form GSTR-3 is notified.
   ***AAP and Co., Chartered accountants V. Union of India [2019] 75 GST 192/107 taxmann.com 125 (Gujarat); Special Civil Application No. 18962 of 2018;* 2019 (7) TMI 401 –Gujarat High Court.**
   Note: - The government vide notification No. *49/2019- Central Tax* dt. 09/10/2019 have nullified the ratio of the above given case by amendment in law, the effect being that GSTR-3B is now treated to be a Return with retrospective effect.

3. **Section 67(2) of the CGST Act 2017, Rule 139(4) CGST Rules 2017**

Where proper authority under section 67 had authorised Assistant Commissioner to carry out search and seizure in premises of petitioner, order of prohibition passed against petitioner was in accordance with law but petitioner could request appropriate authority for release of seized goods on provisional basis on execution of a bond.

Golden Cotton Industries V. Union of India [2019] 75 GST 158/107 taxmann.com 128 (Gujarat); R/Special Civil Application No. 2132 of 2019;[2019] 102 Taxmann.com 412 (Gujarat)

4. **Classification of Services, Section 7 CGST Act 2017, Public Gambling Act 1867, Rule31(A) of CGST Rules 2018**

Online fantasy sports gaming are not gambling services, rather game of skills. Hence 998439 is applicable having 18% rate of tax. GST is applicable only on amount received and retained by respondent towards platform fee being collected for supply of goods/ services and not on entire money which is put at stake by player.

***Gurdeep Singh Sachar V. Union of India [2019] 75 GST 258/106 taxmann.com 290 (Bombay); Criminal PIL stamp No. 22 of 2019*; MANU/MH/1451/2019**

5. **Section 140 CGST Act 2017, Rule 117 of CGST Rules 2017**

Where assesse had filed a writ petition for extending date of submitting declaration electronically in Form GST TRAN- 1 to avail benefit of input tax credit, assesse was directed to prefer a representation before GST Council as also before Nodal Officer for extending time for submitting Form GST Tran-1.

***Megotia Construction (p) Ltd. V. Goods and Service Tax Council [2019] 75 GST 45 (Mag), W.P. (T) No. 1135 of 2019; [2019] 107* taxmann.com 108 (Jharkhand)**

6. **Section 132 CGST Act 2017**

Assessees (husband wife) were directors of two companies. Competent authority had initiated proceedings under fraud in circular billing trading. Assesses filed criminal petitions praying to be released on anticipatory bail in the event of arrest. Court ordered assesses to be released on bail in the event of arrest subject to personal bond of Rs. 5 lakhs each with two sureties.

***Mahendra Kumar Singhi V. Commissioner of Commercial Taxes [2019] 75 GST 46 (Mag.); Criminal petition NOs. 2484 & 2485 of 2019*; [2019] 106 taxmann.com 358 (Karnataka)**

7. **Section 25 CGST Act 2017, Rule 9 (2) CGST Rules 2017**

Assesse had applied for GST registration but the competent authority had rejected stating that it is not in accordance with the provisions of the Act. Assesse filed writ challenging the order of the authority. High Court disposed of the writ petition stating that the matter shall be reconsidered by the Competent Authority *dehors* any reasons as stated in the impugned order and a fresh decision shall be taken in accordance with the GST Act and Rules on submitting a fresh application by the assesse.

West Bengal Lottery Stockists Syndicate (P.) Ltd. V. Union of India WP No. 7445 of 2019; 106 taxmann.com 331 (Kerala); 2019 (5) TMI 1396 – KERALA HIGH COURT; MANU/KE/1454/2019

8. Chapter VIII of CGST Rules 2017

There were some mistakes like non-filing of data in non-mandatory fields of Export Table 6A that led to mismatch of export data, SEZ Transactions of Table 6B inadvertently punched in Table 6A of GSTR-1; writ was filed to allow to make such rectifications in the monthly returns so that correct Annual Return can be filed. Court ordered the respondent to examine the mistakes in the Monthly Returns. The mistakes were verified and found genuine by the respondents in their detailed report filed before High Court. Hence, the claim made by the assessee was required to be corrected. GSTN was ordered to allow the necessary corrections in the Returns.

M/s Neelkamal Enterprises Pvt. Ltd. V. Union of India and others CWP-21651-2019[1]

9. Section 140 CGST Act 2017

The assessee filed TRAN-1 in time with claims of both CENVAT and VAT credit as available on 30th June 2017. The transitional credit of only CENVAT was allowed while carried forward VAT credit was not allowed in the electronic credit ledger to the assesse for which assesse made several efforts. The respondent GSTN is directed to reopen the portal within two weeks. In the event they do not do so, the respondent Jurisdictional Officer will entertain the GST TRAN-1 of the assesse manually and pass orders on it after due verification of the credits. They will also ensure that the assesse is allowed to pay its taxes on the regular electronic system which is being maintained for use of the credit likely to be considered for the assesse.

Shivalik Distribution Pvt Ltd V. Union Of India And 5 Others WRIT TAX No. - 977 of 2019[1]

[1] Assessee's counsel: Adv. Prateek Gupta of Sharnam Legal

10. Section 16 of IGST Act, 2017, Section 149 of Customs Act, 1962

Petitioner was an exporter. In the instant writ petition, it was contended that he was entitled for refund of IGST during transition period. Respondents objected by pointing out that the petitioner had already drawn or availed the higher rate of duty drawback and, therefore, while ordering refund of IGST, the petitioner was required to refund the higher rate of duty drawback already availed by it with interest. It was held that the respondents are given liberty to adjust the amount already availed by the petitioner on account of higher rate of duty drawback and pay the balance of IGST payable to the petitioner within six weeks from the date of the receipt of a copy of the judgment.

G Nxt Power Corp. *v.* ***Union of India - [2019] 109*** *taxmann.com* ***305 (Kerala);*** *WP (C) NOS. 2457 & 2981 OF 2019)*

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[1] Assessee's counsel: Adv. Prateek Gupta of Sharnam Legal

ROLES AND DUTIES OF AN INTERIM RESOLUTION PROFESSIONAL ON COMMENCEMENT OF CIRP

Rajneesh Singhvi

In the new regime of Insolvency Law as envisaged by Insolvency and Bankruptcy Code, 2016, (the Code) the powers of the management/board of the corporate debtor stand suspended and get vested in Interim Resolution Professional (IRP) on initiation of the Corporate Insolvency Resolution Process (CIRP). The IRP or Resolution Professional (RP) plays an important role in Corporate Insolvency Resolution Process (CIRP) as he regulates and manages the entire insolvency and bankruptcy process of the Corporate Debtor.

The CIRP process commences with an order by hon'ble National Company Law Tribunal (NCLT) and ends with either approval of Resolution Plan or order of liquidation. Liquidation order further ends with order dissolving the Company.

An Insolvency Professional (IP), who is a professional registered with the Insolvency and Bankruptcy Board of India (IBBI) is appointed by National Company Law Tribunal (NCLT) as Interim Resolution Professional (IRP) or Resolution Professional (RP) or Liquidator. Therefore, entire insolvency proceedings are to be managed by IP in accordance with law and directions of hon'ble NCLT.

Therefore, the Professionals have a major opportunity and role to play in this new regime, which is making fast and wide-sweeping changes in the corporate landscape. The Insolvency and Bankruptcy Board of India, the regulator who is responsible for implementation of the Code, has defined the role of Insolvency Professional in following words:

"*An IP is a key institution of the insolvency regime. He is the beacon of hope for the person in distress and its stakeholders. He plays a key role in insolvency proceedings (resolution, liquidation and bankruptcy processes) of financially distressed persons (companies, limited liability partnerships, partnership and proprietorship firm and individuals) under the Code*."

The hon'ble NCLT has in its order dated 16.01.2019 in the case of Asset Reconstruction Company (India) Pvt. Limited v. Shivam Water Treaters Pvt. Ltd. held RP (Resolution Professional) as the officer of the Court.

In this article, we primarily comment about the initial period for an IRP, which is quite challenging.

An IP, while acting as an Interim Resolution Professional or Resolution Professional is vested with various statutory and legal duties and powers. The Code read with Regulations has outlined the responsibilities of IRP/ RP. Further, there are certain responsibilities which are to be fulfilled by IRP/RP along with the Committee of Creditors (CoC) jointly. The duties and responsibilities of IRP are as under:

Cessation of the Powers of the Board

Section 17 of the Code defines the role and powers of the Interim Resolution Professional from the date of his appointment.

It states that the management of the affairs of the corporate debtor shall vest in the Interim Resolution Professional and the powers of the board of directors or the partners of the corporate debtor, shall stand suspended and be exercised by the interim resolution.

It further states that the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional. It is the duty of the financial institutions maintaining accounts of the corporate debtor to act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

The interim resolution professional vested with the management of the corporate debtor, shall-

- act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
- take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
- have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
- have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
- be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

Publication of Public Annpuncement

Section 13 of the Code read with Regulation 6 of the CIRP Regulations states that an insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional and call for the submission of claims.

Verification of Claims

It is the duty of the Interim Resolution Professional to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement. The Interim Resolution Professional or the Resolution Professional may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

The Interim Resolution Professional or the Resolution Professional shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

This list of creditors shall be available for inspection by the persons who submitted proofs of claim, members, partners, directors and guarantors of the corporate debtor and shall be filed with the Adjudicating Authority. Such list shall also be displayed on the website of the Corporate Debtor, if any and be presented at the first meeting of the Committee of Creditors.

Constitution of Committee of Creditors

A Committee of Creditors (CoC) is constituted by IRP after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor which shall comprise all financial creditors of the Corporate Debtor.

The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims.

Convening Meeting of Committee of Creditors

The Interim Resolution Professional shall hold the first meeting of the committee within seven days of filing the report as mentioned above. The meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address provided to the resolution professional. Such notice may be sent by hand delivery or by post but in any event, it must be served on every participant by electronic means.

The Quorum for meeting of Committee of Creditors shall be at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means.

The Resolution Professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting and shall file the Minutes to the Adjudicating Authority.

Appointment of Resolution Professional

The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed.

Possession of assets

Section 18 of the Code it will be the duty of interim resolution professional to collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor.

It shall monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.

The Interim Resolution Professional shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets.

The Interim Resolution Professional shall issue mandate to all the Banks maintaining accounts of the Corporate Debtor for the purpose of operating the Bank Accounts.

According to section 23 of the Code, the RP shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the CIRP period. He shall continue to manage the operations of the corporate debtor even after the expiry of the CIRP period, if resolution plan has been submitted to the NCLT, till an order is passed by the NCLT under section 31 of the Code.

Further, Section 19 puts obligation upon the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor to extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

Raising of Interim Finance

The Interim Resolution Professional may raise Interim Finances subject to the approval of the committee of creditors. The costs incurred in raising such finance and such amount shall be included in Insolvency Resolution Process Costs.

Essential Supplies and running of business as going concern

The interim resolution professional shall make every endeavor to manage the operations of the corporate debtor as a going concern. Insolvency resolution process costs will include amounts due to suppliers of essential goods and services which will include electricity, water telecommunication services and information technology services.

Filing with Adjudicating Authorities and Insolvency Professional Agencies

It is the duty of Interim Resolution Professional or Resolution Professional to file various documents like Statement of Claims, Report Constituting Committee of Creditors and Minutes etc. to the Adjudicating Authorities. Such filing is done in paperbook format on set of one original and two duplicate.

Further, the Interim Resolution Professional or Resolution Professional is also required to file disclosures to Insolvency Professional Agencies at time of his appointment, appointment of other professionals, demitting office and regarding the Cost.

Role of the Committee of Creditors

Chapters IV of Part IV of the Insolvency and Bankruptcy Code, 2016 prescribes the functions and obligations of insolvency professionals. It lays down the Code of Conduct of Insolvency Professional which requires him to take reasonable care and diligence while performing his duties.

There are certain matters where both the IRP/RP and the CoC have defined roles. Various actions under section 28 are taken by the IRP/RP only with the prior approval of the CoC. The IBBI has issued a chart of Responsibilities of IRP / RP and CoC in a CIRP so that they have a complete and clear understanding of their roles and responsibilities in CIRP under the Code.

This is in light of the judgment of hon'ble Supreme Court in the matter of K. Sashidhar v. Indian Overseas Bank &Ors. wherein it was observed that: "The Resolution Professional is not required to express his opinion on matters within the domain of the financial creditors, to approve or reject the resolution plan, under section 30(4) under the I&B Code".

Approval of Resolution Plan

Under section 31, the NCLT if satisfied may either approved the Resolution Plan or reject it. On rejection, it shall pass an order requiring the corporate debtor to be liquidated as per the Code. The same RP shall be appointed as the liquidator, after obtaining his consent, on initiation of the liquidation process and all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

The Corporate Insolvency Resolution Process (CIRP) not only affects the various statekeholders but also impacts the economy of the nation. As IRP/IP has been vested with vast powers and roles under the Code, therefore, it is required that they showcase high level of calibre and integrity while discharging their duties and performing their roles under the Code.

The Table presenting a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days is appended below:

Section / Regulation	**Description of Activity**	**Norms**	**Timeline**
Section 16(1)	Commencement of CIRP and appointment of IRP	….	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97

Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(1)	1st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	……
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later?	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10

Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EoI		
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

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FOREIGN INVESTMENT BY REGISTERED FOREIGN PORTFOLIO INVESTOR AND COMPARATIVE ANALYSIS

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

1. Introduction

The previous articles of Foreign Direct Investment (FDI) dealt with the overall regulations governing Foreign Investment in India and various schedules for foreign investment under Notification No. FEMA 20(R)/ 2017-RB (hereinafter referred to as "Fema 20(R)").

In the current article we will cover:

i. Investment by Registered Foreign Portfolio Investor (RFPI)
ii. Comparative Analysis of Foreign Investment through various routes

2. Key definitions used in the article

i. Foreign Portfolio Investment(FPI) : Any investment made by a person resident outside India (PROI) through capital instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company.
ii. Registered Foreign Portfolio Investor (RFPI) means a person registered in accordance with the provisions of Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.Under the SEBI FPI Regulations, 2014, Foreign Institutional Investors (FIIs), Sub Accounts (SA) and Qualified Foreign Investors (QFIs) were merged into a single category, referred to as FPIs.
iii. Broad Based Fund: A broad-based fund means a fund, established or incorporated outside India which has at least 20 investors with no individual investor holding more than 49% of the shares or units of the fund.

3. Investment by RFPI under Schedule 2 and Schedule 5 of Fema 20(R)

3.1. Inclusions under RFPI

i. An RFPI includes investment groups of Foreign Institutional Investors (FII), Qualified Foreign Investors (QFI), Asset Management Companies, Banks,

Pension Funds, Mutual Funds, Investment Trusts as Nominee Companies, Incorporated / Institutional Portfolio Managers or their Power of Attorney holders, University Funds, Endowment Foundations, Charitable Trusts and Charitable Societies etc.

ii. As per SEBI circular no CIR/IMD/FPIC/CIR/P/2018/132 dated 21st September 2018 NRIs/ OCIs/ Resident Indians (RIs) shall be allowed to be constituents of FPIs subject to the following conditions: -

a) Contributions by NRI/ OCI/ RI** includingthoseofNRI/ OCI/ RI** controlled Investment Manager should be below 25% from a single NRI/ OCI/ RI and in aggregate should be below 50% of the corpus of FPI.
***Resident Indian's contribution permitted is that made through Liberalised Remittance Scheme (LRS) approved by Reserve Bank of India in global funds whose Indian exposure is less than 50%.*

b) NRI/ OCI/ RI should not be in control of FPI.

c) However, an Investment Manager (IM) which is controlled and/or owned by NRI / OCI may control the FPI provided:
   1. The IM is appropriately regulated in its home country and is registered with SEBI as a non-investing FPI, or
   2. The IM is incorporated or set-up under Indian laws and appropriately registered with the SEBI

d) The above restrictions mentioned in (ii) do not apply to FPIs investing only in Mutual Funds in India.

e) In caseof temporary breach,a time period of 90 days will be given to ensure compliance with above conditions.

f) The restriction that NRI/ OCI/ RI should not be in control of FPI shall also not apply to FPIs which are 'offshore funds' for which no-objection certificate has been provided by the Board.

3.2. Categories of FPI

i. Category l: Government and Government related investors such as central banks, Governmental agencies, sovereign wealth funds or international and multilateral organizations or agencies. Category l FPIs are subjected to the easiest set of compliance norms.

ii. Category ll: Regulated broad-based funds such as mutual funds, investment trusts, insurance/reinsurance companies.
-Regulated persons such as banks, asset management companies, investment managers/advisors, portfolio managers.

-Broad-based funds not 'appropriately regulated'** but whose investment manager (including investment advisor or trustee) is appropriately regulated and registered as Category II FPI Global Currency Futures & Options.
-University Funds, Pension Funds and University related Endowments already registered with SEBI.
**Appropriately Regulated means an applicant falling in Category II regulated or supervised by the securities market regulator or the banking regulator of the concerned foreign jurisdiction, in the same capacity in which it proposes to make investments in India.

iii. Category lll: All others FPIs not eligible under Category I and II such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.Category lll FPIs are subjected to the strictest set of compliance norms

On the recommendation of the H R Khan committee SEBI has removed the concept of Category-III FPIs. There will now be only two categories of FPIs. However, there is no clarity how the two categories of FPIs will be decided.

3.3. FPI Investment Limits

i. The total holding by each registered foreign portfolio investor (RFPI) or an investor group as referred in SEBI (FPI) Regulations, 2014, shall be less than 10 percent of the total paid-up equity capital on a fully diluted basis or less than 10 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company.

ii. The total holdings of all RFPIs put together shall not exceed 24 percent of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants. The aggregate limit of 24 percent may be increased by the Indian company concerned up to the sectoral cap/ statutory ceiling, as applicable, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively.

iii. One may note that there is no regulation to increase the individual limit of 10 percent and only the aggregate limit of 24% can be increased.

iv. In case the total holding of an FPI increases to 10 percent or more of the total paid-up equity capital on a fully diluted basis or 10 percent or more of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company, the total investment made by the FPI shall be re-classified as FDI subject to the conditions as specified by Securities and Exchange Board of India and the Reserve Bank in this regard.

3.4. Mode of Payment

The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/ or a Special Non-Resident Rupee (SNRR) account. The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule

3.5. Pricing Guidelines

i. In case of Public Offer, the price of the shares to be issued is not less than the price at which shares are issued to residents.

ii. In case of issue by private placement, the price is not less than

   a. The price arrived in terms of guidelines issued by the Securities and Exchange Board of India, or

   b. The fair price worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a SEBI registered Merchant Banker or Chartered Accountant or a practicing Cost Accountant.

3.6. Eligible Investments for RFPI as per Fema 20(R)

The following investments are subject to certain conditions and caps on exposure and size.

i. Capital instruments of Listed Indian companies and with the cap as per paragraph 3.5 above.

ii. Dated Government securities/ treasury bills;

iii. Non-convertible debentures/ bonds issued by an Indian company;

iv. Commercial papers issued by an Indian company;

v. Units of domestic mutual funds;

vi. Security Receipts (SRs) issued by Asset Reconstruction Companies up to 100 percent of each tranche, subject to directions/ guidelines of the Reserve Bank;

vii. Perpetual Debt instruments eligible for inclusion as Tier I capital and Debt capital instruments as upper Tier II capital issued by banks in India to augment their capital (Tier I capital and Tier II capital as defined by Reserve Bank) provided that the investment by all eligible investors in Perpetual Debt instruments (Tier I) shall not exceed an aggregate ceiling of 49 percent of each issue and investment by a single FPI shall not exceed the limit of 10 percent of each issue;

viii. Non-convertible debentures/ bonds issued by Non-Banking Financial Companies categorized as 'Infrastructure Finance Companies'(IFCs) by the Reserve Bank;

ix. Rupee denominated bonds/ units issued by Infrastructure Debt Funds;

x. Listed non-convertible/ redeemable preference shares or debentures issued in terms of Merger or demerger or amalgamation of Indian companies as given in Regulation 9 of Fema 20(R).

xi. Security receipts issued by securitization companies subject to conditions as specified by the Reserve Bank and/ or Securities and Exchange Board of India.

xii. Securitised debt instruments, including (i) any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s with banks, Financial Institutions or NBFCs as originators; and/ or (ii) any certificate or instrument issued and listed in terms of the Securities and Exchange Board of India (Regulations on Public Offer and Listing of Securitised Debt Instruments), 2008.

xiii. Currency Derivatives segment of stock exchange (subject to various position limits and other conditions)

xiv. Stock Derivatives

xv. Units of REITs, InvITs and Category III AIFs

xvi. Municipal Bonds

3.7. Investment conditions/ Restrictions on investment by RFPI

i. FPIs investments in corporate debt securities:

a) FPIs are permitted to invest in corporate bonds with minimum residual maturity of above one year, subject to the condition that short-term investments (i.e. investment in securities with residual maturity up to 1 year) in corporate debt securities by an FPI shall not exceed 20% of the total investment of that FPI in corporate bonds. This requirement applies on an end of day basis.

(short-term investments do not include any investment made after April 27, 2018)

b) Investment by any FPI (including investments by investor group as determined on the basis of clubbing requirement on the basis of common beneficial owner in accordance with Regulation 23(3) of SEBI (FPI) Regulations, 2014), in corporate debt securities, shall be subject to the following concentration limits:

(i) Long-term FPIs: 15% of prevailing investment limit.

(ii) Other FPIs: 10% of prevailing investment limit.

(iii) In case an FPI has investments (INV0) in excess of the concentration limit on the effective date (date on which these concentration limits come into existence as prescribed by RBI), it will be allowed relaxations as

given in SEBI operating guidelines for FPI, subject to availability of overall limits, as a one-time measure

c) FPI investment in corporate bond (including investment by investor groups) shall not exceed 50% of any issue of a corporate bond. In case an FPI, including investments by investor groups, has invested in more than 50% of any single issue, it shall not make further investments in that issue until this stipulation is met.

d) FPIs are not permitted to invest in partly paid debt instruments.

e) FPI investments in any Central Government securities cannot exceed 30% of the outstanding stock of that security.

ii. Position limits available to FPIs for stock and stock index derivative contracts

a) Position limits available to Category I & II FPIs for stock derivate contracts shall be same as of Trading Member level limits as advised by SEBI from time to time.

b) Position limits available to Category III FPIs shall be same of client-level limits as advised by SEBI from time to time.

iii. FPI Position Limits in Exchange Traded Interest Rate Futures (IRF)

a) For category l and ll FPIs there is a limit of INR 5,000 crore on aggregate basis to FPIs for taking long position in IRFs.

b) For Category III FPIs, the gross open positions across all contracts within the respective maturity bucket shall not exceed 3% of the total open interest in the respective maturity bucket or INR 200 crore, whichever is higher.

c) For Category I,II & III FPIs, the total gross short (sold) position of an FPI in IRF shall not exceed its long position in the government securities and in Interest Rate Futures, at any point in time.

iv. An FPI shall not hold more than twenty five percent stake in a category III AIF.

3.8. A RFPI is not eligible to invest in a Limited Liability Partnership or in capital instruments of unlisted Indian companies.

3.9. Recent Amendments in Investment by RFPI

i. As per RBI A.P. (DIR Series) Circular No. 19 dated 15th February 2019, RBI has withdrawn the provision mentioned in paragraph 4(f) (ii) of the AP (DIR Series) Circular No. 31 dated June 15, 2018 that no FPI shall have an exposure of more than 20% of its corporate bond portfolio to a single corporate (including exposure to entities related to the corporate).

ii. SEBI eased the KYC norms and eligibility terms for FPIs through circular no CIR/IMD/FPIC/CIR/P/2018/131 dated 21st September 2018.

3.10. Recommendations by Working Group on FPI Regulations

SEBI had constituted a working group on March 26, 2018 under the Chairmanship of Shri H.R. Khan, Deputy Governor (Retired), Reserve Bank of India,which was entrusted with the task of reviewing the current Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 and recommending any amendments that may be required for rationalising and simplifying the SEBI FPI regulations.

The Khan Committee has submitted its report on May 24, 2019 to SEBI. The report contains the following:

i. **Ease of access** - fast track on-boarding process for select category II FPIs, review of broad based condition for appropriately regulated entities, pension fund to be considered for category I FPI registration, deemed broad based status for insurance/ re-insurance entities, simplified registration for multiple investment manager (MIM) structures, entities established in the international financial services centre(IFSC) be deemed to have met the jurisdiction criteria for FPIs, etc.

ii. **Simplification of documentation** - removal of 'opaque structure" definition, simplified KYC documentation for category III FPI, KYC reliance on same group regulated entity of custodian for non-PAN documents, etc.

iii. **Review of Investment restriction** - Liberalized investment cap, harmonization between investment restrictions in FPI regulations and FEMA 20(R), reclassification of investment from FPI to FDI, permitting FPIs for off-market transactions, review of restriction on sovereign wealth funds for investment in corporate debt securities etc.

iv. **Other aspects** - strengthening of clubbing restrictions, alignment between FPI and alternative investment fund (AIF) routes, strengthening of offshore derivative instrument (ODI) framework, etc.

Entire report can be found on https://www.sebi.gov.in/sebi_data/commondocs/may-2019/Annexure-A_p.pdf

4. Investment avenues in capital instruments of Indian company's byPROI through Foreign structure under Fema 20(R)

A PROI has various investment avenues to invest in India. Most of which has been discussed in the previous articles. Following are the various avenues available to an PROI for investment in India.

4.1. Investment in Capital Instruments of Indian Companies along with management control (Foreign Direct Investment)

i. Schedule I: A PROI can invest in the capital instruments of an Indian company (i.e. Listed and Unlisted) under schedule I, subject to entry routes, sectoral caps and pricing guidelines. Along with filing of form FCGPR within 30 days of issue and form FCTRS within 60 days of transfer of capital instrument.

ii. Schedule VII: A PROI can invest through an FVCI in equity and equity linked instruments or debt instruments of start-ups or the permitted ten sectors (ie Biotechnology, IT related to hardware and software development, Nanotechnology, Seed research and development, Research and development of new chemical entities in pharmaceutical sector, Dairy industry, Poultry industry, Production of bio-fuels, Hotel-cum-convention centres with seating capacity of more than three thousand and Infrastructure sector) whose shares are not listed on any recognized stock exchange at the time of issue of the said securities; Pricing guidelines do not apply to investment and disinvestment by an FVCI. An FVCI has to disclose all its investment strategies to the SEBI before it makes any investment in India.

4.2. Investment in capital instruments of a Listed Indian Companies with no Management control

i. Schedule II – A PROI(excluding NRI)can invest in capital instruments of Listed Indian companies by investment through RFPI under Schedule ll of Fema 20(R) subject to a cap of 10%of the total paid-up equity capital on a fully diluted basis per RFPI or an investor group (same set of beneficial owner) and the total holdings of all FPIs put together shall not exceed 24 percent of paid-up equity capital on a fully diluted basis. The aggregate limit of 24% can be increased by the Board of directors through a special resolution. An FVCI can also be registered as an FPI as per SEBI circular no CIR/IMD/FIIC/05/2015.

ii. Schedule ll&lll - An NRI can invest in capital instruments of a Listed Indian Company through the following ways:

a) Schedule ll: Through an RFPI with a 25% cap on investment per NRI/OCI/RI and aggregate investment should be below 50% of the AUM along with other investment conditions as mentioned above.

b) Schedule lll: Through direct purchase/sell on a recognized stock exchange in India.The total holding by any individual NRI or OCI shall not exceed 5 percent, and the total holdings of all NRIs and OCIs put together shall not exceed ten percent of the total paid-up equity capital on a fully diluted basis.

iii. Schedule VII – A PROI can invest in equity shares of a Listed Indian company by investmentthrough a Foreign Venture Capital Investor, However an FVCI can only invest 33.33% of its investible funds by way of an IPO or through preferential allotment with one-year lock in.

4.3. Investment in Limited Liability Partnership (LLP)

Schedule VI: A PROI (other than citizen of Bangladesh and Pakistan) can invest in an LLP under schedule 6 of Fema 20(R) only in sectors where 100% foreign investment is permitted under automatic route with no FDI linked conditions, subject to pricing guidelines. An FVCI and FPI cannot invest in an LLP.

5. Investment avenues for PROI in capital instruments of Indian company through Domestic structureunder Fema 20(R)

5.1. Investment through Alternate Investment Fund (AIF)

Schedule VIII: A PROI can invest through an AIF in capital structure of unlisted companies through category I,lland lll AIF and in capital instruments of Listed companies through category lll AIF subject to other conditions of investment.

Minimum ticket size for investment is Rupees one crore per investor. If the sponsor and the manager of the AIF are Indian owned and controlled then downstream investment in operating companies will not be treated as foreign Investment and will be deemed to be resident Investment. This would permit the foreign investors to invest in Indian companies without any sectoralrestrictions.

5.2. Investment through a Private or Public company registered with Reserve Bank of India (RBI) as Non-Banking Finance Company (NBFC) under 100% Automatic route

6. Investment avenues in capital structure of an Indian company for RFPI

6.1. Investment in capital instruments of Listed company

i. Schedule III: An RFPI can purchase/sell capital instruments on a recognized stock exchange as per Schedule 2 subject to a cap of 10% of the total paid-up equity capital on a fully diluted basis per RFPI or an investor group (same set of beneficial owner) and the total holdings of all FPIs put together shall not exceed

24 percent of paid-up equity capital on a fully diluted basis. The aggregate limit of 24% can be increased by the Board of directors through a special resolution.

ii. Schedule VIII: An RFPI can invest through investment in category lll AIF subject to a maximum investment of 25% of the AUM of the Fund and other investment conditions.

6.2. Investment in capital instruments of an unlisted company

Schedule VIII: An RFPI can invest in an unlisted company through investment in category lll AIF subject to a maximum investment of 25% of the AUM of the Fund and other investment conditions.

7. **Investment avenues in capital structure of an Indian company for FVCI**

7.1. Investment in capital instruments of Listed company

Schedule VII: Maximum upto 33.33% of the corpus of FVCI can be invested by way of an IPO or preferential allotment with a oneyear lock in.

7.2. Investment in capital instruments of Unlisted company

i. Schedule VII: an FVCI can invest in equity and equity linked instruments or debt instruments of start-ups or the permitted ten sectors (i.e Biotechnology, IT related to hardware and software development, Nanotechnology, Seed research and development, Research and development of new chemical entities in pharmaceutical sector, Dairy industry, Poultry industry, Production of bio-fuels, Hotel-cum-convention centres with seating capacity of more than three thousand and Infrastructure sector) whose shares are not listed on any recognized stock exchange at the time of issue of the said securities; Pricing guidelines do not apply to investment and disinvestment by an FVCI. An FVCI has to disclose all its investment strategies to the SEBI before it makes any investment in India.

ii. Schedule VIII: An FVCI can invest in unlisted companies through investment in units of a Venture Capital Fund or of a category I AIF.

8. Conclusion/Summary

Below is the summary for various Investment avenues under Fema 20(R)

Investor Type	**Investing Entity**				
	Listed Company (FDI)	**Unlisted Company**	**Listed Company (Portfolio Investment)**	**LLP**	**AIF**

PROI (excl NRI)	Permitted under SchI subject to FDI related conditions.	Permitted under SchI of Fema subject to FDI related conditions.	Permitted under Sch II,VII and VIII,subject to respective investment conditions as discussed above	Permitted under SchVI only in sectors where 100% FDI is permitted under Automatic route with no FDI linked conditions	Permitted in all 3 categories of AIF
NRI/OCI	Permitted under SchI subject to FDI related conditions.	Permitted under SchI of Fema subject to FDI related conditions.	Permitted under SchII,III,VII and VIII, subject to respective investment conditions as discussed above	Permitted under SchVI only in sectors where 100% FDI is permitted under Automatic route with no FDI linked conditions	Permitted in all 3 categories of AIF
RFPI	not permitted	Permitted through investment in Category III AIF underschVIII. Maximum upto 25% of the AUM.	Permitted under SchII subject to respective investment conditions as discussed above	not Permitted	Permitted only through category III AIF upto maximum 25% of AUM

FVCI	not permitted	Permitted under SchVII in start-ups and ten sectors as mentioned above	Permitted under Sch VII up to 33.33% of corpus of FVCI only by way of IPO or by way of preferential allotment with one-year lock-	not Permitted	Permitte d only through category I AIF
AIF	Permitted only through category III AIF	Permitted through category, I, II and III AIF	Permitted only through category III AIF	Permitted through category, I, II and III AIF	

9. Issues in various sectors under FDI policy

9.1. FDI in print Media and Broadcasting

i. FDI Policy on Broadcasting Sector applies to Broadcasting Carriage Services (such as Cable Networks, DTH, Mobile TV, etc.) FDI is permitted upto 100% under Automatic route.Broadcasting Content Services being FM Radio, Up-linking of 'News & Current Affairs'(FDI is permitted upto 49% under govt route) and 'Non-News & Current Affairs' TV Channels / Downlinking of TV Channels. (FDI is permitted upto 100% under Automatic route)

ii. FDI Policy on Print Media Sector applies to Publishing of newspaper and periodicals dealing with news and current affairs, Publication of Indian editions of foreign magazines dealing with news and current affairs, Publishing/printing of scientific and technical magazines/specialty journals, etc. and Publication of facsimile edition of foreign newspapers. FDI is permitted upto 29% under Government Route

iii. Detailed conditions are specified for these sectors. Operational conditions seek to regulate the activities of the journalists through sector-specific laws & guidelines.

iv. It can be observed that both sectors deal with different methods of dissemination of information which may be News & Current Affairs or non-News & Current Affairs.

v. However, Internet-based journalism and online dissemination of information through portals which is rapidly proliferating is not specifically covered under the FDI Policy under the above Sectors

Key Issue: Can an Indian company proposing to engage in collection of news & current affairs, analysis & reporting / publishing of same through internet online portals invite FDI under automatic route? Is this a oversight in the law as the intention of the FDI Policy is to regulate foreign investment in sensitive sectors which deal with matters of national interest?

9.2. FDI in Real Estate Sector

Various conditions are specified for undertaking 100% investment in the Construction Sector under the automatic route. Earlier, such conditionalities did not apply to investment by NRIs/OCIs. Now, all the conditionalities except the lock-in conditions will apply to NRI/OCI investment. The issue that arises is whether this requirement restricts NRIs who have historically been offered beneficial conditions for FDI.

9.3. FDI in Defence Sector

i. As per Consolidated FDI Policy, in Defence Industry is subject to Industrial license under the Industries (Development & Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959, FDI is permitted upto 49% in automatic route and upto 100% through Govt. route if it is likely to result in access to modern technology or for other reasons to be recorded.

ii. Licence applications will be considered and licences given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.

iii. Foreign investment in the sector is subject to security clearance and guidelines of the M/o Defence.

The issue that arise,

a) In case of items related to Defense sector but not falling under Industrial Licensing or Arms Act such as electronic components used in Defense products as well as in other industries will attract licensing as per se there is no manufacturing of Defense products.

b) In such cases, will security clearance from Ministry of Defense still be required?

9.4. FDI Policy relating to Other Financial Services

i. FEMA Notification no.FEMA.375/2016-RB dated September 9, 2016 amended the sectoral cap for 'other financial services' thereby doing away with the minimum capitalization norms.
Instead of specifying various activities, the provision has been simplified to mean Financial
services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India.
Financial service activities governed by aforesaid regulators will be permitted to bring 100% FDI under automatic route.

ii. FDI in unregulated/ partly regulated financial sector activities or where there is doubt regarding the regulatory oversight, FDI will be permitted under approval route subject to conditions including minimum capitalization requirement, as may be decided by the Government.
The issue that arises is:
The issue that arises is that a number of financial services (e.g. non-fund based services) are now inadvertently brought under Govt. approval route as such services do not have any Regulator / Govt. agency monitoring the activities. Is this the intent of the legislation?

10. Conclusion: A careful analysis of the FDI policy will reveal that schedular rules are aimed at providing a set of rules for the type of the Foreign Investor. As far as possible a type of investor will not be able to enter or make investment of a particulartype or with similar conditions through more than one schedule. Investment type could be Capital or Debt, direct or portfolio leading to either on repatriation or on a nonrepatriation basis.

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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

M.M.DEVELOPERS V/S MR, ABDUL RAHIM ABDUL AZIZ THAKUR & ORS.

Advocate of appellant says the appellant could not comply order dated 6th April 2018 wherein directions were given to deposit 50% of the sums in reference to the order of MahaRERA dated 19th January, 2017. According to him as negotiations between the parties were in progress, he was given an impression that today the matter could be worked out. As it was specifically notified on 6th April 2018 that if the directions of deposit are not adhered to the appeal shall be dismissed.

As the order is not complied with, the appeals of M.M. Developers are dismissed.

DEEPA AVINASH MANSABDAR V/S M/S RUNWAL HOMES PVT.LTD.

The appellant had booked a flat on dated 08.10.2012 and released 87% of the cost of the flat by cheques, the grievance from the appellant is that the area of the flat which was indicated at the time of booking was not same as mentioned in agreement and enhanced charges of area is charged which is not acceptable to the appellant.The respondent submitted that there is no major variation to increase 96 sq. ft. which the appellant as allottee does not desire to receive and pay additionally.

The tribunal held that minor variation in the size of flat should not be to the detriment of the promoter. He cannot be asked at the whims of the allottee to demolish building to suit the requirement of the allottee.It further held that it cannot be said at this stage that the area agreed has been unilaterally modified or reduced.It was as per

the plans; the minimum area has been multiplied/increased.It therefore cannot be said that there is illegal or incorrect calculation.

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

YASHOMANGAL DEVELOPERS V/S YASHWANT DASHRATH SAWANT

Promoter has filed appeal challenging order of MahaRERA whereby the promoter has been directed to pay interest @) 10.05 % from the respective dates of receipt of amount till they are repaid together with Rs.20, 000/- towards the cost of the complaint. The Learned Adjudicating Member has given concession of six months for the delay in completion of the project. The allottee has booked Flat no. 204, Building No. 1, D Wing of Promoter's registered project Alfa Greenfield, situated at Wadgaon, Mawal, Pune. The Agreement inter alia provided that the Promoter to hand over possession of the flat by December, 2013. Since the Promoter failed to complete the project the allottee has, by invoking provisions of Section 18 of RERA urged for refund of the moneys paid / deposited to the Promoter.

Ld. Counsel for the promoter argued that the Ld. Adjudicating officer erred in applying section 8 of MOFA. According to Ld. Counsel for promoter when the Ld. Adjudicating Officer records a positive finding about the causes for delay in the project, it was not justified on the part of the Ld. Adjudicating Officer to have directed payment of interest and refund of amount. The contention of promoter is that the project was stalled by the authorities of Environment Clearance from 22.7.2013 till 01.03.2017 and this should have been considered by the Ld. Adjudicating Officer.

The Ld. Tribunal member analyzed various provisions of Act. Sec. 71(3) enlarges the scope of Authority to the Adjudicating Officer to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub section (1) he may direct to pay such compensation or interest as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Thus conjoint reading of Section 71 the powers of the Adjudicating Officer and impact of Section 88 does not exclude powers of Adjudicating Officer to refer to Section 8 of MOFA which has been rightly done by the Adjudicating Officer. Even otherwise, the very Agreement upon which the Promoter/ Appellant is banking inter alia provides to applicability of MOFA to the

transaction between the parties. In the situation the submission of Mr. Salunke being not within the bracket of legal terms needs to be overlooked and will not be weighing in favour of the Appellants to brand the order under challenge to be illegal or perverse.

As regard environmental clearance is concerned, the Ld. Member opined that if the promoter was facing any difficulty with the Environment Department, it was expected ofhim to have indicated this fact in the agreement. There is a suppression of the facts when the promoter entered into the agreement. Taking into consideration of the entire facts, the Ld. Adjudicating Officer has rightly extended 6 months concession to the promoter and it cannot be further extended beyond a certain limit to the detriment of the allottee. Considering this, appeal is dismissed.

RAMESH KUMAR PODDAR V/S BENCHMARK TOWN PLANNING LLP

The complainant alleged that the date of possession as stipulated in the agreement June 2016 but the respondent has not given the possession till date. And therefore has filed the claim for the interest for delay in handling over the possession.The respondent submitted that the project has been delayed because of the reasons which were beyond the control of the respondent and assured to give the possession by May 2018.The complainant stated that he doesn't intend to withdraw from the project and accepted the revised timeline in receiving the possession of the said apartment.

In view of the above facts respondent shall hand over the possession along with occupancy certificate before 31.05.2018 failing which the respondent will be liable to pay the interest as prescribed under the rules.

MANGALMURTI VANIJYA PVT. LTD. V/S PARINEE REALTY PVT.LTD.

The complainantalleged that the respondent has failed to hand over possession of the apartments within the stipulated period and therefore they be directed to pay interest as per the provisions of section 18 of the RERA, 2016.The advocate for the respondent submitted that the construction work of the project isdelayed because of reasons which were beyond the respondent's control. Also, he has obtained the part - Occupation Certificate for the said apartments in April, 2018 and had already sent out intimation of the same to the Complainants.Therefore, the authority concluded that, since the respondent has already obtained part Occupation Certificate for the building up to the 9th floor and has offered possession of the said apartment to the complainants, provisions of section 18 of the said Act do not apply in the present case.

Thus, the complainants are advised to take possession of the said apartments at the earliest according to the provisions of section 19 of the said Act.

HARYANA REAL ESTATE REGULATORY AUTHORITY

SUSHIL TIWARI V/S THE SHALIMAR ESTATES PVT LTD.

The main issue involved in the case concerns the jurisdiction of this Authority to entertain a complaint in respect of a project for which completion certificate has already been issued. This Authority has already dismissed some complaints involving such issues, holding that the Authority has no jurisdiction to deal with the complaints involving project for which a completion certificate has been issued by the Competent Authority. Learned counsel for the complainant has today informed the Authority that he has filed an appeal against the order dismissing complaint on the aforesaid ground but the said appeal has not been yet listed for hearing. In these circumstances, the Authority has decided to adjourn the case for awaiting the decision of the Appellate Authority in the matter and for enabling the respondent's counsel to file his arguments in reply to the arguments today filed by the complainant.

ARCHANA SINHA V/S RAHEJA DEVELOPERS LIMITED

The complainant contended that the respondent induced her to purchase a Plot No C-94 in project named as "Akshaara" under Affordable housing Scheme by misrepresenting the fact that the project is situated in Gurugram. However, it is subsequently revealed that the project is situated in District Mewat. Now, complainant wants to withdraw from the project and wants to take refund of the money along with the interest and compensation thereon.

After hearing the parties, it was observed by the authority that the brochure of the project mentioned that the project was located in Gurugram, although the Town and Planning Department mentioned that the project will be developed in District Mewat.The respondent has not represented the facts properly to the complainant. However, the buyer of the property should have acted vigilantly and exercise all the diligence on his part to avoid any misrepresentation. The complainant could have approached the department which had developed Sector-14 and has should have made all the necessary enquiries.

Viewed from this perspective, complainant cannot be allowed to put all the blame to the respondent. Accordingly, the respondent is directed to refund the amount paid by the complainant within two month from the date of order failing which he will be liable to pay interest @ 10% on the amount to be refunded till the actual date of payment.

NOTIFICATIONS/CIRCULARS

GUJARAT REAL ESTATE REGULATORY AUTHORITY
NO. GUJRERA/CIRCULAR/16/2019
DATE: 19.07.2019

FORM-3 FOR PUBLIC AUTHORITIES TO BE ISSUED BY CHARTERED ACCOUNTANTS ONLY

The public authorities, local bodies and government undertakings engaged in developing/constructing properties to be used for residential, commercial or for the purpose of any other business, occupation, profession or trade or for any other related purposes that form a part of the real estate sector, are registering their projects with Gujarat RERA in capacity of promoter of Real Estate under development. Vide GujRERA Circular No.5-2017, the financial heads of Public Authorities were declared competent to sign certificates for the purpose of registration and for withdrawal of money as prescribed under Rule 3 and Rule 5 of the Gujarat Real Estate Regulatory Authority (General) Rules 2017. The Form-3 has since been amended for monitoring of the key performance indicators of the promoters of the Real Estate Projects with effect from 8th June, 2019. The objective is to ensure financial discipline and compliance with various provisions of the RERA Act, 2016 and rules thereunder. The amended Form -3 requires CA to carry out certain professional verifications and the form is to be submitted using Digital Signature of CA registered as Practicing CA with ICAI, Delhi. Considering the changes made in Form-3 and the digitization of Form-3 and Form-5, it has now become necessary for these authorities to obtain form-3 certificate from practicing Chartered Accountant. As such, the exemption is withdrawn with issuance of this circular. All future Form-3 and Form-5 from Government authorities for their registered project will have to be issued by Practicing Chartered Accountant in compliance with RERA Act, Rules & Regulations thereunder.

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HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Miscellaneous Bail Application No. 12440/2019 Rakesh Kumar Khandelwal S/o Shri Ramesh Kumar Khandelwal B/c Khandelwal, Aged About 39 Years, R/o 11-B Udai Nagar Jaipur (At Present Lodged In Central Jail Jaipur)

----Petitioner

Versus

Union Of India, Through Pp

----Respondent

For Petitioner(s) : Mr. Vivek Raj Singh Bajwa
For U.O.I. : Mr. Siddharth Ranka

Normal Bail Application under Section 439 of the CrPC. Bail rejected by Session Judge, Jaipur. High Court allowed the Bail Application on furnishing of personal bond of Rs. 1000000.00

HON'BLE MR. JUSTICE PANKAJ BHANDARI
Judgment / Order

1. Petitioner has filed this bail application under Section 439 of Cr.P.C.

2. Case No. iv(6)118/AE/JPR/2019/PART-1 relating to offence under section 132(1)(e) of Central Goods & Service Tax Act, 2017 regarding which bail application has been rejected by Sessions judge, Jaipur Metropolitan, Jaipur.

3. It is contended by counsel for the petitioner that petitioner was the Manager and Authorized signatory of Padmavati Industries. The partners of the firm were Namrata Jain and Santosh Kumar Jain. Department conducted an investigation and came to the conclusion that Rs. 7.12 Crore Input Tax Credit has been wrongly claimed by Padmavati Industries.

4. It is contended that all transactions were carried out through Bank transactions and the Industries from whom purchases were made were all active, as per the record of the Department.

5. It is also contended that an amount of Rs.3.33 Crore was deposited with the Department, thus bringing the total disputed tax credit amount to below Rs.5 Crore and if the tax credit amount is below five crores the offence is bailable.

6. It is also contended that the owners of Padmavati Industries have obtained a stay on their arrest by the Hon'ble Apex Court. Petitioner had appeared four times before the Departmental Authorities and had co-operated with the investigation. Petitioner is in custody from 28.08.2019.

7. Counsel for the petitioner has placed reliance on "***C. Pradeep vs. The Commissioner of GST & Central Excise Selam & Anr.***" (Special Leave to Appeal Criminal No.6834/2019) vide order dated 06.08.2019, whereby, the Apex Court had restrained the Department from taking coercive action against the petitioner. And order dated 30.09.2019, whereby, Apex Court has restrained the Department from taking coercive action against Namrata Jain and Santosh Kumar Jain who are partners of Padmavati Industries.

8. It is also contended that no determination has been done by the Authorities and in the reply filed by the Union of India, they have not mentioned that any fake invoices were prepared for claiming tax credit.

9. Counsel for the Union of India has vehemently opposed the bail application. It is contended that the annual turn over of Padmavati Industries was just to the tune of Rs.1 Crore which within a year rose to more than Rs.100 Crore. A refund of Rs.23 Crore was claimed and a refund of Rs.18 Crore was granted. Seven entities from whom firm claimed to have purchased material, were not in existence and Input Tax to the tune of Rs.7.12 Crore was wrongly claimed.

10. It is further contended that petitioner is not merely a Manager but he is also having 40% share in the profit of the firm and his capacity is that of a partner.

11. It is also contended that merely because Rs.3.33 Crore was deposited, offence cannot be termed as a bailable offence.

12. Counsel for the Union of India has placed reliance on judgment of Hon'ble Apex Court "***P.V. Ramana Reddy vs. Union of India & Ors.***" *(Special Leave to Appeal (Crl.) No.4430/2019) and* judgments passed by this Court in "***Bharat Raj***

Punj & Anr. vs. Commissioner of Central Goods And Service Tax Department & Ors." *(S.B. Criminal Writ Petition No.76/2019) decided on 12.03.2019 , "**Sandeep Kumar Agrawal vs. Union of India**" (S.B. Criminal Misc. Bail Application No. 7499/2018)* connected with *"**Shri Ram Kumar Singh vs. Union of India"** (S.B. Criminal Misc. Bail Application No. 7656/2018) decided on 05.07.2018* also on judgments passed by Co-ordinate Bench of this Court in *"**Mukat Behari Sharma vs. Union of India**" (S.B. Criminal Misc. Bail Application No. 1238/2019) decided on 25.02.2019 , "**Smt. Himani Munjal vs. Union of India**" (S.B. Criminal Misc. Bail No.10350/2018) decided on* 10.09.2018 & "***Sandeep Goyal & Anr. vs. Union of India***" *(S.B. Criminal Misc. Bail Application No. 1405/2019) decided on 27.02.2019,* where in bail applications were rejected.

13. I have considered the contentions.

14. Petitioner has placed before the Court various Tax Invoices and e-Way Bills through which purchases have been made by the firm and the record of the Department from which it is revealed that Firms were in existence. As per Rules 25 of the GST Rules , it is incumbent upon the Department to verify that the Firms/Companies which are registered are actually in existence.

15. Considering the contentions put forth by counsel for the petitioner also taking note of the fact that the partners of the firm have been granted protection by the Apex Court and petitioner is in custody from 28.08.2019; the total amount which as per Department is wrongly claimed after deposit of Rs.3.33 Crores is less than Rs.5 Crore, I deem it proper to allow the bail application.

16. This bail application is accordingly allowed and it is directed that accused petitioner shall be released on bail provided he furnishes a personal bond in the sum of Rs.10,00,000/- (Rupees Ten Lac Only) together with two sureties in the sum of Rs.5,00,000/- (Rupees Five Lac Only) each to the satisfaction of the learned court below with the stipulation that he shall appear before that Court and any court to which the matter is transferred, on all subsequent dates of hearing and as and when called upon to do so.

17. Petitioner is also directed to deposit the passport with the learned Court below and will not leave the country without seeking prior permission of the Trial Court.

(PANKAJ BHANDARI),J

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD R/SPECIAL CIVIL APPLICATION NO. 16901 of 2019

FOR APPROVAL AND SIGNATURE:
HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment?	YES
2	To be referred to the Reporter or not?	NO
3	Whether their Lordships wish to see the fair copy of the judgment?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?	NO

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INSHA TRADING COMPANY THROUGH PROPRIETOR MUSTAK JAMALBHAI SHEIKH
Versus STATE OF GUJARAT

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Appearance:
MR CHETAN K PANDYA(1973) for the Petitioner(s) No. 1 ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP(99) for the Respondent(s) No. 1
NOTICE SERVED BY DS(5) for the Respondent(s) No. 1,2,3

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

"The reasons for issuance of the notice for confiscation under section 130 of the CGST Act in Form GST MOV-10 are that upon preliminary verification of the dealer online, 42 e-way bills have been generated on December 2018, wherein, IGST has been shown to Rs.3,64,30,800/- and it appears that, dealers have not paid the same or that the purchases are not genuine. If that be so, nothing prevents the respondents from taking appropriate action against petitioner in accordance with law under the relevant provisions of the CGST Act. However, when the conveyance in question was carrying the goods which were duly accompanied by documents and no discrepancy was found in connection therewith, there was no reason for the third respondent to confiscate the same. The impugned order of confiscation passed by the third respondent under section 130 of the CGST Act, therefore, cannot be sustained".

Date : 18/10/2019

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Rule. Mr. Trupesh Kathiriya, learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents.

2. Having regard to the controversy involved in the matter as well as the urgency of the case, the matter was taken up for final hearing today.

3. By this petition under article 226 of the Constitution of India, the petitioner has challenged the order dated 08.04.2019 passed by the third respondent in exercise of powers under section 130 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act"), whereby, the vehicle bearing registration No. DL-01-GC-4470 together with the goods contained therein is ordered to be confiscated and tax, penalty and fine in lieu of confiscation of the goods and conveyance as computed therein have been levied.

4. The facts stated briefly are that the petitioner is engaged in the business of metal and is duly registered under the provisions of the relevant Goods and Services Tax Act. One Ramgarhia Trading Company, which is located at New Delhi and is registered under the relevant Goods and Services Tax Act, placed an order for brass electrical parts through Jay Gujarat Goods Carrier. It is the case of the petitioner that the driver of the truck was carrying invoice, e-way bill and lorry receipt while transporting brass electrical

parts from Jamnagar to Delhi. The truck was intercepted by the third respondent – State Tax Officer on 14.01.2019 at 00:30 a.m. at Soyal Toll Gate. The driver of the truck had produced the documents relating to the goods which were being transported; however, the third respondent detained the truck on the ground that the genuineness of the goods in transit (its quantity etc.) and/or tendered documents requires further verification. Accordingly, on 14.01.2019, the third respondent ssued an order in Form GST MOV-01 recording the statementi of the driver as well as an order for physical verification/inspection of the conveyance and goods and the documents in Form GST MOV-02. Thereafter, by an order dated 14.01.2019, passed under section 129(1) of the CGST Act, the truck as well as the goods contained therein was ordered to be detained. The ground stated in the order of detention as translated into English reads thus: "On a perusal of the details in bilty No.15615, it prima facie being disproportionate, the vehicle has been detained for verification of the same". It may be noted that the order of physical verification in Form GST MOV-02 and the order under section 129(1) of the CGST Act have been passed on the same day, that is, on 14.01.2019.

4.1 Thereafter, by an order dated 29.01.2019, passed in Form GST MOV-09; the petitioner was called upon to pay the tax and penalty as computed therein. Thereafter, a notice came to be issued in Form GST MOV-10 under section 130 of the CGST Act for confiscation of the conveyance and goods in question on the grounds that on a perusal of the details in bilty No.15615, it prima facie being disproportionate, the same required verification; and that upon primary examination of the dealer online, it is found that in December 2018, he has generated 42 e-way bills wherein IGST of Rs.3,64,30,800/- is shown, and that it appears that either the dealer has not paid such amount or the purchases are not genuine. Thereafter, by the impugned order dated 08.04.2019, the goods and conveyance are ordered to be confiscated in exercise of powers under section 130 of the CGST Act.

5. Mr. Chetan Pandya, learned advocate for the petitioner assailed the impugned order by submitting that the documents which were required to be carried by the driver were duly produced at the time when the vehicle came to be intercepted. It was submitted that while Form GST MOV-02 was issued stating that physical verification of the goods is required to be carried out, however, no report in Part A of Form GST EWB-03 has been uploaded on the portal nor has any report in Form GST MOV-04 of any physical verification has been furnished to the petitioner. The attention of the court was invited to the Circular No. 41/15/2018-GST dated 13.04.2018, issued by the Central Board of Indirect Taxes and Customs, GST Policy Wing (hereinafter referred to as "the

Board"), to point out that the Board has prescribed the procedure which is required to be followed by the proper officer at the time when the goods and conveyance are intercepted. It was pointed out that in terms of the said circular, if upon verification of the documents and on verification of the goods, no discrepancy is found, the conveyance shall be allowed to move further. It was submitted that in the present case, the relevant documents namely the e-way bill and the invoice were duly produced and no discrepancy has been found therein and that though the conveyance was detained for the purpose of inspection of the goods, no inspection appears to have been carried out. It was submitted that in the absence of any discrepancy having been noticed by the proper officer, it was not permissible for the officer to detain the conveyance any longer or to proceed under section 129 or 130 of the CGST Act. It was submitted that, therefore, the entire action of the third respondent in passing the orders under section 129 and section 130 of the CGST Act respectively, is illegal and arbitrary and is not in consonance with the instructions issued by the Board in the circular dated 13.04.2018. It was accordingly urged that the petitioner deserves to be allowed by setting aside the impugned order and directing the third respondent to forthwith release the conveyance along the goods contained therein.

6. On the other hand, Mr. Trupesh Kathiriya, learned Assistant Government Pleader, placed reliance upon the affidavit-in-reply filed on behalf of the respondents, to submit that after the conveyance in question was intercepted, the State Tax Officer had conducted search at the business premises of the petitioner on 21.01.2019 as well as on 22.01.2019 and found that the petitioner did not maintain any stock or books of accounts at his business premises. It was further submitted that the petitioner and the transporter – Jay

Gujarat Goods Carrier are working in collusion with each other and that, the petitioner is stated to have purchased the goods which were being transported from parties located at Kolkata, West Bengal; however, upon verification by the GST Department, it was found that such parties are not in existence. It was submitted that, therefore, it appears that the petitioner has purchased the goods from the local market without paying any local tax and is selling the same to the dealers in New Delhi mentioning State tax in the invoice and thereby, claiming input tax credit. It was submitted that the authority under the GST Act had issued DRC-1 under section 74 of the GST Act on

25.04.2019 and the petitioner is facing prosecution for wrongfully availing the benefit of input tax credit and a charge-sheet has been filed against the petitioner on 05.10.2019 for the offence punishable under sections 132(1)(c) as well as 132(1)(d) of the GST Act. It was submitted that in the light of what has been unearthed during the course of investigation, the order of confiscation is justified. It was submitted that the petitioner has no other property except residential premises, the value whereof, is not commensurate with the amount involved in the entire fraud that has been committed by the petitioner in collusion with Jay Gujarat Goods Carrier. It was submitted that, therefore, the respondents are wholly justified in confiscating the conveyance with the goods contained therein and that, the petition being devoid of any merits, deserves to be dismissed.

7. This court has considered the submissions advanced by the learned advocates for the respective parties. In the present case, this court is called upon to examine the validity of the impugned order dated 08.04.2019 passed by the third respondent under section 130 of the CGST Act as well as the order dated 14.1.2019 whereby detention of the conveyance and together with the goods contained therein has been ordered under section 129(1) of the CGST Act.

7.1 The facts have been noted hereinabove. The conveyance in question was transporting the goods being brass electrical parts from Jamnagar to Delhi. The consignor, viz. the petitioner, and the consignee are duly registered under the relevant GST Acts. On 14.01.2019, when the conveyance came to be intercepted, the driver of the conveyance had duly produced the e-way bill as well as the invoice in connection with the goods that were transported. On behalf of the respondents, nothing has been pointed out to show that there was any discrepancy in the e-way bill or the tax invoice. Under the circumstances, in the light of the instructions issued by the Board in the Circular dated 13.04.2018, since, upon verification of the documents no discrepancies were found, the conveyance was required to be allowed to move further. However, in case the third respondent desired to carry out physical verification of conveyance, goods and the documents, it was still permissible for him to detain the conveyance, and accordingly, the third respondent issued an order in Form GST MOV-02 for physical verification/inspection of the conveyance, goods and the documents. The said

order passed on the ground that the genuineness of the goods in transit (its quantity etc.) and/or tendered documents requires further verification.

7.2 In terms of the Circular dated 13.04.2018, when the proper officer issues an order for physical verification, he is within twenty four hours of the issuance of Form GST MOV-02, required to prepare a report in Part A of Form GST EWB-03 and upload the same on the common portal. It is further provided that within a period of three working days from the date of issue of the order in Form GST MOV-02, the proper officer shall conclude the inspection proceedings, either by himself or through any other proper officer authorized in this behalf and that, where the circumstances warrant such time to be extended, he shall obtain a written permission in Form GST MOV-03 from the Commissioner or an officer authorized by him for extension of time beyond three working days and a copy of the order of extension is required to be served on the person in charge of the conveyance. The circular further provides that on completion of physical verification/inspection of the conveyance and goods in movement, the proper officer shall prepare a report of such physical verification in Form GST MOV-04 and serve a copy of the said report to the person in charge of the goods and conveyance. The proper officer shall also record, on the common portal, the final report of the inspection in Part B of Form GST EWB-03 within three days of such physical verification/inspection. Thus, when the conveyance was detained for the purpose of inspection, it was incumbent upon the third respondent to prepare a report in Form GST EWB-03 and upload the same on the common portal within twenty four hours from issuance of Form GST MOV-02 and upon completion of physical verification, he was further required to prepare a report in Form GST MOV-04 and serve a copy of the said report to the person in charge of the goods and conveyance and thereafter record the final report of the inspection in Part B of Form GST EWB-03 within three days of such physical verification. However, in the facts of the present case, no such reports in Part A of Form GST EWB-03, Form GST MOV-04 or Part B of Form EWB-03 have been prepared. Thus, it appears that though the vehicle was detained for the purpose of carrying out inspection, no such inspection was carried out or that upon physical verification no discrepancy was found in the conveyance/goods or documents. Clause (g) of the above referred circular requires that where no discrepancies are found after the inspection of the goods and conveyance, the proper officer shall issue forthwith a release order

in Form GST MOV-05 and allow the conveyance to move further. The clause further provides that when the proper officer is of the opinion that the goods and conveyance need to be detained under section 129 of the CGST Act, he shall issue an order of detention in Form GST MOV-06 and a notice in Form GST MOV-07 in accordance with the provisions of sub- section (3) of section 129 of the CGST Act, specifying the tax and penalty payable and such notice is required to be served on the person in charge of the conveyance. In the facts of the case, despite the fact that no discrepancy appears to have been found after the inspection of the goods and conveyance, the proper officer has not issued a release order in Form GST MOV-05. Further, despite the fact that Form GST MOV-02 was issued, without verification/inspection of the goods and conveyance, the third respondent has issued an order of detention in Form GST MOV-06 on the same day, that is, on 14.01.2019, on the ground that upon a perusal of the details in bilty No.15615, the same being disproportionate, the vehicle is required to be detained for verification of the same.

7.3 In the affidavit-in-reply, there is not even a whisper regarding any discrepancy having been found in bilty No.15615 after verification, despite the fact that the conveyance has been detained for that purpose. Thus, it appears that, there is no valid ground for detention of the vehicle in question on the part of the respondents. Under the circumstances, the question of calling upon the petitioner to pay the tax, penalty and fine, as computed by the respondent in the order of demand of tax and penalty in Form GST MOV-09 dated 29.01.2019 does not arise.

7.4 Despite the aforesaid position, the third respondent has proceeded further and issued a notice under section 130 of the CGST Act in Form GST MOV 10, and has thereafter, passed an order of confiscation under section 130 of the Act in Form GST MOV-11. The reason for passing such an order has got nothing to do with the reasons for which, the goods and conveyance were initially detained. The reasons for issuance of the notice for confiscation under section 130 of the CGST Act in Form GST MOV-10 are that upon preliminary verification of the dealer online, 42 e-way bills have been generated in December 2018, wherein, IGST has been shown to Rs.3,64,30,800/- and it appears that, dealers has not paid the same or that the purchases are not genuine. If that be so, nothing prevents the respondents from taking appropriate action against petitioner in accordance with law

under the relevant provisions of the CGST Act. However, when the conveyance in question was carrying the goods which were duly accompanied by documents and no discrepancy was found in connection therewith, there was no reason for the third respondent to confiscate the same. The impugned order of confiscation passed by the third respondent under section 130 of the CGST Act, therefore, cannot be sustained.

8. For the forgoing reasons, the petition succeeds and is accordingly, allowed. The order dated 08.04.2019 issued by the third respondent under section 130 of the CGST Act as well as the order of demand of tax and penalty dated 29.01.2019, issued in Form GST MOV-09 are hereby quashed and set aside and the third respondent is directed to forthwith release the conveyance and goods in question.

8.1 It is clarified that the fact that this court has ordered release of the goods and conveyance will not, in any manner, come in the way of the respondents in proceeding against the petitioner in connection with the contravention of any provisions of the GST Acts and the rules framed thereunder which find reference in the affidavit-in-reply filed on behalf of the respondents.

8.2 Rule is made absolute accordingly with no order as to costs. Direct service is permitted.

[Harsha Devani, J.]

[Sangeeta K. Vishen, J.]
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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.3311 OF 2015

S.P. Misra & Ors. ...Appellants

Versus

Mohd. Laiquddin Khan & Anr. ...Respondents

J U D G M E N T

R.Subhash Reddy,J.

1. This civil appeal is filed by the appellants, in Civil Revision Petition No. 4894 of 2006, dated 09.04.2009, passed by the High Court of Judicature, Andhra Pradesh at Hyderabad, whereby the High Court has confirmed the order dated 01.02.2006, in E.A. No. 6 of 2005 in E.P. No. 122 of 2003 in O.S. No. 580 of 1980, passed by the II Senior Civil Judge, City Civil Court, Hyderabad.

2. By the aforesaid order, learned II Senior Civil Judge, City Civil Court, Hyderabad, allowed the application filed by the respondents, under Section 47 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.').

3. All the appellants herein are legal heirs of late Sri Jai Narayan Misra and all the respondents herein are legal heirs of late Smt. Hashmatunnisa Begum. During the life time of late Sri Jai Narayan Misra and late Smt. Hashmatunnisa Begum, they entered into a partnership deed dated 14.04.1982. As stated in the partnership deed, late Smt. Hashmatunnisa Begum is the owner of open land with structures, situated in Paigah Compound bearing No. 156-159 ad-measuring 22,253 square meters approximately. After obtaining exemption from Government of India, Ministry of Defence, New Delhi, under Clause 20(1)(b) of the Urban Land (Ceiling and Regulation) Act, 1976, both the partners have entered into partnership, for carrying on business in real estate, by developing the land which forms the part of Paigah Compound. It appears that a major portion of the land is already developed, but dispute is to an extent of 3381 square meters, which is claimed by the original plaintiff, forming part of property No.156-159 of Paigah Compound. There were only two partners, as per the partnership deed.

4. The plaintiff in Original Suit No. 580 of 1988, filed by late Sri Jai Narayan Misra, died on 04.01.2001, whereas the predecessor of the respondents, late Smt. Hashmatunnisa Begum, died on 17.05.1996. During the life time, the predecessor of the appellants late Sri Jai Narayan Misra, has filed a Suit in O.S No. 580 of 1988, on the file of II Additional Judge, City Civil Court, Hyderabad, claiming the following reliefs:

> "1. to grant permanent injunction against the defendant restraining the defendant and all the persons claiming through the defendant from preventing the plaintiff from carrying out the work of preparing layout plan, developing the property and sale thereof, in an extent of 3,381 square meters;
> 2. to grant mandatory injunction directing the defendant to sign the layout and other documents submitting to the Cantonment Board for sanction in respect of the land admeasuring 3,381 square meteres forming part of Paigah Colony situated at S.P. Road, Secunderabad, and for costs."

5. The said Suit was decreed on 14.07.1993, by the Trial Court, granting the following reliefs:

> "1. the defendant and all the persons claiming through the defendant be and that are hereby permanently restrained from carrying the work of developing the property and sale thereof in respect of the suit schedule property;
>
> 2. the defendant is hereby directed to sign the layout plan and other documents for submitting to the Cantonment Board, Secunderabad for sanction in respect of the suit schedule property;
>
> 3. Each party shall bear their own costs."

6. After death of the original plaintiff, the legal heirs of the plaintiffs have filed Execution Petition before the Trial Court, by claiming the following reliefs:

> "1. to direct the J.Dr. No.2 to 4 to sign the layout plan for submitting to the Cantonment Board, Secunderabad for sanction in respect of the suit schedule property;
>
> 2. to sign new/revised layout drawing, earmarking the additional land for development;

3. to break the existing boundary wall at the appropriate place to enable to have access into the additional land for which layout plan is being submitted;

4. to sign a letter to Cantonment Board, undertaking not to claim any water connection for the next 10 years;
5. to sign all other documents that may be required now or in future in connection with the development of the additional land;

6. to join in executing sale deeds and present the memo for registration, in favour of purchasers of the suit land, all under Order XXI Rules 32 and 34 and Section 151 C.P.C."

7. In the following Execution Petition, respondents have filed an application under Section 47 of C.P.C., in E.A. No. 6 of 2005, before the Court of II Senior Civil Judge, City Civil Court, Hyderabad, claiming the relief, to dismiss the Execution petition, as the decree is void and un-executable. By a well reasoned Order, dated 01.02.2006, passed by the II Senior Civil Judge, City Civil Court, Hyderabad, allowed the application filed under Section 47 of C.P.C. The said Order is challenged by the respondents, by way of Civil Revision Petition No. 4894 of 2006, before the High Court of Judicature, Andhra Pradesh at Hyderabad. The High Court, vide impugned order, confirmed the Order passed by the Trial Court, holding that the decree obtained against the predecessors of the respondents, namely, late Smt. Hashmatunnisa Begum, is not executable against the legal representatives.

8. We have heard Sri. A.Subba Rao, learned counsel appearing for the appellants and Sri. B. Adi Narayana Rao, learned senior counsel appearing for the respondents, assisted by Sri. Venkateswara Rao Anumolu, Advocate on-record.

9. It is contended by Sri. A.Subba Rao, learned counsel appearing for the appellants that as per the terms of the partnership deed, in the event of death of either of the party, their legal representatives shall automatically become partners in the partnership firm and they shall continue to act as partners of the firm till the venture envisaged under partnership is completed and such legal representatives, who become partners, shall have same rights and shall be subject to same liabilities and responsibilities, as the deceased partner. The relevant clauses of the partnership deed dated 14.04.1982, read as under:

> "This partnership shall not be dissolved till the completion of the venture except by mutual agreement reduced in writing. The parties hereby expressly and specifically agree that in the event of death of either party their respective legal representatives shall automatically become partners in the partnership firm and they shall continue to act as partners of the firm till the venture envisaged under this partnership is completed and such legal representatives who become partners shall have the same rights and shall be subject to the same liabilities and responsibilities as the deceased partner."

10. By referring to the contents of the partnership deed, it is contended by Sri. A. Subba Rao, learned counsel appearing for the appellants that the decree obtained by the predecessor of the appellants is executable and against the respondents, who are the legal representatives of the original partner. The Trial Court as well as the High Court have erroneously held that the decree which has become final, is not executable against the respondents.

11. Learned counsel has placed strong reliance on a judgment of this Court, in the case of ***Prabhakara Adiga v. Gowri and Others1.***

12. On the other hand, it is the contention of Sri. B. Adi Narayana Rao, learned senior counsel appearing for the respondents that as there were only two partners and on death of one of the partners, partnership stands dissolved, in view of the provision under Section 42(c) of the Partnership Act, 1932. It is submitted that when the right litigated upon is readable, only in such event, decree can be executed. It is submitted that respondents were not the partners in the partnership deed and if, any clause in the partnership deed which runs contrary to statutory provisions are void, such clauses are against the public policy. It is submitted that when the partnership itself stands dissolved on death of one of the partners, the appellants claiming right under a decree obtained by the original partner, cannot be executed against the respondents.

13. In this case, it is not in dispute that as per the original partnership deed there were only two partners, namely, late Smt. Hashmatunnisa Begum, who is the owner of the land/predecessor of the respondents and late Sri Jai Narayan Misra, who is the predecessor of the appellants herein.

14. From the Suit filed in O.S. No. 580 of 1988, the original plaintiff has obtained a decree on 14.07.1993 from the Trial Court, which granted the reliefs as under:

> "1. the defendant and all the persons claiming through the defendant be and that are hereby permanently restrained from carrying the work of developing the property and sale thereof in respect of the suit schedule property;
>
> 2. the defendant is hereby directed to sign the layout plan and other documents for submitting to the Cantonment Board, Secunderabad for sanction in respect of the suit schedule property;
>
> 3. Each party shall bear their own costs."

15. From a perusal of the relief sought for in the Execution Petition, by the legal heirs of the original plaintiff, itself makes it clear that reliefs sought in Execution Petition are going beyond the scope of the decree. It is fairly wellsettled that, the Executing Court cannot travel beyond the decree. The only question which fell for consideration before the Trial Court in E.A. No. 6 of 2005, was whether the decree obtained by the predecessor of the appellants, can be executed against the appellants or not. Section 42 of the Partnership Act, 1932, deals with the situations of dissolution of partnership, on happening of certain contingencies. As per the said provision, subject to contract between the partners, a firm is dissolved when:
(a) if constituted for a fixed term, by the expiry of that term;
(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;
(c) by the death of a partner; and
(d) by the adjudication of a partner as an insolvent.

16. In the case on hand, as much as there were only two partners, the partnership itself stand dissolved, in view of death of a partner.

17. It is true that as per the deed of partnership, the partners have agreed, in the event of death of either party, their respective legal representatives shall automatically become partners in the partnership firm and they shall continue to act as partners of the firm, till the venture envisaged under said partnership is completed and such legal representatives who become partners shall have the same rights and shall be subject to same liabilities and responsibilities, as the deceased partner.

18. At this stage, it is to be noticed that once the partnership comes to an end, by virtue of death of one of the partners, there will not be any partnership existing in which legal

representatives of late Smt. Hashmatunnisa Begum could be taken in. The judgment and decree obtained by late Sri Jai Narayan Misra against late Smt. Hashmatunnisa Begum, in pursuance of partnership deed dated 14.04.1982, cannot bind the legal representatives of late Smt. Hashmatunnisa Begum, as such, decree is not executable against them. The legal representatives of late Smt. Hashmatunnisa Begum are not the partners of the original partnership deed dated 14.04.1982. When such legal representative are not parties to the contract, such contract cannot confer rights or impose obligations arising under it on any third party, except parties to it. No one but the parties to the contract can be entitled under it or born by it. Such principle is known as 'Privity of Contract'. When the partnership stands dissolved by operation of law under Section 42(c) of the Indian Partnership Act, 1932, the question of execution in pursuance of the decree does not arise. There cannot be any contract unilaterally without acceptance and agreement by the legal heirs of the deceased partner. If there are any clauses in the agreement, entered into between the original partners, against the third parties, such clauses will not bind them, such of the clauses in the partnership deed, which run contrary to provisions of Indian Partnership Act, 1932, are void and unenforceable. Such clauses are also opposed to public policy.

19. In the case of Prabhakara Adiga v. Gowri and Others1, on which strong reliance is placed by Sri. A.Subba Rao, learned counsel appearing for the appellants, would not render any assistance to support his case, having regard to facts of the case on hand and the rights litigated in the Suit in O.S. No. 580 of 1988, before the II Senior Civil Judge, City Civil Court, Hyderabad. In the case of Prabhakara Adiga1, plaintiff was allotted suit scheduled property in a registered partnership deed and he was in possession thereof. The defendant, on partition in the family, had been allotted a portion of the land. When there was interference on the suit scheduled property, which fell to the share of plaintiff, as per the registered partnership deed, a suit for permanent injunction was filed.

20. In the aforesaid case, after suffering decree for permanent injunction, judgment-debtor died. When the heirs of the judgment-debtor in violation of the decree for permanent injunction tried to forcibly dispossesess the decree-holder, decree-holder filed the Execution Petition. The Executing Court held that heirs of the judgment-debtor were not bound by the decree. When such order is questioned before the High Court, the Writ Petition is allowed. The High Court held that decree of permanent injunction cannot be enforced against the legal heirs of judgment-debtor, as an injunction does not travel with the land. This Court, by referring to provision under Section 50 of C.P.C. read with Order 21 Rule 32 of C.P.C, has held that such a decree can be executed against the legal

representatives. But, at the same time, the paragraph 25 of the judgment, which is relied on by Sri. B. Adi Narayana Rao, learned senior counsel appearing for the respondents, reads as under:

> "25. In our considered opinion the right which had been adjudicated in the suit in the present matter and the findings which have been recorded as basis for grant of injunction as to the disputed property which is heritable and partible would enure not only to the benefit of the legal heir of decree-holders but also would bind the legal representatives of the judgment-debtor. It is apparent from Section 50 CPC that when a judgmentdebtor dies before the decree has been satisfied, it can be executed against legal representatives. Section 50 is not confined to a particular kind of decree. Decree for injunction can also be executed against legal representatives of the deceased judgment-debtor. The maxim "actio personalis moritur cum persona" is limited to certain class of cases as indicated by this Court in Girijanandini Devi v. Bijendra Narain Choudhary [Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124] and when the right litigated upon is heritable, the decree would not normally abate and can be enforced by legal representatives of decree-holder and against the judgment-debtor or his legal representatives. It would be against the public policy to ask the decree-holder to litigate once over again against the legal representatives of the judgmentdebtor when the cause and injunction survives. No doubt, it is true that a decree for injunction normally does not run with the land. In the absence of statutory provisions it cannot be enforced. However, in view of the specific provisions contained in Section 50 CPC, such a decree can be executed against legal representatives."

> 21. From a reading of the aforesaid judgment, it is clear that the executable decree depend on the rights litigated by the parties. In the case on hand, the original decree was obtained against the predecessor of the respondents, who was party to partnership deed. In view of death of one of the partners, the partnership itself stands dissolved statutorily, by operation of law, in view of provision under Section 42(c) of the Indian Partnership Act, 1932. When the respondents are not parties to the partnership firm, they are not bound by the decree obtained by the predecessor of the appellant. More so, when it is a case of the respondents that they have not derived any assets and liabilities arising out of the partnership firm, decree obtained by the original plaintiff is not executable against the respondents.

22. It is also to be noticed that during the life time of late Smt. Hashmatunnisa Begum, she also filed Suit in O.S. No. 1061 of 1990 on the file of VII Senior Civil Judge, City Civil Court, Hyderabad, for dissolution of partnership firm constituted under deed of partnership dated 26.06.1977 and also for rendition of accounts. It is true that same is a different partnership but, parties are same. In such suit filed by late Smt.Hashmatunnisa Begum, predecessor of the appellants Late Sri Jai Narayan Misra, filed IA No. 1649 of 1997, to dismiss the said suit, claiming that in view of death of one of the partners, during the pendency of the suit, there is no room for third party to be introduced. It was the case of late Sri Jai Narayan Misra that partnership stood dissolved. However, in a similar situation arising out of partnership deed dated 14.04.1982, the appellants claim the decree is executable against the respondents, who are the legal heirs of the judgment-debtor. As much as, we are of the view that the respondents were not parties to the partnership deed and that the partnership stands dissolved, in view of death of one of the partners, the respondents have not derived the benefit of assets of the partnership firm, the decree obtained by the predecessor of the appellants, is not executable against the respondents herein.

23. In view of the same, we are of the view that the Trial Court has rightly allowed the application filed by the respondents under Section 47 of C.P.C. and there is no error committed by the High Court, in confirming such order by dismissing the Civil Revision Petition filed by the appellants herein.

24. We do not find any merit in this appeal so as to interfere in the impugned well reasoned order.

25. This civil appeal is, accordingly, dismissed, with no order as to costs.

.....J.
[Indu Malhotra]

.....J.
[R. Subhash Reddy]

New Delhi;
October 18,2019

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3492 OF 2018

1. Hardcastle Restaurants Pvt. Ltd. A Company incorporated under the Companies Act, 1956 having its office at Tower 3, 10th Floor, Indiabulls Finance Centre, Senapati Bapat Marg, Prabhadevi, Mumbai – 400 013

2. Shri Banwarilal Jatia, shareholder of the Petitioner No.1 having address at Avanti, 67A, Bhulabhai Desai Road, Mumbai – 400 026.

… Petitioners

V/s.

1. Union of India, through Secretary, Ministry of Finance (Department of Revenue) No. 137, North Block, New Delhi – 110 001.

2. The National Anti-Profiteering Authority, through Chairman, 6th Floor, Tower I, Jeevan Bharti Building, Connaught Place, New Delhi.

3. Director General of Anti-Profiteering, Second Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi.

... Respondents.

Mr. Rohan Shah a/w. Divya Jeswant, Mayank Jain i/b. Khaitan & Co. for the Petitioners

Mr. Zoheb Hossain with J.B. Mishra for the Respondents.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.
DATE : 1 OCTOBER 20193

The division bench comprising of Justice M.S Sanklecha and Justice Nitin Jamdar observed that, when the three members of the Authority had heard the Petitioner and participated in the entire hearing, the collectively signed decision, when the fourth member joined only for signing the order has resulted in violation of the principles of natural justice and fairness, and is liable to be set aside.

While allowing the petition the Court also said that, "The term profiteering, under the Act and Rules, is used in a pejorative sense. Such a finding can severely dent the

business reputation. The Authority is newly established. Therefore, as guidance to this Authority, highlighting the importance of fair decision-making is necessary".

Judgment Per (Nitin Jamdar, J.) :-
Rule. Rule is made returnable forthwith. Respondents waives service. Taken up for final disposal.
2. The Goods and Service Tax regime was introduced in the year 2017. Thereafter tax rates for certain items were reduced. The State noticed that the benefit of reduced tax rates was not being passed on to the consumers. For this purpose, the National Antiprofiteering Authority is constituted under section 171 of the Goods and Services Tax Act. The Authority can direct the registered persons to pass on such benefits to the consumers and if the beneficiary cannot be identified, to deposit it in a welfare fund. The Authority is empowered to levy penalty on the registered person and take further deterrent measures. One such order passed by the Authority against the Petitioner is the subject of challenge in this Petition.

3. The Petitioner No1-Hardcastle Restaurants is a private limited company. The Petitioner no.2 is the director. For convenience, they are referred in singular. Petitioner operates quickservice restaurants under the brand name McDonald's in Western and Southern India. The Petitioner serves around 2320 types of food and beverages items from its restaurants. The Petitioner is registered under the Goods and Services Tax Act, 2017 in ten States. After the commencement of GST Act till 14 November 2017, the services rendered by the Petitioner were subjected to 18% of GST. A notification was issued on 14 November 2017 reducing the rate of GST to 5% with effect from 15 November 2017. As a result, the Petitioner had to charge GST at 5% on the services rendered without availing impugned tax credit of the taxes paid on input, input services and capital goods.
4. Some customers of the Petitioner made complaints that, though the rate of GST on restaurant services was reduced from 18% to 5% with effect from 15 November 2017, the Petitioner had increased the prices of product sold, which was an act of illegal profiteering. The Standing Committee on Anti Profiteering examined the complaints. The Standing Committee referred the complaints to the Director-General of Safeguards. The Director- General called upon the Petitioner to submit a reply to the allegations levelled in the complaints and also to suo-motu determine the quantum of benefit the Petitioner had not passed on to the consumers between 15 November 2017 to 31 January 2018. The persons who had filed the complaints/applications were given the opportunity to inspect the evidence and reply furnished by the Petitioner. The applicants did not attend nor

participated any further. The Petitioner filed a reply on 5 January 2018 and denied the allegations.

5. The Director-General analyzed the material placed before it by the Petitioner. The Director-General noted that the Petitioner was selling 1844 types of products and after comparing the price list published before and after 15 November 2017, opined that the Petitioner had increased the base price of 1774 products, which constituted 96.20% of its total products. Though the Petitioner had charged GST at 5% on or after 15 November 2017, due to the increase in the base price, the customers had to pay the same price charged before 15 November 2017. The Director-General, after setting out the reasons, concluded that the profiteering amount was of Rs.7.49 crores. The Director-General submitted a report accordingly to the Authority.

6. The Anti-Profiteering Authority considered the report of the Director-General in its sitting held on 5 July 2018. It was decided to give hearing to the interested parties and to fix schedule of hearings. The Director-General was represented through the Officers. The Petitioner was represented through its Chief Finance Officer, Chartered Accountant and Advocate. Complainants did not remain present. The Authority consisted of three members: Mr. B.N. Sharma, Chairman, Mr. J.C. Chauhan, Technical Member, Ms. R. Bhagya Devi, Technical Member. They heard the Petitioner on 24 July 2018, 9 August 2018, 16 August 2018 and 20 August 2018. The Petitioner took up various grounds to demonstrate that there was no profiteering. The Petitioner questioned the jurisdiction of the Director-General, and also the bar of limitation for instituting the proceedings. The Petitioner contended that the reduction in the tax was neutralized due to withdrawal of input tax credit. The Petitioner stated that the commensurate benefit from the reduction was passed on to the customers. Contentions were raised regarding the implications of the Section 171 of the GST Act. The Petitioner sought to demonstrate as to how, due to the increase in the prices of raw materials, the prices had to be increased, and there is no profiteering. The Petitioner also contended that there was no methodology laid down to determine profiteering. The Director-General, through his representation, justified the report and the conclusions regarding the profiteering made by the Petitioner.

7. The Authority did not accept the contentions of the Petitioner. The Authority interalia held that the Section 171 of the Central GST Act was applicable since there was a reduction in the rate of tax from 5% to 18%. The contention of the Petitioner that there was no methodology was negatived holding that the Authority framed its methodology. It held that only because the CGST was charged at 5% did not mean there was no anti-profiteering since the output tax invoices after 15 November 2017 did not show that benefit has been passed on. Authority observed that the Petitioner increased base prices

overnight on 14 November 2017. It held that the Petitioner could not avail the input tax credit after 15 November 2017, and therefore, the benefit in input tax credit from December 2017 to March 2018 could not have been given. Authority held that the Director General had correctly considered the incremental revenue. The Authority carried out the computation and profiteering amount was derived at Rs.7.49 crores for all products where price increase was over 5.11%. The Authority directed the Petitioners to reduce the prices of its products and to deposit an amount of Rs.7.49 crores to the Consumer Welfare Fund along with 18% interest. The Director General was directed to continue investigation till the Petitioners reduced the prices commensurate to the reduction in tax and to submit a report. Directions were also issued to initiate penalty proceedings.

8. The Authority passed the order on 16 November 2018. Mr. Amand Shah, Technical Member, who had joined on 7 September 2018 ,after the hearings, also signed the order along with three others who had heard the parties.

9. The Authority issued a show-cause notice to the Petitioner on 20 November 2018 as to why penalty should not be imposed. The Petitioner thereafter filed this Writ Petition on 3 December 2018 on the ground that there is no appeal against the order passed by the Anti Profiteering Authority under the CGST Act or the Rules.

10. The Petition came up before the Division Bench of this Court on 17 November 2018 when it was adjourned at the request of the Respondents. By an ad-interim order the Division Bench stayed the directions for investigation into the quantum and initiation of the penalty proceedings. The matter was heard again on 7 February 2019 and the ad-interim order was reiterated to be continued till further orders. On 16 August 2019, parties were put to notice that the Petition will be considered finally on the next date.

11. We have heard Mr. Rohan Shah, learned Counsel for the for the Petitioner and Mr. Zoheb Hossain learned Counsel for the Respondents.

12. The main contention of the Petitioner is of violation of the principles of natural justice. Petitioner contends that since the hearing was only by three members and the impugned order is by four members, it is in breach of principles of natural justice. The Petitioner was not afforded an opportunity to present its case before Mr. Amand Shah, the fourth signatory. The Petitioner further contends that the Rules provides that if the difference of opinion occurs, the opinion of the majority is to be considered and, if

equality of votes occurs, the Chairman has the casting vote, which implies internal deliberation amongst the members. It is submitted that the impugned order, in as much as relates to Mr. Amand Shah, is passed based on hearsay, and therefore, deserves to be set aside in totality as it is not separable. The Petitioner contends that the proceedings are beyond the jurisdiction of the Authority since the complaints were filed regarding one product, a type of coffee, and could not have been extended all the goods and services of the Petitioners. According to the Petitioner that the Authority has taken such a view in case of other entities. It is contended that sufficient evidence was not available in respect of all the products taken up for scrutiny. The Petitioner further contends that no methodology is framed for determining profiteering and absence of any statutory guideline, the exercise carried out is entirely arbitrary. Thus the order suffers from arbitrariness, perversity and contradictions. The Petitioner further contends that various material facets such as loss of input tax credit during 1 November 2017 to 14 November 2017, incremental input tax credit loss due to branch transfer, input tax credit from 1 July 2017 to 14 November 2017 availed in the subsequent months and increase in the variable costs, were not been considered.

13. The Respondents have justified the impugned order contending that this is a clear case of profiteering. The Respondents contend that GST Act, Rules and Procedure framed supply adequate guidance and there is no arbitrariness in the decision making. The Respondents contend that the Director-General on its own motion can look into the matter and its jurisdiction is not restricted to the product for which complaint has been received. On the ground of breach of principles of natural justice, the Respondents contend that as per the Rules, no act or proceedings of the Authority shall be invalid merely on the ground of any irregularity in the procedure followed by the Authority not affecting merits. The Respondents contend that the Rules provides for a quorum of three members, signing the order by four member is superfluous. The basic ground put-forth by the Respondents is that there was no illegality and at the most a mere irregularity and no prejudice has been demonstrated by the Petitioners. The Respondents also contend that the Rules do not mandate oral hearing and the entire record was before the Authority to take a decision.

14. We take up the ground of breach of principles of natural justice first. There is no dispute about the factual position. The Petitioners received notice for oral hearing. Mr. B. Sharma, Chairman, Mr. J.C. Chauhan, Technical Member, Ms. R. Bhagya Devi, Technical Member constituted the Authority. This Authority heard the Petitioners on 24 July 2018, 9 August 2018 and 20 August 2018. Mr. Amand Shah joined the Authority on

7 September 2018. When the final order was passed by the Authority, it was signed by four i.e. Mr. Sharma, Mr. Chauhan, Ms. Bhagya Devi and Mr. Amand Shah. Mr. Amand Shah did not participate in any proceedings of the Authority and he joined after hearings were completed and has signed the order. According to the Petitioners Mr. Amand Shah being party to the ultimate decision when he had joined after the hearing was concluded is against the basic notions of fairness and in breach of principles of natural justice. According to the Respondents, there is no requirement of oral hearing and the case can be decided on documents. The Respondents contend that oral hearing is not contemplated and signing the order by the fourth member is a mere irregularity. Thus, the stand is that there is no breach of principles of natural justice, and even assuming there is a breach, no prejudice is caused to the Petitioner, and the breach is a mere irregularity.

15. The concept of natural justice will vary with the nature of the enquiry and the object of the proceedings and consequences that ensue from the order passed. A bare reading of the statutory scheme reproduced below will show that the proceedings before the Authority are quasi-judicial, oral hearing is contemplated and orders entail civil consequences. We have underlined the relevant portions of the Rules and the Procedure to emphasis this point.

16. The Anti Profiteering Authority is constituted under Section 171 of the Goods and Services Tax Act, 2017. The provision mandates that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. The provision reads thus:

> *"1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*
>
> *(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.*
>
> *(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.*
>
> *1(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered*

person has profiteered under sub- section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation.— For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.

17. The composition and functioning of the Anti Profiteering Authority is elaborated under Chapter XV of the Central Goods and Services Tax Rules, 2017. The composition of the Authority is under Rule 122. Rule 122 reads as under :

"The Authority shall consist of,-

(a) a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and

(b) four Technical Members who are or have been Commissioners of State tax or central tax for at least one year or have held an equivalent post under the existing law, to be nominated by the Council."

(c) Rule 122 lays down that it will consist of a Chairman and four Technical Members.

...."

The constitution of Standing Committee and Screening Committee is provided for under Rule 123, which reads as under :-

"(1)The Council may constitute a Standing Committee on Anti-profiteering which shall consist of such officers of the State Government and Central Government as may be nominated by it.

(2) A State level Screening Committee shall be constituted in each State by the State Governments which shall consist of-

(a) one officer of the State Government, to be nominated by the Commissioner, and

(b) one officer of the Central Government, to be nominated by the Chief Commissioner.

...."

The manner of appointment, payment of salary, allowances and other terms and conditions of the service is provided under the Rule

124. Rule 126 states that the Authority may determine methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods and

services or the benefit of input tax credit has been passed on by the registered person to the recipient by commensurate reduction in prices. The Authority is duty bound, as provided under Rule 127, to determine whether any reduction in rate of tax has benefited the recipient. Rule 127 reads as under :

> *"It shall be the duty of the Authority,-*
> *(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;*
> *(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;*
> *(iii) to order,*
> *(a) reduction in prices;*
> *(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;*
> *(c) imposition of penalty as specified in the Act; and*
> *(d) cancellation of registration under the Act.*
> *(iv) to furnish a performance report to the Council by the tenth day of the close of each quarter."*

The Authority is to identify the registered person who has not passed on the benefit of reduction. The Authority is empowered to direct reduction in prices to return to the recipient the amount equivalent to the amount not passed on and to impose penalty and to cancel registration under the Act.

18. The procedure for conducting the proceedings is laid down in Rule 128 to 132 of the Rules. The procedure under Rule 128 is for receipt of written application. Rule 128 reads as under :

> *"(1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority, in such form and manner as may be specified by it, from*

an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

(2) All applications from interested parties on issues of local nature or those forwarded by the Standing Committee shall first be examined by the State level Screening Committee and the Screening Committee shall, within two months from the date of receipt of a written application, or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority, upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action."

The Standing Committee, if it is prima-facie satisfied refers the matter to the Anti Profiteering for a detailed investigation under Rule 129(1). Rule 129 is as under :-

1). Rule 129 is as under :-

"(1)Where the Standing Committee is satisfied that there is a prima-facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it shall refer the matter to the Director General of Anti-profiteering for a detailed investigation.

(2) The Director General of Anti-profiteering shall conduct investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices.

(3) The Director General of Anti-profiteering shall, before initiation of the investigation, issue a notice to the interested parties containing, inter alia, information on the following, namely:-

(a) the description of the goods or services in respect of which the proceedings have been initiated;

(b) summary of the statement of facts on which the allegations are based; and

(c) the time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

(4) The Director General of Anti-profiteering may also issue notices to such other persons as deemed fit for a fair enquiry into the matter.

> *(5) The Director General of Anti-profiteering shall make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.*
> *(6) The Director General of Anti-profiteering shall complete the investigation within a period of six months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by the Authority and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records."*

The Director General is to investigate and collect evidence to determine the benefit of reduction and whether the benefit of reduction has been passed on to the recipient. For this purpose, the Director General is empowered to issue notices to the interested parties. The Director General is also empowered to issue notices to any such person who will aid and assist the enquiry. The Director General is to complete the investigation within a period of three months from receiving reference or such extended period not exceeding further period of three months for reasons recorded in writing upon completion of the investigation and furnish a report to the Authority.

19. Rule 132 empowers the Director General and the Authority to summon persons to give evidence and produce documents. The Director General is deemed a civil court for this purpose and the proceedings are judicial proceedings. The Rule reads thus :

> *"(1)The Authority, Director General of Antiprofiteering, or an officer authorised by him in this behalf, shall be deemed to be the proper officer to exercise the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing under section 70 and shall have power in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure,1908 (5 of 1908).*
>
> *(2) Every such inquiry referred to in sub-rule (1) shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860)."*

The Authority, within period of three months from receipt of report from the Director General, would determine whether the benefit of reduction in rate of tax has been passed

on. The Rule 133(2) states that an opportunity of hearing shall be granted to the interested parties. Rule 133 is reproduced below :-

> *"(1) The Authority shall, within a period of six months from the date of the receipt of the report from the Director General of Anti-profiteering determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.*
> *(2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.*
>
> *(2A) The Authority may seek the clarification, if any, from the Director General of Anti Profiteering on the report submitted under sub-rule (6) of rule 129 during the process of determination under sub-rule (1).*
>
> *(3) Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may*
>
> *order-*
> *(a) reduction in prices;*
> *(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;*
> *(c) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;*
> *(d) imposition of penalty as specified under the Act; and*
> *(e) cancellation of registration under the Act.*

Explanation: For the purpose of this sub-rule, the expression, "concerned State" means the State or Union Territory in respect of which the Authority passes an order.

(4) If the report of the Director General of Antiprofiteering referred to in sub-rule (6) of rule 129 recommends that there is contravention or even noncontravention of the provisions of section 171 or these rules, but the Authority is of the opinion that further investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of Anti-profiteering to cause further investigation or inquiry in accordance with the provisions of the Act and these rules.

(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Antiprofiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry."

This Rule demonstrates the impact of the order of the Authority. It also shows that oral hearing is contemplated. The Authority is also empowered in certain circumstances to order further investigation or an enquiry.

20. The decision of the Authority is to be taken as provided under Rule 134, which reads as under :-

"(1) A minimum of three members of the Authority shall constitute quorum at its meetings.

(2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote."

Three members constitute the quorum. If the members differ in their opinion on any point, the point is to be decided by voting and if equality of votes occurs, the Chairman would have a casting vote. Rule 134(2) clearly contemplate deliberations within the members before deciding.

21. Under Rule 126 of the CGST Rules, the Authority has notified a procedure. The procedure is called National Anti Profiteering Authority under the Goods and Service Tax Methodology and Procedure, 2018. It is provided that the principal seat of the Authority will be at New Delhi and the Authority can hold seat at such places within the territory of India. Relevant clauses for this petition are referred to as below. Clause 6 is to be noted, which reads as under :-

> *(6) In the discharge of its functions the Authority shall be guided by the principles of natural justice and shall have the power to regulate its own procedure. No order whether interim or final shall be passed by it without affording opportunity of being heard to the concerned interested party.*

Clause 6 of the methodology states that in the discharge of its functions the Authority shall be guided by the principles of natural justice. It further states that no order, whether interim or final shall be passed, without affording opportunity of being heard to the concerned interested party. There can be no better evidence than this to indicate that principles of natural justice apply to the proceedings of the Authority. Clause 7 relied upon by the Respondents reads as under :-

> *(7) No act or proceedings of the Authority shall be invalid merely on the ground that there was a vacancy or any defect in the constitution or appointments made in the Authority or there was any irregularity in the procedure followed by the Authority not affecting merits of the case.*

Clause 7 states that no act or proceedings of the Authority shall be invalid merely on the ground that there was any irregularity in the procedure followed by the Authority unless it affects the merits of the case. But the clause 7 has to be read along with clause 6 which incorporates principles of natural justice and cannot be read in isolation. Conjoint reading of these two clauses mean that irregularity contemplated clause 7 is not the one involving breach of principles of natural justice. Further clauses are also relevant. Clauses 10 and 11 read as under :-

(10) As per Rule 134 (1) a minimum of three members of the Authority shall constitute quorum at its meetings.

(11) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote, Rule 134 (2).

Clauses 10 and 11 reiterate the provisions of the Rule regarding quorum. Clause 13 lays down the procedure for receipt of the report from the Director General. Clauses 14 and 15 read as under :-

(14) In case the report filed by the Director General of Anti-profiteering recommends that there is no violation of the provisions of section 171 of the above Act, the Authority may send a copy of the report to the complaint interested party and invite objections from it and after hearing the above party may either close the matter or pass any order it may deem just and proper or under Rule 133 (4) direct the Director General of Antiprofiteering to further investigate the matter as the case may be.
(15) After registration of the report a notice shall be issued to the interested parties or their agents or their counsels intimating the date, time and place fixed for hearing and a copy of the report shall also be supplied to such parties along with the notice.

These clauses refer to hearing the parties. Clauses 14 to 19 state how notices are to be issued to the interested parties, and empowers the Authority to dismiss the proceedings in default. Clauses 23, 24, 25 and 26 read as under :-

(23) No adjournments shall be ordinarily granted and an adjournment shall be given only on highly compelling grounds and shall also be subject to cost if circumstances so warrant.
(24) The interested parties shall not be allowed to produce additional oral or documentary evidence before the Authority.
(25) The interested parties shall be ordinarily required to file written submissions only; however they can address oral arguments with the permission of the Authority.

> *(26) The interested party on whose part the proceedings have been initiated shall file or address the arguments first and shall also supply copies of such arguments to the other interested parties who shall be entitled to file their arguments, copies of which shall be supplied to the opposite interested parties, who shall be entitled to rebut the same.*

Again in clause 25 oral hearing is referred to. Clauses 20 to 30 regulate the procedure of hearing before the Authority such as adjournments, additional oral or documentary evidence, etc. The Authority is entitled to correct any clerical, arithmetical or factual mistake apparent from the record within three months from passing the order. These are generally the provisions which regulate function of a quasi-judicial authority. Clauses 31 to 35 deal with the communication of the order and disposal of record. Clause 41 states that civil court will have no jurisdiction regarding the matters pending before the Authority, conferring an exclusive jurisdiction.

22. To summarize the scheme in the context of the challenge. Consumers can lodge a complaint of profiteering by the registered persons to the authorities empowered to investigate in the complaints. An detailed enquiry, with powers of Civil court and deemed judicial enquiry, is contemplated. Witnesses can be examined. Oral and documentary evidence can be produced. There can be examination and cross examination of witnesses. The Rules and the Procedure incorporate principles of natural justice. The Authority is guided by the principles of natural justice. A hearing is, thus, contemplated not merely looking at the records. The scheme of Rules and the Procedure demonstrate that the principles of natural justice are statutorily ingrained. There is a deliberation amongst the members. Therefore, the presence of a member of the Authority during the hearing is not a formality. Multi-member panels are constituted so a decision through discussion and exchange of opinions takes place. The litigant is entitled to be heard by all members who are the ultimate decision-makers so the litigant can try to convince each member of the adjudicating Authority. Therefore oral hearing is clearly contemplated and the argument of the Respondent that since all the record was before the Authority, there is no illegality in the fourth member in signing the order, is not correct. If the scheme itself provides for hearing by all members, not giving hearing itself will cause prejudice. Therefore the argument of the Respondents that there is no prejudice, also cannot be accepted.

23. We now turn to the case law relied upon by the parties.

24. In the case of Emperor v Dasrath Rai and Ors.1 of the Privy Council ,relied upon by the Petitioner, the issue arose from Section 350A of the Code of Criminal Procedure. The

Privy Council held that only those members of the bench present throughout the proceedings and who formed a quorum should arrive at their conclusion to write the judgment and pronounce and sign it. In the case of Mushtaq Ali and Ors v. State2, the Allahabad High Court took a review of the case law on the subject. The Allahabad High Court held that if any of the members of the bench who has assisted in making the judgment was absent at any hearing of the case, the judgment would be invalid and the invalidity of the judgment will not be curable by Section 350 of the Code of Criminal Procedure. The need to remain present during the hearing was emphatically stated by the Supreme court in the case of *G. Nageshwara Rao v* APSRTC . The Court held that the divided responsibility of hearing and decision making destroys the concept of a judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables an authority to clear-up its doubts during the arguments, and the party can persuade the authority by reasoned argument to accept the viewpoint. The Court ruled that if one person hears and another decides, then personal hearing becomes an empty formality. The Division Bench of Delhi High Court in the case of M/s. Kwality Restaurant and Ice-Cream Co. v/s. The Commissioner of VAT, Trade and Tax Department and Ors.4 extended this principle to the VAT tribunal.

25. In the case of Punjab University, Chandigarh vs. Vijay Singh Lamba and Ors.5, relied by the Respondents, the Supreme Court was considering a case wherein the High Court of Punjab had set aside a decision on the ground of composition and attendance by one of the members. Here the committee was a Standing Committee established to look into the conduct of students of Punjab University who were disqualified for adopting unfair practices in the examination. In this case, the Supreme Court found that though only two and not all three members of Committee participated in the proceedings and the quorum was of two. In the case of General Manager Eastern Railway vs. Jawala Prasad Singh6, the case was where the issue before the Supreme Court was whether the proceedings of Enquiry Committee constituted to enquire into the charges of misappropriation against the Respondents therein were vitiated by violation of principles of natural justice. Here the Enquiry Committee was constituted and in the proceedings of Enquiry Committee which had gone on for some time, one member of the Enquiry Committee was transferred and in his place other member had stepped in. The High Court had taken a view that the persons who decided the matter finally did not hear the witnesses. It is in this context that the Supreme Court found that the change in the Enquiry Committee, which was not a final authority to impose punishment would not be fatal to the final order passed. In this case, therefore, the change in composition was at the stage of the enquiry authority and not the final Authority. In Indore Textiles Ltd. vs. Union of India7 the issue

before the Division Bench of Madhya Pradesh High Court was regarding the management of a textile mill taken over by the Madhya Pradesh State Textile Corporation under the orders of the Central Government. Breach of principles of natural justice was alleged on the ground that the person who passed the order to take over did not hear the petitioner, and a different person gave the hearing. The Division Bench observed that it is not an absolute rule that the person concerned must himself hear and cannot rely on the report of the officer. The decision of the Kerala High Court in the case of Raghava Menon vs. Inspector General of Police8, was again a case where the Court rejected the contentions based on breach of principles of natural justice on the ground that the evidence was recorded by a person other than the enquiry authority. As these cases would show that they are different from the present case. In the case at hand, hearing by the Authority is contemplated and was given. The order is signed by the fourth member not part of the Authority earlier.

26. In the case of State of Madhya Pradesh & Ors. v Mahendra Gupta & Ors.9, relied upon by the Respondents, the petitioners before the High Court were permit holders of a route for transportation. Another permit holder had applied for modification of the schedule for movement of his vehicle, which was allowed. The petitioners challenged this decision and one of the contentions that were raised that the Transport Authority which was of three members, had heard the matter. However, the order was passed by two members. The Madhya Pradesh High Court held that this could not have been done and the decision of the Authority was set aside. The State of Madhya Pradesh filed an appeal against the decision of the High Court in the Supreme Court. The Supreme Court considered the Motor Vehicle Act and the Rules and the Constitution of the Regional Transport Authority. The Supreme Court noted the fact that the third member was transferred and was not available to be part of the order issued. The Supreme Court examined the facts of the case and found that when the hearing took place, the quorum was complete and all three members were present during the hearing of the Applicants and the objectors. However, before the order could be signed, one member was transferred and was not available for signing. In this context, the Supreme Court analyzed the position and observed that there was no breach of the principles of natural justice. This decision is different on facts. The position was converse to the one at hand. When three members hear, and the fourth member joins subsequently and all sign the order, the roles cannot be severed because they get merged in the collective decision. Situation could be different when some members hear the matter, one is transferred or not available, and others are constituting the quorum sign the order. In such a case, it may be argued that the role of the member who left was automatically severed and the decision

of the quorum could be tested independently. The contention of the Respondents that if the role of the fourth member is removed, then the remaining three constitute a quorum and the order can be sustained, thus is not correct.

27. The Respondents, based on the decision of the Supreme Court is Ossein and Gelatine *Manufacturers Association vs. Modi Alkalies and Chemicals Ltd.*10, sought to invoke the concept of institutional hearing. In this case, the appeal had come up to the Supreme Court under the Monopolies and Restrictive Trade Practices Act, 1969. The Central Government had granted an application for permission to establish an undertaking for manufacturing, the association made representation to the Central Government objecting to the grant of application to a private party. This application was rejected, and the Petitioner filed an appeal to the Supreme Court under the Act. The Supreme Court observed that the decision therein was an institutional decision and by an officer specially empowered. The Respondents have stressed on the concept of the institutional decision-making. Respondents seek to extend the concept of the institutional decision-making to the Anti Profiteering authority to state that no one member is authorized to take a decision but it is an institutional decision. There is no merit in this contention. No doubt the procedure for institutional decision making differs from the judicial decision making, but the institutional decision making would be the decision by the Government such as the one was before the Supreme Court in the above case. In the present case, the decision is by a designated quasijudicial body.

28. The above analysis of the decisions cited by the parties will show that the breach of principles of natural justice are examined in the facts of the case. Certain basic positions of law however are settled. The rule that one who hears must pass the order remains as the basic proposition. In certain circumstances, this rule can be deviated from. None of the decisions relied upon by the Respondents fit the fact situation at hand to justify that deviation. We had adjourned the hearing to enable the Counsel for the Respondents to cite before us any decision where in identical facts courts have permitted the infraction of the basic rule. The Counsel for the Respondents has also fairly accepted that the decisions cited by him can be distinguished on facts, but sought to contend that these decisions lay down certain principles which we must follow. These, according to Respondents, are where an oral hearing is not contemplated; there is no prejudice; is a case of mere irregularity, the court should not interfere. These propositions cannot be accepted from the analysis of the statutory provision which we have undertaken earlier.

29. We conclude that when the three members of the Authority had heard the Petitioner and participated in the entire hearing, the collectively signed decision, when the fourth

member joined only for signing the order has resulted in violation of the principles of natural justice and fairness, and is liable to be set aside.

30. There is one more facet , that is of the perception of the litigants. This was underscored by the Division Bench of the Delhi High Court in the case of M/s. Kwality Restaurant and Ice-Cream Co. v/s. The Commissioner of VAT, Trade and Tax Department and Ors.11 . In this case, a challenge was raised to the continuation of hearing before the VAT Appellate Tribunal wherein two members had heard the case substantially in the absence of the third member who had proceeded on leave, and after the hearing was closed, the third member sought to join the bench. The Court did not permit the same. The Court referred to the importance of public confidence in the decision making by the courts and the tribunals. The Court observed that any practice which even remotely suggest a sense of unfairness must be eschewed. It held that our legal system mandates that no one can suffer an adverse order after being subjected to an unfair procedure. The Court observed that procedural safeguards against executive excesses or apathy apply with equally to the Tribunals responsible for dispensing justice within their sphere of activity. Invoking this broader principle also that the Delhi High Court issued the directions. Thus, fairness and transparency in adjudication will enhance the credibility of the Authority.

31. The issues that come up before the Anti-Profiteering Authority are complex. The Act and Rules provide no appeal. The Authority can impose a penalty and can cancel the registration. The term profiteering, under the Act and Rules, is used in a pejorative sense. Such a finding can severely dent the business reputation. The Authority is newly established. Therefore, as a guidance to this Authority, highlighting the importance of fair decision-making is necessary.

32. As a result, the impugned order dated 16 November 2018 passed by the National Anti-Profiteering Authority is set aside. The proceedings bearing Case No. 14 of 2018 before the National Anti-Profiteering Authority – Respondent No.2. stand restored. Fresh notice to the Petitioner is not necessary as the Petitioner will appear before the Authority on 25 November 2019.

33. We keep all the contentions of the parties on merits, jurisdiction and validity of the Authority, open.

34. The Rule is made absolute in the above terms. No costs.

NITIN JAMDAR, J. M.S. SANKLECHA, J.

COMMERCIAL NEWS

CA Ribhav Ghiya
Jaipur

- **MANY COMPANIES IN A FIX AS WORKING CAPITAL MAY BE STUCK DUE TO A GST REGULATION**

MUMBAI: Many companies could face a stress on their working after a Goods and Services Tax (GST) regulation may lead to hundreds of crores stuck in input tax credit claims.

A government regulation that disallows companies to take input tax credit if vendor invoices are not uploaded on the GST network is creating problems for the companies, said people in the know. According to the GST law, invoices have to be uploaded on the GST IT network for every transaction for it to be complete and eligible for tax credits.

Companies are claiming that since the rule does not specify the time period of this calculation, it is creating a situation where some companies may end up losing input tax credit if the vendor has not supplied an invoice.

"Restrictions on input tax credits in case of invoices that have not been uploaded by the supplier to 20% of the eligible credits appear to be an anti-evasion measure driven by revenue considerations. However, this means that businesses would need to establish a real time reconciliation mechanism to avoid working capital blockages," said MS Mani, Partner, Deloitte India.

Tax experts are also complaining that the credit is restricted on the basis of supplier uploading without giving change to the taxpayer to add to details which suppliers have not reported and this could lead to problems during reconciliation. The last date for claiming the input tax credit is October 20, said industry trackers. Many companies are claiming that they would not be able to reconcile the statements as many vendors are not able to give the invoices.

Many companies are also asking the government to extend the date for claiming input tax credit as it could lapse after the due date. "The governance can extend the date or give a clarification around this since this problem is intensified due to the slow IT platform of the GST," said a tax expert.

"This is unilateral amendment wherein the credit is restricted on the basis of supplier uploading without giving change to the taxpayer to add to details which suppliers have

not report. This will be applicable to all the taxpayers," said Manoj Malpani, senior advisor with Bizsolindia Services

18th October, 2019 by economictimes.indiatimes.com

- **SITHARAMAN SEEKS TAX EXPERTS' INPUTS TO CORRECT GST FLAWS**

Conceding that Goods and Services Tax may have some flaws in its present form, finance minister Nirmala Sitharaman on Friday asked tax professionals not to curse it and sought their help to make it better.

The minister was replying to the concerns raised by taxation industry professionals here, who said the industry was "cursing" the government over how the GST was implemented. Billed as the biggest reform in indirect taxation, the GST, which does away with a host of levies from the federal to the local government levels, was implemented in July 2017.

On several stakeholders "cursing" GST, Sitharaman even objected to a person who raised the question, and asked him not to damn the law which was passed by Parliament and all the state assemblies.

"But we can't just damn it. We can't just damn it. It has been passed in the Parliament. It has been passed in all state assemblies. It might have its flaws. It might give you difficulties. But I am sorry; it is a 'kanoon' of the country. I would appeal to you all to work together to make sure we have a better framework."

"After a long time, many parties in Parliament and in state assemblies worked together and came up with the Act. I know you are saying this based on your experiences but suddenly we cannot call 'what a goddamn structure it is'," the minister said.

She interacted with people from industries, chartered accountants, company secretaries and many other stakeholders in the financial sector.

Stating that it has been only two years since GST was implemented she said she would have wished the new structure was satisfactory from day one.

She also said she wants all stakeholders to give some solutions for better compliance.

BM Sharma, a member of the Cost Accountants Association, later explained why he said what he said. "I said that the objective of GST was to ease of doing business, reduce tax complexities, rationalise 13 taxes, and reduce litigation and corruption. But the same is not being achieved due to several problems and industries and professionals are complaining now," he said.

As Sharma suggested some solutions, the minister asked him to meet her in Delhi.

Earlier during a presser, when asked about the low GST collections, minister attributed it the difficulties due to weather-related disasters and also poor compliance.

"Yes, GST collection in some areas has not been strong enough. Various districts in Maharashtra, Karnataka, Himachal, and Uttarakhand were flooded and we had to postpone filing returns from these areas," she said.

She also said the revenue secretary has already formed a committee to identify where collection has not been adequate as per expectation.

"We have some reports on how in some cases evasion has happened. The committee will look into how this can be plugged and if there has been any under-invoicing," she said.

bloombergquint.com on 11th October

- **WHISTLEBLOWERS ACCUSE INFOSYS CEO SALIL PAREKH OF 'UNETHICAL PRACTICES' TO BOOST PROFIT**

An anonymous whistleblower letter has alleged that Infosys Ltd. Chief Executive Officer Salil Parekh dressed up the company's books—accusations that could plunge the software services provider into its second leadership-related crisis in a little over two years.

The letter from a group of "Ethical Employees" accused Parekh of unethical practices in "recent quarters" to boost short-term revenue and profits, according to a copy published by Deccan Herald newspaper on its website. Employees were asked not to fully recognise costs like those for visas of employees to improve profits, according to the letter dated Sept. 20 addressed to the company's board and the U.S. Securities and Exchange Commission.

An Infosys spokesperson confirmed having received the letter and its contents to BloombergQuint. In a separate response to emailed queries, the company said "whistleblower complaint has been placed before the audit committee as per the company's practice and will be dealt with in accordance with the company's whistleblowers policy".

Emailed queries to Parekh and Chief Financial Officer Nilanjan Roy, also named in the letter, and didn't elicit a response.

The allegations come two years after Vishal Sikka quit as CEO following a founder-led boardroom coup. He, too, faced whistleblower allegations and corporate governance concerns stemming from his salary and acquisitions and how much Infosys paid for them. Parekh's appointment had ended the uncertainty, and he led a revival by focusing on large deals and digital services.

The whistleblowers allegations, however, call some of that record into question. The letter alleged:

- Putting pressure on whistleblowers not to recognise reversals of $50 million of upfront payment in the quarter ended September.
- Revenue recognition in large contracts involving Verizon Communications Inc., Intel Corp., the company's joint venture in Japan as well as acquisition of Stater NV, a a subsidiary of ABN AMRO Bank NV, were "forced" and not as per accounting standards.
- Approvals for large deals have irregularities and the chief executive is bypassing reviews and approvals by instructing sales teams not to send mails for the same.
- Parekh and Chief Financial Officer Nilanjan Roy had asked the whistleblowers to show "more profits in treasury operations" by raising risks and changing policies.

The whistleblowers claim they have emails and voice recordings of the conversations on the matters discussed.

While on certain matters, the auditors refused to sign off because of which certain "issues" were postponed, matters relating to large deal information were asked to be withheld from the auditors. The whistleblowers said they were asked not to make specific disclosures in the company's annual report and share only "good and incomplete information" with investors and analysts.

Deloitte Haskins & Sells LLP is the company's statutory auditors, while EY LLP is its internal auditor. Its board audit committee is led by D. Sundaram as chairperson, and comprises financial expert Punita Kumar-Sinha and Roopa Kudva.

Kiran Mazumdar-Shaw, founder of Biocon Ltd. and an independent director on Infosys board who was part of the panel that selected Parekh, told BloombergQuint, "We will follow due process which will be according to the company's whistleblower policy."

bloombergquint.com on 21st October

- **NEW GST RETURN FORMS MAY FORCE FIRMS TO CHANGE ERP SYSTEMS**

The new Goods and Services Tax (GST) returns from April 2020 that mandate providing more details may require companies to amend their enterprise resource planning (ERP) systems.

Tax experts and chartered accountants (CAs) said that the new return systems would require a lot of details such as purchases from unregistered dealers.

"Besides, bill of entry-wise import details and bill of entry-wise purchases from SEZs (special economic zones) would be required. As of now, there is one-way traffic. Presently, suppliers upload these data, but from April 2020, recipients will also have to upload all these data," said Vivek Jalan, Partner, Tax Connect Advisory Services LLP.

Instead of the GST returns being the current supplier-driven trafc, starting April next year, it would become a workow driven mechanism, he added.

Moreover, electronic or E-invoicing for business to business (B2B) transactions would also kick in from January 1, 2020. This would also require changes in the ERP systems to ensure that every invoice is tracked by the tax authorities. The move is aimed at curbing tax evasion.

In addition to the current invoices which are generated on the companies' ERP, the new system would require automatic uploading of the data on government systems.

Amit Bhagat, Partner, Dhruva Advisors said that depending on the details required in the new return system, the ERP would need to be changed.

"It will not be something which will require complete overhaul of the system, but certainly some changes would be required after e-invoicing is implemented and more details in GST returns are required from early next year," Bhagat said.

Hindustantimes.com on 20th October

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Printed by : Pankaj Ghiya, Published by : Pankaj Ghiya on behalf of All India Federation of Tax Practitioners (name of owner) & Printed at Vee Arr Printers, Bandari Ka Nasik, Subhash Chowk, Jaipur (Name of the Printing Press & Address) and Published at All India Federation of Tax Practitioners, Jaipur • Editor : Pankaj Ghiya • **PUBLISHED ON 25TH EVERY MONTH.**

Annual Subscription - ₹2000/-

All India Federation of Tax Practitioners
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020