AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

ETHICS EDUCATION EXCELLENCE

Volume-2 | Part-1 | February-2021

All India Federation of Tax Practitioners
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NATIONAL EXECUTIVE MEMBERS

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CHIEF-EDITOR'S COMMUNIQUE

Dear All,

The Union Budget -2021 was full of surprises particularly for amendments in the Indirect Tax Laws. In the Budget speech there was no mentioned about any major changes in the GST Act and in Customs Act etc. but going through the Finance Bill- 2021 we found that massive changes has been made. The major change include the amendment which requires that all Associations, Clubs etc. are liable to tax under GST and for Registration and retrospective amendment in Section 7 has been made making all the Associations, Clubs etc. liable under GST. Other amendments include the amendment in Section 16 of the CGST Act. The major amendment was regarding the omission of the Audit under GST by the Professionals by omitting section 35(5) of the CGST Act and providing that self certified reconciliation can be submitted by the dealer. The amendment relating to interest allowing liability of interest on net basis w.e.f. 1st July, 2017 is a welcome amendment. The transit penalty section under GST has been changed and now section 129 of GST is an independent section dealing with penalty only and the reference to other sections like 73, 74 for tax or 134 confiscation has been deleted. Appeal for transit penalties under section 129 will also require pre deposit of 25% and no Provisionals release of goods will be allowed are the major changes. Vast power has been given for collection or asking for information to the Commissioner and the effect of a very small amendment in the Central Sales Tax Act, 1956 by amending section 8(3)(b) has a far reaching effect on the use of the C Forms as now the use of C Form has been deleted for telecommunication network or mining or generation or distribution of electricity or any other form of power. Amendments has also been made in the IGST Act where the refund restriction has been put for export with levy of IGST.

The Journal contains the article on the relevant subject and also on certain important issues which will be useful for all the Professionals. In this part we are sending you a paper asking for your comments and suggestions so that we may incorporate the same to make this Journal more useful.

Friends, I am deeply obliged to the sponsors of this issue Dr.Ashok Saraf who has very kindly agreed to sponsors this issue without his name. I may also add that this journal has been conceptualized by him and it was only his insistence that this journal has seen the light of the day.

We look forward to your continued support and suggestions.

Regards,

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Northern	0	1348	18	2	**1368**
Southern	1	1572	21	5	**1599**
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President's Message

It gives me immense pleasure as declared in 1st NEC about the restarting of AIFTP Indirect Tax & Corporate Laws Journal has been launched in the month of January, 2021 and was posted in hard copy to members, who have opted for the same through our website i.e. www.aiftponline.org. We are also sending this Journal in Soft Copy to all the Members.

I may state that due to consistent demand of GST Professionals for a separate Journal, this was brought back and within a short period, we came out with 1st issue of the said Journal and in this month, the same will cover more articles and updates on Indirect Taxes.

As you know, AIFTP is an organisation which is working continuously for Educational purpose to its members by organising Seminars and Conference. Recently, AIFTP (WZ) in association with local associations, hold a Virtual National Tax Conference on 17th & 18th February, 2021 on Zoom Platform. The said conference was inaugurated by Hon'ble Justice Shri P. P. Bhatt, President, Income Tax Appellate Tribunal and was well attended by the members.

Our next and first Physical National Tax Conference is scheduled to be held in Puri on 10th & 11th April, 2021 and will be hosted by Eastern Zone and due arrangements are being made to obtain the blessings of Lord Jaganath.

Due to long period of Pandemic situation last year, we have decided in the NEC, that the Membership Fee structure should be kept as per last year for the period of six month upto 30th June, 2021 i.e. Rs. 2,500/- plus taxes. Hence, 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 enrol at least one member so that we have a better strength in our life membership.

As this Journal is in the restarting phase and it requires suggestions and contribution. Hence, we request the readers to send their suggestions and also if possible, publishing materials like Articles, Updates and Judgements.

I am thankful to our Past President Dr. Ashok Saraf for sponsoring this February, 2021 issue of AIFTP Indirect Taxes & Corporate Laws Journal.

Place: Eluru
Dated:18/02/2021

M. Srinivasa Rao,
National President (AIFTP)

TIMELINE - GST

Adv. Abhay Singla

GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		February, 2021	20th March 2021
			March, 2021	20th April 2021
(ii)	Detail of Outward Supplies: -	IFF (OPTIONAL)		
	(a) QRMP		February, 2021	13th March 2021
	(b) Monthly Filing	GSTR-1	February, 2021	11th March 2021
			March, 2021	11th April 2021
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	Jan to March 2021	18th April 2021
(v)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(vi)	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.	
(vii)	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.	
(viii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	February, 2021	10th March 2021
			March, 2021	10th April 2021
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	February, 2021	10th March 2021
			March, 2021	10th April 2021
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2019-2020	28th Feb 2021

GST EXEMPTION ON SERVICES PROVIDED TO GOVERNMENT– AN ANALYSIS

CA S Venkataramani

CA Siddeshwar Yelamali

I. Background

Generally, it is perceived that a public sector undertaking or an undertaking which has an involvement / investment by the Central Government, State Government, local authority would fall within the meaning of Government and services provided to such undertaking would be exempt under Goods and Services Tax Law. Caution needs to exercised, since every public sector undertaking would not be covered within the exemption notification. Critical examination of the meaning Central Government, State Government, Government Authority, Government Entity, Local Authority is required to determine the applicability of exemption on services provided to Government. In this article an attempt has been made to discuss the exemption related to 'supply to Government' under the Central Goods and Services Tax Act, 2017 (for brevity, 'CGST Act, 2017').

II. Meaning of certain phrases

a. **Central Government:** Central Government has not been defined in the GST law nor in the Constitution of India. Therefore, the meaning provided in the General Clause Act, 1897 will have to be considered.

Section 3 (8) of General Clauses Act, 1897 - Central Government shall,-

(a) in relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor General in Council, as the case may be; and shall include, —

(i) in relation to functions entrusted under sub-section (1) of Section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioner's Province,

the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of Section 94 of the said Act;

(b) in relation to anything done or to be done ***after the commencement of the Constitution***, ***mean the President***; and shall include, —

(i) in relation to functions entrusted under clause (1) of article 258 of the Constitution to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;

(ii) in relation to the administration of a Part C State before the commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be; and

(iii) in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution;

b. **State Government:** State Government has not been defined in the GST law nor in the Constitution of India. Therefore, the meaning provided in the General Clause Act, 1897 will have to be considered.

Section 3 (60) of General Clauses Act, 1897 - State Government, —

(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorised at the relevant date to exercise executive Government in the corresponding Acceding State, and in a Part C State, the Central Government;

(b) as respects anything done ***after the commencement of the Constitution*** and before the commencement of the Constitution (Seventh Amendment) Act, 1956, ***shall mean***, ***in a Part A State, the Governor, in a Part B State, the Rajpramukh, and in a Part C State, the Central Government***;

(c) as respects anything done or to be done ***after the commencement***

of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union territory, the Central Government; and shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article.

c. **Governmental Authority**(Clause (zf) – definition to Notification 12/2017 dated 28.06.2017 CT(R)) - means an authority or a board or any other body, -

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by any Government,

with 90per cent. or more participation by way of equity or control, to carry out any function entrusted to a Municipality under article 243W of the Constitution or to a Panchayat under article 243G of the Constitution.

d. **Government Entity**(Clause (zfa) – definition to Notification 12/2017 CT(R) dated 28.06.2017) means an authority or a board or any other body including a society, trust, corporation,

(i) set up by an Act of Parliament or State Legislature; or

(ii) established by any Government,

with 90per cent. or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority.

e. **Local Authority** (Section 2(69) of the CGST Act, 2017) means

(a) a "Panchayat" as defined in clause (d) of article 243 of the Constitution;

(b) a "Municipality" as defined in clause (e) of article 243P of the Constitution;

(c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;

(d) a Cantonment Board as defined in section 3 of the Cantonments Act,

2006 (41 of 2006);

(e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;

(f) a Development Board constituted under article 371 and article 371J of the Constitution; or

(g) a Regional Council constituted under article 371A of the Constitution;

III. Analysis

1. The first step is to analyse whether the service/s provided to a person falls within the meaning of Central Government, State Government, Union Territory, Local Authority, Governmental Authority or Government Entity as described in Paragraph II supra.

Though the meaning of Governmental Authority and Government Entity appear similar, one important aspect to notice for difference between Governmental Authority and Government Entity is as under:

- Governmental Authority, the authority or a board or any other body should *carry out any function entrusted to a Municipality under article 243W of the Constitution or to a Panchayat under article 243G of the Constitution*

- Government Entity, authority or a board or any other body including a society, trust, corporations should *carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority*.

Therefore, not every public sector undertaking which has a Central Government / State Government / Local Authority 'investment or control' will tantamount to Government Authority or Government Entity. One needs to take utmost caution on this aspect.

2. A question may arise as to whether one can fall back on the following judgements for the meaning of Central Government / State Government / Government Authority / Government Entity where the public sector investment has investments or control by Central Government / State Government / Government Authority / Government Entity:

a. **Ajay Hasia and others vs Khalid Mujib Sehravadi and Others**

(1981) 1 SCC 722- the Hon'ble Supreme Court held that the Society registered under J&K Registration of Societies Act, 1898 and running a Regional Engineering College is 'State' for the limited purposes of Parts III and IV and bound by the mandates thereof only.

b. **Ramana Dayaram Shetty vs International Airport Authority of India and others – (1973) 3 SCC489**– the Hon'ble Supreme Court held that International Airport Authority is an instrumentality or agency of the Central Government and falls within the definition of 'State' in Article 12.

In this context it be important to note the of judgement of **Dilip Kumar and Company &Ors. 2018 (7) TMI 1826 - Supreme Courtof India**, wherein the Hon'ble 5-Judge Constitution Bench of Supreme Court held the following:

"***Exemption notification should be interpreted strictly***; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

The next authority, which needs to be referred is the case in Mangalore Chemicals (supra). As we have already made reference to the same earlier, repetition of the same is not necessary. From the above decisions, the following position of law would, therefore, clear.

Exemptions from taxation have tendency to increase the burden on the other unexempted class of tax payers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity.

When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue."

The paper writers view is that the Courts will interpret the exemption provided in a strict manner and therefore, the meaning of Central Government / State Government / Government Authority / Government Entity will have to be analysed carefully.

3. The following services are exempt when provided to Central Government or State Government or Union territory or local authority or a Governmental authority or a Government Entity as the case maybe vide Notification No. 12// 2017 Central Tax (Rate) dated 28.06.2017:

a. Pure services (***excluding*** works contract service or other composite supplies involving supply of any goods) ***provided to*** the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

In this entry only pure servicesprovided (***excluding*** works contract service or other composite supplies involving supply of any goods)are exempt. To illustrate, pure service maybe manpower supply service, consulting engineering service etc.

(Entry No. 3 of the said Notification)

Functions covered under article 243G and article 243W of the Constitution is provided in Annexure 1 and 2 respectively.

b. Composite supply of goods and servicesin which the value of supply of goods constitutes not more than 25 per cent. of the value of the said composite supplyprovided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

(Entry No. 3A of the said Notification)

c. Services ***provided to*** the Central Government, by way of transport of passengers with or without accompanied belongings, by air, embarking from or terminating at a regional connectivity scheme airport, against consideration in the form of viability gap funding.

This exemption will be available for a period of 3 years from the date of

commencement of operations of the regional connectivity scheme airport as notified by the Ministry of Civil Aviation.

(Entry No. 16 of the said Notification)

d. Services ***provided to*** the Central Government, State Government, Union territory under any insurance scheme for which total premium is paid by the Central Government, State Government, Union territory.

(Entry No. 40 of the said Notification)

e. Services ***provided to*** the Central Government, State Government, Union territory administration under any training programme for which total expenditure is borne by the Central Government, State Government, Union territory administration.

(Entry No. 72 of the said Notification)

Annexure 1 - Function entrusted to a Panchayat under article 243G of the Constitution

a. The preparation of plans for economic development and social justice

b. The implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule. Matter listed in Eleventh Schedule are as under:

1. Agriculture, including agricultural extension.	2. Land improvement, implementation of land reforms, land consolidation and soil conservation
3. Minor irrigation, water management and watershed development	4. Animal husbandry, dairying and poultry
5. Fisheries	6. Social forestry and farm forestry
7. Minor forest produce	8. Small scale industries, including food processing industries
9. Khadi, village and cottage industries	10. Rural housing
11. Drinking water	12. Fuel and fodder
13. Roads, culverts, bridges, ferries, waterways and other means of communication	14. Rural electrification, including distribution of electricity
15. Non-conventional energy sources	16. Poverty alleviation programme

17. Education, including primary and secondary schools	18. Technical training and vocational education
19. Adult and non-formal education	20. Libraries
21. Cultural activities	22. Markets and fairs
23. Health and sanitation, including hospitals, primary health centres and dispensaries	24. Family welfare
25. Women and child development	26. Social welfare, including welfare of the handicapped and mentally retarded
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes	28. Public distribution system
29. Maintenance of community assets	

Annexure 2 - Function entrusted to a Municipality under article 243W of the Constitution

a. The preparation of plans for economic development and social justice

b. The performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule. Matter listed in Twelfth Schedule are as under:

1. Urban planning including town planning	2. Regulation of land-use and construction of buildings
3. Planning for economic and social development	4. Roads and bridges
5. Water supply for domestic, industrial and commercial purposes	6. Public health, sanitation conservancy and solid waste management
7. Fire services	8. Urban forestry, protection of the environment and promotion of ecological aspects
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded	10. Slum improvement and upgradation
11. Urban poverty alleviation	12. Provision of urban amenities and facilities such as parks, gardens, playgrounds

13. Promotion of cultural, educational and aesthetic aspects	14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums
15. Cattle pounds; prevention of cruelty to animals	16. Vital statistics including registration of births and deaths
17. Public amenities including street lighting, parking lots, bus stops and public conveniences	18. Regulation of slaughter houses and tanneries

Conclusion

Not all public sector entities would fall within the gambit of Central Government / State Government / Government Authority / Government Entity. Each case will have to be analysed in isolation to determine whether the entity to which service provided falls within the meaning of Central Government / State Government / Government Authority / Government Entity and further whether the services provided is specifically covered in the exemption notification.

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 05.02.2021. The authors can be reached on venkat@venkataramani.in and siddeshwar@sduca.com.

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SOME IMPORTANT ADVANCE RULINGS UNDER GST

By: CA Manoj Nahata

1. Whether the landlord is liable to pay GST on electricity or incidental charges recovered in addition to rent as per Lease Agreement for immovable property rented to the tenant? Can electricity charged paid by landlord to Power Company for bill in its name and recovered subsequently from different tenants based on sub meters be considered as 'pure agent' recovery?

Held: Yes, it is pure agent recovery

In case of ***M/s Gujarat Narmada Valley Fertilizers & Chemicals Ltd - AAR Gujrat,*** the applicant has rented its premises to Commissioner of Central Excise, Audit-I, Ahmedabad to provide along with the building for a rent the interior infrastructure like partitions, cabins, work stations, electrical air conditioners, fire safety systems, tables, chairs etc. at agreed monthly rent as per agreement dated 01.12.2015. However, CGST department has stopped paying GST component on electricity and incidental charges from 1-7-2017 under the pretext that GST is not applicable in terms of Rule 33 of the CGST Rules, 2017 on such electricity charges even though such charges are clearly incidental expenses in respect of supply of service of renting or immovable property. However the applicant is charging GST on proportionate electricity charges recovered as a part of total consideration for renting of immovable property and recovering the same from other tenants and is also paying GST to respective governments.

The applicant submitted that in terms of provision of Section 15(1) of the CGST Act, 2017, the value of supply shall be the transaction value, which is the price actually paid or payable for the said supply. Further, in terms of provisions of Section 15(2), the value of supply shall include incidental expenses charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of supply of goods or services. Further the same cannot be considered as 'pure agent' inasmuch as the electric bill is raised only in the name of the applicant but not in the name of the tenants. It thus cannot be

considered as amount recovered as pure agent of the tenant as the legal liability to pay electricity bill to Power Company is that of landlord.

The authority after examining the lease agreement and document submitted by the applicant held that it cannot be said that the electricity charges would be covered by Sec. 15(2)(c) of the CGST Act, 2017 for the sole reason that the rate for renting of premises has been fixed at an amount and the electricity charges are to be borne by the lessee as per the actual usage of electric power by them in terms of the agreement. Accordingly, the said amount would not be includible in the value of supply.

Further the lessee was supposed to pay the electricity charges directly to the electric company as per the actual usage in terms of the agreement. However, for the failure of the lessor to obtain a separate electric meter for the premises rented to the lessee, they have mutually agreed to collect the electric charges on the basis of actual usage based on the sub-meters and onward payment to the electric company. Thus, it is purely a reimbursable expense made by the lessee which is collected on actual usage of the electric power. Secondly, if at all the amount was not be charged on actual usage basis, it would have been all the easier for both the parties to fix a certain amount towards electricity charges in the agreement itself. However, this has not been done which clarifies the intent of both the parties that the charges towards electric power usage would be on actual basis. Since this arrangement has been on-going since such a long time, it can be clearly said that there is a mutual understanding between both the parties and such mutual understanding is also an called an 'agreement' in terms of the provisions of the Indian Contract Act, 1852. Thus, the conditions of Rule 33 of the CGST Rules, 2017 also stand satisfied in the instant case and as such it is concluded that the electricity expenses incurred by the applicant on behalf of the lessee have been incurred in the capacity of a pure agent.

Author's Comment: There are several other rulings issued by different states authorities on this subject matter having contrary views. So this ruling will again open a debate amongst professionals whether Electricity recovery is a 'composite supply' or 'pure agent' recovery.

2. Whether input Tax credit of GST in respect of inputs/capital goods

used or intended to be used or inward supply of goods and services used or consumed for creation of covered logistics facility space (warehouse) to be rented out for storage purposes to be eligible for Input tax credit under the provisions of section 16 and 17 of the CGST Act, 2017?

Held: No

In case of ***M/s Dhingra Trucking (P.) Ltd - AAR Haryana*****,** the applicant is a registered taxable person, engaged in the construction of logistic facility. The applicant has entered into an agreement with an auto manufacturer company wherein it has agreed to leasing of logistic space for commercial use. It has also agreed to provide electricity backup, loading and unloading ramps, and services such as service lift and electric equipment along with their maintenance. The question being asked is whether the applicant is entitled to claim input tax paid on the inward supply of capital goods as well as other goods and services.

The applicant contended that bar of credit of input tax credit under section 17(5)(d) is applicable only when the immovable property is constructed "on his own account" and this term "on his own account" means the taxable person on whose account the said immovable property is constructed. So the bar provided u/s 17(5)(d) is not applicable in their case since the construction of immovable property is for letting out. The applicant also relied upon the judgment of Hon'ble Odisha High Court in case of **M/s Safari Retreats Private Limited Vs. Chief Commissioner of Central Goods and Service Tax**.

The authority examined the matter in the light of provisions of section 2(62) , 2(63) , 16(1) & 17(5) (d) along with entry serial number 5(b) to the Schedule II to the CGST Act,2017 and found that the dictionary meaning of the term "own his own account" means "for one's own purpose or for oneself" or "unaided". In this case the applicant is engaged in the business of providing logistic services including warehouses. The warehouses are constructed for the applicant's own business purpose i.e. letting out. So the contention of the applicant that the bar provided u/s 17(5) (d) is not applicable to it is rejected. Further the Hon'ble Odisha High Court in its judgment had specifically mentioned that "we are not inclined to hold it to be ultra vire". Since, the provision contained under section 17(5) (d) of the CGST Act has not been struck down by the High Court, the

applicant cannot be allowed the claim of input tax credit.

Author's Comment: Safari Retreat's case is challenged in Supreme Court and pending for disposal. So once the Hon'ble SC decides this case then only we can expect finality on the matter.

3. Whether services provided by the assessee to negotiate between buyers and foreign sellers as a facilitator for supply of goods are intermediary services u/s 2(13) of the IGST Act and liable for CGST and SGST @ 18%?

Held: Yes

In case of ***M/s Dharmshil Agencies-AAR Gujrat*** the applicant has entered into an agreement with Tsudokoma Corporation, Japan to sell their machinery and against the said services, they were receiving commission income from Japan in foreign currency. They were paying IGST @18% upto 31.03.2018 considering the transaction as Export of Services. Thereafter they faced some problems in getting refund and upon further enquiry with GST Cell they were advised to charge IGST @18% as an intermediary service. The applicant thus moved petition to AAR for seeking clarification whether they will charge IGST @18% as an export of service or CGST and CGST @9%+9% as an intermediary service.

Based on the submission of the applicant as well as the arguments and discussions made by the representative of the applicant during the course of personal hearing, it appears that the services provided by the applicant are in the nature of services of commission agents or commodity brokers who negotiate between buyers and sellers as a facilitator for the supply of goods for which they are paid a fee or commission. The said service can also be called as 'intermediary services' u/s 2(13) of the IGST Act,2017. The authority further find that that sub-section (2) of Section 13 of IGST Act, 2017 specifically provides that the place of supply of services except the services provided in sub-sections (3) to (13) shall be the location of the recipient of services provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services. In the instant case, the supplier of service is the applicant and the service recipient is

M/s. Tsudokoma Corporation, Japan. Thus the services provided by the applicant i.e. 'intermediary services' appears at Sub-Section (8)(b) of Section 13. Also, sub-section (8) clearly mentions that the place of supply in respect of the services described under the said sub-section shall be the location of the supplier of services. Further, the supplier in the instant case is the applicant and the location of the said supplier is in Ahmedabad, Gujarat. Now, since the location of the applicant, who is supplier of services, is in Gujarat and both the supplier of service as well as the place of supply of service is in Gujarat, the supply of services would be considered akin to intra-state supply of services and would be liable to CGST and SGST (as per the provisions of Section 9(1) of the CGST Act, 2017). Therefore, the present procedure/course of GST payment followed by the applicant i.e. payment of CGST and SGST on the services provided by them, is correct. Further, the applicant would be liable to pay GST at the rate of 18% (9% CGST + 9% SGST) in terms of the provisions of Notification No: 11/2017-Central Tax (Rate) dated 28-6-2017 specific sub-heading No. 996111 (Sr.No.67)) of the Annexure to the Notification.

4. Whether the property tax paid by the Appellant to the Municipal Authority can be deducted from the monthly rental income received? Whether notional interest on the security deposit should be taken into consideration for determining the total income from rental service?

Held: No

In case of ***M/s Midcon Polymers (P.) Ltd-AAAR, Karnataka*****,** the appellant is engaged in the business of renting of commercial property. They intended to enter into contractual agreements with prospective tenants wherein the premise is rented out for monthly rent. The appellant also collects a caution deposit/security deposit from the prospective tenant which is refundable without interest at the time of termination of the rental agreement. In addition, the appellant pays the property tax on the said property to the Municipal authority i.e. BBMP which is a statutory levy by the said authority.

The appellant also approached to AAR with the above questions which held that the appellant cannot deduct the property taxes and other statutory levies for the purpose of arriving at the rental income. Further the notional interest on

the security deposit shall be taken into consideration for the purpose of arriving at total income from rental, only if it influences the value of supply of monthly rent. Being aggrieved by the order of AAR, the appellant challenged the same before AAAR.

The AAAR examined the matter in the light of provisions of section 15 and noticed that only taxes which qualify for exclusion from the value of supply u/s 15(2) are CGST, SGST, IGST, UTGST and compensation Cess which are levied under the respective Acts. Other than above levies no other statutory levy can be deducted from the value of supply. Further unlike the erstwhile law of service tax there was a notification no. 24/2007-S.T. dated: 22.05.2007 which specifically provided for abatement of the property tax paid to the local bodies from the value of taxable services, there is no such exemption/abatement provided under the GST law. So the same cannot be deducted from the monthly rental income for arriving at the value of supply.

With regard to the second issue the AAAR after examining the provisions of section 7 (Supply) & section 2(31) (Consideration) held that the purpose of collecting the security deposit in rental services, is to provide a security in case there is a default in payment of rent by the lessee or if there is a damage to the leased property. Therefore it cannot be considered as consideration for rental services. However, as per the proviso to section 2(31) if at the time of refund of the security deposit , any amount is adjusted by the lessor towards the supply of the renting service , then it will be considered as 'consideration'.

As regard to notional interest the authority held that the interest earned by the supplier from a third person, on account of investing security deposit amount is not a payment made by the third person 'in respect of', in response to or for inducement of the supply of the renting service. There is no connection between the payment of interest by the third person and the renting service supplied by the supplier to the lessee. Further the monthly rent may be revised as per the terms of the agreement but there is nothing in the lease agreement to suggest that such revision in the monthly rent is influenced by the amount of security deposit paid by the lessee. In absence of any such evidence, the AAAR hold that in this case, the consideration received by way of monthly rental is not influenced by the

security deposit given by the lessee or the notional interest earned on such security deposit. Therefore AAAR disagreed with the findings of the lower authority on this aspect.

5. Whether the specified educational services in field of Information Systems Education, is handling courses, namely M.Sc.-IT in Animation, M.Sc.-IT in Mobile application, M.Sc.-IT in IMS (Infrastructure Management Systems) and M.Sc.-IT in Network Securities in affiliation to/partnership under MOU with Gujarat University for which degrees are awarded by Gujarat University are exempt under Entry serial 66 of NN 12/2017 dated: 28.06.2017 under GST?

Held: No

In case of ***M/s D. M. Net Technologies (Isha Chirag Patel)- AAR Gujrat*** the applicant is engaged in providing specific educational services like handling courses namely M.Sc.-IT in Animation, M.Sc.-IT in Mobile application, M.Sc.-IT in IMS (Infrastructure Management Systems) and M.Sc.-IT in Network Securities, in partnership under MOU with Gujarat University. The applicant designs the aforementioned courses on request of Gujarat University and then the contents of the courses are approved by the Gujarat University. The applicant then on the basis of the approved courses, provide training to the students as a partner under MOU with Gujarat University. The awareness and admission of the course is done by the Gujarat University. The fees for the said courses are also collected by Gujarat University. The applicant helps to administer the admission and fees collection process. Further the Gujarat University is providing the infrastructure facilities, viz. Classroom; Computer Systems and office equipment; Internet facilities; All required software; and All other required infrastructure. After the training is completed, the enrolled students undergo examination which is conducted by the Gujarat University. On successful clearance of examination, a Degree is granted by Gujarat University.

The applicant states that, he offers a curriculum to a student which enrolls him/her with a university recognized by an Indian Law. Further, the education is granted through a combination of theoretical and practical training sessions. The curriculum also involves examination being conducted by the University and all

successful candidates are granted University degrees. The applicant further stated that, on identical facts, Karnataka State in the case of M/s Emerge Vocational Skills Private Ltd., vide its Order No. KAR ADRG 20/2018 has held that:

"*The services provided by the applicant in affiliation to specified universities and providing degree courses to students under related curriculums to its students are exempt from Central Goods and Services Tax, vide Entry No. 66 of the Notification No. 12/2017-CT (Rate) dated 28-6-2017 subject to the condition that such education services provided must be as a curriculum for obtaining qualification recognized by any law for the time being in force.*"

The applicant thus claims exemption notification 12/2017 vide entry serial number 66 as stated above.

The authority examined the matter and observed that training given by the applicant as a Private Institutes would not be covered, as such training does not lead to grant of a recognized qualification. Thus, the applicant does not have any specific curriculum and does not conduct any examination or award any qualification/degree. Hence, the applicant does not qualify as educational institution. Further the authority also perused the Order No. KAR ADRG 20/2018 of the Advance Ruling Authorities of Karnataka State passed in the case of M/s Emerge Vocational Skills Private Ltd., as referred by the applicant, and find that the M/s Emerge Vocational Skills Private Ltd., has exempted the services in question vide Entry No. 66 of the Notification No. 12/2017-CT (Rate) dated 28-6-2017 subject to the condition that such education services provided must be as a curriculum for obtaining qualification recognized by any law for the time being in force. Hence, the same is not applicable to the facts of present case and hence the question is answered in negative.

6. (i) Whether the activities of supply installation, operation and maintenance of Greenfield Public Street Lighting System (GPSLS) carried out by the Applicant is classifiable as a supply of Works Contract Services?

(ii) Whether the capital subsidy received/ receivable by the applicant for the subject transaction be liable to be included in the Transaction Value for the purpose of calculation of GST payable in terms of Section

15 of the CGST Act, 2017

Held: (i) No & (ii) liable to be included in the Transaction Value for the purpose of calculation of GST.

In case of ***Nexustar Lighting Project Private Limited AAR Odisha***, the applicant, inter alia, engaged in the business of executing Greenfield street lighting project. The Applicant has made a successful bid for tender and has consequently entered into an agreement on 29.12.2018 for design, supply, installation, operation, maintenance and transfer of the energy efficient Greenfield Public Street Lighting System and the Centralized Control & Monitoring System with the Government of Odisha represented by the Directorate of Municipal Administration ("the Authority") and the ULBs. The Agreement provides that the initial term of the Agreement shall be 7 years.

Under the Agreement, the Applicant undertakes to supply and install equipment such as LED Luminaire, feeder panels, poles, outreach arms, cables/ wires with holding arrangement for overhead supply cables, in respect of both, the Greenfield Public Street Lighting System as well as the Centralized Control & Monitoring System. That for such installation, the Applicant is entitled to receive a consideration, in the form of Capital Subsidy, being 90% of the total capital expenditure incurred by the Applicant in supplying, installing and commissioning of the equipment. The balance 10% of the total capital expenditure along-with O&M fees is receivable as 'Annuity fees', and is recovered by the Applicant by raising quarterly invoices on the ULBs. After the Greenfield Public Street Lighting System has been commissioned, the Applicant is required to undertake the Operation and Maintenance of the system till the end of the term of the Agreement.

It was submitted that the applicant has fulfilled all the conditions of works contract service (WCS). Therefore, the supply made by the applicant qualifies as a supply of works contract services. The Greenfield Street Lighting System qualifies as an immovable property. The applicant has submitted that the entire contract shall be treated as a contract for the composite supply of works contract involving a supply of goods and services. In support of its claim, the applicant cited the decision of **(i) Super Wealth Financial Enterprises (P) Ltd. reported in 2019 (20) GSTL 505 (AAR-GST) (ii) Tag Solar System – 2018 (17)**

GSTL 532 (AAR) (iii) Dinesh Kumar Agarwal – 2018 (15) GSTL 404 (AAR) (iv) KailashChandra-2018 (19) GSTL 537 (AAR-GST). The applicant pleaded that in the present case, capital subsidy has been received from the Authority and the ULBs, as already stated, the Authority is an extension of the State Government. Hence, in their case, capital subsidy should not be included in the value of supply.

The authority after going through the agreement noted that the contract price has clearly bifurcated the contract into a supply of goods and supply of services. The contract is considering a clear demarcation of goods and services to be provided by the applicant but the supplies are naturally bundled and in conjunction with each other. So applying the definition of 'Composite Supply' stipulated in section 2(30) of the CGST Act, 2017. The goods and services are supplied as a combination and in conjunction and in the course of their business where the principal supply is supply of goods. Therefore, the instant supply squarely falls under the definition of "composite supply". Thus there is a composite supply in the subject case since in the subject case there is no building, construction, fabrication, completion, erection etc of any immovable Property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of the contract. Further in the light of the definition of 'works contract service' under section 2(119), the contract governing their supplies does not relate to building, construction, and fabrication etc. of any immovable properties. Their supplies are in the nature of movable property i.e. Supply of goods which involves ancillary services such as installation, commissioning etc. All these services which are supplied to the clients are nothing but ancillary activities with the main activities of supply of goods. The primary activity of the applicant is therefore, 'supply of goods' and not 'supply of services'. The rulings cited by the applicant are distinguishable. Further, **the said activity performed by the applicant is not related to the immovable property at any point of the time and hence the said activity does not qualify to be a 'works contract'.**

Further in view of Section 15(2)(e) of the CGST Act, the 'value of supply' shall include subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments. On perusal of the agreement/ contract, it is clear that the capital subsidy received/ receivable by the applicant

in the instant case is the actual cost incurred by the project SPV (the applicant in the instant case) in the project as approved by the Authority & ULBs. It is not a subsidy which generally means grant/grant-in-aid or a benefit given to an individual, business or institution, usually by the government. It is also not a subsidy which typically given to remove some type of burden and to promote a social good or an economic policy for overall interest of the public. The so called 'capital subsidy' cannot be a 'subsidy' by any stretch of the imagination, rather the same is a consideration as defined in Section 2(31) of the CGST Act in relation to the supply of goods and **therefore, the said 'capital subsidy' shall certainly be liable to be included in the Transaction Value for the purpose of calculation of GST.**

7. Whether the delivery of the 3 items Grated Supari, Lime and Tobacco put together in a transparent plastic pouch by the applicant for the sake of easy carry by the customer will be treated as mixed supply or otherwise.?

Held: No it is a case of composite supply u/s 2(30)

In case of ***M/s Jainish Anantkumar Patel - AAR Gujrat*****,** the applicant an unregistered person in GST wanted to carry on the trading activity of Grated Supari, Lime and Tobacco by putting them together in a transparent plastic pouch for the sake of easy carry by the customer. The applicant further submitted that all the items will be supplied in a single pouch, will have separate price and will be shown in the invoice as a separate bill of item and at no stage will a single price be charged from the customers. He has also stated that the plastic pouch will be used to merely to facilitate the customer for easy carry of the products and that each of these items can be supplied separately and is not dependent on each other, so, they cannot be classified as composite supply. The applicant further submitted that it is also not a case of 'Mixed Supply' u/s 2(74) inasmuch as there is not a single price charged for two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other rather in this case the applicant will charge separate price on all products.

The authority examined the matter and found that the precise reason why the applicant wants to supply the above 3 items in a single transparent plastic

pouch, although packed separately and charged item wise, to the customers, is to enable them to mix these items as per the required proportion before consuming. In view of the facts mentioned above, it can be concluded that the 3 items mentioned above are naturally bundled and supplied in conjunction with each other in the ordinary course of business and this combination is nothing but a composite supply of goods, wherein chewing tobacco is the principal supply. Since the aforementioned combination of 3 items is not sold for a single price and since the aforementioned combination constitutes a composite supply of goods, wherein chewing tobacco is the principal supply, it can be safely concluded that the aforementioned combination is not a 'mixed supply' of goods. So, in view of Section 8(a) of the CGST Act, 2017 it can be seen that a composite supply comprising of two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply.

The delivery of the aforementioned items by the applicant M/s. Jainish Anantkumar Patel in a single transparent plastic pouch to the customers will be considered as a 'composite supply of goods' as per the definition under section 2(30) of the CGST Act, 2017 with the principal supply of 'Chewing Tobacco' falling under Tariff item 24039910 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975). The product 'Chewing Tobacco' appears at Sr.No.15 of Schedule-IV of the Notification No. 01/2017-Central Tax (Rate) dated 28-6-2017 issued under the CGST Act, 2017 on which GST liability is 28% (14% CGST + 14% SGST). The said product also appears at Sr.No.26 of Notification No. 01/2017- Compensation Cess (Rate) dated 28-6-2017 issued under the CGST Act, 2017 under which a Compensation Cess of 160% is leviable on it. Also, as per Section 136 of the Finance Act, 2001, a National Calamity Contingent Duty (NCCD) of 10% is leviable on chewing tobacco as per the Seventh Schedule to the Finance Act, 2001.

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'FAKE INVOICES VS 'TAX' EVASION'

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We have been seeing from the media reports that there has been large scale 'tax evasion' due to fraudulent claim of input tax credit (for short ITC) or on account of fake invoice frauds in the GST scenario. There has been nation-wide drive against fake invoice frauds. Associated issues are fake GST identification numbers (GSTIN), operators of fake entities, connivance of end beneficiaries, persons issuing fake invoices on commission basis, incorrect refund claims, etc. 'Fake' means not genuine or counterfeit. While issue of fake invoice is certainly an offence punishable under the law, one should on the other side analyse whether issue of fake invoices would result in 'tax' evasion. An attempt is being made in that direction.

'Evasion' means 'the action of evading something' or 'an act or instance of escaping, avoiding, or shirking something'. A person may avoid a duty or a question or a responsibility or a tax payable under the relevant law, and the last one is generally known as 'tax evasion'. According to dictionaries, tax evasion is an illegal activity in which a person or entity deliberately avoids paying a true tax liability. Such liability must be legitimate to mean 'according to law or lawful or in accordance with rules'. When there is no liability to pay any tax under the relevant law, the person cannot be tagged with 'tax evasion'. Taxable event triggers the liability. Such event would be supply of taxable goods or services or both by a person in the GST scenario. Liability to pay tax under the relevant law is sine qua non for assuming tax evasion by a person.

Preamble to the Central Goods and Services Tax Act, 2017 (for short GST Act) reads as follows:-

"An Act to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto."

The Integrated Goods and Services Tax Act, 2017 provides for levy of tax on inter State supply of goods or services or both by the Central Government. State Goods and Services Tax Acts, 2017 provide for levy of tax on intra-State supply of goods or services or both by the State Governments. The Union Territory

Goods and Services Tax Act, 2017 provides for levy of tax on intra-State supply of goods or services or both by the Union territories. Section 9 of the GST Act provides for levy of tax on intra State supplies of goods or services or both, subject to certain exceptions. 'Scope of supply' has been specified in Section 7 of the GST Act. Chapter V of the GST Act deals with Input Tax Credit (ITC). We are not dealing with the detailed provisions relating to claim of ITC, as all professionals have been dealing with this concept since more than three years.

GST Act provides for levy of tax on the 'supply' of goods or services or both. If there is no such supply, there would be no levy of tax under the GST Act and consequently evasion of tax cannot be assumed. 'Taxable supply' has been defined in Section 2 (108) of the GST Act to mean 'a supply of goods or services or both which is leviable to tax under this Act'. As per Section 7 (a) of the GST Act, 'supply' includes all forms of supply of goods or services or both such as 'sale', 'transfer', etc. According to Section 4 (1) of the Sale of Goods Act, 1930 'a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.' Para No.1 (a) in Schedule II to the GST Act defines 'transfer' as 'any transfer of the title in goods is a supply of goods'. 'Property in the goods' may be understood as legal ownership of the goods. For the purpose of transfer of the title in goods, there must be goods. There must be some goods as a subject matter, which is an essential element of contract of sale. 'Goods' must be as defined in Section 2 (52) of the GST Act. When a registered person issues tax invoices without physical supply of goods or services, then such invoices are considered as 'fake invoices". In such circumstances, could there be a presumption that there is 'loss of revenue to the State.' Why do persons resort to issue 'fake invoices', without actual supply of goods? There may be various scenarios, but let us consider some of the most prevalent scenarios.

1. It has been the age-old practice to inflate the sales turnover for the purpose of obtaining Bank loans. Naturally for that purpose, corresponding purchases need to be on record and to substantiate such 'make-believe' purchases; invoices are obtained without receiving goods or services.

2. In relation to the tendering process for obtaining contracts, generally there would be a condition that the contractor must have scored say Rs.500 crores turnover in the previous year. To satisfy this condition, sale turnovers are inflated, by following the procedure mentioned at item No.1 above.

3. For the purpose of indulging in tax evasion, fake invoices are obtained to claim ITC and to save output tax.

In the case of first two scenarios, there is no supply of goods or services or both and the fake or bogus invoices have been obtained to make corresponding purchase/receipt entries in the books of account, to substantiate the consequential supplies/sales. When there is no supply of goods or services or both, the question of any liability to pay tax under the GST Act doesn't arise at all. In the absence of any tax liability, tax evasion cannot be assumed. In the case of State of Tamilnadu Vs Ravishankar Films P Limited (61 VST 190), the Madras High Court held as follows:-

"It is a matter of record that the transactions between the assessee and one Asian Films (P) Ltd., were found to be bogus transactions and using the forged documents, certain benefits were sought to be obtained through the Indian Bank, which resulted in the Central Bureau of investigation charge-sheeting the bank officials. The letter of credit opened was accommodative in nature and the letter of credit documents like invoices, delivery challans and lorry receipts and valuable securities were all false and forged documents. **Thus there was no real sale transaction**. Consequently, the Tribunal held that the entire best judgment was not correct. **Therefore, as there were no sales, the Tribunal set aside the order as regards such transactions."**

In the case of State of Tamilnadu Vs Tvl. R.K.G.G.& Co., Dindigul (2005-06 (11) TNCT-212), the Honourable Tamilnadu Sales Tax Appellate Tribunal held that the **inflated figures of salesfurnished to the bank** for getting the loan facilities **cannot be treated as suppression of sales** without any independent corroborative material for such a conclusion. Gist of this decision has been published in the monthly Journal of All India Federation of Tax Practitioners for the month of April, 2006 at page 23.

In the case of Pranit Hem Desai Vs Additional Director General and another (2020-72 GSTR 122), the Honourable Gujarat High Court held that as there was no outward supply, no output tax is payable under Section 9 of the GST Act. The following extract would be useful:-

"We are at one with Mr. Trivedi (counsel for dealers) that even if it is assumed that the allegations as levelled by the Department are correct and the credits though not available were wrongly availed since the tax has been paid, though

it was not payable **having regard to the fact that there was no supply of goods**, the availment of credits could be said to be justified on two counts: (1) **it is a revenue neutral satisfaction**, and (2) payment of tax although not payable yet is to be treated if unavailable credits are reversed if they were wrongly paid."

In the case of Commissioner of Income Tax-22 Vs Pravin BhimshiChheda (2014 (7) TMI 141), the Honourable Bombay High Court held that the transaction was a **circuitous transaction** and it cannot be considered as loan or advance so as to attract Section 2 (22) (e) of the Income Tax Act, 1961. (Dr. K. Shivram, Senior Advocate, Mumbai appeared on behalf of the assessee).

In such round-trip transactions, essentially done to inflate the turnover, what is to be seen is whether there is liability to pay tax on the transactions in the sense whether there was actual supply of goods or services or both. Cambridge Dictionary defines 'invoice' thus 'a list of things provided or work done together with their cost, for payment at a later time'. Essential feature of an 'invoice' is therefore 'things provided' or 'work done'. In the cases mentioned above, no things had been provided and no work has been done. Hence though an 'invoice' has been issued, it doesn't fit into the definition of 'invoice' and as a consequence it will not be a 'tax invoice'. It may therefore be concluded that in the above instances, it cannot be said that there was 'tax evasion' or 'revenue loss', unless otherwise established with documentary evidence, for any other reason.

If there was no receipt of goods or services, there was nothing upon which ITC could be claimed for want of supply of goods or services. There is neither supplier nor supply, so as to claim ITC. In a scenario, when ITC is disallowed for want of receipt of goods or services, equally no output tax could be levied for the same reason, ie.,no outward supply. When the inward transactions were sham, the corresponding outward transactions would also be sham. In the absence of 'in', it is not possible to presume 'out'.

One more interesting situation is issue of 'tax invoice' by the main contractor and by other than the last sub-contractor, who actually executes the work. In the case of Larsen & Toubro Limited and AnotherVs State of Andhra Pradesh and Others (148 STC 616), the Honourable High Court is concerned with the same issue. In that case, it has been held as follows:-

"In a transaction of a works contract, the property in goods passes directly to the employer by the theory of accretion which is already taken note of in this

judgment. It does not appear to us that at any point of lime, the property in goods passes to the contractor where the work is executed by a sub-contractor. The respondents could not bring to our notice any principle of law which establishes that the property in goods passes to the contractor at any stage of the execution of the works contract in the event of a contractor awarding the contract to a sub-contractor. **The sub-contractor as we have already noticed is only an agent of the contractor** and the property in goods passes directly from the sub-contractor to the employer and **therefore there can only be one sale which is recognized by the legal fiction created under sub-Article 29A of Article 366**. It therefore leads us to the conclusion that there is only one taxable event of sale of goods in such a transaction. The understanding of the State that there are two taxable events in such a transaction in our view has no legal basis.

Coming to the question in what manner the State proposes to collect the tax, we declare that it is open for the State to frame appropriate Rules **to collect the same either from the sub-contractor or from the contractor**, **we emphasise, not from both**."

The above decision has been upheld by the Honourable Supreme Court in the case reported at 17 VST 1. In the light of these decisions, would it be possible to hold that the main contractor and other than the last sub-contractor, who has actually executed the work, have issued tax invoices without 'supply of goods or services or both' warranting action under Section 122 (ii) of the GST Act. Also, whether would it be legal to tax the main contractor and other such sub-contractors in a chain of works contract transactions, even though they have not supplied any goods or services or both. Debate must continue.

The third category of transaction mentioned above results in tax evasion and consequent revenue loss. In these transactions, the supplier intends to evade output tax and willfully obtains fake tax invoice to claim ITC. Goods are generally made available in the market through agricultural activity (agricultural produce), manufacturing or processing activity (industrial product), mining activity (ores) and by generation (electricity). For example a dealer in agricultural produce wants to evade output tax. He purchases the produce from the farmers and doesn't account for. As he has to sell the produce on tax invoice by charging tax, he 'purchases' a fake tax invoice and claims ITC. Such ITC is set off against the output tax payable and minimal tax is paid on the margin. Similarly an industry procures raw material off the record, manufactures product and sells on tax invoice.

In this case also 'tax invoice' is 'purchased', ITC is availed and utilized to pay the output tax. Cases of such sort are real cases of tax evasion, resulting in loss of revenue. These cases are not comparable with the first two cases and hence all cases of fake invoices cannot be branded as 'tax evasion cases' or cases resulting in 'loss of revenue'. Heavy onus lies on the authorities to establish actual supply of goods or services by the person claiming ITC on the fake invoices for setting off against the output tax.

ITC fraud is a global phenomenon involving lots of money and the same goods are being traded many times in a circular fashion. Missing trader fraud or carousel fraud has been found in almost all the countries, where the concept of ITC is part of indirect tax law. It is considered as a highly sophisticated process with a number of players in the cycle. In some countries it is known as DMT fraud or 'Domestic Missing Trader fraud'. There is no second opinion that tax evasion must be curbed by all means.

Section 132 of the GST Act provides for punishment in the nature of imprisonment for certain offences. Clause (b) under sub Section (1) reads as follows:-

"Whoever commits any of the following offences, namely:-

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

Section 16 (2) (b) makes it a condition that no registered person shall be entitled to credit unless he has received the goods or services or both. The question of availing any credit doesn't arise when the person doesn't receive the goods or services or both. Section 2 (62) defines 'input tax' to mean the tax charged on any 'supply' of goods or services or both. Therefore 'no supply' should mean 'no input tax', and consequently no 'input tax credit'.

Under Section 122 (1) (ii) of the GST Act, 'where a **taxable person**issues any invoice or bill **without supply of goods or services or both** in violation of the provisions of this Act or the rules made thereunder;' or '(vii) takes or utilises input tax credit **without actual receipt of goods or services or both** either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;' shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the taxevaded or the tax not deducted under section 51 or short

deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, **whichever is higher**. It may be seen from these provisions that taking or availing ITC without actual receipt of goods or services or both shall result in payment of penalty of ten thousand rupees or ITC availed, whichever is higher. It therefore appears that even in the first and second scenarios above mentioned, even though it could be argued that no output tax becomes payable for want of outward supply of goods, still ITC amount availed (whether could there be ITC in the absence of receipt of goods or services or both is another question) of or passed on has to be paid in the form of penalty. Thus consequences of non-supply/receipt of goods and services would be denial of ITC in terms of Section 16 (2) (b) of the GST Act and liability to pay penalty equivalent to the ITC 'availed' in terms of Section 122 (1) (vii) of the GST Act. Levy of output tax in such circumstances would be questionable as there would be no 'supply' and consequently no taxable event. However he may be inflicted with penalty for issuing invoice without supply of goods or services or both under Section 122 (1) (ii). Whether the penalty contemplated under various clauses of Section 122 (1) of the GST Act, is concurrent or is it leviable separately for each of the clauses is a debatable issue? Where a person has been inflicted with penalty under Section 122 (1) (vii) for taking ITC without actual receipt of goods or services or both, can he be punished with penalty under Section 122 (1) (ii) for issuing corresponding tax invoice without any supply is also a debatable question. Let the law evolve on all these issues. On a lighter side, some years back, in an application for sales tax registration, against the column 'Nature of business:', applicant wrote 'purchase and sale of bills'.

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GOODS AND SERVICE TAX – VITAL AMENDMENTS IN FINANCE BILL 2021 FOR SHAPING THE STABILITY OF NEW LAW

Mukul Gupta, Advocate
Prateek Gupta, Advocate

Deletion of requirement of GST Audit or Reconciliation Statement in Form GSTR- 9C

1. A very important amendment with respect to tax professionals has been proposed bycreating a level playing field in the compliance practice of GST Law through Section 101 of Finance Bill 2021, the sub-section (5) of Section 35 of the CGST Act has been omitted.

2. The direct effect of this omission would be that there would not be any requirement now for filing of Form GSTR-9C which is called the 'Reconciliation Statement' or GST Tax Audit.

3. The Annual Return in Form GSTR-9 can be filed without the need of any certified or verified 'Reconciliation Statement' from a Chartered Accountant.

4. Now, an Advocate or Tax Practitioner could be able to independently file the Annual Return without any dependence on a Chartered Accountant, this will not only be a step towards '*ease of doing business'* for the registered dealers in GST but also provide equal opportunity in GST compliance practice for Advocates or Tax Practitioners and Chartered Accountants.

"Principle of Mutuality" – Vanished

1. The amplitude/coverage of the expression *'supply'* has been further enhanced by inserting clause (aa) along with explanation in subsection (1) of section 7 of the CGST Act by introducing amendment vide Section 99 of the Finance Bill 2021. Corresponding amendment has also been made by Section 113 of the Finance Bill by omitting paragraph 7 of Schedule-II. To further avoid any confusion the effect of any existing Judgement of any Court or Authority on the related issue has been specifically nullified in the explanation.

2. The much debated and litigated *'Principle of Mutuality'* as a concept has been now again tried to be removed from GST law. Somehow, the Government of India has never relished the availment of benefits/concessions by adopting the

'Principle of Mutuality' in the erstwhile Service Tax law and now in GST law also.

3. The insertion of clause (aa) along with explanation now in Finance Act 2021 makes it abundantly clear that the erstwhile transactions performed under the umbrella of *'Principle of Mutuality'* were not taxable under GST law. This supports the view that erstwhile such activities or transactions between the Association or Club and its Members was not a 'supply' *per-se* and thus could not be legally subjected to tax under GST.

Amendment in Procedural Provisions concerningImposition of Penalty in Section 129 of CGST Act:

1. Certain amendments have been proposed vide Section 108 of Finance Bill 2021 for the purpose of streamlining the procedure after experiencing the practical problems since July 2017 in implementation of Section 129 of the CGST Act. In clause (a) & (b) of sub-section 1 of section 129 the requirement of payment of 'applicable tax' has been rightly removed as such amount of 'tax' is paid/payable by a dealer with the jurisdictional authority/officer; while the penalty is usually required by the proper officer who have detained/seized the goods during transportation. However, keeping the clinches of the penalty provisions at the same level, the amount of penalty have been increased from 100% to 200% of the tax payable on such goods for the release thereof.

2. The penalty provision has further been hardened in those cases where the owner of the goods is not coming forward for payment of the penalty.

3. The concept of provisional release of goods on bond has totally been withdrawn by omitting subsection (2) of section 129 of CGST Act.

4. The time-period for issuing the notice has been prescribed as within seven days of detention or sizer of goods and similarly time period for issuing the order has also been prescribed as further seven days.

5. Another interesting change has been made by replacing sub-section (6) of section 129 of CGST Act whereby the dependence of the provisions of section 130 has been removed and the consequent action of selling or disposing of the seized goods to recover the penalty imposed/payable has been provided here-in itself.

6. A harsh provision has been introduced for a transporter or truck owner with respect to release of the truck/conveyance, he has to either deposit the penalty

under subsection (3) or Rs 1 lakh whichever is less. This provision will create lot of hardship for a genuine transporter or truck owner in such circumstances when the goods are detained or seized without his fault even after taking all the reasonable precautions, checks and due diligence before booking the goods for transport.

Amendment in Provisions concerning Eligibility for availing Input Tax Credit of GST:

1. An important amendment have been proposed by Section 100 of the Finance Bill 2021 by inserting clause (aa) in sub-section (2) of section 16 of the CGST Act, even though this condition for eligibility for availing Input Tax Credit as a precautionary condition is already being followed by trade and industry because of the provisions contained in Rule 36 which prescribes the documentary requirements and conditions for claiming Input Tax Credit. In one way the lacuna requiring enabling provision in the CGST Act has been now plugged-in by the Government, now Writ Petitions filed challenging the provisions of Rule 36 shall have no useful basis, however the proposed amendment by Section 100 of the Finance Bill have not been granted any retrospective effect from October 2019.

2. Now, as per this new inserted clause, the details of the Tax Invoice on the basis of which goods or services have been supplied by the outward supplier should be reflected in the statement of outward supplies and accordingly such details should have been communicated to the recipient of such Tax Invoice. Meaning thereby that such transaction of supply must be reflected in GSTR-2A of the inward supplier on the Common Portal of the Government, only then the inward supplier would be legally entitled or eligible to claim ITC on the basis of such Tax Invoice.

3. This new condition for eligibility of the claim of Input Tax Credit at the hands of the inward supplier further strengthens its position in such cases where the outward supplier for certain reason has made some legal or factual mistake with an intent to avoid the deposit of tax received by him from the buyer by way of the consideration of the goods or services including the amount of GST.

4. The genuity of the purchase transaction in the hands of the inward supplier already requires the spirit of this new inserted clause duly fulfilled, as it substantially proves that the inward supplier is not the beneficiary and the registered outward supplier of the goods or services under transaction had not paid the due amount of GST into the coffers of the Government with an ulterior motive of defrauding the revenue.

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DIGEST OF ADVANCE RULINGS UNDER GST

S S Satyanarayana, Tax Practitioner

RULINGS OF ADVANCE RULING AUTHORITIES

1. Place of supply :

Facts : The applicant is a company engaged in the business of manufacture of pumps designed for handling water. The applicant's parent company located in Poland is engaged in shipping goods such as spare parts of dairy machinery to recipient customer company located in Bangladesh. The transaction involves generation of one invoice by the parent company to the applicant and generation of another invoice by the applicant on the recipient company which is located in Bangladesh. After receiving Purchase order from Bangladesh Customer, the applicant would place its purchase order to the polish supplierspecifying therein details of the goods required, quantity of such goods etc. The details like name and address of the applicant's customer at Bangladesh are also notified to the polish supplier while placing the PO. The goods are directly delivered from Poland to the customer located at Dhaka on CIF basis. The applicant has to make payment of the price of the goods so invoiced by the Polish supplier and receives payment for the supplies made to Bangladesh Customer.

The applicant has asked the following questions seeking Advance Ruling on the same:

(1) Whether the activity undertaken by the applicant is covered by Entry No.7 in Schedule 3 of the CGST Act, 2017?

(2) Whether the applicant is liable to pay IGST on out and out transactions taking place beyond the Customs frontiers of India?

Observations & Findings : The term 'export of goods' has been defined under sub section 5 of Section 2 of IGST Act, 2017 which reads as under:

"Export of goods would mean-'*With its grammatical variations and cognate expressions, means taking goods out of India to a place outside India'."*

The above definition indicates that the act of taking goods out of India to a place outside India qualifies as export. In the instant case, the goods have not crossed the Indian customs frontier and as such it is clear that the goods are not physically available in the Indian Territory. When the goods are not physically available in the Indian Territory, the question of taking goods out of India does not arise. Thus, the subject transaction does not qualify as export of goods. In view of the above, it appears that the transaction is covered under the ambit of Inter-state supply and is neither exempted nor covered under export of goods or services. Thus, the theory of elimination takes us to the conclusion that such supplies will be subject to levy of IGST. However, we also find that vide Central Goods and Services Tax (Amendment) Act, 2018, Schedule-III of the CGST Act, 2017 (which covers activities or transactions which shall be treated neither as a supply of goods nor a supply of services) has been amended with effect from 01.02.2019 (as per Notification No.02/2019-Central Tax dated 29.01.2019) and entries 7 and 8 have been inserted under the said Schedule.

Ruling : The activity undertaken by the applicant is covered under Entry No.7 in Schedule 3 of the CGST Act, 2017 in respect of the transactions undertaken for the period from 01.02.2019 onwards for the reasons discussed hereinabove.

Applicable IGST is payable on goods sold to customer located outside India, where goods are shipped directly from the vendor's premises (located outside India) to the customer's premises (located outside India) for such transactions effected upto 31.01.2019. However, no IGST is payable on such transactions effected from 01.02.2019 onwards, for the reasons discussed hereinabove.

[2021 (1) TMI 376 – AAR, Gujarat – SPX Flow Technology (India) P Ltd.]

2. Taxable Supply :

Facts : The applicant is a service provider, providing service of Doctors, Nursing staff, ambulances and relative administrative services etc. to corporate entities (Factory/Plant premises) for their staff to facilitate the medical care and

these service.

The applicant sought advance ruling on the following question :

Specified services i.e. appointing Doctors, Nursing Staffs, Ambulances and relating administrative services etc. covered under GST, whether it falls in the category of taxable or exempted services?.

Observations & Findings : Any services of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India provided by a hospital, nursing home, sanatorium or any other institution is exempted from GST in terms of the entry No. 74 of Notification No. 12/2017-CT (Rate) dated 28.06.2017. Whereas the applicant is supplying doctors, nursing staff and other administrative staff to the factory/for their staffs for medical care and he himself is not providing any such medical related services or health care services as defined in para (zg) of the Notification No. 12/2017-CT (Rate) dated 28.06.2017.

Ruling : In view of the above discussion, services provided by the applicant fall under the category of taxable services.

[2021 (1) TMI 371 – AAR, Gujarat – Sparsh OHC Manpower Service]

3. Time of supply :

Facts : The applicant is a registered Commercial Co- Operative service society providing services of maintenance of common facilities/amenities to their members. The applicant has collected money from their members under following heads:

1. Monthly maintenance fees (Recurring basis).

2. Common Maintenance Fund/Deposit (one-time basis).

The applicant has sought for advance ruling in respect of following questions:

1: Whether applicant is liable to pay GST on the common maintenance fund/deposit collected from their members?

2: If Yes, then, what shall be considered as the time of supply for such transaction?

Observations &Findings : The Clause (31) of Section 2 of the CGST Act, 2017 defines the term "consideration", which is as under:

"(31) "consideration" in relation to the supply of goods or services or both includes-

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;"

One needs to apply following test on amount/deposit received from customer to determine whether such deposit / amount will be taxable or not:

1. Whether amount received is refundable or not?

2. Whether such amount can be adjusted as consideration of supply?

In the instant case, the common maintenance fund/deposit so collected is the amount collected towards the future supply of service of maintenance, repair etc. and accordingly, gets applied as consideration towards supply of services only at the time of actual supply of services. Therefore, the amount collected towards the common maintenance fund/deposit do not form part of consideration towards supply of services at the time of collection, however, the amounts so utilized for provision of service are liable to GST at the time of actual supply of service.

Ruling :

Question 1: Whether applicant is liable to pay GST on the common maintenance fund/deposit collected from their members?

Answer: Answered in affirmative.

Question 2: If Yes, then, what shall be considered as the time of supply for such transaction?

Answer: The amounts so utilized for provision of service are liable to tax at the time of actual supply of service.

[2021 (1) TMI 375 – AAR, Gujarat – The Capital Commercial Co-Op (Services) Society Limited]

4. Input Tax Credit :

Facts : The Appellant is engaged in the business of organizing wedding & other banquet functions on a large scale at its premises. The Appellant creates a temporary structures as per the requirement of its customers. A hangar/frame is created for the entire structure by using Iron and steel pillars and sheets, pipes, 'ballies', and angles and the same has been tightened up with nuts and bolts. This frame is covered with iron sheets, and canvas, for coverage and water-proofing and Plywood is used in the inner portion to make the roof smooth and then the decoration is done. The said frame is also decorated on the outside, through design modifications and sheet material, to resemble the thematic identity of the interior.

The Applicant sought Advance Ruling on the following questions :

1. Whether the Temporary Structure built up with Iron/Steel Pillars tight up with Nuts and Bolts specially created for functions would be treated as Movable or Immovable property in pursuance to the GST Law ?

2. Whether credit of the tax paid on Iron/Steel Pillars tight up with Nuts and Bolt used for the creation of Temporary Structure (i.e. hall or pandal or shamiana or any other place) especially for functions are admissible under section 16 of the CGST Act, 2017?

Observations &Findings : Section 17 of the GST Act deals with Apportionment of credit and blocked credits. Section 17 (5) (d) reads as ***"goods***

or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business".

As per the definition of goods some movable property is excluded from the category of goods whereas at the same time, some immovable properties are treated as goods. But the terms movable and immovable property have not been defined under the GST Act. In laymen terms, any goods that can moved is a movable property and which cannot be moved is immovable property.

But the General Clauses Act 1897 and the Transfer of Property Act defines both these terms. Section 3 (26) of the General Clauses Act says: ***"immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth"***. Whereas, Section 3(36) defines movable property as ***"property of every description, except immovable property".*** So as per this definition, any property which does not qualify to be immovable property is a movable property. This definition of immovable property under the General Clauses Act is affirmative in nature as against the definition contained in the Transfer of the Property Act 1882, which is negative in nature. As per TPA, immovable property does not include standing timber, growing crops or grass. It further says that "attached to the earth" means:

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

The premises of the Applicant, where the structure has been erected is company's own premises, it suggests that the shamiana/ tent/pandal has been constructed/ erected for permanent enjoyment. It is not the case of applicant that it plans to dismantle and move the structure to some other place. The pictures attached with the application also depict that the civil work has been undertaken on a very large scale at the premises and this also indicates the permanent nature

of the construction/ erected. Further, the concretionary base and the pillars used as platform and support to the structure is also of large dimensions and the platform or the structure cannot be put to beneficial use without the existence of the other. Merely because the walls and roofs have been replaced with pre-fabricated structure (an Engineering marvel), an immovable property cannot be categorized as movable property. Since, both the degree and nature of annexation/ attachment of the structure to the earth is strong and permanent, the structure in question is an immovable property.

Ruling : The structure created by the applicant is an immovable property for the purposes of GST Law. The applicant is not entitle to the credit of input tax in view of the provisions of Section 17(5)(d) of the CGST/ HGST Act, 2017.

[2021 (1) TMI 1015 – AAR, Haryana – VDM Hospitality P Ltd.]

5. Value of Supply :

Facts : The Applicants are engaged in the business of manufacture and trading of chemicals. The applicant has preferred an application seeking advance ruling on the following questions:

1. The value to be adopted in respect of transfer to branches located outside the state.

2. whether the value of such supplies can be determined in terms of the second provision to rule 28 in respect of supplies made to distinct units in accordance with clause (4) & (5) of section 25 of the CGST rules, 2017?

Observations &Findings : The applicant and the distinct persons outside the state of Tamil Nadu are different legal persons hence, both are said to be related as per the explanation to Section 15. Therefore the value to be adopted is governed by rules prescribed as per Section 15(4) of CGST Act. Rule 28 of CGST Rules, 2017 provides the value to be adopted when the supply is between distinct persons.

The above rules provides that the value to be adopted is to be the 'Open market Value' i.e., the price of sale charged to an independent buyer; if such 'open market value' is not available then value charges for like goods and quality

is to be adopted; and if the value cannot be ascertained by both the above means, then the value is to be determined by cost construction or best judgment method. The Proviso to the above rule presents two scenario-

(1) when the goods are intended for supply as such, then the supply to the related person can be valued at 90% of the ultimate sale value and this is at the option of the supplier;

(2) when the recipient is eligible for full Input Tax Credit, then the value declared in the invoice is deemed to the 'Open Market Value'

Ruling :The applicant can adopt any one of the following three methods provided under:

Rule 28 of the CGST/ TNGST Rules 2017 read with Section 15 of the CGST/TNGST Act 2017to arrive at the value in respect of supply to distinct persons.

a. Open Market Value as is presently being adopted by them;

b. 90% of the ultimate sale value as raised by the distinct persons to the un-related ultimate customers based on the Purchase Orders in cases of 'as such' supplies;

[2021 (1) TMI 697 – AAR, Tamilnadu – Thirumalai Chemicals Ltd.]

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COMPUTATION OF INCOME OF NON RESIDENT

CA. Paresh Shah,
CA. Mitali Gandhi

1. Introduction

In the last article we gave an introduction to taxation of non-residents in India and their scope of Income. In this article we will understand how to compute a non-residents income in India.

2. Income of Non-Resident taxable in India

A Non-Resident is liable to tax in India only on that income which is earned by him in India.Income which is earned outside India is not taxable in India. Income is earned in India if–

i. It is directly or indirectly received in India; or

ii.It accrues or arises in India or is deemed to accrue or arise in India.

The meaning of 'deemed to accrue or arise' in India has been laid down in Section 9 of the Income-Tax Act, 1961 ("Act") whichis defined as:

- Income from a business connection in India (Section 9(1)(i))
- Income from any property in India (Section 9(1)(i))
- Income from any asset or source of income in India(Section 9(1)(i))
- Capital gain on the transfer of a capital asset situated in India (Section 9(1)(i))
- Income from salary if the services are rendered in India (Section 9(1)(ii))
- Income from salary which is payable by the Government of India for services rendered outside of India when you are an Indian citizen (Section 9(1)(iii))
- Dividend paid by an Indian company even though this may have been paid outside India (Section 9(1)(iv))
- Interest (Section 9(1)(v))
- Royalty received from the Central or the State Government or from specified persons in certain circumstances (Section 9(1)(vi))

- Fees for technical fees received from the Central or the State Government or from specified persons in certain circumstances (Section 9(1)(vii))

It is a general Rule that Income will be covered under either of these heads but more specific nature will override over the General nature as specified in Sec 9(1)

2.1 Computation of Income of non-resident:

Unlike resident taxation, in order to provide ease of computation of taxable income for non-residents, they are taxed on their income from India either on gross basis i.e. on gross income / revenue without any deductions or on net basis i.e. after allowing deduction of business expenses.

2.1.1 Business Income: In case business income is taxable under Section 9(1)(i) due to existence of business connection in India or there is presence of Permanent Establishment ('PE') in India,tax computation would be for business income under sections 28 to 44C of the Act, as may be applicable. Such tax computation would be on net basis i.e. after allowing deduction for all usual business expenses from the gross revenue.

In case of income of non-resident (not being a company) or a foreign company being income by way of Royalty or Fees for Technical Services, right, property or contract which is effectively connected to a PE or fixed place of profession in India in pursuance of approved agreement, income is computed under the head 'Profits & Gains of business or profession' in accordance with section 44DA and taxed on net basis. However, if income is not effectively connected with the PE in India, then provisions of section 115A shall apply &such income in nature of Royalty or FTS will be taxed on gross basis at the rate of 10%.

Further, there are special provisions in the nature of presumptive taxation that apply to non-residents engaged in certain specified business where their income is taxed on gross basis. Certain provisions however provide for taxation on net basis at the option of the assesse. These provisions are summarized in the table below.

	Sec. 44B	**Sec. 44BB**	**Sec. 44BBA**	**Sec. 44BBB**
This section applies to -	Non-resident engaged in operating ships	Non-resident engaged in providing service / facilities or supplying plant / machinery for extraction or production of mineral oils (incl. petroleum & natural gas)	Non-resident engaged in operating Aircraft	Foreign company engaged in civil construction or erection, testing or commissioning of plant or machinery in connection with an approved turnkey power project
Deemed Income	7 ½% of gross receipts	10% of gross receipts	5% of gross receipts	10% of gross receipts
Computation of lower income	Not available	Available	Not available	Available
Effective Tax Rate under the Act	40% of 7.5% i.e. 3%	40% of 10% i.e. 4%	40% of 5% i.e. 2%	40% of 10% i.e. 4%
Tax rate as applicable to foreign companies is 40% excluding surcharge & cess				

In addition to the above special provisions on presumptive taxation applicable to non-residents, Section 172 applies to non-resident engaged in operating shipsand is a code by itself as distinguished from Section 44B which also applies to non-resident engaged in operating ships as shown in table above.The provisions of Section 172 arenotwithstanding the Actand allows for computation of lower income whereas Section 44B makes exception to Sections 28 to 44C and taxes on gross basis only.

2.1.2 Salary & Income from House Property: In case of income of non-resident

from Salary and House Property, normal computation procedure under sections 16 to 27 is applicable. Detailed discussions are covered in Paragraph 3 here in below.

Income may also be taxed on the basis of deeming fiction under the provisions of the law however in the absence of the deeming provision tax can be levied only on the

The basis of the Real Income.

2.1.3 Capital Gains: For income of non-resident in nature of Capital gains, normal computation procedure under sections 45 to 55 is applicable except that in case on Non-resident Indians ('NRIs'), special provisions are available under Chapter XIIA of the Act under sections 115C to 115I for taxability of Investment Income and Long-term capital gains from foreign exchange assets on gross basis i.e. without deduction of expenses and no deduction under Chapter VIA of the Act. Detailed discussions are covered in Paragraph 3 here in below.

2.1.4 Income from Other Sources: In case of income of non-resident from other sources (i.e. not being investment income eligible for taxation under Chapter XIIA), normal computation procedure under sections 56 to 59 is applicable. Detailed discussions are covered in Paragraph 3 here in below.

3. Computation of Income under different heads of Income:

A non-resident can receive Income in India under one of the following five heads:

3.1. Income from Salary

i. Salary includes wages, annuity, pension, gratuity, perquisites, fees, commission, profits in lieu of salary, any advance of salary, leave encashment salary, annual accretion to the balance at the credit of an employee participating in a recognised provident fund, contribution made by the Central Government or any other employer to the account of an employee under a pension scheme referred to in section 80CCD

ii.A non-resident is taxed on salary received in India or salary for service provided/rendered in India.

E.g.: if a person (US resident) comes to India on a trip and takes up a part time job in an Indian company the person will be liable to tax in India for the services rendered in India and will be liable to tax the same income in USA since

he is a resident of USA. In such cases the person may resort to the provisions of DTAA to avoid double taxation.

iii. In case of a citizen of India, salary paid by the Government of India for services rendered outside India will be taxable in India

iv. Tax on Salary will be deducted at the rates in force

3.2. Income from House Property

i. Income derived from immovable property located in India will be taxable in India.The calculation of such income shall be in the same manner as for a resident.

ii. A non-resident, like resident is allowed

a. A standard deduction of 30%

b. To deduct property taxes

c. To take benefit of interest deduction if there is a home loan, and

d. To claim principal repayment of loan as deduction under section 80C. Also stamp duty and registration charges paid on purchase of a property can also be claimed under section 80C

iii. It is important to note that even if the income is received directly into the non-residents account outside India or in his NRE account, still the income would be liable to tax in India as the source of income i.e. the property is situated in India.

iv. Any payment made to a Non-resident will be subject to deduction of tax at source based on the nature of income. Since, payment of rent to non - resident is not covered under the particular section, TDS will be deducted u/s 195 @31.2% (including cess) on such payment made to non-resident.

3.3. Income from Business

i. Any income earned by a non-resident from a business controlled or set up in India will be taxed in India under the head of business income. Section 28 to Section 44C will be applicable to compute taxable income of non-resident in India

ii. We will explore income from business of non-resident in detail in the next article

3.4. Income from Capital Gains

i. Any capital gain arising on transfer of capital asset situated in India shall be taxable in India. Capital Gains on investments in India in shares, securities shall also be taxable in India.E.g.: if a non-resident sells an immovable property situated in India to another non-resident outside India, such a transaction will be taxable in India because the asset is located in India

ii. "capital asset" means—

a. Property of any kind held by an assessee, whether or not connected with his business or profession;

b. any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992)

However, the term 'capital asset' shall exclude the following:

a. Stock-in-trade, consumable stores, raw materials held for the purpose of business or profession;

b. Movable property held for personal use of taxpayer or for any member of his family dependent upon him. However, jewellery, costly stones, and ornaments made of silver, gold, platinum or any other precious metal, archaeological collections, drawings, paintings, sculptures or any work of art shall be considered as capital asset even if used for personal purposes;

c. Specified Gold Bonds and Special Bearer Bonds;

d. Agricultural Land in India, not being a land situated:

i. Within jurisdiction of municipality, notified area committee, town area committee, cantonment board and which has a population not less than 10,000;

ii. Within range of following distance measured aerially from the local limits of any municipality or cantonment board:

- not being more than 2 KMs, if population of such area is more than 10,000 but not exceeding 1 lakh;
- not being more than 6 KMs , if population of such area is more than 1 lakh but not exceeding 10 lakhs; or
- not being more than 8 KMs , if population of such area is more than 10 lakhs.

e. Deposit certificates issued under the Gold Monetisation Scheme, 2015

iii. Income chargeable under Capital Gains due to transfer of asset shall be

reduced by deducting the following:

a. Expenditure incurred wholly and exclusively in connection with such transfer

b. The cost of acquisition of the asset and cost of improvement

iv. In case of a non-resident, capital gains arising from the transfer of a capital asset being shares, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred in connection with such transfer and the full value of the consideration received or accruing as a result of such transfer into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency.This should also apply for every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company

v.Long-term capital assets are those held for over 36 months preceding the date of transfer. Immovable property or unlisted shares of an Indian company are classified as long-term capital assets if they are held for more than 24 months, else the same are treated as short term. Listed equity shares or units of equity-oriented funds are classified as long-term capital assets only if they are held for more than 12 months.

vi. Tax Rates in case of Capital Gains:

a. Long term Capital Gain (LTCG) on transfer of listed shares or units of equity-oriented mutual funds are taxed @ 10% (without indexation or adjustment of forex fluctuation), if such gains are over Rs. 1 lakh in a financial year and Securities Transaction Tax (STT) has been paid and short term capital gains on the same is @ 15%.

b. LTCG on transfer of immovable properties is @20% (after indexation benefit) and STCG on transfer of immovable property or unlisted shares is as per the slabrate

c. LTCG on unlisted shares/debentures/securities is @10%

d. All the above rates is increased by Surcharge and Cess

It may be noted that in case of Non Resident , Initial threshold of the Income which is not chargeable to tax is not considered and even if Income from capital gains is lower than the threshold amount tax will still be levied on the amount of the capital Gains.

vii. Like residents, even Non-Resident Indians are allowed to claim exemptions under section 54, section 54EC and section 54F on long-term capital gains from sale of a house property. The long-term capital gain can be invested as under

Section	Asset sold/ transferred	Asset to be invested in	Time period for Investment	Quantum of exemption
54	• Residential House Property	• Residential House Property in India	• within one year before the date of transfer • purchased after 2 years from the date of transfer • constructed within 3 years from the date of sale • The new asset cannot be sold or transferred before the end of 3 years.	• if the entire capital gain is invested into new asset, the capital gain will be fully exempted. • If partial capital gain is invested, then capital gain not invested will be charged to long-term capital gain tax.
54F	• Capital asset other than house property Note: i. one should not own more than one residential house property at the time of transfer of the capital asset. Or ii. purchase any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; OR iii. construct any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset			• To claim full exemption, entire sale proceeds should be invested in new asset. • In case of partial investment of sale proceeds, the exemption would be: Cost of the new house x Capital Gains Sale Receipts
54EC	• Capital asset being land or building or both	• Bonds of National Highway Authority of India (NHAI) or Rural Electrification Corporation (REC)	• The gain from transfer of asset should be invested within 6 months into these bonds. • The maximum amount that can be invested is Rs.50 Lakhs. • The new asset cannot be converted or transferred before the end of 3 years.	• Amount invested out of capital gain; or • Rs.50 Lakhs; Whichever is lower

3.5. Income from Other Sources

i. Indian sourced income in the form of interest on fixed deposits and saving accounts is taxable in India. Interest received on NRE account is tax free, whereas interest received on NRO account is fully taxable.

ii. Winnings from lotteries, crossword puzzles, racesincluding horse races, card game and other game of any sort, gambling or betting of any form whatsoever, are always taxed under this head.

iii. Where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017-

a. Immovable Property, Movable Property or Cash Received as Gift Without Consideration or for Inadequate Consideration, provided the gift value exceeds Rs 50,000

b. Clause a. shall not apply to any sum of money or any property received—

(I) from any relative; or

(II) on the occasion of the marriage of the individual; or

(III) under a will or by way of inheritance; or

(IV) in contemplation of death of the payer or donor, as the case may be; or

iv. Tax is deducted as per the slab rate under section 195

4. <u>Deductions under Chapter VI – A</u>

Following are the Deductions permitted to Non Residents under Chapter VI-A

4.1. Under 80 C up to Rs 1,50,000

i. Life insurance premium payment: The policy must be in the NRI's name or in the name of their spouse or any child's name.

ii. Children's tuition fee payment: Tuition fees paid to any school, college, university or other educational institution situated within India for the purpose of full-time education of any two children.

iii. Principal repayments on loan for the purchase of a house property: Deduction is allowed for repayment of loan taken for buying or constructing residential house property. Also allowed for stamp duty, registration fees and other expenses for purpose of transfer of such property to the NRI. Also, deduction

towards property tax paid and interest on home loan deduction is also allowed

iv. Unit-linked insurance plan (ULIPS): ULIPS is sold with life insurance cover for deduction under Section 80C.

v. Investments in ELSS: ELSS has been the most preferred option in recent years as it allows you to claim a deduction under Section 80C upto Rs 1.5 lakhs, it offers the deduction benefit to taxpayers and simultaneously offers an excellent opportunity to earn as these funds invest primarily in the equity market in a diversified manner.

4.2. Under Section 80D

NRIs are allowed to claim a deduction for premium paid for health insurance.

Particulars	**Self, family, children**	**Parents**	**Deduction under 80D (Rs)**
Individual and parents below 60 years	25,000	25,000	50,000
Individual and family below 60 years but parents above 60 years	25,000	50,000	75,000
Both individual, family and parents above 60 years	50,000	50,000	1,00,000

4.3. Under Section 80E

Deduction is available to NRI in respect of interest on loan taken for higher education paid for self, spouse, children or student for whom NRI is a legal guardian.

4.4. Under Section 80G

Deduction is available to NRI for eligible donations.

4.5. Under Section 80 TTA

Deduction is available to NRI by way of interest on deposits (not being time deposits) in a savings account with a banking company, co-operative society or post office upto Rs.10,000.

5. Exemptions to Non Residents

Following are the illustrative list of exemptions permitted to Non-Residents under Section 10

i. Interest and Premium on Redemption on such securities or bonds as the Central Government may, by notification in the Official Gazette – Sec 10(4)(i)

ii. Interest on NRE Deposit u/s. 10(4)(ii) (Please note exemption u/s 10(4) is permitted for NRI under FEMA so one can avail this exemption even if the person is resident under income tax but NRI under FEMA)

iii. In case of an individual not a citizen of India Remuneration received by Foreign Diplomats/Consulate and their staff (Subject to conditions) –Sec 10(6)(ii)

iv. In case of an individual not a citizen of India, remuneration received by him as an employee of a foreign enterprise for services rendered by him during his stay in India –Sec 10(6)(vi)

v. Income chargeable under the head "Salaries" received by or due to any such individual being a non-resident as remuneration for services rendered in connection with his employment on a foreign ship where his total stay in India does not exceed in the aggregate a period of ninety days in the previous year – Sec 10(6)(viii)

vi. Fees earned by a consultant under section 10(8A)

vii. Income by way of interest, premium on redemption or other payment on such securities, bonds, annuity certificates, savings certificates, other certificates issued by the Central Government and deposits, subject to such conditions – Sec 10(15)

viii. Any income arising from the transfer of a capital asset, being a unit of the Unit Scheme, 1964 referred to in Schedule I to the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002 (58 of 2002) and where the transfer of such asset takes place on or after the 1st day of April, 2002 – Sec 10(33)

ix. Any income received in respect of units of Mutual Funds - Sec.10(35)

x. Long term capital gains on Equity shares and Units of Equity oriented Mutual Funds on which STT is paid [S. 10(38)] upto Rs. 1 lac

xi. Income earned from any international sporting event held in India – Sec. 10(39)

xii. Profits from units in FTZ/SEZ or an undertaking as EOU u/s. 10A, 10AA & 10B

6. Special Tax Provisions for Non-Residents

Sections 115A to 115AD prescribes tax rates for various types of investment income of different non-resident entities. However, if the non-resident is covered by a particular DTAA, he may apply the rates prescribed under that DTAA, if beneficial, without any surcharge and education cess.

6.1. Non-Residents in respect of income from dividend, interest, units of Mutual Funds, Royalties & Fees for Technical Services as provided in Sec 115 A, received from Government or Indian concern. Income tax is payable on income derived by non-resident by way of:

i. Dividend other than dividends referred to in section 115-O – tax to be deducted @ 20%

ii. Income received in respect of units, purchased in foreign currency, of a Mutual Fund specified under clause (23D) of section 10 or of the Unit Trust of India - tax to be deducted @ 20%

iii. Interest received from Government or an Indian concern on monies borrowed or debt incurred in foreign currency – 20%

iv. Interest received from an infrastructure debt fund referred to in clause (47) of section 10 – tax to be deducted @ 5%

v. Interest income payable by a Specified Company (i.e. an Indian Company) or business trust to a non-resident/foreign company is liable to deduct income-tax @5%. This section is applicable if interest is paid or payable by the specified company or the business trust.

a. In respect of monies borrowed in foreign currency from a source outside India –

- Under a loan agreement (at anytime on or after 1st July, 2012 and 1st July, 2023) or
- By way of issue of long-term infrastructure bonds (at any time on or after July 1, 2012 but before October 1, 2014) or
- By way of issue of long-term bonds including long-term infrastructure bonds

(at any time on or after October 1, 2014 but before July 1, 2023) or

b. In respect of monies borrowed by it from a source outside India by way of issue of rupee denominated bond before the 1st day of July, 2023

c. In respect of monies borrowed by it from a source outside India by way of issue of any long-term bond or rupee denominated bond on or after the 1st day of April, 2020 but before the 1st day of July, 2023, which is listed only on a recognised stock exchange located in any International Financial Services Centre – Income tax deducted shall be deducted at the rate of four percent and

d. To the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or the bond and its repayment. (Sec. 194LC)

vi. Interest paid to a Foreign Institutional Investor or Qualified Financial Investor on or after June 1, 2013 but before July 1, 2023 on account of investment made by them in Rupee denominated bonds of Indian currency or Government securities, will be liable to tax @ 5%, (Sec. 194LD)

vii. Income by way of interest received by the business trust from SPV is not taxable in the hands of the trust. [Sec 10(23FC)]. However, when such interest is distributed by business trust to unit holders, who are NR or foreign company, withholding tax @5% shall be applicable. (Sec 194LBA)

viii. Any income by way of royalty or fees for technical services (other than income received by such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment, or performs professional services from a fixed place of profession situated therein, and the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession) from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy – tax to be deducted at the rate of 10% for income by way of royalty or fees for technical services.

6.2. Provisions applicable in case income only comprises of Income under sec 115A

i. No deductions under chapter VI A is will be permitted for incomes taxed under section 115A, other than income by way of Royalty and fees for Technical Services

ii. No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing his or its income referred in clause 4.1.

iii. No Return of Income is required to be filed in case income only consists of dividend, interest, income from units of MFS, Royalty and Fees for Technical Services and TDS has been deducted as per Income Tax Act

iv. The above rates will be increased by the applicable surcharge and cess

6.3. Sec 115 AB: Tax on overseas financial organisation (approved by SEBI) in respect of income received in respect of units purchased in foreign currency or income received by way of long-term capital gains arising on sale/ repurchase of units of mutual fund/ UTI purchased in foreign currency is 10%

6.4. Sec 115 AC: Tax on non-resident in respect of interest on bonds of an Indian company issued in accordance with Central Government notification, on bonds of a public sector company sold by the Government, and purchased in foreign currency; dividends (other than dividends referred to in section 115-O) on Global Depository Receipts and long-term capital gains on sale of such bonds/Global Depository Receipts is 10%

6.5. Sec 115AD: Tax on income of Foreign Institutional Investors (FII) from securities or capital gains arising from their transfer

i. Tax on Income (other than income by way of dividends referred to in section 115-O] received in respect of securities (other than units referred to in section 115AB) – 20% in case of a FII and 10% in case of a specified fund.

"specified fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate,—

a. which has been granted a certificate of registration as a Category III Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);

b. which is located in any International Financial Services Centre;

c. of which all the units are held by non-residents other than unit held by a sponsor or manager;

ii. Short term Capital Gains (STCG) on transfer of the above mentioned securities is 30%. STCG under Sec 115A will be taxed at 15%

iii. Long Term Capital Gains (LTCG) on transfer of the above mentioned securities is 10%

iv. No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 or under chapter Vl A in computing his income referred in clause 4.5.

7. <u>Tax Deducted at Source – Sec 195</u>

i. Any person responsible for paying any sum other than salary to a non- resident, not being a company or a foreign company shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force

ii. Rates in force means Rates as per Finance Act or Double Taxation Avoidance Agreement , whichever is more beneficial (Section 2(37A))

iii. Section 195 uses a special phrase "any other sum chargeable under the provisions of this Act" unlike other provisions in Chapter XVII (TDS provisions

iv. Sum which are not at all chargeable to tax in India (under the Act or the Treaty) shall continue to remain outside the ambit of section 195

v. In case income is embedded in the payment, TDS should be deducted on the gross amount unless an order/certificate permitting lower/nil withholding of tax is obtained

vi. An application can be made by the payer to the AO, if he believes that payment made to Non Resident is not fully chargeable to tax in India in his hands. Certificate may be issued by AO to deduct tax at nil or lower tax rate. However, once sum is ascertained to be even partially chargeable to tax in India, tax is required to be withheld at full rates on grounds of conservatism

vii. Payee may also make an application to AO for non-withholding of tax at source, subject to following conditions (mentioned in Rule 29B):

a. Assessee has been regularly assessed to tax and has filed all returns of income due as on the date of filing of application;

b. Not defaulted in respect of any tax interest, penalty, fine, or any other sum;

c. Not subjected to penalty u/s 271(1)(iii);

d. Carrying on business in India continuously for at least five years and the value of the fixed assets in India exceeds Rs 50 lakhs

viii. Form 15 CA and 15 CB

a. Any person (resident /non-resident/ domestic company/foreign company) making a payment to a non-resident must furnish form 15 CA containing the information relating to payment of such sum

b. If the remittance exceeds Rs 5lakhs, a certificate attested by Chartered Accountant in Form 15CB must be furnished along with form 15 CA

c. Form 15CB is not required to be furnished If the remittance is not taxable

d. Form 15 CA and 15CB is not required to be furnished for list of payments specified in Rule 37BB of Income Tax Rules.

As provided above Non Residents has an option to apply a beneficial provisions of the tax Treaty if they find it more beneficial.

8. Mandatory quoting of PAN – Section 206AA

i. Section 206AA provides that where the taxpayer does not furnish its PAN to the person responsible for withholding of tax, tax shall be deducted at source at higher of the following rates:

a. at the rate specified in the relevant provision of this Act; or

b. at the rate or rates in force; or

c. at the rate of 20%.

ii. However, the provisions of section 206AA shall not apply to a non-resident, not being a company, or to a foreign company, in respect of—

a. payment of interest on long-term bonds as referred to in section 194LC; and

b. any other payment subject to such conditions as may be prescribed.

iii. As per Rule 37BC, if deductee is a non-resident or a foreign company, he is

not required to furnish his PAN to the deductor if he is in receipt of following income:

a. Interest

b. Royalty

c. Fees for technical services

d. Payments for transfer of any capital asset.

9. Filing of Income Tax Return for Non-Residents

i. A non-resident who earns more than Rs. 2,50,000 in a Financial Year is liable to e-file income tax return in India before the due date.

ii. Non Residents must file income tax returns for the following reasons:

a. Claim Refunds

b. Carry forward a loss

c. There is some evidence of the cost or property

iii. The relaxation of not filing of Return of Income is available to Non-Residents only in respect of Dividend Income , Interest Income , Royalty and FTS on which tax has been deducted [Sec. 115A(5)]

iv. In case of a Non Resident Indian whose total income consists of only investment income or LTCG or both & TDS has been deducted on such income [Section 115G (Chapter XII-A)] then no return needs to be filed

v. Non Residents with tax liability exceeding INR 10,000 in a financial year, are required to pay advance tax. If advance tax payments are missed in a year than interest need to be paid for that as mentioned under Section 234B and Section 234C.

10. Rates of Tax Applicable to Non-residents

10.1. The Income Tax Rates in case of Non Resident Individuals is as follows:

Particulars	Tax Rate
Total Income greater than INR 2,50,000	Nil
Total Income is greater than INR 2,50,000 but less than INR 5,00,000	5% of the amount by which the total income exceeds INR 2,50,000;

Total Income greater than INR 5,00,000 but less than INR 10,00,000	INR 12,500 plus 20% of the amount by which the total income exceeds INR 5,00,000
Total Income greater than INR 10,00,000	INR 1, 12,500 plus 30% of the amount by which the total income exceeds INR 10, 00,000.

** The above rates will be increased by surcharge (if applicable) and Cess @ 4% (on income tax + surcharge)

Non Residents cannot avail different exemption limits on basis of gender or age as the Residents can avail

Optional regime of taxation as per Sec 115 BAC without certain deduction has a lower tax Slab rate is also available to Non Residents.

10.2. Income Tax Rate on income of entities other than individual

Entity	Tax Rate
LLP or Partnership Firm	30%
Foreign company	40%

** The above rates will be increased by surcharge (if applicable) and Cess @ 4% (on income tax + surcharge)

10.3. Surcharge

Particulars	Income above INR 50lakhs to INR 1crore *	Income above INR 1crore to INR 2crore and above 2 crore not included under the 15% and 25% rates *	Income above INR 2 crore to INR 5 crore #	Income above INR 5 crore #
In case of an Individual	10% of Income Tax	15% of Income Tax	25% of Income Tax	37% of Income Tax

* including the income under the provisions of section 111A and section 112A of the Income-tax Act

excluding the income under the provisions of section 111A and section 112A of the Income-tax Act

Particulars	Income above INR 1 crore to INR 10 crore	Income above INR 10 crore
In Case of a Firm/LLP	12% of Income Tax	12% of Income Tax
In case of a Foreign Company	2% of Income Tax	5% of Income Tax

10.4. Minimum Alternate Tax

As per Explanation 4 of Section 115JB Mat Provision does not apply to Foreign companies if;

i. The foreign company is a Resident of a country with which India has a DTAA & such foreign company does not have a Permanent Establishment in India as defined in DTAA; or

ii. The foreign company is a Resident of a country with which India does NOT have a DTAA & such foreign company is not required to seek registration under Section 592 of the Companies Act 1956 or section 380 of the Companies Act 2013

11. Tax Computation : Nature of Income will be aggregated as per the scheduler System to arrive at a Total Income

With available deduction under each heads of Income to arrive at a Gross Total Income

Deduction of Chapter VIA will be available from the Gross total Income giving rise to Net Income liable to Tax at a special Rate as well as at a normal rates of Taxation.

Nature of the Income may give rise to various issues of Interpretation as to it's characterisation and hence rates of taxes. There may be income from securities and Properties treated as Business Income and Income accrued or not based on the method of Accounting.

Issues could arise as to attribution of the Income when all the operations are not carried out in India

This may further give rise to a question as to which article of the Tax Treaty will be applicable to consider the beneficial Provisions of the Tax Treaty.

Income then will be divided to arrive at a Tax amount as income liable to special rates of Tax as well as normal Rates of Tax or the rates of the taxation provided in the Tax Treaty.

12. Conclusion: The article is focussed to provide the broad overview of the provisions of the computation of the Income which is similar to the computation of Income in case of Resident of India with a distinction as to how it may differ in case of Non Residents.

Forthcoming articles will provide details of the computation of the Income and the Provisions detailing each character of Income as to it's chargeability to tax and how the provisions of the Treaty ARE Intertwined with the ITA.

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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

LODHA BELLISSIMO CROWN BUILDMART PVT. LTD. V/S HARESH JETHMAL ASHER

The Promoter is aggrieved by the order of MahaRERA dated 12th September 2018 wherein the application of promoter to dismiss the compliant was rejected.

The allottee booked a flat in the project of the respondent. The promoter contented that they received the part occupation certificate on 8th June 2017 for 1 to 40 floors wherein the flat booked by allottee is situated and due to this the there is no liability to register the project under RERA.

The point is that the promoter has a part completion certificate dated 8th June 2017 for the building. This is later than the implementation of RERA in Maharashtra i.e. 1st May 2017. Concession is extended by Section 3(1),the completion certificate obtained is later than the implementation of RERA in the State of Maharashtra which has come into force effective from 1st May, 2017. Even if concession is extended by Sec. 3(1) Proviso then also it will not automatically provide an elbow room or concession to the fact in issue as the part occupancy certificate is dated 8th June, 2017 later than 1.5.2017.

It is curious, that special conditions incorporated in part occupancy certificate also highlights that the applicant (promoter) shall complete the unfinished work before applying for full Occupancy Certificate of the building or before handing physical possession of the building for habitation whichever is earlier as ensured by the promoter in the Undertaking dated 26.5.2017. There is nothing

produced by the promoter indicating that this has been adhered to before completion of the project or getting full O.C.

The representative of the respondent says even the Letter / O.C. dated 8.6.2017 will embrace three months extension, since in Frequently Asked Question, MahaRERA clarified so. However, respondent's Counsel retorted by informing that the Answer No.60 in FAQ is again contradictory. Incidentally, the FAQ has a Disclaimer Clause and hence the views expressed by Secretariat of MahaRERA will not mould the provisions of Statute, contrary to its spirit. Hence FAQ is put out of consideration.

Taking into consideration the above facts, the order under challenge does not call for interference. The MahaRERA Adjudicating Officer has jurisdiction to entertain the complaint.

PUNJAB REAL ESTATE REGULATORY AUTHORITY

JAGJIT SINGH RANDHAWA & VANDANA RANDHAWA V/S PARKWOOD DEVELOPERS PVT.LTD.

The complainants had filed complaint under Section 31 of the Act against the respondent for refund of entire amount paid along with interest thereon and compensation as the respondent failed to deliver possession of the flat till date.

The complainants applied for allotment of flat in the project of the promoter on 07.1.2012 and agreement to sale was executed on same day. As per agreement the possession of the flat was to be handed over to the complainants by 31.07.2014. The work at the site is also going on a very slow pace and it was not clear by what time project would be completed and delivered.

The respondent contended that they have already completed and handed over 4 out of 12 towers in the project already and rest of the project got delayed largely due to circumstances which were beyond the control their control i.e. shortage of sand and gravel in the State of Punjab. However, respondent stressed that as per agreement, the complainants could only get a compensation of Rs.5.00 per sq. feet. per month for the period of delay; and if at all interest was to be paid it could only be for the period of delay after the commencement of the Act.

After considering rival arguments carefully authority held that time is the

essence in such contracts, and it cannot be held that interest is not to be paid for the period of delay prior to the commencement of the RERA Act.

So, respondent is directed to refund the amount paid by the complainants along with interest prescribed In Rule 16 of the Punjab State Real Estate (Regulation and Development)' Rules, 2017 within a period of two months from the date of receipt of the order.

KAMLA RAJPUT V/S TRISHLA DEVELOPERS

The complainant has filed this complaint alleging certain violations and contraventions on the part of the respondent in regard to non-delivery of possession of the shop no. 463 which was purchased by the complainant within the stipulated period.

The respondent alleged that the project in question was completed prior to the coming into force of the Act and completion certificate was already issued. It is further the case of the respondent that the project does not fall within the purview of the Act and the possession has already been delivered to the complainant way back on 04.02.2016 and possession certificate and affidavit-cum- declaration was duly signed by the complainant.

Hearing both the sides, the authority concluded that completion certificate has been issued qua Trishla Little India commercial colony Peer Muchhalla on 21.05.2015 andfurther copy of possession certificate dated 04.02.2016 indicates that possession of the shop in dispute bearing No, 463 in the above colony has been delivered to the complainant and this fact is fortified from the affidavit cum declaration of the complainant on the file.

Thus the authority ordered that the project to which this complaint relates is not registered one. Therefore, this complaint is not maintainable at this stage and the same is accordingly dismissed.

HARYANA REAL ESTATE REGULATORY AUTHORITY

RAMESH KUMAR V/S PARSVNATH DEVELOPERS PVT. LTD

The complainant booked a residential flat in the project named -Parsvnath Elite Floors", Dharuhera on 03.11.2009. Total basic sale price of the flat was

Rs. 26,50,000/- out ofwhich complainant had paid an amount of Rs. 24,02,580/- till 16.01.2010 which constitutes 95% of total sale price. Flat buyer agreement was executed on 04.12.2009. As per clause 9(a) of flat buyer agreement, construction of flat was to be completed within 24 months i.e. on 20.08.2012. However, after delay of 6 years, no construction was done till date and no possession was handed over. Therefore, complainant prayed for refund of entire amount paid along with interest.

Respondent submitted in his written statement that there was no intentional delay on their part to complete the project and to hand over possession of the flat to complainant. Delay was caused due to reasons beyond the control of the company. He stated that he had applied for renewal of licence which is pending before the competent authority, so construction was not completed. Regarding said flat he stated that construction work was almost completed only finishing work is left. Respondent company submitted that construction will be completed soon and possession will be handed over. Respondent is also willing to offer an alternate flat to complainant.

After hearing both the parties, Authority ordered respondent to complete the project and directed respondent to hand over the possession of the flat till 31 December 2019 failing which he shall be liable to refund the entire amount paid by complainant with interest @24%. The authority also directed respondent to submit monthly progress report of the project before the Authority.

DESH RAJ MANGLA V/S M/S AERENS JAI RELATY PVT. LTD.

The complainant states that he had purchased the rights of earlier allottee and the respondent had already endorsed transfer of such rights in his favour January, 2007.The complainant had been earlier allowed refund by the Real Estate Regulatory Authority, Panchkula in complaint Case No.75 2018 decided on 26.09.2018 on the ground that the respondent had failed to deliver him possession in terms of the Letter of Allotment.

The complainant however remained dis-satisfied by the mere refund and has filed the present complaint for grant of compensation of Rs. 10.00 lacs due to mental agony and hardship caused to him by the respondent.

The respondent has opposed his complaint averring that it is liable to be dismissed because the complainant has filed it for the same reliefs. As for the claim of mental agony and harassment respondent states that the complainant has committed default in payment of instalment of Rs. 2,07,400— demanded vide letter dated 31.10.2007. Also a final notice dated 09.05.2008 was issued informing that he shall pay the outstanding amount within 10 days or else his allotment will be cancelled but instead the complainant did not pay the amount and the respondent then allotted the said plot to someone else.

After examining the facts of the case, the authority concluded that complainant himself was guilty for creating the circumstances due to which the respondent could not deliver him possession of the plot and allotted it to someone else. So the respondent cannot be held guilty of causing any such mental agony and hardship to the complainant as may warrant compensation and complaint deserves dismissal. The complaint is accordingly dismissed.

NOTIFICATION

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

No.: R1(167) RJ/RERA/QPR/2020/ 12Dated: 1st January, 2021

Sub.: Submission of Quarterly Progress Reports (QPRs) for Registered Real Estate Projects

Corona time has been a trying time, but the Authority has used this time to strengthen its online system and expand its online services for the promoters. Earlier, we had made a provision only for online submission of applications for registration of projects. But, by now following online services have been added onto RERA web portal:-

1. Online generation of registration certificates
2. Extension of registration
3. Updation of revised approved maps
4. Change of RERA account with banks
5. Updation of encumbrances
6. Uploading of Completion/Occupancy Certificates.

Today, the Authority has launched an online facility for submission of QPRs

of registered projects. This will enable promoters to submit QPRs, using their dashboard. The QPRs submitted by the promoters will become visible to the Authority and to the public as soon as those are submitted by the promoter. In this context, the following directions are issued for compliance by the promoters:

1. From today, no paper QPRs will be accepted by the Authority; and promoters must submit all their QPRs online, using the QPR button on their dashboard.

2. For the purpose of submitting QPRs, quarters have been defined as January to March, April to June, July to September and October to December. First QPR becomes due at the end of the quarter in which a project is registered and last QPR becomes due at the end of the quarter in which the project is completed.

3. Promoters will be able to submit QPRs for their project only for the period of validity of its registration. QPRs for the period beyond the validity of registration can be submitted only after getting the registration of the project extended by making an online application therefore.

4. There is no fee for submitting QPR online, but it is expected that the promoters will submit their QPRs correctly and truly. Therefore, if a QPR has been submitted and the promoter wants to edit the submitted QPR, he will have to pay processing charges as under:-

(a) Rs. 2,000/- If the editing is done before the end of the next quarter.
(b) Rs. 5,000/- If the editing is done after the end of the next quarter.

5. As per the Rajasthan Real Estate (Regulation and Development) Rules, 2017 (hereinafter called the Rules'), the for a quarter has to be submitted within 15 days of the end of quarter. Therefore, if a QPR is not submitted within the time prescribed in the Rules, delay processing charges of Rs. 5,000 / - will have to be paid for each delayed submission.

6. Forms R-1, R-2 and R-3 prescribed under the Rajasthan Real Estate Regulatory Authority Regulations, 2017 will form the basis of each QPR. Therefore, the promoters shall obtain R-1, R-2 and R-3 from concerned professionals at the end of each quarter and fill the QPR online, based thereon. The promoter shall ensure that there is no mismatch between the data provided in R-1, R-2 and R-3 and the data provided in the QPR.

7. In this manner, the promoters are required to obtain Forms R-1, R-2 and R-3 four times in a year, for submitting QPRs; and they can very well use these very Forms for withdrawing money from RERA account. In addition, the promoters will be free to obtain R-1, R-2 and R-3 at any time they need to withdraw money from RERA account.

8. The QPR for October-December 2020 has become due today and needs to be submitted online by 15th January, 2021. As for the QPRs of earlier quarters, those can also be submitted using the online system. All the promoters who have not submitted QPRs for earlier quarters or have submitted those in paper form, are now required to submit the QPRs online for all earlier quarters also, No delay processing charges or penalty will be levied if the promoter submits all pending QPRs by 31st March 2021. Also, no processing charges will be levied if any submitted QPRs are edited before 31st March 2021. But, after 31st March 2021, delayed QPRs can be submitted only by paying the specified delay processing charges and submitted QPRs can be edited only by paying the specified processing charges.

9. To facilitate the submission of QPRs of earlier quarters, obtaining of R-1, R-2 and R-3 has been made non-mandatory. The promoters can submit the QPRs for earlier quarters based on whatever records they have kept or the QPRs they have already submitted in paper form.

10. Under section 11(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called the Act') read with rule 1 6(1)(D) of the Rules, every promoter is required to submit a QPR and update the project details online. Non-submission of QPR for any quarter is, therefore, a violation of section 11(1) of the Act and rule 16(1)(D) of the Rules and attracts a penalty under section 61 of the Act.

11. If any false information is provided in QPRs, it will attract a penalty under section 60 of the Act.

12. To facilitate the submission of QPRs online, the online QPR Forms have been auto-populated with the data that is already available on RERA web portal. The first online submission of QPR may be a little taxing, but the Authority is confident that all subsequent submissions will be very smooth and the promoters

will find it a very useful tool.

13. Submission of QPR is an opportunity for the promoters to review the progress of their project(s), including pending statutory compliances. It provides an opportunity for the allottees as also the potential buyers to know the latest status of the project and stay updated. It also provides an opportunity for the Authority to monitor the progress of registered projects and use the data in its decision-making on various issues concerning registered projects.

14. It is expected that the promoters will make good use of this new online facility to ensure correctly and timely submission of QPRs for each of their registered projects. If there are any practical difficulties in submitting QPR online, Shri ArpitSancheti, DTP-cum-Joint Registrar (Projects) may be contacted on his mobile number 9829872121 or e-mail ID jointregistrar.rera@RAJASTHAN.GOV.IN

This issues with the approval of Hon'ble Chairman.

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HIGH COURT OF TRIPURA AGARTALA

W.P(C) No.847/2020

1. SHRI PANKAJ BEHARI SAHA

S/o Late Anil Chandra Saha, and carrying on the business of bonded warehouse in the name and style of Udaipur Bonded Ware House at Brahmabari, near National Highway, P.O- R. K. Pur, P.S- R.K. Pur, Pin-799120

..... *Petitioner(s).*

Vrs.

1. The State of Tripura

Represented by the Chief Secretary, Government of Tripura, Agartala, New Civil Secretariat, P.O-Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, PIN-799006

2. The Principal Secretary

Finance Department, Government of Tripura, Agartala, New Civil Secretariat, PO- Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, Pin code-799006

3. The Commissioner of Taxes

Government of Tripura, P.N. Complex, Gurkhabasti, PO- Kunjaban, P.S- New Capital Complex (NCC), Agartala, District- West Tripura, Pin Code- 799006

4. The Superintendent of Taxes

Government OF Tripura, Charge-Udaipur, P.O- R.K.Pur, P.S- R.K. Pur, District- Gomati Tripura Pin code- 799120

..... *Respondent(s).*

W.P(C) No.848/2020

1. SHRI PANKAJ BEHARI SAHA

S/o Late Anil Chandra Saha, and carrying on the business of bonded warehouse in the name and style of Udaipur Bonded Ware House at Brahmabari, near National Highway, P.O- R. K. Pur, P.S- R.K. Pur, Pin-799120

..... *Petitioner(s).*

Vrs.

1. The State of Tripura

Represented by the Chief Secretary, Government of Tripura, Agartala, New Civil Secretariat, P.O-Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, PIN-799006

2. The Principal Secretary

Finance Department, Government of Tripura, Agartala, New Civil Secretariat, PO- Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, Pin code-799006

3. The Commissioner of Taxes

Government of Tripura, P.N. Complex, Gurkhabasti, PO-Kunjaban, P.S- New Capital Complex (NCC), Agartala, District- West Tripura, Pin Code- 799006

4. The Superintendent of Taxes

Government OF Tripura, Charge-Udaipur, P.O- R.K.Pur, P.S- R.K. Pur, District- Gomati Tripura Pin code- 799120

..... *Respondent(s).*

W.P(C) No.851/2020

1. SHRI PANKAJ BEHARI SAHA

S/o Late Anil Chandra Saha, and carrying on the business of bonded warehouse in the name and style of Udaipur Bonded Ware House at Brahmabari, near National Highway, P.O- R. K. Pur, P.S- R.K. Pur, Pin-799120

..... *Petitioner(s).*

Vrs.

1. The State of Tripura

Represented by the Chief Secretary, Government of Tripura, Agartala, New Civil Secretariat, P.O-Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, PIN-799006

2. The Principal Secretary

Finance Department, Government of Tripura, Agartala, New Civil Secretariat,

PO- Kunjaban, P.S- New Capital Complex (NCC), District- West Tripura, Pin code-799006

3. The Commissioner of Taxes

Government of Tripura, P.N. Complex, Gurkhabasti, PO- Kunjaban, P.S- New Capital Complex (NCC), Agartala, District- West Tripura, Pin Code- 799006

4. The Superintendent of Taxes

Government OF Tripura, Charge-Udaipur, P.O- R.K.Pur, P.S- R.K. Pur, District- Gomati Tripura Pin code- 799120

..... *Respondent(s).*

BEFORE

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

HON'BLE MR. JUSTICE S. G. CHATTOPADHYAY

For Petitioner(s)	:	Mr. A. K. Saraf, Sr. Advocate. Mr. Biplabendu Roy, Advocate.
For Respondent(s)	:	Mr. D. Bhattacharjee, Govt. Advocate.
Date of hearing and Judgment & Order	:	**8th February, 2021.**
Whether fit for reporting	:	YES

JUDGMENT AND ORDER(Oral)

(Akil Kureshi, CJ)

These petitions arise in similar background. They have been heard together and would be disposed of by this common judgment. The petitioner who is common in all these three petitions has challenged orders passed by the Superintendent of Taxes dated 14.10.2020 under Section 25 of the Tripura Value Added Tax Act, 2004 (TVAT Act, for short), raising unpaid tax demands from the petitioner. The petitioner has also challenged notices dated 05.11.2020 and 18.11.2020 seeking recovery of such tax. The petitioner has also further challenged orders dated 10.12.2020 again passed by the said authority imposing penalty on the petitioner in terms of Section 75A of the TVAT Act.

[2] These petitions relate to the assessment period 2010-11, 2011-12 and 2012-13. For further details, we may refer to the facts in W.P(C) No.847 of 2020 which are as under:

The petitioner is an individual engaged in the business of providing bonded ware houses in the name and style of Udaipur Bonded Warehouse situated within the State of Tripura. The petitioner is a registered dealer under the TVAT Act. For the assessment period 2011-12 the petitioner had filed a return of its taxable turnover in terms of the TVAT Act and according to the petitioner, necessary tax was also paid as per such declared taxable turnover. The revenue however, was not entirely satisfied about the taxes paid by the petitioner for the said assessment period. The Superintendent of Taxes therefore, had issued a notice dated 11.02.2018 under Section 27 (2) of the TVAT Act calling upon the petitioner to show cause why short payment of tax should not be recovered with interest. The petitioner opposed such proposal by making a representation on 26.02.2019 in which he contended that the assessment of the return was barred by limitation and that since no notice under Section 24 of the TVAT Act was issued, no action under Section 27 of the Act can be taken. When the Superintendent of Taxes refused to drop the show cause notice, the petitioner approached this Court by filing WP(C) No.1109 of 2019 and connected petitions. These petitions were disposed of by a judgment dated 20th January, 2020 in which the Court after referring to various provisions contained in TVAT Act, and particularly Sections 24, 25 and 27 thereof, held and observed as under:

"15. All these provisions noted above contained in Chapter V of the TVAT Act pertaining to returns and assessment thus provide for detailed procedure for requiring a dealer to file periodic returns of his turnover, for audit assessment of such returns if so desired and also to address the issues of turnover escaping assessments. The relevant provisions of Sections 24 and 27 need to be looked from the angle of the scheme contained in Chapter V of the TVAT Act concerning returns and assessments.

16. Sub-section (1) of Section 24 requires every registered dealer to furnish return in such form by such due dates as may be prescribed. A registered dealer thus is obliged to file his return as mandated under sub-section (1) of Section 24

of the TVAT Act. Subsection (2) of Section 24 on the other hand, refers to a case of a dealer in respect to whom the Commissioner has reason to believe that his turnover of sales has exceeded the taxable limit, the Commissioner would serve a notice in the prescribed manner requiring such dealer to furnish return as if he was a registered dealer. Sub-section (2) of Section 24 thus covers a case of a person who may not be a registered dealer but in whose case the Commissioner has reason to believe that his turnover of sales has exceeded the taxable limit.

17. Section 27 of the TVAT Act pertains to scrutiny returns. Sub-section (1) of Section 27 provides that every return in relation to any tax period furnished by a registered dealer to whom notice has been issued by the Commissioner under Section 24 shall be subject to scrutiny by assessing authority to verify the correctness of calculation, application of correct rate of tax and interest and input tax credit claimed therein and full payment of tax and interest payable by the dealer during such period. Sub-section (2) of Section 27 provides that if mistake is detected as a result of such scrutiny, the Commissioner of Taxes shall serve a notice in prescribed form on the dealer to make payment of the extra amount of tax along with interest as per the provisions of the Act if payable.

18. Section 27 of the TVAT Act thus is not a provision for full assessment of the return filed in response to the notice issued by the Commissioner under sub-section (2) of Section 24 of the TVAT Act. It is merely for the purpose of verifying the correctness of necessary details furnished in such return such as calculation, application of rate of tax, interest etc. as well as payment of tax and interest by such dealer. If any error is detected in any of these aspects, under subsection (2) of Section 27, the Commissioner would issue a notice of recovery demanding payment of extra tax with interest. These powers are essentially in the nature of prima facie adjustments.

19. The provisions contained in Section 27 of the TVAT Act are vastly different from the provisions for self-assessment under Section 29, provisional assessment under Section 30 and most significantly, the audit assessment under Section 31 of the TVAT Act.

20. The special powers can be exercised only in relation to a dealer to whom notice has been issued by the Commissioner under Section 24 of the Act.

Section 24 refers to issuance of notice only under sub-section (2) of the Act. Necessarily, therefore, unless and until such notice is issued in terms of sub-section (2) of Section 24 of the TVAT Act, the TVAT authorities cannot invoke the powers under Section 27 of the TVAT Act. Any other view would defeat the very scheme of the said Chapter providing for audit assessment and limitation for completing in such assessment as provided under Section 33 of the Act. The respondent authorities cannot be allowed to circumvent the limitation provision for completing audit assessment by permitting resort to the powers of summary adjustments under Section 27 which are peculiar in nature and are available only in case where notice under sub-section (2) of Section 24 of the Act has been issued to a dealer.

21. In the result, impugned orders under Section 27 of the TVAT Act are set aside. Any demand notices consequent to such orders shall also stand invalidated."

[3] After the said judgment of this Court, the department initiated fresh proceedings against the petitioner for the same period and issued a show cause notice dated 23.07.2020. The petitioner replied to the show cause notice under communication dated 3rd August, 2020. The Superintendent of Taxes in order to correct certain technical aspect withdrew the show cause notice and issued a fresh show cause notice on 27th August, 2020 in which he stated as under:

"And whereas, having paid VAT on taxable sales of Rs.4,30,45,451/-, Rs. 7,91,99,189/- & Rs.10,61,17,717/- as per declaration at Sl. No. (iv)(c) of Table 9 of the returns, VAT to the tune of Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- was paid in short by the dealer during the year 2010-11,2011-12& 2012-13 and thus, the dealer failed to pay the full amount of due VAT according to the returns furnished;

And whereas, in view of the above, the dealer is liable to pay balance due VAT amounting to Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- as per the returns furnished for the year 2010-11, 2011-12 & 2012 -13 respectively;

And whereas, interest at the rate of one and half percent per month from the date the tax payable had become due to the date of its payment or to the date of order of assessment, whichever is earlier. As per the returns furnished for the year 2010-11, 2011-12 & 2012 -13 respectively;

Now, therefore, the dealer or any person authorized by the dealer is hereby directed to appear before the Superintendent of Taxes, Udaipur, Gomati District at his office of the Superintendent of Taxes at 1st floor, O/O the Superintendent of Excise Office Building, Dakbanglow Road, Udaipur, Gomati Tripura on 11.09.2020 at 11.00 AM along with relevant books of account & documents and any other evidence, for the material year(s), on which the dealer may rely to show cause the following grounds:-

(i) As to why balance due VAT amounting to Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- shall not be payable by the dealer as per total sales declared in the returns furnished for the year 2010-11,2011-12 & 2012-13 respectively;

(ii) As to why interest at the rate of one and half percent per month from the date the tax payable had become due to the date of its payment or to the date of order of assessment, whichever is earlier. For the year 2010-11,2011-12 & 2012-13 shall not be payable by the dealer under sub-section(1) of Section 25 of the TVAT Act, 2004 and****"

[4] The petitioner filed a detailed reply to the said show cause notice under a communication dated 31.08.2020 raising several legal contentions. The petitioner pointed out that previously the department had initiated proceeding under Section 27 of the TVAT Act which the High Court had terminated. In the present case, notice is issued under Section 25 of the Act which is also wholly impermissible and would amount to circumventing the limitation provisions since all the assessments in the present case have long become time barred. With respect to contentious issue of short payment of tax, the petitioner contended as under:

"18. That, it's reiterated that the applicant-dealer is liable to deposit sales tax/VAT amounting to Rs.4,26,28,570/- for the financial periods 2010-11 but deposited amounting to Rs.4,31,06,304.00 against the sale proceeds amounting to Rs.14,42,94,836.00 after allowing discounts amounting to Rs.23,88,657.00. Hence, the applicant-dealer is deposited excess sales tax/VAT amounting to Rs.4,77,734.00(Taxable Sale proceeds Rs.14,42,94,836.00 - Discount Rs.23,88,657.00 = Rs.14,19,06,179.00 + Excise Duty Rs. 7,12,36,669.00 =Rs.21,31,42,848.00). Accordingly, sales tax/VT was/is Payable @ 20% amounting to Rs.4,26,28,570.00 but Rs. 4,31,06,304.00 was deposited. Hence,

the applicant-dealer has already deposited excess amount of sales tax/VAT amounting to Rs.4,77,734.00 yet the applicant-dealer has been harassing continuously by issuing Notices and passing orders and dropping the same which the action of the Ld. Assessing Authority is surprised one and shows its such ill action as like as megalomaniac. The said ill action of the Ld. Assessing Authority, Charge-Udaipur violates the Article 19(1)(g) of the Constitution of India as well as the violation of the Judgment & order dated 20.01.2020 and 27.01.2020 passed in W.P(c) 1109 if 2019, 1111 of 2019, 1105 of 2019 (Pankaj Behari Saha -Vs- The State of Tripura & Ors.) respectively.

20. That, it's humbly submitted that the order for withdrawal/dropping of the Notice dated 27.08.2020 must be reached to the applicant-dealer within 2(two) days from the date of receipt of this application. Otherwise the applicant-dealer must seek appropriate relief before the competent court of law against the ill action taken against the applicant-dealer without jurisdiction.

Though the matter of the case is a fiscal one yet the Ld. Assessing Authority does not have any prim facie case n or is he entitled to assess the applicant-dealer after expiry of limitation and it's also clear that both the assessing authority and the A.G. Audit made computation with wrong notion and without deducting the 'DISCOUNT' given to the buyers by the applicant-dealer. Hence, it's prayed before the Ld. Assessing authority to withdraw/drop the Notice dated 27.08.2020 within 2(two) days from the date of receipt of this application positively. Otherwise the applicant-dealer seeks appropriate relief before the competent court with contempt of Court against the Ld. Assessing Authority including the power delegated authorities."

[5] Undeterred by these oppositions of the petitioner, the Superintendent of Taxes passed the impugned order dated 14.10.2020 in purported exercise of powers under Section 25 of the TVAT Act, relevant portion of which reads as under:

"10.5. The proceeding under Section 25 of the TVAT Act, 2004 is detection of return default/defective return by making less payment of tax according to the declared total sales made by the dealer in the returns furnished for the periods 2010-11, 2011-12 & 2012-13 and the difference amount of sales detected and

balance tax due arrived at as mentioned in the Notice dated 27.08.2020 issued under Section 25 of the TVAT Act, 2004 is at all based on the total sales declared by the dealer in the returns furnished in Form X of the TVAT Rules, 2005 and the difference amount of sales and balance tax due is not at all determined to the best of judgment of the Superintendent of Taxes.

10.6 The dealer totally failed to produce any documentary evidence with regard to the discount amounting to Rs.23,88,657.00, Rs.39,96,739.00 & Rs.63,23,680.00 as claimed to have been allowed by the dealer to its bonafide buyers under Section 2(26) of the TVAT Act, 2004.

10.7 As per Section 2(26) of the TVAT Act, 2004, "Sales Price" means the amount of valuable consideration received or receivable by a dealer for the sale of any goods less any sum allowed as cash discount, according to the practice normally prevailing in the trade;

It is an undisputed as well as established fact that the dealer declared the total sales at Sl. No.(i) in Table 9 of the return after deducting the amount/sum towards discount allowed by him to its buyers under Section 2(26) of the TVAT Act, 2004, which resulted less payment of tax mounting to Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- according to the returns furnished for the periods 2010-2011, 2011-12 and 2012-13 respectively, which is liable to be paid by the dealer along with applicable interest at the rate of one and half percent per month under Section 25(1) of the TVAT Act, 2004.

11. In view of the foregoing discussed paras, after careful examination of the facts and circumstances covering all aspects including written submissions of the dealer, I am not inclined to accept the dealer's submissions and justifications put forwarded by him and I am satisfied to take the following decision.

Decision

12. The dealer failed to pay full amount of tax according to the returns furnished by him for the periods 2010-11, 2011-12 and 2012-13 as required under Section 24(4) of the TVAT Act, 2004.

13. The dealer paid less tax/VAT amounting to Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- for the periods 2010-11, 2011-12 and 2012-13 respectively,

which is liable to be paid by the dealer in accordance with the declaration f total sales made by him at Sl. No.(i) in Table 9 of the returns furnished by the dealer for the said periods in question.

14. The dealer is also liable to pay interest at the rate f one and half percent per month under Section 25(1) of the TVAT Act, 2004, from the date of tax payable had become due to the date of payment, on the amount of balance tax due or less paid Rs.5,38,383/-, Rs.8,05,845/- & Rs. 12,64,761/- for the periods 2010-11, 2011-12 and 2012-13 respectively.****"

[6] Appearing for the petitioner learned Sr. counsel, Sri Saraf submitted that the action of the Superintendent of Taxes is wholly without authority. Section 25 of the TVAT Act would not permit the Superintendent of Taxes to undertake a details scrutiny of the return filed by the petitioner. Such scrutiny assessment can be made only under Sections 31 or 34 of the TVAT Act, both of which come with time limits. In the present case, these assessments have become time barred. The authority in the guise of exercise of powers under Section 25 is seeking to circumvent such time barring provisions. Accordingly, the impugned order is bad in law. Consequently, the demand notices and the penalty orders may also be set aside.

[7] On the other hand, learned Govt. Advocate opposed the petitions contending that the provision of Section 25 of TVAT Act are completely independent of the assessment provisions and in which no limitation has been prescribed by the statute and none therefore, can be read into it. The Superintendent of Taxes found that the petitioner had made a misdeclaration with respect to the taxable turnover since the petitioner excluded the discount stated to have been given to the dealer from the taxable turnover. Firstly, the factum of such discount was not established and secondly, even otherwise the question whether such discount would form part of the taxable turnover or not was a disputed question. The declarations made in the return filed by the petitioner therefore, were inaccurate. When these aspects came to the notice of the Superintendent of Taxes, he raised the demands after hearing the petitioner, which needs no modifications. If the petitioner has any dispute about the correctness of the order, he must file an appeal as is provided under the Act.

[8] In the present petitions, we are concerned with the jurisdictional aspect of the powers exercise by the Superintendent of Taxes. There are no disputed questions to be decided and we have proceed on admitted facts. When in such background jurisdictional question arises, it would not be necessary to relegate the petitioner to appellate remedy.

[9] The relevant facts which are not in dispute may be summarized thus:

(i) The petitioner had filed the returns for the period of 2010-11, 2022-12 and 2012-13;

(ii) On the basis of declarations of taxable turnover made by the petitioner in such returns, he had also paid the taxes at applicable rates;

(iii) At no stage, the department either undertook audit assessment of such return or undertook assessment for turnover escaping assessment;

(iv) The first attempt on part of the department to include the discount component in the taxable turnover and to demand taxes on the basis of such higher turnover was by issuance of a notice under Section 27 of the TVAT Act which attempt was terminated by the High Court in the judgment dated 20.01.2020. It was held that since no notice under Section 24 of the TVAT Act was issued, powers under section 27 of the Act cannot be exercised; (v) After this judgment was delivered, the Superintendent of Taxes issued notice under Section 25 of the TVAT Act and after hearing the petitioner proceeded to pass order of raising tax demands and also imposing penalty. The question is, was the Superintendent of Taxes within his right to do so. To answer this question, we may refer to certain provisions contained in TVAT Act.

[10] Chapter-V of the TVAT Act pertains to returns and assessment. Section 24 contained in the said chapter pertains to periodical returns and payment of tax. Sub-section (1) of Section 24 provides that every registered dealer shall furnish return in such forms for such period, by such dates and to such authority as may be prescribed. Sub-section (2) of Section 24 provides that if the Commissioner has reason to believe that the turnover of sales of any dealer has exceeded the taxable limit as provided in sub-section (3) of Section 3, he may by notice served in the prescribed manner, require such dealer to furnish return as if he were a registered dealer. However, no tax would be payable by such a person

unless his taxable turnover exceeds the taxable limit. Sub-section (4) of Section 24 provides that every dealer required to file return under sub-section (1) or sub-section (2) shall pay the full amount of tax according to the return or the differential tax according to the revised return, if so filed, into the Government Treasury in such manner as may be prescribed.

[11] Section 24 thus casts a duty on a registered dealer to furnish the return and to pay tax as per the declarations made in such return. If a dealer has taxable turnover but is not registered, the Commissioner may require him under Sub-section (2) of Section 24 to file the return as if he is a registered dealer.

[12] Section 25 of the TVAT Act pertains to return defaults. Relevant portion of which reads as under:

"25. Return defaults:

(1) If a dealer required to file return under sub-section (1) or sub-section (2) of section 24 -

(a) fails without sufficient cause to pay the amount of tax due as per the return for any tax period; or

(b) furnishes a revised return under sub-section (3) of section 24 showing a higher amount of tax to be due than was shown by him in the original return; or

(c) fails to furnish return;

Such dealer shall be liable to pay interest in respect of -

(i) the tax payable by him according to the return, or

(ii) the difference of the amount of tax according to the revised return; or

(iii) the tax payable for the period for which he has failed to furnish return;

at the rate of one and half percent per month from the date the tax payable had become due to the date of its payment or to the date of order of assessment, whichever is earlier.

(3) If a registered dealer, without sufficient cause, fails to pay the amount of tax due and interest along with return or revised return in accordance with the

provisions of sub-section (1), the Commissioner may, after giving the dealer reasonable opportunity of being heard, direct him to pay in addition to the tax and interest payable by him a penalty, not exceeding one and half times of the tax due but which shall not be less than 10% of that amount."

[13] Section 27 of the TVAT Act pertains to scrutiny of returns. Sub- section (1) of Section 27 provides that every return in relation to any tax period furnished by a registered dealer in which notice has been issued by the Commissioner under Section 24 shall be subject to scrutiny by the Assessing Authority to verify the correctness of calculation, application of correct rate of tax and interest and input tax credit claimed therein and full payment of tax and interest payable by the dealer during such period. As per sub-section (2) of Section 27 if any mistake is detected as a result of such scrutiny the Commissioner shall serve a notice to the dealer to make payment of the extra amount with interest.

[14] Section 29 of the TVAT Act pertains to self assessment and Section 30 pertains to provisional assessment. Section 31 of the TVAT Act pertains to audit assessment and authorizes the Commissioner to carry out scrutiny assessment where a dealer has failed to furnish the return or his case is selected for audit assessment or the Commissioner is not satisfied with the correctness of any return filed under Section 24 or the bonafides of any claim of exemption, deduction, concession, input tax credit or genuineness of any declaration or the Commissioner has reason to believe that detailed scrutiny of the case is necessary. Under such circumstances, the Commissioner would carry out a detailed scrutiny of the assessment of the petitioner and in terms of sub-section (5) of Section 31, may also impose penalty under circumstances mentioned therein.

[15] Section 32 of the TVAT Act pertains to assessment of dealer who fails to get himself registered. Section 33 of the TVAT Act provides that no assessment under Section 31 and 32 shall be made after expiry of five years from the end of the tax period to which the assessment relates. Section 34 pertains to turnover escaping assessment. As per sub-section (1) of Section 34 where after a dealer is assessed under Section 29 or Section 30, the Commissioner has reason to believe that whole or any part of the turnover for any period has escaped assessment or has been under assessed or has been assessed at the lower rate or

been wrongly allowed any deduction or allowed any wrong credit, it is open for the Commissioner to proceed to assess amount of tax due from the dealer. Here also sub-section (2) of Section 34 provides that no order of assessment shall be made under sub-section (1) after expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

[16] Chapter V of the TVAT Act thus provides for a complete mechanism for filing of the returns, their assessments and provisions for limitation for exercising such powers of assessment. Once a dealer files a return, it may be subjected to different kinds of treatment depending on the situation and the treatment that the Assessing Officer chooses to accord to it. He may either chose to scrutinize the return under Section 27 if conditions contained therein are satisfied or the return may be selected for audit assessment in which case, the Assessing Officer can scrutinize the return of the assessee and make necessary adjustments as found appropriate. If there is a case of turnover escaping assessment or been under assessed or assessed at a lower rate or grant of wrong and excess deduction of credit, the assessing authority can resort to the powers contained under Section 34 of the TVAT Act. However, one significant aspect of the matter is the power of audit assessment as well as assessment in case of turnover escaping assessment, both can be exercised only within the period of limitation prescribed in relevant section. We have noticed that as per Section 33 of the TVAT Act no assessment under Section 31 i.e. audit assessment can be made after expiry of five years from the end of the tax period in question likewise as per sub-section (2) of Section 34 powers of assessing turnover escaping assessment cannot be exercised after expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

[17] It was in this context, while examining the previous exercise of powers by the Assessing Officer under Section 27 of the TVAT Act, this Court had made certain observations, relevant portion of which we have reproduced earlier. Noticing that once the assessing authority had missed the time limit for carrying out audit assessment or for bringing to tax turnover escaping assessment, the powers under Section 27 could not be exercised that too without satisfying the pre condition of a notice under Section 24 having been issued, the action was

quashed. It was at this stage that the Assessing Officer once again tried to bring to tax the same element of petitioner's turnover which according to him had escaped assessment. The dispute between the petitioner and the department with respect to the correct assessment is that according to the petitioner the discounts offered by the petitioner to his dealers were correctly not included in the taxable turnover, the Assessing Officer however, holds the belief that such discounts have to be verified and in any case should have formed part of the taxable turn over. In the present case, we are not required to and therefore, not inclined to go into the correctness of the rival version. But proceed on the basis that there is a bonafide genuine dispute between the assessee and the department with respect to an element of sale proceed whether would form part of the taxable turnover or not. Such a dispute can be resolved only through the assessment in terms of various provisions contained in Chapter-V. The same under any circumstances cannot be a subject matter of adjustments under Section 25 of the Act.

[18] We may recall, under sub-section (1) of Section 25 the Assessing Officer can charge tax from a dealer at a prescribed rate if the dealer fails without sufficient cause to pay amount of tax as due as per the return or has furnished a revised return showing higher amount of tax as compared to the original return or has failed to furnish return. Obviously, in the present case the department does not argue that the case of the petitioner falls in the later of the two clauses of sub-section (1) of Section 25 of the TVAT Act. Even according to the department the case of the petitioner falls in Clause (a) namely that the dealer has failed without sufficient cause to pay the amount of tax due as per the return.

[19] There is a clear misconception on part of the Assessing Officer as to his powers under sub-section (1) of Section 25 of the TVAT Act. Clause (a) of sub-section (1) of Section 25 can be activated when a dealer has not paid the tax at prescribed rate without sufficient cause which tax liability emerges from the return filed by him. If there is any legal dispute about the declaration of the taxable turnover or any other element of any of the claims made by the assessee in the return, the same cannot be a subject matter of a demand by the Assessing Officer under Clause (a) of sub-section (1) of Section 25 of the TVAT Act. Any dispute

as to correct taxable turnover, any claim of exemption or deduction or any other disputed item under the return filed by a registered dealer, has to be first adjudicated by the Assessing Officer in the assessment proceedings. Clause (a) of sub-section (1) of Section 25 cannot be termed into an assessment which in the present case the Assessing Officer has done. According to him, the petitioner could not have excluded the discounts passed on to the dealers from his taxable turnover and to that extent the assessee had declared turnover less than the actual turnover. Even if the Assessing Officer is correct in so contending, it is not under Section 25(1)(a) of the Act that he can bring such turnover to tax. Allowing him to do so, would not only be expanding the boundaries of the powers under sub-section (1) of Section 25 of the TVAT Act but also overriding the limitation provisions contained in the said chapter.

[20] In the result, the impugned orders of tax demands raised by the Assessing Officer under Section 25 of the TVAT Act are set aside. Consequently, the demand notices are also quashed. The attachment or attachments on the petitioner's bank accounts are lifted. The penalty orders are also quashed.

[21] All the petitions disposed of accordingly. Pending application(s),if any, also stands disposed of.

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

HIGH COURT OF MADHYA PRADESH

W.P. No.16131/2020

(M/s Shri Shyam Baba Edible Oils Vs. The Chief Commissioner and another)

Gwalior, Dt. 19.11.2020

Shri Pankaj Ghiya, learned counsel for the petitioner.

Shri Ankur Mody, learned AAG for the respondent No.3/State. Learned counsel for the rival parties are heard through video conferencing.

1. Instant petition invoking writ and supervisory jurisdiction of this Court under Articles 226 and 227 of Constitution prays for following reliefs:-

"(i) This Hon'ble Court may kindly be pleased to call for the record from the office of respondents for its kind perusal.

(ii) That, a writ of certiorari or any other writ or writs may kindly be issued quashing the impugned order in Form GST DRC-07 dated 18.09.2020 and orders as referred in the said order i.e. order under section 74 dated 10.06.2020 passed by the respondents.

(iii) That, a writ of mandamus or any other writ or writs may kindly be issued quashing the impugned order in Form GST DRC-07 dated 18.09.2020 and orders as referred in the said order i.e. order under section 74 dated 10.06.2020 passed by the respondents.

(iv) Direct the respondents to comply with the provisions of GST Act and upload notices and orders only on the GSTN Portal as mandated under law.

(v) Any other relief considered expedient and just under the facts of the case by the Hon'ble Court may kindly be allowed to the petitioner. "

2. Grievance of the petitioner is that while raising the demand of tax vide summary of order dated 18.09.2020 vide Annexure P/2 (at page 17 of the writ

petition), the foundational show-cause notice/order No.12 dated 10.06.2020 qua financial year 2018-2019 and tax period April, 2018 to March, 2019, was never communicated to the petitioner who is an individual registered under GST Act.

3. As such on the question of violation of principle of natural justice on the anvil of Rule 142 of Central Goods and Services Tax Act, 2017 (for brevity "CGST Act"), this Court requisitioned reply of the State.

4. State has filed reply on 11.11.2020 disclosing that show-cause notice/order No.12 dated 10.06.2020 was communicated to petitioner on his E-mail address and despite receiving the same the petitioner failed to file any response. Copy of show-cause notice/order No.12 dated 10.06.2020 is Annexure R/1 filed alongwith the reply.

5. Learned counsel for the petitioner has drawn the attention of this Court to the provision of Rule 142(1) of CGST Act to contend that the said provision statutarily obliges the revenue department to communicate show-cause notice/ order by uploading the same on the website of revenue so that the aggrieved person can have access to the same and be aware of reasons behind the demand to enable the aggrieved person to avail alternative remedy before the higher forum under CGST Act.

6. For ready reference and convenience, Rule 142 of CGST Act is reproduced below:-

"142. Notice and order for demand of amounts payable under the Act.- (1) The proper officer shall serve, along with the

(a) notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GSTDRC-01,

(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GSTDRC-02,

specifying therein the details of the amount payable. (1A) The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.] 274;

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act [whether on his own ascertainment or, as communicated by the proper officer under subrule

(1A),] 275he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC- 01A.] 276

(3) Where the person chargeable with tax makes payment of tax and interest under subsection (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GSTDRC-06.

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GSTDRC-08.]"

6.1 A bare perusal of the aforesaid provision reveals that the only mode prescribed for communicating the show-cause notice/order is by way of uploading the same on website of the revenue.

7. The State in its reply has provided no material to show that show-cause notice/order No.12 dated 10.06.2020 was uploaded on website of revenue. In fact, learned AAG, Shri Mody, fairly concedes that the show-cause notice/order was communicated to petitioner by E-mail and was not uploaded on website of the revenue.

8. It is trite principle of law that when a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded. This principle becomes all the more stringent when statutarily

prescribed as is the case herein.

9. In view of above discussion, this Court has no manner of doubt that statutory procedure prescribed for communicating show-cause notice/order under Rule 142(1) of CGST Act having not been followed by the revenue, the impugned demand dated 18.09.2020 vide Annexure P/2 pertaining to financial year 2018-2019 and tax period April, 2018 to March, 2019 deserves to be and is struck down.

10. Accordingly, instant petition stands allowed with liberty to the revenue to follow the procedure prescribed under Rule 142 of CGST Act by communicating the show-cause notice to the petitioner by appropriate mode thereafter to proceed in accordance with law.

(Sheel Nagu)
Judge

(Rajeev Kumar Shrivastava)
Judge

HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

S.B. Criminal Miscellaneous Bail Application No. 15605/2020

Anil Kumar Gupta S/o Sh. Chandra Prakash Gupta Partner Salasar E West, R/o Plot No. 3 Ram Nagar Colony Alwar Raj. (Accused Petitioner Is In J.c. At Central Jail Jaipur)

.....Petitioner

Versus

Union Of India, Through Inspector (Anti Evasion) Central Goods And Service Tax Commissionarate Alwar Through Pp

.....Respondent

For Petitioner(s)	:	Mr. Pankaj Ghiya
		Mr. Shahid Hasan
		Mr. Pawan Sharma
		Mr. Deepak Garg
For Union of India	:	Mr. Anand Sharma

HON'BLE MR. JUSTICE PANKAJ BHANDARI

Judgment / Order

19/02/2021

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

2. F.I.R. No.IV (06) 248/ AE/ALWAR/2020 was registered at Chief Metropolitan Magistrate (Economic Offences) Jaipur (Raj.) for offence under Sections 132(l)(c) of the Central Goods and Services Tax Act, 2017.

3. It is contended by counsel for the petitioner that in the initial application, there was an allegation with regard to wrongful claim of input tax credit to the tune of Rs.5.27 Crore, however, in the complaint that was filed before the Court, wrongful claim of input tax is to the tune of Rs.5.88 Crore. It is also contended that all these firms which are stated to be bogus firms were shown in the portal of the Department and three firms are still existing on the portal of the Department. It is also contended

that petitioner is not in the management of any of the firms.

4. It is further contended that there was an actual movement of the goods, which is established by toll naka receipt, wherein the truck number is also mentioned which tallies with the truck number mentioned in the e-way bills. It is further contended that, if the actual goods movement is calculated then there would be reduction of input tax credit by about three crores. It is also contended that where the offence is of wrongful claim of input tax credit below Rs.5 crore the same is bailable and the maximum sentence provided under the Act is five years. Petitioner is in custody since November 2020.

5. Counsel for the Union of India has vehemently opposed the bail application. It is contended that fake firms were created for claiming input tax credit. From the investigation, it is revealed that he firms were fake. The proprietor and owner of the firms are not traceable. It is further contended that evasion of tax has an effect n the economy of the Nation and Court should not be liberal in granting bail to such offenders.

6. I have considered the contentions.

7. Considering the contentions put forth by counsel for the petitioner, I deem it proper to allow the bail application,

8. This bail application is, accordingly, allowed and it is directed the accused-petitioner shall be released on bail provided he furnishes a personal bond in the sum of Rs. 1,00,000/- (Rupees One Lac only) together with two sureties in the sum of Rs.50,000/- (Rupees Fifty Thousand only) each to the satisfaction of the trial Court with the stipulation that he shall appear before that Court and any Court to which the matter be transferred, on all subsequent dates of hearing and as and when called upon to do so.

(PANKAJ BHANDARI), J

GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4334/2020

BARAK VALLEY CEMENTS LTD

A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 AND HAVING ITS REGISTERED OFFICE AT 202, ROYAL VIEW, B.K. KAKOTI ROAD, ULUBARI, GUWAHATI, DIST-KAMRUP (M), ASSAM AND ITS INDUSTRIAL UNIT AT DEBENDRANAGAR, JHOOM BASTI, BADARPURGHAT, DIST-KARIMGNAJ, ASSAM. REPRESENTED BY SRI BANWARILAL PAREEK, THE MANAGER OF THE PETITIONER COMPANY

VERSUS

THE UNION OF INDIA AND 5 ORS.

REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, NORTH BLOCK,

NEW DELHI-110001

2: SECRETARY TO THE GOVERNMENT OF INDIA MINISTRY OF COMMERCE AND INDUSTRY DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION

UDYOG BHAWAN

NEW DELHI-110011

3: JOINT SECRETARY TO THE GOVERNMENT OF INDIA MINISTRY OF COMMERCE AND INDUSTRY DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI-110011

4: COMMIS SIONER

CENTRAL GOODS AND SERVICE TAX

GST BHAWAN

KEDAR ROAD FANCY BAZAR

GUWAHATI-781001

5: ASSISTANT COMMISSIONER

CENTRAL GOODS AND SERVICES TAX AND CENTRAL EXCISE DIVISION SILCHAR

6: CENTRAL BOARD OF EXCISE AND CUSTOMS REPRESENTED BY ITS CHAIRMAN MINISTRY OF FINANCE

DEPARTMENT OF REVENUE

NORTH BLOCK NEW DELHI-11000

Advocate for the Petitioner : DR. ASHOK SARAF **Advocate for the Respondent** : MR. S C KEYAL (SC, GST)

BEFORE

HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

O R D E R

15.02.2021

Heard Dr. A Saraf, learned senior counsel for the petitioner and Mr. SC Keyal, learned standing counsel for the GST Department.

2. The petitioner is an assessee under the GST bearing registration No.18AABCB5691A2ZV. The respondents in the GST by an email dated 08.10.2020 had provided that the E-Way Bill (EWB) generation facility of the petitioner would be blocked on the EWB Portal in the event the petitioner fails to file their GSTR 3B returns for two financial years being 2018-19 and 201-20. The e-mail provides that the blockage of the EWB generation facility would be in terms of Rule 138 E (b) of the CGST Rules, 2017. The relevant portion of the e-mail is extracted as below:-

"Dear Sir/Madam,

In terms of Rule 138 E (b) of the CGST Rules, 2017, the E Way Bill generation facility of a person is liable to be restricted, in case the person fails to file their GSTR-3B returns, for a consecutive period of two months or more.

As you might be aware that the GST Council in its last meeting has decided that this provision will be made applicable for the taxpayers whose Aggregate Annual Turn Over (AATO, PAN based) is more than Rs 5 Crores.

Thus, if the GSTIN associated with the respective PAN (with AATO over Rs 5 Cr.) has failed to file their GSTR-3B Return for 02 or more tax periods, up to the month of tax period of August, 2020, their EWB generation facility will be blocked on the EWB Portal. Please note that the EWB generation facility for such GSTINs (whether as consignor or consignee or by transporter) will be blocked on EWB Portal after 15th October, 2020.

To avail continuous EWB generation facility on EWB Portal, you are therefore advised to file your pending GSTR 3B returns immediately."

3. The stand of the writ petitioner is that they are entitled to certain benefits under the new Industrial Policy resolution as notified by the Government of India in the Industries Department by the Notification dated 24.12.1997 and as per the Industrial Policy, the petitioner is entitled to a refund amounting to Rs.14,42,51,265/- under the relevant budgetary support scheme. It is the stand of the petitioner that in spite of being entitled to the aforesaid refund, same has not been done by the respondent authorities. Accordingly, the petitioner takes a stand that as because the amount of Rs.14,42,51,265/- has not been refunded to the petitioner, therefore, the petitioner had defaulted in submitting the GST returns for the aforesaid two financial years.

4. We are not very much impressed with the said submission of the petitioner by linking up a refund being entitled to them under some other provisions of law and the requirement of law to submit their tax returns. We are also of the view that the same stand of the petitioner cannot bestow a legal right upon them not to pay the required GST under the law or not to submit their returns for two given financial

years. But at the same time, if the petitioner is of the view that as because an amount of Rs.14,42,51,265/- had not been refunded to them and the requirement of tax to be paid by them is a small amount compared to the refund they are entitled and therefore they are unable to pay it, we are of the view that the interest of justice would be met if the respondents being the Principal Commissioner, GST, North-eastern Region would examine the matter and pass a reasoned order on the entitlement of the petitioner for a refund as indicated above.

5. The petitioner accordingly shall forthwith submit a representation before the Principal Commissioner, GST claiming and justifying the reasons for the refund as indicated above and in the event such representation is submitted, the Principal Commissioner shall pass a

reasoned order thereon within a period of 10(ten) days from the date of submission of such representation. In doing so, the Principal Commissioner may also give a hearing to the petitioner. Upon considering the representation, the Principal Commissioner may pass a reasoned order on the entitlement of the petitioner for such refund within a period of ten days from the date of submission of the representation.

6. Till such order is passed by the Principal Commissioner, the earlier interim order dated 14.10.2020 requiring the respondents not to block the EWB Portal of the petitioner shall continue. In the event, the representation is not submitted within a period of three days from today, the continuation of the interim order shall no longer hold. In this writ petition, we are not deciding any other aspect other than requiring the Principal Commissioner to pass an order on the claim of the petitioner on the refund of the aforesaid amount.

The writ petition is disposed of in the above terms.

JUDGE

COMMERCIAL NEWS

CA DEEPAK KAHANDELWL

Furnishing of Letter of Undertaking ('LUT') for Financial Year 2021-22

The GST law allows the registered taxable person to make zero-rated supplies either with payment of taxes or without payment of taxes.

In respect of zero-rated supply without payment of taxes, Rule 96A of the Central Goods and Services Tax Rules, 2017 provides that the registered person is required to furnish the bond or a Letter of Undertaking ('LUT') in Form GST RFD-11 to the jurisdictional Commissioner. The LUT/bond is required to be furnished before any making any zerorated supply.

In this regard, the GSTN common portal has activated the facility to furnish LUT for FY 2021-22.

Where to furnish LUT for the FY 2021-22?

Go to - Services > User Services > Furnish Letter of Undertaking> Select FY & apply

.....

Frequently asked questions on QRMP scheme

Q 1: What is QRMP scheme? What are its benefit?

A: **Quarterly Return, Monthly Payment** of Taxes (QRMP) Scheme is a scheme to simplify compliance for small taxpayers. Under this scheme, taxpayers having an aggregate turnover at PAN level up to Rs. 5 crore can opt for *quarterly* GSTR-1 and GSTR-3B filing. Payment can be made in the first two months by a simple challan in FORM GST PMT-06. For the ease of taxpayers, system has assigned *quarterly* frequency to small taxpayers automatically.

Q 2: Why have I been assigned quarterly filing without opting for the same?

A: Taxpayers eligible for the simplified compliance scheme were assigned quarterly frequency by the GST system. All taxpayers were informed regarding the frequency assigned to them by e-mail and SMS.

Q 3: Why have I been assigned quarterly frequency by system even when my aggregate turnover on PAN is greater than Rs. 5 crore?

A: For the purpose of determining the eligibility for QRMP, the turnover was determined on the basis of the values declared by taxpayers in Table-3.1 of GSTR-3B *(except inward supplies attracting reverse charge)* for the Financial Year 2019-20. If a component of the turnover, like *exempted* or *non-GST turnover,* was not declared by a taxpayer in GSTR-3B or was declared in next financial year, then the turnover computed by the system for such taxpayers could be less than Rs. 5 crore. Such taxpayers may have been assigned to QRMP on the basis of values declared by them in GSTR-3B. Such taxpayers are advised to opt-out of scheme for quarter Apr-Jun'21 by 30th April 2021.

Q 4: Why have I been assigned monthly frequency by system even when my aggregate turnover on PAN is upto Rs. 5 crore?

A: At the time of assigning the frequency by the system, system considered the aggregate turnover of the taxpayer and the filing status of FORM GSTR-3B for the month of October 2020. If the said GSTR-3B was not filed till 30th November 2020, the taxpayer were assigned to monthly frequency. The system allows the taxpayer to opt for QRMP scheme only if the last applicable return in FORM GSTR-3B, whose due date is over, is filed.

Illustration :

If the taxpayer is trying to opt for QRMP Scheme on 25th Feb'21, from Quarter Apr-Jun'21 onwards then it will be allowed only if the return in form GSTR-3B is filed for the month Jan'21.

If the taxpayer is trying to opt for QRMP Scheme on 19th Feb'21, from Quarter Apr-Jun'21 onwards then it will be allowed only if the return in form GSTR-3B is filed for the month Dec'20.

Q 5: I want to opt-out of QRMP scheme and become monthly filer. Why the portal is not allowing me to do same for the quarter Jan-Mar, 2021?

A: The last date to choose or change the filing frequency for the quarter of *January to March 2021* was 31st January, 2021. After 31st January 2021, the filing frequency cannot be changed for the quarter

January to March 2021.

However, for the quarter of *April to June 2021,* taxpayers may change their filing frequency from quarterly to monthly from 1st February, 2021 to 30th April, 2021.

It may be noted that profile selection is not a recurring requirement every quarter. Once a frequency has been opted for, it is applicable for all future periods unless changed further.

Q 6: What is IFF? Is it another compliance requirement?

A: **Invoice Furnishing Facility** (IFF) is an ***optional*** facility made available as per Rule-59(2) of the CGST Rules, 2017. This is provided for those *quarterly* taxpayers who want to pass on input tax credit (ITC) to their recipients *(buyers/customers)* in first two months of a quarter. Since IFF is an *optional* facility, it poses no additional compliance burden. It is

a facility for those *quarterly* filers who intend to pass ITC to their recipients in first two months of the quarter. It may be noted that since IFF is an *optional* facility, IFF for a month will expire after the *due date* of 13th of next month, and cannot be filed after this date.

Q 7: Is filing IFF mandatorily or optional?

A: Invoice Furnishing Facility (IFF) is an ***optional*** facility to those taxpayers who want to pass on input tax credit (ITC) to their recipients *(buyers/customers)* in first two months of a quarter. Those taxpayers who do not have to pass credit to their recipients need not file IFF in the first two months of the quarter. They may declare their outward supplies in the *quarterly* FORM GSTR-1. It may be noted that since IFF is an *optional* facility, IFF for a month will expire after the *due date* of 13th of next month, and cannot be filed after this date.

Q 8: How do I make payment of my liability in first two months of the quarter?

A: In first two months of the quarter, payment of liability can be made by either of the following two methods:

a. Fixed Sum Method: Portal will generate a pre-filled challan in Form GST PMT-06. The system generated pre-filled challan in this case is commonly also known as 35% challan.

b. Self-Assessment Method: The actual tax due is to be paid through challan, in Form GST PMT-06, by considering the tax liability on inward and outward supplies and the input tax credit available for the period as per law.

The *due date* for making payment by challan is 25th of the next month.

Q 9: What is *fixed sum* method of payment?

A: In *fixed sum* method, the taxpayer is required to pay a system generated challan in the first two months of a quarter. The system generated pre-filled challan in this case is commonly also known as 35% challan. If *fixed sum* method is opted for by the taxpayer & there is no ITC to be passed in that month, then except for paying system generated challan, no other compliance requirement is there in the first two months of the quarter

Q 10: How do I declare B2C supplies in IFF for first two month of quarter if I have opted for QRMP?

A: Supplies made to unregistered persons *(also called B2C supplies)* are not required to be declared in IFF. These may be declared in FORM GSTR-1 for the quarter.

Q 12: How will I reconcile the values declared in IFF & GSTR-1 with quarterly GSTR-3B?

A: Taxpayers will be provided with a draft GSTR-3B, which will contain the details of the liability to be paid by taxpayers in the *quarterly* GSTR-3B. This will be prepared on the basis of the supplies declared in FORM GSTR-1 for the quarter. It will also contain data from the *optional* IFF, if any is filed in either of the first two months of the quarter. The said system computed values will also be auto-populated in *quarterly* GSTR-3B.

NOTES

*****

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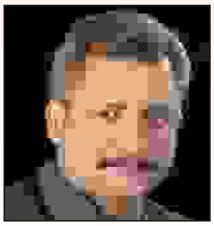

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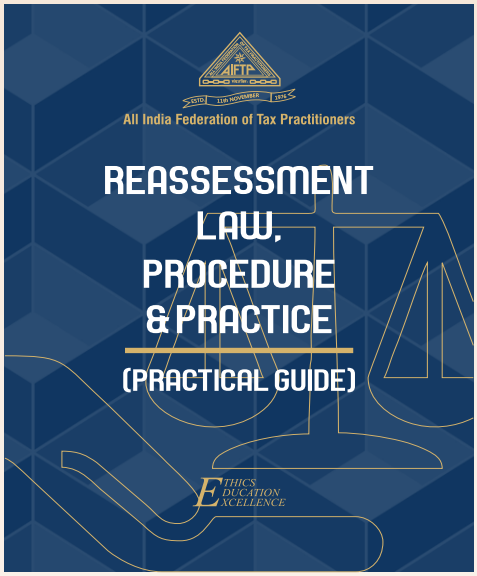

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