AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

ETHICS EDUCATION EXCELLENCE

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CELEBRATING 45 YEARS 1976 - 2021

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

Dear All,

After the Union Budget-2021 which contained many amendments and certain settled issues were unsettled the State Governments has also came out with the State Budget. In some States the Amnesty Scheme for the old litigations has come out and in certain States some benefits has been granted and time extension has been granted for the pending Forms or filing of returns etc.

The departmental activities are going on in full swing. The CBIC particularly has been more active and there are many surveys and search and large number of arrest has been made for the bogus bills and other issues. The Direct Tax has seen the extension of Vivad Se Visvas Scheme till 31st March, 2021 and large number of Income Tax Payees having litigation pending are opting for it.

In this issue of the Journal we are covering GST, RERA, FEMA and some important judgements. The learned authors has devoted much time and given the crux in the Article on the subjects and they cover all aspect of the law. We request our professionals brother to send their articles / judgements on Indirect Tax and Corporate Law for publication in this Journal.

We request the readers to send their suggestions, comments etc. to us on the mail given below, so that we can add or improve on the coming issues of the Journal and be more useful for all. AIFTP is now organizing physical seminars/ conferences in various parts of the Country and we request that the AIFTP Members should join in the Membership Drive and make atleast 10 Members each. The complete Membership process is online and is available at the website i.e. www.aiftponline.org.

Friends, I am deeply obliged to the sponsors of this issue Mr. Anand Pasari, Advocate, Ranchi and National Vice President- East Zone, AIFTP who has very kindly agreed to sponsors this issue.

We look forward to your continued support and suggestions.

Regards,

PANKAJ GHIYA
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ALL INDIA FEDERATION OF TAX PRACTIONERS

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Southern	1	1580	21	5	**1607**
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President's Message

At the outset let me congratulate the Indirect Tax Journal Committee led by Shri Pankaj Ghiya for bringing out the third edition of the AIFTP Indirect Tax and Corporate Laws Journal in time for circulation to the members, I would also like to thank the sponsors for supporting the Federation and sponsoring the Journal.

The Union Budget, 2021 did surprise us with the exclusion of Section 35 (5) of the CGST Act and thereby doing away with the need of GST Audit by Professionals and allowing only a Self Reconciliation by the dealer. The Budget further proposed harsher in transit penalties and also making the Input Tax Credit availment directly related to the filing of Form GSTR 1 by the Seller.

We have also seen positive developments related to GST by introducing the QMRP Scheme, thereby simplifying the processes for SME Dealers.

We also welcome the proposal to decriminalize the LLP Act and bring major amendments in the Companies Act, 2013 to reduce the compliance burdens on the Companies.

I would like to thank the Sponsor Shri Anand Pasari, Advocate, Ranchi for agreeing to sponsor this edition of the Journal.

We would also like members to be participative and hence invite suggestions for improving the Journal content and also send in their Articles for inclusion in the Journal.

I would also like to appeal to the members to join the One Day seminar and Kavi Sammelan at Holy City of Varanasi from 26th to 28th March, 2021 and also to attend the First Physical NTC of the year to be held in Puri on 10th and 11th April, 2021 and also obtain the blessings of Lord Jagannath..

We have also launched an Awards scheme for introduction of New Members within the period 1st January, 2021 to 30th June, 2021 as I have personally requested all to enroll atleast one member each so that we achieve the target of 10000 members by the year end.

Looking forward to your continued support.

Long Live AIFTP

Place: Eluru
Date: 10.03.2021

M. Srinivasa Rao
National President (AIFTP)

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
23.02.2021	03/2021-CENTRAL TAX	Seeks to notify persons to whom provisions of sub-section (6B) or sub-section (6C) of section 25 of CGST Act will not apply.
28.02.2021	04/2021-CENTRAL TAX	Seeks to extend the time limit for furnishing of the annual return specified under section 44 of CGST Act, 2017 for the financial year 2019-20 till 31.03.2021.
08.03.2021	05/2021-CENTRAL TAX	Seeks to implement e-invoicing for the taxpayers having aggregate turnover exceeding Rs. 50 Cr from 01st April 2021.

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
23.02.2021	146/02/2021-GST	Clarification in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices and compliance of notification 14/2020- Central Tax dated 21st March, 2020 - Reg.
12.03.2021	147/02/2021-GST	seeks to clarify certain refund related issues

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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		March, 2021	20th April2021
			April, 2021	20th May 2021
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)		
	(a) QRMP		Jan-March, 2021	13th April 2021
	(b) Monthly Filing	GSTR-1	March, 2021	11th April2021
			April, 2021	11th May 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	March, 2021	10th April2021
			April, 2021	10th May2021
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	March, 2021	10th April2021
			April, 2021	10th May 2021
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2019-2020	31st March 2021

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ZERO RATED SUPPLIES TO SEZ UNDER GST- SHOULD IT BE FOR AUTHORIZED OPERATIONS

CA *S Venkataramani*
CA Siddeshwar Yelamali

1. Background:

Under the erstwhile service tax provisions, service provider was entitled to ab-initio exemption for the service provided to a unit located in a Special Economic Zone (for brevity, 'SEZ Unit') or Developer of SEZ (for brevity, 'SEZ Developer') for 'authorized operations' subject to conditions prescribed in the Notification No. 40/2012-ST dated 20.06.2012 and Notification No. 12 / 2013-Service Tax dated 01.07.2013. Subject to other conditions mentioned in the said notification, there was specific mention in the notification that services should be used for '**authorized operations**.

Supply of goods from domestic tariff area (for brevity, 'DTA') to a SEZ Unit or SEZ Developer is an export as per Section 2 (m) (ii) of the SEZ Act, 2005. Rule 19 of Central Excise Rules, 2002 provided for export of excisable goods without payment of duty. Under the Central Excise Rules there was no mention that the excisable goods supplied to SEZ Unit or SEZ Developer should be for authorized operations.

2. Authorized operations:

The meaning of authorized operations needs to be understood from the Special Economic Zones Act, 2005 (for brevity, 'SEZ Act') and Special Economic Zones Rules, 2005 (for brevity, 'SEZ Rules') since the same is not defined either in the Integrated Goods and Services Tax Act, 2017 (for brevity, IGST Act, 2017) nor Central Goods and Services Tax Act, 2017 (for brevity, CGST Act, 2017). Meaning of authorized operations under the SEZ Act is provided separately for SEZ Developer and SEZ Unit.

SEZ Developer – The authorized operations for a SEZ Developer are approved by the Approval Committee constituted under SEZ Act (Section 2(c) read with Section 4(2) of SEZ Act and Rule 9 of SEZ Rules). The Approval Committee permits goods and services to carry authorized operations (Section 14 SEZ Act and Rule 10 of SEZ Rules).

SEZ Unit - The authorized operations for a SEZ Unit are approved by the

Development Commissioner under SEZ Act (Section 2(c) read with Section 15(9) of SEZ Act. The Development Commissioner specifies the items of manufacture or service activity as approved by the Approval Committee in the letter of approval issued to the SEZ Unit. The Approval Committee permits goods and services to carry authorized operations (Section 14 SEZ of Act and Rule 10 of SEZ Rules)

3. Goods and Services Tax

I. Period 01.07.2017 to until enactment of Finance Bill 2021:

A. Zero rated supply (Section 16(1) (b) of the IGST Act, 2017) means supply of goods or services or both to a SEZ Developer or a SEZ Unit. The said section (***before the amendment in Finance Bill, 2021***) does not use the phrase 'authorized operations' unlike in erstwhile service tax provisions. Thus, it can be argued that a supplier can supply of goods or service as zero rated supply (i.e. without payment of integrated) even when the same are not for authorized operations. However, this is not free from litigation.

B. The use of the phrase 'authorized operations' under the Goods and Services Tax Law is traceable as under:

a. Proviso 3 to Rule 46 of Central Goods and Services Tax Rules, 2017 (for brevity, 'CGST Rules, 2017) that the invoice shall carry an endorsement 'supply to sez unit or sez developer for authorized operations under bond or letter of undertaking without payment of integrated tax'.

b. Rule 89 of CGST Rules, 2017 refund of unutilized input tax credit – supplier of goods / services is required to obtain an endorsement by the officer of the SEZ on the invoice that:

- goods have been admitted in full in the Special Economic Zone for authorized operations
- receipt of services is for authorized operations

C. Following question arises –

a. **Whether a requirement of mentioning by way of endorsement on an invoice that the supply should be for authorized operations (Proviso 3 to Rule 46) under the GST law impact supply goods or services to an SEZ Unit or SEZ Developer at zero rated supply?**

Section 16 of the IGST Act, 2017 (***before the amendment in Finance Bill 2021***), does not mention of the requirement of supply for authorized operation. Therefore, a question arises as to whether a Rule can override a Section. In

this context the following judgements are relevant:

i. **State of T.N. V. P. Krishnamurthy, (2006) 4 SCC 517** wherein the Hon'ble Apex Court held as under-

"It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

(b) …..

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules."

ii. **Inter-continental Consultants & Technocrats Pvt. Ltd. 2013 (29) S.T.R. 9 (Del.) –** The Hon'ble Delhi High Court held that the Rule which goes beyond the statute is ultra vires.

iii. **Indian National Shipowners Association 2009 (13) S.T.R. 235 (Bom.)** – The Hon'ble Bombay High held that Rule 2(1)(d)(iv) of Service Tax Rules, 1994 cannot be framed as not to carry the purpose of the Chapter V ibid.

Thus, the paper writers view is that with no specific conditions provided in Section 16 of the IGST Act, 2017 ***(before the amendment in Finance Bill 2021***), the requirement that the supplies made by a supplier to a SEZ Unit or SEZ Developer should be for authorized operationsis not a pre-requisite.

b. **Whether the refund rules under the GST law impact supply goods or services to an SEZ Unit or SEZ Developer at zero rated supply?**

Section 54 of the CGST Act, 2017 does not impose any restriction on claim of refund if the supply is not made for authorized operations of a SEZ Unit or SEZ Developer. The discussions made in paragraph 3(I) (C) (a) supra is equally applicable to this issue.

The view expressed in paragraph 3(I) (C) (a)and 3(I) (C) (b)is not free from litigation and with specific amendment in Finance Bill 2021 which is discussed infra, one needs to watch how the law will evolve.

II. Finance Bill 2021:

1. Amendment is proposed to Section 16 (1) (b) of the IGST Act, 2017 in the Finance Bill, 2021. The proposed amendment has inserted the phrase 'for authorized operations'. The proposed amendment upon insertion of the said phrase reads as follows

"Zero rated supply means any of the following supplies of goods or services or both, namely

(a) ……..

(b) supply of goods or services or both for authorised operations to a Special Economic Zone developer or a Special Economic Zone unit"

2. Upon the receipt of Hon'ble President Assent to the Finance Bill, 2021 and if the said amendment proposed is retained, then a supply to a SEZ developer or SEZ unit will qualify as zero rated supply only if the supply (goods or services or both) is for 'authorised operations'. Further, for claim of refund the said amendment would equally apply and Rule 89 of the CGST Rules, 2017 discussed in para 3 (I) (B) (b) supra will have to be complied with.

3. In respect of goods for authorized operationsto SEZ developer / SEZ unit, the supplier should obtain copy of document from the SEZ developer / SEZ unit containing the list goods approved by Approval Committee. As regards the services, the supplier to check the list of services approved by Unit Approval Committees (UACs) as default authorised services[refer Circular F. No. D. 12/19/2013-SEZ dated 02.01.2018 issued by Ministry of Commerce & Industry Department of Commerce (SEZ Section)]

4. Every supplier before effecting zero rated supply of goods or services to a SEZ developer or SEZ unit will have to take a prior declaration from the SEZ developer or SEZ unit stating that the goods or services or both procured by them is for authorized operations and that they are approved by the Approval Committee. The IGST Act, 2017 does specify any requirement of a declaration; however, as a good practice for a supplier to prove that the supplies made are for authorized operations of SEZ developer or SEZ unit, it is recommended that a declaration be obtained so that if any questions are raised by the tax authorities, the same would help to prove their bona-fides.

An attempt has been made in this article to make a reader understand the issue involved in the zero-rated supplies to SEZ 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 08.02.2021. The authors can be reached on venkat@venkataramani.in and siddeshwar@sduca.com

*****

IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata

1. Whether the amount received by the applicant towards advances or sales consideration for sale of his share of flats after obtaining the occupancy certificate (OC) under a Joint development agreement is liable to GST?

Held: No GST where the entire consideration is received after OC

In case of ***B.R. Sridhar - AAR Karnataka*****,** the applicant the applicant, being the owner of an immovable property has entered into a Joint Development Agreement with a partnership firm, authorizing them to construct residential flats by incurring the necessary cost together with certain common amenities and upon the development of the said property, the applicant gets 40 per cent share of undivided right, title and interest in the land proportionate to super built-up area and 40 per cent of car parking spaces. The applicant is of the view that the total amounts received by the owner towards the advances or sale consideration of the flats fallen to his share of 40 per cent in terms of the Joint Development Agreement, dated 19-5-2016 and the subsequent Area Sharing Agreement, dated 3-1-2018, are not amenable for payment of GST, since applicant has sold or agreed to sell or gifted, the flats after obtaining Occupancy Certificate dated 26-8-2019 and that applicant has not received any part of the sale consideration prior to the said date of occupancy certificate, thus falling under Entry No. 5 of Schedule III of CGST Act, read with Notification No. 11/2017-Centra1 Tax (Rate), dated 28-6-2017 and the corresponding provisions of SGST Act.

The authority on examination of the records observed that the applicant has entered into JDA, along with irrevocable general power of attorney, on 19-5-2016 with the Developer. The Developer obtained necessary plan approval, dated 21-2-2017, Commencement Certificate dated 16-6-2017 and the Completion/Occupancy Certificate, dated 26-8-2019, from the authority BBMP. The applicant stated that their share of residential flats have been handed over by the developer after the issuance of completion/occupation certificate, dated 26-8-2019 and also clause 1.7 of the Area Sharing Agreement restricts the right of the applicant to execute any sale agreement or any conveyancing deeds till the issuance of completion certificate and taking over of their share of units/flats. Thus the sale of said flats is not exigible to GST, if and only if they are sold after issuance of Completion/Occupancy

certificate, in which case the said transaction is to be treated neither as supply of goods nor supply of services, in terms of clause 5 of Schedule III. Further the applicant is silent about the fact that whether the developer had executed any sale deeds on behalf of the applicant in respect of the applicant's share of units/flats. Thus if the applicant themselves or the developer on behalf of the applicant have sold the applicant's share of units/flats prior to issuance of completion certificate, then the transactions amount to supply of 'Works Contract Service' are liable to GST.

2. Whether supply of service by the assessee who is engaged in providing conservancy service to military station is exempt from payment of GST under Sl. No. 3 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017 ?

Held: Yes

In case of ***M/s Lokenath Builders - AAR West Bengal*****,** the applicant is stated to be providing conservancy service to the (i) Station Commander, Bagrakot Military Station, (ii) Office of Chief Medical Superintendent N.F. Railway, Alipurduar Junction and (iii) Sukna Military Station. The applicant seeks a ruling on whether the above supply is exempted in terms of Sl. No. 3 or 3A of Notification No. 12/2017 - Central Tax (Rate) dated 28/06/2017 (corresponding State Notification No. 1136 - FT dated 28/06/2017),as amended from time to time.

The applicant submitted that Sl. No. 3 of the Exemption Notification exempts from payment of GST any "pure service" (excluding works contract service or other composite supplies involving the supply of any goods) provided to the Central Government, State Government, Union territory, local authority or 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 to a Municipality under Article 243W of the Constitution. Sl. No. 3A of the Exemption Notification extends it to a "composite supply of goods and services" in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply.

The authority proceeded to determine applicant's eligibility under GST vide entry serial no. 3 or 3A from three aspects: (1) whether the supply being made is pure service or a composite supply, where the supply of goods does not exceed more than 25% of the value of the supply, (2) whether the recipient is government, local authority, governmental authority or a government entity, and (3) whether the supply

is being made in relation to any function entrusted to a panchayat or a municipality under the Constitution. In the work orders of Bagrakote Military Station and Sukna Military Station, it is found that all the agreements were between the Central Government and applicant. Further The applicant performs waste disposal activities by engaging garbage lifting vehicles and other cleaning equipment. There is, however, no reference to any supply of goods in the course of executing the work. So it is pure service. Furthermore, Article 243W of the Constitution that discusses the powers, authority and responsibilities of a municipality, refers to the functions listed under the Twelfth Schedule as may be entrusted to the above authority. Sl. No. 6 of the Twelfth Schedule refers to public health, sanitation, conservancy and solid waste management. The applicant's supply, as discussed above, is a function mentioned under Sl. No. 6 of the Twelfth Schedule. Thus the applicant's supply to Bagrakot Military Station and Sukna Military Station, is exempt from the payment of GST under Sl. No. 3 of Notification No. 12/2017-Central Tax (Rate), dated 28/06/2017.

3. Whether services of refining of gold from old jewellery and coins/biscuits, and conversion of old gold jewellery into coins/biscuits as per specification given by service recipient provided to registered person will be covered under the definition of job work under section 2 (68) of CGST Act, 2017? What is the classification and rate of tax for these services provided to registered person and unregistered person?

Held: Covered under Job work. Classification is under SAC 9988 @ 5% to registered person and @18% to unregistered person.

In case of ***Uday Laxman Jadhav -AAR Gujrat*** the applicant is a registered person under GST law. The applicant submitted that they are engaged in the providing services of Testing and Refinery of gold. They receive gold jewellery or coins/biscuits (after melting old jewellery) from service recipient to refine pure gold and testing of purity of gold. All old gold jewellery or coins/biscuits collected by applicant are placed in vessel made up of magnesium and heated and melted at a temperature between roughly 1000 and 12000 degree Celsius in furnace. During the process all metals absorbs in the alloy and left only gold and silver. The available gold and silver is heated in Nitric acid to separate the silver from gold. The remaining pure gold is weighted to determine the percentage of purity. Upon completion of process and analysis, the applicant issued the certificate of purity of gold. After that, a certificate of purity with pure gold will be sent to the recipient of service.

This pure gold is used by service recipient in the further process of making new jewellery or coins/biscuits. The applicant is of the view that since they are working/ doing process on the goods belonging to the registered person so it is basically a job work only.

The authority upon examination of the facts and provisions of law held that in the instant case, the applicant is a person, who is carrying out the process of refining the pure gold from old gold jewellery and coins/biscuit and converting the old gold jewellery into coins/biscuits, as per the specification of the customer. Both the said processes are being done on old jewellery and/or coins/biscuits i.e. on the goods and the goods i.e. old jewellery and/or coins/biscuits belonging to another registered person. The applicant being a job worker satisfies all the necessary ingredients to carry out job work activity. Hence, it was concluded that the said process of refining of pure gold on old jewellery or coins/biscuits and converting the old gold jewellery into coins/biscuits, as per the specification of the recipient, who is a registered person, gets covered under the definition of "Job work". However, in case of unregistered recipient it is not Job work. Accordingly, the said service provided to un-registered person is treated as services on physical input (goods), which are owned by persons other than those registered under the CGST Act, 2017. Further such services of refining pure gold from old jewellery and coins/biscuits and converting the jewellery into coins/biscuits, as per the specification of the registered person and un-registered person, merits classification under Service Accounting Code (SAC) 9988. Further in view of the entry serial no. (i) (c) of 26 of Notification No. 11/2017-CT (Rate) dated 28-6-2017 the rate of GST for registered recipient would be @ 5% (CGST 2.5% +SGST 2.5%) . Further, GST rate for the aforesaid services provided on physical input (goods) owned by un-registered person would be leviable GST @ 18% i.e. (9% CGST + 9% SGST) in terms of entry No. (iv) of Notification No. 11/2017-CGST (Rate) dated 28-6-2017.

4. Whether renting of e-bikes (Miracle), bicycles (Move) without operator can be classified under the SAC 9973 - Leasing or rental services without operator -Sl.No.17 (viia) of Notification No. 11/2017 Central Tax (Rate) dated 28th June 2017 as amended?

Held: No

In case of ***M/s Yulu Bikes (P.) Ltd -AAR, Karnataka*****,** applicant is engaged in renting of vehicles like e-bikes (Miracle), bicycles (Move) through a technology driven mobility platform and they enter into contract with customers with regards

to usage of e-bikes, bicycle and charges based on the time of usage of such vehicles. The applicant is charging GST @18% under the HSN 9966. As per applicant there were two categories of headings, in the provided scheme of classification, relevant to the supply of the applicant i.e. SAC 9966 - Rental services of transport vehicles with or without operators & SAC 9973 - Leasing or rental services with or without operator. The applicant, adhering to the principle of specific description, had classified their supply under the "HSN -9966- Rental of transport vehicles with or without operator" and discharged GST @ 18% as per Notification no. 11/2017. Subsequently, an amendment was made by the Government with regard to the classification of services to give a clarity on the difference between the headings HSN 9966 and 9973 w.e.f. 1st October 2019 vide Notification No. 20/2019 C.T(R) dated 30th September 2019 upon the recommendations given by 37th GST Council Meeting wherein it has been clarified that the Heading 9966 covers "Rental services of transport vehicles with operators" and heading 9973 covers "Leasing or rental services without operator". The applicant, by virtue of such amendment, is eligible to shift his classification of supply of services from HSN 9966 to HSN 9973. So accordingly the tax rate of their products namely Electric vehicles (i.e. Scheme "Miracle") would be @ 5% and Bicycles (i.e. Scheme "Move") would be @ 12%.

The authority found that the applicant construed the amendment to the rate notification under Notification No. 20/2019-CT(R) dated 30-9-2019 as that of the amendment to the classification, which is incorrect. The classification of the services does not change but the rate of tax can be changed by the rate notification. Heading 9966 reads as -Rental Services of transport vehicles with or without operators. Heading 9973 reads as -Leasing or rental services with or without operator and includes rental or operational leasing of machinery and equipment, personal and household goods, but does not include leasing services of machinery and equipment of personal and household goods on a purely financial service basis. Further sub-headings of 9973 pertain to other goods, IPR, etc with no mention of transport goods/vehicle. Thus the applicant's services are squarely covered under SAC 9966. The specific description is preferred to general one as per the Explanatory Notes and hence it was concluded that applicant's activity is classifiable under Heading 9966.

5. What is the applicable rate of GST (SGST and CGST) for supply of food inside the restaurant (branch) situated in zoological garden?

Held: No

In case of ***M/s Hotel Sandesh (P.) Ltd - AAR Kanataka*** the applicant is already registered under GST, providing accommodation, food and beverage services, falling under SAC 9963 and is discharging GST at rate of 18 per cent on said services, in terms of entry number 7(vi) of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017, as amended. The applicant has entered into a contract with Sri Chamarajendra Zoological Gardens, a Zoo Authority of Karnataka, Mysore which is a Government body for opening a stand-alone Restaurant (Branch). The applicant will set up a stand-alone restaurant (Branch) in the premises of Zoological garden for supply of food to the visitors /tourist to Mysore Zoo. The Restaurant will be an independent branch which is away from the Head office (present business premises) by more than 2 kilometers by road. There is no Air- condition facility in any part of the proposed restaurant. Food will be prepared inside the restaurant situated in the premises of Zoological garden. The applicant serves the food to customers directly inside the Restaurant situated at Zoo premises and collects the food bill proceeds. The applicant does not utilize the existing premises (present registered premises) where accommodation and restaurant services are provided. The applicant submitted that they intend to obtain separate registration for restaurant at Zoo premises as the said service is a different business vertical. So the applicable GST rate is 5% without availing input tax credit, for the supply of food inside the restaurant (branch) situated at Zoological garden.

The authority referring to the entry serial number 7(ii) of the Notification no. 11/2017 –Central Tax (Rate) dated: 28.06.2017 as amended confirmed that the impugned services are covered under 'Restaurant Service other than at specified premises' under SAC 9963 and exigible to GST @ 2.5%.

Alternatively, if the applicant intends to amend its existing registration to include the premises at Zoological garden the two options are available to the applicant, which are as under:

(i) The applicant need to maintain separate accounts for individual premises or

(ii) The Applicant need to reverse the input tax credit in terms of Rule 42 & 43 of the CGST Act, 2017, in case they maintain common account for both the premises and avail input tax credit.

6. Whether the applicant entity M/s Haryana State Warehousing Corporation is covered under the definition of 'Government Entity' as defined in Para 2(zfa) in Notification No. 12/20217 Central Tax (Rate) dated: 28.06.2017 as amended by Notification No. 32/2017- Central Tax (Rate)

dated: 13.10.2017?

Held: No

In case of ***M/s Haryana State Warehousing Corporation -AAR Haryana***, the applicant is incorporated under section 18 of the Warehousing Corporation Act, 1962, which is an Act of Parliament. The equity of the Applicant is held equally by the Government of Haryana and Central warehousing Corporation, which is established under section 3 of the Warehousing Corporation Act, 1962. The management of the applicant is regulated as per section 20 of the Warehousing Corporation Act, 1962 under which five Directors are nominated by the Central Warehousing Corporation and five Directors are nominated by the Government of Haryana along with a managing Director.

The authority examined the case of the applicant in the light of definition of 'Government Entity' as contained in Para 2(zfa) in Notification No. 12/20217 as amended by Notification No. 32/2017. The applicant in order to qualify is satisfying the first condition of set up under the Act of Parliament because it is established under section 18 of the Warehousing Corporation Act, 1962 which is an Act of Parliament. But, the definition also provides for 90% or more participation by way of equity control of the respective Govts. It means that if the Authority or Board or any other body is established by an Act of Parliament, the Union Govt. must have 90% or more participation by way of equity or control. The condition applies to a State Govt. if such body is established by a State Legislature.

In this case the applicant clarified that the equity share of Central Govt. is 55.02% so the condition of 90% or more participation by way of equity is not fulfilled. Further out of its ten directors, five are nominee of the State Govt., the Central Govt. cannot be said to have more than 90% control. Even if cumulative control of Central and State Govt. is considered the same also falls short of 90% control because **at least one** of the five Directors nominated by Central warehousing Corporation has to be appointed in consultation with State Bank of which has only 54% share of Govt. of India. So, essentially at the maximum, eight out of the ten directors are purely Govt. nominee. The managing director is appointed by the State Govt. in consultation with ten directors. In nutshell, the applicant fails to satisfy the condition of 90% control also. Hence the applicant is not a Govt. entity in the light of the definition of 'Government Entity' under Para 2(zfa) in Notification No. 12/2017 Central Tax (Rate) as amended by Notification 32/20217.

7. Whether the activity of the applicant of metal coating of goods

belonging to other persons in different methods i.e. thermal spray, plasma spray, HVOF spray, Powder flame spray and wore flame spray, is in nature of job work u/s 2(68) covered under SAC 998873 and Notification No. 20/ 2019 - Central Tax (Rate), dated 30-9-2019 is applicable to the applicant?

Held: Covered under Job work. Classification is under entry serial no. 26 (id) of NN-11/2017 @ 12% to registered person and @18% to unregistered person.

In case of ***M/s Spraymet Surface Technologies (P.) Ltd - AAR Karnataka*****,** the applicant receives the materials from the clients/Principal with proper delivery challan and work order, do the process of thermal spray/metal coating and returns back the said material. The process requires application of various consumables for the said purpose, whose cost is substantial and is nearly half of the value of their service. The applicant, after performing the job, returns back the material to the Principal with service invoice. Thus the applicant believes that their service qualifies to be in the nature of job work as defined under section 2(68) of the CGST Act, 2017. The applicant further contends that they provide engineering services and hence GST rate of 12% is applicable to them in terms of Notification No. 20/2019 dated: 30.09.2019.

The authority examined the matter in the light of definition of 'Job work' u/s 2(68) which provide any **treatment or process undertaken by a person on goods belonging to another registered person**. Further Schedule II in relation to section 7 of the CGST Act, 2017, prescribes the activities or transaction to be treated as supply of goods or supply of services. Clause 3 of the said Schedule II prescribes that **"any treatment or process which is applied to another person's goods is supply of services".** In the instant case the applicant undertakes thermal spray /metal or metal alloy coating on the goods /materials belonging to another person i.e principal. Therefore the work undertaken amounts to job work and is a supply of services.

The services rendered by the applicant is in the nature of metal coating of the goods belonging to other persons in different methods i.e thermal spray, plasma spray, HVOF spray, Powder flame spray & wore flame spray which essentially metal treatment /coating services and hence merit classification under SAC 998873- **Other fabricated metal product manufacturing and metal treatment services.** Further reference to the circular no. 126/45/2019-GST dated: 22.11.2019 was invited wherein it is clarified that item (iv) covers only such services which are carried out on goods belonging to registered principal. Thus the job works

undertaken by the applicant covered under item (id) of SL. No. 26 of the Notification 11/2017 –Central Tax (Rate) dated: 28.06.2017 in case the owner of the goods (Principal) is registered under CGST and attract GST @12% and if the principal is unregistered the impugned job work gets covered under item (iv) of SL. 26 of the said notification and attracts GST @ 18%

8. Whether the applicant should charge GST @18% for providing manpower services only on the services charges or on the total bill amount?

Held: On the total bill amount only

In case of ***M/s KSF-9 Corporation Services Pvt. Ltd. - AAR Karnataka*****,** the applicant has entered into an agreement with the Karnataka State Rural Development & Panchayat Raj University, Karnataka State Warehousing Corporation for provision of manpower supply services. The applicant agreed to comply with all the labor laws, rules and Acts in relation to its workers and ensure payment of minimum wages to the workers engaged to provide the said services on outsourcing basis as per notification issued by the Govt. of Karnataka. The applicant shall deposit EST/PF contributions of the workers to appropriate authority as per rules and amount of which is deemed to have been included in the contract price. The university shall pay service charges to the applicant @2%in addition to wages of their employees, so as the applicant shall not deduct any amount from the wages. The recipient of service instructed the applicant to charge GST @18% only on the service charges but not on total billed amount. Hence the applicant has sought advance ruling.

The authority after examining the facts in the light of section 15 of the CGST Act, 2017 which stipulates that **"the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration of supply".**

Thus the authority held that the applicant and the recipient, in the instant case, are not related and price is the sole consideration. Therefore the value of the taxable supply of manpower services of the applicant shall be the transaction value i.e the total bill amount inclusive of the actual wages of the manpower supplied and the additional 2% amount paid to the applicant.

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GST IMPLICATION ON SALE OF PLOTS AFTER UNDERTAKING DEVELOPMENT ACTIVITIES

Anuj Bansal

The Builders/developers are entering into different types of transactions with the customer. One of the transaction which is becoming very popular now a day is sale of developed plots. In such transactions, landowners purchase a piece of land and thereafter take adequate licenses and develop such piece of land either himself or through some other developer. The developer of the land undertakes construction of basis amenities like drainage system, sewage pipeline, boundary wall, park, road etc. After such development, whole piece of land is further divided in individual plots which are sold to respective buyers. Once the plot is sold, neither the developer nor the landowner is usually involved in anyfurther construction activity.

However, the above proposition is subject to a controversy:

"*Whether sale of such developed piece of land (developedplots) is chargeable to GST or not?"*

Before expressing view in regard to above, we first refer to clause 5 of Schedule III. The Schedule IIIis related to '*Activities or transactions which shall be treated neither as a supply of goods nor a supply of services'*.Further,Clause '5' which is relevant for the discussion,reads as follows:

"5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."

Going through above, outrightly it may be argued/commented that sale of land is outside the ambit of GST and accordingly, not chargeable to tax.

Further, contrary reference can also be made to Schedule II which is related to '*Activities or transactions to be treated as supply of goods or supply of services'*. Clause 5 (b) of such schedule makes certain construction activities like construction of complex, building, and civil structure taxable to GST.

Now, question to ponder over is, ***"Whetherthe sale of developed plots would be falling under clause 5 of Schedule III and is exempt from GST or it would be falling in Clause 5(b) of Schedule II and is chargeable to GST under CGST Act 2017?"***

Various assessees have approached the Advance Ruling Authorities to seek their view on the above. Strangely, different views/ observations have been expressed by the Advance Ruling Authorities. In the present article, attempt has been made to summarize the views being expressed in the Advance Rulings by the Authorities. Same are as follows:-

A. Advance Rulings where owner of land developed plots and sold plots on super built up area basis (not on actual plot size but including share of common developed area) held full amount from sale of land subject to GST under Schedule II(5)(b).

1. Dipesh Kumar Anil Kumar Naik, AAR of Gujarat dated 19.05.2020:

Applicant developed land as per plan passing authority by providing primary amenities like sewerage and drainage lines, water line, electricity line, land levelling for road, pipe line facilities for drinking water, street lights, telephone line etc. AAR made the finding that seller charges the rates on super built up basis and not the actual measure of the plot. The super built up area includes the area used for common amenities as mentioned above. AAR held sale of such plotted development tantamount to rendering of service as per Supreme Court decision in case of M/s Narne Construction P. Ltd. Hence, full amount of sale of plots taxed under Schedule II (5) of CGST Act.

2. SatyajaInfratech, AAR of Gujarat dated 20.09.2019:

Applicant converted its own land into integrated sub plots of varying sizes under the name of " Bliss Homes" with the basic facility. Held sale of such plots is subject to GST taxable under the clause (b) of paragraph 5 of Schedule II attracting 9% CGST and 9% SGCT as per serial no. 3 of Notification No. 11/2017 Central Tax(Rate) dated 28.06.2017.

B. Advance ruling in matter where plot developed by person other than owner of land. The developer received consideration for his service as and when land is sold on agreed percentage of total revenue. Such consideration received by the developer can't be said to be sale of land as title of land was never with developer. Held services rendered by plot developer is taxable under GST as works contract.

1. Marrq Spaces Pvt. Ltd, AAR of Karnataka dated 31.05.2019:

Applicant/Developer entered into an agreement with landowners for development of land into residential layout along with specifications and amenities. Cost of development would be borne by applicant. Consideration from sale ofplots shall be shared in ratio of 75% and 25 % between landowners and applicant. Held, that the service of land development is taxable to GST. Rule 31 applies and value of supply shall be 25% of proceed which he received. Applicant contention that sale of land is not taxable was not accepted, since he was not holding title of land.

2. ***Vidit Builders, AAR of Madhya Pradesh, dated 06.01.2020***:

Applicant developed plots and received 40 % in proceeds of sale of land. Held his services cannot be classified under Para(5) of Schedule III and held thatit's a work contract and Rule 31 applies, value of supply shall be 40% received from sale of land.

C. Advance Rulings in matters where no GST charged on transaction of sale of plots(The same is contrary to above view)

1. ***Informage Realty Pvt Ltd., AAR of Haryana dated 13.09.2018*:**

Applicant developed plots and in return land owners gave 20% of developed area to applicant. Sale of such plots by Applicant and land owners shall amount to sale of land under Schedule III(5) and shall not be chargeable to GST. AAR categorically stated as under:

"Booking/selling of plots to be done by the Applicant and Land owners during the development of the township will remain a transaction of sale/transfer of land and thus will not attract GST. It is immaterial whether the said booking/ sale is done before completion or after completion of the development work."

However, development work undertaken by Applicant/Developer for the land owner shall be works contract attracting GST @ 18%.

2. ***PPD Living Space Pvt ltd., AAR of Kerela dated 19.09.2018:***

Applicant/Land owner has divided cost of plot as cost of land and cost of development separately. GST was collected on development charges from the customers. However, the GST is not chargeable either on development charges or on sale of the land, once the completion certificate is issued.

Based on above discussion, analysis has been made of different situations in regard to sale of developed plots and impact of GST there upon. Same is as follows:-

S.NO.	SITUATION	Analysis of GST implication
1.	Land owner himself develops land and doessale of plots under single agreement	Department may take a view that whole amount is chargeable to GST under Schedule II(5)(b). Reference can be made to the AAR of Dipesh Kumar Anil Kumar Naik and SatyajaInfratech discussed above.
2.	Land owner himself develops land and enters in to two different agreements with buyer of plots. One for cost of land and other for development cost.	Assessee can plead his case that only Development Charges can be made chargeable to GST under Clause(5)(b) of Schedule II. Further, no GST can be charged on cost of land as per para 5 of Schedule III.
3.	Owner of land enters in agreement with developer for development of plots. Developer will get consideration for his service as and when land is sold. Revenue from sale of land is shared between land owner and developer in pre fixed percentage.	GST would be chargeable on amount received by land developer as works contract.
4.	Owner of land enters in agreement with developer of land and transfer certain portion of developed plots.	GST would be chargeable on work done by developer under works contract and value shall be equal to the value of land transferred to developer. However, no tax to be charged from customer.
5.	Buyer of plot can enter into Tri Party agreement with landowner and developer.	GST shall be charged on the consideration being paid to the developer only.

Concluding the Above

It is advisable to enter into two different agreements bifurcating the cost of land and cost of development. In such situation there would be good chances that there will be no chargeability of GST on the cost of land and GST could be charged only on the development charges.

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DIGEST OF ADVANCE RULINGS UNDER GST

S S Satyanarayana, Tax Practitioner

RULINGS OF ADVANCE RULING AUTHORITIES

1. Value of Taxable Supply :

Facts : The Applicant company is a Private Limited Company incorporated under the Companies Act, 1956 and entered into an agreement with The Karnataka State Rural Development & Panchayat Raj University, Karnataka State Warehouse Corporation for provision of manpower supply services. The recipients of the service instructed the applicant to charge GST @ 18% only on the service charges but not on total billed amount. Hence the applicant has sought advance ruling in respect of the following question:

Whether applicant should charge GST @ 18% for providing manpower services only on the services charges or on the total bill amount?

Observations & Findings : Section 9(1) of the CGST Act 2017 stipulates that CGST shall be levied on all intra-state supplies of goods or services or both, on the value determined under Section 15. Thus the value of the instant service need to be decided in terms of Section 15.

Section 15 of the CGST Act 2017 deals with value of taxable supply and Section 15 (1) stipulates that ***"the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration of the supply".***

In the instant case, the applicant (supplier) and the recipients are not related and the price is the sole consideration. Therefore the value of the taxable supply of manpower services of the applicant shall be the transaction value i.e. the total bill amount inclusive of actual wages of the manpower supplied and the additional 2% amount paid to the applicant.

Ruling : The value of the taxable supply of manpower services is the transaction value equivalent to the bill amount which is inclusive of actual wages of the

manpower supplied and the additional 2% amount paid to the applicant.

[2021 (2) TMI 198 – AAR, Karnataka – KSF-9 Corporate Services P Ltd.]

ORDER OF APPELLATE ADVANCE RULING AUTHORITY

1. Classification of Goods :

Facts : The Appellant is engaged in renting of vehicles like e-bikes (Miracle), bicycles (Move) in Bengaluru, Karnataka through a technology driven mobility platform. They enter into contract/agreement with the customers with regard to usage / renting of the e-bikes (Miracle), bicycles (Move) and charge based on the time of usage of such vehicles. The Appellant is charging GST at 18% on the renting of e-bikes Miracle and Move under HSN Code 9966. The Appellant was of the understanding that the services of renting of e-bikes to customers would be more correctly classifiable under HSN Code 9973 as "Leasing or rental services without operator". In this regard, the Appellant approached the Authority for Advance Ruling (AAR) seeking a ruling on the following question:

"Whether renting of e-bikes(Miracle), bicycles(Move) without operator can be classified under the SAC 9973 - Leasing or rental services without operator - Sl.No.17 (viia) of Notification No.11/2017-Central Tax (Rate) dated 28th June 2017 as amended?"

The AAR in its order held as under:

"Renting of e-bikes/bicycles without operator cannot be classified under SAC 9973 - Leasing or rental services without operator and Sl.no.17 (viia) of Notification no. 11/2017 CT(R) dated 28th June 2017 as amended is not applicable to the instant case."

Aggrieved by the Order the Appellant has filed the Appeal before Appellate AAR, Karnataka.

Observations & Findings : The Appellant had initially claimed before the lower Authority that their services would be taxable under entry SI.No 17 (viia) of rate notification No 11/2017 CT (R). However, in their submissions before us they have put forth their claim that the appropriate rate of tax in their case is as per entry Sl.No 17(iii) of the said rate notification. Alternatively, they claim that, if Sl.No 17(iii) is not applicable, then they get covered under Sl.No 17(viia).

The entry SI.No 17(iii) applies when there is a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Transfer of right to use goods is a well-recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. The transfer of the right to use any goods is treated as a 'deemed sale' under Article 366(29-A)(d) of the Constitution of India. The applicability of Article 366(29A)(d) was discussed at length by the Supreme Court in the case of ***Bharat Sanchar Nigam Limited and Another v. Union of India and Others [2006 (3) SCC (1) = 2006 (2) S.T.R. 161 (S.C.)] ("BSNL") = 2006 (3) TMI 1 - SUPREME COURT***. In BSNL, the Supreme Court held that the purpose of Article 366(29A)(d) was to levy tax on those transactions where there was a "transfer of the right to use any goods" to the purchaser, instead of passing the title or ownership of the goods. Thus, by a fiction of law, these transactions were now treated as 'sale'. Elucidating on the "transfer of the right to use any goods", the Hon'ble Supreme Court held as follows:

"97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes :

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor; this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a license to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

(emphasis supplied)

In the instant case, there is no doubt that the first two attributes laid down by the Supreme Court are evident in this transaction in as much as the User Agreement is very clear that the goods available for rent are the e-bikes "Yule Miracle" and

bicycles "Yule Move". However, in order to determine whether the instant transaction involves the "transfer of the right to use goods" it is imperative that the other three attributes are also evident. We have gone through the User Agreement furnished by the Appellant which is an agreement with the Rider for rental, waiver of liability and release. Transfer of right to use also involves transfer of possession and control of the goods to the user of the goods. The right to use the goods - in this case, the right to use the vehicles - can be said to have been transferred by the Appellant to the rider only if the possession of the said vehicles had been transferred to them. In other words, the Rider would have the right to use the vehicle only if he was in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the vehicle. We also see from the terms of the User Agreement that the vehicles (e-bikes and bicycles) are always in the physical control and possession of the Appellant at all times and there is no transfer of right to use such goods. In other words, the Appellant retains the effective control of the goods in all respects. Therefore, we do not find any transfer in the right to use the goods and we hold that in the absence of any such transfer of the right to use the goods, the Appellant does not get covered under entry Sl.No 17(iii) of the Rate Notification. The appropriate correct entry is SL.No 17(viia) i.e Leasing or renting of goods and the rate of tax will be the same rate of tax as applicable on supply of like goods involving transfer of title in goods.

Ruling : We set aside the ruling No. ***KAR ADRG 49/2020 dated 13/10/2020 = 2020 (10) TMI 434 - AUTHORITY FOR ADVANCE RULING, KARNATAKA*** passed by the Advance Ruling Authority and answer the question of the Appellant as follows:

"Renting of e-bikes/bicycles without operator is classifiable under SAC 9973 - Leasing or rental services without operator and rate of tax as applicable under entry Sl.no.17(viia) of Notification no.11/2017 CT(R) dated 28th June 2017 as amended is applicable to the instant case."

[2021 (2) TMI 994 – Appellate AAR, Karnataka – Yule Bikes P Ltd.]

2. Supply or not :

Facts : The Appellant is an organisation incorporated in Germany and is engaged in promoting applied research and development for the benefit of industry and

society. The Appellant had established a Liasion Office in Bengaluru (also referred to as LO or Head Office or HO) which is an extended arm of the Head Office to carry out activities as permitted by the Reserve Bank of India. The Annexure to the RBI permission letter stipulates a number of conditions for establishment of liaison office in India and one such condition is that the liaison office will not generate income in India and will not engage in any trade/commercial activity. The LO only receives reimbursement of expenses from head office in order to meet its daily expenses in running the LO.

In this regard, the Appellant approached the Authority for Advance Ruling (AAR) seeking a ruling on the following question:

"Whether the activities of a liaison office amount to supply of services?

Whether liaison office is required to be registered under CGST Act?

Whether liaison office is liable to pay GST?"

The AAR in its order held as under:

"The liaison activities being undertaken by the applicant (LO) in line with the conditions specified by RBI amounts to supply under Section 7 (1) (c) of the CGST Act.

The applicant (LO) is required to be registered under CGST Act.

The applicant (LO) is liable to pay GST if the place of supply of services is India."

Aggrieved by the ruling given by the AAR, the Appellant has filed this appeal.

Observations & Findings : The Appellant's Head office in Germany is no doubt a 'person' by virtue of clause (h) of Section 2(84) of the CGST Act. However, the liaison office is not recognised as a separate legal entity in India. Under the Companies Act, 2013, every foreign entity establishing its place of business in India by way of a liaison office shall be treated as a foreign company as defined under Section 2(42) of the Companies Act, 2013. The liaison office is registered with the Registrar of Companies in the same name as the parent foreign company. It does not have a separate legal existence in law. The liaison office can at best be a geographical extension of the parent Company in Germany having the same legal identity as the parent company. As already mentioned earlier, the concept of

related person arises only when there are two 'persons' in existence as per law. In this case, there is only one legal entity i.e the company in Germany and the liaison office in India is only an extension of the foreign company having no separate identity in India. We disagree with the findings of the lower authority that the liaison office is an 'artificial juridical person' and that the business conducted by it comes within the purview of the definition of business stated in Section 2(17) of the CGST Act. Artificial juridical persons are not natural persons but separate entities under law. As observed by us, the liaison office is not a separate entity under law. It is merely an extension of the parent company in Germany. When the liaison office is not a 'person' recognised as per law, the question of being a related person to the parent company does not arise. Thus, the finding of the lower Authority that the parent Company in Germany and the Appellant liaison office in India are deemed to be related persons is not correct. . The activities of the liaison office are not a 'supply' under Section 7(1)(a) of the CGST Act and will also not be covered under the ambit of clause 2 of Schedule I of the said Act.

The term 'taxable supply' is defined in Section 2(108) of the CGST Act to mean a "supply of goods or services or both which is leviable to tax under this Act". We have already held that the activities of the liaison office do not amount to a 'supply' under GST. Hence, there is no taxable supply and there is no requirement for obtaining a GST registration or payment of GST. When the liaison office is not required to be registered under GST, the question of whether they are a distinct person or establishment of distinct person is irrelevant.

Order : We set aside the advance ruling No ***KAR ADRG 50/2020 dated 08-10-2020 = 2020 (10) TMI 809 - AUTHORITY FOR ADVANCE RULING, KARNATAKA*** and answer the questions raised by the Appellant in the original advance ruling application and in this appeal, as follows:

1. The activities of the liaison office do not amount to supply of services.

2. The liaison office is not required to be registered under GST as there is no taxable supply.

3. The liaison office is not liable to pay ST.

[2021 (2) TMI 1164 – Appellate AAR, Karnataka – Fraunhofer Gesell Schaft Zurforderung Der….]

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MORATORIUM UNDER IBC AND SECTION 138 NEGOTIABLE INSTRUMENTS ACT

CA Ishaan Patkar

In a recent decision of the Hon'ble Supreme Court, in **P. Mohanraj & Ors. Vs. M/s. Shah Brothers Ispat Pvt. Ltd. [Judgement dated 1.03.2021 in Civil Appeal No. 10355 of 2018]**, a three-judge Bench has held that a moratorium under Section 14 of the IBC Code will automatically suspend the initiation or continuation of any proceedings for cheque dishonour under Section 138 of the Negotiable Instruments Act, 1881 against a corporate debtor. In this article I attempt to analyse this judgment.

Facts of the case:

Steel products were supplied by Shah Brothers Ispat Pvt Ltd [hereinafter **"Shah Brothers"**] to Diamond Engineering Pvt. Ltd. [hereinafter **"Diamond Energy"**]. As payment for the supplies, Diamond Energy issued 51 cheques, all of which were returned dishonoured for the reason "funds insufficient". Shah Brothers then initated the proceedings under Section 138 of the Negotiable Instruments Act, 1881 by issuing the statutory notice to the company and its three Directors (Appellants 1-3). Ultimately Criminal Complaints were filed to initiate prosecution under Section 138 of the Negotiable Instruments Act, 1881.

At the same time, proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 had been issued by Shah Brothers against Diamond Energy. The NCLT admitted this petition and directed commencement of the corporate insolvency resolution process with respect to the Diamond Energy and a moratorium in terms of Section 14 of the IBC was ordered. The criminal proceedings against the Directors of Diamond Energy, that is Appellants 1 to 3, were stayed by NCLT. The NCLAT reversed this order, holding that Section 138, being a criminal law provision, cannot be held to be a "proceeding" within the meaning of Section 14 of the IBC.

Issue raised before SC:

Whether the institution or continuation of a proceeding under Section 138 of the Negotiable Instruments Act can be said to be covered by the moratorium provision, namely, Section 14 of the IBC.

Decision of the Court:

Section 14 of the IBC Code reads as follows:

"14. Moratorium.—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the

corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to—

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

The Court noted that the expression "or" occurs twice in the first part of Section 14(1)(a) - first, between the expressions "institution of suits" and "continuation of pending suits" and second, between the expressions "continuation of pending suits" and "proceedings against the corporate debtor." It was held that the "institution and continuation of suits" is one category and "institution and continuation of proceedings" was a separate category.

It was also held that the word "proceedings" cannot be cut down to mean only civil proceedings on the grounds that the word follows the word "suits". The intention of

the Legislature was to give a wide sweep to the provision and the rules of *nosictur a sociis* and *ejusdem generis* cannot be used to cut down the scope of what the Legislature intended. Where a residuary phrase is used as a catch-all expression to take within its scope what may reasonably be comprehended by a provision, regard being had to its object and setting, noscitur a sociis cannot be used to colour an otherwise wide expression so as to whittle it down and stultify the object of a statutory provision. The object of Section 14 of the IBC Code itself was extracted by the Court from a reading of "The Report of the Insolvency Law Committee of February, 2020". The Court observed that the object of a moratorium provision such as Section 14 was to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea was that the moratorium facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor.

The Court also noted that clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself.

Various other provisions were also gone into by the Court to hold that the object of Section 14 of IBC could not have been to exempt Section 138 proceedings.

The next important issue before the Court was whether natural persons like Directors/ persons in management or control of the corporate debtor can take benefit of the moratorium. It was held that the moratorium under Section 14 of IBC only suspends the initiation or continuation of proceedings qua the corporate debtor. The proceedings qua the directors etc. can still continue with respect to their liability under the Negotiable Instruments Act, 1881. However, the upshot of the decision is that the harassment faced by the Resolution Professional who had to represent the company in Section 138 proceedings is now not possible. Since the company cannot be prosecuted during the time of the moratorium, the Resolution Professional also is out of the woods.

This decision is welcome in as much it finally sheds light on the interaction of the IBC code with the criminal law of this country. The author believes that it can be used as a guide on first principles on how various other such proceedings against a company are to be dealt with by the Resolution Professionals, who end up loosing a lot of valuable time attending to and dealing with such proceedings.

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COMMENTARY ON IMPORTANT SECTIONS AND CASE LAWS ON REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

CA Sanjay Ghiya
CA Ashish Ghiya

COMMENTARY ON SECTION-3

SECTION 3: PRIOR REGISTRATION OF REAL ESTATE PROJECT WITH REAL ESTATE REGULATORY AUTHORITY.

(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required–

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

(b) Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(c) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(d) for the purpose of renovation or repair or re-development which does not involve marketing, advertising, selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation. — For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

COMMENTS

As per this section prior registration of a real estate project is compulsory before issue of any advertisement or invitation or offer to purchase. The projects in a planning area are covered under the Act. However, the Real Estate Regulatory Authority can also direct registration of projects apart from planning area.

There are majorly two categories of projects, which require registration under the Act:

(a) New Projects

Registration of every project in planning area is mandatory under Section 3(1) of the Act, and no promoter shall advertise, market, book or sell etc. without getting it registered with the Authority.

However, the following projects are exempted from registration under the Act:

1. Projects beyond the planning area.

2. Where the area of the land does not exceed 500 sq metres or the development of the number of apartments does not exceed 8 included in all phases. State Governments, have been empowered to reduce these limits, if they deem necessary.

3. Where the promoter has received completion certificate prior to the commencement of the Act.

4. Where the project is for renovation or repair or redevelopment, which does not involve selling or new allotment of building, apartment or plot.

5. Where the apartments or building are given/allotted on tenancy/rent basis.

(b) Ongoing projects

All ongoing projects are required to be registered before marketing. The Act has not defined the meaning of ongoing projects. However, Rule 4 of the Rajasthan

Real Estate (Regulation and Development) Rules, 2017 (Hereinafter called 'Rules') has defined the ongoing project where development is going on and for which completion certificate has not been issued it has also excluded certain projects from the definition of on-going projects. These exceptions are mentioned in Rule 4(5).

It is very pertinent to mention that each state has given exemptions to the on-going projects as per their convenience and there is no uniformity in the exemptions which is hurting the objective of the Act.

Central government must come out with certain clarification regarding the exemptions to be given for the registration of on-going projects as on the date of commencement of the Act.

Various writ petitions have been filed in High Court of different states on these exemptions given to on-going projects but no final outcome has been arrived at till now. It is very likely that the exemptions granted by state government may be held null and void in near future.

Rajasthan Real Estate Regulatory Authority has issued a Notification No.P4 (1)RJ/RERA/2017/450 dated 21.12.2017 notifying the planning area and all projects in these area are required to be registered under the Act.

CASE LAWS

TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL

CASA GRANDE CIVIL ENGINEERING PVT. LTD. VS MR. P. GOVINDARAJ AND MRS. DEEPARAJ

The promoter had advertised in the newspaper with regard to the sale of residential flats of the Project. Both the promoter and the home buyer mutually agreed for consideration of Rs, 98, 47,096/- for the residential flat sought to be booked by the respondent in the said project. The Respondent was also asked to pay an advance for the flat by the promoter. The respondent paid an advance of a sum of Rs. 3 Lakhs as a pre-launch booking.

In July 2017, the appellant/developer sent the mail to the respondent with regard to registration of the construction agreement and also informed about the extent of the flats reduced from its originally contemplated extent of 1277 Sq. ft to 1229 Sq. ftalso the appellant has reduced a sum of Rs, 3,20,000/- from the sale consideration. But, alteration in terms of the agreement in regard to plinth and carpet areas of the apartment was not accepted by the respondents. Hence, the agreement could not be signed. The respondents were sending communication seeking benefit of credit

inputs with regard to tax benefits to be transferred to them. It was said that the construction will commence during 2017 and will be completed within 18 months from June 2017 with a grace period of 3 months and further assured that possession to the home buyers within 31.01.2019.

Subsequently, as per the letter of the appellant the respondents paid the balance 10% of the cost and subsequently in June 2017 the home buyers were directed to pay another 40%. Further on 10.06.2017 the home buyer also paid a sum of Rs.46, 918/- towards tax. The appellant has not complied the launching of project as mentioned in the booking letter dated 17.08.2016 and the stipulated period of 8 months ended on 16.04.2017. Even then they have not launched the project. The launching of project by way of Boomipooja for this project was performed on 28.06.2017. Since, the appellant has not complied with the promise as advertised by it and stated in the allotment letter. Also reduction of size of flats and claiming of GST by the appellant against his advertisement i.e"don't pay GST on your dream home". For the above said reasons the home buyers were not ready to sign in the agreement and came forward before the Adjudicating officer on the ground of violation of sections 12 and 13 of the RERA Act by the appellant.

The appellant contended that regarding alteration it was specifically mentioned in the 17.08.2016 letter itself. Selling of flats through advertisement is only a formal offer, that could be sealed at the instance of the both the parties through an agreement (i.e) signed and delivered. Further, any offer made by the appellant has corresponding obligations on the sides of the respondents and the same is not binding on the appellant till such time both the parties concurred with all the terms and conditions associated with any such offer. Since there is no concluded contract between the parties to fix a liability against the violations therefore, the appeal deserves to be allowed.

Points for consideration:

1. Whether without entering into agreement between the appellant and respondent regarding construction, RERA cannot be invoked is correct or not?

2. Whether the order of the adjudicating officer is a erroneous one?

Point No.1:

On perusal of both sides contention the respondent had paid Rs. 3 lakhs on 17.08.2016 for which a flat booking letter was issued by the appellant and also assured that they will launch project within 8 months from the date of booking. Further agreed

to refund the advance amount with 15% interest in case of failure to launch in the same within the time specified, Boomi pooja for the project was conducted only on 28.06.2017. It clearly proves that launching of project was not done as promised by the appellant. The learned counsel for the appellant would submit that mere letter issued by the promoter to the respondent on 17.08.2016 is only an acknowledgment for the payment of receipt of Rs.3 lakhs. It is not an agreement between the parties. So the letter alone is not sufficient to come to a conclusion that there is a violation of the RERA Act. Now let us discuss about the Exhibit Al booking acknowledgment letter.

The above said letter addressed to the respondent sent by Authorized signatory of the appellant company. In the above said letter itself, the terms and conditions were incorporated. There are 5 Terms and conditions. The first condition is regarding size of the extent, the 2nd condition is with regard to payment of balance of 10%, 3rd condition is with regard to promise of the appellant to launch the project and also incorporated the appellant default clause of payment of 15% interest and the 4th condition is with regard to the price of the flat and 5th condition with regard to refund of booking advance amount without interest.

The above said letter if really as stated is only an acknowledgment for the receipt of the cheque for a sum of Rupees 3 lakhs alone what is the need or necessity to incorporate the terms and conditions. Even before entering into a written agreement the appellant has incorporated the terms and conditions in the letter on the basis of this terms and conditions in the letter alone the appellant is claiming variation in measurements of the flat and pricing. This letter was also relied in regard to the repayment of advance amount also. The appellant claims as per the terms and conditions of this letter for the refund of amount. The appellant having himself treated the said letter as a binding agreement. Now he cannot simply brushed aside exhibit Al as a mere letter. Therefore the contention that without entering into a written contract, there is no binding agreement between the parties and hence the RERA cannot be invoked is wrong.

The above said attitude is against the section 12 and 13 of the RERA Act. Further, admittedly the appellant has received Rs.3 lakhs on 17/08/2016 without any agreement and further a sum of Rs 38 15,500/- totally it amounts to 40% of the value of the project without entering into an agreement. It is more than 10% as contemplated in section 13(i) of the RERA Act. Hence, Section 13(i) is also violated

by the appellant. Under the circumstances the learned Adjudication officer found that the appellant violated the above said section 12 and 13 and directed the appellant to refund of advance amount with interest and compensation. The appellant has not stated how the Adjudication officer has erroneously allowed the complaint of the respondent. AS per section 12 and 13 RERA Act there is no infirmity in the finding of the learned Adjudicating officer. Point No. 1 is answered accordingly.

Point No.2:

Regarding compensation the Learned Adjudicating officer has fixed at 9% on Rs.48,22,468/-, already for the repayment of advance amount interest rate is fixed at 10.60 % totally 18.60 % for the illegal enrichment of appellant for the home buyers advance amount. The interest rate for refund amount as per the RERA Rules itself completed 8 plus 2%. Regarding compensation arrival of 9% is without any basis. Awarding of compensation must be 'Fair and Just'. It should not penalize and prejudice one party that will enrich another party. Mental agony and inconvenience caused to the Home buyers cannot be measured in terms of money. Hence compensation has to be fixed as just and reasonable. If the Home buyers invest his money in his own firm certainly he can get at least not less than 12% interest. On that basis awarding of compensation for the Home buyers is fixed as Rs.1, 00,000/- for mental agony and inconvenience. Therefore this tribunal comes to a conclusion that the compensation awarded by the Learned Adjudicating Officer is modified as Rs.1, 00,000/- instead of 9%. The point No.2 is answered accordingly.

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

CHETANKAUSHAL VS DREAM WORLD LANDMARKS LLP AND OTHERS

The complainant has filed this complaint seeking directions from MahaRERA to the respondent to refund the entire amount paid by him under the provisions of section 18 the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as RERA) with respect of booking of a flat, in the respondent's registered project known as "Godrej Greens".

It is the case of the complainant that he has booked the said flat in the respondent's project by signing the booking application. The said flat was booked for total consideration amount of Rs. 51,64,000/-. The allotment letter was issued by the respondent on 1-11-2017. Accordingly, he has paid an amount of Rs. 5, 42,158/- towards the earnest money in three instalments. Thereafter he could not arrange

the funds for further payment due to his personal difficulty and hence, he cancelled the said booking on 11-06-2018 and sought refund of the booking amount. The respondent agreed to cancel the said allotment of the said flat subject to forfeiting of the entire amount. Thereafter on his request, the respondent asked to look for some other buyer, for the said flat to be transferred in the new buyer's name. However, he could not find any new buyer. However, the respondent on 10-09-2018 issued the cancellation form duly signed by it stating that on cancellation it has forfeited the entire earnest money paid by him. The complainant stated that the said clause is unilateral clause and hence not acceptable to him. The respondent kept his money since booking of the flat and neither refunded the same by finding any new buyer. Hence the complainant stated that the present complaint is filed before MahaRERA. Further during the course of hearing, the Ld. Advocate for the complainant clarified that the present complaint is filed under section 18 of the RERA.

The MahaRERA has examined the arguments advanced by the complainant and also perused the record. The complainant is seeking refund of the earnest money paid by him to the respondent towards the booking of the flat in the present project.

In this regard, the MahaRERA is of the view that section 18 of the RERA would come into force, if the promoter failed to handover possession of the flat to the allottee on the agreed date of possession mentioned in the agreement for sale or as the case may be. Likewise in the present case, admittedly, there is no registered agreement for sale entered into between the parties showing any agreed date of possession. Even, the allotment letter dated 1-11-2017 issued by the respondent does not mention any date of possession. Hence, the MahaRERA is of the view that the provision of section 18 would not apply to the case of the complainant. Moreover, the MahaRERA has also observed that the complainant himself has admitted that the said cancellation is done due to his personal difficulties. Hence, there is no violation of section 18 of the RERA by the respondent. Therefore, the relief sought by the complainant under section 18 stands rejected.

However, in compliance of principles of natural justice, the MahaRERA advised both the parties to settle their dispute amicably.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

PREM PRAKASH SAINI VS M/S NAMAN SHREEGOVINDAM REALESTATE PVT. LTD

The applicant averred that he booked Unit No.L-142-102 in the project "Green

Park Township" developed by respondent. The respondent without consent of the complainant changed the location of the Unit No.L-100-101. After getting signatures on blank agreement, respondent allotted Unit No.L-58-103 and ultimately he is being shifted to flat No.L-5-103. The complainant also mentioned that project is not registered with Rajasthan Real Estate Regulatory Authority. The complainant requested for refund for Rs.3.85 lac with interest and to penalize promoter for non-registration of the project and other activities.

The respondent filed his reply and stated that complainant himself has opted to allot unit No.L-5-103 and remitted the amount accordingly. Although, agreement for sale was executed for the different unit but due to default, the said flat was cancelled and as per the choice of the applicant, the aforesaid unit is allotted. All the allegations made against the respondent are baseless and false. The allotted unit L-5-103 Green Park is ready for possession as completion certificate is already issued by the Competent Authority. Therefore, requested to dismiss the application.

Heard both the parties at length and perused the record of the case. The document dated 26th October, 2018 explicitly proves that the applicant himself agreed to allot unit No.L-5-103 and remittance for Rs.3.08 lakh were made against the said flat on the very day. Therefore, it is not a case for forcibly change of unit by the developer. The agreement for the original unit No.L-142-102 was executed on 15.01.2016 by the parties. Remittance dated 26th October, 2018 substantiates the claim of the respondent that the applicant failed to deposit the instalments. Therefore, previous allotted units were cancelled due to default in payment.

Hence, the unit L-5-103 latest one is allotted to the applicant as per his choice. Therefore, there is no legal ground to challenge that, original units L-142-102 is to be allotted to him. The complainant submitted other narration, which are not relevant here to mention that Authority is not having jurisdiction to decide upon those issues. The applicant is having liberty to approach before Competent Forum to resolve those issues.

For the allocated unit related with Green Park Project, the completion Certificate is issued by authorized Architect. Therefore, the applicant may obtain the possession of latest unit allocated to him. Keeping in view the aforesaid observations, the application is dismissed. The respondent may hand over the possession of the flat to the applicant in terms of agreement for sale.

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COMPUTATION OF BUSINESS INCOME OF NON RESIDENTS

CA. Paresh Shah
CA. Mitali Gandhi

1. Introduction

In the previous articles we gave an introduction to the basics of taxation of non-residents in India highlighting details pertaining to the scope of income of non-residents and computation of non-resident Income in India. In this article we will cover Business Income earned by non-residents in India and their taxation 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"), which includes Income from a business connection in India (Sec 9(1)(i)).

Thus, under the Act, a non-resident is liable to tax in India if he has a business connection in India, as defined in s.9 (1) of the Act.

For determining the tax liability of a non-resident in respect of a transaction with a resident, it is necessary to determine the tax liability both under the Act and under the relevant Tax Treaty, if India has a Tax Treaty with the country of the non-resident. A tax treaty is an extension of domestic law and usually provides for lower rate of tax to be charged by the source state where as the balance tax would be charged by the state of residence of the Non Resident Tax Payer .

Usually, the provisions of the Act or of the Tax Treaty, whichever is more beneficial to the non-resident assessee will apply, except GAAR provisions which override the Tax Treaty benefits. The issuewhether the provisions of the tax treaty override the provisions of the Act has been dealt with extensively in landmark judgments of UOI v. AzadiBachaoAndolan (2003) 263 ITR 706/132 Taxman 373/184 CTR 450 (SC) and Vodafone International Holdings BV v. UOI (2003) 341 ITR 1 (SC).

If India does not have a Tax Treaty with the country of the non-resident, for determining the tax liability of the non-resident in respect of a transaction with a resident, it is necessary to determine the tax liability only under the Act.

2. Income Deemed to Accrue or Arise from Business Connection in India – Section 9(1)(i)

Business income of a foreign company or other non-resident person is chargeable

to tax to the extent it accrues or arises through a business connection in India or from any asset or source of income located in India, and to the extent such income is attributable to the operations carried out in India.

A business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in India which contributes to the earning of these profits or gains. There has to be an element of continuity between the non-resident and business activity in India. An isolated transaction is not normally regarded as a business connection.

Expansion of scope of Business connection to incorporate the changes introduced by Base Erosion and Profit Shifting (BEPS). The Finance Act 2018 expanded the scope of the 'business connection' test by introducing two changes. The first change was to align the scope of dependent agent stipulated in 'business connection' under the domestic tax law with the BEPS Action Plan 7 and Multilateral Instrument (MLI). The second amendment was to include 'significant economic presence test' for the purpose of determining the trigger of business connection for the entities in digital business.

2.1. Person Acting on behalf of the non-resident

i. The term business connection shall include any business activity carried out through a person who, acting on behalf of the non-resident:

a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident (it does not cover the activity of only the purchase of goods or merchandise for the non-resident) and the contracts are—

I. in the name of the non-resident; or

II. for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or

III. for the provision of services by the non-resident; or

b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident

ii. However the above business connection will not include any business activity carried on by an independent broker, general commission agent having an independent status, and acting in the ordinary course of business*[R. D. Aggarwal, 56 ITR 20 (SC); Western Union Financial Services, 101 TTJ 56 (Del); U.A.E. Exchange Centre, 183 taxman 495 (Delhi)]*. Provided where such broker, general

commission agent or any other agent works mainly or wholly on behalf of a non-resident or other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status*[Reuters Limited Construction House, 48 SOT 256 (Mum ITAT); Rolls Royce Singapore, 13 taxmann.com 81 (Delhi)]*.

iii. A branch office a foreign company will fall under the purview of the above provisions and will be taxed in India for income earned in India.

iv. An Example to explain the above provision: XYZ company (foreign company in Singapore) has appointed Mr. Z an individual in India to solicit business on their behalf, secure orders for them and store the company's good in his go down for which Mr.Z charges a commission. In this case XYZ has a business connection in India and will be taxed on the income earned in India. However if Mr. Z was appointed as an agent by multiple foreign companies and Mr.Z was behaving as an independent agent, the company XYZ would not have a business connection in India and hence the income would not be taxable in India

2.2. Significant Economic Presence (SEP)- A Business Connection:

i. SEP was introduced in the Income Tax Act, 1961 in April 2018 expanding the scope of income of a non-resident which accrues or arises in India that results in a 'business connection' in India

ii. SEP definition was amended by the Finance Act 2020 and shall have effect from 1-04-2022. The amended definition is:

(a) transaction in respect of any goods, services or property carried out by a non-resident **with any person** in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

(b) Systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed

iii. SEP to trigger irrespective of :

a) the agreement for such transactions or activities is entered in India; or

b) the non-resident has a residence or place of business in India; or

c) the non-resident renders services in India

iv. Activities that may be covered under SEP

a) Sale or purchase of goods, services or property through digital means

b) Provision of online training / gaming services

c) Websites, online database, cloud storage and computing services,with significant user base in India

v. Safeguards from SEP provisions

The double taxation avoidance treaties tax based on the concept of permanent establishment (PE) for taxing business profits of a non-resident and the inclusion of SEP in the ITA will not be read into the tax treaties unless they are amended. It may be noted that apart from SEP, there is incidence of Equalisation Levy on digital transactions that was introduced by Finance Act, 2016

2.3. Expansion of scope of Business connection in India via Finance Act 2020

i. In the case of a business ,[other than the business having business connection in India on account of significant economic presence,] of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;

ii. The above income shall also include income from: - w.e.f. 1-4-2021

a. such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;

b. sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and

c. sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

iii. The provisions of clause ii shall also be applicable to income generated through significant economic presence in India - w.e.f. 1-4-2022

2.4. Objective of Broadening the scope of Business Connection

i. Taxation of Business profits on economic presence rather than only physical presence

ii. Widen the tax base to cover digitized business model

iii. Address the tax leakages and loopholes in the taxation scheme based on physical presence

iv. Implement the recommendation of BEPS Action plans 1 and 7

2.5. Share or interest in a company

i. An asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India – Explanation 5

ii. Explanation 5 will be applicable if on the specified date the value of such assets exceeds INR ten crores and represents at least fifty per cent of the value of all the assets owned by the company or entity – Explanation 6

iii. Specified date means:

a) Date on which the accounting period of the company/entity ends preceding the date of transfer of a share or an interest; or

b) Date of transfer, if the book value of the assets of the company or, as the case may be, the entity on the date of transfer exceeds the book value of the assets as on the date referred to in sub-clause (i)

iv. As per Explanation 7 to section 9(1)(i), where the transferor along with its associated enterprise, has not held any voting power, share capital or interest in the foreign company whose share are being transferred in excess of 5% nor any right of management or control in such foreign company during the twelve months preceding the date of transfer, the income from transfer of shares of such foreign company for such transferors would not be taxable in India.

v. Further, Explanation 7(b) to section 9(1)(i) provides that where the foreign company holds other assets outside India besides the assets located in India, income only reasonably attributable to asset located in India would be taxable in India.

vi. Background and clarifications of Explanation 5,6 and 7 of Sec 9(1)(i):

a) Explanation 5 was introduced due to the Supreme Court's decision in the landmark case of *Vodafone BV International Holdings V. Union of India*, the Government of India vide Finance Act, 2012. However, the Finance Act, 2012 did not define the word 'substantially' occurring in Explanation 5.Subsequently, the Finance Act, 2015 ("FA 2015") introduced Explanation 6 and 7 to section 9(1)(i) of the ITA to clarify the particular situations to which Explanation 5 to section 9(1)(i) of the ITA would apply.

b) In 2020 Authority for Advance Rulings ("AAR") pronounced a ruling that clarificatory amendments (Explanation 6 and 7) brought about to the indirect transfer tax provisions under the Income-tax Act, 1961 ("ITA") should be applied retroactively. The AAR ruled that the amendments that were brought about in the year 2015 viz. (i) the meaning of 'substantial'; (ii) small shareholder exemption; and (iii) determination of how much capital gains will be attributable to India in case of the indirect transfer provisions, are clarificatory in nature and have to be applied retroactively to render the indirect transfer provisions which were inserted in the ITA in the year 2012 workable.

vii. An Example to explain the above clause – ABC a foreign company is owned by an NRI Mr. X. The company has its presence globally through wholly owned subsidiaries, it also has a wholly owned subsidiary in India. ABC earns around 70% profits from its operations in India. In FY 2020 Mr X. sold 50% of his stake to another individual Mr.Y. This transfer will be taxed in India as indirect transfer since more than 50% of its value is derived from India (also assuming the value of such assets is more than INR 10 crores). However income only to the extent of assets attributed to India.

Above provisions of Indirect transfer of Shares of a Foreign Company will be subject to the provisions of the Tax Treaty under the Article of Capital Gains and

hence the provision of Tax treaty will apply if that is more beneficial to the tax Payer.

2.6. Cases where Business Income is not deemed to accrue or arise in India for Non-Resident

i. Income from operations which are confined to the purchase of goods in India for the purpose of export.

ii. a person engaged in the business of running a news agency or of publishing newspaper, magazines or journals for activities, which are confined to the collection of news and views in India for transmission outside India

iii. In the case of a foreign company engaged in the business of mining of diamondsactivities which are confined to display of uncut and unassorted diamond in any Special Zone notified by the Central Government in the Official Gazette in this behalf.

iv. An individual who is not a citizen of India or a firm which does not have any partner who is a citizen of India or who is resident in India or a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

3. Tax Treaty and Business Connection

i. One of the most important aspects of a treaty-based law or Double Taxation Avoidance Agreement (DTAA) is the existence of Article 5 in the Tax Treaty,a Permanent Establishment (PE). As per general parlance, a non-resident taxpayer is not required to pay income tax on its business profits unless it has a Permanent Establishment in the source country and the profits are attributing from such PE. **Usually, as per Section 90(2) of the Income Tax Act, while ascertaining the tax liability of a non-resident, the provisions of the Income Tax Act and the DTAA are taken into consideration and whichever is more beneficial shall apply**. Business connection equivalent in a tax treaty is the Permanent Establishment concept though the depth and degree of threshold could vary.

3.1. Permanent Establishment as per DTAA

i. Article 5(1) - Permanent Establishment means a fixed place of business through which the business of the enterprise is wholly or partly carried on. There can be following types of PEs:

a) Fixed Place
b) Construction
c) Service
d) Agency
e) Subsidiary/ Holding

ii. Fixed Place PE:A fixed place PE of a foreign enterprise exists in the India (source country) when the following tests are satisfied:

a) Physical place: There must be a physical place of business. It usually means a premises, facilities or installation of the enterprise used for carrying on the business, whether or not it is exclusively used for business. It does not matter whether this place of business is owned or leased.

A place of business means all tangible assets (e.g., premises, facilities, machinery or equipment or installations) used for carrying on the business, whether or not they are exclusively used for business. Para 17 of the OECD Model Commentary states that a PE may exist if the business of the enterprise is carried on mainly through an automatic equipment and the activities of the personnel are restricted to setting up, operating, controlling and maintaining such equipment. The existence of Computer Server amounts to existence of a PE in India *[AREVA T&D, 18 taxmann.com 171 (AAR)]*. A PE will still exist if the enterprise which sets-up machines also operates and maintains them for its own account - whether operated by itself or by a dependent agent *[Amadeus Global, 11 taxmann.com 153 (Delhi ITAT)]*. It may also include a machinery or an equipment, e.g., an automatic vending machine or a gaming machine, or a race horse.

b) Location: The place of business must be a fixed place located at a certain area. The residence of an employee may also be treated as a PE if the same if used as office for business.

c) Permanence: The place of business must be for a fixed and reasonably longer period of time. There should be a reasonable degree of continuity and regularity.

d) At Disposal: The place must be at the disposal of the foreign entitywhether owned by it or not (e.g., hired place of business) *[Seagate Singapore International Headquarters, 322 ITR 650 (AAR)]*. If the place of business is situated in the business premises of another enterprise and the foreign enterprise has certain part thereof at its constant disposal, that premises may be considered as having a PE in India.

The place has to be owned, rented or otherwise be at the disposal of the assessee; a mere occasional factual use of the place is not sufficient *[Airlines Rotables Ltd, 44 SOT 368 (Mum ITAT)]*.

No formal legal right to use that place is required. For instance, a PE could exist even where an enterprise illegally occupied a certain location where it carried on its business *[Para 4.1 of OECD Commentary and Amadeus Global Travel, 11 Taxmann,com 153 (Delhi ITAT)]*.

e) Business activity: Proper business activity must be carried out from such fixed place

Key jurisprudence on Fixed Place PE: In addition to a recent judgment in the case

of Samsung *[DIT New Delhi Vs Samsung(Civil Appeal No. 12183 of 2016)]*, there have been quite a few landmark judgments on the matter of fixed place PE viz. DIT Mumbai Vs Morgan Stanley & Co. *(2007) 292 ITR 416*, CIT Vs Hyundai Heavy Industries Co. Ltd. *(2007) 7 SCC 422*, Ishikawajma-Harima Heavy Industries Ltd. v. DIT Mumbai *(2007) 3 SCC 481* and ADIT New Delhi Vs E-Funds IT Solution Inc. *(2018) 13 SCC 294*.

A reading of the aforesaid judgments makes it clear that when it comes to "fixed place" permanent establishments under DTAAs, the deciding factors are as follows:

a) The condition precedent for applicability of Article 5(1) of the DTAA and the ascertainment of a "permanent establishment" is that it should be an establishment "through which the business of an enterprise" is wholly or partly carried on.

b) The profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment.

c) The maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5.

d) It is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment.

Thus although Business is carried out in India it will not be taxable in India unless minimum threshold of business Connection or the PE is achieved by the Non Resident Tax payer.

iii. Specific inclusions within PE. The following are specifically included in the PE definition:

a) Place of management. It exists where control and management of an enterprise reside. The term must be interpreted widely and it could also be a residential premises. Mooring/support vessels used for installation of pipelines may be a place of management *[Brown and Root Inc, 237 ITR 156 (AAR)]*

b) Branch. When a non-resident has a branch in a foreign country, then it is usually regarded as a PE unless it falls within one of the exceptions, such as use of that branch for the purposes of storage or display of goods or the only activity of making payments did not satisfy the condition of para 1 of Article 5 of carrying on business activity in India through a fixed place *[Whirlpool India, 140 TTJ 155 (Delhi ITAT)]*.

c) Office. The word "office" has various meanings and uses. It may mean a room, a set of rooms or a building where the business usually is carried on. It is generally mentioned for correspondence or contact purposes. There are contrary decisions for a "project office" to constitute a PE*[MicoperiS.P.A. Milano, 82 ITD 369 (Mum); BKI/HAM VOF, 70 TTJ 480 (Del)]*.It does not include a "representative office" or a "liaison office"*[UAE Exchange Centre, 138 Taxman*

495 (Delhi); Vishakhapatnam Port Trust, 144 ITR 146 (AP); Motorola Inc, 95 ITD 269 (Del); Western Union, 101 TTJ 56 (Del)]

d) Factory. It is a place where processing or manufacturing of goods is carried out.

e) Workshop. It is a place where an industrial process is carried on. It may mean any place in which collective manual labour, under an employer is done by way of trade or in making, repairing etc.

f) Mine, oil or gas, quarry or any other place of extraction of natural resource

iv. Construction PE and Service PE

a) Construction Rule PE: if an enterprise has a building site, a construction, assembly or installation project or supervisory activities in connection therewith, a PE would come into existence if such site, project or activities continue for more than twelve months.The clause related to Supervisory activities is included only in some of the tax treaties as far as India is concerned.The duration of the project and percentage of payment towards supervisory activity will vary from Treaty to Treaty with various countries.

b) Service Rule PE: if an enterprise furnishes services (including consultancy services) through employees or other personnel engaged by it for furnishing such services, a PE would come into existence. Generally, the Indian treaties provide for a threshold limit of 90 to 120 days if the services are rendered to unrelated enterprises and 1 to 30 days if such services are rendered to associated enterprise. Construction PE and Service PE may be read without applying the condition of the Fixed Place PE of paragraph 1 and 2 of the Article 5.

Also attribution rule of the Sec 9 will apply whereever there is a possibility of the apportionment of the Income between India and the Non Resident State or any other Country.

Attribution is again a subject matter of various court decisions under ITA as well as attribution Rule as provided under Article 7 of the tax Treaty.

v. Specific Exclusions from the term PE:

a) Use of facility solely for the purpose of storage or display of goods belonging to the enterprise;

b) Maintenance of stock of goods belonging to the enterprise solely for the purpose of storage or display;

c) Maintenance of stock of goods belonging to the enterprise solely for the purpose of processing by another enterprise;

d) Maintenance of fixed place of business solely for the purpose of purchasing of goods or for collection of information for the enterprise;

e) Maintenance of fixed place of business for carrying out activities of preparatory or ancillary character.

f) Maintenance of fixed place of business solely for any combination of above activities provided the overall activity of fixed place of business resulting from this combination is of preparatory or ancillary character.

vi. Dependent Agency PE (DAPE)

If a person resident in India represents or acts on behalf of the foreign enterprise, his presence in India may be regarded as presence of foreign enterprise PE in India on fulfilling the following circumstances:

a) A person is dependent on the foreign enterprise;

b) Such person acts on behalf of the foreign enterprise;

c) He has authority to conclude contracts on behalf of the foreign enterprise; and

d) He habitually exercises such authority to conclude contracts on behalf of the foreign enterprise.

In *SET Satellite (Singapore), 106 ITD 175 (Mum) and Airlines Rotables, 44 SOT 368 (Mum ITAT)*, the Tribunal described the rationale for dependent agent PE. However, an agent will not constitute a DAPE of its principal if he is an agent of an Independent status who is legally as well as economically independent of the foreign enterprise on whose behalf he acts.

vii. Subsidiary/ Holding PE

Mere existence of a subsidiary/holding Company in India does not by itself make the subsidiary/holding Company a PE of the Foreign Company. To constitutea PE, the business of the Foreign Company should be carried on through the subsidiary/ holding company in India.

Where the parent sold parts/CKD to the subsidiary company on a principal-to-principal basis and no operations in respect of the manufacture and sale of parts were carried out by the parent in India, it was held that the parent did not carry out any operations in India, and therefore, could not be said to have a PE in this respect under Article 5(1) and 5(2) of the Indo-German Treaty *[Daimler Chrysler, 133 TTJ 766 (Mum ITAT)]*.

4. <u>Outcome of Establishing PE in India and computation of tax liability</u>

i. Once it is established that Foreign Enterprise has a PE in India, the profits attributable to its activities in India will be taxed as Income and the tax treatment of such income would depend upon the nature of the income, i.e., whether it is a business income or capital gain or income from shipping and air transport, dividend, royalty, fees for technical services, etc. For this purpose, usually there are separate articles in Tax Treaties dealing with the taxability of each type of income.

It is important to distinguish between tax treatment in case of income from activities when there is PE in India and when there is no PE in India. For example, in case of business connection in India, there is presence of PE in India and hence 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. However, in case of income of non-resident from royalty or fees for technical services without the existence of PE in India, then such income shall be taxed under the special dispensation of section 115A which provides for tax rate of 10% and not the general tax rate applicable to non-residents or foreign companies. Refer Para 4(vi) below for detailed discussion on taxation of royalty and fees for technical services under section 44DA in case of existence of PE in India.

Similarly, it is important to distinguish between tax treatment of business income of a PE in India and business income derived from specified business activities which are subject to presumptive taxation under the Act. Under such presumptive tax provisions, a special tax treatment is provided which is applicable whether or that such activities are carried out by a PE in India. Under some presumptive tax provisions, income is taxable on gross basis (i.e. without deduction of any expenses) whereas under other provisions, income is tax'able on net basis. Please refer to Para 4(vii) & (viii) below for detailed discussions on presumptive taxation.

ii. In case of business income of PE, though no guidelines are available to determine how much should be the business income reasonably attributable to the operations carried out in India, the same has to be determined on factual situation prevailing in each case.

The Act provides for Rule 10. Also, in various judicial pronouncements, the Courts have, in the past, used an ad hoc basis for estimating the profits attributable to India specific activities, based on facts of each case.

In the case of Anglo French Textile Company Ltd. v. CIT: 25 ITR 27, the Supreme Court returned a finding that in the facts of the case, 10% of profits were to be attributed to operations carried out in India.

Again, in Hukum Chand Mills Ltd. v. CIT: 103 ITR 548, the Supreme Court found that attribution of 15% of profits was reasonable in the facts of that case. More recently, in case of *Motorola Inc: 95 ITD 269,* the Special Bench of the Income Tax Appellate Tribunal, ('ITAT') held that attribution of 20% of profits was sufficient for role played by the PE in negotiation and conclusion of contracts and supply of equipment in India by the PE of the taxpayer. Similarly, in case of *Galileo International Inc. 114 TTJ 289,* 15% of total revenues were considered to be attributable to the Indian PE on the basis that the PE played a role in negotiating contracts.

While the Courts have in the past followed an ad hoc approach in determining profits attributable to PE, more recently, it is seen that the judicial view is veering towards more scientific and systematic way of attribution of profits, by relying on FAR analysis, using transfer pricing principles.

The Central Board of Direct Taxes ('CBDT'), vide circular no. 5 dated September 28, 2004, provided, inter alia, that profits to be attributed to a PE should be those which the PE would have made if, instead of dealing with the head office, it had been dealing with a separate enterprise under prevailing market conditions, thus bringing in the arm's length concept in profit attribution.

The Supreme Court, in *Morgan Stanley & Co. v DIT: 292 ITR 416*, categorically stated that profits attributable to a PE shall have to be determined based on FAR analysis, i.e. functions performed, assets employed and risks assumed, based on arm's length principles. This view has been upheld in a number of decisions.

iii. The analysis of attributing business profits to the PE has to be undertaken taking into account the Functions performed, Assets utilised and Risks assumed (FAR analysis) by the PE in India as laid down by the Transfer Pricing Regulations

iv. Tax computation for business income would be done 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.

v. A non-resident can choose to be taxed as per the provisions of the Income Tax Act or the DTAA, whichever is more beneficial.

vi. It should be noted that S.9(1) (vi) and (vii) respectively provide that where royalty or fees for technical services are receivable by a non-resident from a resident, they are deemed to accrue in India (subject to certain exceptions). However, s.44 DA introduced w.e.f. 1.4.2004 for taxability of royalty or fees for technical services is also relevant. This section provides that where royalty or fees for technical services are received by a non-resident from an Indian concern (a) in pursuance of an agreement made after 31.3.2003, (b) such non-resident carries on business in India through a PE in India, or performs professional services from a fixed place of profession in India, and (c) the right, property or contract in respect of which such income are paid is effectively connected with such PE or fixed place, then such income shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of the Act. In other words, all the deductions provided in the Act will be available.

No deduction shall be allowed in respect of (a) any expenditure or allowance which is not wholly and exclusively incurred for such PE / fixed place, or (b) in respect of amounts paid by the PE to its head office or to any of its other offices. If, however, the amount is paid by the PE to its head office etc., towards reimbursement of the actual expenses, then it would be allowed as a deduction.

For the purposes of s.44DA, the term "PE" has the same meaning as in s.92F(iiia) for the purposes of transfer pricing provisions

vii. As mentioned earlier, 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 ships and

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 are notwithstanding the Act and allows for computation of lower income whereas Section 44B makes exception to Sections 28 to 44C and taxes on gross basis only.

viii. The presumptive taxation sections discussed above (except section 44DA) begin with a non-obstante clause which excludes applicability of the other provisions of the Act relating to computation of business income. Accordingly, all business deductions, including depreciation and unabsorbed depreciation shall be deemed to have been allowed to the assessee. However, other provisions of the Act, including those relating to aggregation of income and set-off or carry forward of losses, tax deduction at source, Transfer Pricing, payment of advance tax, interest, penalty, deductions under Chapter VI-A, will continue to apply.

ix. Computation of Business Income and tax liability:

To summarise, as PE does not have a separate or distinct identity, it derives its status from the status of its non-resident principal. Hence, as discussed in earlier paragraphs, it is essential to determine whether or not there are special provisions applicable to non-residents for certain income and also to determine the rate of tax applicable in a given case. Therefore, while computing the business income of non-resident under the Act, the following segregation of various elements of business income and their tax treatment needs to be kept in mind:

(a) Business income which is attributable to a PE in India (including royalty and fees for technical services which is effectively connected to such PE). Such business income is taxable on net basis after allowing various deductions under section 28 to 44C at normal tax rate applicable to non-residents or foreign companies.

(b) Business income subject to presumptive taxation irrespective of whether such activities are carried out through a PE in India. As discussed in Para 4(vii) & (viii) above, under certain presumptive tax provisions, the income is taxable on gross basis and under certain other provisions, assesse has the option to pay tax on net basis. Such income is taxable at tax rates specified under the relevant sections and not at the general tax rate applicable to non-residents or foreign companies.

(c) Income from royalty and fees for technical services which is not effectively connected with PE, if any, in India shall be taxable under section 115A at the specified tax rate of 10%.

In a very recent judgment dt. 02.03.2021 in the case of *Engineering analysis centre of Excellence Private Limited Vs CIT*, the Supreme Court has settled the long standing dispute regarding the taxability of sale of software. It has held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Act were not liable to deduct any TDS under section 195 of the Act.

(d) The total income of the non-resident comprises the above-mentioned income as well as income taxable under other heads of income such as Capital Gains, Other sources, etc. The tax liability is computed based on specific rates for specified income discussed above (e.g. S. 115A, presumptive taxation, etc.) and at normal rate for the balance income. Such tax liability is compared for tax under MAT discussed below to the extent applicable.

(e) Minimum Alternate Tax ('MAT'):

Section 115JB, which deals with the levy of MAT, is applicable to foreign companies except in two instances – (i) if it is a resident of a country with which India has a tax treaty and it does not have a PE in India, and (ii) if the foreign company is a resident of a country with which India does not have a tax treaty but is not required to seek registration under Section 592 of the Companies Act 1956 or Section 380 of the Companies Act, 2013.

Thus, if the foreign company does not have a PE in India and there exists a tax treaty with its country of residence, its income as computed under the Act read with the treaty would be taxed without further reference to MAT. In case where treaty does not exist, applicability of MAT is exempt only if the foreign company in not required to seek registration in India under the Companies Act.

Further, as provided in Explanation 4A of section 115JB, the provisions shall not be applicable to an assessee, being a foreign company, where its total income comprises solely of profits and gains from business under presumptive taxation referred to in section 44B or section 44BB or section 44BBA or section 44BBB and such income has been offered to tax at the rates specified in those sections.

(f) Foreign Tax Credit ('FTC'):

Relief for taxes paid in foreign country is given to tax payer while taxing the same income in India under section 90 which governs the tax credit for countries where India has entered into a tax treaty and under section 91 which addresses credit for those cases where no tax treaty is in force with that overseas jurisdiction. FTC is available only for residents for the amount of foreign taxes paid by it in a foreign country. PE does not have a separate residential status from that of its non-resident principal. Therefore, as PE is not a resident of India, it cannot avail of FTC in India of tax paid on its income from a foreign country.

5. Changes brought in by Multilateral Instrument(MLI)

With the advent of the digital era, the idea of an establishment being geographically linked to incite a tax liability is fading away. The virtue of identity which was of utmost importance is losingprominence with more people moving to e-commerce model from brick and mortar. In order to incorporate the changes in the means of generating revenue, international tax rules needed to be amended.

It was observed that certain tax avoidance strategies were used to circumvent the existing PE definition. Changes to the scope and PE definition to address such avoidance strategies was felt to be a matter of utmost importance. The task was undertaken as a part of the BEPS Action Plan 7. Three issues were identified for which amendments were suggested to the PE definition. They are:

i. Commissionaire arrangements: An arrangement through which a person sells products in a state in his own name but on behalf of the Foreign Enterprise. The enterprise is able to sell the products without having PE therefore avoiding taxation and the agent would offer the remuneration to tax rather than profits

ii. Anti-fragmentation: Large Multinational Enterprises would avoid PE status by breaking down a cohesive operating business into several small operations in order to argue that each part is merely engaged in preparatory or auxiliary activities

iii. Contract Splitting: Mainly for construction sites where enterprises would bypass the time threshold that triggers PE by splitting long term contracts into short term contracts and/or structuring and dividing contracts to enable them to be considered of auxiliary or preparatory in nature

5.1. Amendment to PE Status by MLI

Part IV of the MLI is an outcome of BEPS Action 7 - ''Preventing the Artificial Avoidance of Permanent Establishment Status" and recommends amendment to

Article 5 of the tax treaty on PE such as:

i. An extended dependent agency PE (DAPE) rule which covers a person who habitually plays the principal role leading to the conclusion of contracts - Article 12

ii. Stricter independent agent exclusion rule denying exclusion to the agents who work exclusively for an enterprise and its closely-related enterprises - Article 12

iii. Availability of specific activity exemption only if such activities qualify to be of preparatory or Auxiliary – Article 13

iv. An anti-fragmentation rule to prevent artificial disintegration of cohesive business activities done to avail specific activity exemption as Preparatory or Auxiliary – Article 13

v. Anti-splitting rule to prevent artificial splitting of contracts between related parties such that each contract covers a period which does not exceed the time threshold provided under the relevant treaty for trigger of construction PE- Article14

Clause i and ii have already been incorporated in the Indian domestic laws.

5.2. India's Position with regard to MLI

India has been one of the first signatories to the MLI on 7th June, 2017. The MLI came into force in India on 1 October 2019 and will be effective for 20 tax treaties from 1st April 2020. These include treaties with key trade and investment jurisdictions such as Australia, France, Ireland, Netherlands, Japan, Singapore and the UK.

6. Conclusion

PE is an age old concept gone through multiple changes due to the change in way of doing business. The most crucial parameter for taxing the business profits of a non-resident is establishment of PE in that country. In case a non-resident demonstrates a no PE position, the source country cannot tax the business income of the non-resident.

The way of doing business has changed drastically with the advent of Digitization, where it is possible to operate the whole business without having a physical presence. In order to innovate with the changing landscape, the Indian tax authorities have introduced various provisions like SEP, equalization levy to tax non- residents on income generated in India via digital means.

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GAUHATI HIGH COURT

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

Case No. : WP(C)/2918/2020

M/s TOPCEM INDIA

A PARTNERSHIP FIRM REGD UNDER THE PROVISIONS OF THE INDIAN PARTNERSHIP ACT, 1932 AND HAVING ITS REGD OFFICE AND FACTORY AT VILL- GAURIPUR, P.O COLLEGE NAGAR, MOUZA-SILASUNDARI GHOPA, AMINGAON- 781031 IN THE DIST OF KAMRPUR (R), GUWAHATI, ASSAM AND IN THE PRESENT PROCEDDINGS REP BY SRI ARUN KEJRIWAL, THE AUTHORISED SIGNATORY OF THE PETITIONER FIRM.

VERSUS

UNION OF INDIA AND 3 ORS

REP. BY THE SECRETARY TO THE GOVT OF INDIA, MIN OF FINANCE, DEPTT OF REVENUE, NORTH BLOCK, NEW DELHI-

BEFORE

HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

For the Petitioners	: Dr. A. Saraf, Sr. Adv.
	: Mr. P. Das & Others
For the Respondent(s)	: Mr. S. C. Keyal, SC Central Excise & GST
	: Ms. P. Das, Adv. & Others
Date of Hearing &	: 05.02.2021
Date of Judgment	: 12.03.2021

JUDGMENT & ORDER (CAV)

Heard Dr. A. Saraf, learned senior counsel assisted by Mr. P. Das, learned counsel for the petitioner in WP(C) No. 2918/2020, WP(C) No. 1366/2020, WP(C) No. 2916/2020, WP(C) No. 2920/2020, WP(C) No. 2926/2020, WP(C) No. 2940/2020, WP(C) No. 3155/2020, WP(C) No. 3156/2020, WP(C) No. 3237/2020, WP(C) No. 3298/2020, WP(C) No. 3372/2020, WP(C) No. 3464/2020, WP(C) No. 3763/2020, WP(C) No. 4031/2020, WP(C) No. 4035/2020, WP(C) No. 4046/2020 and WP(C) No. 4194/2020.

2. Mr. R. K. Choudhury, learned counsel assisted by Mr. A. Das, learned counsel appears for the petitioners in WP(C) No. 1780/2020, WP(C) No. 2899/2020 & WP(C) No. 4824/2020.

* With this case many cases are linked. Here we mentioned only name of one petitioner and respondent same in Advocate names, for the petitioner and respondents.

3. Mr. G. Sahewalla, learned senior counsel assisted by Mr. M. Sahewalla, learned counsel appears for the petitioners in WP(C) No. 3087/2020, WP(C) No. 3596/2020 WP(C) No. 3610/2020, WP(C) No. 3810/2020, WP(C) No. 4053/2020, WP(C) No. 4493/2020 and WP(C) No. 4721/2020.

4. Mr. D. Saraf, learned counsel appears for petitioners in WP(C) No. 3113/2020 and WP(C) No. 3835/2020.

5. Ms. N. Hawelia and Ms. N. Gogoi, learned counsels appears for the petitioners in WP(C) No. 2872/2020, WP(C) No. 2929/2020, WP(C) No. 2935/2020, WP(C) No. 2947/2020, WP(C) No. 2951/2020, WP(C) No. 3049/2020, WP(C) No. 3166/2020, WP(C) No. 3176/2020, WP(C) No. 3177/2020, WP(C) No. 3386/2020, WP(C) No. 3762/2020 and WP(C) No. 4947/2020.

6. Mr. B. Chakraborty, learned counsel appears for the petitioners in WP(C) No. 5800/2020.

7. Also heard Mr. S. C. Keyal, learned standing counsel assisted by Ms. P. Das, and Ms. G. Hazarika, learned counsels for the respondent, Central Excise and GST Department and Mr. P. Parasar and Mr. C. Sarma Baruah, learned CGC appearing for the Union of India.

8. All these writ petitions raise common questions of law and, therefore, the same are taken together for hearing and disposal. The matters were heard on several dates and pursuant thereto the same are taken up for disposal by this common Judgment and Order. Dr.

A. Saraf, learned senior counsel has lead the arguments for the petitioners. All other learned counsels for the petitioners have adopted the arguments of Dr. Saraf. The brief facts necessary for adjudicating the issues raised in the present proceedings are narrated as under:-

9. In all these writ petitions, the petitioners have challenged the Demand-cum-show cause notices issued by the Central Excise Authority directing the petitioner to show cause as to why the amount of Education Cess and Secondary and Higher Education Cess, which were refunded to the petitioners should not be recovered under the Provisions of Section 11A(i) of the Central Excise Act, 1944, (hereinafter known as the "Act") and further as to why interest should not be charged and realized in terms of Section 11AA of the Act. The show cause notices were issued in view of the Judgment and Order of the Apex Court in M/S Unicorn Industries –Vs- Union of India reported in (2020) 3 SCC 492 whereby an earlier Judgment of the Apex Court, namely, SRD Nutrients Pvt. Ltd. –Vs- Commissioner of Central Excise, Guwahati reported in (2018) 1 SCC 105 have been declared to be per incuriam. According to the Department, the refunds sanctioned to the petitioners earlier were made pursuant to the Judgment of the Apex Court in SRD Nutrients Pvt. Ltd. (supra) and the said Judgment having been held to be "per incuriam" by the Apex Court in the recent Judgment of M/S Unicorn Industries –Vs- Union of India; the refunds earlier granted to the petitioners on the strength of the Judgment

in M/S SRD Nutrients (supra) have become "erroneous refunds" and, therefore, the same are sought to be recovered from the petitioners by way of impugned show cause notice.

10. For enhancing the industrial progress in the North-East Region and for attracting the investees with a view to foster industrial growth and industrial activities in the North-East region, the Govt. of India announced an Industrial Policy Resolution vide Notification dated 24.12.1997. The Industrial Policy Resolution (hereinafter referred to as "IPR") contained a package of incentives and concessions for the industries established in the entire North-East Region.

11. The said IPR amongst others declared all industrial activities in growth centers; integrated infrastructural development centers, export promotion and industrial parks, export processing zone, industrial estates and industrial areas as completely tax free zones for a period of 10 (ten) years. It was announced and promised by the Government of India that all industrial activities for such areas would be free from, inter alia, income tax, central excise for a period of 10(ten) years from the date of commencement of production and also that the State Government would be moved for exemptions of sales tax, municipal tax and other such local taxes on industrial activity in the said areas. It was further stated in the aforesaid office memorandum of 24.12.1997, that Ministry of Finance of Government of India would be moved to amend the existing rules/notifications for giving effect to the decisions embodied in the Industrial Policy Resolution. Apart from exemption from, inter alia, income tax and Central excise duty, the IPR, envisages other different incentives and concessions like Capital Investment Subsidy assistance in obtaining Term Loan and Working Capital and Interest Subsidy.

12. In terms of the promises made by the Government of India in the North-East Industrial Policy Resolution contained in the office Memorandum dated 24.12.1997, various Notifications conferring benefits in terms with the promise as visualized in the Industrial Policy Resolution were issued by various authorities of the Central Government. Insofar as the exemption of Central Excise was concerned, the respondents issued notifications No. 32/99- CE and 33/99-CE both dated 08.07.1999 respectively granting exemption in respect of all excisable goods cleared from a unit located in the Growth or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estates or Industrial area or Commercial Estate, as the case may be, specified in the Annexure appended to the said notifications from such of the excise or additional duty of excise leviable thereon as is equivalent to the amount of the duty paid by the manufacturer of goods from the account current maintained under Rule 9 read with Rule 173 G of the Rules. The exemption contained in the said notification was made applicable to only new Industrial Units which commenced their commercial production on or after the 24th Day of December, 1997 and to the Industrial Units existing before the 24th day of December but which undertook substantial expansion by way of increase in the installed capacity by not less than 25% on or after the 24th day of

December, 1997. The exemption contained in the said notifications in terms of para 4 of the Notification was made applicable to any of the above stated Industrial units for a period not exceeding 10 years from the date of publication of the Notification in the official Gazette or from the date commencement of commercial production, which ever was later.

13. The Government of India on 01.04.2007 announced a new Policy, namely, the North-East Industrial and Investment Promotion Policy (NEIIPP), 2007. Vide the said Policy, the Government of India vide the NEIIPP, 2007 has also approved a package of fiscal concessions and other concession for the North-East Region. In the said new Policy NEJIPP of 2007, on the issue of the excise duty exemption under clause (v) it was clearly noted that "hundred per cent excise duty exemption will be continued, on finished products made in the North-Eastern Region, as was available NEIP, 1997".

14. In terms of the promise made by the Government of India in the North-East Industrial and Investment Promotion Policy (NEIIPP), 2007 dated 01.04.2007, Notification No.20/2007 was issued conferring benefits in terms with the promises as visualized in the NEIIPP, 2007, insofar as the exemption of Central Excise was concerned, granting exemption in respect of all excisable goods cleared from a unit located in the states of Assam or Tripura or Meghalaya or Mizoram or Manipur of Nagaland or Arunachal Pradesh or Sikkim, from such of the excise or additional duty of excise leviable thereon as is equivalent to the amount of the duty paid by the manufacturer of goods other than the amount of Duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2004. The exemption contained in the said notification was made applicable to only new Industrial Units which commenced their commercial production on or after the 1st of April, 2007 but not later than 31st day of March, 2017 and to the Industrial Units existing before the 1st day of April, 2007 which undertook substantial expansion by way of increase in the installed capacity by not less than 25% on or after the 1st day of April, 2007. The exemptions contained in the said notifications in terms of para 4 of the Notification are made applicable to any of the Industrial Units for a period not exceeding 10 years from the date of publication of the Notification in the official Gazette or from the date of commencement of commercial production, which ever was later.

15. Bolstered by the promises and incentives offered by the Govt. of India under the North-East Industrial Policy Resolution by Office Memorandum dated 24.12.1997 and the subsequent Notification granting Central Excise Exemption, the petitioners set up their respective units for manufacturing of the respective excisable goods falling under various Central Excise Tariff Heads and Sub-heads. The particulars regarding the industrial units set pup by the petitioners are described in details later in this Judgment,.

16. All the petitioners are stated to be duly registered with the Central Excise Authority in accordance with the provisions of Central Excise Act, 1944. The

goods manufactured at the petitioners' Plants/factories are cleared upon payment of Central Excise duties leviable thereon after due compliance of all required procedural formalities under cover of appropriate Central excise invoices. The petitioners had been claiming exemptions under Notification No. 20/2007-CE dated 25.04.2007, as amended, by way of refund excise duty through Account Current in respect of the above mentioned final products w.e.f. 25.11.2011.

17. By Finance Act, 2004, the Parliament levied Education Cess by way of the Finance Act, 2004. Education Cess was levied on goods specified in the First Schedule of the Central Excise Tariff Act, 1985, being goods manufactured or produced on which there shall be a duty of excise i.e. Education Cess, @ 2% calculated on aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Govt. in the Ministry of Finance (Department of Revenue) under the provision of Central Excise Act, 1944 or any other law for the time being in force. It was also provided that Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods under Central Excise Act, 1944 or any other law for the time being in force. The provisions of Central Excise Act, and the Rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalties shall as far as may be apply in relation to the levy and collection of Education Cess on excisable goods as far as they apply in relation to the levy and collection of duties of excise on such goods under Central Excise Act, 1944 or the Rules.

Subsequently, by Finance Act, 2004, Higher Education Cess was also levied as a duty under the Central Excise Act. In terms of the provisions of the Finance Act, 2004, the petitioners were paying the Education Cess and the Higher Education Cess however, as per the Notification No. 20/07 CE dated 25.04.2007, although the basic duty was refunded to the petitioners, but the Education Cess and the Higher Education Cess paid by the petitioners were not refunded to the petitioners. Several representations were made to the Department for refund of the Education Cess and the Higher Education Cess not being acceded to. The issue travelled to the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), as well as to the various High Courts of the country including this Court in respect of entitlement of the petitioners towards refund of Education Cess and Higher Education Cess when the basic Excise duty exempted and refunded. Various departmental circulars like Circular dated 10.08.2004 and Circular dated 08.04.2011 were also issued whereby the view of the Government was that when the whole of excise duty or service tax was exempted then education Cess as well as Secondary and Higher Education Cess would not be payable. However, in spite of the circular being issued, the petitioners continued to pay Education Cess and Higher Education Cess on the basic Central Excise Duty and which were not refunded to the petitioners in terms of the Notification No. 20/07 CE dated 25.042007. Ultimately, the question pertaining to entitlement of industrial units like the petitioners towards

refund of Education Cess and Secondary and Higher Education Cess paid by the petitioners when the basic excise duty was exempted from the levy, was finally decided by the Apex Court in M/S SRD Nutrients Pvt. Ltd. Vs. Commissioner of Central Excise, Guwahati reported in (2018) 1SCC 105.

18. The Apex Court by the Judgment and Order dated 10.11.2017 in "M/S SRD Nutrients (supra)" decided the issue by holding that the appellants were entitled to refund of Education Cess and Secondary and Higher Education Cess which were paid along with excise duty as the excise duty itself was exempted from levy. In the said Judgment, the Apex Court held that Education Cess is payable on excise duty and those assessees who are required to pay excise duty have to shell out Education Cess as well. It was further held that Education Cess was introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004 and as per Section 91 thereof, Education Cess is the surcharge which the assessee is required to pay. The Apex Court held that Section 93 of the Act of 2004 made it clear that Education Cess is payable on the 'excisable goods' i.e. in respect of goods specified in the First Schedule to the Central Tariff Act, 1985 and the same was to be levied @ 2% and calculated on the aggregate of all duties of excise which were levied and collected by the Central Government under the provisions of the Central Excise Act, 1944 or under any other law for time being in force. Sub- section (3) of Section 93 provided that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those related to refunds and duties etc. shall as far as may be applied in relation to levy and collection of Education Cess on excisable goods. In view of the aforesaid, the Apex Court held that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well, inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise and that there cannot be any surcharge when basic duty itself is Nil.

19. A review petition by the Department was filed before the Apex Court bearing number Review Petition (C) D. No. 6714 of 2018 in Civil Appeal Nos. 2781-2790 of 2010 against the aforesaid judgment dated 10.11.2017 passed by the Supreme Court. The Apex Court vide its order dated 10.07.2018 dismissed the review application.

20. In view of the aforesaid judgment of the Apex Court, the petitioners filed their claim petitions for refund of Education Cess and Higher Education Cess for the respective relevant periods before the concerned Department Authorities of Central Excise vide their representations giving reference to the judgment of the Apex Court in, M/S SRD Nutrients (supra).

21. Since in-spite of the claims filed by the petitioner, no refund on account of Education and Secondary & Higher Education Cess was granted to the petitioners, some of the petitioners filed writ applications before this Hon'ble Court challenging the inaction of the respondent authorities in not granting refunds of Education and Secondary & Higher Education Cess claimed in spite of the law laid down by the Apex Court in SRD Nutrients (supra). This Hon'ble Court following the decision

of the Apex Court in SRD Nutrients (supra) disposed of the writ petitions by directing the respondent authorities to refund the Education Cess as well as Secondary & Higher Education Cess which was collected from the petitioners along with excise duty.

22. In pursuance to the Judgment of the Apex Court passed in SRD Nutrients (Supra) as well as the directions of this Court, the Assistant Commissioner, the respondent No. 3 herein, passed respective Refund Orders on various dates sanctioning the refunds claimed by the petitioners as Education Cess and Secondary and Higher Education Cess for the relevant periods. The said amounts sanctioned were subsequently refunded to the petitioner.

23. Pursuant to the refund orders sanctioned by the Department, the Apex Court while dealing with similar issues, in a recent judgment rendered in the case of Unicorn Industries –Vs- Union of India, held that in the absence of notifications containing an exemption to additional duties in the nature of Education Cess and Secondary & Higher Education Cess, it cannot be said that same are exempted. The Apex Court held that in Union Of India & Ors –Vs- M/S Modi Rubber Limited reported in (1986) 4 SCC 66, and in Rita Textiles Pvt. Ltd. and Ors. –Vs- Union of India reported in (1986) Supp SCC 557 had already laid down the law and the subsequent judgment rendered by the Apex Court in the case of SRD Nutrients(supra) being contrary to the view taken earlier, was held to be per incuriam. The Apex Court in Unicorn Industries(supra) held that earlier binding judgments of the Apex Court in M/S Modi Rubber Limited and Rita Textiles Pvt. Ltd. were not placed for consideration and, therefore, decision of the Apex Court rendered in SRD Nutrients and Bajaj Auto Limited were clearly per incuriam.

24. After the decision of the Apex Court in Unicorn Industries, the Department issued impugned Demand-cum-show cause notices to the petitioners on various dates, seeking recovery of the refund of Education Cess, Secondary & Higher Education Cess earlier sanctioned/granted to the petitioners were treated to have been erroneously made. The Department by the impugned show case notices held that the amounts so refunded are liable to be recovered from the petitioners in terms of provisions of Section 11A(i) of the Central Excise Act, 1944 and further held the petitioners to be liable to pay interest on the amount so recovered in terms of Section 11AA of the Act. The petitioners were directed to show cause as to why the amount erroneously refunded to the petitioners should not be demanded and recovered back from the petitioners in terms of Section 11A(i) of the Central Excise Act, 1944. The details of various demand-cum-show cause notices seeking recovery of Education Cess and Secondary and Higher Education Cess earlier sanctioned by the Department in respect of the each of the petitioners, the showing the amounts sought to be recovered, the authority issuing the show cause notices along with items manufactured by each of the petitioners is extracted from the pleadings in a tabular form for convenience:-

Sl. No.	WP(C)	Parties Name	Company Address	Intems/ Manufactures	Demand of Refund by the Department	Show cause notice details	Issuing Authority
1	WP(C)/2918 /2020	M/S TOPCEM INDIA Vs. UNION ofINDIA & 3 ORS	Office and factory atVillage-Gauripur, P.O. College Nagar,Mouza-Silasundari Ghopa, Amingaon-781031 in the District of Kamrup(R), Guwahati.	Excisable goods viz.OP & PP Cement.	Rs.1,05,28,680/-	C.No.V(15)06/A DJ/CGST-HQRS/GHY/CE/ 2020/19506-07 Dated 17.06.2020	Joint Commissioner,GST & Central Excise Commissionera te, Guwahati.
2	WP(C)/1366 /2020	PAN PARAG INDIA LTD.Vs. UNION OF INDIA & ANR	Office at Pan ParagHouse, 24/19, TheMall, Kanpur- 208001 having oneof its unit at A-1 toA-4, Industrial Estate, Cinnamara, Jorhat- 785008.	manufacture and sale of Pan Masala and Pan Masala containing tobacco	Rs.1,93,05,728/	F.No.V(18)01/A CJ/REF/2018 - 19/327 Dated 10.02.2020	Assistant Commissioner,CGST, Division Jorhat.
3	WP(C)/1780 /2020	M/S. DIGBOI CARBON PVT.LTD. Vs. UNION OF INDIA & 2ORS.	Office and factory atBorguri Industrial State, Borguri, Tinsukia, Assam, Pin- 786126	excisable goods viz. Calcined Petroleum Coke	E.Cess + S&HECess= Dt.15.11.18 Rs.34,41,786 /-Dt. 05.12.18 Rs.3,37,922/ - Dt. 13.09.19 Rs.10,63,719/-	06.02.2020 No. F.No.V(15)06/S CN/DCPL/ACT/ 2019-20	Assistant Commissioner,Central Goods& Service Tax, Tinsukia.
4	WP(C)/2872 /2020	M/S OZONE AYURVEDICS,UNIT-II Vs. UNION OF INDIA & 4 ORS	Office and factory atEPIP, Amingaon, Guwahati, Dist-Kamrup, Assam-781031	Ayurvedic Extracts, Cosmetics orToilet Preparation and Medicaments of Ayurvedic	Rs.20,10,048/-	C.No. V (18)10/SCN - CESS/OZONE AYURVEDICS-II/ACG-I/2020 dated 02.06.2020	Assistant CommissionerGuwahati, Assam.
5	WP(C)/2899 /2020	M/S GUWAHATI CARBON LIMITED Versus THE UNION OF INDIA AND 2 ORS.	Office and factory atNH- 37, Pub-Boragaon, Gorchuk, Kamrup(M), Guwahati-781035, Assam.	Calcined Petroleum Coke (CPC)	Dt.13.03.2019 E.Cess + S&HECess= Rs.1,27,57,035/-	17.06.2020 C.No.V(15)03/A DJ/CGST-HQRS/GHY/CE/2020	Issued by Joint Commissioner.

6	WP(C)/2916 /2020	M/S JUMBO ROOFING AND TILES Vs. UNION OF INDIA & 3 ORS	Place of business atSila, Haluguri Chowk, Changsari, Kamrup(R), Assam-781001	excisable goods viz. Asbestos Cement Corrugated Sheet and Asbestos Cement Plain Sheet	Rs.8,07,137/-	C.No.V(18)04/SCN-CESS/JUMBOR OOFING/ACG-I/2020/2275 Dated 27.05.2020	Superintendent(Tech-I), CGST & Central Excise, Division-I.
7	WP(C)/2920 /2020	M/S JUMBO PACKAGING INDUSTRIES Vs. UNION OF INDIA & 3 ORS	Place of business atUdalbakra, Lal Ganesh, Opposite Kali Mandir, Guwahati-781034, Assam.	excisable goods viz. Corrugate dcartons/ Paper scrap	Rs.3,91,118/-	C.NO.V(18)25/SCN-CESS/Jumbo Packaging/ACG-I/2020/2324 Dated 02.06.2020	Superintendent(Tech-I), CGST & Central Excise, Division-I.
8	WP(C)/2926 /2020	M/S RIVER VALLEY CEMENT CORPORATION Vs UNION OF INDIA & 3 ORS	Place of business atLaxmi Nagar, Changsari, Kamrup(R), Assam	excisable goods viz. Ordinary Portland Cement (OPC) and Portland Pozzolana Cement (PPC)	Rs.23,60,321/-	C.NO.V(18)01/SCN-CESS/River Valley/ACG-I/2020/2333 dated 02.06.2020	Assistant CommissionerGST & CE, Guwahati Division-I.
9	WP(C)/2929 /2020	M/S KESHARI INDUSTRIES Vs UNION OF INDIA & 4 ORS	Office and factory atAbhaypur, Shilasundari, Gauripur, Guwahati-31, Assam	Plastic Moulded Furniture	Rs.5,96,470/-	C.No.V(18)08/SCN-CESS/Keshari Industries/ACG-I/2020 dated 27.05.2020	Superintendent(Technical-I), Guwahati, Assam.
10	WP(C)/2935 /2020	OZONE PHARMACEUTICALS LTD. Vs. UNION OF INDIA & 5 ORS.	Office and factory atExport Promotion Industrial Park (EPIP), Amingaon, North Guwahati Circle, Dist-Kamrup, Assam.	pharmaceutical products	Rs.93,38,718/-	C.No.V(15)04/ADJ/CGST-HQRS/GHY/CE/ 2020 dated 18.06.2020	Joint Commissioner,Guwahati, Assam.
11	WP(C)/2940 /2020	M/S JOYSHREE POWEROL Vs. UNION ofINDIA & 3 ORS	Place of Business atSila Katamur, Mouza-Sindurighopa, Changsari, Kamrup(Rural), Assam- 781001	excisable goods viz. Diesel Generator Set and Acoustic Enclosure & Electrical Panel	Rs.2,94,502/-	C.NO.V(18)24/SCN-CESS/Powerol/ACG-I/2020/2318 Dated 02.06.2020	Superintendent(Tech-I), CGST & Central Excise Guwahati Division-I.

12	WP(C)/2947 /2020	M/S. OZONE AYURVEDICSVs. UNION OF INDIA AND 4 ORS	Office and Factory at EPIP, Amingaon, Guwahati, Dist-Kamrup, Assam-781031	Ayurvedic Medicaments	Rs.49,23,097/-	C.No.V(18)18/SCN-CESS/Ozone Ayurvedics/ACG-I/2020 dated 02.06.2020	Assistant Commissioner,Guwahati, Assam.
13	WP(C)/2951 /2020	M/S. BARAK ISPAT PVT. LTD. Vs. UNION OF INDIA AND 4 ORS	Office at Mohanpur Road, Srikona, Silchar-26 and Factory at Dag No. 187 & 188 of 2nd R S Patta No. 15 & 161, Mouza Srikona,Dist-Cachar, Assam.	M. S and H.S.D. Rod	Rs.3,59,344/-	C.No.IV(10)20/E.CESS/Refund/ACS/2019/707 dated 09.06.2020	Assistant Commissioner,Silchar, Assam.
14	WP(C)/3049 /2020	M/S BARAK ALLOY Vs UNION OF INDIA AND 4 ORS	Office at MohanpurRoad, Srikona, Silchar-26, Assam and Factory at Mouza Srikona, Part- II, Pargana Rajnagar, Dist-Cachar, Assam.	M. S. Ingot	Rs.22,49,076/-	C.No.IV(10)11/E.CESS/Refund/ACS/2019/691 dated 09.06.2020	Assistant Commissioner, Silchar, Assam.
15	WP(C)/3087 /2020	UPPER ASSAM PETROCOKE PRIVATE LIMITED VsUNION OF INDIA AND ANR	Office at No. 2, Makum Pather, P.O.Margherita, Dist: Tinsukia-786181,Assam	Manufacture and sale of Calcined Petroleum Coke (CPC)	E.Cess + SHE Cess= Rs.13,63,561/-	F.No.V(15)/07/SCN/UAPC/ACT/2019-20/215 Dated 06.02.2020	Assistant Commissioner,Central Goods and Service TaxDivision, Tinsukia
16	WP(C)/3113 /2020	KAMLANG SAW AND VENEER MILLS PVT. LTD. Vs UNION OF INDIA AND 3 ORS.	Office at Palasbari, Mouza-Chayani, Kamrup-781128, Assam.	Plywood, Block Board & Flush Door	Rs.15,52,417/-	V(18)14/SCN/-CESS/KAMLANG /ACG-I/2020/2342 Dated-02.06.2020	Assistant Commissioner

17	WP(C)/3155/2020	CEMENT INTERNATIONAL LTD. Vs UNION OF INDIA AND 2 ORS.	Manufacturing unit at Davendranagar, Jhoom Basti, P.O. Badarpurghat, Dist-Karimganj, Assam.	excisable goods viz. cement (OPC and PPC)	Rs.30,80,122/-	C.NO.IV(10)17/E.CESS/CIL/Refund/ACS 2019/693 Dated 09.06.2020	Assistant Commissioner.
18	WP(C)/3156/2020	M/S. K.D.CEMENTS Vs UNIONOF INDIA AND 2 ORS.	Factory at Bhomraguri, Samaguri, P.O.-782140, Dist-Nagaon, Assam	product OPC,PPC & PS Cement & Clinker	Rs.19,46,217/-	C.NO.V(18)327/Refund/KDC/ACG-II/2018/697 Dated 28.07.2020	Assistant Commissioner,CGST, Guwahati Division-II
19	WP(C)/3166/2020	M/S GATTANI POLYMERS Vs UNION OF INDIA AND 4 ORS	Office at G.B. Gattani Industrial Complex, MarianiRoad, Cinnamara, Jorhat, Assam.	excisable commodities,viz. HDPE & PP Circular woven Fabrics and Industrial Bags	Rs.2,51,967/-	C.No.V(18)13/ACJ/REF/2019-19/213 dated 23.01.2020 (read with CorrigendumNo. C.No.V(18)13/ACJ/REF/2018-19/349-50 dated 13.02.2020)	Assistant Commissioner,Jorhat, Assam.
20	WP(C)/3176/2020	M/S AHINSHA CHEMICALS LTD. (INSTANT TEA DIVISION) Vs THE UNION OF INDIA AND 4 ORS	Office at N.T. Road,Milanpur, Dist- Nalbari, Assam-781335	excisable commoditiesviz Instant Tea & Instant Tea Premixes	Rs.2,05,140/-	C.No.V(18)13/SCN-CESS/AHINSHA / ACG-I/2020 dated 20.05.2020	Superintendent(Technical-I), Guwahati, Assam.

21	WP(C)/3177 /2020	M/S JSVM PLYWOOD INDUSTRIESLTD. (FORMERLY KNOWN AS M/S ARUNACHALSAW AND VENEER MILLS PVT. LTD Vs THE UNION OF INDIA AND 4 ORS	Office at 17th Mile, Stilwell Road, P.O. Jairampur, Dist-Changlang, Arunachal Pradesh.	articles ofwood	Rs.14,09,689/-	C.No. V (18)07/Refund/ JSVM/ACI/2018 /149 dated 06.03.2020	Deputy CommissionerItanagar Division, Arunachal Pradesh.
22	WP(C)/3237 /2020	M/S. PCL CEMENT ANDPIPE INDUSTRIES Vs UNION OF INDIA AND 3 ORS.	Place of business at Borera Gaon, Na Ali, Titabar, Dist- Jorhat, Assam- 785630	Excisable goods viz. Cement.	Rs.1,29,710/-	C.NO. V(18)02/ACJ/REF/PCL/2019- 20/216 dated 06.03.2020	Assistant Commissioner,CGST, Division Jorhat.
23	WP(C)/3298 /2020	BARAK VALLEY CEMENTS LTD Vs UNION OF INDIA AND 3 ORS	Manufacturing unit at Dabendranagar, Jhoom Basti, P.O. Badarpurghat, Dist-Karimganj, Assam.	excisable goods viz. Clinker andOPC/ PPC/ PSC Cement	Rs.1,66,22,535/-	C.No.V(15)09/A DJ/CGST-HQRS/GHY/CE/ 2020 dated 27.07.2020	Joint Commissioner,GST & Central Excise Commissionera te, Guwahati.
24	WP(C)/3372 /2020	CENT PLY VsUNION OF INDIA AND 2 ORS.	Principal place of business at Mirza- Palashbari Road, Palashbari, Kamrup, Assam- 781128	plywood, block board, flush door and resin	Rs.85,24,563/-	C.No.V(15)05/A DJ/CGST-HQRS/GHY/CE/ 2020/19510-11 dated 17.06.2020	Joint Commissioner,GST & Central Excise Commissionera te, Guwahati.
25	WP(C)/3386 /2020	M/S. BULLAND CEMENT PVT.LTD. Vs THE UNION OF INDIA AND 4 ORS.	Office and factory atVillage Bamungaon, Lanka, Dist-Nagaon, Assam.	excisable commoditiesviz Cement (OPC & PPC) and Clinker	Rs.16,25,503/-	C.No.V(18)247/ Refund/BCPL/ACG-II/2018 dated 28.07.2020	Assistant Commissioner,Guwahati, Assam.

26	WP(C)/3464/2020	ASSAM ROOFING LTD. Vs UNION OF INDIA AND 2 ORS.	Office and Factory situated at Bonda,Narengi, Assam.	"excisable commodities viz. Galvanized Plain Sheets, Galvanized Corrugated Sheets and Asbestos products	Rs.90,70,956/-	C.No.V(15)15/A DJ/CGST-HQRS/GHY/CE/2020/750-51 dated 06.08.2020	Joint Commissioner,GST & Central Excise Commissionera te, Guwahati.
27	WP(C)/3596/2020	M/S. INDIA CARBON LTD.Vs UNION OF INDIA AND ANR.	Office at Noonmati, Guwahati	Calcined Petroleum Coke and Electrode Carbon Paste	E.Cess + SHECess= Rs.63,42,164/-	C.No.V(15)12/A DJ/CGST-HQRS/GHY/CE/2020 dated 06.08.2020	Joint Commissioner,GST & Central Excise Commissionera te, Guwahati.
28	WP(C)/3610/2020	ASSAM CARBON PRODUCTSLTD. Vs UNION OF INDIA AND ANR	Office at Narengi Chandrapur Road, Bikruchi, Narengi, Guwahati-781026,Assam.	manufacture and sale of electrical grade carbon blocks, mechanical grade carbon blocks, Metal Graphite andSilver Graphite Grade Blocks, NH Coke, electrical carbon brushes, Tamping Powder, Tamping Paste etc	E.Cess + SHE Cess= Rs.19,93,410/-	C.No.V(18)246/Refund/ACPL/ACG-II/2018 dated 28.07.2020	Assistant Commissioner,GST & Central Excise, Guwahati-II Division, Guwahati.
29	WP(C)/3762/2020	M/S PURBANCHAL CEMENT LTD.Vs THE UNION OF INDIA AND 3 ORS.	Factory situated at Village-Sarutari Mouza-Sonapur, P.O.-Byrnihat, Dist-Kamrup(M), Assam-782402	excisable commodities viz Cement	Rs.97,99,652/-	C.No.V(15)11/A DJ/CGST-HQRS/GHY/CE/2020 dated 06.08.2020	Joint Commissioner,Guwahati, Assam.

30	WP(C)/3763 /2020	MODI MUNDIPHARMA BEAUTY PRODUCTS PVT. LTD. Vs UNION OF INDIA AND 2 ORS.	Office at House No.17, Rukminigaon, Guwahati, Assam- 781022	manufacturer of Cosmetics	Rs.1,09,35,787/-	C.NO.V(15)14/ ADJ/CGST-HQRS/GHY/CE/ 2020/752-53 dated 27.07.2020	Joint Commissioner,GST & Central Excise Commissionerate, Guwahati
31	WP(C)/3810 /2020	M/S. K.D.IRON AND STEEL CO. Vs UNION OF INDIA AND ANR	Factory at Integrated Industrial Development Centre, Village-Borshil, P.O. Moranjana, Rangia,in the district of Kamrup(R)	M.S. Rod, M.S. Pipe, M.S. Wire Rod and M.S. Billet	E.Cess + SHECess= Rs.25,70,952/-	C.No.V(18)21/SCN-CESS/K.D.IRON /ACG-I/2020/2351 Dated 02.06.2020	Assistant Commissioner,GST & Central Excise, Guwahati-I Division, Guwahati
32	WP(C)/3835 /2020	M/S. SHANDAR PAINTS INDUSTRY (UNITII) Vs UNION OF INDIA AND 4 ORS	A sole proprietorship concern having theirprincipal place of business at Shed No.11 & 12, Rani Industrial Area, Rani, Kamrup-781131.	Special Oxide Pigment, Damp Roof Powderfalling	Rs.2,14,199/-	V(18)23/SCN-CESS/Shandar-II/ACG-I/2020/2269 Dated 27.05.2020 alleged Rs.2,14,199/- erroneousrefund.	SuperintendentTechnical-I
33	WP(C)/4031 /2020	M/S K.D. COKES Vs THE UNION OF INDIA AND 2 ORS	Office at Village-Amerigog, 11th Mile,Jorabat, G.S. Road, District-Kamrup, Assam	ExcisableGoods i.e Coke	Rs.5,91,532/-	C.No.V(18)167/ Refund/K.D. COKES/ACG-II/2018 dated 17.09.2020	Assistant Commissioner,CGST, Guwahati Division-II.
34	WP(C)/4035 /2020	NORTH EAST ROOFING (P)LTD. Vs UNION OF INDIA AND 2 ORS.	Registered office atBonda, Narengi, Guwahati-781026, Assam	excisable commoditiesunder broad description of Articles ofAsbestos Cement of Cellulose Fibre Cement Corrugated Sheets, AC Plain Sheet and Accessories	Rs.29,35,614/-	C.NO.V(18)242/ REFUND/NERPL /ACG-II/2018/1035 dated 22.09.2020	Assistant Commissioner,CGST, Guwahati Division-II.

35	WP(C)/4046 /2020	PDP STEELS LTD Versus UNION OF INDIA AND 2 ORS	Registered office atBonda, Narengi, Guwahati-781026,Assam	excisable commoditi esviz. CR Coils,End Cut and Scrap, HR Slit Coil/ Scrap and MS Wire	Rs.32,73,850/-	C.NO.V(18)244/ REFUND/PDPST EELS/ACG-II/2018/1018 dated 21.09.2020	Assistant Commissioner,CGST, Guwahati Division-II.
36	WP(C)/4053 /2020	M/S. B.R.METTALICS Vs UNIONOF INDIA AND ANR	Factory at Integrated Industrial Development Centre, Village-Borshil, P.S. Moranjana, Rangia,in the district of Kamrup(R), Assam-781354	M.S. Billetand M.S. Ingots	E.Cess + SHECess= Rs.17,27,580/-	c.No.V(18)03 /SCN-CESS/B.R. METTALLICS/ACG-I/2020/2345 dated 02.06.2020	Assistant Commissioner,GST & Central Excise Guwahati-I Division, Guwahati.
37	WP(C)/4194 /2020	KAMAKHYA PLASTICS PVT. LTD. VsUNION OF INDIA AND 2 ORS.	Factory situated atBonda, Narengi, Guwahati	excisable goods i.e UPVC Pipesand Fittings and plastic water storage tank	Rs.7,92,439/-	C.NO.V(18)249/ REFUND/KPPL/ ACG-II/2018/1032 dated 22.09.2020	Assistant Commissioner,CGST, Guwahati Division-II.
38	WP(C)/4493 /2020	ASSAM CARBON PRODUCTS LIMITED VsUNION OF INDIA AND ANR	Registered office at Narengi ChandrapurRoad, Bikruchi, Narengi, Guwahati-781026, Assam.	manufacture and sale of electrical grade carbon blocks, mechanical grade carbon blocks, Metal Graphite andSilver Graphite Grade Blocks, NH Coke, electrical carbon brushes, Tamping Powder, etc	E.Cess + SHECess= Rs.1,10,823/-	C.No.V(18)245/ Refund/ACOL/ACG-II/2018/1015 dated 21.09.2020	Assistant Commissioner,Central Goods and Service Tax, Guwahati-II Division, Guwahati.

39	WP(C)/4721 /2020	M/S NEW AGE PETCOKE PVT. LTD. VsUNION OF INDIA AND ANR.	Office and IndustrialUnit at Palashbari, P.O. Kajalgaon, inthe District of Chirang (BTAD), Assam.	Calcined Petroleum Coke	E.Cess + SHE Cess= 4,50,915/-	Bearing No. GEXCOM/SCN/ CE/29/2020-TECH-CGST- DIV-BONG-COMMRTE-GUWAHATI - I/19126/2020/ 714 Dated 07.10.2020	Assistant Commissioner,GST & Central Excise, Bongaigaon Division
40	WP(C)/4824 /2020	M/S BRAHMA PUTRA CARBON LTD Vs THE UNION OF INDIA AND 2 ORS	Industrial Estate,New Bongaigaon, Assam-783380	Calcined Petroleum Coke (CPC).	E.Cess + S&HECess= Dt. 14.02.2019 Rs.4,84,461/ - Dt. 20.06.2019 Rs.47,80,113/-	Dated 07.10.2020	Assistant Commissioner.
41	WP(C)/4947 /2020	GREENPLY INDUSTRIESLTD. Vs UNION OF INDIA AND 3 ORS	Makum Road, Tinsukia, Assam and its manufacturing unitat Lapa Lampong, Tizit, Mon, Nagaland-798602and having one of its office at Makum Road, Tinsukia, Assam	Plywood, Block Board, Flush Door etc.	Rs.1,31,28,902/-	C.No.IV(9)02 /D MR/GST/COMM R/ADJ/GREENP LY/2020-21 dated 04.06.2020	Commissioner, CGST, Dimapur, Nagaland.

25. Being aggrieved by the impugned Demand-cum-show cause notices issued, the present writ petitions have been filed assailing the said demand-cum-show cause notices and praying for appropriate orders seeking interference by this Court.

26. The common grounds urged by the writ petitioners assailing the impugned demand-cum-show cause notices are as under:-

(i) That the refund of Education Cess and Secondary and Higher Education Cess which was granted to the petitioners was on the basis of law laid down by the Apex Court in the case of SRD Nutrients(supra) which was prevailing at that point in time, and therefore, it cannot be said to be erroneous refund simply on the ground that the Apex Court in the subsequent decision rendered in M/S Unicorn Industries(supra) held that judgment passed by the Apex Court earlier in SRD Nutrients Pvt. Ltd. (supra) to be per incuriam.

(ii) As the refunds granted to the petitioners was in terms of the law laid down by the Apex Court in the case of SRD Nutrients(supra) prevailing at the relevant point in time, cannot be held to be erroneous and, therefore, the impugned demand-cum-show cause notices issued by the Department under Section 11A of the Central Excise Act is without jurisdiction.

(iii) That the binding effect of any judgment rendered will not be reversed or

effected even if the said judgment is overruled and/or held to be per incuriam by a subsequent judgment as the refund granted to the petitioners were made by the Central Excise Department in terms of the judgment rendered by the Apex Court in SRD Nutrients which was the law prevailing at the relevant point in time. The said judgment being held to be per incuriam by later judgment will not alter the binding effect of SRD Nutrients under which the refunds were already granted to the petitioners. Accordingly the refunds granted cannot be said to be erroneous as have been sought to be p4ubmits that the Judgment held to have been rendered "per incuriam" by the Apex Court will not have any effect on the actions initiated under such judgment namely, grant of refunds. It cannot be treated to have been made erroneously. Therefore, the impugned demand notices are contrary to the provisions of Section 11A of the Central Excise Act, 1944 as the impugned recovery of refunds granted earlier sought to be made cannot be treated to be erroneous.

28. The learned senior counsel further submits that when a judgment is declared to be "per incuriam", by a latter Bench or a larger Bench, then the Judgment declared "per incuriam" loses its precedential value. However, the binding effect of the judgments between the parties to the said judgment remains conclusive and cannot be altered except otherwise by way of an appeal or review by any of the parties to the Judgment. It is submitted that pursuant to the judgment of the SRD Nutrients(supra), the departments granted the refunds claimed by the petitioners. The review petition filed before the Apex Court by the Department at the relevant point of time was also dismissed. Accordingly, the refunds having been granted under orders of the Apex Court, in view of M/S SRD Nutrients (supra), had attained finality. Merely because M/S SRD Nutrients (Supra) has subsequently been declared to be "per incuriam" by the Apex Court in M/S Unicorn Industries (Supra), the refunds granted cannot be said to be erroneous and thereby the Department cannot seek to invoke the provisions of Section 11A of the Central Excise Act, 1944 and demand recovery of the refunds granted.

29. The learned Senior counsel submits that the term "erroneous" has been defined by the Black's Law Dictionary as "involving error; deviating from the law". The learned counsel referred to the Judgment of the Apex Court in Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, Kerala State, (2) 2 SCC 718 held that incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.

30. The learned Sr. counsel submits that this Court in Rajendra Singh Vs. Superintendent of Taxes reported in 1990 Vol. 1 GLR 449, held that "erroneous" means involving error; deviating from law. The Division Bench of this Court in the said judgment held that "Erroneous assessment" refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officer in fixing the amount of valuation of the property. Similarly 'erroneous judgment' means: 'One rendered according to course and practice of Court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles".

31. The learned senior counsel submits that the said judgments of this Court rendered in Rajendra Singh(supra) came to be considered by a larger Bench as in a latter judgment, also rendered by Division Bench of this High Court, the view of the Division Bench of this Court in Daga Entrade Pvt. Ltd, reported in 2010 327 ITR 467 was perceived to be in conflict with the judgment rendered in Rajendra Singh(supra). The larger Bench in the case of Commissioner of Income Tax Vs. Jawahar Bhattacharjee, reported in 2012 (2) GLR 495, held that there was no conflict between the two judgments. It was held therein that incorrect assumption of facts or incorrect application of law as also non-application of mind and condition to follow natural justice will satisfy the requirement of the order being "erroneous". The learned sr. counsel, therefore, submits that since the refunds made earlier by the Department in terms of the judgment of the Apex Court rendered in SRD Nutrients(supra) and were not on incorrect assumption of facts or incorrect application of law or non- application of mind, the same cannot be treated to be "erroneous" in order to bring it within the ambit of Section 11A of the Central Excise Act 1944. The learned senior counsel submits that the refunds orders passed by the Department in respect of refunds of Education Cess and Secondary and Higher Education Cess cannot be said to be erroneous, inasmuch as, the same where refunded by the Department on the basis of the law existing at the relevant pointing time as was laid down by the Apex Court in SRD Nutrients(supra).

32. The learned senior counsel submits that the subsequent contrary view taken by the Apex Court in a later judgment i.e. M/S Unicorn Industries Ltd(supra) will not render any proceedings concluded to be illegal and thereby making the refunds already granted "erroneous". It is submitted that there is no provision under the Central Excise Act, 1944, which permits the concerned Officer under the Department to revisit orders finally made by him/her or his or her predecessor in office by resorting to provisions of Section 11A. The learned Sr. counsel submits that section 35 of the Central Excise Act, 1944 there is a provision for appeal against any order or decision passed under the Central Excise Act, 1944 by the Central Excise Officer lowering rank then a Principle Commissioner of Central Excise or Commissioner of Central Excise. It is submitted that no appeal has been filed by the Department against the order of the concerned departmental officer sanctioning the refunds of Education Cess and Secondary and Higher Education Cess to the petitioners. It is submitted that if the department was aggrieved they could have preferred an appeal as provided under Section 35 of the Central Excise Act. However, no such appeal has ever been preferred by the Departmental authorities, the refunds granted has long attained finality.

33. It is further submitted that in respect of WP(C) 2918/2020, W.P(C) No. 3156/2020, W.P.(C) No. 3237/2020, W.P(C) 3464/2020, W.P(C) No. 4035/2020, W.P(C) No 4046/2020, W.P.(C) No. 4194/2020 and W.P.(C) No. 1366/2020, the refunds were granted on the basis of directions issued by this Hon'ble Court in writ applications filed by the petitioners. No appeals against such orders were filed by the Department and therefore, the orders passed by this Court in the writ petitions

have attained finality. The refunds granted to those petitioners on the basis of such orders being passed by this Court have been so done because the Department has accepted the direction of this Hon'ble court passed in the said writ petitions. Accordingly, they are estopped and barred from reopening the issues by way of the impugned show cause notices on the ground of change of law as declared by the Apex Court.

34. The further submissions of the learned senior counsel is that the impugned show cause notices have been issued in total contravention to the department circulars issued. The learned Sr. counsel submits that vide instructions, dated 09.01.2020, issued to all Principle Chief Commissioners/ Chief Commissions of Customs and GST, all Principle Directors General/Director Generals of Customs and GST, clear instructions were issued by the Department that any interim or final order decided against the review may be contested by final statutory appeal, writ appeal or review petition as the case may be and if the same is not possible, a self-contained SLP proposal may be forwarded to the Board on the aforesaid instructions. The learned Sr. counsel submits that a bare perusal of the instructions clearly reveal the Department has accepted that the refunds granted earlier and that they have attained finality. Therefore, Field Officers/ departmental officers have been instructed to contest by filing statutory appeals/ writ appeals or review petitions or forward a proposal for filing SLP to the Board. Accordingly, it is submitted that the Departmental Officers on whom departmental instructions/ circulars are binding, cannot act in contrary to such instructions issued and continue to pursue the impugned demand notices issued. It is submitted that in view of the instructions dated 09.01.2020, the impugned show cause notices are required to be dropped by the Department and not be pursued with.

35. The Department contested that case by filing their affidavit. Mr. S. C. Keyal, learned standing counsel submits that since common questions of law are involved in the present proceedings, the affidavits filed in W.P.(C) No. 2918/2020, W.P.(C) No. 1366/2020 and W.P.(C) No. 1780/2020 will reflect, the stand of the department in respect of all the other petitioners also. Mr. Keyal, learned Standing counsel, Central Excise Department, submits that there is no infirmity in the show cause notices issued as the same were issued pursuant to judgment of the Apex Court rendered in M/S Unicorn Industries (Supra). It is the submission of Mr. Keyal that in view of the judgments of M/S Unicorn Industries (supra) holding the earlier judgment SRD Nutrients (supra) to be "per incuriam", the Department is duty bound in law to treat the refunds granted earlier to have been wrongly or erroneously granted. The learned Standing counsel submits that in view of the judgment of M/S Unicorn (supra) that the earlier judgments rendered in M/S SRD Nutrients(supra) was rendered "per incuriam" has occasioned the necessity of the issuance of the show cause notices by the Department for recovery of the refunds granted earlier in terms of the judgments of SRD Nutrients(supra). The learned Standing counsel submits that the Apex Court in M/S Unicorn Industries(supra) has held M/S SRD Nutrients (supra) to have been rendered in "per incuriam" in view that earlier

judgments rendered by the Apex Court in Modi Rubber(supra) and Rita Textile Pvt. Ltd (supra) were not considered by the Apex Court while rendering M/S SRD Nutrients(supra). The learned Standing counsel submits that as the refunds made earlier were contrary to the law laid down in Modi Rubber(supra) and Rita Textile, therefore, the refunds will have to be considered to have been made erroneously. Under such circumstances the department has correctly sought the recovery of the refunds already granted by issuance of the show cause notices as has been done and which are impugned in the present proceedings. The learned Standing counsel submits that in that view of the matter, the refunds granted earlier being erroneous will have to be recovered under the provisions of Section 11A of the Central Excise Act, 1944. The learned Standing counsel submits that the show cause notices served upon the petitioners were also within the period stipulated under the statute.

36. In the affidavits filed, the Department denied the contentions of the petitioners that the recovery of refunds sought to be made is barred by limitation under the provisions of Section 11A of the Central Excise Act or that the impugned show cause notices issued by the Department for the recovery of the refunds of Education Cess and Secondary and Higher Education Cess are void and without jurisdiction. The Department contended that the questions which arise for consideration before this Court are as under:-

(i) Whether the law laid down in the judgment dated 06.12.2019 in Unicorn Industries shall have retrospective effect as the earlier judgment dated 10.11.2017 in SRD Nutrients Pvt. Ltd. held to be per incuriam.

(ii) Whether refund of Education Cess and Secondary and Higher Education Cess have become erroneous refund in view of declaration of judgment dated 10.11.2017 (SRD Nutrients Pvt. Ltd.) as per incuriam and as such recovery of Education Cess and Secondary and Higher Education Cess sought through impugned Demand notice is legal and valid.

37. The learned standing counsel contended that the law declared by the Hon'ble Apex Court in the context of the present proceedings, will have to be taken to be effective retrospectively since the Apex Court in Unicorn Industries Limited (supra) had already declared that the SRD Nutrients Pvt. Ltd. (supra) to be per incuriam in view of Modi Rubber(supra), and M/S Rita Textiles (supra). As such, the refunds of Education Cess and Secondary and Higher Education Cess made to the petitioners in terms of SRD Nutrients Pvt. Ltd. (supra) were contrary to law itself as it stood then as laid down in Modi Rubber(supra) and M/S Rita Textiles (supra), and thereby making it erroneous. The learned standing counsel contended that when a Judgment has been held to be "per incuriam" it amounts to overruling the Judgment and, therefore, it is deemed to be applicable from a retrospective period except otherwise when indicated in the Judgment itself. The refunds allowed to the petitioners earlier are now required to be recovered as they have become refunds erroneously made in view of the Judgment of the Apex Court in M/S Unicorn Industries (supra). The petitioners are under clear obligation to pay back

the amounts which were received by them in terms of the Judgment of M/S SRD Nutrients (supra) which have been overruled presently. As the refunds granted earlier to the petitioners have become erroneous in view of the judgment of the Apex Court in M/S Unicorn Industries(supra), the demand-cum-show cause notices were rightly issued by the Department under Section 11A.

38. The learned standing counsel further contended that in terms of Notification No. 32/99 and 33/99 both dated 08.07.1999 and Notification No. 20/2007 dated 25.04.2007, there was no provision for exemption of the Education Cess and Secondary and Higher Education Cess provided for. The refunds of the Education Cess and Secondary and Higher Education Cess were granted by the Department only in terms of the judgment of the Apex Court in SRD Nutrients (supra) which have now become erroneous in view of the later judgment of the Apex Court in M/S Unicorn Industries Limited (supra) whereby the earlier SRD Nutrients (supra) has been held to be per incuriam. The learned standing counsel for the respondents relied on the judgments of the Apex Court in the case of Assistant Commissioner, Income Tax, Rajkot –Vs- Saurashtra Kutch Stock Exchange Limited reported in (2008) 14 SCC 171 to support his contention that the judicial decision acts retrospectively. Where an earlier decision of the Court operated for quite some time, the decision later would have retrospective effect to clarify the legal position which was earlier not correctly understood. He submits that in view of the judgment of the Apex Court in M/S Unicorn Industries holding the earlier Judgment of the Apex Court in SRD Nutrients (supra) to be per incuriam, the legal position will have to be given retrospective effect. Therefore, as the refunds granted by the Department earlier were granted erroneously and contrary to the law laid down in Modi Rubber(supra). Consequently the demand-cum-show cause notices for recovery of the education Cess and Secondary and Higher Education Cess refunded has been rightly issued and, therefore, the same ought to be interfered with. In support of his contentions that decisions rendered in ignorance of law cannot bind subsequent benches as held by the Apex Court. The learned standing counsel referred to Jagannath Temple Managing Committee –Vs- Siddha Math reported in (2015) 16 SCC 542. The learned standing counsel also relied *upon the Judgment of Apex Court in P.V. George and Ors, -Vs- State of Kerala reported in (2007) 3 SCC 557 and M.A. Murthy –Vs- State of Karnataka and Ors., reported in (2003) 7 SCC 17 to submit that any decision* of the Apex Court unless indicated therein to be operative prospectively will have to operate retrospectively. Where the law was ambiguous, the correct position of law will have to be operative retrospectively unless otherwise indicated in the judgment itself. The learned standing counsel also referred to Judgment of the Rajasthan High Court in WP(C) No. 880/2018. The learned counsel strongly disputed the contentions of the petitioners that the Judgment of the Apex Court in M/S Unicorn Industries (supra) is prospective only and that it shall not affect the earlier settled cases. He submits that even though a case may not have been expressly over-ruled but once it has been held that it has been rendered "per incuriam", it cannot be said that it lays

down good law as held by the Apex Court in Mukesh K. Tripathi –Vs- L.I.C. (2004) 8 SCC 387. He further refers to Sanchalakshri –Vs- Vijyakumar Raghuvirprasad Mehta reported in (1998) 8 SCC 245 to submit that the Judgment of the Apex Court in "M/S Unicorn Industries"(supra) had not laid down any new law but has only interpreted the existing law and therefore, the Judgment will have to relate back to the date when the law came into force. The learned standing counsel submits that in Sanchalakshri (supra). The Apex Court held that the High Courts/Tribunal did not possess the same power as the Apex Court possess under Article 142 of the Constitution of India for doing complete justice, even in the absence of such a provision. Therefore, he submits that unless indicated in the Judgment itself, it will have retrospective effect. The learned standing counsel also referred to H.P. Nurpur (P) Bus Operators' Union reported in (1999) 9 SCC 559 to submit that once a Court came to the conclusion that the provisions are declared invalid, then the collections made thereunder also consequently stood invalid. He, therefore, submits that the law under which the refunds were made having been declared to be "per incuriam", the refunds granted thereunder would automatically become erroneous and therefore, the Department is duty bound to issue notifications for recovery under Section 11A as has been done in the present case.

39. The learned standing counsel for the respondents further submits that the decision of SRD Nutrients (supra) was on a pure and abstract question of law and, therefore, the principle of res judicata cannot be applied. For this purpose, he also relied on Union of India –Vs- Indian Railway SAS Staff Association reported in (1995) Supp. (3) SCC 600. It is the contention of the learned standing counsel that the principle of res judicata and settled assessment will apply only to the company M/S. SRD Nutrients Pvt. Ltd. and other companies who were party before the Hon'ble Apex Court in the case of SRD Nutrients vs. Union of India. The said company M/S. SRD Nutrients Pvt. Ltd. which was one of the industrial units in Assam was eligible to Excise Duty exemption under the aforesaid notification and who was denied refund of Education Cess and Secondary and Higher Education Cess by the Assessing Officer, challenged the order of the Assessing Officer by filing an appeal before the Commissioner of Central Excise and Customs (Appeals), Guwahati. However, these appeals were dismissed by the Commissioner (Appeals) and the order of the Commissioner (Appeals) was thereafter also upheld by the Customs Excise & Service Tax Appellate Tribunal (CESTAT), East Regional Bench, Kolkata by the impugned judgment. Against the said order passed by the learned CESTAT, an SLP was preferred before the Hon'ble Apex Court which was decided by the Hon'ble Apex Court vide judgment dated 10.11.2017 passed in SRD Nutrients Pvt. Ltd vs. Commissioner of Central Excise, Guwahati reported in (2018) 1 SCC 105. As such, the said company being a party in the said case, res judicata will apply to the said company. As far as the other petitioners are concerned, principle of res judicata will have no application.

40. The learned standing counsel further submits that a decision on an abstract question of law unrelated to facts which give rise to a right, cannot operate as res

judicata. Nor also can a decision on the question of jurisdiction be res judicata in a subsequent suit or proceeding. He referred to the Judgment of Supreme Court Employees' Association –Vs- Union of India reported in (1989) 4 SCC 187 in support of his contention. The relevant paragraph of the judgment is extracted as under:-

"**24.** Thus, a decision on an abstract question of law unrelated to facts which give rise to a right, cannot operate as res judicata. Nor also can a decision on the question of jurisdiction be res judicata in a subsequent suit or proceeding. But, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same. The Delhi High Court judgments do not decide any abstract question of law and there is also no question of jurisdiction involved. Assuming that the judgments of the Delhi High Court are erroneous, such judgments being on questions of fact would still operate as res judicata between the same parties in a subsequent suit or proceeding over the same cause of action."

41. The further contention of the learned standing counsel is that grant of refund to the petitioners will result in "unjust enrichment". He has referred to the Judgments of Apex Court in Mafatlal Industries vs. Union of India reported in (1997) 5 SCC 536; U.P. State Electricity Board v. City Board, Mussoorie reported in (1985) 2 SCC 16; I.T.C. Ltd. Vs. State of Karnataka reported in (1985) Supp SCC 476; Indian Oil Corpn. Vs. Municipal Corpn, Jullundhar reported in (1993) 1 SCC 333; Entry Tax Officer Vs. Chandanmal Champalal & Co. reported in (1994) 4 SCC 463 and Jindal Stainless Ltd. Vs. State of Haryana reported in (2017) 12 SCC 1 to support his contentions that refund can only be allowed when the claimant establishes that the tax burden has not been passed on to the end consumers. No refund can be granted to cause a windfall gain to any person when he has not suffered to burden of tax. As the petitioners have not disclosed that they have not passed on the tax burden to the end users/consumers, refund of Education Cess and Secondary and Higher Education Cess will amount to against enrichment and therefore, the refunds submitted be allowed.

42. The learned counsel submits that the Writ jurisdiction under Article 226 of the Constitution has wide amplitude. These writs are therefore, referred as prerogative writs and even now retain its discretionary character. The Court will not always issue a writ simply because it is lawful to do so. Therefore, even if a petitioner establishes infringement of some legal right, the Court may still refuse to issue a writ. When therefore a petitioner invokes writ jurisdiction and urges the High Court to issue an appropriate writ, his legal rights and infringement thereof are not the only considerations before the Court.

43. Finally, the learned counsel further submits that the law prevailing in Assam and Meghalaya till the decision of the Apex Court in M/S SRD Nutrients (Supra) is that Education Cess and Secondary and Higher Education Cess were not exempted. However, pursuant to the judgment of M/S SRD Nutrients (Supra) the

refunds were granted. However, in so far as the state of Sikkim is concerned, the Education Cess and Secondary and Higher Education Cess is not exempted and the industries in the state of Sikkim have paid the Education Cess and Secondary and Higher Education Cess to the Government. If this is permitted to continue it will leave to a anomalous situation resulting in territorial discrimination and which will be against the letter and spirit of Article 141 of the Constitution of India which provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India.

44. The learned counsel for the parties have been heard. The pleadings on record have also been perused. There is no dispute with regard to the facts that the petitioners before this Court have all set up their industries or under took substantial expansions of the industries and are manufacturing excisable items. The excise duty on the products manufactured by the petitioners are exempted under the Industrial Policy of 1997 and 2007. The petitioners claimed refund of the Education Cess and Secondary and Higher Education Cess paid as it was their contention, that since the excise duty on the products manufactured were itself exempted under the Industrial Policy notification issued by the Central Government in furtherance of the Industrial Policy. The claims of refund of Education Cess and Secondary and Higher Education Cess were rejected by the Department and against which appeals were filed before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT). The CESTAT also rejected the claims for refund of Education Cess and Secondary and Higher Education Cess. Ultimately, the issue relating to entitlement of refund of Education Cess and Secondary and Higher Education Cess paid, reached the Apex Court by way of several appeals. The Apex Court upon due examination of the entire matter by its Judgment dated 10th November, 2017 in "M/S SRD Nutrients Private Limited" (supra) held that the industrial units like the petitioners are entitled to refund of Education Cess and Secondary and Higher Education Cess when the basic duty of excise was exempted from levy. Pursuant to the said judgment of the Apex Court, the refunds claimed by the petitioners were granted by the department. Some of the petitioners were required to prefer writ petitions before this Court seeking such refunds in terms of the Apex Court judgment in SRD Nutrients (Supra). Pursuant to orders passed by this Court refunds were granted by the department following the Judgment of "M/S SRD Nutrients Private Limited" (supra). Much later, after the refunds were granted by the Department, the Apex Court while considering the same issue arising in a matter where the parties are similarly situated held in "M/S Unicorn Industries Private Limited" (supra), that the earlier Judgment of the Apex Court in "M/S SRD Nutrients Private Limited" (supra) to be "per incuriam" as the said Judgment was rendered without taking into consideration, the still earlier Judgments of the Apex Court in "M/S Modi Rubber"(supra) and "M/S Rita Textile"(supra) which had already taken a contrary view. In view of the judgment of the Apex court in "M/S Unicorn Industries" (supra) holding the Judgment of the Apex Court in "M/S SRD Nutrients" (supra) to be "per incuriam", the department considered

the refunds granted earlier to have been "Erroneously" granted and consequently the impugned Demand-cum-show cause notices were issued to the petitioners seeking recovery of the refunds of the Education Cess and Secondary and Higher Education Cess which were granted earlier to the petitioners.

45. The question which falls for consideration in the present proceeding is whether refunds granted earlier pursuant to the Judgment of the Apex Court in "M/S SRD Nutrients Private Limited" (supra) can be considered to be refunds erroneously granted in view of the subsequent Judgment of the Apex Court in "M/S Unicorn Industries" (supra) wherein the earlier Judgment of "M/S SRD Nutrients Private Limited" (supra) was held to be "per incuriam" and whether the same can be recovered under the provisions of Section 11A of the Central Excise Act as sought to be done by the Department. The further question that has arisen for consideration in the present proceedings is whether an order passed by the Quasi Judicial Authority under the Central Excise Department granting refunds earlier can be re- visited by another co-lateral authority of the same Department in exercise of their powers under the Central Excise Act. To deal with the question presented, it is necessary to first refer to statutory provisions, under which the show cause notices were issued by the department under Section 11A and 11AA of the Central Excise Act, 1944 which reads as under:-

"[**11-A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded**.— (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,—

(a) the Central Excise Officer shall, within [88][two years] from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,—

(i) his own ascertainment of such duty; or

(ii) duty ascertained by the Central Excise Officer,

the amount of duty along with interest payable thereon under Section 11-AA.

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

(3) Where the Central Excise Officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in

respect of such amount which falls short of the amount actually payable in the manner specified under that sub-
section and the period of [89][two years] shall be computed from the date of receipt of information under sub-section (2).

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

(a) fraud; or

(b) collusion; or

(c) any wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11-AA and a penalty equivalent to the duty specified in the notice.

[1][* * *]

[2][(7-A) Notwithstanding anything contained in sub-section (1) or sub-
section (3) or sub-section (4) [3][* * *], the Central Excise Officer may, serve, subsequent to any notice or notices served under any of those sub- sections, as the case may be, a statement, containing the details of duty of central excise not levied or paid or short-levied or short-paid or
erroneously refunded for the subsequent period, on the person chargeable to duty of central excise, then, service of such statement shall be deemed to be service of notice on such person under the aforesaid
sub-section (1) or sub-section (3) or sub-section (4) [3][* * *], subject to the condition that the grounds relied upon for the subsequent period are the same as are mentioned in the earlier notice or notices.]

[4][(8) Where the service of notice is stayed by an order of a court or tribunal, the period of such stay shall be excluded in computing the
period of [5][two years] referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4) [1][* * *], as the case may be.]

(9) Where any appellate authority or tribunal or court concludes that the notice issued under sub-section (4) is not sustainable for the reason that the charges of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty has not been established against the person to whom the notice was issued, the Central Excise Officer shall determine the duty of excise payable by such person for the period of [99][two years], deeming as if the notice were issued under clause (a) of sub-section (1).

(10) The Central Excise Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made

by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice.

(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within [2][two years] from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4) [1][* * *].

(12) Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10), then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified.

(13) Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section

(10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

(14) Where an order determining the duty of excise is passed by the Central Excise Officer under this section, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

(15) The provisions of sub-sections (1) to (14) shall apply, mutatis mutandis, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded.

[(16) The provisions of this section shall not apply to a case where the liability of duty not paid or short-paid is self-assessed and declared as duty payable by the assessee in the periodic returns filed by him, and is such case, recovery of non-payment or short-payment of duty shall be made in such manner as may be prescribed.]"

[**11-AA. Interest on delayed payment of duty**.— (1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in sub- section (2), whether such payment is made voluntarily or after determination of the amount of duty under Section 11-A.

(2) Interest, at such rate not below ten per cent, and not exceeding thirty-six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid in terms of Section 11- A after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—

(a) the duty becomes payable consequent to the issue of an order, instruction or

direction by the Board under Section 37-B; and
(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.]

46. "**ERRONEOUS REFUND"**

The provisions of section 11A in the context of the present proceedings have been invoked by the Department by treating the refunds granted earlier to the petitioners to have been granted "erroneously". A perusal of the provisions of Central Excise Act and the Rules framed thereunder reveals that the term erroneous has not been defined anywhere. In this context, it is relevant to refer to the Judgment of this Court rendered in Rajendra Singh(supra) wherein by referring to the Black's Law Dictionary, it was held that "erroneous"
means involving error; deviating from law. In the said judgment, it is held that an order cannot be term as erroneous unless it is not in accordance with law. It is held that if an officer acting in accordance with law makes certain assessment and determines the turnover of dealer, the same cannot be branded as erroneous. In another matter, the Division Bench of this Court in Victor Cane Industries vs. Commissioner of Taxes and ors, reported in 2001 SCC Online Gau 216 : (2002) 2 GLR 69**,** held that simply because the law has changed or earlier law laid down has been reversed, it would not entitle the revisional authority to reopen the earlier assessments. The relevant paragraphs of the judgment are extracted below:
"**10.** It will be seen that this Court had taken the view after relying on earlier judgments of different High Courts as also observations of Supreme Court in India Aluminium Cable Ltd. case. No doubt the view of the Apex Court expressed in Pine Chemicals case, (1992) 2 SCC 683 was reversed by the Apex Court itself in (1995) 1 SCC 58, but according to us that should not make any difference on the assessments already completed. On similar matter a Division Bench of Punjab & Haryana High Court in 107 STC 332 observed as under:
"4. From the perusal of Section 40 as reproduced above, it would be apparent that the Commissioner can call for the record of any case pending before or disposed of by any Assessing Authority or appellate authority to satisfy himself as to the legality or propriety of any proceedings or any order and pass such order in relation thereto as he may think fit. The Scope of revisional powers is, thus, only to examine legality or propriety of any proceedings or any order. That being the scope of the revision, the only question that, thus, needs determination is as to whether the appellate authority while accepting the appeals preferred by M/s. Free Wheels (India) Limited as on the day when the appeals were decided had committed any illegality or the orders suffered from any impropriety. All that is stated on behalf of the counsel representing the State of Haryana is that the appellate authority had based its decision on the decision of the Tribunal in M/s. Liberty Footwear Co., Karnal, which decision could not be held to be laying down the correct law in view of the later decision rendered by the Tribunal in M/s. Steel Kraft, Panipat. We do not find any merit in the contention of the learned counsel as on the day when the

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

11. The matter can be looked from another angle also. This Court in. Mahavir Coke Industries v. Income Tax Commissioner; Assam, (1995) 97 STC 186 (Division Bench which judgment was pronounced on October 5, 1993 relying on earlier judgment of this Court (1992 (1) GLR 46) as well as Pine Chemical Limited Case, (1992) 2 SCC 683 (supra) took the view that industries like the appellant were exempt from the payment of Central Sales Tax U/S. 8(2A) of the Central Sales Tax Act. Against the aforesaid judgment the S.L.P. filed by the revenue was dismissed on 3.3.1997 (S.L.P. No. C 5644 of 1997). Thereafter the revenue filed a review petition No. 1370/97 before the Apex Court on the ground that the judgment reported in (1992) 2 SCC 683 (supra) already stood reviewed and reversed in the case reported in (1995) 1 SCC 58 and therefore the order passed in the S.L.P. dated 3.3.1997 may be reviewed.

12. .....

13. From the above, it can reasonably said that despite the fact that it was brought to the notice of the Apex Court that the earlier view expressed in (1992) 2 SCC 683 stood reversed in (1995) 1 SCC 58; yet the Apex Court did not review the order passed in the SLP inasmuch as the Division Bench judgment of this High Court in Mahavir Coke Industries case was on the basis of the then existing law i.e., (1992) 2 SCC 683 and could not be said to be wrong just because lateron that view was upset in (1995) 1 SCC 58. We agree with the learned counsel that law laid down in Tax matters should normally be applied prospectively. No tax was collected by the appellant from the purchasers as per the law then existing. On the basis of what has been observed above, we are of the view that on the day the assessment order was passed and even on the day when the Assistant Commissioner of Taxes passed the order on 31.7.1992 the law then existing was

as per (1992) 2 SCC 683 as also the earlier law of this Court and the various other High Courts. The orders of assessment could not be said to be erroneous and prejudicial to the interest of the revenue. We are in respectful agreement with the view expressed by the Punjab & Haryana High Court (supra) that simply because the law has been changed or earlier law laid down has been reversed, that would entitled the revisional authority to reopen the earlier assessments. The learned Single Judge has not gone into this aspect of the matter."

47. Another Division Bench Judgment of this Court rendered similar findings in the case of Mahabir Coke Industries, reported in (2007) 4 GLR 515**.** It was held that even if subsequently the law is changed or reversed, the assessments already completed cannot be allowed to be opened as the law covering the field relating to exemption of tax to a new Industry at the time of passing of the order of assessment to be considered.

48. State of Harayana –Vs- Free Wheels (India) Limited reported in 1997 SCC Online P&H 1849 : (1997) 107 STC 332, the Hon'ble Punjab and Haryana High Court while dealing with the similar issue relate that a contrary view taken by the Tribunal in respect of proceedings finalized earlier which were based upon earlier decision of the Tribunal then, the said proceedings cannot be illegal or improper. In this Context, the relevant paragraph is extracted as under:-

"**5.** From the perusal of section 40 as reproduced above, it would be apparent that the Commissioner can call for the record of any case pending before or disposed of by any Assessing Authority or appellate authority to satisfy himself as to the legality or propriety of any proceedings or any order and pass such order in relation thereto as he may think fit. The scope of revisional powers is, thus, only to examine legality or propriety of any proceedings or any order. That being the scope of the revision, the only question that, thus, needs determination is as to whether the appellate authority while accepting the appeals preferred by M/s. Free Wheels (India) Limited as on the day when the appeals were decided had committed any illegality or the orders suffered from any impropriety. All that is stated on behalf of the counsel representing the State of Haryana is that the appellate authority had based its decision on the decision of the Tribunal in Liberty Footwear Co., Kamal, which decision could not be held to be laying down the correct law in view of the later decision rendered by the Tribunal in Steel Kraft, Panipat. We do not find any merit in the contention of the learned counsel as on the day when the appellate authority decided the appeals preferred by Free Wheels (India) Ltd., the decision rendered by the Tribunal in Liberty Footwear Co., held the field. **If on a subsequent decision the Tribunal has taken a contrary view it would not make the proceedings that have been finalised far earlier and are based upon an earlier decision of the Tribunal either illegal or improper. If the contention of the learned State counsel is upheld, it would result into endless litigation as all matters finalised earlier on the basis of law then in existence and holding the field would need reconsideration if law changes in succeeding years.** All matters that have been finalised shall be then reopened, thus, unsettling

the settled matters, in any case, as mentioned above, the order passed by the appellate authority which was based upon the law then holding the field could not possibly be styled as illegal or improper. That apart, the Commissioner by powers vested in him by virtue of section 40 on his own motion can call for the record of any case pending or disposed of by any Assessing Authority or appellate authority other than the Tribunal. The decision of the appellate authority that was set aside by the revisional authority as mentioned above was based upon the decision of the Tribunal, even though, therefore, the revisional authority was not reopening the case decided by the Tribunal, it virtually amounts to upsetting an order that is based upon the decision of the Tribunal.

49. The Bombay High Court while dealing with the similar issues upheld that the views of the Tribunal that the revisional jurisdiction by the Higher departmental Officers cannot be exercised in respect of orders passed by the Assessing Officer which are based on binding decision of the High Court. In this Context the relevant paragraphs of Commissioner of Income Tax –Vs- Paul Brothers 1992 SCC Online Bom 650 : (1995) 216 ITR 548 are extracted as under:-

5. That in view of the merger of the Income-tax Officer's order for the assessment year 1981–82 in appeal, revisional jurisdiction could not be exercised is a settled position having been concluded against the Revenue by several decisions of this court including CIT v. P. Muncherji and Co., [1987] 167 ITR 671.

6. The Calcutta High Court in the case of Russell Properties Pvt. Ltd. v. A. Chowdhury, Addl. CIT, [1977] 109 ITR 229 and the Allahabad High Court in K.N. Agrawal v. CIT, [1991] 189 ITR 769 have held that where the Income-tax Officer's order is passed on the basis of a binding decision, revisional power under section 263 cannot be exercised to undo the said order. The Income-tax Officer is a quasi-judicial authority and the principle laid down is sound. We endorse the same.

7. Either in section 80HH or in section 80J, there is no provision for withdrawal of special deduction for the subsequent years for breach of certain conditions. Hence unless the relief granted for the assessment year 1980–81 was withdrawn, the Income-tax Officer could not have with-held the relief for the subsequent years. [See Gujarat High Court decision in the case of Saurashtra Cement and Chemical Industries Ltd. v. CIT, [1980] 123 ITR 669].

50. In G.M. Mittal Stainless Steel Pvt. Ltd. report in (2003) 11 SCC 441, the Apex Court while dealing with the matter under Section 263 of the income tax act, 1961 held that the power of the commissioner under Section 263 must be exercised on the basis of the materials that was available to him when he exercised the power. The Apex Court held that the satisfaction of the Commissioner was not based on materials either legally or factually which would have given the jurisdiction to take action under section 263. It was held:-

"**6.** In this particular case, the Commissioner has not recorded any reason whatsoever for coming to the conclusion that the assessing officer was erroneous in deciding that the power subsidy was capital receipt. Given the fact that the decision of the jurisdictional High Court was operative at the material time, the

assessing officer could not be said to have erred in law. The fact that this Court had subsequently reversed the decision of the High Court would not justify the Commissioner in treating the assessing officer's decision as erroneous. The power of the Commissioner under Section 263 of the Income Tax Act must be exercised on the basis of the material that was available to him when he exercised the power. At that time, there was no dispute that the issue whether the power subsidy should be treated as capital receipt had been concluded against the Revenue. The satisfaction of the Commissioner, therefore, was based on no material, either legal or factual which would have given him the jurisdiction to take action under Section 263 of the Income Tax Act '.

51. In the case of **Malabar Industrial Co Ltd vs Commissioner of Income Tax, Kerala State,** reported in (2000) 243 ITR 83**,** wherein it was held that every loss of revenue cannot be treated to be erroneous for the purposes of invoking revisional powers under Section 263 of the Income Tax Act. The Apex Court while dealing with the correctness of revisional powers invoked by the Commissioner of Income Tax held that scope of 263 covers loss of tax due to erroneous order, but does not cover loss of tax resulting from a valid order.

52. From the Judgments discussed above, it is seen that the term "erroneous" any error deviating from law. A change of law subsequently would not make an action taken earlier by Quasi Judicial Authority in terms of law as it stood then, to be held to be erroneous so as to enable the Departmental Officer to invoke powers under Section 11A of the Central Excise Act. On perusal of Section 11A reveals that the power under Section 11A for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded will be available to the departmental Officer only on the decisions mentioned in Sub-section (4) unless the concerned departmental Officer is satisfied that the refund granted earlier was because of any or all of the conditions mentioned under sub-Section (4), the refunds cannot be treated to be erroneous. The mandate of section requires the departmental Officer to apply its mind and only upon satisfaction of the conditions mentioned under sub-Section (4) of Section 11A can any refund granted earlier be treated to have been erroneously.

53. The Department proceeded to issue, the impugned demand-cum-show cause notices on the premise that once the judgment on the basis of which the refunds were granted have been held to be per incuriam, the refunds sanctioned/granted earlier will become unavailable to the petitioners because of the change in law and, therefore, the same will be an erroneous refund enabling the Department to invoke its statutory powers under Section 11A read with Section 11AA of the Central Excise Act, 1944. What cannot be lost sight of is that the Department sanctioned the refunds demanded/claimed by the petitioners on the basis of the Judgment in SRD Nutrients without any demur. The contention of the departmental counsel that the refunds sanctioned become erroneous by virtue of the Apex Court holding the judgment of SRD Nutrients to be rendered per incuriam as the still earlier Judgments of the Apex Court rendered in Modi Rubber(supra) and Rita

Textile(supra) were not considered, cannot accepted. It is not disputed that pursuant to the judgment of the SRD Nutrients, a review application was filed by the Department and which was dismissed on 10.07.2018.

54. As such a perusal of the law discussed above, it can be held that the concerned departmental Officer exercising power under Section 11A of the Central Excise Act must arrive at finding that the earlier order/refunds as have been granted in the present proceedings, were contrary to the law and therefore, erroneous and that the same are required to be reopened or recovered by invoking the powers under Section 11A. The refunds were granted by the Department in terms of the Judgment in "M/S SRD Nutrients Private Limited" (supra). As discussed above, the Department accepted the Judgment of the Apex Court in "M/S SRD Nutrients Private Limited (supra)" and sanctioned the refunds. As such, the contention of the Department that the refunds granted earlier were erroneous and could be recovered under Section 11A cannot be accepted. The grounds urged by the Department supporting impugned show cause notices do not satisfy the requirements of Section 11A(4). The Division Bench of this Court in Shri Rajendra Singh (supra) and Victor Cane Industries (supra) are binding precedents and I respectfully concur with the same. Therefore, the refunds granted earlier cannot be considered "erroneous" to invoke the powers under Section 11A of the Central Excise Act, 1944 only on the premise that the Judgment of the Apex Court in "M/S SRD Nutrients Private Limited" (supra) held to be "per incuriam" by the Apex Court subsequently in "M/S Unicorn Industries Private Limited".

55. <u>Binding effect of a Judgment and Principle of Res Judicata</u>

It is also not disputed that in respect of the some of the petitioners since the refunds were not granted, writ petitions were filed before this Court and this Court by orders on different dates held that the petitioners were entitled to refunds claimed in terms of the judgment of the Apex Court in "M/S SRD Nutrients Private Limited" (supra). There is no appeal or review filed in respect of these orders also which have been since attained finality.

Accordingly, the refunds which were granted by the Department were pursuant to judicial proceedings before the Apex Court and/or the Gauhati High Court, the refunds sanctioned/released were on the basis of orders passed by the Apex Court and/or the Gauhati High Court. Consequently, once a judgment or judicial order is passed by a Court of law against the Department, the remedy available to the Department is by way of an appeal to a higher Court or review. Since, the review filed before the Supreme Court were dismissed and since no further appeal and/or review was passed against the different orders passed by the Gauhati High Court , the lis between the parties, namely, the petitioners and the Department of Central Excise has attained finality in respect of the issues which are now sought to be re-opened by way of the demand-cum-show cause notice impugned in the present proceedings. Such a procedure sought to be invoked by the Department is completely alien in law as established by the constitution as well as the law laid down by the Apex Court in a catena of judgments.

56. In this context, it will be relevant to refer to meaning ascribed to a "judgment" by the Apex Court :-

2. Generally speaking, a judgment adjudicates on the rights of the parties as they existed before the suit in which it was obtained. A judgment is an affirmation of a relation between a particular predicate and a particular subject. So, in law, it is the affirmation by the law of the legal consequences attending a proved or admitted state of facts. Its declaratory, determinative and adjudicatory function is its distinctive characteristics. Its recording gives an official certification to a pre-existing relation or establishes a new one on pre-existing grounds. It is always a declaration that a liability, recognized as within the jural sphere, does or does not exist.

57. From the judgment of the Apex Court discussed above, it is evident that a "Judgment" decides the rights between the parties to a lis. Once a Court renders a judgment on the issues viz-a-viz the rights of the parties, such a judgment can only be re-visited by the established judicial norms, namely, a review or an appeal or revision in some cases. Unless, the findings of a Court arrived at by way of legal proceeding is sought to be reopened in the manner discussed above, the operative portions in the judgment viz-a-viz parties will attain finality. A subsequent change in law arrived at by a Court by way of the separate judicial proceeding, wherein the earlier law laid down has been held to be not a good law or that the earlier law will cease to have precedential value, will not ipso facto reverse the position of the party viz-a-viz their rights which were declared and concluded by way of an earlier judicial proceedings.

58. The question of the effect of actions taken under the judgment subsequently declared to be "per incuriam" came up for consideration before the apex court in the case of A.R. Antulay vs. R.S. Nayak & Anr**,** reported in (1988) 2 SCC 602**,** the apex court while dealing with the issue held as under:

"**183.** But the point is that the circumstance that a decision is reached per incuriam, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. When a previous decision is so overruled it does not happen — nor has the overruling Bench any jurisdiction so to do — that the finality of the operative order, inter partes, in the previous decision is overturned. In this context the word 'decision' means only the reason for the previous order and not the operative order in the previous decision, binding inter partes. Even if a previous decision is overruled by a larger Bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter partes. Even if the earlier decision of the Five-Judge Bench is per incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the Five-Judge Bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterised as one reached per incuriam? Indeed,

Ranganath Misra, J. says this on the point: (para 105)
"Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench."

59. This judgment of the Apex Court came up to be considered again in the Apex Court of Madras Telephone SC & ST Welfare Association, reported in (2006) 8 SCC 662. In the said judgment the Apex Court held that since the rights of applicants were determined in duly constituted proceedings which determination as attained finality, a subsequent judgment of the Court or a tribunal taking a contrary view will not adversely affect the applicant in whose cases the orders have attained finality. The said judgment is extracted below**:**

"**21.** Having regard to the above observations and clarification we have no doubt that such of the applicants whose claim to seniority and consequent promotion on the basis of the principles laid down in the Allahabad High Court's judgment in Parmanand Lal case [Parmanand Lal and Brij Mohan v. Union of India, WPs Nos. 2739 and 2652 of 1991 decided on 20-2-1985] have been upheld or recognised by the Court or the Tribunal by judgment and order which have attained finality will not be adversely affected by the contrary view now taken in the judgment in Madras Telephones [(1997) 10 SCC 226 : 1997 SCC (L&S) 1279] . Since the rights of such applicants were determined in a duly constituted proceeding, which determination has attained finality, a subsequent judgment of a court or tribunal taking a contrary view will not adversely affect the applicants in whose cases the orders have attained finality. We order accordingly.

60. The Apex Court in Bharat Sanchar Nigam Limited and Anr., –Vs- Union of India and Ors., reported in (2006) 3 SCC 1 held as under:-

"**22.** A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra [(2002) 4 SCC 388] . As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. **This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate.** But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in State of U.P. v. Union of India [(2003) 3 SCC 239] related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can, if we so find, declare that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the

circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected".

61. Again in the Special Reference No. 1 of 2012- Natural Resources Allocation reported in (2012) 10 SCC 1 held as under:-

"**48.1.** The first limitation is that a decision of this Court can be reviewed only under Article 137 or a curative petition and in no other way. It was in this context that in para 85 of Cauvery (2) [1993 Supp (1) SCC 96 (2)] , this Court had stated that the President can refer a question of law when this Court has not decided it. Mr. Harish Salve, learned Senior Counsel, is right when he argues that **once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment-as a precedent- does not reopen the decree.**

48.2. The second limitation, a self-imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the Court relied upon the judgment in Bengal Immunity case [AIR 1955 SC 661 : (1955) 2 SCR 603] wherein it was held that when Article 141 lays down that the law declared by this Court shall be binding on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis a lis inter partes is not affected. It is the attempt to overturn the decision of a previous case that is problematic, which is why the Court observed that: [Cauvery (2) case [1993 Supp (1) SCC 96 (2)] , SCC p. 145, para 85]

"85. … Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143."

62. In yet another recent judgment, the Apex Court in Dr. Shah Faisal and others – Vs- Union of India and Anr., reported in (2020) 4 SCC 1, the issue of precedential value of a judgment came up for consideration while hearing an application wherein contesting parties were seeking a reference to be made to a larger Bench in view of the contention urged that the earlier judgment was rendered "per incuriam". The View of the apex court rendered in

A.R Antulay(supra) has again been reiterated in this Judgment.

63. The Department contends that the law declared by the Apex Court will not have prospective overruling unless it is so indicated in the particular decision. As the Apex Court in the decision of M/S Unicorn Industries(supra) did not provide that the law declared by M/S Unicorn Industries (Supra) will be applied prospectively, it must be accepted that it will have retrospective effect. If that interpretation is accepted then the law which was declared by the Apex Court earlier by the judgments of Modi Rubber(supra) and Rita Textile(supra) will

continue to be applicable even at a time when the refunds were made by the Department following the judgment of the Apex Court in SRD Nutrients(supra). The contention of the respondents that in view of such position, there is no infirmity in treating the refunds already granted to have been erroneously granted and, therefore, the show cause notices issued by the Department under Section 11A of the Central Excise Act are inconsonance with law and should, therefore, not been interfered with as prayed for. The contentions urged by the Department, if accepted, will be self-defeating inasmuch as the refunds were granted earlier in terms of the Apex Court in "M/S SRD Nutrients Private Limited" (supra). From the pleadings, it is evident that even in the writ petitions filed before this Court, the Department accepted that the Apex Court in "M/S SRD Nutrients Private Limited" (supra) held that the Education Cess and Secondary and Higher Education Cess paid along with the excise duty were required to be refunded. The Department accepted the Judgment in "M/S SRD Nutrients Private Limited" (supra) and refunded the Education Cess and Secondary and Higher Education Cess notwithstanding the contrary view of the Apex Court in "M/S Modi Rubber Limited" and "Rita Textiles Pvt. Ltd".

64. The Judgment referred to by the Department in M.A. Murthy (supra) to support the above contention does not come to the aid of the respondents. In this judgment, the Apex Court held that the law declared by the Supreme Court under Article 141 has to be assumed to be the law from inception. Prospective overruling is only an exception to the normal rule. The decision of the Apex Court unless indicated therein to be operative on the prospectively cannot to be treated to be so, more so when it was a review judgment overruling the earlier judgment. There is no dispute with this proposition. However, in the context of the present proceedings, this judgment will not come to the aid of the respondents as the judgment rendered by the Apex Court in SRD Nutrients was not reviewed by the Apex Court in M/S Unicorn Industries Limited although by the subsequent judgment, the earlier judgment was held to have been rendered "per incuriam".

65. In the Judgment of Assistant Commissioner, Income Tax, Rajkot –Vs- Saurashtra Kutch Stock Exchange Limited reported in (2008) 14 SCC 171 referred to by the respondents, relates to the power of rectification available to statutory authority under the Income Tax Act, 1961. The issue which arose before the Apex Court was whether non-consideration of a decision of the jurisdictional High Court or of the Supreme Court can be said to be a mistake apparent from the record. In this case, the Tribunal passed an order without taking into consideration of judgment passed by the jurisdictional High Court. Subsequently, an application for rectification was filed, by which the Tribunal rectified its earlier order. The Apex Court held that on the facts of that case that such course was available to the Tribunal under the provisions of the Income Tax Act as non-consideration of a decision of jurisdictional High Court was a mistake apparent from record and, therefore, can be rectified. Similarly the judgments of the Rajasthan High Court and Madhya Pradesh High Court pressed into service by the Department are also not applicable in the context of the present proceedings. Further in the context of

the present proceedings, the Department did file a review petition in the case of Bajaj Auto Limited (supra) being Review Petition No. of 2020 (Diary No. 13857/ 2020) which was preferred by the Department seeking review of the judgment rendered by the Apex Court in the case of Bajaj Auto Limited –Vs- Union of India reported in 2019 SCC Online SC 421 in which matter similar orders were passed by the Apex Court as in the case of "M/S SRD Nutrients Limited (supra)". It is submitted at the Bar that by order dated 01.09.2020 the Apex Court dismissed the application misc. application seeking condonation of delay of 148 days that had occurred in filing the said review petition. It is also submitted that a similar review petition in respect of "M/S SRD Nutrients (supra)" has also been filed and the same is pending before the Apex Court. No order passed by the Apex Court allowing or rejecting the said review petition has been brought before this Court till the date of hearing of these matters. In any view of the matter such orders that may be passed by the Apex Court in the review application will be binding on all including this Court.

66. The contra submissions of the respondents, however, do not deal with the proposition of law as laid down by the Apex Court in the case of A.R. Antulay(Supra) and Madras Telephone SC & ST Welfare Association (supra).There is no quarrel with the submissions of the respondent that the earlier judgment under which the refunds were granted, namely, "M/S SRD Nutrients (supra)" has been declared in "per incuriam" by subsequent a judgment of the Apex Court rendered in M/S Unicorn industries (Supra). However, it is equally not disputed by the respondents that the refunds sought for were granted following the judgment of the Apex Court rendered in "M/S SRD Nutrients (supra)" and/or judgment of this Court directing the respondents to comply with the law declared by the Apex court in "M/S SRD Nutrients(supra)". The respondents have not disputed the position that the refunds claimed by the petitioners have since been granted and presently there is no refund application pending with the Department insofar as the present petitioners are concerned. Under the circumstances, the directions of the Apex Court as well as the Gauhati High Court having been complied with, a finality of the issue inter-party has been arrived at. No appeal or review by the Department has been filed in respect of the refunds granted earlier. It is also evident from a perusal of the impugned show cause notices that there is no other ground on which the refunds have been treated to be erroneous except that the law under which the refunds were granted earlier has been held to be "per incuriam" by a later Judgment of the Apex Court rendered in "M/S Unicorn Industries" (supra).

67. The Officers of the Central Excise Department exercise Quasi judicial functions. The orders passed by the Department Officers being in exercise of Quasi Judicial powers cannot be co-laterally revoked/reviewed except when permitted under the Statute. It is seen that against sanction orders passed the concerned officers, the statute does not provide for any review of such order passed. However, under Section 35, there is a provision for appeal, which however has not been resorted to by the Department seeking revocation/recall of orders

already passed sanctioning the refund in terms of "M/S SRD Nutrients (supra)". The refund orders passed cannot be unilaterally revoked by application of Section 11A unless the requirements of sub-Section (4) of Section 11A are satisfied. This will amount to impeaching collaterally a finding rendered by a quasi judicial authority. The Apex Court in "Abdul Kuddus" reported in (2019) 6 SCC 604 has very succinctly laid down the law regarding impermissibility of collateral impeachment of orders passed by Quasi Judicial bodies. The relevant paragraphs of the Judgment is extracted as under:-

"**23.** The procedure prescribed by the post 2012 amendment under the 1964 Order mandates compliance with the principles of natural justice. All the allegations and grounds are required to be served by the Tribunal in the form of a show-cause notice to the person who is alleged to be a foreigner [see para 60 in Sarbananda Sonowal (2) [Sarbananda Sonowal (2) v. Union of India, (2007) 1 SCC 174]]. Thereupon, the person has to be given a reasonable opportunity to file representation and also produce evidence. The Tribunal has been authorised to consider and allow prayer for production and examination of the witnesses which can be refused if found to be vexatious, or made with the intent to cause delay, etc. The evidence produced by the Superintendent of Police can also be recorded. The person concerned has to be heard before the Tribunal gives its opinion. The person concerned may appear in person or can be represented by a legal practitioner or an authorised representative. Opinion is to be given within a period of sixty days after the reference from the competent authority. No doubt, the Rules do not prescribe and require an opinion of the Tribunal to be a detailed judgment, nevertheless, it is obvious that the opinion rendered must state the facts and reasons for drawing the conclusions. It is a decision and an order. Fixing time-limits and recording of an order rather than detailed judgment is to ensure that these cases are disposed of expeditiously and in a time-bound manner. The opinion by the Foreigners Tribunal is a quasi-judicial order and not an administrative order. The expression "quasi-judicial order" means a verdict in writing which determines and decides contesting issues and question by a forum other than a court. The determination has civil consequences. Explaining the meaning of quasi-judicial body in Indian National Congress (I) v. Institute of Social Welfare [Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685] , it was held that when any body of persons has a legal authority to determine questions affecting the rights of subjects and a duty to act judicially, such body of persons constitute a quasi-judicial body and decision given by them is a quasi-judicial decision. It would also be a quasi-judicial order if the statute empowers an authority to decide the lis not between the two contesting parties but also when the decision prejudicially affects the subject as against the authority, provided that the authority is required by the statute to act judicially. Further, what differentiates an administrative act from the quasi-judicial act is that a quasi-judicial body is required to make an enquiry before arriving at a conclusion. In addition, an administrative authority is the one which is dictated by policy and expediency whereas a quasi-judicial authority

is required to act according to the rules.

24. The opinion/order of the Tribunal, or the order passed by the Registering Authority based upon the opinion of the Foreigners Tribunal, as the case may be, can be challenged by way of writ proceedings. Thus, it would be incorrect to hold that the opinion of the Foreigners Tribunal and/or the consequential order passed by the Registering Authority would not operate as res judicata. Both the opinion of the Tribunal and the order of the Registering Authority result in determination of rights/status under the statute and by an authority after a contest on the merits which would necessarily operate as a bar to subsequent proceedings before the same authority for redetermination of the same issue/question. This Court in Ujjam Bai v. State of U.P. [Ujjam Bai v. State of U.P., AIR 1962 SC 1621] has held that the principles of res judicata equally apply to quasi-judicial bodies. Whenever a judicial or quasi- judicial tribunal gives a finding on law or fact, its findings cannot be impeached collaterally or in a second round and are binding until reversed in appeal or by way of writ proceedings. The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong. Thus, any error, either of fact or law, committed by such bodies cannot be controverted otherwise by way of an appeal or a writ unless the erroneous determination relates to the jurisdictional matter of that body.

25. In J.J. Merchant v. Shrinath Chaturvedi [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] , when the learned counsel had pleaded that the National Consumer Disputes Redressal Commission cannot examine complicated questions of facts which require examination and cross- examination of experts including doctors and that the procedure followed for determination of consumer disputes being summary in nature is not suitable for determination of complicated questions, this Court rejected these contentions and held that under the Consumer Protection Act, 1986, for a summary trial, an exhaustive procedure conforming to the principles of natural justice is provided. Merely because the trial is summary in nature cannot be a ground to reject it as unjust or unfair. Further, it was held in Rajesh Kumar v. CIT [Rajesh Kumar v. CIT, (2007) 2 SCC 181] that when civil or evil consequences ensue by reason of an act done by the statutory authority, principles of natural justice must be followed. The Act and power of judicial review vested with the constitutional courts provide sufficient safeguards, in the present context.

26. When we apply general principles of res judicata, the contention of the appellants that the person concerned should be permitted to double-dip and be entitled to a second round of litigation before the Foreigners Tribunal notwithstanding the earlier opinion expressed by the Foreigners Tribunal is far- fetched, and completely unacceptable. The plea is fallacious and has no merit. This contention therefore must be rejected and fails.

27. As stated above, a person aggrieved by the opinion/order of the Tribunal can challenge the findings/opinion expressed by way of a writ petition wherein the High Court would be entitled to examine the issue with reference to the evidence and material in the exercise of its power of judicial review premised on the principle

of "error in the decision-making process", etc. This serves as a necessary check to correct and rectify an "error" in the orders passed by the Tribunal."

68. In view of the above discussions, this Court holds that the refund granted/ sanctioned earlier in terms of the Judgment of the Apex Court rendered in " M/S SRD Nutrients Private Limited" (supra) as well as in terms of orders passed by this Court directing such refunds of Education Cess and Secondary and Higher Education Cess in terms of "M/S SRD Nutrients Private Limited" (supra), cannot be revoked co-laterally by a Quasi Judicial Authority of the Department without taking recourse to the statutory and/or judicial remedies available to the Department. In view of dismissal of the earlier review petition filed by the Department against the Judgment of the Apex Court in "M/S SRD Nutrients Private Limited" (supra) and also in view that no appeal or review having been preferred against orders of this Court directing entitlement of refund of Education Cess and Secondary and Higher Education Cess to the petitioners, the issue between the parties to the lis having attained finality, the later Judgment of the Apex Court in "M/S Unicorn Industries" (supra) holding "M/S SRD Nutrients Private Limited" (supra) to be per incuriam, will not permit the Department to unilaterally revoke or re-open the issue without taking recourse to the remedies available to them before a judicial forum. Such actions initiated by issuance of the impugned show cause notices, if permitted, will amount to revoking the earlier orders passed by the departmental officers exercising Quasi Judicial powers unilaterally and which action cannot be permitted in view of the law laid down by the Apex Court in "Abdul Kuddus" (supra).

69. <u>Department Circulars – Binding on Department Officers.</u>

It is contended by the petitioners that the actions of the department impugned in the present proceeding are contrary to departmental circulars/instructions issued by the department on 09.01.2020 whereby the field officers and department officers have been instructed to contest by filing Statutory Appeals/ Writ Appeals or Review Petitions or forward proposals for filing SLP to the Board in view of the judgment of the Apex Court of M/S Unicorn Industries (Supra), it is seen that the circular vide Circular No. F. No. 276/187/2018- CX.8A part, has been issued by the legal cell of the Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India and the same is disputed by the departmental counsel. In view of the said circular, the department has been directed, inter alia, to initiate recovery of duties, including NCCD, in cases where the assessees were not paying the same on the strength of the previous Judgment, specifically the Judgment in the case of Bajaj Auto Limited (supra). The circular further instructed that the subject Judgment may be brought to the notice of the Hon'ble Courts, wherein the similar issues are pending. Any interim or final order decided against the revenue may be contested by filing statutory appeal, writ appeal or review petition, as the case may be, in consultation with the Standing Counsel. If the same is not possible, a self-contained SLP proposal may be forwarded to the Board, as per extant instructions. In view of the circular, it is evident that the Board has instructed the officers to contest matters pending before the Hon'ble

Courts by filing statutory appeal, writ appeal or review petition as the case as may be or in the alternative submit a proposal for filing SLP before the Apex Court. There is also no pleading/submission on behalf of the department as to the effect of the instructions issued on the departmental officers nor has any official communication been submitted before this Court to show that the circular has not been properly issued or that the same has been modified/withdrawn.

70. Insofar as the Departmental circulars being binding on the Officers of the department, instructions/circulars issued under Section 37B of the Central Excise Act, 1944 are binding as the Department Officers. Under Section 37 B, it is provided that the Central Board of Excise and Customs (CBEC) constituted under the Central Boards of Revenue Act may, if it considers it necessary or expedient so to do for the purpose of uniformity with respect to levy of duties of excise, issue such order, instructions and directions to the Central Excise Officers as it may deem fit and such Officers employed in the execution of this Act shall observe and follow such orders and directions issued by the Board. The Apex Court in Commissioner of Customs (Calcutta) & Ors Vs. Indian Oil Corporation and Ors. reported in (2004) 3 SCC 488 laid down that such circulars issued under Section 37B are not binding on the assessee. However, it will not be open to the Revenue to raise a contention contrary to the circular issued by CBEC. When the circular remains in operation, the Revenue is bound by it and it cannot be allowed to take the plea that it is not valid or that it is contrary to the terms of the statute. The relevant paragraph of the judgment is extracted below:-

12. The principles laid down by all these decisions are:

(1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

71. <u>Judicial Review in Show Cause Notice</u>

There is another aspect that needs to be dealt with in the present proceedings. The petitioners before this Court in the present proceedings are questioning the show cause notices issued by the department. Although, the High Court in exercise of judicial review under Article 226 of the Constitution of India would not ordinarily interfere with the show cause notices issued, however, where a show cause notice has been issued by an authority wholly without jurisdiction or by way of wrongful usurpation of power, the person aggrieved need not be relegated to avail any statutory alternative remedy available. The Writ Court in exercise of judicial review

can interfere with the show cause notices when the same is issued wholly without jurisdiction and/or wrong usurpation of power. In the facts of the present case, there is no dispute that the refunds granted earlier to the petitioners were in pursuance to judicial orders passed by the Apex Court in "M/S SRD Nutrients Private Limited" (Supra) and/or orders passed by this Court in writ applications filed by some of the petitioners. As held by the Apex Court as discussed above, declaration of judgment to be rendered "per incuriam" by latter judgment will not upset the binding effect of the judgment between the litigating parties. As the department sanctioned the refunds in terms of such orders passed in judicial proceedings between the assessees and the department, the same having attained finality cannot be reopened except by way of the Department taking recourse to available judicial remedies. Unless, such remedies are availed of, attempting to re-open orders passed by Department officers by collaterally by taking recourse to Section 11A cannot be permitted. Reference in this Context may be made to the judgment of the Apex Court rendered in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors., reported in (1998) 8 SCC 1. The relevant paragraph of the judgment is extracted herein below:

"**14.** The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

72. In that view of the matter, the show cause notices issued are required to be held to have been issued without any jurisdiction and by wrong interpretation of the powers under Section 11A read with Section 11AA and therefore, the same are required to be set aside. In view of all the decisions above, the impugned show cause notices cannot be sustained, the same are accordingly, set aside and quashed.

73. The writ petitions are accordingly allowed. No order as to cost.

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COMMERCIAL NEWS

CA Deepak Khandelwal

LOK SABHA PASSES FINANCE BILL 2021

The Lok Sabha on Tuesday passed the Finance Bill, 2021, which gives effect to the financial proposals of the central government for the financial year 2021-22.

Finance Minister Nirmala Sitharaman replied to the debate on the bill which has some changes in the proposals made in the Union budget. The passage of the Finance Bill by Parliament marks the completion of the budgetary process.

The minister said the changes have been made largely to boost ease of doing business and easing compliance burden. She also said there will be no change in the rate of income tax. "This is a point on which even as the budget was being prepared, the Prime Minister was clear that we are not going to generate resources by raising the tax to meet the contingency which is arising out of coronavirus," the minister said.

Several opposition members pointed to high prices of petrol and diesel and said the petroleum products should be brought under Goods and Services Tax (GST) Council.

The minister said that the Centre is open to discussing the idea in the GST Council meeting. "The Centre also taxes and the states also tax. If there is this concern about the fuel tax, I honestly think based on today's discussion - many of the states would be watching this and in the next GST Council if that discussion comes up, I will be glad to have it on the agenda and discuss it," she said.

She also noted that Maharashtra has the highest tax on petrol and diesel. "The point is, states also tax fuel, not just Centre. When the Centre taxes it is part of a devolvable amount," she said.

March 23, 2021 by timesofindia.indiatimes.com

GST E-INVOICING MANDATORY FOR TURNOVER OF RS 50 CR AND ABOVE FROM APRIL 1

The government had earlier planned to extend e-invoicing to all entities from April 1, 2021, but has refrained, taking care of interest of small entities

E-invoicing under the goods and services tax (GST) regime will become mandatory for entities with a turnover of Rs 50 crore and more from April 1 for business to business transactions, the government said in a notification on Monday. This will be the third phase of e-invoicing roll out, which was rolled out for entities with Rs 500 crore and more turnover from October 1 last year and later extended to entities with Rs 100 crore and above from January 1 this year. The government had earlier planned to extend e-invoicing to all entities from April 1, 2021, but has refrained, taking care of interest of small entities.

The system is aimed at bringing in more transparency in sales reporting, minimising errors and mismatches, automating data entry work, and improving compliance. It will help prevent tax evasion once it is made mandatory for small and medium firms in phases.

Rajat Mohan, partner, AMRG Associates said, "Government had earlier planned to roll out the electronic invoicing system for all business-to-business (B2B) transactions from April 1, whereas government has now zeroed on a threshold of Rs 50 crores. Keeping MSME organisations with turnover of upto Rs 50 crores out of the E-invoicing net would help them thrive and grow without any change in business processes.

Under e-invoicing, companies have to generate an invoice registration number (IRN) from a government portal and it has to be shown to the authorities while moving goods. Sectors like transportation, insurance and banking companies, other financial institutions, non-banking financial companies, goods transportation agencies, and passenger transportation services are exempt from e-invoicing. Besides, units in special economic zones too are exempt from this.

March 08, 2021 by business-standard.com

NO PROPOSAL FOR SCRUTINY OF GST ASSESSMENT IN FACELESS MODE: THAKUR

There is no proposal of faceless scrutiny assessment of GST returns as the Goods and Services Tax rule already provide for electronic filing and assessment, Minister of State for Finance Anurag Singh Thakur said on Tuesday.

Income tax assessments are being done in a faceless manner except in certain conditions and till March 10, a total of 82,072 assessment cases have been completed in a faceless manner, he added.

To a query in the Rajya Sabha on whether the government is considering scrutiny of GST assessments and some stages of investigations by SFIO in a faceless mode, he said, "No such proposal for scrutiny of GST assessment in a faceless mode is under consideration of the Government presently as the GST laws and rules made thereunder already provide for electronic filing and assessment of returns on the common portal. With regard to the Serious Fraud Investigation Office, the information is also nil".

The minister said faceless assessments have been initiated to impart greater efficiency, transparency and accountability by eliminating the interface between the Assessing Officer and assessee in the course of proceedings to the extent technologically feasible, optimising utilisation of the resources through economies of scale and functional specialisation and introducing a team-based assessment with dynamic jurisdiction.

"An independent study to ascertain assessees' experiences in a faceless manner is being conducted by National Council of Applied Economic Research (NCAER). Department of Economic Affairs (DEA), Central Board of Direct Taxes (CBDT) have a tripartite arrangement with NCAER for conducting this independent assessment of Faceless Assessment Scheme of the CBDT," Thakur said.

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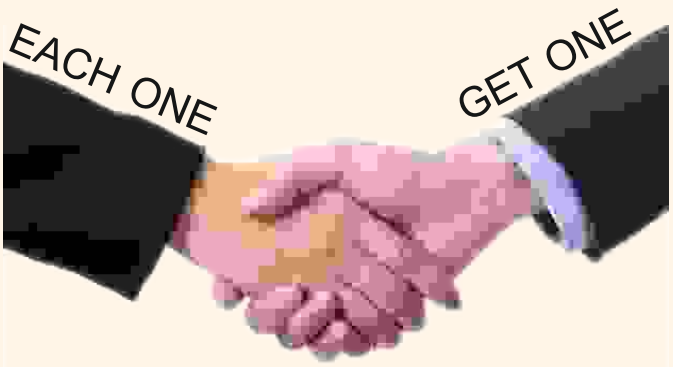

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