ETHICS EDUCATION EXCELLENCE

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AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

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CONTENTS

SECTION: I

SECTION: II - GOODS & SERVICE TAX

SECTION: III - CORPORATE & OTHER LAWS

SECTION: IV - JUDGMENTS

SECTION: V – MISCELLANEOUS

CHIEF-EDITOR'S COMMUNIQUE

Friends

The current issue of AIFTP Indirect Tax and Corporate Law Journal is covering topics relating to GST, RERA, FEMA etc. and some important judgment of the various High court are also covered. There has been vast changes in the Indirect Tax Laws and continue amendments and updates are coming. The GST Council meeting has been held during the period and major changes in the Tax rate of certain goods and some important clarifications has been issued.

The country is going through tough time due to Covid Pandemic and the month of April and May and part of June has been under lockdown almost throughout India resulting in economic loss and apart from it the severity of the pandemic was very strong and had effected almost all the families and the Members of the AIFTP has also suffered the Wrath of this pandemic. A benevolent fund has been created with a huge sum of over Rs. 1 Crore with the guidance of Dr. Ashok Saraf, Past President and Chairman of this benevolent fund. Help has been provided to the needy persons on the recommendation of the Zone Committee very quickly. This is a continuous exercise and in the times to come this fund will be a trend setter for other voluntary organizations so that they may create such type of fund for the ultimate benefit of the Members in the time of need.

Litigations are increasing in the Indirect taxes and it seems that many writ petition are being filed in the various High Court challenging the procedure or the legality of the provisions. Sometimes the relief are fast and quick but sometimes it takes time in the judiciary to get the relief. Summons and searches has been now increased by the department and it is time that we should be aware of the provisions and their implications. Continuous education through webinar is being conducted by AIFTP and we request that all Members should try and join the webinars.

We also request the Members to send their articles, judgements or other accomplishments so that the same may be covered in this Journal the same can be made to the undersigned.

Regards,

PANKAJ GHIYA
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ALL INDIA FEDERATION OF TAX PRACTIONERS

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President's Message

As we are hearing the positive news that daily positive cases are on the decline and the recovery rate is high, I hope you and your family members are safe and healthy. Friends it is important that we get vaccinated and hence I would like to appeal to all movers to get yourselves and your families vaccinated and also don't let your guard down and always be masked up, this will help us deal with the purported third wave as us being stated by some medical experts.

Friends, we at AIFTP are equally concerned about the health and well being of our members as we have also lost quite a few members to this pandemic, we pray that their souls get eternal peace at the lotus feet if the almighty.

I am thankful to Shri Pankaj Ghiya, Chief Editor of this Indirect Taxes Journal for again printing this Journal and sending the same all the subscribers. Earlier, January, February and March, 2021 were printed and were sent to all the subscribers. April and May, 2021 were not printed due to ill health of Shri Pankaj Ghiya, but after his recovery, he has combined both the issues and released the soft copy of this combined issue. Now, we hope regular monthly issue will be printed and will be posted to all the subscribers. I would like to thank all the contributors, who have sponsored the monthly Indirect Tax Journal.

We have initiated a COVID Relief Fund with an initial contribution of ` 20 Lakhs from the Head Office, under the Chairmanship of our Past President Dr. Ashok Saraf to provide relief to needy members, who have suffered on account of hospitalisation on account of COVID and also to the family members of the members who have lost their lives on account of the pandemic. The details of the scheme are given on Page No. 7. I also would like to thank the Zones for promising to contribute handsomely to the Noble cause and also thankful to the members who have shown their largesse and donated handsomely, and helping us in achieving the initial target of ` 1 Crore, members are also requested to donate generously for the Fund so we can help our AIFTP members in these testing times and also circulate the scheme amongst members so that they can benefit of the Scheme. We are glad to inform that at the time of writing this message we have already started disbursing amounts to the needy members, I would like to thank the COVID Relief Committee and the Office Bearers for coming to action immediately.

All zones are regularly conducting webinars on different topic with versatile speakers. We are organising special webinar jointly with Income Tax Appellate Tribunal Bar Assciation, Mumbai, GST Practitioners Association, CTC and BCAS Mumbai on 25th June, 2021 on You Tube Channel which will be addressed by Shri Harish Salve, Sr. Advocate on "Constitutionality of Tax Laws". All are requested to join the same. Link will be shared on all Whatsapp Group and on Mail. I on behalf of the Federation request all Zonal Chairman, Vice Presidents, Jt. Secretaries and all eminent leaders in the Federation are requested to plan physical programmes in their respective areas in grand manner for the benefit of the Tax Fraternity.

In GST, lot of changes received relating to HSN Code and the GST Tax Rates also changed in relating to Covid bases items and some of other rates. AIFTP as Head Office is representing in various aspects before the GST Counsel and CBIC for the benefit of Professionals and as well as in the larger interest of Tax Payers even though pandemic times. The same have been already discussed in our various zonal webinars and will be continued to be discussed. All are requested to join such various webinars and get benefited to their day to day professions.

AIFTP is planning to restart the National Tax Moot Court Competition in memory of Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate in association with Maharashtra National Law University, Mumbai. The same will be on virtual mode. I personally request all my Zonal Chairmen, Vice Presidents, Jt. Secretaries are requested to support and same and we will invite colleges from all over India to participate. In respect of the same under the guidance of Dr. K. Shivaram, Sr. Advocate, Mumbai and Chief Advisor of the Moot Court Committee, with Prof. (Dr.) Dilip Ukey, Vice Chancellor, Maharashtra National Law University, Mumbai and Prof. (Dr.) Anil G. Variath, Registrar, Maharashtra National Law University, Mumbai and principally agreed to hold Virtual National Tax Moot Court Competition. I thank Vice Chancellor and Registrar for agreeing on holding this Virtual National Tax Moot Court Competition.

I would at the end request all of you to Stay Home Stay Safe and always be masked up.

Place: Eluru
Dated: 18-6-2021

M. Srinivasa Rao
National President, AIFTP

ALL INDIA FEDERATION OF TAX PRACTITIONERS FINANCIAL SUPPORT TO MEMBERS (COVID-19) SCHEME, 2021

In view of the current pandemic Covid-19, many of the members of the Federation have been hospitalized for treatment. Many of the Members have also lost their lives. Due to the present Covid-19 pandemic situation, such members and/or their families are facing financial exigencies. With a view to give financial support to such members and/or their families, the Federation has framed a scheme to provide financial support to the needy members and/or their families.

1) This scheme is called as AIFTP Financial Support to Members (COVID-19) Scheme, 2021.

2) The scheme has come into force with effect from 01-03-2021. The object of the scheme is to provide financial support to the members who are facing financial exigencies because of the hospitalization due to Covid-19 and to the family of the member who lost his/her life due to the Covid-19.

3) A Committee is constituted who shall provide financial assistance to the needy members and their families. The composition of the Committee is as under-

   i. Chairman: Dr. Ashok Saraf, Past President, Guwahati

   ii. Member: Shri. Sanjay Kumar, Allahabad

   iii. Member: Shri. S. Venkataramani, Bengaluru

   iv. Member: Shri. Vivek Agarwal, Kolkata

   v. Ex-Officio Member: Shri. M Srinivasa Rao, National President

   vi. Ex-Officio Member: Shri. S. S. Satyanarayana, Secretary General

   vii. Ex-Officio Member: Shri. Vijay Kewalramani, Treasurer

4) The decision of the Committee in providing financial support shall be final and shall not be questioned by anyone at any level.

5) The quantum of financial support shall be as under:-

Sl. No.		Amount
1.	Hospitalization of members upto 7 days due to Covid- 19	Rs. 20,000
2.	Hospitalization of the member due to Covid- 19 for a period of more than 7 days	Rs. 35,000
3.	Death of a member due to Covid-19	Rs. 50,000
4.	That in cases of Home Quarantine & Treatment at Home if the member is having financial exigencies and there is recommendation of the Chairman or Secretary or the National Vice President of the respective Zone, in such cases the committee may sanction Financial support of amounts as it finds reasonable but which shall remain within the above limits.	

Note : That where the member is hospitalised and has a Medical Insurance Policy from an Insurance Company then the financial support shall be given of amounts as the committee finds reasonable.

6) The member or their family who needs financial support shall send such a request to the Committee duly recommended by the Chairman and/or Secretary in consultation with National Vice President of the Zone to which the member belongs.

7) The concerned member must be a member of the Federation as on 31.12.2020.

8) The member seeking financial support of the Scheme of 2021 shall not have an average Net Income above Rs.7,50,000 during the years 2017-18, 2018-19 and 2019-20 from any of the sources.

9) The member concerned and/or family member of the member shall provide necessary Bank details for the transfer of the financial support amount. The name of the member of the Federation and/or family to whom the financial support is given shall be confidential and shall not be disclosed to anyone under any circumstances.

10) A self declaration to that effect shall be given by the member or the family member of the said member to the aforesaid effect. After the Covid period is over, the member and/or the family member shall give necessary documentary proof in support of the aforesaid to the head Office of the Federation. If the declaration given by the member or the family member as the case may be, is found to be incorrect, the membership of the said member shall be terminated immediately and the said member and/or the family of the said member shall be liable to refund the amount of the financial support to the Federation forthwith.

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

CA Ribhav Ghiya

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
01.06.2021	16/2021-CENTRAL TAX	Seeks to appoint 01.06.2021 as the day from which the provisions of section 112 of Finance Act, 2021, relating to amendment of section 50 of the CGST Act, 2017 shall come into force.
01.06.2021	17/2021-CENTRAL TAX	Seeks to extend the due date for FORM GSTR-1 for May, 2021 by 15 days.
01.06.2021	18/2021-CENTRAL TAX	Seeks to provide relief by lowering of interest rate for a specified time for tax periods March, 2021to May, 2021.
01.06.2021	19/2021-CENTRAL TAX	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-3B ; and to provide conditional waiver of late fee for delay in filing FORM GSTR-3B from July, 2017 to April, 2021; and to provide waiver of late fees for late filing of return in FORM GSTR-3B for specified taxpayers and specified tax periods.
01.06.2021	20/2021-CENTRAL TAX	Seeks to rationalize late fee for delay in furnishing of the statement of outward supplies in FORM GSTR-1.
01.06.2021	21/2021-CENTRAL TAX	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-4.
01.06.2021	22/2021-CENTRAL TAX	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-7.
01.06.2021	23/2021-CENTRAL TAX	Seeks to amend Notification no. 13/2020-Central Tax to exclude government departments and local authorities from the requirement of issuance of e-invoice.
01.06.2021	24/2021-CENTRAL TAX	Seeks to amend notification no. 14/2021-Central Tax in order to extend due date of compliances which fall during the period from "15.04.2021 to 29.06.2021" till 30.06.2021.

01.06.2021	25/2021-CENTRAL TAX	Seeks to extend the due date for filing FORM GSTR-4 for financial year 2020-21 to 31.07.2021.
01.06.2021	26/2021-CENTRAL TAX	Seeks to extend the due date for furnishing of FORM ITC-04 for QE March, 2021 to 30.06.2021.
01.06.2021	27/2021-CENTRAL TAX	Seeks to make amendments (Fifth Amendment, 2021) to the CGST Rules, 2017.

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
02.06.2021	01/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 1/2017-Central Tax (Rate) to prescribe change in CGST rate of goods.
02.06.2021	02/2021-CENTRAL TAX(RATE)	Seeks to amend notification No. 11/2017-Central Tax (Rate) so as to notify CGST rates of various services as recommended by GST Council in its 43rd meeting held on 28.05.2021.
02.06.2021	03/2021-CENTRAL TAX(RATE)	Seeks to amend notification No. 06/2019-Central Tax (Rate) so as to give effect to the recommendations made by GST Council in its 43rd meeting held on 28.05.2021.
14.06.2021	04/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 11/2017-Central Tax (Rate) so as to notify GST rates of various services as recommended by GST Council in its 44th meeting held on 12.06.2021.
14.06.2021	05/2021-CENTRAL TAX (RATE)	Seeks to provide the concessional rate of CGST on Covid-19 relief supplies, up to and inclusive of 30th September 2021

NOTIFICATIONS - INTEGRATED TAX

DATE	NOTIFICATION NO.	REMARKS
02.06.2021	03/2021-INTEGRATED TAX	Seeks to amend Notification No. 4/2019-Integrated Tax dt. 30.09.2019 to change the place of supply for B2B MRO services in case of Shipping industry, to the location of the recipient.

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
17.06.2021	149/05/2021-GST	Clarification regarding applicability of GST on supply of food in Anganwadis and Schools.
17.06.2021	150/05/2021-GST	Clarification regarding applicability of GST on the activity of construction of road where considerations are received in deferred payment (annuity).
17.06.2021	151/05/2021-GST	Clarification regarding GST on supply of various services by Central and State Board (such as National Board of Examination)
17.06.2021	152/05/2021-GST	Clarification regarding rate of tax applicable on construction services provided to a Government Entity, in relation to construction such as of a Ropeway on turnkey basis
17.06.2021	153/05/2021-GST	GST on milling of wheat into flour or paddy into rice for distribution by State Governments under PDS
17.06.2021	154/05/2021-GST	GST on service supplied by State Govt. to their undertakings or PSUs by way of guaranteeing loans taken by them
17.06.2021	155/05/2021-GST	Clarification regarding GST rate on laterals/parts of Sprinklers or Drip Irrigation System
21.06.2021	156/12/2021-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

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TIMELINE - GST

Adv. Abhay Singla

GOODS & SERVICE TAX

Sr. No.	GSTR 3B	Tax Period	Due Date	No Late Fees Till	Interest Rate
(i)	Turnover More than Rs. 5 Crore	May, 2021	20th June 2021	05th July 2021	9% till 05.07.2021 after that 18% from 06.07.2021
		June, 2021	20th July 2021	-	-
(ii)	Turnover Upto Rs. 5 Crore (not opting QRMP Scheme)	May, 2021	20th June 2021	05th July 2021	NIL till 05.07.2021 after that 9% from 06.07.2021 to 20.07.2021 and after 20.07.2021 @ 18%
		June, 2021	20th July 2021	-	-
(iii)	Turnover Upto Rs. 5 Crore (opting QRMP Scheme)	April-June, 2021	22nd July 2021	-	
		May 2021 (Tax Payment)	25th June 2021	-	NIL till 09.07.2021 after that 9% from 10.07.2021 to 24.07.2021 and after 24.07.2021 @ 18%
		June 2021 (Tax Payment)	25th July2021	-	

Sr. No.	Particulars	Form	Period	Due Date
(i)	Detail of Outward Supplies: -	IFF	May, 2021	28th June 2021
	(a) QRMP		April to June 2021 (GSTR-1)	13th July 2021
	(b) Monthly Filing	GSTR-1	May, 2021	26th June2021
			June, 2021	11th July 2021

(ii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iii)	Quarterly return for Composite taxable persons	CMP-08	April to June 2021	18th July 2021
(iv)	Return for Non-resident taxable person	GSTR-5	May, 2021	30th June 2021
(v)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	
(vi)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	May, 2021	30th June 2021
(vii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	May, 2021	30th June 2021
(viii)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	May, 2021	30th June 2021
(ix)	Annual GST return (Composition Taxpayers)	GSTR-4	FY 2020-2021	31st July 2021

*****

IMPLICATION ON SERVICES PROVIDED BY ARBITRATION & CONCILIATION CENTREUNDER THE GST LAWS

CA S Venkataramani
CA Siddeshwar Yelamali

I. Background:

The Arbitration & Conciliation Centre (herein after referred to as "Arbitral Tribunal") are generally established to undertake domestic and international Arbitration or Conciliation in the jurisdiction of such centre. The Arbitral Tribunal are usually established under an initiative of the High Court in terms of the Arbitration & Conciliation Rules, 2012. In this article applicability of tax under the provisions of Central Goods and Service Tax Act, 2017 (for brevity, 'CGST Act, 2017') on the Arbitration or Conciliation services provided by Arbitration & Conciliation Centre under the Arbitration & Conciliation Centre Rulesis discussed.

II. Introduction to GST and relevant provisions:

Tax under CGST Act, 2017 and SGST Act, 2017 shall be levied on all **intra-State supply of goods or services or both** and tax under Integrated Goods and Services Tax Act, 2017 (for brevity, 'IGST Act, 2017') shall be levied on **inter-State supply of goods or services or both**. The rate at which the tax is levied is based on the classification and category of goods or services supplied and as regards to services, based on the classification of service in terms of the Notification 11/2017- Central Tax (Rate) dated June 28, 2017 as amended from time to time. In this regard, the relevant provisions of CGST Act, 2017 are provided below:

1. **Levy**[1]: The levy of tax shall be on all **intra-State supply / inter-State supply** of goods or services or both on the value determined in terms of section 15 of the CGST Act, 2017 at such rates as may be notified by the Government on the recommendations of the Council and in such manner as may be prescribed; The said tax shall be paid by the taxable person.
2. **Rate of tax[2] and Classification:** The Central Government and the State Governments have issued notifications specifying the rate of tax based on the classification and category of services supplied.
3. **Explanatory notes to scheme of classification of services[3]:** The Government has released the explanatory notes for classification of

[1]Section 9 of the CGST / SGST Act, 2017 and Section 5 of the IGST Act, 2017
[2]Notification No. 11/2017 – Central Tax (Rate) / State Tax (Rate) dated 28.06.2017 as amended from time to time
[3] Published on CBIC website

services. These notes indicate the scope and coverage of the heading, groups and service codes of the Scheme of Classification of Services. These explanatory notes may be used by the tax payers as a guiding tool for classification of services. However, where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

4. **Taxability under reverse charge mechanism:** Section 9(3) of the CGST Act, 2017 provides that the Government can notify categories of supply of goods or services or both which will be liable to tax on reverse charge basis by the recipient of goods or services or both.

   Notification No. 13/2017 – Central Tax (Rate) dated 28th June, 2017 has notified categories of services which are liable to tax under reverse charge mechanism in the hands of recipient of services.

5. **Arbitral Tribunal**[4]has the same meaning as assigned to it in clause (d) of section 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

6. **Arbitral Tribunal**[5]means a sole arbitrator or a panel of arbitrators**.**

7. **"Governmental Authority**[6]**"** means an authority or a board or any other body, -

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

   (ii) established by any Government,

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

8. "Government Entity[7]" means an authority or a board or any other body including a society, trust, corporation,

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

   (ii) established by any Government,

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

[4] Paragraph 2(i) of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 as amended from time to time.

[5] Section 2(d) of the of The Arbitration & Conciliation Act, 1996.

[6] Paragraph 2(zf) of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 as amended from time to time.

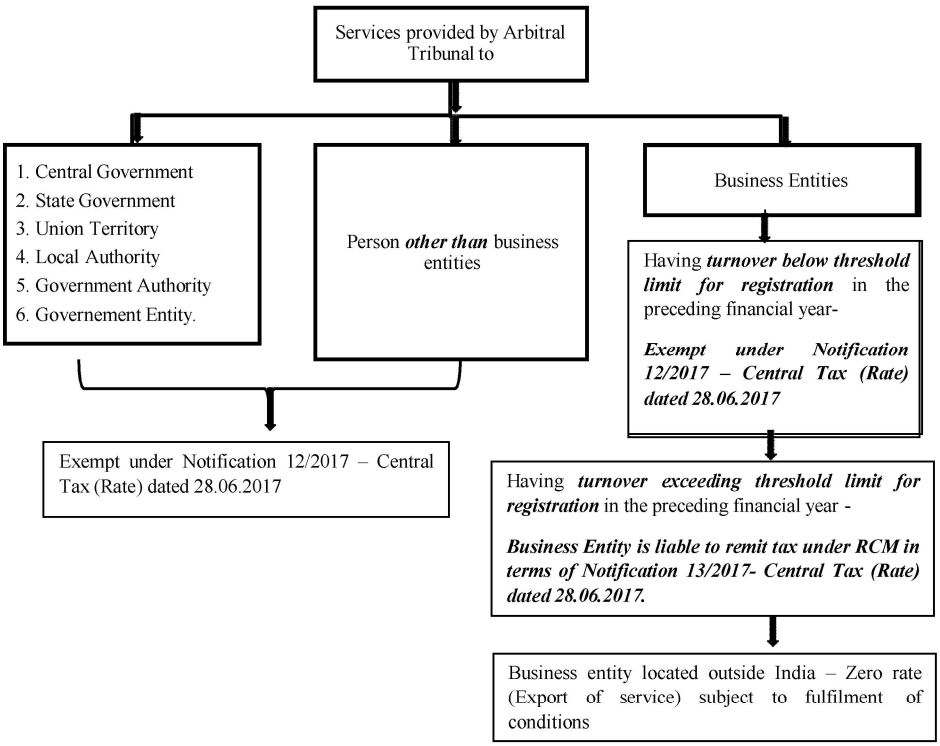
[7] Paragraph 2(zfa) of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 as amended from time to time.

Government, Union Territory or a local authority.

9. **"Taxable Territory[8]"** means the territory to which the provisions of this Act apply. Section 1(2) of the CGST Act, 2017 provides that the Act extends to whole of India.

III. Discussion on GST implications on services provided by Arbitration & Conciliation Centre

A. GST implications on services provided by the Arbitration & Conciliation centre is provided by way of a pictorial diagram



B. Detailed analysis of taxability of services provided by the Arbitration & Conciliation centre:

[8] Section 2(109) of the CGST Act, 2017.

1. **Analysis of goods or services:**
   i. The Arbitration & Conciliation Centre are engaged in providing Arbitration or Conciliation services for various disputes arising on account of domestic or international agreements. Such disputes are resolved by appointing an arbitrator or conciliator/a panel of arbitrators or a panel of conciliators.
   ii. In terms paragraph II (5) and II (6) *supra*, The Arbitration & Conciliation Centre –in paper writers view qualifies as an "Arbitral Tribunal".
   iii. Arbitration / disputes resolved by the Arbitral Tribunal qualifies as "Supply of services" under Section 7 of the CGST Act, 2017.

2. **Rate of tax, HSN and Classification:**
   Following is the rate of tax, HSN and classification for the services provided by the Arbitral Tribunal:

HSN	**998215 – Arbitration and Conciliation services**
Rate of tax	9% - CGST; 9% - SGST

3. **Applicability of various notifications issued under the CGST Act, 2017:**

   The taxability of Arbitral or Conciliation services provided by the Arbitral Tribunal is discussed in the ensuing paragraphs:

   A. Exemption: The Arbitral or Conciliation services provided by an Arbitral Tribunal to the following recipient of services is exempt vide Sl. No. 45 of Notification 12/2017- Central Tax (Rate) dated 28.06.2017:

      a. Any person ***other than a business entity (Refer Note below for meaning of 'business entity')***.

      b. A ***business entity*** with an aggregate turnover upto such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017.

      c. The Central Government, State Government, Union territory,

local authority, Governmental Authority or Government Entity.

B. Supply of service to business entity located in India: Sl. No. 3 to Notification 13/2017- Central Tax (Rate) dated 28.06.2017 provides that services supplied by an Arbitral Tribunal to a ***business entity*** (other than the one which is exempt as explained *supra*) located in a taxable territory is liable to tax under reverse charge mechanism in the hands of the recipient of service (i.e. in the hands of the business entity). ***(Refer Note below for meaning of business entity)***.

C. Supply of service to business entity located outside India:

- In terms of Section 13 (2) of the IGST Act, 2017, the place of supply for Arbitration or Conciliation services provided, where the recipient of services is located outside India, will be the location of the recipient of service.
- Section 7(5) of the IGST Act, 2017 provides that supply of goods or services or both will be treated as an inter-State supply, if the supplier is located in India and the place of supply is outside India.
- Section 16 of the IGST Act, 2017 16(1) of the IGST Act, 2017 provides that export of service would be a zero-rated supply.

  The services provided by the Arbitration & Conciliation Centre to a ***business entity*** located outside India will qualify as "Export of services" only upon fulfilment of the following conditions enumerated under Section 2(6) of the IGST Act, 2017:

  i. Supplier of service is located in India (in the topic under discission, The Arbitration & Conciliation Centre is located in India);

  ii. The recipient of service is located outside India;

  iii. The place of supply of service is outside India;

  iv. The payment for such service has been received by the supplier of service (in the topic under discission, Arbitration & Conciliation Centre) in convertible foreign exchange or in Indian rupees wherever permitted by Reserve Bank of India and

v. The supplier of service (in the topic under discission, The Arbitration & Conciliation Centre) and the recipient of service who is located outside India are not merely establishments of distinct person in accordance with explanation 1 in Section 8 of the IGST Act, 2017.

In terms of Explanation 1 in Section 8 of the IGST Act 2017 the following persons qualify as distinct persons:

a. Foreign branch of a registered person.

b. Branches of a registered person in various States.

c. Registered person having multiple registrations in the same State or Union territory.

d. Any registered person operating through a branch, agency or representational office in any territory.

On combined reading of the above Sections, Arbitration or Conciliation service provided by the Arbitration & Conciliation centre to a business entity located outside India will qualify as export of service if all the conditions are cumulatively fulfilled. If any of the conditions of export of service is not fulfilled, the same will qualify as "inter-State supplies" and applicable IGST has to be charged on the tax invoice.

Note:

1. Notification 12/2017 (Central Tax) dated 28.06.2017 relating to exemption of services defines business entity to mean 'any person carrying out business'. Business is defined under section 2(17) of the CGST Act, 2017 as follows

"business" includes—

a. any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

b. any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

c. any activity or transaction in the nature of sub-clause (a),

whether or not there is volume, frequency, continuity or regularity of such transaction;

d. supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

e. provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

f. admission, for a consideration, of persons to any premises;

g. services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

h. activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and

i. any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

Conclusion

An attempt has been made in this paper to make a reader understand the applicability of tax on services provided by Arbitral Tribunal under GST law. This paper 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 June 10, 2021.

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IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata

1. Whether the amount collected as membership subscription fee paid by the members of the applicant towards facilities provided by the applicant are liable as supply of service under GST?

Whether the amount collected as infrastructure development fund for the development and maintenance of the facilities provided by the applicant are liable as supply of service under GST?

Held: No GST applicable subject to the amendments to the section 7 of CGST as proposed in the Finance Act, 2021 is notified.

In case of ***Bowring Institute - AAR Karnataka*****,** the applicant club is a non-profit organization collecting GST on subscription fee and infrastructure development fund from its members. The applicant submitted that they are members club as opposed to proprietary club. Thus in terms of the judgment of Supreme Court in case of **State of West Bengal Vs. Calcutta Club (AIR 2019 SC 5310)** the doctrine of mutuality is applicable to their club. The applicant cited various clauses of their MOA and put stress on the point that in the event of dissolution of the society the members of the club will not be entitled to profits of the club and same shall be given to other society. The applicant also placed reliance on cited judgments of Hon'ble Jharkhand High Court in case of Ranchi Club Ltd. Vs. Chief Commissioner [2012] 26 S.T.R.401 (Jhark.) , Gujrat High Court in case of Sports Club of Gujrat Ltd. Vs. UOI [2013] 40 STT 486 (Guj.) & Apex Court in case of Joint Commercial Tax officer, Harbour Division II Madras Vs. The Young Men's Indian Association (1970) 1 SCC 462 wherein the concept of mutuality was dealt in length.

The Authority observed that the ruling of Hon'ble Apex Court in case of **Calcutta Club Limited** is fully applicable to the applicant. However, the authority also noticed that the section 108 of the Finance Act, 2021 brought in a retrospective amendment in Section 7 of the CGST Act,2017 whereby it overruled what the Courts have held till now and has countered the Principle

of Mutuality by way of Explanation which states that the members or constituents of the club and the club are two separate entities and persons for the purpose of Section 7 of the CGST Act,2017. However, the said amendment will come into effect on the date when Central Govt. notifies the same and corresponding amendments also passed by respective States and UTs.

Therefore, the authority concluded that unless the amended Section 7 of the CGST Act, 2017 is notified, the applicant is not liable to pay GST on the subscription fees and Infrastructure development fund collected from the members as per the Hon'ble Supreme Court judgment in case of M/s. Calcutta Club Ltd.

2. **Whether the applicant can use Input Tax Credit Balance available in the Electronic Credit Ledger legimately earned on the inputs/raw-materials/inward supplies(meant for outward supply of Bullions) towards the GST liability on 'Castor Oil Seed' which were procured from Agriculturists and subsequently meant for onward supply?**

Held: No

In case of ***M/s. Aristo Bullion Pvt Ltd- AAR Gujrat*****,** the applicant is intend to engage in supply of Gold (including Gold Plated with Platinum) unwrought or in semi-manufactured forms or in powder form, based metal clad with silver, not further worked than semi-manufactured, coin etc; that it involves some manufacturing process also and in the said activities various inputs viz. Gold dore, silver dore are required; that the said inputs will be procured domestically on payment of GST at appropriate rate; that sometimes the applicant may import raw materials/inputs from overseas market and will be discharging applicable duty and tax including IGST. There is accumulation of ITC in the applicant's business due to the reason there can be sudden upward or downward movement in prices which may exceed the percentage of value additions on physical trades, thereby leading to accumulation of ITC on physical trades. Sometimes excess stocking may also lead to accumulation of ITC.

The applicant also intend to procure Castor oil seeds from agriculturist (not liable to be registered u/s 23 of CGST/SGST Act, 2017), and will be selling in the Domestic Market to the buyer as well as exporting the same. No ITC will be available on procurement of Castor oil seeds as the same will be procured

from the agriculturist. But the sale will attract GST @ 5% on sale in terms of Schedule-I, Sr.No.70 of Notification No.01/2017-Central Tax(Rate). It is also submitted that as of now, the provisions of Section 9(4) of the CGST Act, 2017 and Section 5(4) of the IGST Act, 2017 are not operative attracting GST on the supply of goods received by the Registered person from the unregistered person, hence the Castor oil seeds procured from unregistered person will not attract GST in the hands of the recipient of supply at the receipt stage; that therefore the procurement of Castor oil seeds from the agriculturists who are unregistered is not liable to GST either in the hands of the Agriculturists under Section 9(1) of CGST Act, 2017 or in the hands of Recipient of the Castor oil seeds procured from the unregistered person under Section 9(4) of the CGST Act, 2017.Thus when the applicant procures Castor oil seeds it does not attract GST; that however, it attracts GST when it is supplied by the applicant; that simultaneously, the applicant is having input tax credit earned on the inward supply viz. Gold meant for manufacture and its supply gold semi-finished silver etc. out of unwrought or in semi-manufactured forms or in powder form and base metal and the same are lying as Balance in Electronic Credit Ledger of the applicant; that in this back drop, the applicant wants to know whether GST on Castor oil seed can be discharged through the input tax credit balance available in the Electronic Credit Ledger of the applicant.

The authority examined the matter in the light of the provisions of section 16(1) and section 17(5) of the CGST Act and fond that for the applicant, to be eligible to take input tax credit on any supply of goods or services, the same has to be used or should be intended to be used in the course or furtherance of his business i.e. the nexus/connection between the inputs and the final products manufactured from these inputs is required to be proved. So such nexus is apparent in case of bullion transactions. However, there is no nexus/ connection whatsoever, of the inputs i.e. gold dores or silver dores with the business of supply of Castor oil seeds by the applicant. Thus the authority concluded that the applicant is not eligible to utilize the input credit available in their Electronic Credit Ledger (earned on the inputs/raw-materials/inward supplies meant for outward supply of Bullions) for payment of GST liability

on supply of Castor oil seeds.

Note: This ruling has again created doubts whether for availing ITC one to one co-relation necessary? In the humble opinion of the author the same is not required but the AAR seems to run contrary.

3. Whether the activities performed by the Liaison office (LO) of the applicant shall be treated as 'Supply' under GST? Whether LO of the applicant needs GST registration? Whether LO of applicant is liable to pay GST?

Held: Yes

In case of ***Dubai Chamber of Commerce & Industry -AAR Mumbai*** the applicant Dubai Chamber of Commerce & Industry –Liaison office ("DCCI LO") is established by Dubai Chamber of Commerce & Industry, Dubai ("DCCI UAE") in Mumbai. The main objects of DCCI UAE are to support the business community in Dubai and promote Dubai as an international business hub. The applicant is a non-profit organization, formed to represent, support, and protect the interest of the Dubai business community in India, by creating a favorable environment, promoting Dubai business and by supporting development of business in India.

The applicant contended that as per RBI guidelines the applicant shall undertake liaison and representation activities in India viz: Liaison between India office and Dubai office, Attending and representing DCCI in various seminars, conferences and trade fairs, connecting businesses in India with partners in UAE & vice-versa & organizing events & interactions with Indian stakeholders for sharing information about Dubai. Apart from this no other activities is to be performed in India by the applicant with or without consideration. All the expenses incurred by the applicant like office rent, salaries and consultancy services etc. are reimbursed from DCCI UAE on cost to cost basis. Thus, no consideration is to be charged /paid for such services. Further the applicant is also not a separate legal entity; rather it is mere extension of DCCI UAE. Mere re-imbursement of expenses received from DCCI UAE cannot be treated as consideration under GST law and hence, applicant is not liable to obtain GST registration. Further the provisions of FEMA also cited to buttress the argument. Also, it was contended that the deemed supply as mentioned in

Sch-I of CGST shall not be applicable in case of liaison work undertaken as the same is never in furtherance of business. Also the decision of Rajasthan AAR and Tamilnadu AAR in the similar matter was cited.

However, the dept. argued that the definition of "Business" u/s 2(17) is wide enough to cover non-pecuniary activities also. Hence the claim of the applicant that since it is a non-profit organization their activity is not to be treated as supply is not correct. Further the applicant cannot be considered as 'Pure agent' inasmuch as its activities does not satisfy the provisions of rule 33 of the CGST rules. Further section 15(2) (c) again consider that any amount charged for anything done by the supplier in respect of the supply of the goods or services or both is treated as consideration. Also, the financial statements of the applicant shows surplus that amply proves that the applicant is not running on cost to cost basis. Rather it is receiving consideration from its Head office in excess of expenses incurred by it.

The authority examined the matter and found that the on the one hand applicant has submitted that it has not undertaken any supply, on the other hand applicant accepts that it connects business in India with business partners in Dubai, which is nothing but supply. Thus applicant acts as a conduit between some business partners in Dubai and certain businesses in India. It therefore appears that the applicant is acting as an Intermediary within the meaning of section 2(13) of the CGST Act, 2017. Further as per provisions of section 13(8) of the IGST Act, 2017 the place of supply would be location of the supplier of services i.e location of the applicant which is located in the State of Maharashtra. Further the website of the DCCI UAE revealed that they are providing various services for which fee is charged. Also, the cases cited by the applicant are distinguished on the ground that the applicant is providing services to various businesses in India and Dubai. Therefore, the authority held applicant liable for GST and answered all the questions in affirmative.

4. **Whether concessional rate of GST shall apply to the sub-contractor who is sub-contracted from a sub-contractor of the main contractor, the main contractor being provider of works contract to a Government entity?**

Held: Activity undertaken by the applicant is not covered under entry no.3(ix)

or under entry 3(iii) or under entry 3(vi)of Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 (as amended) and hence applicant is not liable to charge concessional rate of GST@ 12%.

In case of ***M/s Hadi Power System -AAR, Karnataka*****,** the applicant is a proprietary concern registered under the Goods and Services Acts and is engaged in the business of execution of works contracts relating to electrical works and electrical infrastructure. Further they have been allocated electrical subcontractor works by the first sub-contractor M/S Shaaz Electricals which in turn is sub-contracted by main contractor M/S. Ocean Construction (India) Pvt. Ltd., who have been awarded the contract by M/S Karnataka Neeravari Nigam Ltd. The applicant also states that the nature of works delegated to the main contractor, M/S. Ocean Construction (India) Pvt. Ltd. is for the construction of Channa basaveshwara Lift Irrigation Scheme which includes preparation of plans and drawings, construction of intake canal, jack well cum pump house, Rising main, Electrical sub-station, erection of vehicle turbine pumps, including commissioning of entire project, including maintenance for 5 years period on turnkey basis. The applicant has also stated that the main contractor has subcontracted the certain electrical works to M/S Shaaz Electricals (hereinafter called "first subcontractor"). Further, first sub-contractor has in turn entered into sub-contract agreement with the applicant for providing electrical works. Further M/S Karnataka Neeravari Nigam Ltd is being registered as a company which is wholly owned Government of Karnataka. The applicant is of the opinion that the services provided by them falls under clause (ix) to serial number 3 of Notification 11/2017-Central Tax (Rate) dated 28-06-2017, as amended by Notification No.01/2018-Centra1 Tax (Rate) dated 13-10-2017 and the concessional rate of tax@12% shall apply to him.

The authority examined the documents produced and noticed that there is no privity of contract between the applicant and M/S Karnataka Neeravari Nigam Ltd. The original contract is awarded by M/S Karnataka Neeravari Nigam Limited to M/S Ocean Constructions (India) Private Limited. Hence as per the notification, any subcontractor providing services to Main contractor by executing the works mentioned in the serial number 3 of clause (iii) and clause

(vi) which is exclusively covered under the clause (ix) of serial no.3 of Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 (as amended from time to time) will be exempted from payment of GST subject to M/S Karnataka Neeravari Nigam Limited is qualified to be called as a Government Entity. In the present case, it is M/S Shaaz Electricals who is the sub-contractor who is covered under the said entry. As there is no privity of contract between the applicant and M/S Ocean Constructions (India) Private Limited and the contract is between the applicant and M/S Shaaz Electricals, the services provided by the applicant is not covered under the said entry. For the same reason, the activity of the applicant is also not covered under entry no. 3(vi) of the Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 (as amended).

Thus the composite supply undertaken by the applicant under question is not covered under entry no. 3(iii) or 3(vi) or 3(ix) of the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 as amended and hence applicant is not eligible to charge GST at a rate of 6% under CGST Act and 6% under the KGST Act. The applicant has to discharge tax rate CGST @9% and KGST @ 9% each under the provision of the GST Acts.

5. Whether the issuance of Pre-Paid Instruments (PPIs) commonly called as Gift Vouchers/ Gift cards by the applicant to its customer is to be considered supply of goods or services? If yes, then what will be the time of Supply and applicable rate of tax under GST?

Held: Taxable under GST. TOS will be the date of issue of such vouchers and applicable rate of tax is that applicable to goods.

In case of ***M/s Kalyan Jewellers India Ltd - AAAR Tamilnadu*** the applicant aggrieved by the order of the AAR approached to the Appellate Authority with the same sets of facts and questions framed. The AAR held that the Own closed PPIs issued by the Applicant are 'vouchers' as defined under CGST/TNGST Act 2017 and are a supply of goods under CGST/TNGST Act 2017. The time of supply of such gift vouchers / gift cards by the applicant to the customers shall be the date of issue of vouchers if the vouchers are specific to any particular goods specified against the voucher. If the gift vouchers/gift cards are redeemable against any goods bought, the time of

supply is the date of redemption of voucher. Further the AAR has also ruled separate tax rates for paper based tax vouchers and others vouchers.

The applicant contended that the voucher or PPI only have a redeemable face value and no intrinsic value capable of it being considered as marketable for the purpose of levy of GST. It is submitted that the amounts received upon such issuance of PPI's are treated and entered as 'Other Current Liabilities' in the statement of accounts, and only when the instruments are redeemed the amounts received are credited to the sales/revenue account of the Appellant. It is submitted that the PPI's are issued to the customers in card as well as digital formats and it is not sold to the customers. The PPI's are in the nature of actionable claims and not goods. It is submitted that if the PPI's are made liable to tax, it would amount to double taxation as GST is levied on the supply of jewellery made by the appellant also at the time of redemption of a voucher is against the provisions of Law as well as the EU Council Directives.

The AAAR examined the matter and held that when a voucher is issued, though it is just a means of advance payment of consideration for a future supply, subsection (4) of section 12 and 13 determine the time of supply of the of the underlying good(s) or service(s). Voucher per se is neither a goods not a service. It is a means for payment of consideration. Therefore, there is no need to determine whether voucher is an actionable claim to arrive at a conclusion that it is neither a goods nor a service. In the instant case the gold voucher clearly indicates that the voucher can be redeemed for gold jewellery at a known rate of tax. The gold voucher (representing the underlying future supply of gold jewellery) would be taxable at the time of issue of the voucher. It must be emphasized that this interpretation does not result in double taxation as transfer of gold subsequently will not be subject to tax at the time of redeeming the voucher for gold, as the supply is deemed to have been done at the time of issue of voucher itself (section 12(4)). Thus the time of supply of the gift vouchers / gift cards by the applicant to the customers shall be the date of issue of such vouchers and the applicable rate of tax is that applicable to that of the goods.

Further the appellate authority also observed that Voucher by GST law is

recognized as an instrument of consideration (non-monetary form) for future supply. Regarding classification of voucher, since voucher is only an instrument of consideration and not goods or services, the same is not classifiable separately but only the supply associated with the voucher is classifiable according to the nature of the goods or services supplied in exchange of the voucher earlier issued to the customer.

6. Whether the promotional products /materials & marketing items used by the appellant in promoting their brand and marketing their product can be considered as "input" as defined in section 2(59) of the CGST Act,2017 and GST paid on the same can be availed as input tax credit in terms of section 16 of the CGST Act,2017 or not ?

Held: Can be classified as input but no ITC in view of section 17(2) & 17(5)(h)

In case of ***M/s Page Industries Ltd.-AAAR Karnataka***, the appellant is engaged in the manufacture, distribution and marketing of Knitted and Woven Garments under the brand name "JOCKEY" and swimwear and swimming equipment under the brand name "SPEEDO". The Appellant also gets the garments manufactured from job workers. The Appellant market/sell their products through their franchisees and distributors/dealers. To promote their brands and to market their products, the Appellant is availing advertisement agency services such as ads in the print media, electronic media, outdoor advertising, etc and also procuring the promotional items and marketing material such as display boards, uniforms to staff, posters, gifts and hoardings, etc to use in displaying their products at the point of purchase i.e Exclusive Brand Operator's showrooms and retail show rooms. The Appellant is paying GST on the procurement of the advertisement services and promotional products/marketing materials. The appellant sought ruling on the availability of input tax credit on such goods and services.

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

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

The appellant being aggrieved approached to the appellate authority with the grounds that the AAR has misconstrued facts and traversed beyond the ruling sought for by treating the Appellant and their franchisees i.e Exclusive Brand Operators as "related persons". Further in terms of Section 16 of the Act, the substantial condition is that the goods or service should be used in the course of or in furtherance of business; that the phrase "used in the course or furtherance of business" has a very vast meaning; that it is not necessarily only goods or services or both procured in relation to their "output" but also includes any goods or services used in the course or furtherance of business which will qualify as "inputs" or "input service". In this regard, they relied on the decision of the Hon'ble Supreme Court in the case of Mazagon Dock Ltd vs CIT and Excess Profit reported in 1958 (5) TMI 2- SUPREME COURT, the Bombay High Court decisions in the case of Coco Cola India Pvt Ltd vs CCE, Pune III reported in 2009 (15) STR 657 (Bom) and CCE, Nagpur vs Ultratech Cement Ltd reported in 2010 (260) ELT 369 (Bom). Also they have accounted such expenses in their books of accounts as "revenue expenditure" and the same will not remain as "asset" in their books of accounts and they are not claiming any depreciation on the same.

The appellate authority examined the matter in the light of provisions of section 16 and 17 of the CGST Act, 2017 and set aside the order of the AAR. It was held that the provision of promotional materials free of charge by the Appellant to the franchisees and distributors is neither covered within the scope of a taxable supply as defined in Section 7 of the CGST Act nor is it a supply covered under the ambit of Schedule I of the said Act. The activity of providing the promotional items can be termed as a 'non-taxable supply'. Further section 17(2) provides that input tax credit shall be allowed only when the goods and services or both are used for business purposes or for making a taxable supply

(including zero-rated supply). When the goods or services or both are used towards making an exempt supply, then input tax credit is not allowed. As per Section 2(47) of the CGST Act, the term 'exempt supply' also includes non-taxable supply. In view of the above provisions, the AAAR hold that the GST paid on the procurement of promotional items supplied to the EBOs/franchisees and distributors free of charge will not be eligible for input tax credit since the said supply is a non-taxable supply.

Also , the promotional items such as carry bags, calendars, diaries, pens, etc embossed/engraved with the brand name and which are distributed to the EBOs/distributors/retailers for the purpose of giving away to the customers are nothing but 'Gifts'. Therefore input tax credit is not eligible on the promotional items distributed as give away items on the grounds that the same is blocked by virtue of the provisions of Section 17(2) and Section 17(5)(h) of the CGST Act.

7. Whether the rent received from Backward Classes Welfare Department is taxable or not?

Held: Exempted under entry 3 of NN 12/2017 dated: 28.06.2017

In case of ***Puttahalagaiah GH.- AAR Karnataka*****,** the applicant has rented his property to the Backward Classes Welfare Department, Government of Karnataka, who in turn is using the same for providing hostel facilities to the post metric girls of backward classes. The applicant is of the opinion that since he is letting out his property to Backward Classes Welfare Department who in turn is using it for welfare of weaker section of the society of the backward classes students where the annual income of the family is less than threshold for the creamy layer, therefore the service provided by him to Backward Classes Welfare Department to run post metric Girl's Hostel is exempted service as it is covered under Article 243G of the Constitution. The applicant is only providing the services of renting an immovable property. Hence, the services provided by the applicant constitute pure service as per entry no 3 of the Notification No. 12/2017-Central Tax (Rate) dated 28-06-2017.

The authority examined the matter and noticed that the service provided by the applicant is to the Backward Classes Welfare Department is a Department

of State Government. The applicant is providing service as per entry number 27 of the Eleventh Schedule (Article 243G) of the Constitution of India. This is in relation to the function entrusted to a panchayat under article 243G of the constitution which is covered by 27th entry of 11th schedule which says Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes. Since the applicant is providing to the State Government pure services by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution, the same is covered under the entry number 3 of Notification No. 12/2017-Central Tax (Rate) dated 28-06-2017 and hence is exempted under the CGST Act, 2017.

8. Whether the Services provided by the applicant to the recipient i.e The Greater Chennai Corporation is a pure service provided to the local authority by way of activity in relation to functions entrusted to a Panchayat under article 243G and Municipality under article 243W of the Constitution and eligible for benefit of exemption provided under Serial No. 3 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017?

Held: Composite supply - Not eligible for exemption under entry sl. 3

In case of ***M/s Unique Aqua Systems - AAR Tamilnadu*****,** the applicant has entered into a contract with the Greater Chennai Corporation based on which they have been awarded with the project of Operation and Maintenance of High Quality Treated Drinking Water Plant for the "Amma Kudineer (Drinking Water Plant) Project". As per the Contractual conditions of work order, they have supplied, installed and commissioned high quality drinking water plants at different locations as required by the Greater Chennai Corporation (herein after referred as "GCC") on the land allotted to them. They contended that the service provided by them by way of treating the water supplied to it by GCC against consideration received from GCC and dispensing treated water to the general public as directed by GCC is a pure service provided to the local authority by way of activity in relation to functions entrusted to a Municipality under article 243W of the Constitution and hence they are eligible for exemption provided under No. 3 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. They also placed reliance on another ruling by Gujrat

AAR in case of M/s. A B Enterprise.

The dept. on the other hand countered that the Services rendered by the Dealers is a taxable service since the Service Recipient have considered the Service as a Taxable service under GST Act 2017 and deducted TDS and paid into GST Account.

The authority examined the matter in the light of documentary evidences produced and the conditions of entry no. 3 of the notification no. 12/2017. The applicant has entered into a composite contract of supply of RO Plant along with the Operation &Maintenance of the said Plant for a period of 5 Years. The applicant at present as per the contract undertakes the O & M of the Plant. The supply under a composite contract cannot be vivisected as the supply of R.O. Plant and the O&M of the same are naturally bundled. It is not that the RO Plant can be supplied by one contractor and the O & M of the same can be done by any other contractor in as much as the tender is floated for both together. The tender and agreement are to be read as a whole, to understand the intention of such agreement. Even if we consider that the supply of RO Plant and the O & M of such plant are two different supplies, while not accepting, we find that the supplies undertaken under O&M involves providing Purified Water (goods) through the vending machines to the designated beneficiaries; issuance of smart cards (goods) to the consumers, providing security (service) to the plant and undertaking Maintenance of the RO Plant, vending Machines (services) for the period of O & M. Thus it is evident that the supplies made by the applicant is not 'pure service' but is a composite supply of purified water(goods), smart cards(goods), maintenance of RO Plant, vending machines(Service), providing security(service). The supply being not a 'Pure Service', the same is not covered by the Description of Service at SI.No. 3. Therefore the primary condition of entry no. 3 that the supply must be 'Pure Service' is not satisfied.

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DIGEST OF ADVANCE RULINGS UNDER GST

S.S. Satyanarayana, Tax Practitioner

RULINGS OF ADVANCE RULING AUTHORITIES

1. Input Tax Credit :

Facts : The applicant intend to engage in supply of Gold (including Gold Plated with Platinum) unwrought and involves some manufacturing process also and in the said activities various inputs viz. Gold dore, silver dore are required; that the said inputs will be procured domestically on payment of GST at appropriate rate; that sometimes the applicant may import raw materials/inputs from overseas market and will be discharging applicable duty and tax including IGST; that the input tax credit has to be availed in terms of Section 16 of the CGST Act, 2017 and Rules made there under and discharge GST on their outward supplies at applicable rate. The said taxes will be discharged through Electronic Credit Ledger as well as through Electronic Cash Ledger in the case if balance available in Electronic Credit Ledger is not adequate.

The applicant has submitted that they also intend to procure Castor oil seeds directly from the Agriculturists who produce the same in their farms and after procuring the said Castor oil seeds they intend to supply in the Domestic market as well as intend to export the same, The applicant and has asked the following question seeking Advance Ruling on the same:

> *"Can the applicant use Input Tax Credit Balance available in the Electronic Credit Ledger legimately earned on the inputs/raw-materials/inward supplies(meant for outward supply of Bullions) towards the GST liability on 'Castor Oil Seed' which were procured from Agriculturists and subsequently meant for onward supply?"*

Observations & Findings : The moot issue to be decided is whether the applicant can use the Input Tax credit available in the Electronic Credit Ledger towards the GST liability on 'Castor Oil Seed' which they intend to supply in domestic market or to export it.

On going through the provisions of Section 17(5) as mentioned herein above,

we find that the inputs i.e. gold dores and silver dores on which the applicant intends to avail input credit are not covered under the excluded provisions of the said section. Further, on going through the provisions of the Section-16 as mentioned above, we find that sub-section(1) specifically mentions that the registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, **be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.** This means that, for the applicant, to be eligible to take input tax credit on any supply of goods or services, the same has to be used or should be intended to be used in the course or furtherance of his business i.e. the nexus/connection between the inputs and the final products manufactured from these inputs is required to be proved.

Ruling : The applicant cannot use the Input Tax Credit Balance available in the Electronic Credit Ledger legimately earned on the inputs/raw-materials/ inward supplies(meant for outward supply of Bullions) towards the GST liability on 'Castor Oil Seed' which were procured from Agriculturists and subsequently meant for onward supply, for the reasons discussed hereinabove.

[2021 (4) TMI 561 – AAR, Gujarat – Aristo Bullion P Ltd.]

2. Mutuality Concept :

Facts : The applicant is a club and a non-profit organization established by the British in the year 1868 as a literary and scientific society. The members contribute by way of subscription fees and infrastructure development fund which is used for the purposes of provision of services and goods and a reading room, library, chambers for accommodating family and guests, a bar and sports facilities. The applicant outsources catering services who supply foods and beverages and run a super market within the premise of the applicant. These facilities are only available for use by the members. These outsourced agencies charge GST on their supplies of food, beverages and sale of goods to members. The applicant bears the cost of such goods and services from the subscription fees paid by the members.

The applicant sought advance ruling on the following questions:

i. Whether amount collected as membership subscription fees paid by the members of the applicant towards facilities provided by the applicant are liable as supply of service under GST?

ii. Whether amount collected as infrastructure development fund for the development and maintenance of the facilities provided by the applicant are liable as supply of service under GST?

Observations & Findings : We have considered the submissions made by the applicant in their application for advance ruling. We also considered the issues involved, on which advance rulings are sought by the applicant, relevant facts and the applicant's interpretation of law.

We observe that the Hon'ble Supreme Court judgment in the case of ***M/s. Calcutta Club Limited [AIR 2019 SC 5310]*** is fully applicable on the applicant. We also observe that Section 108 of Finance Act 2021 brought in a retrospective amendment in Section 7 of CGST Act, 2017, which is reproduced below:

108. Amendment of section 7.

In the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the Central Goods and Services Tax Act), in section 7, in sub-section (1), after clause (a), the following clause shall be inserted and shall be deemed to have been inserted with effect from the 1st day of July, 2017, namely:-

"(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

***Explanation**.-For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;".*

Ruling : The applicant is not liable to pay GST on subscription fees and

Infrastructure development fund collected from the members and this ruling is subject to the amendment to the CGST Act by section 1 of the Finance Act 2021, as and when it is notified.

[2021 (4) TMI 1112 – AAR, Karnataka – M/s Bowring Institute]

3. Reverse Charge Mechanism :

Facts : The applicant is engaged in business of selling guitar training books in United States of America, United Kingdom and Canada through their website. The applicant sends soft copy of the book to the printer located in USA, who in turn prints it and ships to the customers located in USA, UK and Canada. Further, in another business model the applicant is having an agreement with Amazon Inc., who through their website "amazon.com" based on the choice of the customers either prints the books and sells it to the consumers on their own account or will share the link to download the e-books material in an of the electronic devices and pays royalty to the applicant as agreed between the two parties.

In view of the above, the applicant sought advance ruling, on classification of goods and services, in respect of the following questions:

i. Whether the supply of books from the warehouse located in USA (non-taxable territory) to the customers located in USA, UK and Canada (non-taxable territory) without such books entering into India by the applicant are treated as supply under GST?

ii. Whether GST is levied on the shipping charges collected by the applicant from the customers located in USA, UK and Canada (non-taxable territory) for the delivery of books from the warehouse located in USA (non-taxable territory) to the customer located in USA, UK and Canada (non-taxable territory)?

iii. Whether printing charges for printing of books charged by the Printer located in USA (non-taxable territory) is taxable under Reverse Charge Mechanism under GST, where only content is supplied by the applicant?

iv. Whether the services received by the applicant from Foreign service provider such as warehousing of printed books located in USA (non-

taxable territory) is taxable under Reverse Charge Mechanism under GST?

v. Whether input tax credit can be availed, to the extent of inputs and input service on the transaction covered in Question 1 above?

Observations & Findings : In the instant case the goods (books) are supplied by the person from the warehouse located in USA which is outside India (a non-taxable territory), to the customers in USA/UK/Canada, which is outside India (a non-taxable territory). Schedule III, relevant to Section 7 of the CGST Act 2017, at clause 7 specifies that "*Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India"* shall be treated neither as a supply of goods nor a supply of services.

In view of the above, supply of books from the warehouse located in USA (non-taxable territory) to the customers located in USA, UK and Canada (non-taxable territory) without such books entering into India does not amount to supply under GST, in terms of clause 7 of Schedule III, relevant to Section 7 of the CGST Act 2017.

The applicant is not actually shipping the books to the customers but arranging the shipping through his agent outside India and has not furnished any copy of contractual agreement with the warehousing agent to act as pure agent of the applicant to incur expenditure towards shipping of the books. Thus the applicant is in receipt of the service of shipping the books from the warehousing agent outside India.

In view of the above, it is clearly evident that the supplier providing the shipping services to the applicant is outside India, the recipient of the said service i.e. the applicant is within India and the place of supply is in India in terms of Section 13 of the IGST Act 2017. Thus the impugned service squarely qualifies to be an import of service, in terms of Section 2 (11) of the IGST Act 2017, in the hands of the applicant and hence the amount paid by the applicant towards the said shipment service is exigible to GST, under Reverse Charge Mechanism.

Para 4 of the Circular No.11/11/2017-GST dated 20.11.2017 specifies that in the case of printing of books, pamphlets, brochures, annual reports, and the

like, the supply of printing of the content supplied by the recipient of supply is the principal supply and therefore such supplies would constitute supply of service, falling under heading / SAC 9989, subject to the following conditions namely

a) The content is supplied by the publisher or the person who owns the usage rights to the intangible inputs.

b) The physical inputs including paper used for printing belong to the printer.

In the instant case, the content of the books is supplied by the applicant, who owns the said content i.e. usage right to the intangible inputs. Further the physical input i.e. the paper used for printing the books belongs to the printer and hence both the conditions are fulfilled.

In view of the above, it is clearly evident that the supplier providing the printing services to the applicant is outside India, the recipient of the said service i.e. the applicant is within India and the place of supply is in India in terms of Section 13 of the IGST Act 2017. Thus the impugned service squarely qualifies to be an import of service, in terms of Section 2(11) of the IGST Act 2017, in the hands of the applicant. Hence the printing charges for printing of books charged by the printer located in USA (non-taxable territory), is taxable under Reverse Charge Mechanism under GST, where only content is supplied by the applicant.

The warehousing of printed books located in USA is covered under import of service or not. We invite reference to Section 2 (11) of IGST Act, 2017, in terms of which "import of Service" has been defined as a supply of service where

-The supplier of service is located outside India;

-The recipient of service is located in India; and

-The place of supply of service is in India;

In the instant case we observe that, though the supplier is located outside India and the recipient is located in India, the place of supply of service is outside India, in terms of Section 13 of IGST Act 2017. Therefore, the impugned service is not covered under import of service and hence is not exigible to

GST under RCM basis on expenses incurred on warehousing charges of printed books.

Ruling : i. The supply of books from the warehouse located in USA (non-taxable territory) to the customers located in USA, UK and Canada (non-taxable territory) without such books entering into India by the applicant does not amount to supply under GST.

ii. The shipping charges collected by the applicant from the customers located in USA, UK and Canada (non-taxable territory) for the delivery of books from the warehouse located in USA (non-taxable territory) to the customer located in USA, UK and Canada (non-taxable territory) are not exigible to GST.

iii. The printing charges, for printing of books, charged by the printer located in USA (non-taxable territory) are taxable under Reverse Charge Mechanism under GST, where only content is supplied by the applicant.

iv. The services received by the applicant from foreign service provider such as warehousing of printed books located in USA (non-taxable territory) is not taxable under Reverse Charge Mechanism under GST.

v. The input tax credit can't be availed, to the extent of inputs and input service on the transaction covered in first question as the said transaction does not amount to supply under GST.

[2021 (4) TMI 929 – AAR, Karnataka – Guitar Head Publishing LLP]

4. Intermediary Services :

Facts : Dubai Chamber of Commerce and Industry - Liaison Office (DCCI LO) is established by DCCI UAE in Mumbai, Maharashtra. Applicant is also a non-profit organization, formed to represent, support and protect the interests of the Dubai business community in India, by creating a favorable environment, promoting Dubai businesses and by supporting development of business in India. Under the ambit of RBI norms, Applicant shall undertake liaison/ representation activities in India. The applicant, seeking an advance ruling in respect of the following questions.

A) Whether activities performed by DCCI LO shall be treated as supply under GST law?

B) Whether DCCI LO is required to obtain GST registration?

C) Whether DCCI LO is liable to pay GST?

Observations & Findings : The definition of 'intermediary' as defined in the CGST Act. Section 2(13) of the IGST Act is reproduced as under:-

> *"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account"*

Applicant is located in India and represents its Dubai Head Office and as a representative of the Dubai office, the applicant connects businesses in India with business partners in Dubai. Hence it is necessary to find out if the applicant acts as an intermediary because in such a case the provisions of place of supply will be applicable. Therefore, in the context of definition of 'Intermediary' as mentioned above, we now examine the submission made by the applicant that, it **connects businesses in India with business partners in Dubai,** to ascertain whether the applicant is an Intermediary in the subject case.

In view of the fact that the applicant is receiving consideration from its Head Office in excess of expenses incurred by it, the applicant cannot be treated as a non-profit organization. Also, the application is providing intermediary services for which it is liable to pay GST.

Ruling : Question A):-Whether activities performed by 'DCCI LO' shall be treated as supply under GST law?

Answer:- Answered in the affirmative.

Question B):- Whether 'DCCI LO' is required to obtain GST registration?

Answer:- Answered in the affirmative.

Question C):- Whether 'DCCI LO' is liable to pay GST?

Answer:- Answered in the affirmative.

[2021 (5) TMI 813 – AAR, Maharashtra – Dubai Chamber of Commerce and Industry]

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

CA Sanjay Ghiya,
CA Ashish Ghiya

COMMENTARY ON SECTION-5

Section 5: Grant of Registration

(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days

(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or

(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.

COMMENTS

As per this section application for registration of project shall either be rejected or

the registration shall be granted within 30 days of the submission. In case no communication is received, registration shall be deemed to have been granted. If the application is rejected than RERA has to give an opportunity of being heard to the promoter mentioning the reason why registration is not being granted. Once registration is granted, the Authority shall provide a registration number and a Login Id and password for accessing website to the applicant/promoter along with the registration certificate of the project. The registration granted in this section shall be for a period declared by the promoter for completion of the project under section 4(2) (l) (D) of the Act.

As per Rule 6 of Rajasthan Real Estate (Regulation and Development) Rules, 2017, the authority shall grant registration certificate in Form-C to the promoter. If however, application for registration is rejected, then intimation to promoter is to be given in Form-D.

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

NIRMAL UJWAL CREDIT CO-OPERATIVE SOCIETYV/S PRANALI R. PUTTERWAR

Appellant/Applicant seeks condonation of delay of 38 days in filing appeal against the order passed by MahaRERA on 4th January, 20L9.According to Learned Counsel for appellant, appeal came to be filed on 11.04.2019 and delay of 38 days has occasioned for the following reasons:

a) **Appellate Tribunal is based at Mumbai whereas applicant is a Co-operative Society based in Nagpur;**

b) **Applicant Society was required to take decision by consensus regarding preferring an appeal;**

c) **Advocate for the applicant from Nagpur was required to prefer an appeal at Mumbai as at the relevant time appeal against Source complaint was not accepted online.**

Learned Counsel for applicant submits that in view of the reasons, delay being neither intentional nor deliberate may be condoned and opportunity be granted to applicant to place his grievances as mentioned in the appeal.

Learned Counsel for respondent strongly resists the application and submits that from the impugned order itself, it can be seen that applicant is delaying the

registration of the project and considering the delaying tactics application needs to be rejected with costs. Alternatively, Learned Counsel submits that respondent is Nagpur based and lawyer representing the respondent is also coming all the way from Nagpur. Considering the same, reasonable costs be imposed if application is allowed.

The reasons for condonation of delay of the application have been substantiated by an affidavit. It is not denied that applicant is a Co-operative Society and it is Nagpur based. It is not specifically denied that online appeal against the order in source complaint was not accepted at the relevant time and Counsel from Nagpur representing the applicant was required to file the appeal in the Tribunal at Mumbai;

In view of the reasons assigned in the application, tribunal does not find that delay is deliberate or intentional. Hence application is allowed. Delay is condoned.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

MANOJ KUMAR TRIPATHI & ORSVS SARVAWAS HOUSING BHIWADI PVT. LTD

The complainants have filed execution applications, which relate to the non-complainant's project 'Aravali Gardens'. The complaint were decided by the Authority on 04.04.2019, with the direction that the non-complainant shall refund the full amount to the complainant along with interest at the rate of SBI Highest MCLR + 2%, i.e., 8.75+2 = 10.75 per cent as provided in the Rajasthan Real Estate (Regulation and Development) Rules, 2017, i.e., from the date of each deposit. The refund will be made by the non-complainant within 45 days from the date of order.

The matter again come up before the Authority on an execution application having been filed by the complainants on 19.08.2019, stating that the non-complainant has not complied with the aforesaid orders of the Authority and praying that the said orders may be executed.

Notices were issued by the Authority on 26.09.2019 and 27.09.2019 under section 7 and section 63 of the Real Estate (Regulation and Development) Act, 2016 asking the non-complainant promoter to explain as to why per-day penalty should not be imposed on it and why the registration granted to the project in question, 'Aravali Gardens', be not revoked for its default

in complying with the Authority's aforesaid orders.

Authority finds that the non-complainant has failed to submit any reply or put in appearance despite service of notice upon it. As such, we take it that the non-complainant has failed to comply with the Authority's aforesaid orders dated 04.04.2019 without any good reason. Under clause (f) of section 34 of the Act, the Authority is duty-bound to enforce all its orders; and, therefore, would like to insist on the implementation of our orders dated 04.04.2019 and 03.04.2019.

Therefore, in exercise of the powers conferred on the Authority under section 37 and section 40 of the Act, direct the Registrar of the Authority to issue a recovery certificate to District Collector of Alwar to recover from the non-complainant the ordered amount of refund and interest as arrears of land revenue and remit the same to the Authority.

Further, under clause (a) of sub-section (1) of section 7 of the Act, the registration granted to a project is liable to be revoked if the promoter makes default in doing anything required by or under the Act or the rules or the regulations made thereunder. In the present case, the non-complainant promoter has defaulted in complying with the directions contained in the aforesaid orders of the Authority dated 04.04.2019, even though it was required and bound under section 37 of the Act to comply with those directions. And the non-complainant has not filed any reply and has not appeared before the Authority and put up any defence in response to the notice of revocation issued to it.

Therefore, in exercise of the powers conferred on the Authority under section 7 of the Act, direct that the registration of the non-complainant promoter's project 'Aravali Gardens' situated at Bhiwadi (Alwar), granted under Registration No. RAJ/P/20171198 dated 23.10.2017 shall be **revoked, with all the consequences provided in section 7(4) and section 8 of the Act. Registrar of the Authority is directed to issue intimation of this revocation of registration in Form-D prescribed under Rule 8 of the Rajasthan Real Estate (Regulation and Development) Rules, 2017; and to initiate all necessary action pursuant thereto, in accordance with the said section 7(4) and section 8.**

TAMIL NADU REAL ESTATE REGULATORY AUTHORITY

USHA RAVIKUMAR & ORS. V/s M/S CASA GRANDE CIVIL ENGG (P) LTD.

The complainants entered into a construction agreement with the respondent for construction of a flat and the respondent undertook to complete the construction of the flat within 18 months from the date of the agreement. Subsequently the respondent asked the complainants to enter into another construction agreement, by which the construction period was extended till November, 2019.The respondent agreed to pay compensation for the delay. The respondent collected GST at 12% amounting toRs.7,33,020/-. An ongoing project attracts only 5% of GST. Hence, the complainants is entitled for compensation for delay, mental agony and monetary loss and the legal expenses and also refund of the excess GST collected by the respondent.

The respondent contended that they are ready and willing to pay rent from July 2019 to the complainants as per the terms and conditions of the agreement. The issue on GST is directly covered by the advisory of the GST Council dated 19.03.2019 whereby the option has been given to the promoters for the ongoing projects to continue to pay tax at the old rates. For the projects not completed by 31.03.2019, it is not open to the complainant to raise the issue in the second complaint. The claims of the complainants are not sustainable. The complaint is liable to be dismissed.

On the basis of the rival contentions of the parties the following points arise for consideration:

1. Whether the complainants are entitled for compensation for the delay in completion and delivery of the constructed flat as per the dates specified in the agreements and compensation for mental agony and monetary loss and refund of difference in GST rates and litigation expenses?
2. Whether the complainants are entitled for all the reliefs as prayed for?

Answer for Point No. 1

The construction agreement states the time period to complete the entire construction of the flat within is 18 months with a grace period of 3 months and in case of failure to complete, a sum of Rs_5/- sq.ft per month is to be paid as compensation for such delay period to the complainants. The due date for delivery including grace period expired by 11.04.2019. It is not in dispute that the respondent has not completed the construction of the flat of the complainants for delivery by the promised date and the time limit has been extended.

In the counter of the respondent and proof affidavit, the respondent admitted their liability to pay the compensation as agreed by them in the construction agreement entered on 12.07.2017. The complainants claim the compensation for the delay period only from 12.04.2019, i.e., after the due date for delivery was over as per the agreement at the rate provided in the agreement. **As per the allotment letter, the super built up area of the flat allotted to the complainants is 1630 sq.ft. Therefore, the claim of the complainants would be Rs.8,150/- per month from 12.04.2019 till the handing over of the flat is found sustainable .**

So far as the rate of GST applicable to ongoing projects is concerned, as per notification of the GST council, in on-going projects the promoter has an option to pay GST on oldrates, i.e., 8% for affordable residential apartments and 12% on other residential apartments and consequently to avail permissible input tax credit and pass the benefit of the credit availed to the home buyers. **Here, the respondent opted to pay GST on old rates and preferred to avail permissible input tax credit and pass on the benefit of the credit to the complainants. Therefore, the complainants shall have a right toclaim the benefit of the input tax credit after the delivery of the flat from the respondent.**

Answer for Point No: 2

As per answer of point (i), it is held that the complainants are entitled for compensation due to delay as per the terms of the agreement at the rate of Rs.8,150/- per month from 12.04.2019 to till the handing over of the flat to them. Considering the facts and circumstances of the case, compensation for mental agony and in convenience is fixed at Rs.1,00000/- and towards litigation expenses a sum of Rs.25,000/- is fixed. So far as the GST is concerned, the complainants are entitled for the benefit of input tax credit on completion and delivery of the flat from the respondent. The complainants are entitled for the relief as above.

NOTIFICATION

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

No. F.1(146) RJ/RERA/2020/Special IV Dated: 06th May, 2021

Sub: Submission of Annual Report on Statement of Accounts of the Project (APR)

In view of the corona pandemic, vide this Authority's Order No. F1(146)RJ/RERA/2020/852, dated 15th May, 2020, it was ordered that "once an agreement for sale

is executed on a stamp paper of appropriate value, the promoter and the allottee will, pending registration of the said agreement, be allowed to proceed with the said agreement, provided the said agreement is subsequently got registered by the promoter and the buyer, preferably within 4 months, otherwise within 8 months, of execution [as stipulated under section 23 and section 25 of the Registration Act, 1908]. Accordingly, the allottees are allowed to deposit instalments and the banks/ financiers of the allottees are allowed to sanction housing loan for the sold unit and disburse the due amount of loan on the basis of such executed agreement for sale. However, after registration of such agreement within the time stipulated under the Registration Act, 1908, the registered document shall be deposited with the concerned bank/financial institution. These directions would apply only to such agreements which do not involve transfer of possession of the sold unit. These directions shall come into force at once and shall continue to be in force upto 31.03.2021."

Now, in view of the ongoing second wave of corona pandemic, and in exercise of the powers conferred on the Authority under section 37 of the Real Estate (Regulation and Development) Act, 2016 and all other powers enabling it in this behalf, it is hereby ordered that the aforesaid directions, as c tamed in this Authority's Order dated 15th May, 2020, shall continue to be in force upto 31.03.2022.

Though a copy of this order is being endorsed to the Convener of the State Level Bankers' Committee for circulating it among all the banks, the promoters are authorized to submit a copy of this order to the concerned bank/ bank branch or financial institution financing any apartment, plot or building in their registered project.

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ROYALTY AND FEES FOR TECHNICAL SERVICES (FTS)

CA Paresh Shah
CA Mitali Gandhi

1. Introduction

This is the fifth article in the series of taxation of Non-Residents. In the current article we will cover the provisions of taxation of Royalty and FTS earned by a non-resident in India. With increased globalization and the growth of information technology, the import of technical know-how, acquisition of software and technical services is not very uncommon in developing economies like ours, therefore one must be privy with the taxation provisions for Royalty and FTS.

As highlighted in the previous articles, we know that a non-resident is liable to tax in India on that income which is chargeable to tax in India. Income of a Non Resident is chargeable to tax in India if–

i. It is received in India; or deemed to have been received in India

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

Non resident is entitled to the beneficial provision of the Double tax Avoidance Agreement (DTAA).Generally scope of the Royalty and FTS income as provided in Article 12 or 13 andis narrower in the DTAA due to various reasons some of these could be:

i. Narrower definition of Royalty

ii. Tax Rate may be more favorable

iii. Absence of the article on Royalty orFTS or both. Due to such absence of the Article,income may be treated as either Business Income being residual article under the Tax Treaty as it is in the nature of the business Income of the Non Residentwhen such article is absent or revenue may treat it as Income from Royalty or FTS under the Income tax Act, 1961.

iv. Most Favoured Nation clause whereby if favourable treatment is given to any other subsequent tax treaty same will be available to the DTAA under consideration.

v. Treaty with a clause of make available technical knowledge reduces the scope of the meaning of Royalty and FTS

Article 12 and 13 applies to the Non Resident while comparing it with the provisions of the Sec 9(1)(vi) and (vii) of the ITA however if a tax payer has business presence in India in the form of a fixed place permanent establishment, a service permanent establishment, dependent agent permanence establishment, etc. then Sec 44 DA of ITA applies and if beneficial then Income may be taxed as per Article 5 of DTAA and taxability of the tax payer would be governed by computational rule of Article 7 relating to Business Profits provided the right or property towards which the royalty is paid is effectively connected with such permanent establishment.

Concessional Tax rate Is provided for Non Resident where payer of Service is Indian Concern as provided under Sec 115A of the ITA ,however rate of tax deduction could be higher if Sec 206 AA is applicable or where Tax is borne by the Resident Payer for grossing up as required u/s 195A. There may not be any Tax deduction if Income is not chargeable to tax under the DTAA. If Tax is deducted in accordance with the above mentioned provisions then Non Resident is not required to file their Tax Return in India

2. Meaning of Royalty & Fees for Technical Service

In order to understand the taxation provisions, one must first familiarize themselves with the meaning/definition as to what will be construed as Royalty Income and Fees for Technical Services

2.1 Meaning of Royalty

Royalty is generally a consideration received by a person – a creator or an innovator for allowing his work of art or scientific invention to be used commercially. Royalty is generally a payment received by the owner of an intangible right or knowhow under license in any technology transfer.

As per Explanation 2 of Section 9(1)(vi) For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(i) the transfer of all or any rights (including the granting of a licence) in

respect of a patent, invention, model, design, secret formula or process or trade mark or similar property

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB (presumptive taxation of a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils)

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting **[**, but not including consideration for the sale, distribution or exhibition of cinematographic films**]** ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).

2.2 Analysis of Section 9(1)(vi)

It may be noted that

a. That the clause(i) starts with word "Transfer of all or any rights"whereas clause(iii)starts with the words "Use of" with almost same phrase subsequent to these words

b. Subclause (ii)and(iv) both commences with the word imparting of any……

c. Sub clause (iva) starts with the "use" and "right to use" both together unlike the words only Use at subclause (iii)

d. The sub clause (v) starts with the Transfer of all or any rights in respect of any …..

e. The subclause (vi) do not deal with any rights, information and Property but deals with only services

In the context of clause(i) and(iii) it may be pertinently noted that there cannot be useof the stated property unless right to use are transferred.

In view of the fact that "use" cannot precede unless rights are transferred in respect of use of such property, mere use incidental to any service contract without transfer of rights will be outside the scope of the inclusion within the meaning of clause (iii) or (i).

2.2.1 **Meaning of the transfer of the rights in a Property or a sale**:

An appropriation takes place where the goods are situated at the timeof the appropriation, not where the contract of sale is made, or where one party assents to an appropriation by the other. An authority given by one party to the other to appropriate the goods is an implied assent by the party giving the authority to a subsequent appropriation by the other, provided the appropriation is made in accordance with the contract..

In the context of the Sale of Goods Act, It may be noted that levy of tax is on transfer of right to use any goods. The tax is not on the actual use of the goods; the hirer may use the goods during the period specified in the contract in exercise of the right acquired thereunder or he may not use them at all.

2.2.2. **Lease of Equipment**:

If there is no possession or the control of the property with the payer, there may not be any user's right with the payer but use may be by the service Providerhimself for the provision of the service to the payer. Right to use or the Use of Process V/s use of the Transponder V/s the use of the transponder by the service provider himself, is very well distinguished in the Asia Sat's decision.

Transfer of all or any rights contemplated in clause (i)and(v) are mutually exclusive rights available from those assets as referred therein only and rights of a particular property covered by a clause is specific and not intended to be covered more than one clause.

In any case of the matter, each clause is employed to target the specific character of income and one cannot try and fit the by pick and choose method ie if it is in the nature dealt with by a particular clause it cannot be fitted in any

other clause unless context so infer.

2.2.3. **Imparting of the information**

Knowledge and experience is required to be Secret and one which is confidential, any information available in public domain or available to all at a price is not covered here but one which is of the payer and not of the other parties are the essential of the information in respect of the knowledge or the experience. In respect of the equipment, it has to be purely hire of the equipment but not the service where service provider employs the equipment. Sub clause (iva)dealing with the equipment lease excludes in it's scope the consideration received for services or hire in connection with the exploration Contract referred to in Sec 44BB.

It is difficult for Non Resident to offer income on net basis as majority of the expenses are incurred outside India and hence tax rate is fixed after considering the estimated expenses.It will be interesting to note here that Sec 44BB exclusion is not for the purpose of exempting such income but to allow the Non Resident Payer to pay taxes on a net basis unlike it is on a Gross basis under Sec 9(1)(vi).

2.2.4 **Copy Rights/Literary work**

Copy right /Computer software is also not defined in the I.T. Act although provided as explanation 4 inserted with retrospective effect from 1.4.1976, clarificatory in nature to Section 9(1)(vi) and not in the definition of Royaltyand therefore meaning may be imported from the Copy right Act, 1957 may be for the purposes of the Act and certainly required for the purposes of the treaty ,see Gracemac Corporation v/s ADIT

[2010] 42 SOT 550 (Delhi).

Generally license of the property with artistic or literary work refers to the manner and arrangement in which the work is embedded as IPR. These rights are generally not available to acquirer either under the license or the sale arrangement because License is subject to retention of the copy right ownership and sale is of Copyrighted article without affecting/parting with the copy rights.

2.3 Illustration to explain the above definition

Income generated in the nature of Royalty Income	Under Sub Clause	Explanation
Illustration 1: XYZ Scientific Pte. Ltd (XYZ) (A Singapore company)has formulated a vaccine for covid19. Patent lies with XYZ. How will the Income generated be treated		
With respect to patent, invention, model, design, secret formula or process or trade mark or similar property means		
XYZ has transferred the License of their patented vaccine to Berum India for exclusive rights to manufacture and sell the vaccine in Africa under the name of XYZ	(i)	Transferring of all or any rights (including granting of license) of Patent
Berum India manufactures vaccines in India, in order to register their vaccine in the name of XYZ , XYZ assisted them by imparting requisite information and data tested on human being on the working of the Vaccine	(ii)	Imparting any information concerning their work or use
If XYZ hastransferred the right to License the patent to manufacture the vaccine and distribute the vaccine in Africa. Berum India pays royalty on sale of vaccines sold in Africa orwill not require additional licence to use the Patent as right to transfer the License will include the right to use but such right to use Patent cannot be for any other territory	(iii)	Actual Use of Licenses Patent for registering the Vaccine
With respect to technical, industrial, commercial or scientific knowledge, experience or skill		
Berum India is relatively new in the vaccination market. It regularly consults XYZ for gaining information pertaining to the technique of producing the vaccine with various manufacturing parameters the expiry parameters of the vaccineThe obstacles faced by XYZ in their manufacturing process experience. XYZ would charge a fees for imparting any information to Berum India in respect of the Licensed Patent .	(iv)	Imparting of any Informationwhich are confidential to them other than what is available in the public Domain
With respect to any industrial, commercial or scientific equipment		
Illustration 2: Hydro Maritime FZE, a company in UAE, dry leases out its Vessels (Ships) to India Maritime LLP for its cargo business in and around India. India Maritime pays a lease rental to Hydro Maritime for lease of the vessel. Such lease rental is in the nature of Royalty (read with clause 2.6(v))	(iva)	Use or Right to Use…Equipment
With respect to any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting		
Illustration 3: R&B a music composer in Netherlands is a famous music composer known globally, all his music is copyrighted. MrShyam Varma, an Indian director has requested R&B to use one of his compositions in an upcoming movie. R&B has agreed to let MrShyam use his composition with or without modification but at a certain fee. Such fee paid will be in the nature of Royalty	(v)	Transfer of all or any rights in respect of use(no license to right to use) of literary or the Artistic Work.

2.4 Broadly, the following conditions need to be satisfied for a payment to be characterized as "royalty" –

(i) The amount must not be in the nature of capital gains;

(ii) The recipient of the Royalty must be the owner/licence holder of the underlying asset in connection with which the royalty is received;

(iii) The transaction must not be that on an outright sale basis

2.5 Royalty income is deemed to accrue or arise in India if payable by

(i) the Government ; or

(ii) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(iii) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

If Resident Payer has a Business outside India or any source of Income outside India , if Royalty is paid in respect of such a business then it is not chargeable to tax in the hands of the recipient of such an Income , question of it's chargeability in the hands of Non Resident for his business outside India does not arise.

2.5.1 **Specific and General Provisions**

The structure and historical development of it's evolution of Sec 9 also suggest that Sec 9(1)(1) is general in nature while other Sec from Sec 9(1)(ii) to 9(1)(vii) is of a specific nature and hence while examining the nature of Income Specific provision will take priority over the general. This was held in decision **Commissioner Of Income-Tax vs Copes Vulcan Inc. on 25 February, 1985,1987 167 ITR 884 Mad and followed in subsequent decisions.**

2.6 Retrospective Amendment brought in by FA 2012

2.6.1. **Explanation 4**.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

2.6.2. The explanation applies to Sec 9(1)(vi) and not specifically to clause dealing with Copy rights. Hence, the computer software has been recognized as a separate item not only in2nd proviso to clause (vi) but in Explanation 4 also and has been included in the definition andwithin the scope of the words 'right', 'property' or 'information'.The same has not been included inthe meaning and scope of the term copy rights or the 'literary work' under clause (v) to Explanation 2 dealing with copy rights , scientific, artistic and the literary work. The license agreements found in case of software are thus the conditions of the sale of theproduct, a work a keen to a copy righted article and may not be termed as a grant of license to use the product.

2.6.3. **Implications of Explanation 4**

The main reason for inserting Explanation 4 was to put the long standing dispute of whether by making payment for software, the licensee gets rights in the "copyright" of the software and can the same be taxed as royalty, by inserting payment for software in the definition of royalty the lawmakers have intended to clarify the dispute. However considering the fact that a non-resident assessee can opt to be governed by the Act or the DTAA whicheveris beneficial, the dispute still continues and in most cases recourse to Article 3(2) of the treaty to find a meaning of the word or the phrases will lead to the meaning under the Copyright Act,1957, for the purposes of the treaty because Copy right is not defined under the Income Tax Act within the definition of the Royalty.

As per the provisions of section 2(o) of the Indian Copyright Act, 1957 the term 'literary work' includes computer programs,tables and compilations including computer data base. Therefore, the computer software has been recognized as a copyright work in India, if they are original intellectual creations.

"Computer programme" as defined in the Copyright Act, means a set of instructions expressed in words, codes, schemes or in any other form, including a machine-readable medium capable of causing a computer to perform a particular task or to achieve a particular result. The words 'schemes or in any other form' would seem to indicate that the source code and object code of a computer programme are entitled to copyright

protection. It may be noted here that copyright protects the expression of an idea and not the idea itself. The ideas embedded in the software are therefore not protected but the ways by which the ideas are expressed in the source code are protected. These license agreements in case of software are thus the conditions of the sale of the

product License and cannot be termed as a grant of license to use the product as whatever is transferred is forever.

The above dispute has finally been put to rest by the landmark judgment of the honorable Supreme Court, which said that payments made to non-resident for import of software is not a royalty (explained in detail below in clause 3.1)

2.7 Explanation 5 of Section 9(1)(vii)

Royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(i) the possession or control of such right, property or information is with the payer

(ii) such right, property or information is used directly by the payer

(iii) the location of such right, property or information is in India.

This is introduced mainly to target the dry lease or wet lease of the Equipment when the equipment is not in the control of the payer of the service/property hire

2.7 .1 **Implications of Explanation 5**

Explanation 5 seeks to clarify that once a right, property or information is deemed to be covered under Explanation 2, the interpretation would continue to remain so irrespective of possession or control of the right, property or information, direct or indirect use of the right, property or information or location of the right, property or information.However the retrospective changes brought in by FA 2012 cannot supersede the provisions of DTAA. The internationally accepted and judicially recognized requirement that use' involve control / possession of or physical access to the Industrial, Commercial or Scientific equipment should vest with the user cannot be overridden by the domestic laws

2.8 Explanation 6

For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret

2.8.1 **Implications of Explanation 6**

While the above Explanation does away with the requirement of the process being secret,[(as referred in 9(1)(vi)(i)] it may be relevant to consider the decision of the Calcutta High Court in MV Philips v. CIT [1988] 172 ITR 521 which held that, once specialized knowledge becomes public; the person loses the exclusivity in respect of such special knowledge and hence, loses the right to receive any royalty in respect of the same.Thus, for a payment to be classified as royalty, 'exclusivity' of the subject matter is of crucial relevance.

Revenue in Asia Sat contended that the issue to be decided was whether the customers were merely using a physical asset or were they using the process installed in the transponder.

It was argued by the Assessee and approved by the court that the term ¯process occurring in Clause (iii) of Explanation 2 to Section 9(1)(vi)means a process which is an item of intellectual property. The process employed in the transponder of a satellite, i.e., of changing the frequency and amplifying the signal is not at all an item of intellectual property because that process has been in the public domain for more than half a century. The payment received by AsiaSat from its customers is, therefore, the payment made by a Customer in a chafffeur driven Car as agreed and approved by the court.

3. Meaning of Royalty: Judgements

(i) Standard Services :In case of DDIT, Pune vs John Deere India (P) Ltd (2019) , ITAT Bench Pune held that receiving I.T. services from its associate entity outside India and making payment of IT support charges, i.e., internet charges, use of e-mail charges, back up support services, etc. was not in the realm of Royalty as there was no technology was made available to assessee by its foreign associate company.

The assessee company also received lease line services for transmitting data

on payment of charges. It was held that since the assesse was only using the lease line for transmitting data and there was no lease of any equipment by foreign concern of assessee to it, lease line charges paid by assessee could not be considered as 'royalty' a normal business services not chargeable to tax in the absence of any business connection in India U/S 9(1)(i)

(ii) Service in respect of the Property: In case of Godaddy.com LLC v. ACIT [2018] (Delhi – Trib.), the asssessee company was engaged as accredited domain name registrar authorized by Internet Corporation for Assigned Names and Numbers. The assessee had income from domain registration fees which was claimed to be not taxable in India. Apex Court in the case of Satyam Infoway Ltd. v. Siffynet Solutions (P.) Ltd. AIR 2004 SC 3540. In the instant case, the Supreme Court held that the domain name is a valuable commercial right and has all the characteristics of a trademark and, accordingly, domain names are subject to legal norms applicable to trademarks. Thus, the rendering of services for domain registration was equivalent to rendering of services in connection with the use of an intangible property which was similar to trademark.

Refer Sec 9(1) (V) Explantion 2, clause VI, Rendering of services in connection with the activities referred to at I to iv …….

(iii) Information and Experience :In case of DIT v. HaldorTopsoe [2014] (369 ITR 453) (Bombay HC) it was held that that every case imparting of any information concerning technical, commercial, industrial or scientific knowledge, expertise of skill by itself has not been brought into the definition of royalty. For instance, in a contract for supply of equipment, giving information so as to guide the buyer to install the equipment at site and thereafter to use it would not be royalty.

(iv) Scientific Equipments/Hoisting Services : In case of DDIT vs Savvis Communication Corporation (2016), The Mumbai Tribunal held that payment received for providing web hosting services though involving use of scientific equipment cannot be treated as consideration for use or right to use of scientific equipment, which is sine qua non for taxability under section 9(1)(vi) read with Explanation 2 (iva). Similar view was taken by ITAT Mumbai in case of ITO vs. People Interactive (I) P Ltd

wherein Shaadi.com's payment for web hosting charges paid to Rackspace US by shaadi.com is not royalty u/s 9(vi). The ITAT held that no physical access or right to operate equipment situated outside India was given to assessee and payment is not for use of equipment but for hosting services

(v) Dry Lease :The I-T Appellate Tribunal in the case of West Asia Maritime Ltd vs ITO (111 ITD 155) and Poompuhar Shipping Corp. Ltd vs ITO (109 ITD 226) has held that ships are equipment. So lease rentals paid by a resident to a non-resident should be subject to tax in India, but tax treaties with countries such as Sweden, Israel, the Netherlands, Greece and Belgium do not consider payments for the use of or right to use ICS equipment as royalties. Further, the treaty executed with Ireland excludes aircraft from the definition of royalties. Accordingly, in case of such treaties, payments for the use of or right to ICS equipment should not be considered as royalties.

3.1 <u>Import of software is not a Royalty:</u>

(i) The Supreme Court recently on March 2nd, 2021 ruled that payments made to non-residents for software purchase can't be taxed as royalty, setting at rest a long-standing row. Settling the 20-year dispute, a Bench led by Justice RF Nariman said "…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 the End-User Licence Agreements/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 (resident Indian importers) referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under Section 195 of the Income Tax Act."

In all there situation there was no transfer of right in the copy right of the software as it either always belonged to Non Resident, as License to the end user has always been the sale and a transaction of the whole sale with the distributor.

(ii) A potential repercussion of the judgement that may require further consideration by affected businesses is the effect on liability for the

equalisation levy (EQL). As from 1 April 2020, the scope of India's EQL was extended to introduce a 2% levy on consideration received or receivable by a nonresident "e-commerce operator" from an "e-commerce supply of goods or services" in India. A proposed amendment to the levy in the 2021/22 union budget provides that only those payments not otherwise taxable as royalties or fees for technical services would be subject to the EQL. Since software license fees no longer are taxable as royalties following the Supreme Court's decision, it must be examined whether the fees would be subject to the 2% EQL.

4. Difference between Royalty and FTS

Basic differences between royalty and FTS is summarized below:

(i) In FTS, the supplier undertakes and guarantees result whereas Royalty is basically for letting of IPRs or for imparting someexclusive information and knowledge. Consideration for services connected with commercial licensing of rights andknowhow are also in the nature of Royalty.

(ii) The consideration for the services not connected with royalty may fall in the category of Fees for Technical Services (FTS).

(iii) Generally, in the case of Royalty, the owner enables the user to use the technology. In FTS, the owner uses his technology to perform some service for a consideration excluding the standard Services where there is no transfer of knowledge or skill.

(iv) Royalty is usually paid for some innovation or creation, whereas FTS is paid for providing specialized services

5. Meaning of Fees for Technical Services

As per Explanation 2 of Section 9(1)(vii) fees for technical services" means any consideration (including any lump sum consideration) for the **rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel)** but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"

The meaning of managerial, technical or consultancy is not defined under the ITA and hence ordinary meaning will have to be employed

to understand the nature of the services as there could be number of services outside the scope of the section i.e., neither consultancy, nor managerial, nor technical as per GVK Industries Ltd. [2015] 371 ITR 453 (SC)).

i. The expression "consultancy" involves giving of an advice/opinion/ recommendationor counseling or advisory services by a professional. Expertise in a technology isnot essential while providing consultancy services. However, an element ofexpertise or special knowledge on part of the advisor is essential.Advisory service which merely involves discussion and advice of a routine nature cannot be classified as consultancy services. Refer - Intertek Testing Services India (P) Ltd. [2008] 307 ITR418 (AAR)).

ii. The ordinary meaning of the term "technical"involves the application of specializedknowledge, skill or expertise with respect to a particular art, science, profession oroccupation.The word technical is involving or concerning applied and industrial sciences.Consultancy is generally understood to mean advisory services. Further, itmay be fair to state that not all kind of advisory could qualify as technical. services. For any consultancy to be treated as technical services, it would be necessary that a technical element is involved in such advisory. Thus, theconsultancy should be rendered by someone who has special skills andexpertise in rendering such advisory. (Skycell Communication Ltd. vs DCIT[2001] 251 ITR 53). The term 'technical services' takes within its sweep services which wouldrequire the expertise in technology or special skill or knowledge relating to thefield of technology. As per the concise oxforddictionary, the term 'technicalservices' means belonging or relating to art, science, profession or occupationinvolving mechanical arts and applied sciences. Refer Le Passage to India Tours & Travel (P) Ltd. [2014] 369 ITR 109 to distinguish technical service from consultancy services.

Thus these phrases are overlapping in nature and one can consider their ordinary meaning to distinguish one from another.Further, managerial service is also in the nature of consulting services but it may be easier to distinguish managerial services from other

two as it is in the nature of management, administrative, supervisory etc.

iii. The expression "managerial" service needs to be considered in a commercial parlance. It has been interpreted as follows:

It signifies service for management of affairs or services rendered in performing management functions.It involves controlling, directing or administering the business. It means managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in light of the procedures so laid down. A "managerial" service has a definite human element attached to it or an application of human mind or can only be rendered with human interface/human intervention. It will be interesting to witness as to how Artificial Intelligence development (AI Services) will modify these general principles and the understanding.

6. Nature of Services - Judicial Precedents

(i) Consultancy Services - In case of GVK Industries Ltd. [2015] 371 ITR 453 (SC),the Honorable Supreme Court held that Financial Services provided by a non-resident is treated as consultancy services and taxable as FTS, since the non resident company providing the service has the skill acumen and knowledge in the specialized field to provide such services.

(ii) Technical Services - As per Delhi ITAT in Le Passage to India Tours & Travel (P) Ltd. [2014] 369 ITR 109, it is held that not all kinds of advisory qualify as technical services. Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such advisory which is in the nature of pure and/or applied science

(iii) Standardised Facility :The Madras High Court in the case of Skycell Communication Ltd. Vs. DCIT (2001) 251 ITR 53 (Mad) had examined the scope of term technical services and held that installation and operation of sophisticated equipment with a view to earn income by allowing customers to avail of the benefits of the user of such equipments does not result in the provision for technical service to the customer for a fees .

(iv) Intermediary Services: In case of Digi Drives (P.) Ltd vs. ACIT (2021),. ITAT Delhi gave a ruling in favour of the assesse, stating that mere

rendering of service of procurement of export orders by a non-resident company for Indian company does not fall in category of managerial/ consultancy services as explained in Explanation 2 to section 9(1)(vii).

(v) Grading Services: In Diamond Services Intl. – Mumbai High Court held that Consideration for grading of diamond does not result in FTS as it cannot be said to have transferred its experience, knowledge or skills to the customer. Also, payment can be regarded as 'fee for technical included services' only if the twin test of rendering services and making available technical knowledge at the same time is satisfied[

7. <u>Income of a non- resident will be deemed to accrue or arise in India under clause 9(1)(vi) and 9(1)(vii) whether or not the</u>

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.

The clause (i)above was inserted in the Act post the decision of the Supreme court in Ishikawaji Harima case, however it has been held in subsequent decisions of various courts in Jindal Thermal Power Company Ltd. vs. DCIT [2009] (225 CTR 220) (Karnataka HC), Clifford Chance vs. DCIT [2008](318 ITR 237) (Bombay HC), and M/s Bovis Lend Lease (India) Pvt Ltd vs. ITO [2009]

(127 TTJ 25) (Bangalore ITAT), that this**2.** amendment brought in 2007 by way of explanation to Sec 9(2) is of no consequences and law laid down by the supreme court still holds good. The position was finally settled when law was again amended in 2010 by inserting (ii) above that FTS is chargeable to tax irrespective whether Non Resident has rendered the services in India or not.

8. <u>Taxation of Royalty and FTS in India with PE.</u>

Section 44 DA states 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" and sections 28 to 44C of the act will be applicable and all the deductions provided in the Act will be available.

It may be noted that any services rendered by a Non Resident in accordance with the policy of the Government of India will qualify as the one pursuant to the agreement as refereed above even it is rendered after such date.

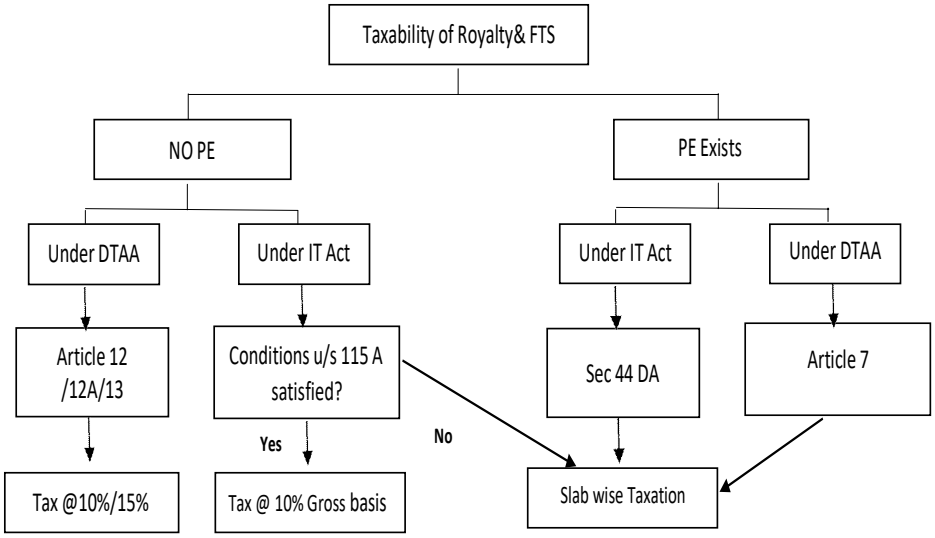
8.1 Tax Rates and Compliance:

(i) As per section 115A, Income from Royalty and fees for technical services earned by a non-resident (not being a company) will be taxed at the rate of 10% (plus Surcharge and Cess)

(ii) No deduction under chapter VI-A is permitted If tax is deducted under section 115A

(iii) Taxability of Royalty& FTS

It shall not be necessary for an assessee to file his income tax return under section 139 if his income only comprises of incomes specified under Section 115A (which includes Income from Royalty and Fees for Technical Services), provided accurate TDS under section 195 has been deducted. Sec 115 A may apply to net basis of taxation



8.2 Higher rate of Tax Deducted at Source

As per Sec 206AA of the ITA in case a non-resident tax payer does not furnish his/her PAN Card to the person responsible for deducting TDS, the deductor will deduct TDS higher of the following rates:

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

b. at the rate or rates in force; or

c. at the rate of 20%.

Rule37BC (1) In the case of a non-resident, not being a company, or a foreign company (hereafter referred to as 'deductee') and not having permanent account number the provisions of section 206AA shall not apply in respect of payments in the nature of interest, royalty, fees for technical services , dividend and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified to the deductor such as TRC, Tax Identification number,address and the contact number and email id. Thus business income with PE or otherwise is not covered by the Rule.

9. Income Tax Act and DTAA

9.1 Definition of Royalty in DTAA.

(i) As per OECD Model

a. Article 12 (2) as per OECD Model – The term 'royalties' as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

b. Article 12(1) of OECD Model - Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

(ii) As per UN Model

a. Article 12 (3)of UN Model - The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television

broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

b. Article 12(1) & 12(2) of UN Model - Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

Certain issues in connection with "Beneficial Owner" of the Royalty or the FTS has not been discussed here in the interest of the simplicity including certain others such as interpretation/ characterization of the Royalty or FTS as Business Income (when the article dealing with one of them or both is absent in the DTAA) , MFN clause, Net Basis of Taxation and the PE issues, payer is Resident of India or the Indian concern in the context of the turnkey project, Payment by Non Resident to another Non Resident on behalf of the Resident without claiming any reimbursement from Resident.

9.2 Definition of FTS – Article 12A of UN Model

The term "fees for technical services" as used in this Article means any payment in consideration or any service of a **managerial, technical or consultancy nature**, unless the payment is made:

a. to an employee of the person making the payment;

b. for teaching in an educational institution or for teaching by aneducational institution; or

c.by an individual for services for the personal use of an individual.

9.3 Treaty provisions and Income Tax Act

(i) The definition of "royalty" underthe OECD Model Convention is narrower

when compared with the UN ModelConvention. In view of the retrospective amendments made to section9(1)(vi) by the Finance Act 2012 with regard to royalty, widening the scopethereof, the narrower definition as contained in the tax treaties could come to the rescue of the taxpayer.

(ii) The OECD Conventionprovide for taxation of royalty income in thestate where person who beneficially owns the IPR is resident. Inthe UN Convention, the source (on income) state also has taxationrights, and the resident country may reserve its taxation right. Also,the tax is imposed by the source state at a pre-negotiated percentageof the gross amount. As per Section 9(1)(vi) and (vii) of Income Tax Act, Royalty/ FTS income is taxable in India if service is used/utilized in India. Place of rendering service not relevant. Since India is traditionally a net importer of technology andhence a payer of Royalty, it has followed the UN Model Conventionin its negotiations with most of the countries

(iii) It isseen that the OECD convention does not have any clause onequipment royalty, which is available in the UN Convention. Rentalsfor commercial and scientific equipments fall under the category of equipment royalty

(iv) Fees for Included Services

India –US tax treaty incorporates a concept of Fees for Included Services (FIS). As per Paragraph 4 of Article 12 of India US tax treaty the definition of FIS is as under:

For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

The term 'make available' means that the person acquiring the technical

service is enabled to independently apply the technology. The word 'enable' is used in the sense that the technical services should be such that they make the recipient able or wiser in the subjectmatter, thus it reduces the scope of the FTS

For instance, a US resident (X) "makes available" technical knowledge, skill etc. to an Indian resident (Y),when X sends its experts to India to show Y's engineers how toproduce an extra strong wall board, or when X modifies Y's formulaspertaining to oil refining process, to eliminate cholesterol in refinedoil and trains Y's employees in applying these new formulas.

10. Conclusion

The subject has been the most controversial one and arguably, the largest number of court decisions are related to this topic. However one of the issues still unsettled is on employment services treated as FTS. Although the income from the fees for technical services is clearly distinguished from the purview of the employment income, it has become a most litigated subject, particularly when foreign company deputes technical personnel to provide consulting services to the Indian concern under the supervision of the Indian concern as an employer, while continuously remaining on the payroll of the foreign company.It has been always the attempt of the Revenue to tax it as Fees for Technical Services while Tax Payer would want to avoid the employee's presence as that of the foreign company and treat the payment made to foreign company as that of remuneration to the deputed technical personnel.

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HIGH COURT OF TRIPURA

Tirthamoyee Aluminium Products

v.

State of Tripura

AKIL KURESHI, CHIEF JUSTICE AND S.G. CHATTOPADHYAY, J.

W.P(C) NO.1108 OF 2018 MARCH 9, 2021

In case goods are accompanied by an invoice as also an E-way bill, and proceedings under section 129 should not be initiated if defect in E-way bill was as a result of a minor oversight and a clerical error and it was solely on account of incorrect distance being shown while generating E-way bill.

JUDGMENT

Akil Kureshi, CJ. - Petitioner has challenged an order dated 5th November, 2018 passed by the Inspector of State Tax demanding Central Goods and Service Tax (CGST, for short) of Rs. 1,48,425/- each and a similar sum under State Goods and Service Tax (SGST, for short) with penalties of Rs. 4,12,291/- under CGST and SGST Act, 2017.

2. Brief facts are as under:

Petitioner is a proprietary concern and is engaged in the business of manufacturing aluminium utensils and its unit is located at Agartala. The petitioner purchased certain aluminium products from Hindalco Industries Ltd. which is a Government of India company for a sum of Rs. 19,46,014/- and would be supplied from Kolkata to be transported to Agartala by road. Invoice was generated by the Hindalco on 25-10-2018 which showed that the goods would be transported from Howrah west, Kolkata and would be delivered at the petitioner's unit at A.D Nagar Industrial Estate, Agartala. Hindalco also issued a Test Certificate and Packing Slip of the goods under transportation which gave full breakup of the number of items, their weight, chemical compositions as also the number of the truck in which the goods would be transported. In terms of the provisions of the GST Act and Rules thereunder, the consignor also generated the E-way bill from the official portal of the State agencies on 25-10-2018. According to the petitioner, due to a clerical error the distance from the place of origin to the ultimate destination *i.e.* from Howrah to Agartala, was shown as 470 Kms. instead of actual distance which was 1470 Kms. The petitioner would point out that as per sub-rule (10) of Rule 138 of the Central Goods and Services Tax Rules, 2017, a transporter would have time of one day to transport the goods for every 100 Kms. of distance require to be travelled. The system thus automatically generated the validity period of five days for the E-way bill since the distance, as noted earlier, was erroneously shown as 470 Kms. instead of 1470 Kms.

3. The goods arrived at Tripura border at Churaibari Check Post on 5-11-2018. The inspecting agency intercepted the goods and issued a memo of detention on the ground that the transporter had not produced valid E-way bill. On 5-11-2018 itself, a show cause notice was issued by the Inspector of State Taxes calling upon the petitioner to pay total GST of Rs. 2,96,850/- and penalty of Rs. 8,24,582/- under sub-clauses (*a*) and (*b*) of sub-section (1) of Section 129 of the CGST Act, 2017. He required the petitioner to appear before him on 19-11-2018 at 10.45 a.m. Strangely, having issued notice to the petitioner to appear on 19-11-2018, the Inspector of State Tax passed

the impugned order on 5-11-2018 itself and confirmed the principal tax demand with penalties as noted. This order, the petitioner has challenged on the ground that validity of the E-way bill had expired on account of a clerical error which would not result into any tax liability. The penalty obviously was wrongly demanded.

4. Learned counsel for the petitioner in addition to making factual submissions and taking us through the statutory provisions applicable, also drew our attention to the affidavits filed by the Central Government as well as Hindalco in which both the said respondents have supported the case of the petitioner of minor clerical error which would be condoned.

5. On the other hand, learned special counsel Sri A. Nandi appeared for the State Government and opposed the petition contending that the transporter was carrying the goods without valid E-way bill. The Tax Inspector was within his right to demand taxes and penalties. In any case, statutory appeal against the impugned order is available which the petitioner has not availed of.

6. Having thus heard learned counsel for the parties and having perused documents on record, it emerges indisputably that the defect of the goods in transporting without valid E-way bill was as a result of a minor oversight and a clerical error. Things which are not seriously disputed are:

(i) That the goods were being transported from Howrah to Agartala;
(ii) Approximate distance between the two places is close to 1500 Kms;
(iii) Mentioning the distance of 470 Kms was thus clearly a typographical error;
(iv) The goods were sold by Hindalco which is a Government of India company;
(v) The goods were duty paid and all taxes were already collected by the seller which formed part of the bill which the petitioner would pay;
(vi) It was solely on account of incorrect distance being shown while generating the E-way bill that at the rate of one day per 100 Kms., the E-way bill was generated with the validity of 5 days instead of 15 days' validity which should have been provided had correct distance been mentioned.
(vii) There is no dispute that the goods were sold by way of interstate sale and on such basis, applicable tax was paid.

7. In view of such undisputable facts, we do not think that the Inspector of State Tax had the power to demand GST with penalty. Central Board of Indirect Taxes and Customs, has issued a circular dated 14th September, 2018 clarify the manner in which such clerical errors would be dealt with. The relevant portion of this circular reads as under:

"2. Various representations have been received regarding imposition of penalty in case of minor discrepancies in the details mentioned in the e-way bill although there are no major lapses in the invoices accompanying the goods in movement. The matter has been examined. In order to clarify this issue and to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as „the CGST Act?) hereby clarifies the said issue hereunder.

** ** **

5. Further, in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under section 129 of the CGST Act may not be initiated, *inter alia*, in the following situations:

(*a*) & (*c*)** ** **

(*d*) Error in one or two digits of the document number mentioned in the e-way bill;
(*e*) & (*f*)** ** **

6. In case of the above situations, penalty to the tune of Rs. 500/- each under section 125 of the CGST Act and the respective State GST Act should be imposed (Rs.1000/- under the IGST Act) in FORM GST DRC-07 for every consignment. A record of all such consignments where proceedings under section 129 of the CGST Act have not been invoked in view of the situations listed in paragraph 5 above shall be sent by the proper officer to his controlling officer on a weekly basis."

8. As per this circular thus in case the goods are accompanied by an invoice as also an E-way bill, proceedings under section 129 of the CGST Act, 2017 should not be initiated if there is a error of one or two digits in a document number mentioned in the E-way bill. In such a situation, at best, penalty of Rs. 500 & 1000/- under State and Central GST may be collected under section 125 of the Act. In tune with these clarifications, even the Central Government in its reply has stated that:

"4. That, as to the contents of Para 5 of the instant writ petition the answering respondent submits that the E-way Bill under reference showed the place of dispatch of goods to be Howrah, West Bengal, 711302 and place of delivery at Agartala Tripura- 799003. Only error recorded was the wrongful depiction of distance in Kilometers. It is seen that 470 kilometers has been shown in place of 1470 kilometers. This is a minor lapse on the part of the consigner/transporter and the procedure to deal with such incidence is spelt out in CBEC, Government of India, Ministry of Finance, Department of Revenue under Circular No. 64/38/2018-GST, dated 14-09-2018 issued form file No. CBEC/20/16/03/2017-GST."

9. Hindalco has also filed an affidavit in which it is stated as under:

"9. That with reference to the Statements made in paragraph 5 of the writ petition, I say that it is true that the Consigner *i.e.* Hindalco's godown issued e-way bill on 25-10-2018 showing 470 Kms as distance whereas the actual distance from Howrah to Agartala is 1470 Kms.

10. That with reference to the Statements made in Paragraph 6 of the writ petition, I say that in the e-way bill at page 30 of the writ petition it is categorically stated that the goods were being dispatched from Howrah, West Bengal and being delivered to Tirthamoyee Aluminium Products at Agartala, Tripura - 799003. I further say that the distance between Howrah to Agartala is approximately 1500 Kms and due to clerical error the distance was reflected as 470 Kms instead of 1470 Kms because of which the validity of the e-way bill expired on 30-10-2018."

10. In view of such facts, we do not find that it is a fit case where we should relegate the petitioner to appeal remedy, more importantly when the order passed by the Inspector of State Tax suffered from gross irregularity of no hearing been granted to the petitioner. As noted, the said authority issued a notice of personal hearing making it returnable on 19-11-2018, long before that
however, on 5-11-2018 *i.e.* a date on which he issued the notice, he passed a separate order confirming the demand of tax with penalty. This was wholly impermissible since he does not treat this order as a tentative demand but as a mandatory demand.

11. In the result, impugned order dated 5-11-2018 is set aside. Petition is disposed of accordingly. Pending application(*s*), if any, also stands disposed of.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani Vs. … Petitioner
Union of India and others … Respondents

Mr. Bharat Raichandani a/w. Ms. Pragya Koolwal i/b. UBR Legal for Petitioner.
Mr. Anil C. Singh, ASG a/w. Mr. Pradeep S. Jetly, Senior Advocate and Mr. J. B. Mishra for Respondent Nos.1 to 4.
Mr. S. G. Gore, AGP for Respondent No.5-State.

CORAM : UJJAL BHUYAN & ABHAY AHUJA, JJ.
Reserved on : DECEMBER 02, 2020
Pronounced on :JUNE 9, 2021

Note:- There was difference of opinion in the matter between the Hon'ble judges and accordingly the judgment given by Hon'ble Mr. Justice Mr. Ujjal Bhuyan is reproduced hereunder and in the next issue the judgment given by Hon'ble Mr. Justice Abhay Ahuja will be printed.

Section 13(8)(b) of IGST Act not only falls foul of overall scheme of CGST Act and IGST Act but also offends Articles 245, 246A, 269A and 286(1)(b) of Constitution. The extra- territorial effect given by way of section 13(8)(b) of IGST Act has no real connection or nexus with taxing regime in India introduced by GST system; rather it runs completely counter to very fundamental principle on which GST is based i.e., it is a destination based consumption tax as against principle of origin based taxation. Thus, section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is ultra vires said Act besides being unconstitutional.

Judgment and Order : (*Per Ujjal Bhuyan, J.*)

Heard Mr. Bharat Raichandani, learned counsel for the petitioner ; Mr. Anil C. Singh, learned Additional Solicitor General of India alongwith Mr. Pradeep S. Jetly, learned senior counsel and Mr. J. B. Mishra, learned counsel for respondent Nos.1 to 4; also heard Mr. S. G. Gore, learned AGP for respondent No.5.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has prayed for a declaration that section 13(8)(b) and section 8(2) of the Integrated Goods and Services Tax Act, 2017 are *ultra vires* articles 14, 19, 245, 246, 246A, 269A and 286 of the Constitution of India and also *ultra vires* the provisions of the Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and Maharashtra Goods and Services Tax Act, 2017.

3. Thus from the above it is evident that challenge made in this writ petition is to the constitutionality of section 13(8)(b) and section 8(2) of the Integrated Goods and Services Tax Act, 2017.

4. Case of the petitioner is that he is a proprietor of a proprietorship firm M/s. Dynatex International having its registered office at Andheri (West), Mumbai which is engaged in providing marketing and promotion services to customers located outside

India. It is registered as a supplier under the provisions of the Central Goods and Services Tax Act, 2017 (briefly "the CGST Act" hereinafter).

5. Petitioner has explained in the writ petition the nature of the services rendered by it and the transactions involved. According to the petitioner, it is a service provider. It provides service to customers located outside India. These overseas customers are engaged in manufacture and / or sale of goods. Such overseas customers may or may not have establishments in India. However, petitioner provides services only to the principal located outside India and in lieu thereof receives consideration in convertible foreign currency from the principal located outside India. For providing such services, ordinarily an agreement is entered into with the overseas customers.

6. In terms of such agreement petitioner solicits purchase orders for its foreign customers. As a matter of fact petitioner undertakes activities of marketing and promotion of goods sold by its overseas customers in India.

7. The Indian purchaser i.e., the importer directly places a purchase order on the overseas customer of the petitioner for supply of the goods which are then shipped by the overseas customer to the Indian purchaser. Such goods are cleared by the Indian purchaser from the customs. The overseas customer raises sale invoice in the name of the Indian purchaser who directly remits the sale proceeds to the overseas customer. Upon receipt of such payment, the overseas customer pays commission to the petitioner against invoice issued by the petitioner. The entire payment is received by the petitioner in India in convertible foreign exchange.

8. Essentially the transaction entered into by the petitioner with the foreign customers is one of export of service from India earning valuable convertible foreign exchange for the country. It is an "export of service" within the meaning of section 2(6) of the Integrated Goods and Services Tax Act, 2017 (briefly "the IGST Act" hereinafter). Petitioner is also an "intermediary" within the meaning of section 2(13) of the IGST Act. So it is an export of service by an intermediary.

9. While section 7 of the IGST Act deals with inter-state supply, section 8 thereof deals with intra-state supply. The above provisions lay down when a supply will be considered as inter-state supply in India i.e., supply between two or more states or union territories of India and intra- state supply i.e., supply within one state or within one union territory.

10. Section 13 of the IGST Act deals with situations where the location of the supplier or the location of the recipient is outside India. While sub-section (2) generally provides that the place of supply of services shall be the location of the recipient of services, exceptions are carved out in sub-sections (3) to (13). As per sub-section (8), the place of supply of the services mentioned therein shall be the location of the supplier of services which is intermediary services in terms of clause (b).

11. Thus, by way of a deeming fiction, in the case of intermediary services where the location of the recipient is outside India, the place of supply shall be the location of the supplier of services which is in India, thus bringing into the tax net what is basically export of services. In this connection reference may be made to sub-section (2) of section 8 of the IGST Act which says that in case of supply of services where the location of the supplier and the place of supply of services are in the same state or same union territory, it would be treated as an intra-state supply. Therefore the export

of service by the petitioner as intermediary would be treated as intra-state supply of services under section 13(8)(b) read with section 8(2) of the IGST Act rendering such transaction liable to payment of central goods and services tax (CGST) and state goods and services tax (SGST).

12. Petitioner has stated that it has paid CGST and SGST under protest from out of its own pocket without collecting the same from its foreign customers. Since the year 2015-16 petitioner is bearing net tax burden of about 40% of the total revenue leading to significant drop in net revenue of the petitioner. According to the petitioner, its tax burden has gone up from 28% in the year 2012 to 43.81% in the year 2017. The tax burden has increased post implementation of goods and services tax (GST) and is impacting the whole revenue earning of the petitioner.

13. It is in such circumstances that the present writ petition has been filed assailing the constitutional validity of section 13(8)(b) of the IGST Act read with section 8(2) of the said Act on the various grounds urged in the writ petition which can be broadly summed up as under:-

1. Levy of tax on export of service is *ultra vires* Article 269A of the Constitution of India.
2. Section 8(2) and section 13(8)(b) of the IGST Act are *ultra vires* section 9 of the CGST Act which is the charging section.
3. GST is a destination based tax on consumption. Therefore, services provided by a service provider in India to a service receiver located outside India which is treated as export of service cannot be taxed; for taxing a service it is not the place of performance but the place of consumption which is relevant. Once the services are consumed outside India, Parliament has no jurisdiction to levy tax on such services consumed outside India.
4. Levy of GST on an intermediary like the petitioner is violative of Article 14 of the Constitution of India.
5. Levy of CGST and SGST on the export of service by the petitioner to its overseas customers constitute an unreasonable restriction upon the right of the petitioner to carry on trade and business under Article 19(1)(g) of the Constitution of India.
6. GST is an indirect tax. The cardinal rule of indirect taxation is that it must be capable of being passed on to the end receiver of the service. Therefore, it is trite that an agent cannot be burdened with GST.
7. Levy of GST on an intermediary like the petitioner providing services to an overseas customer would lead to double taxation on the same service.

14. Respondent Nos.1 to 4 have filed a common affidavit-in-reply through Dr. K. N. Raghavan, Principal Commissioner of Central Goods and Services Tax, Mumbai Central Commissionerate. In so far contention of the petitioner that levy of tax on export of service is *ultra vires* Article 269A of the Constitution of India is concerned, it is submitted that there are several intermediaries who provide services to overseas customers. However, such services do not qualify as "export of service" even when consideration is received in foreign exchange. In this connection it is stated that till 2014 place of supply for intermediary services was governed by the Place of Provision of Service Rules, 2012. As per the said rules, for intermediary of services place of

supply was location of service provider and for intermediary of goods place of supply was location of service recipient.

14.1 Several representations were received seeking change in place of supply for intermediary of services, further seeking clarification on the scope of the expression 'intermediary'. The issue was examined and with effect from 01.10.2014 place of supply for all intermediaries (goods as well as services) was made the location of the intermediary. This was because many a times the same person provided agency services for selling of goods and subsequently selling of annual maintenance contract (AMC). Therefore, making a distinction between intermediary of goods and services caused hardship. Generally value addition of the service provided by an intermediary is at the place where the intermediary is located. Thus to eliminate any ambiguity between the place of supply of intermediary services provided in relation to goods and services and to bring both at par, place of supply for both was made the location of intermediary. If place of supply was to be made the location of recipient, place of supply for all intermediaries located in taxable territory providing service to a person whose usual place of residence is outside India would be the location of the recipient i.e., outside India and thus such services would have gone outside the tax net.

14.2 It is further stated that the issue of place of supply of intermediaries was discussed during the stage of drafting of GST laws and the above reasoning was adopted by the GST Council. In addition, it was found that with respect to intermediary services in relation to goods and services including stocks, transportation of goods etc., the services are actually performed and enjoyed at the place where the underlying arranged supply is made. Taxing such services provided by Indian service providers to foreign companies incentivises the foreign company to start manufacturing in India to offset the liability against the tax on goods cleared domestically or get refund of taxes on goods exported from India. Therefore, taxing such services in India is in consonance with the *Make in India* program.

14.3 Referring to the definition of the expression 'export of services' as provided in section 2(6) of the IGST Act, it is stated that the services provided by the intermediary (petitioner) are not export of services as all the five conditions mentioned in section 2(6) of the IGST Act are not satisfied. Therefore, the contention that levy of tax on export of services is *ultra vires* Article 269A of the Constitution of India is untenable.

14.4 Contention of the petitioner that section 13(8)(b) read with section 8(2) of the IGST Act would lead to double taxation has been denied. In case of intermediary services in relation to import of goods in India, there are two distinctly identifiable supplies involved, *viz*, (a) supply of goods by the overseas supplier to the Indian importer of goods; and (b) supply of services by the intermediary to the overseas supplier of goods. The above two mentioned distinct supplies are liable to tax under two different statutes i.e., Customs Act, 1962 and the IGST Act operating under two different fields of taxation. Thus the argument that there is double taxation on the services rendered by the petitioner is untenable. Elaborating further it is stated that in the first transaction as the title of the imported goods does not lie with the intermediary service provider, the incidence of custom duty is on the importer of goods. In so far the second transaction is concerned, the commission is paid by the overseas supplier to the Indian intermediary for the services provided by the latter and IGST on the

same is levied in India on the intermediary as the place of supply is the location of the intermediary as per section 13(8)(b) of the IGST Act.

14.5 In the circumstances, respondents seek dismissal of the writ petition.

15. Petitioner has filed a longish rejoinder affidavit. In so far place of supply in terms of Place of Provision of Service Rules, 2012 is concerned it is contended that challenge made in the present writ petition is to section 13(8)(b) of the IGST Act read with section 8(2) of the said Act after introduction of the GST regime with effect from 01.07.2017. Therefore, reference to the 2012 Rules is wholly irrelevant and completely out of context. Referring to impost of service tax it is contended that taxable territory was defined under section 65B(52) of the Finance Act, 1994 as the territory to which provisions of the said Act applied; section 64(1) of the Finance Act, 1994 provided that Chapter V thereof extended to the whole of India except the State of Jammu and Kashmir. Therefore, any service provided outside India could not be subjected to service tax. Thus, the Finance Act, 1994 did not have extra- territorial operation. With effect from 01.07.2012 a new scheme of taxation was introduced. All services were made subject to service tax except those placed in the negative list or specifically exempt. The Place of Provision of Service Rules, 2012 was introduced with effect from 01.07.2012. This set of rules provided for determining the place of provision of the services. In other words, if the place of provision of service was India, the service would be taxable. On the other hand, if the place of provision of service was not India then the said service would not be taxable.

15.1 Petitioner has meticulously referred to the various individual rules of the aforesaid 2012 Rules whereafter it is submitted that while Rule 3 was the general rule which provided that the place of provision of a service would be the location of the recipient of service, this being based on the universally accepted principle that tax on services is a destination based consumption tax; it was a tax on the consumer and levied in the country of consumption of the service. Rules 4 to 12 were exceptions to the general rule which were based on actual consumption of the service. The exceptions were carved out keeping in mind that the said services were related to physical performance of the service and service related to immovable property situated in India. Such exceptions did not have any remote connection with the services provided by the petitioner which had no nexus to immovable property situated in India.

15.2 Reiterating his contentions made in the writ petition, petitioner asserts that all services when provided to overseas customer and consumed abroad are treated as export of service and not taxed in India; the same treatment should be offered to intermediary services as well. Similarly placed services provided by market research agencies, marketing agents, advertising consultants, professional services provided by lawyers, accountants etc. are all treated as export of service. Therefore, there can be no justifiable reason for singling out the petitioner as intermediary and by creating a legal fiction deny export of service by treating it to be service rendered in India and taxed accordingly.

15.3 In so far claim of the respondents that section 13(8)(b) would in fact boost the *Make in India* program the same has not only been denied but has been termed as unreal and illusory.

15.4 Petitioner has also referred to the 139th Parliamentary Committee Report, annexed

to the writ petition as Exhibit-1, and submits therefrom that levy of GST on intermediary services is contrary to the basic fundamental concept of GST as a destination based consumption tax. On such basis petitioner asserts that for taxing a service it is not the place of performance but the place of consumption which is relevant; export would take place when the service is provided from India by a person in India but is received and consumed abroad. The artificial exception carved out in section 13(8)(b) of the IGST Act is contrary to all principles of interpretation besides being unconstitutional and *ultra vires* the IGST Act itself. Therefore the aforesaid provision is liable to be struck down as *ultra vires* to the fundamental principle of destination based consumption tax.

15.5 By giving various illustrations, petitioner has stated that levy of GST on export of services has created an exodus of such intermediaries from India. While it will not have any impact on import of goods into India, it would only lead to extinguishment of intermediaries from India.

15.6 Asserting that GST would be levied twice on the same commission, once by the petitioner on the commission and then by the importer (Indian purchaser of the goods) on the said commission, which is a clear case of double taxation.

15.7 Finally petitioner asserts that the world over intermediary services are treated as export of services and are accordingly not subject to VAT / GST. In the circumstances petitioner seeks and prays that the writ petition be allowed in full.

16. Opening his arguments Mr. Raichandani, learned counsel for the petitioner submits that the factual position in this case is undisputed. Petitioner is engaged in providing marketing and promotional services to customers located outside India. The Indian purchaser (importer) directly places purchase order on the overseas customer for supply of goods which are shipped by the overseas customer to the Indian purchaser who gets the goods cleared from the port / customs. The overseas customer raises sale invoice in the name of the Indian purchaser who directly remits the sale proceeds to the overseas customer. Upon receipt of the payment from the Indian purchaser the overseas customer pays commission to the petitioner. Petitioner has no privity of contract with the Indian purchaser.

16.1 By virtue of section 13(8)(b) read with section 8(2) of the IGST Act the place of supply has been declared to be the location of the service provider i.e., the petitioner making the said transaction liable to payment of CGST and MGST as intra-state supply of services. Petitioner has paid such taxes from out of his pocket 'under protest' without collecting the same from the foreign customers.

16.2 In the above circumstances, petitioner has challenged the legality and validity of section 13(8)(b) of the IGST Act to the extent that it seeks to levy GST on services provided to, used and consumed by recipients located outside India and treating the same as intra-state supply leviable to CGST and MGST which is not only illegal, void, arbitrary and unreasonable but also *ultra vires* Articles 14, 19(1)(g), 21, 286, 246A, 265, 269A and 300A of the Constitution of India read with section 9 of the CGST Act and the MGST Act.

16.3 Mr. Raichandani submits that admittedly the service rendered by the petitioner is an export of service to foreign customer located outside India. The said service is used and consumed outside India. That being the position it is an 'export of service'

as defined under section 2(6) of the IGST Act. In fact it is so in terms of section 13(2) of the IGST Act as well. However, 'intermediary' which is defined under section 2(13) of the IGST Act has been placed under section 13(8)(b) of the IGST Act by virtue of which the place of supply of the service is the location of the supplier (petitioner). Consequently, the said supply is deemed to be an intra-state supply within the state of Maharashtra and taxed accordingly.

16.4 Further submission is that GST is a destination based consumption tax. It is a value added tax; a tax on services provided and consumed within the territory of India. Therefore it cannot have any extra-territorial operation or nexus. In this connection learned counsel has referred to the decision of the Supreme Court in *All India Federation of Tax Practitioners Vs. Union of India*, **2007 (7) STR 625**. He has also extensively referred to the 139th Parliamentary Committee Report with regard to place of supply of services. On the strength of the above, Mr. Raichandani contends that section 13(8)(b) of the IGST Act is evidently contrary to the fundamental principle of destination based consumption tax.

16.5 Another limb of argument of learned counsel for the petitioner is that levy of CGST and MGST on export of service by intermediary is arbitrary, unreasonable and discriminatory. He submits that petitioner has been denied a level playing field *vis-a-vis* other exporters of services. Besides it incentivises the foreign customer to set up liaison office in India at the cost of an intermediary like the petitioner. Though all service providers like the petitioner should be treated in the same manner, this is not so. Service providers like marketing agents, marketing consultants, management consultants, market research agents, professional advisers etc. provide similar services. However, such services would not be subject to GST in terms of section 13(2) of the Act. But by virtue of the exception carved out under section 13(8)(b) of the IGST Act, the service rendered by the petitioner despite satisfying all the conditions of section 13(2) read with section 2(6) of the IGST Act would be subject to GST. Therefore, he contends that the levy is most unreasonable and arbitrary, thus violative of Article 14 of the Constitution of India.

16.6 On the proposition that a provision can be struck down if it is violative of Article 14, learned counsel for the petitioner had placed reliance on the following decisions:-

a. *Reliance Energy Limited Vs. MSRDC*, **(2007) 8 SCC 1**;
b. *Union of India Vs. N. S. Rathnam*, **(2015) 10 SCC 681**; and
c. *K T Moopil Nair Vs. State of Kerala*, **AIR 1961 SC 552**.

16.7 Mr. Raichandani in his next limb of argument advances the proposition that levy of tax on export of service is *ultra vires* Article 246A read with Article 269A and Article 286 of the Constitution of India. Referring to Article 246A he submits that this is a special provision with respect to GST. It provides that notwithstanding anything contained in Articles 246 and 254, Parliament and subject to clause (2) the legislature of every state have power to make laws with respect to GST imposed by the union or by such state. As per clause (2), Parliament has exclusive powers to make laws with respect to GST where the supply of goods or of services or both take place in the course of inter-state trade or commerce. Article 269A provides for levy and collection

of GST in the course of inter-state trade or commerce. While clause (1) provides that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India, clause (5) provides that Parliament may by law formulate the principles of determining the place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce. On the above basis Mr. Raichandani submits that the Constitution only grants power to the Parliament to frame laws for inter- state trade and commerce i.e., for determining inter-state trade or commerce. It does not permit imposition of tax on export of services out of the territory of India by treating the same as a local supply. Hence, section 13(8)(b) of the IGST Act is *ultra vires* Articles 246A and 269A of the Constitution.

16.8 Referring to Article 286, learned counsel for the petitioner submits that clause (1) is very clear in as much as it provides that no law of a state shall impose or authorize the imposition of a tax on the supply of goods or services or both where such supply takes place outside the state or in the course of import of the goods or services or both into the territory of India or export of goods or services out of the territory of India. He submits that this is a prohibitive bar and is couched in negative language. In so far clause (2) is concerned, Parliament may by law formulate principles for determining a supply of goods or of services or both in any of the ways mentioned in clause (1). Thus no state has authority to levy local tax on export of services. Section 13(8)(b) of the IGST Act has deemed an export to be a local supply. This is violation of Article 286(1). In support of the above submission, Mr. Raichandani has placed reliance on the following decisions:-

a. *State of Travancore - Cochin Vs. Bombay Company Limited*, **AIR 1952 SC 366**;

b. *Central India Spinning and Weaving and Manufacturing Company Limited Vs. Municipal Committee, Wardha*, **AIR 1958 SC 341**; and

c. *GVK Industries Limited Vs. ITO*, **(2011) 332 ITR 130**.

16.9 Mr. Raichandani has argued that section 13(8)(b) of the IGST Act is not only *ultra vires* the charging section of the said Act i.e., section 5, but is also *ultra vires* the charging section of the CGST Act as well as the MGST Act i.e., section 9. He submits that IGST Act is an Act providing for levy and collection of tax on inter-state supply of goods and services. While section 1 provides that it shall extend to the whole of India except the State of Jammu and Kashmir, section 5 which is the charging section provides that there shall be levied IGST on all inter- state supplies of goods or services or both. Section 7 explains what is inter-state supply. Section 8(2) clarifies that supply of services where the location of the supplier and the place of supply are within the same state or union territory, shall be treated as an intra-state supply. Thus he submits that from an analysis of the scheme, scope and object of the IGST Act, it is evident that the same provides for levy of IGST on inter- state supplies. However, section 13(8)(b) runs contrary to the overall scheme of the IGST Act because it deems a supply out of India as an intra-state supply. Viewed in that context the said provision is also contrary to section 9 of the CGST Act as well as the MGST Act in as much as section 9 provides for levy of CGST on all intra-state supplies of goods or services or

both. The said levy cannot be extended to cross border transactions i.e., export of services.

16.10 Learned counsel for the petitioner has also argued that respondents by levying CGST and MGST on the service provided by the petitioner to its overseas customers have imposed an unreasonable restriction upon the right of the petitioner to carry on trade under Article 19(1)(g) of the Constitution. He submits that such action on the part of the respondents would result in closure of business of the petitioner besides encouraging foreign service recipient to set up liaison offices in India and thereby escape taxation.

16.11 Last submission of Mr. Raichandani is that section 13(8)(b) of the IGST Act leads to double taxation and more. The same supply would be taxed at the hands of the petitioner and following the destination based principle it would be an import of service from India for the foreign service recipient and would be taxed at his hands in the importing country. In support of his above submission learned counsel has placed reliance on the following decisions:-

a. *BSNL Vs. Union of India*, **2006 (2) STR 161**;
b. *Adani Power Ltd. Vs. Union of India*, **2015 (330) ELT 883** (*Guj.*); and
c. *Union of India Vs. Adani Power Ltd.*, **2016 (331) ELT 129**.

17. Leading the arguments on behalf of the respondents, Mr. Anil C. Singh, learned Additional Solicitor General submits that there is always a presumption in favour of constitutionality of a statute. Burden lies heavily on the person who challenges the validity of a statute. It is a settled proposition that for declaring a statute as unconstitutional, Court has to see whether there is legislative competence to enact the statute or not and whether the impugned provision is violative of any of the fundamental rights enshrined in Part III of the Constitution or not. According to Mr. Singh, the impugned provision cannot be assailed or struck down on the above two tests. Elaborating further he submits that no statute can be struck down as arbitrary unless it is unconstitutional. Greater latitude vests with the Parliament in taxing statutes and motive is not a relevant factor. In support of the above submissions, learned Additional Solicitor General has placed reliance on the following decisions:-

a. *Union of India Vs. Exide Industries Ltd.*,
(2020) 425 ITR (SC) 1;
b. *Shri Ram Krishna Dalmia Vs. Shri S. R. Tendolkar*,
AIR 1958 SC 538;
c. *R. K. Garg Vs. Union of India*, **AIR 1981 SC 2138**;
d. *Government of Andhra Pradesh Vs. P. Lakshmi Devi*,
AIR 2008 SC 1640;
e. *Laya Binykumar Panday Vs. Medical Council of India*,
2006 (6) Mh.L.J. 438; and
f. *Amrit Banaspati Company Vs. Union of India*,
(1995) 3 SCC 335

17.1 Next submission of Mr. Singh is that even under the erstwhile service tax regime, the Place of Provision of Service Rules, 2012 contained a similar provision with effect from 01.10.2014. In compliance thereto petitioner had been paying service tax on the service rendered to overseas customer and therefore it is not open to the

petitioner to make the impugned challenge now. Reverting back to the aforesaid rules Mr. Singh, learned Additional Solicitor General submits that central government considered several representations and after examining the issue in detail declared that with effect from 01.10.2014 the place of supply for all intermediaries (goods and services) would be the location of the intermediary. This in turn would encourage the *Make in India* program by encouraging the overseas customers to set up units in India thereby leading to foreign investments giving a boost to *Make in India* program. This will also bring about a level playing field in India.

17.2 Learned Additional Solicitor General has placed strong reliance on the judgment of the Gujarat High Court in *Material Recycling Association of India Vs. Union of India* decided on **24.07.2020**, wherein identical challenge made to section 13(8)(b) of the IGST Act has been repelled by the Gujarat High Court. Mr. Singh firstly submits that the decision of the Gujarat High Court is correct in all respects and therefore, there is no reason as to why a different view should be taken by this Court. Secondly, relying on a decision of the Supreme Court in *Kusum Ingots & Alloys Vs. Union of India*, **(2004) 6 SCC 254** followed by the Gauhati High Court in *Rehena Begum Vs. State of Assam*, **Writ Petition (C) No.6968 of 2013** decided on **21.07.2015**, he submits that in the case of an all India statute a view taken by a High Court as to its constitutionality or otherwise would be applicable throughout the territory of India and therefore, should be followed.

17.3 In such circumstances learned Additional Solicitor General submits that there is no merit in the writ petition and therefore, the writ petition should be dismissed.

18. Replying to the general submissions made by the learned Additional Solicitor General on constitutionality of a statute Mr. Raichandani submits that there can be no doubt or dispute about the said propositions canvassed by Mr. Singh. However, each challenge has to be decided having regard to the facts and circumstances of each case and there can be no straight jacket formula. In this connection learned counsel for the petitioner has placed reliance on *State of UP Vs. Deepak Fertilizers & Petrochemical Corporation Ltd.*, **(2007) 10 SCC 342**.

18.1 Mr. Raichandani submits that substance of the impugned provision has to be looked into to determine as to whether in pith and substance it is within a particular entry. He has placed reliance on a number of decisions in this regard. Continuing with his submissions Mr. Raichandani asserts that apart from passing the test of legislative competence, the impugned provision must be otherwise legally valid and would also have to pass the test of constitutionality in the sense that it cannot be in violation of the provisions of the Constitution nor can it operate extra-territorially.

18.2 In so far reliance placed on the Place of Provision of Service Rules, 2012 by the respondents, Mr. Raichandani submits that there cannot be waiver or estoppel against raising an issue of constitutionality. Challenge made is to section 13(8)(b) of the IGST Act which has come into effect from 01.07.2007. Therefore, reference to the Finance Act, 1994 and to the Place of Provision of Service Rules, 2012 is wholly irrelevant and completely out of context. The present challenge as to levy of GST on export of services by intermediary treating the same as intra-state supplies cannot be judged or adjudicated on the touchstone of service tax law which in any case did not have extra-territorial operation.

18.3 Regarding the submission that the impugned provision would boost the *Make in India* program, Mr. Raichandani submits that such a submission is without any evidence and needs to be rejected outright. As a matter of fact levy of GST on export of services by intermediary has created an exodus of intermediaries to places like Singapore, Dubai, Hong Kong etc. thereby depriving the central government not just GST but also income tax, valuable foreign exchange and employment to thousands of people. Such levy of GST is rather against the *Make in India* program as well as against the age old policy of the Government of India to encourage export of goods and services.

18.4 In so far the Gujarat High Court judgment in **Material Recycling Association of India** *(supra)* is concerned, the submission is that decision of the Gujarat High Court cannot be treated as a binding precedent. It is a settled legal position that decision of one High Court is not binding on another High Court. If what the learned Additional Solicitor General submits is accepted then no High Court would be in a position to examine the validity of a provision which has been upheld by one High Court. Assailing the Gujarat High Court judgment Mr. Raichandani submits that it has been rendered *sub silentio*. The challenge to section 13(8)(b) of the IGST Act that it is *ultra vires* Article 286 read with Article 246A and Article 269A of the Constitution was neither canvassed before nor considered by the Gujarat High Court. There is no discussion on Articles 14 and 19(1)(g) as well. He therefore submits that this Court may take a view different from and independent of the Gujarat High Court.

19. Both the sides have filed written submissions.

20. Submissions made by learned counsel for the parties have received the due consideration of the Court.

21. Before we proceed to deal with goods and services tax (GST) and integrated goods and services tax (IGST), we may note what the Supreme Court had said on two of the legacy taxes i.e., value added tax (VAT) and service tax which have since been replaced and subsumed by GST. In **All India Federation of Tax Practitioners** *(supra),* the question for consideration before the Supreme Court was the constitutional status of the levy of service tax and the legislative competence of Parliament to impose service tax under Article 246(1) read with entry 97 of List I of the seventh schedule to the Constitution. It was an appeal before the Supreme Court against the decision of the Bombay High Court upholding the legislative competence of Parliament to levy service tax *vide* Finance Act, 1994 and Finance Act, 1998. According to the Bombay High Court, service tax fell in entry 97 List I of the seventh schedule to the Constitution.

21.1 The issue was examined by the Supreme Court from the point of view of competence of Parliament to levy service tax on practising chartered accountants having regard to entry 60 of List II of the seventh schedule to the Constitution and Article 276 of the Constitution. Referring to the service tax background it was noticed that Government of India in the late 1970s had initiated an exercise to explore alternative revenue sources due to resource constraints. Though customs and excise duty constituted two major sources of indirect taxes in India, however by 1994 Government of India found revenue receipts from customs and excise on the decline due to various reasons. Therefore, in the year 1994-95 the then Union Finance Minister introduced

the new concept of service tax by imposing tax on services of telephones, non-life insurance and stock brokers. That list increased since then, as knowledge economy had made 'services' an important revenue earner. Service tax was an indirect tax levied on certain services provided by certain categories of persons. Service tax was premised on the economic viewpoint that there is no distinction between consumption of goods and consumption of services as both satisfy the human needs.

21.2 Finance Bill, 1998 was introduced in Parliament so as to levy tax on services rendered by a practising chartered accountant, cost accountant and architect to a client in professional capacity at a particular rate.

21.3 It was in that background that Supreme Court referred to the concept of VAT which is a general tax that applies in principle to all commercial activities involving production of goods and provision of services whereafter it was concluded that VAT is a consumption tax as it is borne by the consumer. It was held that service tax is a VAT which in turn is a destination based consumption tax in the sense that it is on commercial activities. It is not a charge on the business but on the consumer and it would logically be leviable only on services provided ***within the country*** (emphasis is ours); service tax is a value added tax. It was held as under:-

> "6. At this stage, we may refer to the concept of Value Added Tax (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.
>
> 7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.
>
> 8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly services fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc."

21.4 After re-stating that the economic concept of there being no distinction between consumption of goods and consumption of services was translated into a legal principle of taxation by the Finance Acts of 1994 and 1998, it was noted that Government of India had introduced Article 268A in the Constitution in the year 2003 by providing that taxes on services shall be charged by the Union of India and shall be appropriated by Union of India and the States. A new entry 92C was also introduced in the Union List for the levy of taxes on services.

21.5 On analysing the scheme of the Finance Act, 1994, Finance Act, 1998, relevant provisions of the Constitution of India and the decision of the Supreme Court in *Moti Laminates Pvt. Ltd. Vs. Collector of Central Excise, Ahmedabad*, **1995 (76) ELT**

241 (SC), Supreme Court recorded the finding that source of the concept of service tax was traceable to economics. It is an economic concept. It has evolved on account of the service industry becoming a major contributor to the Gross Domestic Product (GDP) of an economy particularly knowledge based economy. Supreme Court held that service tax is a value added tax which in turn is a general tax applying to all commercial activities involving production of goods and provision of services, besides VAT being a consumption tax as it is borne by the client. It was held as under:-

> "20. On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country."

22. Thus what is clearly discernible is that the emphasis in the above paragraph was on tax leviable on services provided within the country.

23. In *Commissioner of Service Tax Vs. SGS India Pvt. Ltd.*, **2014 (34) STR 554 (Bom.)**, this Court was considering an appeal by the Revenue under section 35G of the Central Excise Act, 1994 read with section 83 of the Finance Act, 1994. In that case respondent was providing technical inspection and certification agency service as well as technical testing and analysis agency service at different places in India in respect of goods imported by their customers located abroad. For providing such services respondent received consideration in convertible foreign exchange. A show cause notice was issued to the respondent by the Directorate General of Central Excise Intelligence, Mumbai Zonal Unit alleging that the services provided by the respondent were performed in India though test reports thereof were sent outside India. Since the services were performed in India, there was no export of services. Respondent was therefore called upon to pay service tax. This demand was disputed by the respondent. However, the adjudicating authority passed the order in original confirming the demand and imposing penalty.

23.1 It is this order of the adjudicating authority which was challenged by the respondent in appeal before the Central Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT). CESTAT by the order impugned allowed the appeal. As a result the demand was dropped, so also the penalty.

23.2 This decision of CESTAT was challenged in appeal before the High Court by the adjudicating authority. This Court noted that CESTAT had found as a finding of fact that the clients of the respondent were located abroad. The test reports might have been prepared in India; the test might have been conducted in India. However, the certificates had been forwarded to the clients of the respondent abroad. From this the High Court deduced that the respondent had exported the services by way of testing and analysis in India and transmitting the test report / analysis report to the foreign clients. The service was complete when the report was delivered to the foreign client. Since the delivery of the report to the foreign client was considered to be an essential part of the service, the demand of service tax was set aside.

23.3 This Court held that the view of the CESTAT was in accord with the statutory provision as clarified by the Central Board of Excise and Customs in the circular relied upon, further opining that the services rendered by the respondent were fully covered by the principle laid down in the decision of the Supreme Court in **All India Federation of Tax Practitioners** (*supra*). It was held as under:-

"24. In the present case, the Tribunal has found that the assessee like the respondent rendered services, but they were consumed abroad. The clients of the respondents used the services of the respondent in inspection/test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were foreign clients, paid the respondent for such services rendered, in foreign convertible currency. It is in that sense that the Tribunal holds that the benefit of the services accrued to the foreign clients outside India. This is termed as 'export of service'. In these circumstances, the Tribunal takes a view that if services were rendered to such foreign clients located abroad, then, the act can be termed as 'export of service'. Such an act does not invite a Service Tax liability. The Tribunal relied upon the circulars issued and prior thereto the view taken by it in the case of *KSH International Pvt. Ltd. v. Commissioner and B.A. Research India Ltd*. The case of the present respondent was said to be covered by orders in these two cases. To our mind, once the Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non- commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. It is this finding and conclusion of the Hon'ble Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case.

25. The view taken by the Tribunal therefore, cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. If the emphasis is on consumption of service then, the order passed by the Tribunal does not raise any substantial question of law."

23.4 This Court held that though the reports of test and analysis were done in India, those were sent abroad because the clients of the respondent were foreign clients. They paid the respondent for such services in foreign convertible currency. It was in that sense that the Tribunal held that the benefit of the services accrued to the foreign clients outside India, terming the same as 'export of services'. High Court upheld the view of CESTAT that if services were rendered to such foreign clients located abroad then such an act can be termed as 'export of service' which act does not invite a service tax liability. This Court referred to the Supreme Court judgment as alluded to hereinabove that service tax is a value added tax which in turn is a destination based consumption tax in the sense that it is not a charge on the business but on the consumer, then it is leviable only on services provided ***within the country***. Thus the view taken by the CESTAT was upheld.

23.5 During the hearing Mr. Singh pointed out that against the aforesaid decision of

this Court, Commissioner of Service Tax has filed SLP before the Supreme Court wherein Supreme Court has condoned the delay and has issued notice.

24. Having noticed the views taken by the Supreme Court as well as by this Court on VAT and service tax, we may now look at those constitutional provisions dealing with GST.

25. Part XI of the Constitution of India deals with relations between the Union and the States. Article 245 which is included in Chapter I of the said part lays down the extent of laws made by Parliament and by the legislatures of the states. Clause (1) says that subject to provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a state may make laws for the whole or any part of the state. As per clause (2), no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

25.1. Thus what Article 245 contemplates is that while Parliament may make laws for the whole or any part of India, the legislature of a state may make laws for the whole or any part of the state. Further, no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. This apparent dichotomy manifest through clause (2) of Article 245 has been explained by the Supreme Court in **GVK Industries Limited** (*supra*) and in *Sondur Gopal Vs. Sondur Rajini*, **AIR 2013 SC 2678**. It has been held that laws made by one state cannot have operation in another state. A law which has extra- territorial operation cannot directly be enforced in another state but such a law is not invalid and is saved by Article 245(2) of the Constitution. But clause (2) does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. Unless such contingency exists, Parliament shall be incompetent to make law having extra-territorial operation.

26. Article 246 deals with subject matter of laws made by Parliament and by the legislatures of states. Clause (1) says that notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of the seventh schedule to the Constitution. As per clause (2), notwithstanding anything in clause (3), Parliament and subject to clause (1) the legislature of any state also have power to make laws with respect to any of the matters enumerated in List III of the seventh schedule to the Constitution. In terms of clause (3), legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in List II of the seventh schedule to the Constitution which is however subject to clauses (1) and (2). As a clarification, clause (4) makes it clear that Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a state notwithstanding that such matter is a matter enumerated in the State List.

26.1. At this stage we may briefly note that power to legislate, be it by the Parliament or by the legislature of a state, is traceable to Article 246 of the Constitution. The various entries comprising the three lists of the seventh schedule to the Constitution of India are the fields of legislation.

27. By way of Constitution (101st Amendment) Act, 2016, Article 246A was inserted in the Constitution of India. It lays down special provision with respect to goods and services tax (GST). Clause (1) says that notwithstanding anything contained in Articles

246 and 254, Parliament and subject to clause (2) the legislature of every state have power to make laws with respect to GST imposed by the union or by such state. Before proceeding to clause (2) we may note that clause (1) has overriding power over Articles 246 and 254. While we have already discussed Article 246, we may mention that Article 254 deals with inconsistency between laws made by Parliament and laws made by the legislatures of states leading to repugnancy. Be that as it may, clause (2) says that Parliament has exclusive power to make laws with respect to GST where the supply of goods or of services or both takes place in the course of inter-state trade or commerce.

28. Article 269A was inserted in Chapter I of Part XII of the Constitution by way of the Constitution (101st Amendment) Act, 2016 providing for levy and collection of GST in the course of inter-state trade or commerce. Clause (1) says that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the union and the states in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council i.e., GST Council. As per the explanation to clause (1), supply of goods or of services or both in the course of import into the territory of India shall be deemed to be supply of goods or of services or both in the course of inter-state trade or commerce. Clause (5) clarifies that Parliament may by law formulate the principles for determining the place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce.

29. By the said Constitution (101st Amendment) Act, 2016, Article 279A was inserted in the Constitution of India providing for Goods and Services Tax Council i.e., GST Council which is headed by the Union Finance Minister as the chairperson. Clause (4) provides that GST Council shall make recommendations to the union and to the states on various aspects including on model GST laws, principles of levy, apportionment of GST levied on supplies in the course of inter-state trade or commerce under Article 269A and the principles that govern the place of supply [Article 279A(4)(c)].

30. Parliament enacted the Central Goods and Services Tax Act, 2017 (already referred to as "the CGST Act" hereinabove) to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the central government and for matters connected therewith or incidental thereto. As per section 1(2), the CGST Act extends to the whole of India except the State of Jammu and Kashmir.

31. Section 2 of the CGST Act provides for definitions of different expressions finding place in the CGST Act. Sub-section (93) defines 'recipient' of supply of goods or services or both to mean - (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration; (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available or to whom possession or use of the goods is given or made available; and (c) where no consideration is payable for the supply of a service the person to whom the service is rendered, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied. Thus what is of relevance is that where a

consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration would be construed to be the recipient of supply of goods or services or both.

31.1 As per sub-section (102) of section 2, 'services' means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.

31.2 'Taxable supply' means supply of goods or services or both which is leviable to tax under the CGST Act and 'taxable territory' means the territory to which the provisions of the CGST Act apply.

32. Scope of supply is dealt with in section 7 of the CGST Act. Sub- section (1) says that for the purpose of the CGST Act, the expression 'supply' would include - (a) all forms of supply of goods or services or both, such as, sale, transfer, exchange, license, rental, lease etc. made or agreed to be made for a consideration by a person in the course or furtherance of business; (b) import of services for a consideration whether or not in the course or furtherance of business etc.

33. Section 9 is the charging section. It provides for levy and collection of a tax called the central goods and services tax (CGST) on all intra-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rate as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and paid by the taxable person.

34. Similar provisions are there in the Maharashtra Goods and Services Tax Act, 2017 (already referred to as the 'MGST Act' hereinabove) which is an act to make provisions for levy and collection of tax on intra-state supply of goods or services or both in the state of Maharashtra and matters connected therewith or incidental thereto. Here also section 7 deals with scope of supply whereas section 9 is the charging section.

35. That brings us to the Integrated Goods and Services Tax Act, 2017 (already referred to as the 'IGST Act' hereinabove). The IGST Act has been enacted to make provision for levy and collection of tax on inter- state supply of goods or services or both by the central government and for matters connected therewith or incidental thereto. As per section 1(2), the IGST Act shall extend to the whole of India except the State of Jammu and Kashmir.

36. Section 2 provides for definitions of various expressions used in the IGST Act. Sub-section (6) is relevant. It defines 'export of services'. Since this definition is relevant it is extracted as under:-

"2(6) 'export of services' means the supply of any service when,-

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

(v) the supplier of service and the recipient of service are not merely establishments

of a distinct person in accordance with Explanation 1 in section 8;"

36.1. Thus from the above it is seen that 'export of services' means the supply of any service when the supplier of service is located in India; the recipient of service is located outside India; the place of supply of service is outside India; payment for such service has been received by the supplier of service in convertible foreign exchange; and the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

37. 'Intermediary' is defined in sub-section (13) to mean a broker, an agent or any any other person by whatever name called, who arranges or facilitates the supply of goods or services or both or securities between two or more persons but does not include a person who supplies such goods or services or both or securities on his own account.

38. 'Location of the recipient of services' has been defined in sub- section (14) of section 2. Since this definition is also relevant, the same is quoted hereunder:-

"2(14) 'location of the recipient of services' means,-

(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(d) in absence of such places, the location of the usual place of residence of the recipient;"

38.1. From the above what is deducible is that location of the recipient of services would mean where a supply is received at a place of business for which registration has been obtained, the location of such place of business; where a supply is received at a place other than the place of business for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and in the absence of such places, the location of the usual place of residence of the recipient.

39. Sub-section (15) of section 2 defines the expression 'location of the supplier of services' to mean where a supply is made from a place of business for which registration has been obtained, the location of such place of business; where a supply is made from a place other than the place of business for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the supply; and in the absence of such places the location of the usual place of residence of the supplier.

40. Section 5 of the IGST Act is the charging section. Sub-section (1) says that subject to the provisions of sub-section (2) there shall be levied a tax called the

integrated goods and services tax (IGST) on all inter- state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rate as may be notified by the central government on the recommendations of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Sub-section (2) deals with integrated tax on the supply of petroleum, crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel.

41. Inter-state supply is dealt with in section 7. As per sub-section (3), subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply are in two different states; two different union territories; or in a state and in an union territory, shall be treated as a supply of services in the course of inter- state trade or commerce. Sub-section (4) says that supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-state trade or commerce. Sub-section (5) says that supply of goods or services or both - (a) when the supplier is located in India and the place of supply is outside India; (b) to or by a special economic zone developer or a special economic zone unit; or (c) in the taxable territory not being an intra-state supply and not covered elsewhere in section 7, shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce. Thus the takeaway from this sub-section particularly from clause (a) is that in the case of supply of goods or services or both when the supplier is located in India and the place of supply is outside India that shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce; as distinguishable from intra-state supply.

42. Section 8 deals with intra-state supply. As per sub-section (2), subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same state or in the same union territory shall be treated as intra-state supply. As per the proviso, intra-state supply of services shall not include supply of services to or by a special economic zone developer or a special economic zone unit. Explanation 1 clarifies that where a person has an establishment in India and any other establishment outside India; an establishment in a state or union territory and any other establishment outside that state or union territory; or an establishment in a state or union territory and any other establishment in a state or union territory and any other establishment being a business vertical registered within that state or union territory then such establishment shall be treated as establishments of distinct persons. As per Explanation 2, a person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

43. While section 10 deals with place of supply of goods other than supply of goods imported into or exported from India, section 12 on the other hand deals with place of supply of services where location of supplier and recipient is in India. Sub-section (1) says that provisions of section 12 shall apply to determine the place of services where the location of supplier of services and the location of the recipient of services is in India. Clause (a) of sub-section (2) clarifies that except the services specified in sub-sections (3) to (14), the place of supply of services made to a registered person shall be the location of such person.

44. That brings us to section 13 which deals with place of supply of services where location of supplier or location of recipient is outside India. Sub-section (1) gives the intent of section 13. It says that provisions of section 13 shall apply to determine the place of supply of services where the location of the recipient of services is outside India. Sub-section (2) provides that except the services specified in sub-sections (3) to (13), the place of supply of services shall be the location of the recipient of services. However as per the proviso, where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services. Thus sub-section (2) lays down the general proposition that place of supply of services shall be the location of the recipient of services barring the exceptions carved out in sub-sections
(3) to (13). In this case we are concerned with clause (b) of sub-section (8). For a proper perspective sub-section (8) is quoted hereunder:-

"13(8) The place of supply of the following services shall be the location of the supplier of services, namely:-

(a) * * * *

(b) intermediary services;

(c) * * * *. "

44.1. Thus what sub-section (8)(b) says is that in case of supply of services by intermediary the place of supply shall be the location of the supplier of services i.e., the intermediary which is an exception to the general rule as expressed in sub-section (2) of section 13 and this is what is impugned in the present proceeding.

45. The Parliamentary Standing Committee on Commerce submitted report No.139 on *Impact of Goods and Services Tax (GST) on Exports*. The said report was presented to the *Rajya Sabha* on 19 December, 2017 and was laid on the table of *Lok Sabha* on the same day. After referring to the definition of 'export of services' as defined under section 2(6) of the IGST Act, it was noted that service providers providing services to overseas suppliers of goods earn commission in convertible foreign exchange; but IGST @ 18% is leviable on such commission because the government does not recognize their services as export of services. Section 13(8) provides that place of supply of services will be the location of the service supplier and not the location of overseas customers. Even in cases where both the supplier and the buyer are located outside India, commission earned for such transaction also attract IGST @ 18%. In view of the fact that GST is a destination based consumption tax, the Parliamentary Standing Committee made the following recommendations:-

"♦ Provide that place of supply of Indian intermediaries of goods will be the location of service recipient i.e., customers located abroad (and not the location of such intermediaries as is currently provided), so that intermediary services will be treated as exports; or

♦ Providing an exemption to Indian intermediaries of goods from levy of IGST, exercising the powers vested under section 6(1) of the IGST Act; or

♦ Notify such services under section 13(13) of the IGST Act to prevent double taxation (tax in India as well as in the importing country) by treating place of effective use (foreign country) as place of supply."

45.1. The Committee further recommended that the government may also cause

amendment to section 13(8) of the IGST Act to exclude intermediary services and make it subject to the default section 13(2) so that the benefit of export of services would be available. Noting that it is the long standing policy of the Government of India to export services without exporting taxes and duties, the Committee hoped that government would leave no stone unturned to place in an efficacious taxation regime for a robust export framework.

46. It may also be mentioned that GST Council i.e., respondent No.3 in its paper on *GST - Concept and Status*, dated 01.04.2018 reiterated that GST would be applicable on supply of goods or services as against the concept of tax on manufacture of goods or on sale of goods or on provision of services. GST is a destination based consumption tax as against the principle of origin based taxation. Under destination based taxation, tax accrues to the destination place where consumption of the goods or services takes place. Import of goods or services would be treated as inter-state supplies and would be subject to IGST in addition to applicable customs duty. All exports and supplies to special economic zones and special economic zone units would be zero-rated. The fact that GST is a destination based consumption tax; it is a value added tax; it is a tax on services provided and consumed within the territory of India having no extra-territorial operation or nexus has been clarified by respondent No.2 i.e., Central Board of Indirect Taxes and Customs in its circular bearing No.20/16/04/2018-GST dated 18.02.2019 wherein it is reiterated that after introduction of GST which is a destination based consumption tax it is essential to ensure that the tax paid by a registered person accrues to the state in which the consumption of goods or services or both takes place.

47. We have already referred to and analysed Articles 246A and 269A of the Constitution of India. Both were inserted into the Constitution by way of the Constitution (101st Amendment) Act, 2016. While Article 246A deals with special provision with respect to GST, Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. From a careful and conjoint reading of the two Articles it is quite evident that the Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce, besides laying down principles for determining place of supply and when such supply of goods or services or both takes place in the course of inter-state trade or commerce. Thus the Constitution does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply.

48. At this stage we may refer to Article 286 of the Constitution of India. Article 286 lays down restrictions as to imposition of tax on the sale or purchase of goods. Article 286 being relevant is extracted as under:-

> "286. Restrictions as to imposition of tax on the sale or purchase of goods -
> (1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or services or both, where such supply takes place -
> (a) outside the State; or
> (b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India
> (2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1).

48.1. Clause (1) says that no law of a state shall impose or authorize the imposition of a tax on the supply of goods or of services or both where such supply takes place - (a) outside the state; or (b) in the course of the import of the goods or services or both into or export of the goods or services or both out of the territory of India. Clause (2) provides that Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1). Though the expressions "import" and "export" have not been defined in the Constitution which would mean that we would have to fall back upon usage of the said expressions in the ordinary common parlance, nonetheless there is an express bar under clause (1) of Article 286 that no law of a state shall impose or authorize imposition of a tax on the supply of goods or services or both where such supply takes place in the course of import into or export out of the territory of India. While clause (2) empowers the Parliament to make laws formulating principles for determining supply of goods or of services or both certainly the same cannot be used to foil or thwart the scheme of clause (1). Both have to be read together.

49. In so far the present case is concerned, it is certainly a supply of service from India to outside India by an intermediary. Petitioner fulfills the requirement of an intermediary as defined in section 2(13) of the IGST Act. That apart, all the conditions stipulated in sub-section (6) of section 2 for a supply of service to be construed as export of service are complied with. The overseas foreign customer of the petitioner falls within the definition of 'recipient of supply' in terms of section 2(93) of the CGST Act read with section 2(14) of the IGST Act. Therefore, it is an 'export of service' as defined under section 2(6) of the IGST Act read with section 13(2) thereof. It would also be an export of service in terms of the expression 'export' as is understood in ordinary common parlance. Evidently and there is no dispute that the supply takes place outside the State of Maharashtra and outside India in the course of export. However, what we notice is that section 13(8)(b) of the IGST Act read with section 8(2) of the said Act has created a fiction deeming export of service by an intermediary to be a local supply i.e., an inter-state supply. This is definitely an artificial device created to overcome a constitutional embargo. Question for consideration is whether creation of such a deeming provision is permissible or should receive the imprimatur of a constitutional court?

50. In **State of Travancore - Cochin** (*supra*), the state was in appeal before the Supreme Court against the decision of the High Court quashing the assessments under the United State of Travancore and Cochin Sales Tax Act. The respondents in each case claimed exemption from assessment in respect of the sales effected by them on the ground *inter alia* that such sales took place in the course of export of the goods out of the territory of India. Sales tax authorities rejected the contention as in their view the sales were completed before the goods were shipped and could not therefore be considered to have taken place in the course of the export. This led the respondents to file writ petitions before the High Court. The High Court after hearing the matter upheld the claim of exemption and quashed the assessment orders which thereafter led to filing of the appeals.

50.1 Constitution Bench of the Supreme Court referred to clause (1) of Article 286 on which the respondents based their claim to exemption. Supreme Court referred to

the views expressed by the learned judges of the High Court on the scope and meaning of sub-clause (b) of clause (1) of Article 286 which is extracted as under:-

"7. * * * *

The words 'in the course of ' make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions, the sale has taken place, such a sale is exempted from the levy of sales tax. The sale may have taken place within the boundaries of the State. Even then sales tax cannot be levied if the sale had taken place while the goods were in the course of import into India or in the course of export out of India. We are stressing this point because both parties in what we may describe as the cashew nut cases entered into a lengthy discussion as to the exact point of time when the sale became completed and as to the exact place where the goods were when the sale became a completed transaction."

50.2 It was found that on this interpretation local purchases made for the purpose of export were held by the learned judges to be integral part of the process of exporting. Approving such interpretation, Supreme Court held as under:-

"11. We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under article 286(1)(b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under article 286(1)(b). That clause, indeed, assumes that the sale had taken place within the limits of the State and exempts it if it took place in the course of the export of the goods concerned."

50.3 Accordingly it was held that whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India would come within the exemption. Agreeing with the conclusion of the High Court, the appeals were dismissed.

51. Interpretation of the expressions 'export' and 'import' in the context of the

Constitution of India came up before the Supreme Court in **Central India Spinning and Weaving and Manufacturing Company Limited** *(supra).* Supreme Court held thus:-

"7. The High Court was of the opinion that "The words 'export' and 'import' have no special meaning. They bear the ordinary dictionary meaning, which has been the foundation for the decisions to which I have referred in the opening portion of my opinion. These words mean only 'taking out of and bringing into'."

8. The appellant's contention is that the words 'imported into or exported from' do not merely mean 'to bring into' or to carry out of or away from but also have reference to and imply the termination or the commencement of the journey of the goods sought to be taxed and therefore goods in transit which are transported across the limits of a Municipal Committee are neither imported into the municipal limits nor exported therefrom. It is also contended that even if the words 'imported into or exported from' are used merely to mean "to bring into" or "to carry out of or away from" the qualifying of the tax by the adjective "terminal" is indicative of the terminus ad quern or terminus a qua of the journey of the goods and excludes the goods in transit. The respondent on the other hand submits that the tax is leviable merely on the entry of the goods into the municipal limits or on their exit there from and the word "terminal" has reference to the termini of the jurisdictional limits of the municipality and not to the journey of the goods. The efficacy of the relative contentions of the parties therefore requires the determination of the construction to be placed on the really important words of which are "terminal tax", "imported into or exported from" and " the limits of the Municipality". In construing these words of the statute if there are two possible interpretations then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him.

9. 'Import' is derived from the Latin word importare which means 'to bring in' and 'export' from the Latin word exportare which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico- logically they do not have any reference to goods in 'transit' a word derived from transire bearing a meaning similar to transport, i.e., to go across. The dictionary meaning of the words 'import' and 'export' is not restricted to their derivative meaning but bear other connotations also. According to Webster's International Dictionary the word "import" means to bring in from a foreign or external source; to introduce from without; especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export. Similarly "export" according to Webster's International Dictionary means "to carry away; to remove; to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import". The Oxford Dictionary gives a similar meaning to both these words.

* * * * *

20. The respondent also relied on Muller v. Baldwin (1874) 9 Q.B. 457 where it was held that "coals exported from the Port" must be taken to have been

used in its ordinary meaning of "carried out of the Port" and therefore included coals taken out of the port in a steamer as "bunker coals" that is, coals taken on board for the purpose of consumption on the voyage. The argument that the term "exported" must receive a qualified interpretation and that it means taken for the purpose of trade only was rejected. Lush J. said at p. 461:-

> "There is nothing in the language of the Act to show that the word "exported" was used in any other than its ordinary sense.....Construing the words of the Act upon this principle, we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure-boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the Act".

"

52. Reverting back to Article 245 of the Constitution of India, we have already discussed that clause (1) empowers the Parliament to make laws for the whole or any part of the territory of India which power is however subject to the provisions of the Constitution. We have also noted that as per clause (2), no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. As we have noted earlier there appears to be an apparent dichotomy of what clause (1) says and what clause (2) saves. While clause (1) says that Parliament may make laws for the whole or any part of the territory of India which is however subject to the provisions of the Constitution, clause (2) however says that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

53. In **GVK Industries Limited** *(supra),* Supreme Court formulated two questions for its consideration, viz.,

1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspect or causes that do not have nor expected to have any direct or indirect, tangible or intangible impact on or effect in or consequences for (a) the territory of India or any part of India or (b) the interest of, welfare of, well being of or security of the inhabitants of India and Indians?

2) Does the Parliament have the powers to legislate 'for' any territory other than the territory of India or any part of it?

53.1 In so far question No.1 was concerned, the answer was in the affirmative i.e., Parliament being constitutionally restricted from enacting extra-territorial legislation but such restriction was made subject to certain exigencies, such as, it should have a real connection to India which should not be illusory or fanciful. In so far the second question was concerned, the answer was an emphatic no. Supreme Court held as under:-

> "76. We now turn to answering the two questions that we set out with:
>
> (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected

to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

77. The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, - events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

78. It is important for us to state and hold here that the powers of legislation of Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

79. The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra- territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question No.1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra- territorial operation. Any laws enacted by Parliament with respect to extra- territorial aspects or causes that have no impact on or

nexus with India would be ultra-vires, as answered in response to Question No.1 above, and would be laws made "for" a foreign territory."

53.3 In **Sondur Gopal** *(supra)* reiterating the above position Supreme Court clarified that clause (2) of Article 245 does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. Unless such contingency exists, Parliament shall be incompetent to make laws having extra-territorial operation. Referring to an earlier decision of the Supreme Court in *M/s. Electronics Corporation of India Limited Vs. Commissioner of Income Tax*, **AIR 1989 SC 1707**, it was held that unless a nexus with something in India exists, Parliament would have no competence to make the law. Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India.

54. Reverting back to section 9 of the CGST Act which is the charging section we find that it provides for levy and collection of CGST on all intra-state supplies of goods or services except on the supply of alcoholic liquor for human consumption at such rate as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Likewise section 5 of the IGST Act which is the charging section provides for levy of IGST on all inter-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rates as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Thus it is apparent that section 9 of the CGST Act cannot be invoked to levy tax on cross-border transactions i.e., export of services. Likewise from the scheme of the IGST Act it is evident that the same provides for levy of IGST on inter-state supplies. Import and export of services have been treated as inter-state supplies in terms of section 7(1) and section 7(5) of the IGST Act. On the other hand sub-section (2) of section 8 of the IGST Act provides that where location of the supplier and place of supply of service is in the same state or union territory, the said supply shall be treated as intra-state supply. However, by artificially creating a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.

55. Coming to the judgment of the Gujarat High Court in **Material Recycling Association of India** (*supra*), we find that Gujarat High Court while holding that section 13(8)(b) of the IGST Act cannot be said to be *ultra vires* or unconstitutional in any manner, however kept it open for the respondents to consider the representation made by the petitioner so as to redress its grievance in a suitable manner and in consonance with the CGST Act and the IGST Act. This is how Gujarat High Court dealt with the challenge:-

65. ….. The petitioner has tried to submit that the services provided by a broker outside India by way of intermediary service should be considered as "export of services" but the legislature has thought it fit to consider such intermediary services; the place of supply would be the location of the supplier of the services. In that view of the matter, it would be necessary to refer to the definition of "export of services" as contained in section 2(6) of the IGST Act, 2017 which provides that export of service means the place of service of supply outside India. Conjoint reading of section 2(6) and 2(13), which defines export of service and intermediary service respectively, then the person who is intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both. In such circumstances, the respondent No.3 have issued Circular No.20/2019 where exemption is granted in IGST rates from payment of IGST in respect of services provided by intermediary in case the goods are supplied in India.

66. It therefore, appears that the basic logic or inception of section 13(8)(b) of the IGST Act, 2017 considering the place of supply in case of intermediary to be the location of supply of service is in order to levy CGST and SGST and such intermediary service therefore, would be out of the purview of IGST. There is no distinction between the intermediary services provided by a person in India or outside India. Only because, the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has though it fit to consider the place of supply of services as place of person who provides such service in India.

67. Therefore, there is no deeming provision as tried to be canvassed by the petitioner, but there is stipulation by the Act legislated by the parliament to consider the location of the service provider of intermediary to be place of supply. Similar situation was also existing in service tax regime w.e.f. 1st October 2014 and as such same situation is continued in GST regime also. Therefore, this being a consistent stand of the respondents to tax the service provided by intermediary in India, the same cannot be treated as "exporter of services" under the IGST Act, 2017 and therefore, rightly included in Section 13(8)(b) of the IGST Act to consider the location of supplier of service as place of supply so as to attract CGST and SGST."

56. With utmost respect we are unable to accept the views of the Gujarat High Court as extracted above. Having regard to the discussions made in the preceding paragraphs it is evident that section 13(8)(b) of the IGST Act not only falls foul of the overall scheme of the CGST Act and the IGST Act but also offends Articles 245, 246A, 269A and 286(1)

(b) of the Constitution. The extra-territorial effect given by way of section 13(8)(b) of the IGST Act has no real connection or nexus with the taxing regime in India introduced by the GST system; rather it runs completely counter to the very fundamental principle on which GST is based i.e., it is a destination based consumption tax as against the principle of origin based taxation.

57. Mr. Singh, learned Additional Solicitor General had argued that the decision of the Gujarat High Court should be followed by this Court and for this purpose had relied upon the decision of the Supreme Court in **Kusum Ingots & Alloys** *(supra)* as well as of the Gauhati High Court in **Rehena Begum** *(supra)*. In **Kusum Ingots & Alloys** *(supra)* the question before the Supreme Court was whether the seat of the Parliament or the legislature of a state would be a relevant factor for determining the territorial jurisdiction of a High Court to entertain a writ petition under Article 226 of the Constitution of India. In the context of the issue involved Supreme Court examined the expression 'cause of action', clause (2) of Article 226 of the Constitution of India and section 20(c) of the Civil Procedure Code whereafter it was held that even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have territorial jurisdiction in the matter. A writ petition questioning the constitutionality of a Parliamentary legislation can be filed in any High Court of the country. Of course it can be done only when a cause of action arises which will confer territorial jurisdiction. It was in that context Supreme Court held that an order passed on a writ petition questioning the constitutionality of a Parliamentary act whether interim or final will have effect throughout the territory of India subject of course to applicability of such act.

58. In **Rehena Begum** (*supra*), a Single Bench of the Gauhati High Court found that section 17A of the Industrial Disputes Act, 1947 was held to be unconstitutional by the Andhra Pradesh High Court which decision was followed by the Madras High Court. Gauhati High Court agreed with the views expressed by the Madras High Court as well as by the Andhra Pradesh High Court that unconstitutionality of the provision of section 17A would have effect throughout the territory of India.

59. It is a settled legal proposition that decision of one High Court is not binding on another High Court though it deserves due consideration and certainly has a high persuasive value. This position has been clarified by the Supreme Court in *Valliamma Champaka Pillai Vs. Sivathanu Pillai*, **(1980) 1 SCR 354** and by this Court in *CIT Vs. Thane Electricity Supply Limited*, **(1994) 206 ITR 727**. In **Valliamma Champaka Pillai** (*supra*), Supreme Court declared that the erroneous decisions rendered by the erstwhile Travancore High Court could not be made binding on the Madras High Court. Such decisions could at best have a persuasive effect. There is nothing in the States Re-organisation Act, 1956 or any other law which exalts the ratio of those decisions to the status of a binding law nor could the *ratio decidendi* of those decisions be perpetuated by invoking the doctrine of *stare decisis*. Expanding on this, this Court in **Thane Electricity Supply Limited** (*supra)* held that the decision of one High Court is neither a binding precedent for another High Court nor for courts or tribunals outside its own territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the states or territories over which the Court has jurisdiction. In other states or outside the territorial jurisdiction of that High Court it may at best have only persuasive effect. By no amount of stretching of the doctrine of *stare decisis*, can judgments of one High Court be given the status of a binding precedent so far other High Courts or courts or tribunals outside the territorial jurisdiction of that High Court are concerned.

60. That apart, from a practical and pragmatic point of view if what the learned

Additional Solicitor General argued is accepted then decision of one High Court declaring constitutionality of an all India statute would foreclose adjudication by other High Courts which would neither be in the interest of administration of justice nor in the public interest. Furthermore, there is a fundamental difference in the present case in as much as unlike in **Rehena Begum** *(supra),* here the Gujarat High Court has held the particular provision as intra *vires* and constitutional.

61. In so far the general submissions made by Mr. Singh as to presumption in favour of constitutionality of a statute and that burden lies on the person who challenges constitutionality, there can be no dispute to such propositions. As a matter of fact these are well settled principles which are to be borne in mind while examining constitutionality of a statute. Moreover greater latitude has to be given to the Parliament or to the legislature while framing taxing statutes and that exercise of power to tax may normally be presumed to be in the public interest. But as has been held by the Supreme Court, each case would have to be decided on the facts of that case. There can be no straight- jacket formula in applying the above principles. It is also a settled proposition that a statute must pass the test of legislative competence; it must also pass the test of constitutionality in the sense that it cannot violate any provisions of the Constitution.

62. Reliance placed by the learned Additional Solicitor General on the Place of Provision of Service Rules, 2012 to highlight the fact that similar provision as contained in section 13(8)(b) was there unchallenged which would preclude the petitioner from instituting the challenge now appears to be misplaced. Because there was no challenge to the Place of Provision of Service Rules, 2012 can be no valid ground for non-suiting the petitioner from instituting the present challenge. Section 13(8)(b) of the IGST Act read with section 8(2) of the said Act have been challenged on the ground that those provisions violate the CGST Act and the IGST Act besides being violative of Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India. The challenge has to be met on the touchstone of the above provisions and not by falling back upon a non-existent Place of Provision of Service Rules, 2012.

63. The other submissions made by Mr. Singh that levy of IGST on supply of services by intermediaries to foreign customers would strengthen the *Make in India* program by encouraging foreign investment can be no answer to challenge to constitutionality of a parliamentary statute. Besides such a statement has been made *de-hors* any supporting statistics and analysis. Therefore, the same cannot be of any assistance to the respondents.

64. In view of what we have discussed and the conclusion that is being reached, it may not be necessary to deal with the other grounds raised by the petitioner in support of the challenge.

65. Thus having regard to the discussions made above and upon thorough consideration, we have no hesitation in holding that section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is *ultra vires* the said Act besides being unconstitutional.

66. Writ petition is accordingly allowed to the above extent. However, there shall be no order as to cost.

(ABHAY AHUJA, J.) **(UJJAL BHUYAN, J.)**

COMMERCIAL NEWS

CA Deepak Khandelwal

PRESS RELEASE

In view of the challenges faced by taxpayers in meeting the statutory and regulatory compliances under GST law due to the outbreak of the second wave of COVID-19, the Government has issued notifications, all dated 1st May, 2021, providing various relief measures for taxpayers. These measures are explained below:

1. Reduction in rate of interest:

Concessional rates of interest in lieu of the normal rate of interest of 18% per annum for delayed tax payments have been prescribed in the following cases-

a. **For registered persons having aggregate turnover above Rs. 5 Crore:** A lower rate of interest of 9 per cent for the first 15 days from the due date of payment of tax and 18 per cent thereafter, for the tax payable for tax periods March 2021 and April 2021, payable in April 2021 and May 2021 respectively, has been notified.

b. **For registered persons having aggregate turnover upto Rs. 5 Crore:** Nil rate of interest for the first 15 days from the due date of payment of tax, 9 per cent for the next 15 days, and 18 per cent thereafter, for both normal taxpayers and those under QRMP scheme, for the tax payable for the periods March 2021 and April 2021, payable in April 2021 and May 2021 respectively, has been notified.

c. **For registered persons who have opted to pay tax under the Composition scheme:** NIL rate of interest for first 15 days from the due date of payment of tax and 9 per cent for the next 15 days, and 18 per cent thereafter has been notified for the tax payable for the quarter ending 31st March, 2021, payable in April 2021.

2. Waiver of late fee

a. **For registered persons having aggregate turnover above Rs. 5 Crore:** Late fee waived for 15 days in respect of returns in **FORM GSTR-3B** furnished beyond the due date for tax periods March, 2021 and April, 2021, due in the April 2021 and May 2021 respectively;

b. **For registered persons having aggregate turnover upto Rs. 5 Crore:** Late fee waived for 30 days in respect of the returns in **FORM GSTR-3B** furnished beyond the due date for tax periods March, 2021 and April, 2021 (for taxpayers filing monthly returns) due in April 2021 and May 2021 respectively / and for period Jan-March, 2021 (for taxpayers filing quarterly returns under QRMP scheme) due in April 2021.

3. **Extension of due date of filing GSTR-1, IFF, GSTR-4 and ITC-04**

a. Due date of filing **FORM GSTR-1** and **IFF** for the month of April (due in May) has been extended by 15 days.

b. Due date of filing **FORM GSTR-4** for FY 2020-21 has been extended from 30th April, 2021 to 31st May, 2021.

c. Due date of furnishing **FORM ITC-04** for Jan-March, 2021 quarter has been extended from 25th April, 2021 to 31st May, 2021.

4. **Certain amendments in CGST Rules**:

a. **Relaxation in availment of ITC:** Rule 36(4) i.e. 105% cap on availment of ITC in **FORM GSTR-3B** to be applicable on cumulative basis for period April and May 2021, to be applied in the return for tax period May 2021. Otherwise, rule 36(4) is applicable for each tax period.

b. The filing of GSTR-3B and GSTR-1/ IFF by companies using electronic verification code has already been enabled for the period from the 27.04.2021 to 31.05.2021.

5. **Extension in statutory time limits under section 168A of the CGST Act:** Time limit for completion of various actions, by any authority or by any person, under the GST Act, which falls during the period from **15th April, 2021 to 30th May, 2021**, has been extended upto **31st May, 2021, subject to some exceptions** as specified in the notification.

*****

[This note presents the notifications in simple language for ease of understanding. For details, please refer to the notifications issued in this regard, which shall have force of law.]

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