AIFTP

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ETHICS EDUCATION EXCELLENCE

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All India Federation of Tax Practitioners
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CHIEF-EDITOR'S COMMUNIQUE

Dear All,

It's a privilege for me that we are again after gap of one year continuing with the AIFTP Indirect Tax & Corporate Laws Journal. It would be released monthly on 25th day of each month and will be sent in physical copy to the Members who opted for it on the website of AIFTP. As earlier the journal would cover Articles on Indirect Tax & Corporate laws and allied laws and also some important judgment on Indirect Taxes. Apart from it, it will cover the timelines and other relevant Commercial news.

Friends I had been appointed as Chief Editor of this Journal again and I request you all to kindly send your articles, judgements or other important information on Indirect Tax or Corporate Laws to me for publication in this journal. A great team consisting of Senior Tax Professionals has been appointed along with me in the Committee to provide you from this year again the Specialize Journal on Indirect Taxes.

The Journal will cater to the need of all the Tax Professionals working on Indirect Tax side and corporate laws as the complexity in the taxation laws has increased day by day with the issue of umpteen numbers of Notifications, Circulars, Press Notes etc. and then independent interpretation of the Tax Authorities. Therefore, specific articles on Indirect Taxes clearing the doubt and covering the recent amendment are required. The Journal would be released in soft copy also and will be sent on WhatsApp and all other social media for circulation to all the Tax Professionals.

We look forward to your continued support and suggestions.

Regards,

PANKAJ GHIYA

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Membership of All India Federation of Tax Practitioners as on 9th January, 2021

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Northern	0	1348	18	2	**1368**
Southern	1	1572	21	5	**1599**
Western	5	2689	37	6	**2737**
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PRESIDENT'S COMMUNIQUE

Wish you a Happy & Prosperous New Year to all the Members of AIFTP and their Families.

I am very much delighted to be in the helm of affairs of the All India Federation of Tax Practitioners (AIFTP), a matter of prestige for any practitioner all over the country.

I am glad that we are restarting publishing the Indirect Tax Journal during my tenure and I am sure that the members would be amply benefited from the same as with the growing emphasis on Indirect Taxes, it is imperative impart knowledge relating to the same and the same shall be sent to all members free of cost, who opt for the same through our website.

I wish to congratulate Shri Pankaj Ghiya, Advocate for having accepted the responsibility of coming out with the Indirect Tax Journal and am sure that that he will do thorough justice to the same. I would also like to thank the sponsors of the Journals who have agreed to sponsor one issue each till December, 2021 by the twelve honourable sponsors.

I wish to inform the members that there have been many firsts during this year viz. The National Office Bearers and the five Zonal Chairmen have taken an Oath while taking over office.

I also wish to inform you that the souvenir of 23rd National Convention along with highlights of the convention including Zonal Managing Committee Members will also be dispatched free of cost to the NEC members, Co-opted members, Special Invitees and all Committee Chairmen and Members respectively.

We have installed a new Dell Laptop with latest configuration at the head office, so that staff can work more productively. The same is sponsored by Dr. Ashok Saraf, Senior Advocate and Past President, AIFTP, Guwahati.

We have also purchased a new Canon colour printer at the AIFTP head office for better colour correspondence as and when required. The same is sponsored by me as a National President.

We have also installed a Godrej Electronic Safe in the Head Office for safe keeping of Documents. The same has been sponsored by CA. Vijay N. Kewalramani, National Treasurer, Thane.

After the success of 23rd National Convention, we have also planed the First NTC for the year which would be held in mid-February by the Western Zone in Virtual Mode.

The First Physical NTC is proposed to be held in Puri on 10th and 11th April, 2021 and will be hosted by Eastern Zone and due arrangements are being made to obtain the blessings of Lord Jagannath.

We have also planned NTCs in Kerala, Khajuraho and Katra, the details of the same would be announced in my future interactions with you.

I would personally like to request the members to set up a target of **Each One Get One** that is every member is requested to enroll at least one member so that we have a better strength in our life membership.

We have also proposed to enroll Patron members to our esteemed organization, the modalities are being worked out and will be announced in due course.

I wish, the readers will take advantage of all publications of AIFTP, AIFTP Times, AIFTP Journal, AIFTP Indirect Tax Journal and wish them a very happy learning.

Place: Eluru
Dated: 20-01-2021

M Srinivasa Rao,
National President, AIFTP.

FORTHCOMING PROGRAMME

1.	16.02.2021	National Executive Committee Meeting- Virtual
2.	16 & 17.02.2021	National Tax Conference - Virtual
3.	10.04.2021	National Executive Committee Meeting- Puri
4.	10 & 11.04.2021	National Tax Conference - Puri

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

NOTIFICATIONS - CENTRAL TAX

CA Ribhav Ghiya

DATE	NOTIFICATION NO.	REMARKS
14.12.2020	91/2020-CENTRAL TAX	Seeks to extend the due dates for compliances and actions in respect of anti-profiteering measures under GST till 31.03.2021.
22.12.2020	92/2020-CENTRAL TAX	Seeks to bring into force Sections 119,120,121,122,123,124,126,127 and 131 of Finance Act, 2020(12 of 2020).
22.12.2020	93/2020-CENTRAL TAX	Seeks to waive late fee for FORM GSTR-4 filing in UT of Ladakh for Financial year 2019-20.
22.12.2020	94/2020-CENTRAL TAX	Seeks to make the Fourteenth amendment (2020) to the CGST Rules.2017.
30.12.2020	95/2020-CENTRAL TAX	Seeks to extend the time limit for furnishing of the annual return specified under section 44 of CGST Act, 2017 for the financial year 2019-20 till 28.02.2021.
01.01.2021 12.01.2021	01/2021 & 02/2021-CENTRAL TAX	Seeks to make amendment (2021) to CGST Rules, 2017.

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
15.12.2020	144/14/2020-GST	Waiver from recording of UIN on the invoices for the months of April 2020 to March 2021.

PRESS RELEASE

DATE	REMARKS
07.01.2021	CBIC Introduces Flagship Liberalised Authorised Economic Operator Package For MSME
11.01.2021	FAQs On Aadhaar Authentication For Existing Taxpayers (Regular And Composition)

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TIMELINE - GST

GOODS & SERVICE TAX

Adv. Abhay Singla

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		January, 2021	20,22,24 Feb 2021
			February, 2021	20,22,24 March 2021
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		Jan to March 2021	13th April 2021
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		January, 2021	11th Feb 2021
			February, 2021	11th March 2021
(iii)	Quarterly return for Composite taxable persons	CMP-08	Jan to March 2021	18th April 2021
(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	January, 2021	10th Feb 2021
			February, 2021	10th March 2021
(viii)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	January, 2021	10th Feb 2021
			February, 2021	10th March 2021
(ix)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2019-2020	28th Feb 2021

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COMPOSITE V/S MIXED SUPPLY A VEXED ISSUE UNDER GST LAWS

CA S Venkataramani,
CA Siddeshwar Yelamali,

I. Background

The erstwhile service tax provisions, provided for the interpretation of taxability of bundled services. Explanation to Section 66F of the Finance Act, 1994 defined 'bundled service' to mean bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. Section 66F of the Finance Act, 1994 provided for the following principles of interpretation of specific description of services and bundled services:

1. Reference to a service does not include reference to a service which is used for providing the main service. For instance, consulting engineer services are required for construction services; Construction service provided to the Government is exempt. In this illustration *"though the construction services provided to the Government are exempt, the consulting engineer services provided for the construction, which is an input service for the construction services is not exempt".* In this illustration the construction services are construed to be the main service.
2. If a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.
3. Taxability of bundled service is to be determined as under:
   a. If various elements of such services are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character.

   b. If various elements of such services are not 'naturally bundled in the ordinary course of business', it shall be treated as provision of the single service which results in highest liability of service tax.

II. Central Goods and Services Tax Act, 2017

1. The fundamental principle for taxing 'goods or services or both' under the Central Goods and Services Tax Act, 2017 (for brevity, 'GST Law' / 'CGST Act, 2017') is that the goods or services or both so supplied by the supplier to the recipient, should constitute a supply under Section 7 of the CGST Act, 2017. Once this fundamental principle is fulfilled, the next logical and essential step would be to determine the nature of such supply and the rate of tax to be applied to such supply. Determination of rate of tax would be a less complex exercise, if the supply constitutes only a single supply. It gets more complex when a supply involves a combination of one or more supply of goods or service or both.

   In certain circumstances, the supply of goods and / or services will include one or more supply of goods or services therein. To illustrate:

   (1) Hotel Room booked for 3 days as a package inclusive of breakfast, lunch and dinner;

   (2) A supply involving installation and commissioning service along with supply of machinery;

   (3) Combo pack consisting of aerated drinks, wafers, cakes and chocolates.

   In a supply involving a combination of one or more supply of goods or service or both, the issue of composite supply viz-a viz mixed supply will have to be analysed to determine the applicable nature of supply and the corresponding rate of tax that would be applicable.

2. Deciphering composite supply / mixed supply

A. Activities or transactions which are treated either as a supply of goods or supply of services in terms of the Second Schedule to the CGST Act, 2017, such transactions are to be treated accordingly. For instance, works contract service and supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or

other valuable consideration is to be treated as a 'composite supply' in terms of the said second schedule.

B. Tax Liability on composite and mixed supplies - (Section 8 of the CGST Act, 2017)

The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a 'supply of such principal supply'; and

(b) a mixed supply comprising two or more supplies shall be treated as a 'supply of that particular supply' which attracts the highest rate of tax.

C. Composite Supply

a. **Composite supply** is defined to mean a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply (Section 2(30) of the CGST Act, 2017).

b. **Principal supply** means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary (Section 2(90) of the CGST Act, 2017)

c. A supply would fall within the meaning of composite supply, if ***two or more taxable supplies*** are naturally bundled and supplied in conjunction with each other. If two or more supplies "that consist of taxable and exempt supply, then such a supply will not fall within the meaning of composite supply".

d. To determine whether ***services*** are naturally bundled or not where two or more services are provided, a cue can be taken from the Taxation of Service – Education Guide issued by the Central Board of Excise & Customs issued under the erstwhile service tax provision which is reproduced below:

"9.2.4 Manner of determining "if the services are bundled in

the ordinary course of business"

In order to understand as to whether the services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

- The perception of the consumer or the service receiver - If a large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.
- Majority of service providers in a particular area of business provide similar bundle of services - For example, 'catering onboard and transport by air' is a bundle offered by a majority of airlines.
- The nature of the various services in a bundle of service will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that - one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example, service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.
- Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are–
  - There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.

- The elements are normally advertised as a package.
- The different elements are not available separately.
- The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected."

e. Where a 'composite supply' involves supply of goods and services, determining whether the supply would tantamount to a composite supply and further determining what constitutes principal supply gets complex. Say for instance, there is a contract for supply of a high-end machinery coupled with contract for installation and commissioning the machinery. Determining the supply in this instance as to whether it is a composite supply or mixed supply would require understanding of the terms of the contract and also the interdependence of the supply of machinery and installation / commissioning activity. If the supply of machinery and installation / commission are so inextricably linked and naturally bundled then the supply can be classified as composite supply. The next issue to determine would be, what is the principal supply in the instant case; the supply of machinery being the principal supply one can take view that supply of machinery is the principal supply and rate of tax applicable to machinery would be the applicable rate.

f. One more illustration is provided in this context. A registered person supplies authentic healthy Indian regional food to its customers visiting his farm premise. The customers are allowed to enter the farm by paying a lumpsum amount of say Rs. 500 per person for full day entry into the farm. The customers would be served breakfast, lunch and high tea during the visit. The main attraction is the supply of healthy India regional food and to promote the healthy food habits of local cuisine. In order to cater to this business and keep visitors engaged throughout the day, the supplier also educates visitors about organic farming, provide them access to the camel ride, bullock cart ride, cycling, pottery etc., on a 'free of cost' basis which is within the farm. In this case, whether the supply is a composite supply or not will have to be analysed. One

view is that supply of food being the main intention of the supplier and access to camel ride, bullock cart ride, cycling, pottery etc., being incidental, it can be said that the supply is a composite supply with supply of food being the principal supply. Therefore, supply of food being the main activity, the said supply falls within meaning of composite supply of supply of services as per paragraph of 6(b) of Schedule II of the CGST Act, 2017 i.e. supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption).

Alternatively, one may argue that it is a mixed supply and camel ride, bullock cart ride, cycling, pottery etc., being the main attraction and as such would fall within the meaning of admission to an entertainment event and thus liable to 28% GST.

The paper writers view is that the above model is not different from any other restaurant business wherein some restaurants in order to attract customers provide the facility of good garden ambience, viewing of television on large screen and certain play area for the children accompanying the customers and would fall within meaning of composite supply of supply of services as per paragraph of 6(b) of Schedule II of the CGST Act, 2017.

D. Mixed supply

a. **Mixed supply** means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply (Section 2(74) of the CGST Act, 2017).

b. In a mixed supply, the supply of two or more individual supplies of goods or services should be for a single price. Such a condition is not prescribed in the definition of composite supply. Further, two or more individual supplies in a mixed supply can be consisting of taxable and exempt supply.

c. Illustration for mixed supply given in Section 2 (74) of the CGST Act, 2017 is as follows:

A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply.

d. Another illustration is discussed in the context of mixed supply- 3 years maintenance package is entered into by a car dealer with the owner of cars, wherein, the package provides for servicing of the car and also replacement of spare parts listed in the package for a single price for 3 services in each year. One may argue that this is a mixed supply of goods and services and the rate of spare parts (some spares of automobiles being liable to tax at 28% GST) should be applied being the highest rate for the full package. Alternatively, an argument can be taken that this is a composite supply of goods and services and service being the principal supply for which the customer has agreed (replacement of parts being incidental to providing service) the rate of tax applicable for providing the service should be charged. The papers writers are of the view that the same is a composite supply.

3. Interpretational issues

a. Can parties to a contract have separate contracts i.e., one for supply of goods and another for installation of service and then charge applicable rate of tax to each of the supplies. The following judgements of the erstwhile law can be considered in this context:

i. Commissioner of Sales Tax v. Sabarmati Reti Udyog Sahakari Mandali Ltd. [1976] 3 SCC 592 wherein the Hon'ble Apex Court held as follows 'It is well-settled that whether a particular transaction is a contract of sale or a works contract depends upon the true construction of all the terms and conditions of the document, when there is one. The question will depend upon the intention of the parties executing the contract.'

ii. Based on the above judgement, the Hon'ble Apex Court in the case of Kone Elevator India Pvt. Ltd. 2014 (5) TMI 265 - SUPREME COURT held as follows 'We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary

to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, that would be a contract for labour and service'.

The paper writers view is that supplier and recipient can enter into separate contracts for supply of goods and service and that the tax authorities cannot compel to read the contracts as single contract. However, caution has to be exercised so as, not to artificially split a contract leading to tax disputes.

b. **NBCC (India) Limited, AAR Odisha Order NO.01/0DISHA-AAR/2020-21dated 19.11.2020**

The facts of the case are as under –

i. Number of works were entrusted to NBCC (India) Limited (NBCC) under a single contract by Indian Institute of Technology, Bhubaneswar for Project Management Consultancy (PMC) works.

ii. The scope of the work as per the agreement includes ; "(not limited to) providing and laying Sewerage & STP for residential cum academic campus, 800 seater boys hostel, 200 seater girls hostel, Construction of lecture hall complex, Construction of Student Activity Centre, Dispensary, Construction of 1000 capacity Auditorium, Construction of Directors Bunglow, 40 nos. staff Quarters, 84 nos Faculty Quarters, Construction of Central Research & Instrumentation facilities, Construction of Central Workshop, Landscaping and allied works for academic area, construction of water works, Roof top solar PV power plants, Play grounds, Electricity, Substation DG set and fire safety measures etc.

iii. NBCC submissions to the AAR was that the impugned supply is a composite supply of works contract service which is being supplied to IIT, Bhubaneswar a Government entity / Governmental Authority /Government and accordingly the same would merit entitlement for concessional rate of GST @ 12% [CGST @ 6% + SGST @ 6%] in terms of Serial Number 3(vi) (a) & (b) of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 (as amended).

Ruling of the AAR

"4.2 We have given a careful consideration to the arguments adduced by the applicant and the counsel. We observe that there are number of works entrusted to the applicant under a single contract/agreement made on 02.05.2016. We also find that IIT, Bhubaneswar has engaged the applicant as a "Project Management Consultant". In order to execute the project, the applicant has engaged contractors through different competitive tender process**. The applicant has awarded different types of works to various agencies/contractors with categorical mention of individual works to be carried out by them with specific remuneration for each such work. Hence, it is a supply having distinctly identifiable components with distinct value attributable to each of the components**. **We, however, do not agree with the contention of the applicant for the reasons that the items covered under the 'Scope of Work' are disjoint in character and can be supplied in conjunction with each other in the ordinary course of business. Hence, we are unable to subscribe to the views of the applicant that the supply of services and goods encompassed in the subject work order/contract are naturally bundled. Mere fact that a number of tasks have been entrusted to the applicant would not make it entitled to be categorized as 'composite supply' particularly in terms of Section 2(30) of the CGST Act, 2017'**."

In this case it is relevant to note that though a single contract was entered for execution of various works, the AAR held that ***it is not*** a composite supply.

c. **IAC Electricals Pvt. Ltd. AAR West Bengal Order No. & 05/ WBAAR/2018-19**

The facts of the case are as under –

i. Two separate contracts were entered with the customer - one for supply of materials at ex-factory price and second contract for supply of allied services like transportation, insurance, loading/ unloading etc for delivery of materials at the contractee's site. As

IAC Electricals Pvt. Ltd. ('Applicant') are not a Goods Transport Agency they arrange for the supply and delivery of materials through various other suppliers of these services.

ii. The applicant submitted that he is not a goods transport agency (hereinafter referred to as "GTA") or engaged in the business of in-transit insurance and loading, which are naturally bundled with and dependent of the transportation services. The Applicant, arranges such services and pays the GST, as applicable, on the consideration paid to the suppliers of such services. The Applicant is of the opinion that this service to the Contractee is exempt under the GST Act. According to the Applicant, it is a composite supply with road transportation as the principal supply, and loading/ unloading, in-transit insurance etc as ancillary supplies to the transportation service. As the Applicant is not a GTA, his supply of transportation service is exempt.

Ruling of the AAR

"9. It is immediately apparent that the First Contract cannot be executed independent of the Second Contract. There cannot be any 'supply of goods' without a place of supply. ……. In other words, the First Contract has "no leg to stand on" unless supported by the Second Contract. It is no contract at all unless tied up with the Second Contract.

10. ***The Contractee is aware of such interdependence of the two contracts***. Although he awards the contract under two separate NOAs, Clause 3.2 of both of the NOAs makes it abundantly clear that "Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract.

11. The two contracts are, therefore, linked by a cross fall breach clause that specifies that breach of one contract will be deemed to be a breach of the other contract, and thereby turn them into a single source responsibility contract. **Black's Law Dictionary defines that "a severable contract, also termed as divisible contract, is a contract that includes two or more promises**

each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promises in breach of the entire contract". ……**The two promises – supply of the goods and their transportation to the Contractee's site – are, therefore, not separately enforceable in the present context. The supplies of goods and services of transportation etc are, therefore, naturally bundled**.

Services of transportation, in-transit insurance and loading/ unloading, being ancillary to the principal supply of goods, shall be treated to taxation under Section 8 (a) of the GST Act, and the consideration receivable on that account be taxed accordingly.

In this case, it is relevant to note that, though two contracts were entered, the AAR held that ***it is a composite supply***. It is reiterated that caution has to be taken not to artificially split a contract to leading to tax disputes.

The above advance rulings are cited to bring to the reader's attention the complexities involved in classifying a supply as composite or a mixed supply.

Conclusion

There is no straight jacket formula that can be laid to determine what constitutes a composite supply or a mixed supply. Each case will have to analysed / examined carefully. As the concept of composite / mixed supply is new and there being no precedence under the erstwhile indirect taxation laws, it will take some years for this vexed concept to settle.

An attempt has been made in this article to make a reader understand the issue involved in the composite / mixed supply under the GST law. This article is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views, would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion. The views written in this article is as on 01.01.2021. The authors can be reached on venkat@venkataramani.in and siddeshwar@sduca.com

LEVY OF INTEREST ON GROSS LIABILITY UNDER CGST ACT

CA R.V. Shah

Notice under Section 50(1) of the CGST Act, 2017 are issued to dealers to pay huge interest on gross tax liability on account of delay in filing of GSTR-3B. The incidence of heavy late fees for delay in filing of GSTR-3B was already in existence, now the additional burden in form of interest is sought to be levied by the authorities has created anguish and resentment. This will give rise to increase litigations and demand from trade and various associations and chambers to revisit the application of this provision in the interest of business. Covid-19 has affected the country's economy and also affected trade, hence, in the interest of survival of business it is very essential.

Section 50(1) of CGST Act, 2017

Section 50(1) of CGST Act, 2017 reads as under:

Every person who is liable to pay tax in accordance with the provisions of this Act or rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay on his own interest at such rate, not exceeding 18% as may be notified by the Government on the recommendations of the Council.

Section 100 of Finance No. (2) Act, 2019, the following proviso was inserted

"Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of Section 39, except where such action is furnished afterthe commencement of any proceedings under Section 73, or Section 74, in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger".

The above proviso was inserted with a view to levy interest on net tax liability, i.e.,the liability that was paid by deleting the cash ledger. However, unfortunately the above proviso has not been given effect to.

To initiate Recovery of Interest after Telangana High Court Judgment

CBIC has recently issued a directive to its field formation across the country to initiate recovery of interest payable under Section 50(1) of CGST Act on the basis of gross tax liablity. This directive was based on recent judgment of Telangana High Court in case of Megha Engineering and Infrastructures Ltd. Vs. Commissioner of Central Tax [2019] 104 Taxmann.com 393/73 GST 787, wherein the Hon'bleHigh Court upheld the levy of interest under Section 50(1) based on the gross tax liability. But the said judgment was ignored since the proposed judgment was not released which was only at press.

Is levy of interest contradicts the intention of Government

Section 50(1) provides that every person who is liable to pay tax in accordance

with the provisions of this Act on the rules made thereudner but fails to pay tax or any part thereof to the Government within the period prescribed, shall be for the period for which the tax or any part thereof remains unpaid, pay on his own, interest at such rate, not exceeding 18% as may be notified by the Government on the recommendations of the Council. The question arises whether the word tax here contains net or gross effect.

Int. Vs.Considered value added tax system (VAT)

In value added tax system, tax is payable on value added at each stage of supply. In this system, the amount of tax that the user pays is cost of product less cost of purchase of material used in the product. In short, it is on net value addition.

If interest is to be levied on gross tax liability including Input Tax Credit component, which also denotes the cost of purchase, then it would invariably lead to an illogical incidence of financial burden on a taxpayer. GST is a modified value added tax system. GST applicable on purchase is something which has already been paid by him and he can charge GST as an indirect tax on his subsequent purchase only on net valued added. GST is an indirect tax, hence, the interest burden cannot be shifted to a subsequent purchase.

A demand for recovery of interest for delayed filing of GSTR-3B is unreasonable and unjustified and late fee for delayed filing of GSTR-3B was waived off upto 31st March, 2019, hence the imposition of heavy burden of interest would contradict the intention of Government itself of one time waiver facility allowed.

Is interest a Compensatory for late payment of tax?

Provision Late fees for delayed filing of returns are a punitive measure whereas levy of interest on late payment of tax is a compensatory measure. The taxpayer ultimately pays the net tax liability that after taking the benefit of input tax credit hence levy of interest on gross liability is illogical and absurd since sufficient credit balance is available to the taxpayer at the time of filing GSTR-3B. GSTR-3 allows discharge of tax liability on outward supplies through the credit / cash ledger. The tax is deemed to have been paid only when the liability is discharged through appropriation of credit ledger towards output to and remaining tax, if any, is paid through the cash ledger.

Can the interest be levied on a belated cash payment when ITC is available to the credit of the assessee?

Hon'ble Madras High Court in the case of Refex Industries Ltd. Vs. Sherisha Technologies (P) Ltd. [2020] 114 Taxmann.com 447 (Mad.) had the occasion to interpret the provisions of Section 50(1). "The specific question arose before Hon'ble Madras High Court as to whether in a case, where the credit is due to an assessee, payment by way of adjustment can still be termed "belated" or "delayed". The use of the word "delayed" connotes a situation of deprival, where the state has been deprived of the funds representing tax component till such time the return is filed accompanied by the remittance of tax. The availability of ITC runs counter

to this, as it connotes the enrichment of the State, to this extent. Thus, Section 50 which is specifically intended to apply in a situation where the state is possessed of sufficient funds to the credit of the assessee. The latter being available with the Department is, in my view, neither belated nor delalyed"

The above view is also supported by a recently inserted proviso to Section 50(1) namely, "Provided that interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of Section 39, except where such return is furnished after commencement of any proceedings under Section 73 or Section 74 in respect of the said period shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger. The above proviso as per which interest shall be levied on that part of the tax which is paid in cash, has been inserted with effect from 1st August, 2019 but clearly seeks to correct an anomaly in the provision as existed prior to such insertion. Thus the said proviso be read as clarificatory and operative retrospectively.

Thus it can be seen that Hon'ble Madras High Court has given much wider and liberal interpretation of the provisions of Section 50(1) and has rightly held that interest under Section 50(1) is leviable only on net tax liability. The Hon'ble Madras High Court has observed that correct application of Section 50(1) would lie on delayed payment of cash and not on ITC available with the department which is neither delayed nor belated. It may be noted that Hon'ble Madras High Court has distinguished the judgment in Megha Engineering and Infrastructures Ltd. on the basis that it was delivered at the time when the proposed amendment to Section 50(1) was still on paper and there the court still referred to comment on proposed amendments.

Landmark Lifestyle Vs. Government of India [2019] 105 Taxmann.com 354 (Delhi)

Hon'ble Delhi High Court has granted stay over the recovery proceedings still the disposal of the case. Thus, there are conflicting judgments. Thus, the proposed proviso to Section 50(1) has not been given effect to in the absence of which it cannot be said the true intent of the law maker.

Conclusion:

The levy of interest based on total tax due is arbitrary, unreasonable and unwarranted on taxpayers. Thus, the issuance of notices by CGST Officers are not even in the nature of showcause notices as laid down in Section 73 of the Act. Hence, issuance of such notices are arbitrary and gross abuse of power. Further, the Department has initiated recovery of interest without examination of legal position and also without proper application of mind. This exercise of powers on the part of the CGST Officers tentamounts to harassment of taxpayers and must come out with a solution to give effect to the proposed proviso to Section 50(1) retrospectively. A correct and practical approach by the Government will bring a lasting solution and ensure the ease of doing business.

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'BENEFIT OF INPUT TAX CREDIT' & 'ANTI-PROFITEERING' IN GST

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If the people have money, businesses increase the prices and if the people do not have money, all kinds of discounts are offered. On the other side, for various reasons, Governments impose maximum price ceiling or price control on a commodity or service, to make them available at affordable prices. Prices can also be kept within a certain band. Once upon a time, we had Monopolies and Restrictive Trade Practices Act, 1969. According to Section 2 (i) (i) of this Act, one of the 'monopolistic trade practices' is 'maintaining the prices of goods or charges for the services at an unreasonable level etc.' Section 31 (3) (f) of this Act provides for regulating the profits which may be derived from the supply of goods or from the provision of any service. The Essential Commodities Act, 1955 provides for controlling the price at which any essential commodity may be sold. The Drug Prices control order is issued under this Act. Section 2 (6) (iv) of the Consumer Protection Act, 2019 reads as follows:-

"2 (6) "complaint" means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that—

(iv) a trader or a service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

(a) fixed by or under any law for the time being in force; or

(b) displayed on the goods or any package containing such goods; or

(c) displayed on the price list exhibited by him by or under any law for the time being in force; or

(d) agreed between the parties;"

It shall be noted from the above provision that the price agreed between the parties is not in excess of the 'price'. Unless the prices are controlled under a statute or a specified profit margin has been fixed, the parties are at liberty to determine the prices of goods and services. According to Kautilya, Government should not dictate the prices without taking into consideration the various ingredients like cost of production, ratio of supply to demand, etc., and that higher quantum of profit @ 10 shall be allowed on the goods imported from foreign territories. Needless to say that realization of profit over and above the said limit is punishable.

In Malaysia 'The Price Control and Anti-profiteering (mechanism to determine unreasonably high profit) Regulations, 2018' prescribe a mechanism to determine unreasonably high profits by examining either: (i) the

mark-up percentage; or (ii) the margin percentage, of the goods and services supplied. If either the mark-up percentage or margin percentage adopted on any date in a particular financial year or calendar year is higher than the mark-up or margin percentage adopted on the first day of that financial year or calendar year, then such profit is determined as unreasonably high. Even the Australian anti-profiteering measure was based on the net dollar margin rule method – that is, if taxes and costs fell by $1, then prices should also fall by at least $1. No such mechanism or methodology has been prescribed in India under the GST law.

Supply and demand are related to each other and the same is governed by the law of supply and demand. Such relationship effects the price of goods and services. Prices either fall or rise on this principle. Even the supply and demand theory would be equally applicable to raw materials/inputs and accordingly it influences the prices of finished products. There is therefore necessity to adjust the margin of profit and fix the price according to the costs involved.

According to Cambridge English Dictionary, the word 'profit' means 'money that is earned in trade or business after paying the costs of producing or selling goods and services'. Accordingly the word 'profiteering' has to be understood as '*the act of making unreasonable profit*'. It could be therefore seen that profit needs to be computed only after deducting all the costs. Thus 'profiteering' must be understood as excess or undue or unreasonable profit earned on the supply of goods or services or both. With this brief introduction to the subject, let us look into the 'anti-profiteering' provision ie., Section 171 in the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the GST Act).

"171. Anti-profiteering measure.—

(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.

(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."

Corresponding Rule 126 in the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as GST Rules) reads as follows:-

"126. Power to determine the methodology and procedure.-The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices."

Thus in brief, it is mandated that any reduction in rate of tax or the benefit of input tax credit (ITC) shall be passed on to the recipient by way of commensurate reduction in prices and the specified authority may determine the methodology and procedure for determination of the above compliance. Nothing more is available in the GST Act and the GST Rules. It is true that the principle behind bringing 'anti-profiteering measure' on the statute book is a part of welfare policy, intending to protect the interests of consumers but it should not be at the cost of businesses, with ambiguous provisions.

The words 'commensurate reduction' used in Section 171 are not defined and no statutory guidelines have been provided on how to compute the benefit of input tax credit. There are also no guidelines issued on how ITC can be translated into price changes. In the free economy, fixation of price is a bargain between two parties, unless otherwise the price is statutorily controlled. The price is struck after a bargain. The word 'commensurate' means 'corresponding in size or degree; in proportion'. If the profit is measured only in terms of 'benefit' of input tax credit', it would be a bad methodology as the price and its consequential profit is influenced by various other factors including increase in non-creditable expenditure like salaries, wages, purchase of non-GST goods like diesel oil and petrol, interest, purchases from composition dealers, loss on account of various reasons etc. Thus 'benefit of ITC' is only one factor among several other factors that determines the price-increase or reduction. Particularly in the case of real estate developers, price fixed for Sft holds good during the construction period of say three to four years and the developer has to absorb all costs in the nature of subsequent increases in the prices of goods and services. Due to the constraints of the terms and conditions of the sale agreement, developer cannot demand any increase in price fixed for Sft.

It is not correct to adopt a standard methodology for one and all for determining the benefit of input tax credit. Price structure changes from business to business and

from region to region. Hence based on facts in each case 'profiteering' has to examined. In a case, where the taxable person suffered loss at the end of the year, it is debatable, whether still can it be said that there is 'profiteering'. It is needless to state that while considering the benefit of ITC to be passed on to the recipient, all the contingencies and costs, that influence the price must be considered.

The flyer released by CBEC on the subject states as follows:-

"National Anti-Profiteering Authority is a mechanism devised to ensure that prices remain under check and to ensure that businesses do not pocket all the gains from GST because **profit is fine**, but undue profiteering at the expense of the common man is not."

The statement of CBEC is very much precise on the subject. It refers only to 'profit', which is the gross receipt minus costs. Hence it is not just an examination of passing on the benefit of input tax credit but something more. CBEC asserted that what is objectionable is 'profiteering' and not 'profit' as such, because 'profit is fine'. What has been prohibited under Section 171 is 'profiteering', which means 'the act of making unreasonable profit'. Unreasonable and undue profit is only not permitted under the said provision. What is the mark-up for 'profiteering' is not known.

There is no statutory methodology available to determine the 'profiteering' in any category of businesses. In the case of Delux Wines Vs State of AP(77 STC 373), the Honourable Andhra Pradesh High Court, in a different context held as follows:-

"We also declare that section 2 (1) (s) (ii) and section 14-B of the Andhra Pradesh General Sales Tax Act, 1957, as incorporated by the Amendment Act 18 of 1985, must be read down by not giving effect to the said provisions **until and unless the legislature prescribes guidelines for exercising the power conferred thereunder and defines the expressions "prevailing market prices" and "abnormally low"** occurring in section 14-B of the Act."

On the same analogy unless the GST Act defines the expressions 'benefit of input tax credit', 'anti profiteering' and 'commensurate reduction in prices' and provides statutory guidelines, it is not correct for the executive authorities to adopt any non-statutory methodology for the purpose. It may be seen from the above Rule 126 that power has been granted to the Authority for determining 'profiteering'. In my view, such determination must be part of the statute book and cannot be left to the discretion of the executive authorities. Section 171 has been framed to identify 'profiteering', which means 'the practice of making or seeking to make an excessive or unfair profit, especially illegally or in a black market. How such profiteering has to be measured and what procedure shall be adopted for such measure in different situations and for different categories of business must be made known to the taxable persons through the statutory provisions. Statute is silent on how such 'benefit of ITC' shall be computed and how the benefit of input tax has to be passed on. There is no one-size-fits-all methodology to different categories of business. Trading in goods is never comparable with providing the services. The

intention of the Parliament is to identify 'profiteering' and not to examine whether the benefit of ITC has been passed on or not. It is not just passing on the benefit of ITC but by so not passing on, whether the person resorted to 'profiteering' has to be seen. Ambiguous anti-profiteering provisions and unguided methodology shall not be a stick to beat in the hands of the recipient-customers to harass the businesses. Any provision which allows taking away the property of the citizen must be unambiguous. It must be litigation-free. Instead of stamping out unreasonable profit, some non-statutory formula to identify the 'benefit of input tax credit' has been coined, resulting in unending litigation. No one is against the anti-profiteering measure but what is warranted is the valid statutory formula or methodology for identifying 'profiteering'. Framing methodology is different from computing the quantum. If the statutory methodology is unconstitutional or impermissible under the law, it will be challenged in a court of law. Quantum of benefit of ITC is the computation as per the methodology. Without providing the methodology in the statute, quantum of benefit of ITC is being computed at the discretion of the executive authorities, which is questionable.

Essential legislative function cannot be delegated. In a way, anti-profiteering measures can be bracketed under excessive delegation. There should be guiding principle or policy in the Act itself for the purpose. In the case of Municipal Corporation of Delhi Vs Birla Cotton, Spinning and Weaving Mills, Delhi and another (1968—3 SCR 251) the Honourable Supreme Court held that **so long as the law has provided the method** by which the local body can be controlled and there is a provision to see that reasonable rates are fixed it can be said that there is guidance in the matter of fixing the rates for local taxation. In the case of State of Kerala and others Vs Travancore Chemicals and Manufacturing Co and another (112 STC 191) the Honourable Supreme Court held as follows:-

"We are unable to agree with the submission of Mr. Bhatt that the

section furnishes a limitation subject to which the power can be exercised. **The section does not contain any guidelines** as to at what stage the power can be exercised and nor does the exercise of such a power make it amenable to the appellate or revisional provisions provided by the Act."

GST Act neither provided any guidelines for computing the 'benefit of input tax credit' nor made any provision for appealing against the order of the National Anti-profiteering Authority.

In the case of Kantilal Babulal and Bros Vs HC Patel, STO, Surat City Division, (21 STC 174), the Honourable Supreme Court held as follows:-

"The Act is silent as to the machinery and procedure to be followed in determining the question as to whether there has been a contravention of section 12A (1) and (2), and if so, to what extent. **Hence it would be open to the department to evolve all the requisite machinery and procedure which means that the**

whole thing, from the beginning to end, is treated as of a purely administrative character, completely ignoring the legal position. The imposition of a penalty on a person is at least of a quasi-judicial character….On a reasonable interpretation of the impugned provision, we have no doubt that the power conferred under section 12A(4) is **unguided, uncanalised and uncontrolled**."

In the result, certain questions continue to hang in our minds:-

1. If a person under composition system makes unreasonable profit (profiteering) on the supplies made, can he still be punished, even though there is no benefit of input tax credit?
2. How to compute the benefit of input tax credit?
3. What is the standard format to ascertain the 'commensurate reduction in prices'?
4. How to establish that a person has reduced the price and passed on the benefit of input tax credit?
5. Whether the evidence shown by the person will be acceptable to the authorities?
6. Where a person suffered gross loss at the end of the year, can still it be said that there was profiteering by alleging that benefit of ITC has not been passed on?

Some decisions for reference:-

In the case of Jubilant Foodworks Limited a & Another Vs Union of India & Ors (WP ©2347/2019 dated 13.3.2019, the Honourable Delhi High Court while considering the challenge to vires of Section 171 of the GST Act held 'the court is of the view that the Petitioners have made out a prima facie case and that at this stage the balance of convenience is also in their favour.'

The Honourable Delhi High Court has also stayed an order passed by the National Anti-profiteering Authority against Hindustan Unilever Limited.

In the case of McDonald's franchisee Hardcastle Restaurants, the Honourable Bombay High Court has set aside the order of the NAA observing '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.

FICCI has since called for abolition of anti-profiteering provisions through its pre-budget recommendations. As the ambiguity as regards the methodology to be adopted persists even after three years of implementation of GST, it has to be resolved against the Government.

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QUARTERLY RETURN FILING AND MONTHLY PAYMENT OF TAXES (QRMP) SCHEME UNDER GST

CA Shilvi Khandelwal,
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1. **Introduction :** As a trade facilitation measure and in order to further ease the process of doing business, CBIC has launched the Quarterly Return filing & Monthly Payment of Taxes (**QRMP**) scheme for small taxpayers under the GST system. This scheme has been rolled out vide Circular no. 20/01/08/2020-GST on 10th November 2020. In this scheme, small taxpayers have the option to file their GSTR-1 and GSTR-3B returns quarterly. However, the tax payment will still remain to be monthly. This new Scheme will be effective from 1st January 2021.

Government has issued following notifications/ circulars to implement this Scheme-.

Sr No	Notification/ Circular	Details
1	Noti. No. 81/2020-CT, dt. 10.11.2020	Notifies amendment carried out in sub-section (1), (2) and (7) of section 39 of the CGST Act vide Finance (No.2) Act, 2019.
2	Noti. No. 82/2020-CT, dt. 10.11.2020	Thirteenth amendment (2020) to the CGST Rules 2017.
3	Noti. No. 84/2020-CT, dt. 10.11.2020	Notifies class of persons under proviso to section 39(1) of the CGST Act.
4	Noti. No. 85/2020-CT, dt. 10.11.2020	Notifies special procedure for making payment of tax liability in the first two months of a quarter.
5	Cir. No. 143/13/2020-GST, dt. 10.11.2020	Explanation of Scheme in Simple Terms.

2. **Eligibility :** A registered person who is required to furnish a return in FORM GSTR-3B, and whose aggregate annual turnover (PAN India Basis) is up to Rs. 5 crores in the preceding financial year is eligible for this scheme. Registered persons are not required to exercise the option every quarter. When the taxpayer exercises this option once, then such taxpayer shall continue to furnish the return as per the selected option for future tax periods, unless the taxpayer revise the said option.

3. **Deemed migration to the Scheme** : For classes of persons, who have furnished the return for the tax period Oct, 2020 on or before 30th Nov 2020 and having aggregate turnover upto Rs 5 crore for F.Y. 2019-20, shall be deemed to be migrated for this scheme as detailed in the table given below:

Sr No	Class of registered person	Deemed Option
1	Registered persons having aggregate turnover of up to 1.5 crore rupees, who have furnished FORM GSTR-1 on quarterly basis in the current financial year.	QRMP Scheme Opted : Quarterly return
2	Registered persons having aggregate turnover of up to 1.5 crore rupees, who have furnished FORM GSTR-1 on monthly basis in the current financial year.	QRMP Scheme not opted : Monthly return
3	Registered persons having aggregate turnover more than 1.5 crore rupees and up to 5 crore rupees in the preceding financial year.	QRMP Scheme Opted : Quarterly return

- Such migrated persons are free to change the option as above, if they so desire, from 5th of December, 2020 to 31st of January, 2021.
- The taxpayers who have not filed their return for October, 2020 on or before 30th November, 2020 will not be migrated to the Scheme. They will be able to opt for the Scheme once the FORM GSTR-3B as due on the date of exercising option has been filed.

4. **Opt-out of the scheme:** The facility for opting out of the Scheme for a quarter will be available from first day of second month of preceding

quarter to the last day of the first month of the quarter. However, if aggregate turnover of the taxpayer **crosses** five crore rupees during a quarter in a financial year, then such taxpayer shall not be eligible for furnishing of return on quarterly basis from the first month of the next quarter.

5. **Time Limit to Opt-In/ Opt-out :** Facility to opt-in or opt-out the Scheme on the common portal would be available throughout the year. Option for opt in or opt out of the Scheme for a quarter will be available from first day of second month of preceding quarter to the last day of the first month of the quarter. Timeline for opt in or opt out of this scheme during a financial year will be as given in the table below:

Sr No	Quarter	Timeline
1	April-June	1st February to 30th April
2	July-September	1st May to 31st July
3	October- December	1st August to 31st October
4	January-March	1st November to 31st January

6. **Furnishing of details of outward supplies :** The registered persons opting for the Scheme would be required to furnish the details of outward supply in FORM GSTR-1 quarterly.

7. **Invoice Furnishing Facility (IFF) :** The person opted in for this scheme will also have the facility to furnish the details of such outward supplies on monthly basis. The facility of furnishing details of invoices in IFF has been provided so as to allow details of such supplies to be duly reflected in the FORM GSTR-2A and FORM GSTR-2B of the concerned recipient. This facility is not mandatory and is only an optional facility made available to the registered persons under the QRMP Scheme. Details of this facility are as under:

   - The IFF can be used only for the first two months of a quarter.
   - For each of the first and second months of a quarter, such a registered person will have the facility (Invoice Furnishing Facility-IFF) to furnish the details of such outward supplies to a registered

person, as he may consider necessary, between the 1st day of the succeeding month till the 13th day of the succeeding month.

- The taxpayer has to submit the B2B invoice details of sale transactions (both inter-state and intra-state) along with debit and credit notes of the B2B invoices issued during the month.
- The total net value of invoices that can be uploaded is restricted to Rs.50 lakh per month.
- After 13th of the month, this facility for furnishing IFF for previous month would not be available.
- As a facilitation measure, continuous upload of invoices would also be provided for the registered persons wherein they can save the invoices in IFF from the 1st day of the month till 13th day of the succeeding month.
- There is no requirement to upload invoices in GSTR-1 if the same has been uploaded in the IFF.
- Accordingly, the details of outward supplies made by such a registered person during a quarter shall consist of details of invoices furnished using IFF for each of the first two months and the details of invoices furnished in FORM GSTR-1 for the quarter.
- At his option, a registered person may choose to furnish the details of outward supplies made during a quarter in FORM GSTR-1 only, without using the IFF.

8. **Monthly Payment of Tax :** The registered person under the QRMP Scheme would be required to pay the tax due in each of the first two months of the quarter by depositing the due amount in FORM GST PMT-06, by the twenty fifth day of the month succeeding such month. While generating the challan, taxpayers should select "Monthly payment for quarterly taxpayer" as reason for generating the challan. The registered person is free to avail either of the two tax payment method in any of the two months of the quarter. The said person can use any of the following two options provided below for monthly payment of tax during the first two months –

i) **Fixed Sum Method:** A facility is being made available on the portal for generating a pre-filled challan in FORM GST PMT-06 for an amount equal to thirty five per cent. of the tax paid in cash in the preceding quarter or equal to the tax paid in cash in the last month of the immediately preceding quarter as per the conditions given in the table below-

Sr No	Type of Taxpayer	Tax to be paid
1	Who furnished GSTR-3B quarterly for the last quarter	35% of tax paid in cash in the preceding quarter
2	Who furnished GSTR-3B monthly during the last quarter	100% of tax paid in cash in the last month of the immediately preceding quarter

ii) **Self-Assessment Method:** The said persons, in any case, can pay the tax due by considering the tax liability on inward and outward supplies and the input tax credit available, in FORM GST PMT-06. In order to facilitate ascertainment of the ITC available for the month, an auto-drafted input tax credit statement has been made available in FORM GSTR-2B, for every month.

Points to consider:

- In case the balance in the electronic cash ledger and/or electronic credit ledger is adequate for the tax due for the first month of the quarter or where there is nil tax liability, the registered person may not deposit any amount for the said month.
- Similarly, for the second month of the quarter, in case the balance in the electronic cash ledger and/or electronic credit ledger is adequate for the cumulative tax due for the first and the second month of the quarter or where there is nil tax liability, the registered person may not deposit any amount.
- Any claim of refund in respect of the amount deposited for the first two months of a quarter for payment of tax shall be permitted only after the return in FORM GSTR-3B for the said quarter has been furnished.
- This monthly deposit cannot be used by the taxpayer for any other purpose till the filing of return for the quarter.

9. **Quarterly filing of FORM GSTR-3B :** Persons opted for this scheme, would be required to furnish FORM GSTR-3B, for each quarter, on or

before 22nd or 24th day of the month succeeding such quarter. Followings points to be considered while filing GSTR-3B for the quarter-

- In FORM GSTR-3B, they shall declare the supplies made during the quarter, ITC availed during the quarter and all other details required to be furnished therein.
- The amount deposited by the registered person in the first two months shall be debited solely for the purposes of offsetting the liability furnished in that quarter's FORM GSTR-3B.
- However, any amount left after filing of that quarter's FORM GSTR-3B may either be claimed as refund or may be used for any other purpose in subsequent quarters.
- In case of cancellation of registration of such person during any of the first two months of the quarter, he is still required to furnish return in FORM GSTR-3B for the relevant tax period.

10. **Applicability of Interest:** Interest payable under this scheme shall be calculated based on the method used for making payment of tax - Self-Assessment Method or Fixed Sum Method. Interest payable, if any, shall be paid through FORM GSTR-3B.

i) Interest calculation for registered person making payment of tax by opting Fixed Sum Method : No interest would be payable in case the tax due is paid in the first two months of the quarter by way of depositing auto-calculated fixed sum amount by the due date. Calculation of interest under this method of payment shall be as given below:

- If while furnishing return in FORM GSTR-3B, it is found that in any or both of the first two months of the quarter, the tax liability net of available credit on the supplies made /received was higher than the amount paid in challan, then, no interest would be charged if they deposit system calculated amount for each of the first two months and discharge their entire liability for the quarter in the FORM GSTR-3B of the quarter by the due date.
- In case such payment of tax by depositing the system calculated amount in FORM GST PMT-06 is not done by due date, interest would be payable at the applicable rate, from the due date of furnishing FORM GST PMT-06 till the date of making such payment.

- In case FORM GSTR-3B for the quarter is furnished beyond the due date, interest would be payable as per the provisions of Section 50 of the CGST Act for the tax liability net of ITC

ii) Interest calculation for registered person making payment of tax by opting Self-Assessment Method : Interest amount would be payable as per the provision of Section 50 of the CGST Act for tax or any part thereof (net of ITC) which remains unpaid/paid beyond the due date for the first two months of the quarter.

11. **Applicability of Late Fee :** Late fee is applicable for delay in furnishing of return/details of outward supply as per the provision of Section 47 of the CGST Act. No late fee is applicable for delay in payment of tax in first two months of the quarter. As per the Scheme, the requirement to furnish the return under the proviso to sub-section (1) of Section 39 of the CGST Act is quarterly. Accordingly, late fee would be the applicable for delay in furnishing of the said quarterly return/details of outward supply.

12. **Other Points to be noted:**
    - The option to avail the QRMP Scheme is GSTIN wise. That means some GSTINs for that PAN can opt for the QRMP Scheme and remaining GSTINs may not opt for the Scheme.
    - This scheme can also be opted by Persons applying for a fresh registration as Normal taxpayer.
    - Taxpayers who have opted out of composition scheme during any quarter shall be able to opt for the Scheme for the quarter for which the opting facility is available on the date of exercising option.
    - To opt for this scheme it is necessary to file the Form GSTR-3B return for most recent tax period.
    - To opt for this scheme, there should no data saved on the portal in Form GSTR-1 for the applicable period (i.e. period for which you are opting for this scheme).
    - A GST practitioner cannot opt in/ opt out of the QRMP scheme on the behalf of taxpayer. A GST Practitioner can only view details.

13. **Conclusion:**

It was really a need of the hour to ease the procedure by the government, after the changes, now small taxpayers need to file the returns quarterly instead of monthly which will definitely save time and more convenient. Taxpayer's compliance burden will be reduced significantly. Taxpayers will require to file only 4 GSTR-3B returns instead of 12 GSTR-3B returns in a year. They would also require to file only 4 GSTR-1 returns since Invoice Filing Facility (IFF) is provided under this scheme.

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IMPORTANT ADVANCE RULINGS UNDER GST

Manoj Nahata,
FCA, DISA (ICAI)

1. Whether services provided by State Examination Board by way of conducting exams are exempt under GST?

Held: Yes

In the case of ***M/s State Examination Board-AAR Gujarat,*** the applicant is engaged in conducting various types of examinations i.e. for getting job of teacher for pre-primary, primary and secondary school, for getting job as a teacher in Government/Grant-in-Aid School in standard 9 to 12, for getting a job as a Principal in Grant-in-Aid School, for being confirmed in service, for getting higher Scale, for getting promotion, etc. The applicant further stated that these exams are planned and conducted by the State Examination Board on its own accord and that the beneficiaries of these exams are the persons appearing in these examinations. Further, for conducting such examinations, the applicant takes input services of private institutions who prepare the question sets and also prepare the required answer sheets for such exams and that the nominal fees are charged for the various exams.

The applicant submitted that it is registered under section 12AA of the Income-tax Act. Further, as per Notification No. 09/2017, Integrated Tax(rate), services by an entity registered under section 12AA of the Income-tax Act 1961 (43 of 1961) by way of charitable activities are exempt, rate prescribed in such notification is nil. Also, entry no. 66 of Notification No. 12/2017-Central Tax (Rate) dated 28-6-2017 provides exemption to services provided to an educational institution, by way of services relating to admission to, or conduct of examination by, such institution.

The Authority stated that Notification no. 12/2017, clearly provides exemption to services by an entity registered under section 12AA of the Income-tax Act, 1961 by way of charitable activities. However, the applicant does not fall in the category of charitable activities as defined in the said notification. Further, the benefit of exemption is not available to the State Examination Board under entry no. 66(b) of the Notification No. 12/2017-Central Tax (Rate) as the exams conducted by the applicant are planned and conducted by the State Examination Board on its own accord and it is not the services provided to an educational institute as per the said notification. Hence, the services of State Examination Board are taxable under GST.

2. Whether ITC is available of GST paid on input and input services used for construction of commercial immovable property, subsequently used for renting?

Held: No.

In the case of ***M/s Ashish Arvind Hansoti-AAR Maharashtra,*** the applicant is engaged into the construction of immovable property for letting out to various tenants on which GST will be charged. For the purposes of such construction, huge quantities of materials and other inputs were purchased by applicant and certain input services were also availed against which applicant has paid GST and the applicant wanted to offset the ITC against the output tax liability. The applicant sought an advance ruling on the admissibility of ITC in respect of above transaction.

The applicant submitted that though sec-17(5)(d) of the CGST Act does not allow ITC in respect of goods and services used for construction of the immovable property on own account, the same should not be read in a manner as to disallow credit where immovable property is used for rendering output taxable service. There is no break in tax chain and because it will pay tax output tax in respect of such construction, provisions of sec-17(5)(d) won't be attracted and ITC shall be allowed.

The Authority stated that sec-17(5) is having overriding effect on sec-16 and sec-18. Sec-17(5)(d) bars a taxable person from taking ITC for construction of immovable property, even when such goods or services are used in the course or furtherance of business. It squarely applies in the applicant's case and thus the applicant cannot avail ITC.

3. Whether ITC on purchase of lift would be available to hotel as it is used in the course or furtherance of business?

Held: No

In case of ***M/s. Jabalpur Hotels Pvt Ltd.–AAR Madhya Pradesh,*** the applicant is a company established with the object to construct hotel. It started construction of hotel and completed a major part of it. It sought an advance ruling on the admissibility of ITC in respect of purchase of lift.

The applicant submitted that lift is an essential part in a hotel and without which it is very difficult to provide best services to the guests. Sec-17(5) blocks credit of works contract and goods or services received by a taxable person for construction of immovable property (other than plant and machinery). As lift is a machine and hence excluded from the scope of sec-17(5). So, ITC should be allowed on lift.

The Authority stated that the applicant seeks to avail ITC on lifts which are purchased and installed in the building which would be used in hotel for providing taxable services. Therefore, ITC is blocked unambiguously in terms of sec-17(5)(d) even when such goods or services are used in the course or furtherance of business. Hence, hotel building being an immovable property, any input or input service shall not be available for availment of ITC.

4. Whether GST is payable on grant or financial assistance to Tourism Development Board by Govt.?

Held: No

In the case of***M/s H.P Tourism Development Board-AAR Himachal Pradesh,*** applicant is engaged into the business of promoting and regulating tourism activities. The Govt. of Himachal Pradesh, Development of tourism agreed to credit certain amounts to the applicant for smooth functioning of the Board. Such amounts are receipts from sale of publicity material/literature books, fee from parking lots, donations/grants received specially for tourism promotion/development, annual license fee and success fee, etc. The applicant sought an advance ruling on the taxability of the above amounts received by the applicant.

The applicant submitted that the amount received by the department on account of license fee or other levies is simply credited in the account of the applicant. The amountso received is not 'receipts' within the meaning of GST Law but purely a grant in aid by the govt to the applicant as subsisting fund.

The Authority stated that the Notification No. 32/2017 C.T (R) dated 13.10.2017 provides exemption to supply of service by a Govt entity to Government (Central/ State/ U.T/ Local Authority/ or any person specified) against consideration received from the Government in the form of grants. The said notification also provides the definition of "Government Entity". The applicant fulfills the criteria laid down for "Government Entity" as it was established by the Govt. with 100% control to carry out the function of promotion and regulation of tourism activities in the state. Hence, the above stated credits in the account of the applicant are not subject to GST.

5. Whether fabrication and painting of steel structures at the construction site amounts to mixed supply under GST?

Held: Yes

In case of ***M/s. Vrinda Engineers (P.) Ltd-AARWest Bengal,*** the applicant is a supplier of building structure, railway bridge equipment, technical structure, blast furnace shell, civil structure. Apart from supplying items, the applicant does job work on the materials and design belonging to another registered person. It is engaged in the reconstruction of the Majherhat Railway Overbridge (ROB). The Principal has contracted with the applicant for fabrication, painting and transportation at the site of the 'Viaduct and Cable Stay' part of the ROB. According to the contract, the Principal provides all materials and drawing for fabrication. The applicant sought an advance ruling on the classification of the above said activities.

The applicant contended that the activities in terms of the above contract should be treated as job work and should attract GST @ 12%.

The concerned officer of the Revenue contended that agreement does not clarify who would supply the paints. If the applicant supplies the paint, the activity should be regarded as works contract. On the other hand, if the Principal provides the paint, the agreement should be treated as that of job work. The concerned officer also focused on the issue that performance of fabrication, paintings and transportation should come under the ambit of mixed supply and should attract the highest rate of tax.

The Authority analyzed the terms of contract between the Principal and applicant. The Principal delivers the raw materials for fabrication at the applicant's unit free of cost. The applicant is required to paint as per the approved specification. But, the scope of painting is restricted to surface preparation, metal spraying and one coat of paint at the shop. The final coat of paint will be done on-site after the completion of the erection. On receipt of the fabricated structures at the site, the Principal will do weighment, and the work shall be measured as per the above weighment. After completion of the fabrication work, the applicant has to return the excess materials to the Principal. There are two questionsinvolved - liability of the applicant and the payment schedule. The significant portion of the applicant's liability ends with the delivery of the fabricated structures. It is required to apply a coat of paint after the structures are erected. But the contract does not make it responsible for the work of erection in any way. After delivery of the fabricated structures, its liability extends only to applying a coat of paint to the erected structures. Although the applicant will not receive the full amount of the consideration till

the structures are erected and the completion certificate is issued by the competent authority, it cannot be penalized for a breach of contract for any defect in the erection work. Mere extension of the payment schedule does not turn the applicant's job description into a works contract.

Hence, the contract combines two separate services: (1) the job work of fabrication of steel structures and delivery thereof at the site with incidental supply of paint, and (2) works contract of applying a coat of paint to the steel structures after erection. Although they are supplied in conjunction with each other at a single price, they are not naturally bundled. The works contract of applying paint to the erected structures is a separate supply made in conjunction with the job work. It is, therefore, a mixed supply.

6. Whether supply of conservancy services to military stations is exempt under GST?

Held: Yes

In case of ***M/s Lokenath Builders-AAR West Bengal,*** the applicant is engaged in providing conservancy services to different military stations. The applicant sought an advance ruling on the taxability of the above said services.

The applicant submitted that the Exemption Notification exempts from payment of GST any "pure service" (excluding works contract service or other composite supplies involving the supply of any goods) provided to the Government by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution or to a Municipality under Article 243W of the Constitution. It stated that in the applicant's case, the recipient is Central Govt.

The Authority observed that the applicant's eligibility under the Exemption Notification should be examined from three aspects: (1) whether the supply being made is pure service or a composite supply, where the supply of goods does not exceed more than 25% of the value of the supply, (2) whether the recipient is government, local authority, governmental authority or a government entity, and (3) whether the supply is being made in relation to any function entrusted to a panchayat or a municipality under the Constitution, as clarified in the above paragraphs.

The recipient describes the nature of the work as removal, collection and disposal of garbage, rubbish, filth etc., sweeping and clearing of roads, drains

and open areas, cutting and pruning of tree including removal of undergrowth and foliage on drain and roads, and lifting of dead animals. The applicant performs waste disposal activities by engaging garbage lifting vehicles and other cleaning equipment. The vehicles used and the fuel consumed and the machinery used do not result in any transfer of property in goods to the recipient. Therefore, it may be concluded that the applicant's supply to the recipient is a pure service. Furthermore, Article 243W of the Constitution that discusses the powers, authority and responsibilities of a municipality, refers to the functions listed under the Twelfth Schedule as may be entrusted to the above authority. Sl. No. 6 of the Twelfth Schedule refers to public health, sanitation, conservancy and solid waste management. Therefore, the applicant's supply of service is exempt under GST.

7. Whether IGST is liable to be paid under RCM by a recipient which is an Indian co., in respect of maintenance and repair services provided by a supplier, which is a local branch of Foreign business entity?

Held: No

In case of ***M/s IZ-Kartex-AAR West Bengal,*** the applicant is a local branch of a Russian business entity by-the same, name which entered into a maintenance and repair contract(MARC) with Bharat Coking Coal Ltd (BCCL)with respect to the machinery and equipment it (applicant) had supplied. The applicant sought an advance ruling on whether the recipient is liable to pay GST on RCM basis?

The applicant submitted that the supply of service by the foreign company in terms of the MARC is import of service within the meaning of section 2 (11) of the IGST Act, 2017. The supplier is located outside India andthe recipient BCCL is located in India. According to section 13 (3) (a) of the IGSTAct, the place of supply of the service provided in terms of the MARC is the location wherethe machinery and equipment are used in India. All the conditions of import of service withinthe meaning of section 2 (11) of the IGST Act are, therefore, satisfied. Therefore, the applicant is not liable to pay tax on supply of services in terms of MARC.

The Authority stated that it is a long-term contract spanning over seventeen years from the date of commissioning of the equipment. The MARC Holder is responsible for supply of the spares, components, and consumables over the entire period. It will depute the officers, support staff and system expert at

the site for maintenance and repair of equipment and train the BCCL personnel. BCCL shall provide the MARC Holder access to the machines and repair facilities at allreasonable time.The MARC Holder, therefore,supplies the service at the sites from fixed establishments as defined under section 2 (7) ofthe IGST Act. The location of the supplier should, therefore, be in India in terms of section 2 (15) of the IGST Act. Therefore, the supply of above services is not import of services within the meaning of section-2(11) of the IGST Act and hence the recipient is not liable to pay GST under RCM, rather the supplier is liable to pay GST under FCM.

8. Whether supply of cleaning and sweeping services to hospitals is exempt?

Held: No

In the case of ***M/s. Altabur Rahaman Mollah-AAR West Bengal,*** the applicantis supplying facility management services like merchandised and manual cleaning, housekeeping, security services etc. to various Central Government andState Government hospitals. The applicant sought an advance ruling on the taxability of the above services.

The Authority stated that the applicant is supplying cleaning and sweeping service, which is a composite supply having supply of cleaning material ancillary or incidental to the principal supply of cleaning and sweeping service. Therefore, the only point that needs to be examined is whether the service being provided is an activity relatableto a function listed under the Eleventh or the Twelfth Schedule under Article 243G or 243W of the Constitution. 'Security services' provided to Government Hospitals and Medical Colleges are notcovered under the list of Eleventh Schedule of the India Constitution. 'Cleaning and sweeping services' can be considered asrelated to the function listed under Sl No. 26 of the Eleventh Schedule, namely "Health andsanitation, including hospitals, primary health centers and dispensaries", provided 'sanitation service', as classified under SAC 99945, includes sweeping and cleaning of places likehospitals etc. 'Sanitation and similar services', classified under SAC 99945, includes sweeping andcleaning, but only with reference cleaning of a road or street. Cleaning of hospital premisesis not, therefore, classified under'Sanitation or similar service' and hence taxable under GST.

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ONLINE INFORMATION DATABASE ACCESS AND RETRIEVAL (OIDAR)

CA Sunil Gabhawalla

1. Introduction

The imposition of any tax requires a nexus of the subject matter of taxation with the territory to which the said tax law applies. Being an indirect tax, it is generally felt that the subject matter of GST is 'supplies made or agreed to be made'. Read with the provisions of Section 1 defining the extent of the law to be the whole of India, it is evident that in general, the GST Law will apply in case the supplies made or agreed to be made bear a nexus with the Indian territory.

It is by now a settled proposition that supply requires the existence of two parties – supplier and recipient. Further, the subject matter of taxation being supplies 'made' further amplifies that one needs to focus on the origin of the supply (i.e. the source location from where the supply is made) rather than the destination of the supply (i.e. the location where the supply is consumed)

However, in view of the philosophy of GST being a destination based consumption tax (though not documented in any authoritative legislative text) and also to bring in level playing field between domestic and international suppliers, it becomes important that supplies made from abroad be taxed if the same are consumed in India.

The above objective is served by the levy of additional customs duty under section 3(7) of the Customs Tariff Act in case of import of goods. However, for import of services, the Customs Act is inapplicable and therefore Section 7(1)(b) seeks to expand the scope of supply to specifically include import of services, whether or not for the furtherance of business.

Having said so, it is administratively impossible to collect the tax from suppliers located outside India. The legal validity of such levy could also be fraught with challenges. Therefore, Entry 1 of Notification 10/2017-IT(Rate) prescribes reverse charge mechanism in such cases requiring the recipient of service to discharge the said tax liability.

Further, it is also administratively impossible to collect the tax from service recipients who are unregistered and are also not into business. Therefore, Entry 10 of Notification 9/2017-IT(Rate) grants an exemption from payment of GST in cases where the services are received for non business purposes.

Therefore, in general, import of services are taxable in the hands of the service recipient who is into business whereas the same are exempted in case of service

recipients who are not into business. However, online information and database access and retrieval (OIDAR) services received by non taxable online recipients constitutes an important exception to this general rule. Both the above notifications carve out the exclusion for such OIDAR services rendered by foreign suppliers and received by non taxable online recipients (NTOR) making such supplies taxable. Section 14(1) of the IGST Act defines the foreign supplier or foreign intermediary as the person liable for paying the tax.

2. What is OIDAR?

Section 2(17) of the IGST Act defines the term as under
"online information and database access or retrieval services" means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology and includes electronic services such as, -
(i) advertising on the internet;
(ii) providing cloud services;
(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;
(iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;
(v) online supplies of digital content (movies, television shows, music and the like);
(vi) digital data storage; and
(vii) online gaming;

On a perusal of the above definition, it is evident that the scope of coverage under OIDAR is restricted only to services (both the means as well as the inclusive clause refers to 'services'). The term 'service' is defined to mean anything other than goods. Therefore, if a particular supply is characterised as 'goods', the same cannot be a subject matter of OIDAR. It is a settled proposition in law that intangibles could also be considered as goods. Therefore, the inclusion of entries (iii) & (v) in the above definition could result in substantial litigation since it could be contended that these supplies are supply of goods rather than supply of services.

It may be noted that just because there is the use of internet, or some electronic means of communication, just to communicate or facilitate outcome of service does not always mean that a business is providing OIDAR services. What is important is that there is minimal or no human intervention. In practice, this can be either:

(i) where the provision of the digital content is entirely automatic e.g., a consumer clicks the 'Buy Now' button on a website and either the

content downloads onto the consumer's device, or the consumer receives an automated e-mail containing the content

(ii) where the provision of the digital content is essentially automatic, and the small amount of manual process involved doesn't change the nature of the supply from an OIDAR service

The CBIC has provided an indicative list of services which could get covered under OIDAR as under

(1) Website supply, web-hosting, distance maintenance of programmes and equipment;

(a) Website hosting and webpage hosting;

(b) automated, online and distance maintenance of programmes;

(c) remote systems administration;

(d) online data warehousing where specific data is stored and retrieved electronically;

(e) online supply of on-demand disc space.

(2) Supply of software and updating thereof;

(a) Accessing or downloading software (including procurement/ accountancy programmes and anti-virus software) plus updates;

(b) software to block banner adverts showing, otherwise known as Banner blockers;

(c) download drivers, such as software that interfaces computers with peripheral equipment (such as printers);

(d) online automated installation of filters on websites;

(e) online automated installation of firewalls.

(3) supply of images, text and information and making available of databases;

(a) Accessing or downloading desktop themes;

(b) accessing or downloading photographic or pictorial images or screensavers;

(c) the digitised content of books and other electronic publications;

(d) subscription to online newspapers and journals;

(e) weblogs and website statistics;

(f) online news, traffic information and weather reports;

(g) online information generated automatically by software from specific data input by the customer, such as legal and financial data, (in particular such data as

continually updated stock market data, in real time);

(h) the provision of advertising space including banner ads on a website/web page;

(i) use of search engines and Internet directories.

(4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events;

(a) Accessing or downloading of music on to computers and mobile phones;

(b) accessing or downloading of jingles, excerpts, ringtones, or other sounds;

(c) accessing or downloading of films;

(d) downloading of games on to computers and mobile phones;

(e) accessing automated online games which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another.

(5) supply of distance teaching.

(a) Automated distance teaching dependent on the Internet or similar electronic network to function and the supply of which requires limited or no human intervention, including virtual classrooms, except where the Internet or similar electronic network is used as a tool simply for communication between the teacher and student;

(b) workbooks completed by pupils online and marked automatically, without human intervention.

In an interesting advance ruling applied by NCS Pearson Inc 2020 (37) GSTL 486, the Karnataka Advance Ruling Authority was examining the applicability of the OIDAR provisions for conduct of online tests / exams at designated centres. In 'Type 2 tests' as defined in the said application, the tests (consisting of objective questions) were both conducted and evaluated online but at designated centres where the supervisors were provided by the supplier to supervise the examinations. The applicant argued that the presence and the activities of the said supervisors constituted more than minimal human intervention. However, the advance ruling authority held that such supervision is not consumed by the service recipient and is in any case incidental to the main supply of conducting online tests and therefore held that the services are in the nature of OIDAR. However, in the case of 'Type 3' tests, the tests consisted of certain analytical questions which involved subjective evaluation by human beings. Here the authority was satisfied that the human intervention is more than minimal and the service does not constitute OIDAR.

3. Person Liable to pay the tax

As stated earlier, Section 14(1) of the IGST Act defines the foreign supplier or foreign intermediary as the person liable for paying the tax in cases where OIDAR services are provided by such foreign supplier or foreign intermediary to a non taxable online recipient. Rule 14 of the CGST Rules deals with the procedural aspect of granting a centralised registration to such foreign suppliers or foreign intermediaries.

4. Non Taxable Online Recipient

The tax on OIDAR has to be collected and paid by the foreign supplier or intermediary only in cases where the service recipient is non taxable online recipient. The term is defined under section 2(16) of the IGST Act to mean any Government, local authority, governmental authority, an individual or any other person not registered and receiving online information and database access or retrieval services in relation to any purpose other than commerce, industry or any other business or profession, located in taxable territory.

The first test for the recipient to be NTOR is that he is not registered. Therefore, the moment the recipient is registered under the GST Law, the provisions of the foreign supplier collecting and paying GST does not arise. Further, even in cases where the NTOR is not registered, it is important that the OIDAR services are received in relation to non business purposes.

It is in this context that Springer Nature Customer Service Centre Gmbh sought an advance ruling from the Karnataka Advance Ruling Authority. The Applicant was engaged in supplying OIDAR service by providing online books and journals to Government and other organizations in India. However, it did not have enough clarity on the probable end use of the service by the service recipients. Through the advance ruling application, it was informed that the majority of content in books, journals, etc., supplied by the applicant is used/capable of use by way of reference by professional end-users, i.e. scientists, doctors, engineers, researchers, academicians, etc., and accordingly a clarification was sought as to whether it can be implied that applicant's OIDAR services are used by recipients in India for purposes of commerce, industry, business or profession. The Advance Ruling Authority held that the burden of proving that an unregistered person located in the taxable territory has received OIDAR services for the purposes 'other than' (sic) for business, commerce, industry or profession lies on the applicant.

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DIGEST OF ADVANCE RULINGS UNDER GST

S S Satyanarayana,
Tax Practitioner,

RULINGS OF ADVANCE RULING AUTHORITIES

1. Input Tax Credit :

Facts : The applicant is engaged in the manufacture, distribution, and marketing of knitted and woven garments and swim wear and swimming equipment. The applicant also gets the said garments manufactured from his job workers. The applicant market or sell their products through their own outlets and also through their distributors or dealers.

The applicant, to promote their brands & to market their products, is availing the services of advertisement agencies such as ads in the print media, electronic media, outdoor advertising etc. They are also procuring the promotional products and marketing materials for use in displaying their products at the point of purchase i.e. their showrooms & showrooms of their distributors/ dealers. On availment of such advertisement services & procurement Promotional Products / marketing materials, the applicant is paying applicable GST thereon. Since they are used in the course or furtherance of their business, they avail the GST paid on such input service and inputs as "input tax credit" in terms of section 16 of CGST Act, 2017.

The Applicant had sought advance ruling on classification of goods and services is as under:-

> *"Whether in the facts and circumstances of the case, the promotional products / Materials and Marketing Items used by the Applicant in promoting their brand and marketing their products can be considered as "inputs" as defined under section 2(59) of the CGST Act, 2017 and GST paid on the same can be availed as input tax credit in terms of section 16 of the CGST Act, 2017?"*

Observations & Findings : The applicant submitted that to promote their brands at point of purchase level, they procure various promotion items such as display items, display boards, uniforms, posters, gifts, catalogues & pamphlets and carry bags etc, on payment of applicable GST and distribute the same

under challans to their Exclusive Brand Operators and Retailers to use in the brand promotion. Since the brand promotion being in furtherance or in the course of their business, the applicant, treating the said promotional item as "input" as defined in section 2(59) of CGST Act, 2017, is availing the GST paid on the same as "input tax credit" in terms of section 16 of CGST Act, 2017. The applicant states that they are supplied free of cost and are to be used only for the promotion of their brand and products in the showrooms of the distributors and retailers. They have stated that they are supplying uniforms for the sales personnel of the distributors and franchisees to be worn by them at their outlets and even this is for sales promotions. The applicant states that some of the materials, like display boards, Posters, Outdoor hoardings, remain in his own account and are treated as capital goods. There is no transfer of ownership of these materials to his franchisees, distributors and retailers and hence there is no sale involved in them.

Since the applicant has used or intended to use the goods and services procured in the course or furtherance of business, the applicant is entitled to take input tax credit, subject to other provisions of the Act and there is no blockage attributable to section 17 (1) as the applicant has used the goods in the course or furtherance of business.

Ruling : 1. The ITC on GST paid on the procurement of the "distributable" products which are distributed to the distributors, franchisees is allowed as the said distribution amount to supply to the related parties which is exigible to GST. Further the said distribution to the retailers for their use cannot be claimed as gifts to the retailers or to their customers free of cost and hence ITC of GST paid on such procurement is not allowed as per Section 17 (5) of the GST Acts.

2. The GST paid on the procurement of "non-distributable" products qualify as capital goods and not as "inputs" and the applicant is eligible to claim input tax credit on their procurement, but in case if they are disposed by writing off or destruction or lost, then the same needs to be reversed under Section 16 of the CGST Act, 2017 read with Rule 43 of the CGST Rules, 2017.

[2020 (12) TMI 902 – AAR, Karnataka – M/s Page Industries Limited]

2. Place of Supply :

Facts : The applicant located in Thane is a proprietor supplying digital goods, in the subject case 'online gaming' and has not obtained GSTIN because he is of the opinion that the services rendered by him is export of e-goods (Digital

Goods). Applicant has submitted that, in electronic commerce, digital goods are described as goods, which are stored, delivered and used in electronic format and shipped electronically to the consumer through email or downloaded from the Internet. Applicant contacts the suppliers of digital products, located outside the Country, requesting a list of digital products that are available with them. Digital Goods are then sent to the applicant by Email or Instant message service and payout is issued. These received digital goods are assessed and stored on Cloud Servers for dispatching to customers of the applicant. Customers visit the Website of the applicant online and make payments to the applicant, after which Digital Goods are then delivered by cloud server to customer by Email.

The applicant, sought advance ruling on the following important issues apart from many others :

1) Whether "e-goods", as commercially known in the market, are "goods" as defined in the GST Acts or are they services as per GST Act?

2) Whether they are exempted from GST?

Observations & Findings : We find that there is a supply of OIDAR services to the applicant from suppliers based abroad. The nature of OIDAR services are such that it can be provided online from a remote location outside the taxable territory. A similar service provided by an Indian Service Provider, from within the taxable territory, to recipients in India would be taxable. In cases where the supplier of such service is located outside India and the recipient is a business entity (registered person) located in India, the reverse charge mechanism would get triggered and the recipient in India who is a registered entity under GST will be liable to pay GST under reverse charge and undertake necessary compliances.

We find that in case applicant's customer is from India i.e. taxable territory. Hence, GST would be liable on such transactions. In the case of supply of taxable service the word 'consideration' is the key. As per Section 2 ((31) of the CGST Act, 2017, Consideration, includes any payment to be made, whether in money or otherwise.

Ruling : E-goods, in this case- 'Online Gaming' will be covered under services under the GST Act and are liable for payment of GST. In the situation of procurement from foreign supplier & supply from out of India the applicant has to discharge IGST liability under reverse charge mechanism.

[2020 (12) TMI 786 – AAR, Maharashtra – Amogh Ramesh Bhatawadekar]

3. Consideration :

Facts : Applicant is engaged in supply of electric transformers, static converters, electric wires/ cables for transmission of electricity, equipment for spark ignition, installation and commissioning services. The applicant is an Indian Subsidiary of the Company located in Germany. Applicant's holding company, desires to join the *'develoPPP.de programme'* run by the German Federal Ministry for Economic Cooperation and Development. The Holding Company desires to provide financial assistance of 540,000 Euro to the Applicant under the said program.

The main question on which, Advance Ruling is sought by the applicant is *: Whether the financial assistance to be received by the Applicant is a consideration for supply and the activity is covered under the meaning of supply of services in terms of Section 7 of the Central Goods and Services Tax Act, 2017 / Maharashtra Goods and Services Tax Act, 2017?*

Observations & Findings : The applicant has consented/agreed to do some acts and as per clause 5 of Schedule II appended to GST Act, 'an agreement to do an act' will be considered as supply of services. Hence in the subject case, we hold that the applicant is rendering supply of services for which it is receiving consideration in the form of "financial assistance".

Ruling : Whether the financial assistance to be received by the Applicant are covered as "consideration for supply and the activity is covered under the meaning of supply of services in terms of Section 7 of the CGST Act, 2017 / MGST Tax Act, 2017". The answer is yes.

[2020 (12) TMI 836 – AAR, Maharashtra – M/s Prettl Automotive India P Ltd.]

4. Registration :

Facts : The Applicant, Company registered in Japan, sought for a ruling as to "Whether the Applicant is required to be registered under Odisha Goods arid Services Act, 2017 and Central Goods and Services Act, 2017 for the consultancy services provided to Odisha Power Transmission Corporation Limited (OPTCL), Bhubaneswar."

Observations & Findings : It is evident that the technical personnel maintains suitable structures in terms of human and technical resources at the sites of Odisha Power Transmission Corporation Limited belongs to the applicant. It ensures provision of supply of consulting services for the contract period, indicating sufficient degree of permanence to the human and technical resources employed at the sites. The applicant through its expert belonging, therefore, supplies the service at the sites from fixed establishments as defined under

section 2 (7) of the IGST Act. The location of the supplier should, therefore, be in India in terms of section 2 (15) of the IGST Act. Therefore, We do not agree with the contention of the applicant that the services supplied would be covered under the ambit of Entry No. 1 of Notification No. 10/2017- Integrated Tax (Rate) dated 28th June, 2017 and shall be liable to tax under RCM.

Ruling : Supply of service to OPTCL is not import of service in terms section 2 (11) of the IGST Act The recipient is not, therefore, liable to pay GST on reverse charge basis in terms of Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017. The applicant, being the supplier of service in India, is liable to pay tax and therefore, required to take GST registration under Odisha Goods and Services Act, 2017 and Central Goods and Services Act, 2017 for the consultancy services provided to Odisha Power Transmission Corporation Limited.

[2020 (12) TMI 900 – AAR, Odisha – M/s Tokyo Electric Power Company, Holding INC]

5. Mixed Supply :

Facts : The applicant is a supplier of building structure, railway bridge equipment, technical structure, blast furnace shell, civil structure. Apart from supplying items, the applicant does job work on the materials and design belonging to another registered person. The applicant has entered into contract with another Principal contractor for fabrication, painting and transportation at the site of the 'Viaduct and Cable Stay' part of the ROB, under job work.

The applicant wants to know the applicable rate of tax in terms of Sl No. 26 of Notification No. 11/2017- Central Tax (Rate) dated 28/06/2017, amended time to time.

Observations & Findings : The job work of fabrication of steel structures and delivery thereof at the site with incidental supply of paint, and works contract of applying a coat of paint to the steel structures after erection. Although they are supplied in conjunction with each other at a single price, they are not naturally bundled. The job work of fabrication ends with the delivery of the fabricated structures at the site. The works contract of applying paint to the erected structures is a separate supply made in conjunction with the job work. It is, therefore, a mixed supply.

Ruling : The applicant supplies a mixed supply constituting of the job work of fabrication of steel structures and the works contract of applying paint to the erected steel structures. It is taxable @ 12% in terms of the provisions under section 8(b) of the GST Act. **[2020 (12) TMI 190 – AAR, West Bengal – M/s Vrinda Engineers P Ltd.]**

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DEALING IN FOREIGN EXCHANGE AND CURRENCY

CA Paresh Shah & CA Mitali Gandhi,

1. Introduction

Currency is a generally accepted form of money, including coins and paper notes, which is issued by a government and circulated within an economy. It is used as a medium of exchange for goods and services, currency is the basis for trade. In most of the cases, the central bank of a country has the sole right to issue money for circulation. In this article we will understand the FEMA laws related to Indian and foreign currency.

Foreign currency means any currency other than Indian currency as per Sec 2(m) of Foreign Exchange Management Act,1999(FEMA)

Foreign exchange means foreign currency and includes, —

(i) deposits, credits and balances payable in any foreign currency,

(ii) drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,

(iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; (Sec 2(n) of FEMA)

1.1 Dealing in Foreign exchange

Dealing in Foreign Exchange is governed by Section 3 of the Foreign Exchange Management Act,1999 FEMA, which states that

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—"

(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India,

then, such person shall be deemed to have received such payment otherwise than through an authorised person;

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

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

Various regulations are made to carry out the transactions which will otherwise be in violations of the Sec 3 as to making or receipt of any payments from PROI or their order by a Person in India.

1.2 Dealing in Foreign Exchange & Security

Clause (a) under section 3 may be read as under:

No person shall, deal in/transfer any foreign exchange/foreign security to a person not being an authorised person (AP);

Thus foreign securities or foreign exchange cannot be transferred to any person. Not only transfer, the prohibition extends to dealing with such foreign exchange or securities which will normally include sale, transfer, acquisition, borrowing or lending etc under its fold and the provision will apply to all the persons whether person resident in India (PRII) or person resident outside India(PROI).

i. Foreign exchange can be dealt in the following (illustrative list) ways by PRII and PROI. Besides these regulations, transactions cannot be carried out
   a) Borrowing and Lending in Foreign Exchange (Notification 3 of FEMA)
   b) Borrowing and Lending in Rupees (Notification 4 of FEMA)
   c) Foreign Exchange Management Deposit Regulation (Notification 5 of FEMA)
   d) Import and export of foreign currency mentioned below (Notification 6 of FEMA)
   e) Purchase/sale of Immovable Property Abroad (Notification 7 of FEMA)
   f) Earning foreign exchange outside India and bringing it back and depositing the same in Resident Foreign Currency Account (RFC) (Notification 10 of FEMA)
   g) By way of Gift from PROI or to PROI (Notification 11 of FEMA and

Notification 5 respectively)

h) Foreign Direct Investment (for Companies and LLP, Notification 20(R) of FEMA)
i) Export of goods or services (Notification 23 of FEMA)
j) By way of Inheritance from PROI or to PROI

ii. Regulations regarding transfer of foreign securities are given in Notification 120 of FEMA which states that Foreign securities can be transferred between:

a) PROI and PRII in the form of Gift, Inheritance and sale
b) PRII and PRII by way of Inheritance and sale
c) PROI and PROI FEMA may not be applicable

Thus due to the presence of the above Notifications, Section 3 will not apply in such situations and transactions will be carried on in accordance with the respective regulations.

1.3 Making any Payment

Clause (b) under section 3 states that no person shall make any payment to or for the credit of any PROI in any manner;
Any person in India whether PRII or PROI cannot make any payment to PROI or to any other person (PRII or a PROI) for the credit of a PROI in rupees or foreign currency. As explained, Payer is a person in India hence it can be a PRII or PROI. Thus a PRII/PROI (in India, Indian bank A/c) cannot make payment to PROI whose bank account could be in India or outside India.

In case of a PRII, payment of US$ 2,50,000 is allowed under Liberalised Remittance Scheme (LRS) to PROI to his Indian Bank Account or to foreign Bank Account located outside India , hence other payments will require scrutiny as to whether each of payment is authorised as a current A/c transaction in addition to LRS or it is a permitted capital A/c transaction of PRII.
PROI may transfer Rupees from Indian bank A/c to another PROI being gift to transferee or some other transaction as authorised under Notification 5 as permitted debits.
In an another case ,if a PRII purchases goods from PROI and request his friend who is PROI to make the payment from his bank account in India on his behalf then such a transaction is not permitted, as payment is being made from an Indian bank A/c of a PROI to a PROI for goods purchased by the PRII which is not permitted as per FEMA provisions relating to import of goods in to India..

1.4 Receipt of Payment

Clause (c) under section 3 states no person shall receive otherwise (than) through an AP, any payment by order or on behalf of any PROI in any manner;

Thus any person in India, whether PRII or PROI is not authorised to receive any payment from PROI or from any other person on behalf of a PROI. Also the definition includes in any manner which can mean actual payment or constructive payment. The above provision also includes Rupee transactions between two residents representing payment by order or on behalf of any non-resident unless it is through an Authorized Dealer and represented by way of corresponding inward remittance from outside India;

For example, if PRII sells goods to PROI and the PROI tells his brother who is a PRII to make the payment for the same. Such a transaction is not permitted under FEMA. Although the payment would be from a PRII to another PRII in Indian rupees, the same will not be permitted because the payment is on behalf of a PROI and not in accordance with regulations relating to Export of goods.

1.5 Financial Transaction

Clause (d) of section 3 states that no person shall enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person..

The above clause states that any financial transaction undertaken by person in India cannot be settled through a consideration payable for any other transaction outside India either by the same person or any other person For Eg: if Mr Y (PROI) is traveling to India to meet his friend Mr X (PRII) and Mr Y requests Mr X to buy his flight tickets from London to India for him, who in turn would buy flight tickets of Mrs X(PRII) for her travel to London, due a month later. Such transaction is not permitted under FEMA.

An exception to the above clause would be payment made towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India (PROI) who is on a visit to India as provided in Notification 16 in respect of hospitality services by PRII.

1.6 It may be noticed that:

i. Item (i) and (iii) above includes reference to authorised dealer whereas (ii) and (iv) does not have any such reference

ii. Item (ii) and (iv) are dealing with payment or credit to PROI and financial

transaction of PRII or PROI which has an effect of settling the transaction in India without consideration being paid or received in India.

1.7 Clause b,c,d of section 3 do not apply to any transaction entered into in Indian rupees by or with:

i. A person who is a citizen of India, Nepal or Bhutan resident in Nepal or Bhutan;

ii. A branch situated in Nepal or Bhutan of any business carried on by a company or a corporation incorporated under any law in force in India, Nepal or Bhutan;

iii. A branch situated in Nepal or Bhutan of any business carried on as a partnership firm or otherwise, by a citizen of India, Nepal or Bhutan. (Notification 17 of FEMA)

The above exemption is obvious because Notification 6 and 17 permits free movement of Indian Rupees, Nepali Rupees and Bhutanese Rupees across the border of these 3 countries including overseas investment to Nepal and Bhutan in Rupees.

2. There are 2 types of transactions under FEMA:

i. Capital Account Transactions

ii. Current Account Transactions

Foreign Exchange can be drawn for Current or Capital Account Transaction

2.1. Capital Account Transaction

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

It may be noted that contingent liabilities in India of PROI is not considered as capital account transaction

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

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

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

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

Capital account transactions are generally prohibited unless permitted. They are regulated by RBI.
They are classified under the following heads, namely :-

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

Details of Schedule I and Schedule II can be found on: https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=155
About 25 Notifications have been issued by RBI to deal with the manner in which permissible Capital Account Transactions can be carried out.

2.2. Current Account Transaction

Current account transaction means a transaction other than a capital account transaction. Such transaction includes:-

i. Payments due in connection to foreign trade, other current business, services and other short-term banking facilities in the ordinary course of business;
ii. Payments due as interest on loans and as net income from investments;
iii. Remittances for living expenses of parents, spouse and children residing Abroad;
iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children; (section 2(j) of FEMA)

Current Account transactions are freely permitted, unless prohibited. Any person may sell or draw foreign exchange to or from an AP if such sale or drawal is a current account transaction as per Section 5 of FEMA. They are regulated by Central Government. Current Account Transactions are divided into 3 categories:
Schedule I -Transactions which are prohibited
Schedule II -Transactions which require prior approval of the Central Government
Schedule III- Transactions which require prior approval of the RBI

Details of Schedule I, II, and III can be found on: https://m.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10193

2.3 A few current account transactions like private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip; medical treatment abroad; studies abroad are subsumed in the Liberalised Remittance Scheme (LRS) limit i.e. of US$ 2,50,000. **In case of emigration, medical treatment abroad and studies abroad the actual expenses are permitted which may exceed the LRS limit**. An example to explain the same, let us consider 3 different situations:

i. The LRS limit has been exhausted and after that there are medical expenses to the tune of US$ 2,50,000 have emerged.
ii. Medical expenses in the year is of US$ 2,60,000 and no other expenses in that year.
iii. There are medical expenses in the year to the tune of US$ 2,00,000 in that year

In situation i) Though the LRS limit has been exhausted medical expenses will be allowed by AD, based on the estimate from the doctor in India or hospital/ doctor abroad. If the above expenses were expenses other than medical treatment, studies abroad and emigration then the same would require RBI approval since the LRS limit has been exhausted for that year.

In situation ii) Since medical expenses are allowed on actual basis the same would be allowed.

In situation iii) Medical expenses upto US$ 2,00,000 will be allowed and any other expenses like business trip, private visit, gift/donation, maintenance of close relatives abroad will be allowed upto the balance limit of LRS i.e. US$ 50,000 for that year

2.4 Drawal of foreign exchange by any person for the following purpose is prohibited, namely:-

i. Transaction specified in the Schedule I; or
ii. Travel to Nepal and/or Bhutan; or
iii. Transaction with a person resident in Nepal or Bhutan;

Provided that the prohibition in clause (iii) may be exempted by RBI subject to such terms and conditions as it may consider necessary to stipulate by special or general order. Rule 3 of FEM (CAT) Rules, 2000

2.5 Holding Assets Abroad

A person resident in India (PRII) shall not acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. —Save as otherwise provided in this Act, as per Sec 4 of FEMA. Provisions concerning foreign assets and foreign securities are dealt in Notification 7

(Acquisition and transfer of immovable property outside India) and Notification 120 (Transfer or Issue of Any Foreign Security)
If there is any amount of foreign exchange due or has accrued to any PRII, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank as per Sec 8 of FEMA
The law further provides that
Provisions of section 4 and section 8 shall not apply to the following cases (Sec 9 of FEMA):
(a)Possession of foreign currency or foreign coins by any person upto such limit as the Reserve Bank may specify;
(b) Foreign currency account held or operated by such person or class of persons and the limit upto which the Reserve Bank may specify;
(c) Foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
(d) Foreign exchange held by a person resident in India upto such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;
(e) Foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means upto such limit as the Reserve Bank may specify; and
(f) Such other receipts in foreign exchange as the Reserve Bank may specify

Thus one can observe that drawing of foreign exchange for any current account transaction is freely permitted whereas drawal of foreign exchange for Capital Account transaction is subjected to rules and restrictions under FEMA, except in the case of an Individual who is permitted to transfer upto US$ 2,50,000 LRS limit for any capital or current account transaction. Also, no restrictions under FEMA will apply to payments made from balance in Resident Foreign Currency Account (RFC).

Regulations to hold or transfer any currency or foreign exchange, is provided in **Notification No. FEMA 6 (R)/RB-2015 dated December 29, 2015** (hereinafter referred to as "FEMA 6") & **Notification No. FEMA 11(R)/2015-RB dated December 29, 2015** (hereinafter referred to as "FEMA 11").
Any foreign exchange due to a PRII must be realised and repatriated as per the provisions of **Notification No. FEMA 9 (R)/2015-RB dated December 29, 2015** (hereinafter referred to as "FEMA 9")

3.Export & Import of Currency

3.1 Export & Import of Indian Currency

i. A PRII

a) May take Indian currency notes outside India (except Nepal and Bhutan) upto Rs 25,000 per person or such amount subject to conditions as notified by RBI

b) Who had gone outside India (except Nepal and Bhutan) on a temporary visit may bring back Indian currency notes upto Rs 25,000 per person or such amount subject to RBI conditions

c) May take or send outside India (other than to Nepal and Bhutan) commemorative coins not exceeding two coins each.

(Reg 3(1) of FEMA 6)

ii. A PROI (other than citizen of Pakistan & Bangladesh)

a) May take Indian currency notes outside India (except Nepal and Bhutan) upto Rs 25,000 per person or such other amount and subject to such conditions as notified by RBI.

b) May bring into India currency notes of India upto an amount not exceeding Rs.25,000 per person or such other amount and subject to such conditions as notified by RBI

(Reg 3(2) of FEMA 6)

iii. Reserve Bank may, on application made to it by a PROI/PRII allow to take or to send out of India or bring into India currency notes subject to terms and conditions.

iv. A PROI may hold, own, transfer or invest in Indian currency, if such currency, was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India. (Sec 6(5) of FEMA)

It may be observed that the limit of Rs 25,000 is on transfer of Indian currency for every person i.e. it's the limit is the same for a PRII and PROI

3.2 Export & Import of Foreign Currency

i. Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or

import or bring into India, any foreign currency.
(Reg 5 of FEMA 6)

ii. Any person may send into India without any limit foreign exchange in any form other than currency notes, bank notes and travellers' cheques. Which means any transfer through banking channels is permitted without any limit
(Reg 6a of FEMA 6)

iii. Any person may bring into India from any place outside India without limit foreign exchange (other than unissued notes), provided he makes a declaration to the custom authorities in currency declaration form (CDF) if aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time exceeds US$10,000 and/or the aggregate value of foreign currency notes brought in by such person at any one time exceeds US$ 5,000.
(Reg 6b of FEMA 6)

iv. Any person may send or take out of India:

a) Cheques drawn on foreign currency accounts

b) Foreign exchange obtained by him by drawal from an AP in accordance with the provisions of FEMA

c) Currency in the safes of vessels or aircrafts which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank
(Reg 7(2) of FEMA 6)

v. Any person may take out of India:

a) Foreign exchange possessed by him in accordance with FEMA regulations. Which would include foreign currency brought in by him and declared, balances in foreign currency bank accounts like NRE, RFC, EEFC account.

b) Unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with FEMA regulations; but the same shall be surrendered to AP within 90/180 days as per Notification 9 of FEMA
(Reg 7 (3) of FEMA 6)

vi. PROI may take out of India unspent foreign exchange not exceeding the amount brought in by him and declared in accordance with clause iii above
(Reg 7(4) of FEMA 6)

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

viii. If a PRII makes any foreign exchange payment from funds held in the Resident Foreign Currency Account(RFC) or Exchange Earner's Foreign Currency Account(EEFC) then the limits on Investment amount will not be applicable (Notf 10(R) of FEMA)

Question arises in cases where a person carrying foreign currency of more than US$ 10,000 forgets to declare or does not declare the same in the custom declaration form on arrival into India?
In such situations it would be assumed that the person has not received such money in accordance with FEMA and a penalty would be imposed for violating the FEMA regulations. Compounding facility may be available only if breach is technical in nature

3.3 Export and import of currency to or from Nepal and Bhutan

A person may:

i. Take/Send out of India, currency notes of India of denominations of Rs 100 or less. An individual travelling from India to Nepal or Bhutan can carry Reserve Bank of India notes of Mahatma Gandhi (new) Series of denominations Rs. 200/- and/or Rs. 500/- upto a total limit of Rs. 25,000;

ii. Bring into India from Nepal or Bhutan, Indian currency notes of denominations of Rs.100 or less;

iii. Take out of/Bring into India , from Nepal or Bhutan, currency of Nepal or Bhutan

(Reg 8 of FEMA 6)

4. Other Remittances made by PRII in Indian Currency to or for a PROI

i. Payment made towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India (PROI) who is on a visit to India – no limit specified for such expense under Fema

ii. An individual resident in India may make a gift in Rupees to a Non-Resident Indian (NRI)/Person of Indian Origin (PIO), who is a close relative by way of

crossed cheque/electronic transfer upto LRS limit

iii. A resident individual may grant loan in rupees to an NRI relative by way of crossed cheque/electronic transfer as per the provisions of Notification 4 of FEMA upto LRS limt

iv. A company which is a resident in India, can make payment in rupees to its non whole time director who is PROI and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance, with the provisions contained in the company's Memorandum of Association or Articles of Association or in any agreement entered into by it or in any resolution passed by the company in general meeting or by its Board of Directors.

v. A PRII can make payment in rupees to a PROI, by means of a crossed cheque or a draft as consideration for purchase of gold or silver in any form imported by such person subject to conditions
(Reg,2,3,4&5 of Notification 16 of FEMA)

It can be observed from the above provisions that gifting and giving a loan to a Non resident come under the LRS limit but making payments for a PROI towards boarding, lodging, travel within India do not come under the LRS limit hence expenses incurred for boarding, lodging or travel purpose of PROI would be in addition to LRS limit

5. Realisation, Repatriation & Surrender of Foreign Exchange

A PRII to whom any amount of foreign exchange is due or has accrued shall take all reasonable steps to realise and repatriate to India such foreign exchange as per Section 8 of FEMA, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which would result in ceasing/delay of receipt of part or whole of the foreign exchange (Reg 3 of FEMA 9)

5.1 Manner of Repatriation

i. On Realisation of foreign exchange due, a person shall repatriate the same to India and –

a) Sell it to an AP in India in exchange for rupees; or

b) Retain/hold it in account with an AD in India to the extent specified by RBI; or

c) Use it for discharge of a debt or liability denominated in foreign exchange to

the extent and in the manner specified by RBI.

(Reg 4(1) of FEMA 9)

ii. A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house (Western union, Money gram) situated in any country outside India, maintained with an AD.

(Reg 4(2) of FEMA 9)

Thus each and every transaction of entitlements of the Foreign Exchange due to PRII is required to be eventually converted in to a receipt of the Foreign Exchange in India within the permitted time.

6. Period for Surrender of Realised Foreign Exchange

i. A person not being an Individual resident in India shall sell the realised foreign exchange to an AP within the period specified below:-

a) Foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

b) In all other cases within a period of ninety days from the date of its receipt

ii. Any person not being an individual resident in India who has acquired foreign exchange for any purpose mentioned in the declaration made by him to an AP under sub-section (5) of Section 10 (which states that an AP shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make a declaration and give such information that there will be no contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder.) of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible shall surrender such foreign exchange or the unused portion thereof to an AP within a period of sixty days from the date of its acquisition or purchase by him.

(Reg 6(1) of FEMA 9)

iii. Where the foreign exchange acquired/purchased by any person other than an individual resident in India from an AP is for foreign travel, then, the unspent balance of such foreign exchange shall be surrendered to an AP -

a. within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

b. within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques. (Reg 6(2) of FEMA 9)

iv. A person being an individual resident in India shall surrender the received/realised/ unspent/unused foreign exchange in any form to an AP within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be. A resident Individual can open an Resident Foreign Currency Domestic Account (RFCD)with the unspent foreign exchange (Reg 7 of FEMA 9)

Time limit for realising and repatriating foreign exchange for a PRII who is individual is 180 days but for persons other than individuals it is only 90 days. A resident individual can deposit the unspent foreign exchange in a RFCD account, such a facility is not allowed to resident non individuals.

Any Income earned by an Individual on Investments made through LRS route or through funds in RFC account need not be repatriated back.

Provisions mentioned in FEMA 9 shall not apply to foreign exchange in the form of currency of Nepal or Bhutan and to the cases which are exempted under section 9 of FEMA.

7. Possession & Retention of Foreign Exchange

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

i) Possession without limit of foreign currency and coins by an AP within the scope of his authority;

ii. Possession without limit of foreign coins by any person;

iii. A PRII can retain foreign exchange in the form of currency notes, bank notes and foreign currency travellers' cheques upto US$ 2000 or its equivalent in aggregate, provided that such foreign exchange

a) Was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or

b) Was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or

c) Was acquired by him by way of honorarium or gift while on a visit to any place outside India; or

d) Represents unspent amount of foreign exchange acquired by him from an AP for travel abroad.

(Reg 3 of FEMA 11)

Thus there is a relaxation in Realisation and repatriation of the exchange in certain cases as referred above

7.1 Possession of foreign exchange by a PRII but not permanently resident therein

A PRII but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

Explanation : for the purpose of this clause, 'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years (Reg 4 of FEMA 11)

8. Foreign Exchange for Travel

i. Drawal of foreign exchange for travel to Nepal and/Bhutan is not allowed

ii. Ticket held by the traveller should be for journey commencing not later than 180 days from the date of drawal of foreign exchange

iii. Payment in Indian currency notes for drawal of foreign exchange should not exceed 50,000 for a single journey/visit

iv. Amount of foreign currency, notes and coins sold to a traveller out of the overall permitted foreign exchange shall be within limits as set below:

a) US $ 3,000 to travellers proceeding to all countries other than those listed in (b) and (c).

b) US $ 5,000 to travellers proceeding to Iraq or Libya.

c) Entire permitted foreign exchange (upto US$ 2,50,000) released can be in the form of currency notes in case of travellers proceeding to Iran, Russian Federation and other Republics of Common Wealth of Independent States. For travellers proceeding for Haj/ Umrah pilgrimage, full amount of entitlement (US$ 2,50,000) in cash or upto the cash limit as specified by the Haj Committee of India, may be released by the ADs and FFMCs

v. A drawal of upto US$ 2,50,000 can be made for all travel related purpose in a financial year including in currency as explained in above paragraphs. The amount other than in cash can be by way of debit card or a credit card including traveller's cheque within the overall limit of US$2,50,000. However the overall limit of US$ 2,50,000 shall not apply where payment is made out of funds held in RFC or EEFC account.

Conclusion:

Provisions regarding dealing of foreign exchange and currency it's receipt as well as payments and the settlement of each transaction as provided in 3(d) can only be done as per the provisions of FEMA, anything not mentioned in the Act or rules, regulations, notifications, orders issued under the Act shall not be permitted. One may review each transaction as to it's nature whether it's a current or a capital account transaction and if it is not permitted under the detailed regulation they may not enter into any such transaction else it would result in contravention of the provisions under FEMA.

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ARTICLE 226/227 OF THE CONSTITUTION AND CHALLENGES TO JURISDICTION OF ARBITRATORS

Ishaan Patkar,
Advocate

An arbitration clause in an agreement essentially ousts the jurisdiction of the civil courts and confers it on a private umpire to decide disputes. Parties who voluntarily agree to submit disputes to arbitration do so to avoid the fetters of Court procedure, and the sometimes stifling rules of Evidence Act. An arbitrator is bound to conduct proceedings only by natural justice and fair play and this has great value in commercial disputes, where the sheer delay caused in the traditional court system can have negative consequences for the suffering party.

Despite these many benefits of the arbitral process, collateral challenges are always made to the various stages. Frequently challenges are made at the very outset of the arbitral process, for the party who is at fault in any dispute would want the resolution to be delayed as far as possible. After having agreed to oust the jurisdiction of the Civil Courts to ensure speedy dispute resolution, suddenly the great delays of the Civil Court proceedings become very endearing to the party who seeks to benefit from such delay.

The inspiration for this article is the recent judgment of the Supreme Court in **Bhaven Construction v Executive Engineer [Judgment dated 6.1.2021 in Civil Appeal No.14665 of 2015]** wherein the question was whether a Writ Court can intervene to quash proceedings before an arbitrator appointed under the contract and to whom the Arbitration and Conciliation Act, 1996 applies, on the ground that the State Legislature had set up a separate arbitral tribunal which had jurisdiction over that dispute. Normally, the writ court intervenes when there is inherent lack of jurisdiction in a tribunal which is constituted by statute. This case involves the interesting question as to whether a Writ Court can intervene when the lack of jurisdiction is of a tribunal appointed under contract (that is, the arbitrator) who is not a statutory tribunal. One must keep in mind that though an arbitrator appointed under contract is bound by the Arbitration and Conciliation Act, 1996, that does not make him a statutory tribunal *per se*.

Some basic principles need to be discussed before we go into the analysis of the judgment itself. Article 226 or 227 of the Constitution of India are the two great Constitutional provisions which can be described as the very foundation on which the freedoms and liberties of the people rest. They are ordinarily invoked in case of State action like Legislative enactments, rules or statutory rules, circulars or orders.

In fit cases, even State action in contractual matters can be challenged when any aspect of public law is engaged. For example, State action in contractual matter which falls foul of public interest, fairness, non-arbitrariness, non-discrimination etc. can be challenged on the touch-stone of Articles 14, 19 or other Constitutional provisions which bind the Governmental authority in contractual matters also **[R. D. Shetty v International Airport Authority of India (1979) 3 SCC 480]**. Judicial review under Articles 226 and 227 would not generally lie in respect of private rights which arise out of contracts etc. However, Article 226 can be invoked where a private body is performing public functions or exercising regulatory functions with monopolistic powers which affect fundamental rights of citizens. For example, Board of Control for Cricket in India has been held to be a body exercising public functions in **Zee Telefilms v Union of India [(2005) 4 SCC 649]** and thus amenable to writ jurisdiction under Article 226. A private Jockey Club which regulated the horseracing profession with monopoly powers and refused to issue license to a woman trainer based on gender disqualification for all women, was held to be amenable to judicial review in **Nagle v Feilden [(1966) 2 QB 633]**.

There is also no question that an arbitration clause in a contract cannot curtail the jurisdiction of the Writ Court under Articles 226 and 227 of the Constitution **[Union of India v Tantia Construction (P) Ltd. (2011) 5 SCC 697]**:

> "Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."

Tantia Construction was a case on a contract with a Governmental authority. The same principles will also apply where the writ is filed against a private body which is performing public functions or exercising regulatory functions with monopolistic powers which affect fundamental rights of citizens as afore-said. The High Court can adjudicate contractual disputes involving public law disputes which fall within the *R. D. Shetty* parameters. But the Court adjudicates the merits of the dispute in such a case.

Unlike *Tantia Construction*, however, the case in *Bhaven Construction* was different. The Court was not invited to actually decide the merits of the dispute in

Bhaven Construction under Article 226/227. The case of the writ Petitioner was simply that the sole arbitrator appointed under the contract lacked jurisdiction because the arbitral tribunal under the Gujarat Public Works Contract Disputes Arbitration Tribunal Act, 1992 was vested with jurisdiction to decide disputes to which that Act applied. When the jurisdiction of a statutory tribunal is questioned, the Constitutional remedy issues in the form of a writ of prohibition under Article 226 if the tribunal is still seized of the cause or in the form of writ of certiorari under Article 226 or under supervisory jurisdiction of Article 227 after the order is passed. For example, if CESTAT decides an income tax matter, Article 226 and 227 are available. Could these remedies issue to a private tribunal appointed under contract?

In *Bhaven Construction*, the company Bhaven Construction had invoked arbitration against Sardar Sarovar Nigam Ltd. The defendant in the arbitration, that is Sardar Sarovar Nigam Ltd., did not go to the Writ Court at the outset. Instead, it filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 contending that only the arbitral tribunal under the Gujarat Public Works Contract Disputes Arbitration Tribunal Act, 1992 had jurisdiction to decide the dispute. Section 16 of the Arbitration and Conciliation Act, 1996 empowers the arbitrator to decide questions relating to its own jurisdiction. Whatever the arbitrator decides can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996 only after the final award is passed. Thus, parties cannot raise frivolous challenges relating to jurisdiction of the arbitrator to derail or delay the process, and at the same time, a valid challenge can be raised at the end of the entire arbitral process.

When the arbitrator in *Bhaven Construction* decided the matter of jurisdiction against the Sardar Sarovar Nigam Ltd., it applied to the High Court of Gujarat under Article 226 and 227 for quashing and setting the ongoing proceedings before the Arbitrator. The Single Judge dismissed the writ petition on the ground that the remedy is under Section 34 to challenge the jurisdiction of the arbitrator after the award is passed. The Division Bench, which heard the appeal against the Single Judge order, reversed his judgment. Bhaven Construction then appealed to the Supreme Court. During the pendency of the appeal, the award was passed by the arbitrator and the same was separately challenged under Section 34 of the Arbitration and Conciliation Act, 1996.

The Supreme Court allowed the appeal of Bhaven Construction and reversed the judgment of the Division Bench of the Gujarat High Court on the ground that the scope for interference in the arbitral process is very narrow. In doing so, it referred to the judgment in **Deep Industries v ONGC [(2019) SCCOnline SC 1602]** wherein an order was passed by the arbitrator denying interim relief under Section 17 of the Arbitration and Conciliation Act, 1996 and against which an appeal under Section 37 was filed in the City Civil Court. This appeal was also dismissed. A

petition under Article 227 was thereafter filed before the High Court of Gujarat which reversed the judgment of the City Civil Court. Two extreme arguments were placed before the Supreme Court – On one hand it was contended that unlike the arbitrator, the City Civil Court was subject to the High Court's supervisory jurisdiction under Article 227 and hence a writ petition can lie against the judgment of the City Civil Court which is issued under Section 37. On the other hand, it was argued that the scheme of the Arbitration and Conciliation Act, 1996 showed that there could be no exercise of supervisory jurisdiction under Article 227 at all in cases of appeals decided under Section 37. The Supreme Court held that ordinarily there should be no interference under Article 227 against appeals decided under Section 37, since the scheme of the Act valued speedy disposal instead of unending litigation and the parties had voluntarily submitted themselves to arbitration by contracting out the traditional public law remedies afforded by ordinary Courts of law . However, in exceptional circumstances relating to jurisdictional issues, it was held that Article 227 can be invoked to set aside the judgment rendered under Section 37.

At this stage it is important to note that *Bhaven Construction* in fact involved jurisdictional issue of whether the private arbitral tribunal had jurisdiction or the statutory arbitral tribunal under the Gujarat Public Works Contract Disputes Arbitration Tribunal Act, 1992 had jurisdiction. However, the Supreme Court held that the question whether the Gujarat Public Works Contract Disputes Arbitration Tribunal Act, 1992 applied or not depended on whether the contract was a "works contract" as defined under the Act or not. This issue required leading of evidence and such disputed questions of fact could not be decided under writ jurisdiction. Therefore, it was only appropriate that the arbitrator should first decide this question of jurisdiction and then the Civil Court under Section 34 gets to review the finding of the arbitrator. The Supreme Court expressly allowed Sardar Sarovar Nigam Ltd. to agitate the question of jurisdiction under Section 34 of the Act.

There are some observations which give the impression that the Supreme Court has still left the door open for a direct challenge to the arbitrator's jurisdiction if it is challenged at the very outset under Article 226/227 without first applying under Section 16 and where exceptional circumstances call for interference of the High Court at the very outset and where bad faith is shown. It is however difficult to understand how the private arbitral tribunal can be made subject to Article 226 and 227 from the very outset itself before a section 16 application is filed and what really constitutes "exceptional circumstances" and "bad faith". This aspect will have to await clarification in future cases which will involve similar situations.

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CRYPTO OR CRYPTIC? CONUNDRUM OF TAXATION OF VIRTUAL CURRENCIES

By Adv. Bharat Raichandani,
Adv. Annweshaa Laskar

Introduction

Virtual currencies, the most popular of them being 'bitcoin', have taken the world by a storm in this last decade. Currently, there are over 1600 virtual currencies being circulated. This number is growing. Unlike money, which is legal tender, virtual currencies are decentralized, unregulated and uninhibited. Crypto-assets, and virtual currencies in particular, are in rapid development and tax policymakers are still at an early stage in considering their implications.

The term virtual currency was first coined by European Central Bank (ECB) in the year 2012. It was defined to classify types of "*digital money in an unregulated environment, issued and controlled by its developers and used as a payment method among members of a specific virtual community."*[1] In India, virtual currency is still an unknown animal. Definitions, let alone rules and regulations, are absent. A void looms large over aspects which would form subject matter of taxation on transactions involving such currencies. This needs to be answered. In this piece, we would endeavour to examine issues arising taxation of transactions involving virtual currencies.

Concept of Virtual Currency

Virtual currency is digital currency that is created from a code. There is no legal definition. The concept of 'Neti Neti' is an expression of something inexpressible, but which seeks to capture the essence of that to which no other definition applies. This mystery will squarely apply to crypto currencies and hence hindsight, into its genesis, so that it's DNA is sequenced.

The European Banking Authority defined virtual currency as *"a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically"*.[2]

Virtual currency is not fiat currency. It is not issued by the Government. It can be characterised as decentralised mode of transaction that can be is used for payment of both goods or services or can also be stored digitally as investment. It allows two parties to transact with each other securely, without a need for a trusted third party by offering 'crypto proof'.[3]

The process of creation of virtual currency is termed as mining. It is the key procedure for transaction processing, recording and security. Issuance of virtual currency is done by miners through software run on specialized hardware to process transactions. These transactions are verified and added to the block chain digital ledger. Each time a transaction is made; a miner ensures the authenticity of information and updates the block chain with the transaction.[4]

The act of creation itself (mining) would amount to a "transaction" or "supply" is being debated. Whether such "currencies", if not "money", would be considered as "goods" or "Services"? If held to be currency, then it would be out of the ambit of taxation, in India, under the Goods and Services Tax (GST) regime.

EU VAT

Before analyzing the provisions of GST in India, it would prudent to have a look as to how the global village recognizes such transactions.

The EU VAT Directive from 2006 regulates VAT systems in EU member countries. Article 2 thereof sets out transactions that are subject to VAT. It states that supply of goods or services for a consideration within the territory of a Member state would be subject to VAT. In 2014, the EU Group on the Future of VAT (European Commission Value Added Tax Committee, 2014) discussed the status of virtual currencies. The Group concluded that it was unlikely that virtual currencies could be considered to be e-money. Likewise, it expressed uncertainty over whether they would be characterised as a digital product or negotiable instrument. In 2015, a subsequent paper from the EU Value Added Tax Committee (European Commission Value Added Tax Committee, 2015) addressed issues arising from the two potential approaches, including: the lack of an exchange rate; the complexity of compliance in barter transactions; anonymity; place of supply; users becoming taxable persons for VAT purposes; and the risk of carousel fraud. Based on the analysis of the impacts of the two potential characterisations and the associated challenges, the 2015 paper concluded that virtual currencies are most appropriately treated as "negotiable asset", bringing them within the exemption in Article 135(1)(d).

However, in EU countries, the decision in *Hedqvist*, treating virtual currencies as akin to currencies for the purpose of the VAT Directive has been responsible for the tax treatment currently applied. In October 2015, the ECJ ruled on these issues in Skatteverket v Hedqvist (European Court of Justice, 2015). In that case, Hedqvist intended to provide exchange services between virtual currencies (specifically, Bitcoin) and fiat currency, via an online platform and a company structure. The Swedish Revenue Law Commission found that this would be a

supply of an exchange service for consideration that was exempt under the Swedish law on VAT. The Swedish tax authority appealed. ECJ was asked to rule on two questions: whether exchanges of virtual for fiat currency were a taxable supply under Article 2(1) of the EU VAT Directive; and if so, whether Article 135(1) of that Directive meant that those exchange transactions are VAT exempt. The opinion of the court was thus:

(i) Bitcoin with bidirectional flow which will be exchanged for traditional currencies in the context of exchange transactions cannot be categorized as tangible property since virtual currency has no purpose other than to be a means of payment;

(ii) VC transactions do not fall within the concept of the supply of goods as they consist of exchange of different means of payment and hence, they constitute supply of services;

(iii) Bitcoin virtual currency being a contractual means of payment could not be regarded as a current account or a deposit account, a payment or a transfer, and unlike debt, cheques and other negotiable instruments (referred to in Artcile 135(1)(d) of the EU VAT Directive), Bitcoin is a direct means of payment between the operators that accept;

(iv) Bitcoin virtual currency is neither a security conferring a property right nor a security of a comparable nature;

(v) The transactions in issue were entitled to exemption from payment of VAT as they fell under the category of transactions involving 'currency [and] bank notes and coins used as legal tender';

(vi) Article 135(1)(e) EU Council VAT Directive 2006/112/EC is applicable to non-traditional currencies i.e., to currencies other than those that are legal tender in one or more countries in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment.

The ECJ, accordingly, concluded that virtual currencies would fall under this definition of non-traditional currencies.

Thus, exchange of virtual currencies for fiat currency, following scenarios

could emerge: (i) supplies of goods and services, subject to VAT, remunerated by way of virtual currencies; (ii) services concerning the arrangement of transactions in virtual currencies (digital wallets); (iii) services concerning the verification of transactions in virtual currencies (i.e. mining); and (iv) services related to intermediation provided by exchange platforms for consideration.

The VAT treatment of virtual currencies is more consistent across countries than income taxes. In almost all countries, the exchange of virtual currencies is not subject to VAT, whether the exchange is made for fiat currency or other virtual currencies. The pure activity of using virtual currencies to acquire goods or services is also outside the scope of VAT, and thus no VAT should be charged on the value of the virtual currencies themselves. Virtual currencies represent only a means of payment and the transaction is not "barter". However, the supply of taxable goods and services paid with virtual currencies remain subject to VAT as appropriate.

With a few exceptions, for example in France and Italy, the receipt of new tokens via mining is also not chargeable under VAT. Another impact of this treatment is to avoid practical difficulties associated with treating these transactions as taxable under VAT rules, including the complex record keeping needed to establish values and deductions, and the potential inclusion of individuals or small dealers under VAT registration rules.

Services related to virtual currency exchanges but which are not integral to these exchanges have a more varied treatment across countries. VAT is not chargeable in the vast majority of countries, typically because it is considered to be covered by exemptions or provisions relating to financial services. In other countries, particularly outside the EU, services related to the exchange of virtual currencies are subject to the normal VAT rules as a supply of taxable services. In relation to these services, consistency with countries' treatment of traditional payment instruments and financial services is important as well as consideration of the practical implications of different treatments for taxpayers in terms of registration, record-keeping, and valuation of the virtual currency

As virtual currencies are typically considered to be property for tax purposes, with the possible exception of VAT, they are also likely to be subject to property taxation in countries that levy inheritance, gift, wealth or transfer taxes, although the guidance available rarely provides information on whether and how these taxes apply to virtual currencies.

Regulatory Mechanism in India

There is no regulatory mechanism governing the arena of virtual currency in India. The Reserve Bank of India issued a circular in 2018 which prohibited banks and financial institutions from dealing in and from providing services that

facilitate dealing in virtual currencies.[5] This Circular was challenged in the Supreme Court and in March 2020, the said Circular was struck down by a three-judge bench of the Supreme Court of India on the ground of proportionality[6]. However, inter alia, it held that virtual currencies fall short of the legal concept of money. It was held that RBI can intervene only if crypto currency has acquired the status of currency, which at present it does not have, they nevertheless constitute digital representations of value and that they are capable of functioning as (i) a medium of exchange and/or (ii) a unit of account and/or (iii) a store of value. Since then, gloomy clouds still ponder.

GST in India

In the back drop of the Apex Court judgment, let us see the implications there of and taxation under GST.

As is well known, GST is touted to be the single biggest tax reform to take place post-independence. Most of the indirect taxes levied on manufacture and sale of goods and provision of services are sought to be subsumed into one single tax known as GST. GST would be applicable on supply of all goods and services in India. Central Goods and Services Tax Act has come into effect from 01.07.2017. Chapter III of the said Act provides for levy and collection of GST. Section 7 of the CGST Act provides for the scope of supply. It is, inter alia, provides that "supply" includes: (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. The Act defines "money" under Section 2(75) to mean "the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other instrument recognised by RBI, when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value." Under the RBI Act, "rupee coin" means rupees which are legal tender in India under the provisions of the Indian Coinage Act, 1906. Section 2(h) of the Foreign Exchange Management Act, 1999 ('FEMA') defines "currency" to include "currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, acts of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the RBI." It also defines foreign currency as any currency which is not Indian currency. Thus, in light of the above ruling, it can be deciphered that crypto currency would not be considered as "money" for the purposes of GST Act. In fact, at Para 6.68 of the judgment, their Lordships refer to the definition under section 2(75) of the Act.

Once virtual currency is not legal tender, could it be termed as

"consideration" is the obvious question that would, in my view, arise. "Consideration" has been defined under section 2(31), inter alia, as any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person. Thus, consideration could be anything other than money as well.

Section 2(52), goods has been defined as "every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply." Section 2(102) defines the term "services" as anything other than goods, money and securities. Thus, once virtual currency is not "money", to fall out of the tax net it has to be either "actionable claim" or "securities". These are not securities. Securities have been defined under section 2(101) as the same defined under section 2(h) of the Securities Contracts (Regulation) Act, 1956. It has been defined to include (i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate; (ia) derivative; (ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes; (ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; (id) units or any other such instrument issued to the investors under any mutual fund scheme; (ii) Government securities; (iia) such other instruments as may be declared by the Central Government to be securities; and (iii) rights or interest in securities.

"Actionable claim" has been defined under section 2(1) of the Act as having the same meaning under section 3 of Transfer of Property Act, 1882. Transfer of Property Act defines "Actionable claim' to mean a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. Based on this definition, it can be understood that: (i) it should be a claim to debt, or (ii) a beneficial interest in moveable property not in the possession, either actual or constructive; (iii) the debt or beneficial interest may be existent, accruing, conditional or contingent. Whether virtual currency would satisfy the said tests? I think not.

In fact, virtual currency has been classified as an "intangible asset" by the OECD[7]. Whether such intangible would be "goods" or "services" leaves to be determined. Here, the principles laid by the Constitution Bench of the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh*[8] would be

relevant. In that case, the Court held that canned software which is sold in packages or CDs or DVDs or USB Drivers will be classified as goods. Though the copyright of the program would remain with the development company, the moment copies are made and marketed; it would be termed as goods. In the same way, can virtual currency be termed as "goods" or not remains to be seen. In any case, it could be classified as supply of "services".

The problem would not rest here. There could be issued relating to point of taxation and valuation. Issues of double taxation and input tax credit could also arise. Hence, it would be advisable, in my opinion, to keep the virtual currencies out of the tax net.

Conclusion

Due to its unregulated nature and easy accessibility to everyone on the internet, people have started transacting and investing in virtual currencies. The major concern regarding virtual currencies is that if left unregulated then it may result in diabatization of the monetary system because of its volatile nature. Other areas of concerns also include fraud, funding of unlawful activities, security and consumer protection.

India rather than banning virtual currencies should evolve with the changing system and provide for and implement a clear, regularly updated guidance and legislative frameworks for the tax treatment of crypto-assets and virtual currencies, which considers consistency with the treatment of other assets and remains abreast of emerging areas; supporting improved compliance, including through the consideration of simplified rules on valuation and on exemption thresholds for small and occasional trades; and aligning the tax treatment of virtual currencies with other policy objectives, including regarding the use of cash and environmental considerations.

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

CA Sanjay Ghiya
CA Ashish Ghiya

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

VIVEK SHASHIKANT AGARWAL V/S M/S. NIRMAN CONSTRUCTIONS & ABHIJEET RAMNATH GUNJAL

The allottee/appellant has filed this complain because he feels dissatisfied with the directions of Ld. Chairperson, MahaRERA, Mumbai dated March 5, 2018 whereby a concession has been extended in favour of the Promoter to hand over possession of the two apartments along with access road before March 31, 2018.

The allottee has entered into two registered agreements dated 25th July 2014 and 20th August 2014 to purchase two flats bearing nos. 601 & 604 with two car parking space. The Agreement inter alia provided to hand over possession within a period of 12 months of the respective Agreements. Audience was given by Ld. Chairperson to the parties and he was more considerate, to accommodate the Promoter, by allowing him to complete the project and hand over possession by March 31, 2018. However, virtually 7 months have passed from the order but the possession to the Allottee is still not given.

If the project is not completed and possession is not handed over the promoter by the date earmarked and agreed upon, law contemplates liability of interest and compensation in terms of Section 18 of RERA. In this case, the Allottee does not wish to withdraw or quit from the project. He wants to continue.

According to the advocate of appellant, the liability against the Promoter is for 38 months for interest @ 10.05% per annum.

In the instant case when the arguments were advanced, it emerged that promoter he lost his father Mr. Ramnath Gunjal on 2nd February, 2017. The submission of present proprietor that it was a mess after death of his father for him to reconcile the documents and keep himself updated to completion of project, needs consideration. The ground realities should not be ignored while adhering to the compliance of Section 18 of RERA for the liability. After considering all the above facts, it was concluded that the appeal is partly allowed. The Promoter shall pay interest for a total past period of 26 months calculated upto 30th October, 2018 and shall also pay future interest at 10.05% till handing over possession of the flats to the Allottees / Appellant by legal compliances of obligation of developing the access road and getting Completion Certificate from competent Planning Authority. The

liabilities of interest shall be cleared by the Promoter within two months from today's order. No costs are allowed.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

UMESH SONI V/S RIDDHI SIDDHI INFRA PROJECTS PVT. LTD.

The complainant has filed the complaint in form 'N' under Section 31 of the RERA Act, 2016. In the given complaint, the complainant has sought relief as he has not yet received possession of the flat which has been delayed by more than three years.

The complainant and the promoter entered into a written agreement on 21.5.2012, wherein obligations of the parties were detailed out. The complainant has paid a total amount of Rs. 26, 74,869. As per agreement, the respondent was to handover possession within thirty six months after the date of release of approved maps by Jaipur Development Authority, i.e., 01.12.2011. According to which the possession should be handover by 01.12.2014.

The respondent has submitted the reply and stated that the project has been registered with Rajasthan RERA and possession has been offered to the owners. Ninety two flat owners have taken possession as on date and got the sale deed executed. There was some delay in completion of the project due to various reasons, such as, height of the building and certain restrictions on construction material imposed by the State Government/ Court. The respondent further said that the agreement was executed on 21.5.2012; therefore the provisions of the RERA Act, 2016 cannot be made applicable as the said Act cannot have a retrospective effect.

The authority opined, the respondent's argument that provision of the RERA Act, 2016 would not be applicable is not tenable as the project is an ongoing project and is registered as such under the RERA Act, 2016. As per Section 18 of the RERA Act, 2016 delay in handing over possession in case of an ongoing project has to be counted from the date of possession as per the agreement executed between the parties. Thus, in the case of an on-going project, the RERA Act, 2016 can be invoked to deal with contraventions of agreement for sale executed prior to the commencement of the Act.

The contentions of the respondent that delay was because of certain restrictions imposed by the State Government/ Court, is also not acceptable as the alleged restriction was not applicable before the scheduled date of completion of the project; and provisions for such contingencies is always provided while fixing timelines for any construction project.

The Authority after considering all the above mentioned facts concluded that it is a case of delay in completion of the project and handing over of possession of the flat. It would, therefore attract the Proviso to Section 18(1) of the RERA Act, 2016. Therefore it is hereby ordered that the respondent shall hand over possession of the flat to complainant and pay or adjust interest on the deposited amount at the

rate of SBI Highest MCLR + 2% i.e., 10.70% from the scheduled date of possession as per agreement upto the date of handing over of possession of the flat within 45 days from the date of this order.

HARYANA REAL ESTATE REGULATORY AUTHORITY

MR. HARDIP SINGH V/S M/S KASHISH DEVELOPERS LIMITED

Allottees have filed this complaint against the promoter under section 31 of the RERA Act, 2016 on account of violation of the clause 3(a) of buyer's agreement executed between them, for not handing over the possession of the plot on the due date.

Complainant submitted that respondent allotted apartment no. A- 2B which is at a very premium location. He further said that he has made the payment of Rs. 43,48,609 and was assured that the apartment shall be handing over on due date as per the agreement.

The unit was to be handed over to the complainant on 01.08.2016 as per the agreement executed between the parties. The complainant was further assured that all the approvals has already been received from concerned department and the relevant allotment paper will be handing over soon. On the inquiries made by the complainant, they came to know that the project was not registered with RERA. The complainant submitted that the respondent has not only cheated him but also cheated all other buyers of project. The respondent has not been providing RERA registration number and even not giving timely possession. Therefore, complainant sought relief directing the respondent to give refund along with the prescribed interest from the date of booking.

The respondent submitted that they have already completed construction upto 11th Floor out of total G+15 floors in tower in which the complainants have booked their unit. Work in the project is progressing fast and the project is scheduled to be handed over by 30th Sep 2019 after getting the OC for Phase-1.

The authority observed that since the project is not registered under RERA, notice under section 59 of RERA, 2016 for violation of section 3(1) be issued to the respondent. As there has been a failure on the part of the respondent, thus the respondent is liable to pay interest on the deposited amount at the prescribed rate for delay in handing over of possession and refund cannot be allowed at the current stage because the project is near completion and it will hamper the interest of other allottee who wish to continue with the project.

After considering all the above facts authority has directed the respondent to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum as per provisions of section 18 (1) of the RERA Act, 2016 till the offer of possession. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month. The respondent

is further directed to adjust the payment of delayed possession charges towards dues from complainant, if any. The authority has decided to take suo- moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of RERA Act, 2016 by the registration branch.

PUNJAB REAL ESTATE REGULATORY AUTHORITY

ARVIND SHARMA V/S M/S COUNTRY COLONIZERS PVT. LTD.

The complainant have filed this complaint alleging violations as per the provisions of the Section 18 of the RERA Act, 2016 seeking interest and compensation on account of delay in handing over possession of the unit.

Upon notice of this complaint, respondents appeared and filed a detailed reply opposing the claim of the complainants on various grounds.

The Punjab State Real Estate Authority, in its 7th meeting held on 09.10.2018 has taken a decision in regard to the role of the Adjudicating Officer in the context of complaint in form M and N. The item No.7.4 is reproduced as under for ready reference:-

"7.4 Role of the Adjudicating Officer in the context of complaint in form 'M' and 'N'. The matter was discussed at length and it was decided that the role of the Adjudicating Officer was limited only to the purpose of adjudication of compensation under Sections 12, 18 and 19 of the Act. Refund of money deposited by a complainant, along with interest thereon, would not be treated as compensation; and hence, complaints in which the above relief was claimed were to be filed in form-M and be dealt with by the Authority or its Benches. The complainants would also be free to file a separate claim in Form-N before the Adjudicating Officer for compensation in Form-M for refund of amount deposited and interest thereon. It was also seen that in a number of cases, the relief of compensation for harassment etc. was claimed in the complaint, but, was not pressed at the time of arguments. Therefore, if the relief of compensation was claimed in addition to the refund of the amount and interest thereon, the complaint would still be filed in Form-M; and if the point of compensation was actually pressed, the complainants would be advised to file a separate complaint before the Adjudicating Officer for this purpose.

The Legal Branch should scrutinize the complaints received in accordance with the above decision."

In view of the above decision of the Authority, the Adjudicating Officer now cannot deal with the cases of the refund and interest and for that purpose the complaint has to be filed in Form-M before the Authority. For compensation only, the party may file complaint in Form-N. Thus, in view of these circumstances, the Adjudicating Officer lacks the jurisdiction to grant relief of refund or interest. Therefore, in the larger interest of justice, the complaint is ordered to be returned to the complainants, who are at liberty to file a fresh complaint before the Authority as per the decision of learned Authority.

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NOTIFICATIONS

GUJARAT REAL ESTATE REGULATORY AUTHORITY

No: GujRERA/Order - 43 Date: 30th September, 2020

Extension of Due Date for Submission of Form-5 for FY 2019-20

As per the provision of section 4(2) (l)(D) of The Real Estate (Regulation and Development) Act, 2016 read with Regulation 4 of the Gujarat Real Estate Regulatory Authority (General) Regulation, 2017, every promoter is required to submit the annual report on statement of accounts in Form-5 within six months after the end of every financial year for every registered project.

Gujarat RERA Authority has made available the online facility of filing of Form-5 by Chartered Accountants on the Guj-RERA portal for promoter of Registered Project. It is pertinent to note that COVID 19 pandemic and country-wide lockdown has halted all activities in the Real Estate Sector. Various other statutory bodies like CBDT have extended their due date for submission of annual compliances. In such circumstances, Gujarat RERA Authority has decided to publish below order after thoughtful consideration.

The last date for the submission of Form 5 for financial year 2019-20 which is due on 30th September 2020, is extended up to 31st December 2020. Promoters and Chartered Accountants are required to comply with the requirement of submission of Form 5 by the revised time period.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

No. F1 (184) RJ/RERA/CMJAY/2020/ 1569 Dated: 13th October, 2020 Sub.: Registration of Projects proposed to be developed under Provision-3C of CMJAY-2015.

Promoters seeking registration of their projects proposed to be developed under Provision-3C of CMJAY-2015 shall have a choice of:-

1. Applying for registration of the whole project as a Group Housing Project, while adding a remark in the online application that some plots [not exceeding 80% under any category (EWS/LIG/MIG-A)] may be sold without constructing houses thereon; or
2. Applying for registration of the project in 2 separate phases, one in Plotted Development Category and the other in Group Housing Category, while submitting a phase plan which clearly demarcates the plots between the two phases and ensures that the plots in Group Housing phase are not less than 20% of the total number of plots under each category (EWS/LIG/MIG-A).

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JUDGMENTS

TRIPURA HIGH COURT

WP(C) No. 465 of 2020

12th January, 2021

Tripura Ispat (A Unit of Lohia Group). A partnership firm having its registered office at B.K. Road, Palace Compound, Agartala, Tripura (West), 799001 and its factory at Bodhjung Nagar, Industrial Growth Centre, Agartala, Tripura (West)-799008 and in the present proceedings represented by its partner, namely, Sri Rahul Lohia, son of Sri Kailash Chandra Lohia, resident of Maitri Kunj, NS Road, PO- Bharalumukh, Guwahati Kamrup, Assam, Pin-781009

.....Petitioner(s)

VERSUS

1. Union of India, represented by the Secretary to the Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi.
2. Commissioner, Central Goods & Service Tax, Agartala, Jackson Gate Building, 3rd Floor, Lenin Sarani, Agartala-799001.
3. Assistant Commissioner, Central Goods & Service Tax, Agartala, Division-I, Jackson Gate Building, 3rd Floor, Lenin Sarani, Agartala- 799001.

.....Respondent(s)

For Petitioner(s) : Dr. A.K. Saraf, Sr. Advocate, Mr. Kousik Roy, Advocate.
For Respondent(s) : Mr. Paramartha Datta, Advocate.

It was held that since there was exemption in payment of basic excise duty, Education and Higher Education cess also would be exempt. The petitioner therefore allowed to claim refund of such duties paid in cash.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

[1] Petitioner has challenged a show-cause notice dated 03.07.2020 issued by the Assistant Commissioner of Central Goods & Service Tax, Agartala, respondent No.3 herein calling upon the petitioner to show-cause why an amount of Rs.53,06,055/- which according to the said respondents was erroneously refunded to the petitioner should not be recovered under Section 11A of the Central Excise Act, 1944 along with interest.

[2] Briefly stated the facts are as under :

Petitioner is a registered partnership firm and is engaged in the manufacture of excisable goods such as M.S. Ingots, HSD Bars, Rods etc. falling under Central Excise Tariff Sub Heading No.72142090 & 72061010. In order to encourage industrial growth in the North Eastern region and for the industrial development of the region the Government of India had formulated industrial policy. After due deliberations the Government of India issued a notification dated 24.12.1997 under which certain areas such as growth centres, infrastructure development centres, export promotion and industrial parks etc. were made tax free zones for a period of 10 years. Pursuant to such notification various circulars were issued giving shape to the said industrial policy granting exemption from payment of excise and additional duty of excise. In subsequent policy decisions taken by the Government of India in the year 2007 also such concessions were continued. Attracted by the tax concessions offered by the Government of India the petitioner established a plant for manufacture of excisable goods such as M.S. Ingots, HSD Bars etc. in the State of Tripura. The commercial production commenced on or around 13th February, 2006. For the goods cleared by the petitioner from its manufacturing unit it claimed exemption under notification dated 25.04.2000 and claimed refund of CENVET duty paid in cash. In the year 2004 the Parliament introduced Education and Higher Education Cess. The petitioner was of the view that since there was exemption in payment of basic excise duty, Education and Higher Education cess also would be exempt. The petitioner therefore claimed refund of such duties paid in cash. However, the departmental authorities refused to refund the same at one stage.

[3] The question of collecting education cess and higher education cess on such goods which were exempt from payment of excise duty, came up for consideration before a two-Judge Bench of the Supreme Court in case of **SRD Nutrients Private Limited versus Commissioner of Central Excise, Guwahati,** reported in **(2018) 1 SCC 105.** In the said decision it was held that the education cess and the higher education cess are in the nature of surcharge and when the primary tax i.e. the basic excise duty itself is exempt such additional levies cannot be collected. The Supreme Court concluded as under :

"27. For the aforesaid reasons, we allow these appeals and hold that the appellants were entitled to refund of education cess and higher education cess which was paid along with excise duty once the excise duty itself was exempted from levy. There shall, however, be no order as to costs."

[4] Based on the said decision of the Supreme Court the petitioner made refund applications before the competent authority. By an order dated 29th May, 2019 the Assistant Commissioner of Central Goods & Service tax, Agartala

passed a detailed speaking order and held that the petitioner was entitled to receive the refund of the education cess and higher education cess collected on the goods cleared from its manufacturing units. Relevant portion of this order reads as under :

"From the above discussion I am in the opinion that the Education Cess and the Secondary & Higher Education Cess bears the same characteristics of their parent levy i.e. the Excise duty and hence the refund of Education Cess and the Secondary & Higher Education Cess along with the Excise Duty will also bear the same characteristics as the Excise Duty. In the present scenario as the Refund of Excise Duty is not barred by unjust enrichment hence the refund of Education Cess and the Secondary & Higher Education Cess along with the Excise Duty will also not barred by unjust enrichment and the refundable amount will also be calculated in line of the calculation of the Excise Duty refund.

I sanction an amount of Rs.35,97,315/- (Rupees thirty five lakh ninety seven thousand three hundred fifteen) as Education Cess and Rs.17,08,740/- (Rupees seventeen lakh eight thousand seven hundred forty) as Secondary & Higher Education Cess of totaling Rs.53,06,055/- (Rupees fifty three lakh six thousand fifty five) for the period from 2005-06 to 2014-15 as arrear refund to M/s Tripura Ispat, Bodhjungnagar Industrial Growth Centre, Bodhjungnagar, P.O. R.K. Nagar, Tripura (West), PIN 799008 as per judgment dated 10.11.2017 of the Hon'ble Supreme Court of India."

[5] The petitioner received the refund as per the said order of the Assistant Commissioner. However, a few months after the Assistant Commissioner passed the said order, the decision of the Supreme Court in case of SRD Nutrients (supra) came up for consideration in three- Judge Bench judgment in case of Unicorn Industries versus Union of India and others reported in (2020) 3 SCC 492. In Unicorn Industries. The Supreme Court held and observed that the decision in case of SRD Industries (supra) was rendered per incuriam. Relevant portion of the judgment of the Supreme Court reads as under :

"50. The decision of the larger Bench is binding on the smaller Bench has been held by this Court in several decisions such as Mahanagar Railway Vendors' Union v. Union of India, State of Maharashtra v Mana Adim Jamat Mandal and State of U.P. v. Ajay Kumar Sharma. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra v. Delhi Subordinate Services Selection Board, Dashrath Rupsingh Rathod v. State of Maharashtra and Central Board of Dawoodi Bohra Community v. State of Maharashtra. It was held that

a smaller Bench could not disagree with the view taken by a larger Bench.

51. Thus, it is clear that before the Division Bench deciding SRD Nutrients (P) Ltd. and Bajaj Auto Ltd., the previous binding decisions of the three-Judge Bench in Modi Rubber Ltd. and Rita Textiles (P) Ltd. were not placed for consideration. Thus, the decision in SRD Nutrients (P) Ltd. and Bajaj Auto Ltd. are clearly per incuriam. The decisions in Modi Rubber Ltd. and Rita Textiles (P) Ltd, are binding on us being of coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.

52. Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs.

[6] Based on the decision of the Supreme Court in case of Unicorn Industries (supra) the Assistant Commissioner issued impugned show cause notice. According to him, the refund of education cess and higher education cess was erroneously granted and therefore in terms of Section 11A of the Central Excise Act the same was liable to be recovered. He, therefore, called upon the petitioner to show cause why such amount should not be recovered with interest.

[7] This show cause notice the petitioner has challenged in the petition raising several legal contentions. As is well settled, ordinarily High Court would not encourage litigation at the very threshold when a competent authority has merely issued a show cause notice and not yet taken a final decision. The noticeee would ordinarily be asked to respond to the show cause notice and allow the competent authority to pass order in accordance with law. However, in the present case the petitioner has questioned the very jurisdiction of the Assistant Commissioner to raise a demand for recovery of the refund already released. No factual aspects are involved. We have, therefore, heard learned counsel for the parties at considerable length for final disposal of the petition.

[8] Appearing for the petitioners learned counsel Dr. Saraf painstakingly took us to the relevant statutory provisions and case law and contended that the Assistant Commissioner had passed the order of refund based on the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*) which held the field at the relevant time. Any subsequent change in law, would not authorize the competent authority to seek recovery of such refund since his original order can neither be stated to be erroneous nor would any such change in law will cloth him with the jurisdiction to seek recovery in terms of Section 11A of the Central Excise Act. Counsel has placed for our consideration several decisions of Supreme Court and various High Courts, some of which are for the purpose

of pressing home the same contention. We would, therefore, refer to select few decisions at the appropriate stage.

[9] On the other hand, learned counsel for the revenue opposed the petition. He submitted that the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*) was disapproved in the subsequent decision in case of ***Unicorn Industries*** (*supra*) in which the three-Judge Bench held and observed that the decision in case of *SRD Nutrients* was per incuriam. The impugned notice has been issued within the period of limitation prescribing Section 11A of the Act. The Assistant Commissioner was thus justified in invoking the correct law as declared by the Supreme Court in subsequent decision. Petition may, therefore, be dismissed.

[10] None of the relevant facts are in dispute. The petitioner having set up a manufacturing unit in the State of Tripura, availed the benefit of duty exemption on the goods cleared from such manufacturing unit pursuant to the Government of India policy to encourage industrial investment and growth in North Eastern region. The petitioner contended that since the basic duty of excise was not payable the additional charge of education cess and higher educationCess also cannot be collected. Based on the decision of the Supreme Court in case of *SRD Nutrients*, the petitioners made refund claims for refund of education and higher education cess. Such refund application was allowed by the Assistant Commissioner. However, soon thereafter in the decision in case of *Unicorn Industries* the Supreme Court held and observed that decision in case of *SRD Nutrients* was rendered per incuriam. Short question is in view of such factual scenario can the Assistant Commissioner seek recovery of refund already granted.

[11] In this context, we may first refer to Section 11A of the Central Excise Act. It pertains to recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Relevant portion of this Section reads as under :

"(1) When any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice".

Provided that where any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub- section shall have effect as if for the words one year, the words" five years" were substituted.

4. Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(d) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty."

[12] Section 11A thus makes a distinction between the cases of duty of excise not having been levied, paid or short levied or short paid or erroneously refunded for the reason of fraud, collusion or any mis- statement or suppression of facts or contravention of the provisions of the Act or the rules with intent to evade payment of duty and in cases where none of these elements is present. Under sub-section 1 of Section 11A when any such duty of excise has not been levied, paid or short levied or short paid or erroneously refunded for reasons other than fraud, collusion etc. the Central Excise Officer would within 2 years from the relevant date serve a notice on the person chargeable to the duty calling upon him to show cause why the amount specified in the notice along with interest not be recovered. Sub-section 1 of Section 11A thus authorizes the Central Excise Officer to recover any duty of excise, besides others, which has been erroneously refunded. It is in this context that the term erroneously refunded assumes significance. Before we refer to certain decisions on the question of erroneously refunded or erroneously ordered, we may briefly state that when the Excise Officer passed the order of refund, he was applying the law laid down by the Supreme Court which by virtue of Article 142 of the Constitution is the law of the land. He had no other choice but to follow the decision of the Supreme Court in case of ***SRD Nutrients*** (*supra*). Any other action on his part would be wholly illegal. His order of refund thus was in consonance with the law declared by the Supreme Court at the time when he was passing the order. In our view any subsequent change in the legal position, would not permit him to invoke the powers under Section 11A of the Central Excise Act. As is well settled, all legal proceedings on the date when they are being decided by any Court, would be governed by the law laid down by the Supreme Court which prevails on such date. As is often

happens, a decision of the Supreme Court is reviewed, reconsidered or overruled by larger Bench. Such subsequent decision would undoubtedly clarify the position in law and such declaration would undisputedly apply to all pending proceedings, the proceedings which are closed in the *meantime*, cannot be reopened on the basis of subsequent declaration of law by the Supreme Court. Any other view would lead to total anarchy. Based on the judgment of the Supreme Court several proceedings would have been decided. If years later such view is reversed, the parties who had not carried the proceedings in higher forum and thus not kept the proceedings alive, cannot trigger a fresh look at the decision already rendered by the competent court on the basis of the previous judgment of the Supreme Court which was correctly applied at the relevant time.

[13] If the department was aggrieved by the refund order passed by the Assistant Commissioner, it was open for the department to file appeal against such order as is provided in Section 35 of the Central Excise Act, 1944. It is well settled that under section 35 even the department can be stated to the person aggrieved against an order that the competent authority may pass. Thus the order of assessing officer is open to challenge at the hands of the department under Central Excise Act unlike in case of Income Tax Act, 1961 where the assessing officer's order of assessment cannot be appealed against by the department and a limited review is available under Section 263 of the Income Tax Act, 1961.

[14] We have briefly touched on this difference in statutory scheme of the Central Excise Act against the Income Tax Act in order to drive home the point that if the department was desirous of pursuing the question of leviability of education and higher education cess when the basic duty of excise was exempt, it ought to have carried the order of refund passed by the Assistant Commissioner in appeal. Only if such appeal was pending or could have been filed within the period of limitation subject to power of condonation of delay, can the department take advantage of the change of law declared by the Supreme Court.

[15] Section 11A of the Central Excise Act does not authorize the Assistant Commissioner to revise or review his own order. In the show cause notice effectively what he proposes to do is revise and recall his own order on the ground that the law that he applied when he passed order of refund, has since been changed. This in our opinion is wholly impermissible.

[16] In this context, we may refer to the decisions of the Supreme Court in case of ***Priya Blue Industries Ltd. versus Commissioner of Customs (Preventive)*** reported in ***(2005) 10 SCC 433*** and ***Collector of Central Excise, Kanpur versus Flock (India) Pvt. Ltd., C-7, Panki Industrial Area, Kanpur*** reported in ***(2000) 6 SCC 650***. In case of ***Flock (India) Pvt. Ltd.***

(*supra*) it was held that by the order of classification of the goods passed by the adjudicating authority though appealable was not challenged by filing appeal and the assessee paid the duty, he could not subsequently challenge the correctness of the order by filing a refund claim on the ground that the said order was erroneous. In case of ***Priya Blue Industries Ltd*** (*supra*) it was observed that an assessment order unless reviewed or modified in appeal stands and in absence of such modification of the order of assessment a claim for refund would not be maintainable.

[17] These are the decisions where under a reverse situation an assessee would seek refund of a duty paid without questioning, challenging or having the order of assessment reversed or modified in appeal. In our opinion the same analogy would apply in the present case also; though to the detriment of the department. We may also refer to the decision of the Supreme Court in case of ***Mafatlal Industries Ltd. and others versus Union of India and others*** reported in ***(1997) 5 SCC 536*** where the nine-Judge Bench of the Supreme Court settled several issues of refund of excise and customs duties. One of the principles settled by the majority judgment was that each party must carry his own assessment in appeal and cannot rely on the order of the higher forum in case of some other assessee to claim refund of the duty collected in his case.

[18] In case of ***State of Haryana versus Free Wheels (India) Ltd.*** reported in ***1997 SCC Online P&H 1849 : (1997) 107 STC 332***, the Division Bench of Punjab and Haryana High Court had observed as under :

> ***"(5) From the perusal of section 40 as reproduced above, it would be apparent that the Commissioner can call for the record of any case pending before or disposed of by any Assessing Authority or appellate authority to satisfy himself as to the legality or propriety of any proceedings or any order and pass such order in relation thereto as he may think fit. The scope of revisional powers is, thus, only to examine legality or propriety of any proceedings or any order. That being the scope of the revision, the only question that, thus, needs determination is as to whether the appellate authority while accepting the appeals preferred by M/s. Free Wheels (India) Limited as on the day when the appeals were decided had committed any illegality or the orders suffered from any impropriety. All that is stated on behalf of the counsel representing the State of Haryana is that the appellate authority had based its decision on the decision of the Tribunal in M/s. Liberty Footwear Co., Karnal, which decision could not be held to be laying down the correct law in view of the later decision rendered by the Tribunal in M/s. Steel Kraft, Panipat. We do not find any merit in the contention of the learned counsel as on the day when the appellate authority decided the appeals preferred by Free Wheels***

(India) Ltd. , the decision rendered by the Tribunal in M/s. Liberty Footwear Co. , held the field. If on a subsequent decision the Tribunal has taken a contrary view it would not make the proceedings that have been finalised far earlier and are based upon an earlier decision of the Tribunal either illegal or improper. If the contention of the learned State counsel is upheld, it would result into endless litigation as all matters finalised earlier on the basis of law then in existence and holding the field would need reconsideration if law changes in succeeding years. All matters that have been finalised shall be then reopened, thus, unsettling the settled matters, in any case, as mentioned above, the order passed by the appellate authority which was based upon the law then holding the field could not possibly be styled as illegal or improper. That apart, the Commissioner by powers vested in him by virtue of section 40 on his own motion can call for the record of any case pending or disposed of by any Assessing Authority or appellate authority other than the Tribunal. The decision of the appellate authority that was set aside by the revisional authority as mentioned above was based upon the decision of the Tribunal, even though, therefore, the revisional authority was not reopening the case decided by the Tribunal, it virtually amounts to upsetting an order that is based upon the decision of the Tribunal."

[19] Learned counsel for the petitioner has also drawn our attention to the decision of the Supreme Court in case of ***Malabar Industrial Co. Ltd. versus Commissioner of Income Tax, Kerala State*** reported in ***(2000) 2 SCC 718*** in which in the context of the term used erroneous in Section 263 of the Income Tax Act, 1961 it was observed as under :

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."

[20] For the reasons stated above, the petition succeeds. The impugned show cause notice dated 03.07.2020 issued by the Assistant Commissioner of Central Goods & Service Tax, Agartala is set aside.

[21] Petition is disposed of accordingly. Pending application(s), if any, also stands disposed of.

(S.G. CHATTOPADHYAY, J) **(AKIL KURESHI, CJ)**

JUDGMENT
GAUHATI HIGH COURT

Case No. : WP(C)/6314/2017

M/S VA TECH WABAG LTD.
"WABAG MOUSE" NO. 17, 200 FEET THORIAPAKKAM, PALLAVARAM MAINROAD, SUNNAMBU KOLATHUR, CHENNAI- 600117, REP. BY SRI ARUN NAIR, THE ADDITIONAL GENERAL MANAGER OF THE PETITTNER COMPANY.

VERSUS

THE STATE OF ASSAM and 2 ORS
REP. BY THE COMMISSIONER AND SECRETRY TO THE GOVT OF ASSAM, FINANCE TAXATION DEPARTMENT, D1SPUR, GUWAHATI-781006.

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner	:Dr. A. Saraf, Senior Advocate Mr. P. Baruah, Advocate
Advocates for respondents	: Mr. B. Choudhury, Standing Counsel Finance (Taxation) Department.
Date of hearing	: 22-06-2020, 14-10-2020, 20.10.2020
Date of judgment	: 20.01.2021

JUDGMENT & ORDER (CAV)

(Soumitra Saikia, J.)

1. Heard Dr. A. Saraf, learned senior counsel assisted by Mr. P. Baruah, learned counsel for the petitioner. Also heard Mr. B. Choudhury, learned Standing counsel, Finance (Taxation) for the respondents.

2. This writ petition has been filed by the petitioner Company assailing the action of the respondent authorities and rejecting the refund applications filed by the petitioner on the ground of delay while filing the refund applications. It is the case of the petitioner that for the assessment year 2006-07 to 2010-11 assessments were completed and different amounts for different assessment years were determined as amounts paid is excess by way of TDS. The petitioner accordingly submitted refund applications to the respondent authorities, receipt of which, however were not acknowledged by the respondent authorities. Subsequently upon enquiry the petitioner company was informed that there was no record of any such applications filed/

submitted by the petitioner company. The petitioner company therefore filed/submitted fresh refund applications. The same were however rejected on the ground that it was submitted beyond limit time prescribed under the AVAT Act 2003 and the Rules made thereunder.

3. For the assessment years 2006-07 to 2010-11, under Assam Value Added Tax Act, 2003 (hereinafter referred to as AVAT ACT, 2003), several amounts were paid by the petitioner Company by way of taxes. Subsequently, it was noticed that for several years there were excess amounts paid into the State Exchequer by way of TDS. The petitioner Company regularly filed its monthly returns showing its monthly turnover as well as annual returns prescribed under the AVAT ACT, 2003 before the concerned jurisdictional assessing authority, namely the respondent No.3 herein. In the annual returns filed, the petitioner company had shown the amount of taxes paid in excess by deposits made through TDS for each assessment year.

4. In respect of the relevant assessment years, the amount of taxes due under the Act and the excess amount paid by way of TDS as stated by the petitioner in paragraph 3 of the writ petition are extracted here under:-

3. That for the Financial years 2007-08 to 2010-11, the petitioner Company has filed its monthly returns showing its monthly turnover as well as the annual returns prescribed under the Assam VAT ACT, 2003 before the jurisdictional assessing authority i.e. the respondent No.3 herein. In the said annual returns file, besides payment of taxes due under the Act, the petitioner company has further shown certain amount of tax paid in excess by way of TDS by the selling dealer for each assessment year. The following are the figures of payment of tax paid by the Petitioner and the amount paid in excess by way of TDS for each assessment year.

Assessment year	Payment of tax due under the Act	Excess amount paid by way of TDS
2006-07	Rs. 17,07,955.00	Rs. 26,64,179.00
2007-08	Rs. 2,07,081.00	Rs. 49,48,973.00
2008-09	Rs. 9,43,761.00	Rs. 30,84,478.00
2009-10	Rs. 6,91,875.00	Rs. 10,36,863.00
2010-11	Rs.24,18,325.00	Rs. 51,95,652.00
Total amount paid	In excess =	Rs. 1,69,30,145.00

5. It is submitted on behalf of the petitioner that in view of the excess amounts paid, the petitioner company filed refund applications in the prescribed Form-37 in terms of Section 50 of the AVAT ACT, 2003 read with Rule 29 of the Assam VAT Rules, 2005. The refund applications were stated to have been duly submitted before the concerned authority. However, the site representative of the petitioner, who had submitted the Refund Applications before the office of respondent no.3, did not forward the acknowledgement copy of the refund applications submitted to the petitioner's office. Thereafter, on 05.11.2015, when the representative of the petitioner visited the office of respondent no.3, he was informed that the refund applications filed were not available in the official records of respondent no.3. Accordingly, fresh applications for refund of taxes paid were submitted again on 05.11.2015 for the assessment years 2006-07 to 2010-11.

6. Thereafter vide the letter No.9538 dated 21.11.2015, the respondent No.3 informed the petitioner that the assessment for the aforesaid assessment years 2006-07 to 2010-11 were completed much earlier whereas the applications seeking refunds were filed only on 05.11.2015 which is beyond the prescribed time limit of 180 days from the date of assessment. The petitioner company was requested to submit proof of submission of the application for refund against the above mentioned periods within the prescribed time limit or otherwise submit reasons for late filing of the refund applications.

7. The petitioner responded to the letter dated 05.11.2015 by explaining the reason for the alleged late submission of the refund applications. The same, however, were allegedly not considered by the respondent No.3 vide order dated 09.12.2016 and the claims for refund were rejected. The rejection was communicated by Communication No. 3589-90 dated 17-12-2016 by the respondent No. 3. Being aggrieved, the present writ petition has been filed assailing the rejection of the refund claim made by the petitioner and praying for setting aside of impugned order dated 09-12-2016 passed by the respondent no. 3 as well as communication no. 3589-90 dated 17-12-2016 issued by respondent no. 3.

8. The Department contested the case by their affidavit filed on 03.09.2020 supporting the rejection order. The respondents in their affidavit contended that the copy of the refund application stated to be submitted by the petitioner is not available in the official record of the Department nor is there any proof that the application was filed before the concerned unit office i.e. respondent no. 3. The respondent department further contended that the assessments for the period mentioned were completed way back in 2012 and their time limit of 180 days for submission of the refund application begins from the date of receipt of the Demand Notice against the assessment made. It is contended that the department after offering the petitioner reasonable opportunity to present its case, rejected the application seeking refund and the said action undertaken by the department was in accordance with the statutory provisions of the Assam Value Added Tax Act, 2003. The respondent further contended that the reasons for non-filing of the application was duly examined and it was found that the whole approach of the petitioner was very casual and without any proper justification. After consideration of the submissions of the petitioner, the petition was rejected for the reason that the same was not submitted within the prescribed time limit as prescribed under the Assam Value Added Tax Act 2003 Read with the Rules.

9. In the backdrop of these facts, the learned Senior counsel for the petitioner submits that in terms of the provisions of Section 50 of the Assam VAT Act, it is provided that on a claim made by the dealer in the prescribed manner and within the prescribed time, the refund of excess tax, penalty or interest paid by the dealer would be refunded. Referring to Rule 29 of the Assam VAT Rules, 2005, the learned senior counsel for the petitioner submits that the application for refund is to be made in Form-37 within 180 days from the date of assessment or reassessment as the case may be. The learned senior counsel submits that even assuming that there was some delay on the part of the dealer in submitting the refund application when sufficient cause have been shown, the respondent No.3 ought to have granted the refund claim as per its application. In that view of the matter, the impugned order rejecting the refund is bad in law and the same should be suitably interfered with and set aside and quashed.

10. Learned Senior counsel for the petitioner submits that when there is no dispute that the petitioner company had made excess payments towards the VAT and the same is reflected in its Return filed and when the Department has also completed the assessments, then refusal to grant refund of amounts legitimately due to the petitioner company, will amount to withholding of revenue due to the petitioner by the Department on the Government which is not sanctioned by Law. The learned Senior counsel submits that in a democratic

society governed by Rule of Law, every Government which claims to be inspired by ethical and moral values must do what fairness demands, regardless of legal technicalities. The Department/Government cannot be permitted to defeat a legitimate claim of the assessee for refund of excess VAT paid by resorting to technicalities. Fairness and Justice demands that such legitimate claim is duly entertained by the Department.

11. Regarding the plea of the bar of limitation raised by the respondent Department, the learned Senior counsel submits that the Apex Court has held that when public bodies under the colour of public laws, recover public moneys, later discovered to be erroneous levies, there is no law of limitation especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs.

12. Learned counsel for the petitioner refers to the following judgments of the Apex Court in support of his contentions:-

(i) (1978) 4 SCC 271 Hindustan Sugar Mills vs State of Rajasthan and Others.
(ii) (19801) 2 SCC 437, M/S Shiv Shankar Dal Mills vs. State of Haryana.
(iii) (1976) 38 SCC 99, Suresh Chnadra Bose vs. State of West Bengal.
(iv) C. Ex. Appeal No. 8/2006, M. K. Jokai Agri Plantation P. Ltd. Vs. Commissioner of Central Excise and Service Tax, Dibrugarh Division.

13. Mr. B. Choudhury, learned standing counsel appearing for the respondent submits that there is no infirmity in the order rejecting the refund claims by the respondent no. 3 by order dated 09-12-2016 and which is impugned in the present proceeding. He relies on the stand of the department reflected by its affidavit filed before this Court. Mr. Choudhury submitted that the Departmental Authorities by following the law prescribed has rightly rejected the application seeking refunds of the petitioner.

14. After perusal of the pleadings on record and upon hearing of the learned counsels for the parties, it is seen that the issue in the present proceeding is only with regard to the correctness of the rejection of the application seeking refund, made by the respondent authorities on the ground that the same was filed beyond the prescribed period of 180 days without sufficient explanation being furnished explaining the delay in filing the application for refund.

15. It would be relevant to refer to the provisions of refund under the AVT Act and Rules namely, under section 50 of the AVAT Act 2003 and Rules 29 of the AVAT Rules 2005. The relevant extract of the Section and the Rules are reproduced below:

"50. *Refund* *: (1) Subject to other provisions of this Act and the rules made hereunder, if it is found on the assessment or reassessment, as the case may be, that a dealer has paid tax, interest or penalty in excess of what is due from him, the Prescribed Authority shall, on the claim being made by the dealer in the prescribed manner and within the prescribed time, refund to such dealer the amount of tax, penalty and interest paid in excess by him: Provided that, such refund shall be made after adjusting the amount of tax or penalty, interest or sum forfeited or ail of them due from, and payable by the dealer on the date of passing of order for such refund.*

(2) Where the amount of input tax credit admissible to a registered dealer for a given period exceeds the tax payable by him for the period, he may, subject to such restrictions and conditions as may be prescribed, seek refund of the excess amount, by making an application in the prescribed form and manner, containing the prescribed particulars and accompanied with the prescribed documents to the Prescribed Authority, or adjust the same provisionally with his future liability to tax in the manner prescribed.

Provided that the amount of tax or penalty, interest or sum forfeited or all of them due from, and payable by the dealer on the date of such adjustment shall first be deducted from such refund before adjustment".

Rule 29. Refund *— (l)(a) The application for refund as referred to in sub-section (1) of section 50 shall be made in Form-37 within one hundred and eighty days from the date of assessment or reassessment, as the case may be:*
Provided that an application for refund made after the said period may be admitted by the Prescribed Authority, if he is satisfied that the dealer had sufficient cause for not making the application within the said period.
(b) An application for refund shall be signed and verified as in the case of application for registration in case of a registered dealer.
(c) The Prescribed Authority may reject, any claim for refund if the claim filed appears to involve any mistake apparent on the record or appears to be incorrect or incomplete, based on any information available on the record, after giving the dealer the opportunity to show cause in writing against such rejection.
(d) When the Prescribed Authority is satisfied that the refund claimed is due he shall record an order sanctioning the refund.
(e) When the amount to be refunded is more than rupees three lakh the Prescribed Authority shall take prior approval of Deputy Commissioner before sanctioning such refund. The Deputy Commissioner shall not approve the refund if the amount to be refunded exceeds rupees ten lakhs but forward such cases to the Commissioner for approval. Where the amount to be refunded is more than fifty lakhs, the Commissioner shall take prior approval of the Government before sanctioning such refund.
(f) When an order for refund is passed refund voucher in Form-38 shall be issued in favour of claimant if he desires payment in cash and advice in Form-39, shall, at the same time be forwarded to the Treasury Officer concerned.
(g) Where any amount refundable under this sub-rule is not refunded to the dealer within the period of ninety days of claim of refund made in accordance with the provisions of clause (a) of this sub-rule, the refund voucher shall include the interest specified under section 52 covering the period following the end of the said period to the day of refund. The authority issuing such order shall simultaneously record an order sanctioning the interest payable, if any, on such refund, specifying therein, the amount of refund, the payment of which was delayed, the period of delay for which such interest is payable and the amount of interest payable by the State Government and shall communicate the same to the Commissioner stating briefly the reasons for the delay in allowing the refund:
Provided that in computing the period of ninety days, the following periods shall be excluded:-

(i) any delay attributable to the conduct of the person to whom the refund is payable; and

(ii) the time during which any reasonable inquiry relating to' the return or claim was initiated and completed and the time taken for adjustment by the refunding authority of any tax, interest and other amount due.

(h) After the refund is sanctioned if the claimant desires to adjust the amount of refund due to him, the Prescribed Authority shall set off the amount to be refunded or any part thereof against the tax, if any, remaining payable by the claimant or against the future dues.

(i) The Prescribed Authority shall enter in a register in Form-40 particulars of all the refunds allowed in pursuance of assessment orders, all applications for refunds and of the order passed thereon".

16. It will also be relevant here to extract the impugned order dated 09-12-2016 passed by the respondent No. 3. For ready reference the impugned order available at Page No.36 as Annexure-V is extracted below:

"XXXXXXXXXX

ORDER

Dealer was asked to furnish reasons for late submission of refund application. Dealer has submitted that they had filed application within time for which they have failed to furnish any proof.

In view of the above submission I have no alternative but to reject the application to the dealer for under delay in filing the refund application. Inform dealer accordingly.

Sd/
Illegible
Act, Unit-A

17. In view of the facts narrated above as pleaded by the contesting parties, let us examine the judgments of the Apex Court as well as by this Court relied upon by the learned Senior counsel. In the case of *Hindustan Sugar Mill vs Sate of Rajasthan (Supra),* the Apex Court has culled out the ratio that even if there is no legal liability of the Central Government towards an assessee, it must be remembered that in a democratic society governed by the Rule of Law, every government which claims to be inspired by ethical and moral values must do what is fair and just to the citizens regardless of the technicalities. The Apex Court held that legitimate claim of the assessee for reimbursement of the sales tax on an amount of fare paid cannot be defeated by a Government by adopting a legalistic attitude rather do what fairness and justice demands. In every civilized state the Apex Court held the motto must be "let right be done."

18. In the case of *M/S Shiv Shankar Dal Mills (supra),* the Apex Court held as under:

"XXXXXXXX

Where public bodies, under colour of public laws, recover people's moneys, later discovered to be erroneous levies, the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy", since the root principle of law married to justice, is ubi jus ibi remedium.

XXXXXXXXXX

2 ..... it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of distributive justice, while moulding the relief, by consenting to restore little sums, taken inlittle transactions, from little persons, to whom they belong.

XXXXXXX

6. Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury.

XXXXXXXXXX"

19. In the case of *C. Ex. Appeal No.8/2006, M. K. Jokai Agri Plantation P. Ltd. Vs. Commissioner of Central Excise and Service Tax, Dibrugarh Division,* a Division Bench of this Court held as under:

"XXXXXXXXXX

The appellant having been once found to be eligible for exemptions and refund of duty paid, denial of benefit of exemptions and refund on the ground of delay, in our

considered opinion, will cause grave injustice which cannot be permitted. Even otherwise, it is well settled law that non-following of procedural requirement cannot deny the substantive benefit, otherwise available to the assessee. Also exemptions made with a beneficient object like growth of Industry in a Region have to be liberally construed and a narrow construction of the Notification which defeats the object cannot be accepted.

XXXXXXXXXX"

20. It is seen that Section 50 of the Assam Value Added Tax, 2003 provides that, if it is found on assessment or reassessment that a dealer has paid tax, interest or penalty in excess of what is due from him, the Prescribed Authority shall, on a claim being made by the dealer in the prescribed manner and within the prescribed time refund to the dealer the amount of tax, penalty and interest paid in excess by him.

21. The Rule 29 of the Assam Value Added Tax Rules 2005 provides that a claim for refund as provided under Section 50(1) of the AVAT Act, 2003 shall be made in Form 37 within 180 (one hundred and eighty days) from the date of assessment or reassessment. The said Rule prescribes the manner in which the Form is to be filled and submitted seeking claim of refund. Provisio to Rule 29(l)(a) of the AVAT Rules gives a latitude to the Prescribed Authority to entertain an application seeking refund submitted even after the prescribed period of 180 (one hundred and eighty days) from the date of assessment or reassessment as the case may be. The Prescribed Authority may consider the refund claim if it is satisfied that the dealer had sufficient cause for not making an application within the said period. What will be sufficient cause has not been described in the statute. The Prescribed Authority is given the liberty to entertain such claims that may be filed even after the expiry of prescribed period of 180 (one hundred and eighty days) from the date of assessment or reassessment on sufficient causes being shown by the dealer. Accordingly, it is implied under the provisions of Section 50 of the AVAT Act 2003 read with Rule 29(1)(a) AVAT Rules 2005 that if cause(s) shown by a dealer are not considered to be sufficient then the Prescribed Authority must reflect and disclose the reasons therefor in the order passed by the Prescribed Authority rejecting any claim for refund made by a dealer, namely the petitioner company in the present proceeding.

22. The Department's Notice dated 21-05-2015 at page 32 of the writ petition called upon the petitioner to submit proof of submission of applications or otherwise submit reasons for late filing of refund applications. The petitioner duly responded to the Notice issued by the Department. A copy of the refund application of 2006-07 originally submitted was also stated to have been enclosed with the reply submitted. However, as discussed above the department vide the impugned order dated 09-12-2016 rejected the claims of refunds sought by the petitioner. It is evident from the recital of the impugned order that the question of the delay which occurred in filing the refund petition, whether ought to be condoned or not, was not adequately addressed to by the respondent No.3. There was also no reference to the application seeking refund and/or the relevant orders of assessment which indicates the refund available/payable to the petitioner. There was no reference in the impugned order, regarding any enquiry etc. made by the Departmental Officer to have arrived at a finding that the applications were not filed, which the petitioner on the contrary had claimed it had filed within the relevant time although no acknowledgement was received. That fact whether verified by the respondent authorities from the records before arriving at the conclusion as has been done by the impugned order, is not discernabfe from the impugned order.

23. This exercise of the respondent authorities although not reflected in the recital of the impugned order, the same is now sought to be supported by way of an affidavit filed on

03.09.2020 in respect of the impugned order which was passed on 09-12-2016. It is also stated in paragraph 4 of the affidavit filed by the Department before this court that the petitioner failed to submit any reasonable, logical and substantive reasons for not filing application within the prescribed time. Such explanation in a subsequent affidavit pursuant to the impugned order passed will amount to permitting the Department to expand the scope of an order passed by the Departmental Officer exercising quasi-judicial jurisdiction and which is not permissible under the statute. It has long been held that orders passed by administrative or quasi judicial authorities are required to stand or fall on its own. Subsequent explanations by way of affidavit(s) cannot be permitted in order to improve an order already passed by the Departmental Officer. The principle enunciated in the Judgment of the Apex Court in the case of *Mohinder Singh Gill,* reported in *(1978) 1 SCC 405* is still a good law. Relevant paragraph of the Judgment is extracted below:

"XXXXXXXXXXX

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in ***Gordhandas Bhanji*** *AIR 1952 SC 16.*

Public orders, publicly made, in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming between s they grow older.

XXXXXXXX

24. In view of all the above discussions, the writ petition is allowed. The impugned order dated 09.12.2016 and Communication No. 3589-90 dated 17-12-2016 is interfered with and is accordingly set aside and quashed.

25. The matter is remanded back to the respondent authorities to re-decide on the question of grant of refund as prayed for by the writ petitioner, keeping in view the law laid down by the Apex Court.

26. Writ petition is allowed to the extent indicated above. No order as to costs.

JUDGE

COMMERCIAL NEWS

CA DEEPAK KHANDELWAL

FM Nirmala Sitharaman launches 'Union Budget Mobile App' at halwa ceremony

1. 'Halwa Ceremony'

The Halwa ceremony, marking the final stage of the Budget making process, was held in North Block on Saturday afternoon in the presence of Union Finance and Corporate Affairs Minister Nirmala Sitharaman.

2. When will the Union Budget be presented?

The Union Budget 2021-22 is to be presented on February 1. The Halwa is prepared in a large utensil in the presence of Finance Ministry officials, including ministers, and sharing the sweet dish is considered auspicious before starting any good work. Due to the Covid-19 pandemic, there was question mark over the ceremony this year.

3. App launched for Union Budget!

On the occasion, the Finance Ministry also launched the 'Union Budget Mobile App' for hassle-free access to Budget documents by the MPs and the general public using the simplest form of digital convenience.

4. What does the app do?

The app facilitates complete access to 14 Union Budget documents, including the Annual Financial Statement (commonly known as Budget), Demand for Grants (DG), Finance Bill etc. as prescribed by the Constitution. The Budget documents will be available on the app after the completion of the Budget speech by the Finance Minister on February 1.

5. Team for Budget 2021

At the Halwa ceremony, Sitharaman was accompanied by Union Minister of State for Finance & Corporate Affairs Anurag Singh Thakur; A.B. Pandey, Finance Secretary & Secretary (Revenue); T.V. Somanathan, Secretary, Expenditure; Tarun Bajaj, Secretary, Economic Affairs; Tuhin Kanta Pandey, Secretary, DIPAM; Debashish Panda, Secretary, Financial Services; K.V. Subramanian, Chief

Economic Advisor; Rajat Kumar Mishra, Additional Secretary (Budget) and other officials of the Finance Ministry.Later, Sitharaman reviewed the status of the compilation of the Union Budget 2021-22 and extended her best wishes to the officials concerned.

Source: economictimes.com 23rd January 2021

Auto-population of e-invoice details into GSTR-1

1. From 1-10-2020, certain notified taxpayers have been issuing invoices after obtaining Invoice Reference Number (IRN) from Invoice Registration Portal (IRP) (commonly referred as 'einvoices').

From 1-1-2021, the taxpayers with aggregate turnover above Rs. 100 Cr. had also started reporting invoices to IRP. Details from the reported e-invoices are being auto-populated in respective tables of GSTR-1. Update on the same was last published on 30/12/2020. A detailed advisory regarding methodology of auto-population of e-invoice details into GSTR-1 is already published on GSTR-1 dashboard. You can read the same HERE.

2. It is observed that, while pulling the e-invoice data for the month of December, 2020 into GSTR-1, details of some invoices were not populated into GSTR-1.

This inadvertent gap is being rectified on priority and details of those invoices will be pushed to GSTR-1 shortly. However, taxpayers should not wait for the same and advised to proceed with preparation and filing of GSTR-1 for the month of December, 2020 (before the due date), based on actual data as per their records.

3. As already noted in the afore-mentioned advisory, the taxpayers may modify/ delete only those documents where the details auto-populated from e invoices are not as per the actual documents issued. Otherwise, the details of e-invoices auto-populated in GSTR-1 can be edited/deleted by the taxpayer.

However, in such cases, the 'Source', 'IRN' and 'IRN date' fields will be reset to blank in respective tables of GSTR-1 and accordingly won't get reflected in GSTR-2A/2B/4A/6A also. Such edited documents will be treated as if they were not auto-populated but uploaded separately by taxpayer.

4. Other than the details auto-populated from e-invoices, taxpayers are required to add details of any other supplies made, in respective tables of GSTR-1.

5. An additional facility of consolidated excel download of all documents auto-populated from e-invoices is available in GSTR-1 dashboard. This file includes details of cancelled documents also.

However, any subsequent modifications made to the auto-populated documents (in GSTR-1 tables) would not be reflected in this excel file.

Date: 11/01/2021 Source: GST.gov.in

National Informatics Centre
e-way bill Project
Generation of E-way Bills by Transporters for e-invoices

e-Invoice is launched on 1st Oct 2020 successfully for the tax payers having annual turnover more than Rs. 500 Crores. More than 33000 tax payers have accessed this system and generated more than 1250 Lakhs of IRN from the NIC portal, as on date. On average, 18 Lakh IRNs are generated daily. The NIC system is geared up to take the load of the tax payers, with annual turnover more than Rs 100 Crores, to generate the IRNs from 01.01.2021, as notified by government.

The system has also been enabled for the tax payer to generate the e-way bill along with IRN or after generation of IRN. There are two APIs for this purpose. There is also provision to generate E-way Bill or 'Part-A Slip'. The 'Part-A Slip' will enable the supplier to assign the e-invoice to the transporter. In turn using this, the transporter will enter the Part-B and generate the regular E-way Bill.

As per the requirements, the transporter can be enabled to generate the E-Way Bill by the supplier by following ways.

i. While preparing the invoice, if the supplier is aware about the Part-B details, he can pass the invoice details along with the transportation (Part-B) and transporter Id details as per the e-way bill requirements and get the IRN generated along with the E-way Bill as well. This Eway Bill can be passed onto the transporter for movement of goods and further updating Part-B, if required.

ii. While preparing the invoice, if the supplier is not aware about the PartB details and knows the transporter, then he can pass the invoice details along with the transporter Id as per the e-way bill requirements and get the IRN generated along with the 'Part-A Slip'. This 'Part-A Slip' number can be passed onto the transporter so that he can enter the transportation details as per the requirement and generate the E-Way Bill and move the goods. He will also be enabled to carry out the other activities of the e-way bill, if required.

iii. While preparing the invoice, if the supplier is not aware about the PartB details and the transporter, then he can pass the invoice details and get the IRN generated. Afterwards, once the transportation or transporter details available, the supplier can generate E-way Bill or 'Part-A Slip' accordingly, using 'Generate EWB by IRN' API and pass it to the transporter for further updation, if required and start movement of goods.

It may be noted that Once the E-way Bill number is available for e-invoice, the transporter can do all the activities of the e-way bill like update Part-B, update transporter, extension, etc. on the e-way bill portal as usual.

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