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AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

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CHIEF-EDITOR'S COMMUNIQUE

Dear Professionals,

After the Second wave of Corona the work is coming back to normal. The issues relating to the Income Tax and GST Portal are creating problems for all. Particularly the New Income Tax Portal is a pain for all as it is not working properly and has many issues and because of it trhe Professionals throughout the country are having big problems in filing of returns or even checking the data of the earlier years etc. Representation has been given by the Federation as well as many other trade and professionals Association regarding the various issues of the Income Tax Portal and we expect that very shortly the issues would be resolved.

The current issue of this Indirect Tax Journal has incorporated the Articles, Judgements etc. on GST, FEMA, RERA and other allied loss and we had tried to cover the current issues. We request all Professionals to send their Articles or judgments for Publication in this Journal.

Friends, we are working on a paid subscription model for this Indirect Tax and Corporation loss Journal from the year 2022. The details will be announced shortly. For the last few years this Journals offline and online has been circulated free of cost to the Tax fraternity and has benefited us all. We are grateful to our sponsors who had contributed for the benefit of the profession. We feel that from 2022 the journal should become a paid journal for all and for it the details would be stated in the next issue.

We are grateful to Sh. O.P. Shukla, Advocate and National Vice President, North Zone who had sponsored this issue. He has been kind to accept the request and support this Journal by giving his sponsorship.

Journey of the Tax Laws is a continuous journey where in amendment and updates are part of it and therefore it is very necessary for the Tax Professionals to keep them updated always. The endeavor of the Journal is to give the latest details and professional knowledge on Indirect Tax and Corporate Laws. It is therefore requested that new changes / judgement should be sent to us at the email pankajghiyajaipur@gmail.com.

Wishing you all a very healthy and safe time with the family and happy Independence Day in advance.

Regards,

PANKAJ GHIYA
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ALL INDIA FEDERATION OF TAX PRACTITIONERS

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Membership of All India Federation of Tax Practitioners as on 19th July, 2021

Life Members

Zone Name	Associate	Individual	Association	Corporate	Total
Central	0	1180	25	0	**1205**
Eastern	6	1916	37	0	**1959**
Northern	0	1466	20	2	**1488**
Southern	1	1944	23	5	**1973**
Western	5	2752	38	6	**2801**
Total	**12**	**9258**	**143**	**13**	**9426**

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1.	Life Membership of the AIFTP (Including 18% GST Rs. 900/-)	Rs. 5,900/-
	ID Card Fees (Including 18% GST Rs. 18/-)	Rs. 118/-
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	Subscription of AIFTP Journal (for 1 year)	Rs. 1,400/-
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Nature of fees	*Type I (5 Yrs.)*	*Type II (10 Yrs.)*	*Type III (15 Yrs.)*	*Type IV (20 Yrs.)*
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Subscription	5,000/-	7,500/-	11.500/-	15,000/-
Total	5,590/-	8,090/-	12,090/-	15,590/-

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President's Message

Dear Colleagues,

I hope this communication finds you and your family members are safe and healthy.

Friends, Covid-19 vaccination drive is in full swing in the Country. I hope all of you including your family members got vaccinated. I request you all to encourage your relatives and friends to get vaccinated, so that we can get immunity from so called third wave as being cautioned by many medical experts.

I am extremely happy to inform you that, the new membership applications received from 15th February, 2021 to 15th July,2021 have crossed 1,000 and overall membership of AIFTP has also crossed 10,000 (Reduced membership fee was effective from 15th February,2021). All the new applications received after NEC meeting are subject to approval of NEC. The new membership fee has been increased to Rs.5,000 + Expenses + GST w.e.f., 16th July,2021, as decided by the NEC. I am very much thankful to all the National and Zonal Officer Bearers, NEC Members, all the Committees and all the other members of the AIFTP, who have motivated the new members to join AIFTP Family. I do hope efforts for strengthening the Federation will be continued forever.

In my earlier communication, I have informed you that we have initiated a COVID Relief Fund under the Chairmanship of our Past President Dr. Ashok Saraf. Some esteemed members of AIFTP have contributed generously. We have already received contributions of more than Rs.55 lacs from our members for providing financial assistance to the needy members as per the Scheme guidelines. I am very much thankful to the members who have shown their generosity while making contributions to the scheme. I request other members also to contribute generously for the good cause taken up by AIFTP.

We have also decided to initiate the AIFTP Members Benevolent Fund to help the needy members of the Federation. The NEC has constituted a Committee under the Chairmanship of Shri. Ganesh Purohit, Past President for preparation of guidelines of the scheme for the benefit of the members.

All the zones are regularly conducting webinars on different topic with versatile

speakers. I request all the Zones Chairmen, Vice Presidents, Jt. Secretaries and all eminent leaders in the Federation to plan physical programmes in their respective areas in grand manner for the benefit of the Tax Fraternity following Covid-19 guidelines issued by the Governments from time to time.

AIFTP is organising the National Tax Moot Court Competition in the memory of Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate, in association with Maharashtra National Law University, Mumbai. The same will be organised on virtual mode. Further details and the dates of the competition will be intimated in due course of time.

Friends, this week our Indirect Taxes Representation Committee Chairman, Shri. HL Madan has submitted a very detailed and comprehensive memorandum to the Hon'ble Union Finance Minister, highlighting procedural as well as technical issues which requires urgent attention for better administration of the GST. I am very much thankful to him and all the members who have contributed their sparing their valuable time in preparation of the memorandum.

Friends, as you all are aware this year is the election year of the Federation. We have to conduct National as well as Zonal Elections for electing new members to the National Executive and Zonal Management Committees. The NEC has appointed Dr.Ashok Saraf, Past President as Chief Election Officer for conducting National and Zonal elections for the years 2022-2023. The Chief Election Officer, with the help of 5 Zonal Election Officers will conduct elections at the appropriate time and manner as required under the Constitution of AIFTP. I request you all to co-operate with the Elections Officers in discharging their duties efficiently.

I express my sincere thanks to Shri. Pankaj Ghiya, Chief Editor of the Journal for bringing out excellent journal every month with very useful information to the members of the Federation.

I would take this opportunity to greet you all on the occasion of 74th Independence Day of India on 15th August, 2021**.** At the end I appeal to you all to stay safe during the current time which we are all passing through.

Place: Eluru
Dated: 23-07-2021

M. Srinivasa Rao
National President, AIFTP

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

CA Ribhav Ghiya

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
30.06.2021	28/2021-CENTRAL TAX	Seeks to waive penalty payable for non-compliance of provisions of Notification No. 14/2020 dated 21st March 2020

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
20.07.2021	157/13/2021-GST	Clarification regarding extension of limitation under GST Law in terms of Hon'ble Supreme Court's Order dated 27.04.2021.

*****

TIMELINE - GST

Adv. Abhay Singla

GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		July, 2021	20th August2021
			August, 2021	20th Sep 2021
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	July, 2021 (IFF)	13th Aug 2021
	(a) QRMP		July-Sep, 2021	13th Oct 2021
	(b) Monthly Filing	GSTR-1	July, 2021	11th August 2021
			August, 2021	11th Sep2021
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	July-Sep, 2021	18th Oct 2021
(v)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(vi)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	
(vii)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	

(viii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	July, 2021	10th Aug 2021
			August, 2021	10th Sep 2021
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	July, 2021	10th Aug 2021
			August, 2021	10th Sep 2021
(x)	Annual GST return (Composition Taxpayers)	GSTR-4	FY 2020-2021	31st July 2021

*****

REFUND ON EXPORT OF GOODS / SERVICES WITH PAYMENT OF TAX – ARE ALL EXPORTS ELIGIBLE UNDER THIS CRITERION?

CA S Venkataramani,
CA Siddeshwar Yelamali

I. Preamble

The Central Goods and Services Tax Act, 2017 (for brevity, 'CGST Act, 2017') provides to exporters of goods / services refund of tax under two mechanisms:

a. Refund of unutilized input tax credit on export goods / services
b. Refund of integratedtax paid on export goods / services

In this article,circumstances under which refund of integrated tax paid on export of goods or services ***cannot*** be claimed is discussed.

II. Snippet on refund on export made with payment of tax

Refund of integrated tax paid on exports generally involves the following procedures:

a. The exporter issues an export tax invoice with applicable tax on goods / services.
b. The tax charged on the export tax invoice is *not* collected from the recipient of goods / services.
c. The tax attributable on export tax invoice is generally paid by utilizing the accumulated eligible input tax credit.
d. The refund application for such export tax invoice is applied by filing Form RFD-01 under the category 'Export of services with payment of tax' for services. In case of export of goods, shipping bill filed is deemed to be application for refund.

III. Circumstances under which refund of integrated tax paid on export of goods or services exported cannot be claimed

Rule 96 of the CGST Act, 2017 provides for refund of integrated tax paid on goods or services exported out of India. Rule96(10) provides that refund of integrated tax paid on goods or services exported out of India ***cannot*** be claimed in the following circumstances:

a. Exporter of goods or services should not have received supplies from registered person availing benefitunder notification No. 48/2017-Central Tax, dated 18.10.2017 namely
   (i) Advance Authorisation under Chapter 4 of the Foreign Trade Policy 2015-20 benefit
   (ii) As an Export Oriented Unit or Electronic Hardware Technology Park Unit or Software Technology Park Unit or Bio-Technology Park Unit (in short, 'EOU')benefit approved in accordance with the provisions of Chapter 6 of the Foreign Trade Policy 2015-20.

Receipt of capital goods under Export Promotion Capital Goods Scheme (EPCG scheme) is allowed.

b. Exporter of goods or services should not have received supplies from registered person availing benefitof concessional rate of 0.05% CGST + 0.05% SGST / 0.1% IGST in terms of notification No. 40/2017-Central Tax (Rate) or notification No. 41/2017-Integrated Tax (Rate), both dated 23.10.2017.

c. Exporter goods or services should not have availed benefits under customs notifications, by way of importing goods without payment of duty under advance authorisation under notification No. 79/2017-Customs, dated 13.10.2017 or as an Export Oriented Unit under notification 52/2003 Customs dated 31.03.2003 as amended vide notification No. 78/2017-Customs, dated 13.10.2017.
Import of capital goods under Export Promotion Capital Goods Scheme (EPCG scheme) is allowed.

d. Where goods are imported under advance authorisation or by an EOU upon payment of integrated goods and services tax and compensation cess on inputs and availed exemption of only Basic Customs Duty (BCD), refund under Rule 96 of the CGST Act, 2017 can be claimed (Explanation inserted vide Notification No. 16/2020 – Central Tax dated 23-03-2020 w.e.f. 23.10.2017).

e. Therefore, if anygoods or servicesexported falls under any of the circumstances mentioned in para 'a' to 'c' supra, refund of integrated tax with payment of tax cannot be opted. The only option available is by way of refund of unutilized input tax credit.

f. Finance Act, 2021 - In a major change,the claim of refund of integrated taxes paid on zero-rated supplies (i.e.with payment of tax) of goods / services has been restricted to only certain class of taxpayers / certain class of goods or services and will not be available uniformly for all registered persons.Effective date of the said amendment is yet to be notified and notification specifying class of taxpayers / class of goods or serviceseligible for refund of zero-rated supplies with payment of tax is yet to be issued.

g. One has to be very cautious while opting for refund in case of export with payment of integrated tax and ensure that the claim is not hit by any of the restrictions discussed above.

Conclusion

An attempt has been made in this paper to make a reader understand the restrictions of imposed on refund on export with payment of tax 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 July 10, 2021

*****

SOME IMPORTANTADVANCE RULINGS UNDER GST

CA Manoj Nahata

1. Whether GST is to be paid only on the difference between the selling price and purchase price as stipulated under Rule 32(5) of CGST Rules, 2017, if applicant purchases used/second hand gold jewellery from individuals who are not dealers under the GST and at the time of sale there is no change in the form/nature of goods?

Held: Yes

In case of ***Aadhya Gold (P.) Ltd -AAR Karnataka*****,** the Applicant is a Private Limited company registered under the provisions of Central Goods and Services Tax Act, 2017 as well as Karnataka Goods and Services Tax Act, 2017 (hereinafter referred to as the CGST Act and KGST/SGST Act respectively) engaged in the business of buying and selling of second hand gold jewelleryfrom unregistered persons who are not dealers registered under GST (i.e., from common man). No ITC is available on such purchases. Further the used gold ornaments are sold in the same form in which they are originally purchased, to another registered person (buyer) after minor processing such as cleaning and polishing but without altering the nature of the ornament/ jewellery. The applicant is charging GST at the rate of 3% (CGST 1.5% and KGST 1.5%) to the buyer, on the entire sale consideration received from the buyer on sale of used ornaments/second hand goods. The applicant is of the view that as per Rule 32(5) of the CGST Rules, 2017, the value of supply shall be the difference between selling price and purchase price. Further, if the said difference is negative, then GST is not applicable on such transaction. Further they also placed reliance on the AAR pronounced by Karnataka & Maharashtra Authority.

The Authority examined the provisions of rule 32(5) and noted that the said rule is applicable if the following conditions are satisfied:

a) The supply made by the supplier must be a taxable supply
b) The supplier shall be a person dealing in buying and selling of second-hand goods, that means
   Used goods as such or after such minor processing which does not change the nature of the goods and
   Where no input tax credit has been availed on the purchase of such goods.

In the instant case the supplier is making a taxable supply covered by entry no. 13 of Schedule V to the Notification No. 01/2017-Central Tax (Rate) dated 28th June, 2017 which is taxable at 1.5% under the CGST Act and similarly taxable under the KGST Act, 2017 also at 1.5%. Further the applicant has stated that he is not melting the jewellery to convert it into bullion and

then remaking it to new jewellery but only cleaning the old jewelry and polishing it without changing the nature and form of the jewellery so purchased. These goods are then supplied to other persons. Further, the applicant admits that they are invoicing the goods as "used gold ornaments". Hence, the applicant satisfies the second condition also.

In view of the applicant satisfying both the aforesaid conditions, the valuation of the supply of second hand jewellery may be made as prescribed in sub-rule (5) of rule 32 of the Central Goods and Services Tax Rules, 2017.

2. **Whether applicant can charge concessional rate of GST under provisions of Notification No. 45/2017-C.T. (Rate), Notification No. 45/2017-S.T. (Rate) and Notification No. 47/2017-I.T. (Rate) all dated 14-11-2017 on scientific and technical instruments and equipment supplied to public funded research institutions, research institutions, universities, Indian Institute of Technology (IIT), departments and laboratories of Central and State Government on basis of certificates from respective authority ?**

Held: Yes

In case of ***M/s Thermo Fisher Scientific India (P.) Ltd - AAR Maharashtra***, the applicant supplies scientific and technical instruments and equipment (hereinafter referred to as the said goods), to public funded research institutions, research institutions, universities, Indian Institute of Technology (IIT), departments and laboratories of the Central and State Government (hereinafter referred to as the said institutions).The said institutions, raise purchase order on the Applicant for supply of the said goods, declaring therein that, supplied items will be used for research and development and shall not be transferred or sold by the Institution for a period of five (5) years from the date of installation as issued by the institutions in each case/purchase order wise. Applicant supplies the said goods to the said institutions from their customs bonded warehouse/non-bonded warehouse. The applicant is of the view that post GST, they will be entitled to supply the said goods to the said institutions, availing exemption under Notification No.45/2017-Central Tax (Rate) and Notification No. 47/2017-Integrated Tax (Rate), both dated 14.11.2017.

The authority examined the matter and noticed that the applicant was claiming such exemption benefit under the erstwhile law of Central Excise as well. The benefit under GST as per Notification No.45/2017-Central Tax (Rate),would be in line with Notification No. 51/96 Customs, dated the 23rd July, 1996 and is applicable with effect from the 15th November, 2017. As per Sr. No 1 of Notification 45/2017 mentioned above, when the said goods are supplied to public funded research institutions other than a hospital or a university or an IIT or an IIS or a National Institute of Technology (NIT)/ REC, for availing exemption mentioned therein, the said institution must produce a certificate of registration with DSIR, from an officer not below the rank of the Deputy Secretary in the Union territory in concerned department

to the supplier, (in this case, the applicant) at the time of supply of the specified goods. Another condition to be satisfied as per Sr. No. 1 is that the Head of the Institution to whom the supply of the said goods are made, issues a Certificate certifying that goods are required for research purposes only and such certificates, are provided to them by the Head of the Institutions to whom the said goods are supplied according to the applicant's submissions. Exemption as per Sr. No 2 of the said Notification 45/2017 is available only when the said goods are supplied to research institutions other than a hospital. The applicant satisfied all the conditions as enumerated in the notification. In view of the same Applicant would be correct in charging 5% GST only in 4 cases of National Centre for Polar and Ocean Research, University of Delhi, Council of Scientific and Industrial Research CSIR-North East and Institute of Science & Technology where all the conditions mentioned in the impugned Notifications are found to be satisfied and the necessary and proper certificates, complete in all respects as mandated by the relevant Notifications have been produced.

3. Whether services provided by way of arranging or facilitating sales of goods for various overseas suppliers is an 'exempt supply' under GST?

Held: No

In the case of ***Teretex Trading (P.) Ltd-AAR West Bengal*****,** the applicant is going to be engaged in supplying services by way of arranging sales of goods for various overseas manufacturers/traders. As against this service, the applicant will receive consideration in the form of commission in convertible foreign exchange from the overseas suppliers. The applicant sought an advance ruling on whether the service will be considered as 'export of services' or not.

The applicant submitted that being an independent service provider, he is going to undertake supply of services at his own risk and cost without being appointed as an agent by the supplier or by the recipient of goods. He doesn't represent the party for whom he is procuring the order for supply of goods nor has any authority to negotiate at the time of procuring order for them. He doesn't assume any obligation either on behalf of the supplier or on behalf of the recipient of the goods. Also, he doesn't maintain any establishment outside India and receives payment as commission directly from the overseas seller to his bank account in India and the applicant cannot be termed as merely an establishment of a distinct person.

The Authority observed that the nature of activities going to be undertaken by the applicant towards arranging or facilitating supply of goods envisages the services closely akin to the services provided by an 'intermediary' as defined in clause (13) of section 2 of the IGST Act, 2017. By referring sec-2(13) of the IGST Act, the Authority stated that the crux of the definition is lying with the phrase 'arranges or facilitates the supply of goods or services

or both' between two or more persons. The supply of services as provided by the applicant is inextricably linked with the supply of goods made by the overseas supplier. The applicant being the supplier of services is located in India and the recipient of services being located outside the country attracts the provisions of the 'place of supply' of the Act. The applicant is found to be an 'intermediary' as defined in clause (13) of section 2 of the IGST Act, 2017.So, the place of supply shall be determined under sub-section (8) of section 13 of IGST Act, 2017 which shall be the location of the supplier of services. It therefore appears that the applicant being supplier of services by way of arranging or facilitating sales of goods for various overseas suppliers and admittedly the same is not being done on his own account, satisfies all the conditions to be an intermediary as defined in clause (13) of section 2 of the IGST Act, 2017.

4. Whether liability to pay GST on Reverse charge arises if amount is paid for reimbursement of Stamp tax paid as a pure agent by holding co. on behalf of subsidiary co.?

Held: Yes, the subsidiary co. is liable to pay GST under RCM.

In the case of ***M/s. Enpay Transformers Components India Pvt. ltd., AAR-Gujarat***, the applicant is importing goods from the Holding company located in a foreign country. The company has obtained bank credit facility from CITI Bank based on the Corporate Guarantee issued by holding company and the holding Co. has paid Stamp tax in its foreign country as per their land rules and they have raised reimbursement invoice of said payment to the subsidiary Co. The applicant sought an advance ruling on whether liability to pay GST on Reverse charge arises if amount is paid for reimbursement of Stamp tax paid as a pure agent by the holding co. on their behalf.

The applicant submitted that the Stamp duty paid by the holding co. is neither intending to hold any title for it and not for the use of his own interest; that also the holding co. has received only actual amount of stamp tax paid and considering the above facts, the value paid as a reimbursement to the holding co. should not be considered as import of services considering it as a payment made to pure agent and hence no IGST on RCM should be liable to pay.

The Authority referred to the provisions of Rule 33 of the CGST Rules, 2017 which covers the value of supply of services in case of pure agent of the recipient of supply. It stated that the expenditure or costs incurred by the supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, if, and only if, the holding co. satisfies all the conditions envisaged in the Explanation to Rule 33 of the CGST Rules, 2017. In the given case, the Bank Guarantee entered into by the supplier with the CITI Bank on behalf of the applicant, is in direct relation to the business connection/ link that they are having with the applicant by way of supply of goods to them and therefore, the payment of stamp tax made by them to the bank (on behalf of the applicant) and demanded by them from the applicant as reimbursement

through issuance of a reimbursable invoice would be considered to be payment made in respect of the supply of goods made by them to the applicant . The amount of stamp tax, which is paid as reimbursement by the applicant will undoubtedly form a part of the 'consideration' i.e. the value of the supply of goods provided by the supplier to the applicant and GST is liable on the same. The supplier of the applicant does not fulfill/satisfy all the conditions required for being a 'Pure agent' in terms of the provisions of Rule 33 of the CGST Rules, 2017 and therefore, the expenditure or costs incurred by the supplier of the recipient of supply cannot be excluded from the value of supply in terms of the provisions of Rule 33 of the said rules and is liable to GST on reverse charge basis.

5. Whether the medicines, consumables and implants used in the course of providing health care services to in-patients for diagnosis or treatment for patients opting with or without packages along with allied services i.e. (room rent/food/doctor fees Etc.) provided by hospital would be considered as "Composite Supply and accordingly eligible for exemption under the category "HEALTH CARE SERVICES" ?

Held: Yes

In the case of ***M/s. Shalby Limited-AAR Gujarat***, the applicant is a multi-specialty hospital and providing health care services to both out-patients and in-patients. The in-patients are provided with stay facilities, medicines, consumables, surgical implants, dietary food and other surgery items required for treatment. During the course of such treatment after admission into the hospital, the in-patients are also provided rooms on rent. The in-patients are charged for their hospitalization and stay in the Hospital for treatment of their illness. As far as an inpatient is concerned, hospital provides lodging, care, medicine and food as part of treatment under supervision till discharge from the hospital. Accordingly, Hospital charged together and is billed to the In-patient for their hospitalization and stay in the Hospital for treatment of their illness. An advance ruling is sought on whether the medicines, consumables and implants used in the course of providing health care services to in-patients for diagnosis or treatment for patients opting with or without packages along with allied services provided by hospital would be considered as "Composite Supply and accordingly eligible for exemption.

The applicant submitted that object of the Hospital is to cure the illness of the patient and in the process medicines are being administered through the services of doctors and trained staff. The intention of the hospital is to cure the illness of patients admitted in its hospital rather than to sell medicines and other goods to them. There is as composite contract for rendering medical services wherein the supply of goods is incidental and part of the services provided by the Hospital.

The Authority observed that the hospital cannot provide health services

including diagnostic, treatment surgery etc. without the help of medicines to be taken during treatment, implants and consumables used during their stay in the hospital. Only on using these medicines, consumable and implants as required and prescribed by the doctors and administered during their stay will the treatment be complete. Hence, supply of medicines, implants and consumables are natural bundled with the supply of health services. In this case, supply of health services is the principal supply as that is the reason the in-patients get admitted to hospital instead of buying the medicines or consumables and using on themselves. Therefore, supply of medicines, consumables and implants to the In-patients in the course of their treatment is a composite supply of health services.

6. Whether online/offline tendering is to be considered as supply of goods or supply of services?

Held: Supply of Services.

In the case of ***M/s. Maharashtra State Dental Council-AAR Maharashtra***, the applicant is constituted under The Dentists Act, 1948 to provide help, assistance and guidance for the benefit and welfare of dental practitioner who are registered with the council. It is not a profit making institution and income earned by way of fees is used for the maintenance of the council. An advance ruling is sought on the matter whether online tendering to be considered as supply of goods or supply of services.

The Authority observed that in respect of online tendering, requirement for procurement of goods or services will be raised online. It referred sec-2(56) which defines 'Goods' and sec-2(12) which defines the term 'Services'. From these definitions, it became amply clear that online tendering does not satisfy the definition of 'Goods'. Further, it referred sec-2(17) of the IGST Act and stated that the provision of E-Tender, which is intangible have to be delivered through telecommunication network or internet. Thus, the intention of the legislature is clear to treat online tendering as supply of services.

In the case of offline tendering, the requirement for procurement of goods or services will be raised by manual process i.e. manual tender. The difference between online and offline tendering is only that in the case of the former, the tender forms are sold on line and in the case of the latter, the tender forms are sold as printed matter. In offline tendering too, there are intangible products such as application, payment of fees, submission of bids. etc. These services are difficult to be identified individually. The definition of the term 'service' as per the CGST Act, is an inclusive definition and is wide. Sometimes services are difficult to identify because they are closely associated with a goods: such as the combination of a diagnosis with the administration of a medicine. No transfer of possession or ownership takes place when services are sold. Hence offline tendering, in our opinion will also be considered as rendering of services.

7. Whether landscaping and gardening work provided to the government

departments attract GST?

Held: Exempted under GST

In the case of ***M/s Narayanappa Ramesh-AAR Karnataka***, the applicant is engaged in the landscaping and gardening work and maintenance of community assets provided to the government departments. An advance ruling is sought on whether such services provided to government dept. are exempt or not.

The applicant submitted that the activity of maintenance of community assets mentioned in the entry no.29 to Schedule-II OF Article 243G of the Constitution is covered under exemption under GST and the provision of urban amenities and facilities mentioned in entry no.12 of Schedule-12 of Article 243W of the constitution is covered under exemption under GST.

The Authority examined the case and found that the applicant is executing two types of works, wherein in one set of cases, the applicant is making supply of pure services without it being a works contract service or composite supply and in the second category of supply, the applicant is providing composite supply of both goods and services.

In respect of the first set, the Authority stated that the activities are covered under entry no.3 of the NN-12/2017-C.T(R) and the same is exempt under GST.

In respect of the second set, such supplies which are involving goods either as a works contract or composite supply, the activities will get exempted only if it satisfies certain prescribed conditions. It observed that the supply of goods is less than 25% of the value of the said composite supply. Secondly, the recipient must be for the Central or State Govt. dept. or a local authority or a Govt. entity. In the given case, the recipient is falling under these categories. Also, the activity of maintenance of community assets falls under entry no.29 of Schedule-11 of Article 243G of the Constitution.

Hence, the second set of activities is also exempt under GST.

8. Whether GST is applicable on the maintenance charges collected by the Society for providing various facilities or benefits like security, cleaning, repairs, water, common electricity etc. to its members?

Held: Yes by whatever name it is collected.

In the case of ***M/s Emerald Court Co-operative Housing Society Limited-AAR Maharshtra***, the applicant is a co-operative society (here-in-after referred as "CHS"). The CHS provides services to its members in the form of facilities or benefits like security, cleaning, repairs, water, common electricity etc. It also arranges to pay for the ancillary services like accounting, auditing, caretaker, etc. Presently, the CHS is raising monthly bills on its members which consist of 2 parts, one is property tax on which GST is not being charged and another is 'Maintenance charges' on which GST is being charged. Hence they seek opinion on the chargeability of GST on such transaction since there could be no sale by the Co-operative Housing Societies to their

own permanent members, for doctrine of mutuality would come into play. To elaborate, CHS treated itself as the agent of the permanent members in entirely and advanced the stand that no consideration passed for the services rendered by the society to its members and there was only reimbursement of the amount by the members and therefore no GST could be levied. Also, they are not into any business. Further, the Hon'ble Supreme Court, in the Calcutta Club Limited case held that, clubs are not entitled to charge, collect and pay taxes on any services/sales made to their members. The rationale for the decision was that if there are no members, there is no club and vice-versa.

The jurisdictional officer on the other hand, has contended that cooperative housing societies are covered by the definition of business as given under the provisions of the GST Act; transaction of supply of services by a Co-Op Housing Society to its members is Covered by transaction taking place between "related persons" as provided in Section 15 of GST Act ; if supply of service or goods takes place in case of related persons or distinct persons, then such activity is 'supply' even if it is not accompanied by "consideration" : a member of cooperative society and the cooperative housing society itself are separate and distinct entities under the MGST and CGST Act by virtue of the provisions of the Section 15. i.e. related person.

The authority examined the matter and observed that Vide clause 99, an amendment was proposed in the CGST Act, 2017. whereby, in section 7, in sub-section (1), after clause (a) a new clause (aa) was inserted whereby the principle of mutuality has been done away with by considering the transactions between a club and its members as "Supply" under GST. The authority further observed that the amendment mentioned above has received the assent of the President of India on the 28th March, 2021 and in view of the same the issue of principles of mutuality in the case of cooperative societies like the applicant has been settled. Therefore in view of Section 7 of the CGST Act,2017 the applicant society and its members are distinct persons and the amounts received by the applicant, against maintenance charges, from its members are nothing but consideration received for supply of goods/services as a separate entity. Therefore, the applicant is liable to pay GST on maintenance charges (by whatever name called) collected from its members, if the monthly subscription or contribution charged from the members is more than Rs. 7,500/- per month.

Author's comment: The Ld. AAR in this ruling has considered the retrospective amendment proposed to section 7 as made effective from 28.03.2021. But in actual as on the date of ruling, the retrospective amendments made under GST vide finance Act 2021 was not made effective. Hence the said ruling has not considered correct position of law.

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DIGEST OF ADVANCE RULINGS UNDER GST

S.S. Satyanarayana, Tax Practitioner

1. Exempted supply :

Facts : The applicant is providing training to the candidates in the field of JEE (Non Med.) and NEET (Med.) to the selected candidates at behest of Directorate of Welfare of Schedule Caste and Backward Class, Department of Haryana. The selected candidates are sponsored by Directorate of Welfare of Schedule Caste and Backward Classes Department, Haryana.

The applicant sought Advance Ruling –

- To determine the liability to pay GST / IGST tax on training to students at behest of Directorate of Welfare of Scheduled Caste and Backward Classes Department, Haryana by applicant under a training program for which total expenditure is borne by state Govt. of Haryana which implement three types of scheme i.e. State Scheme, Sharing basis, Centrally sponsored Scheme especially in view of Entry No. 72 of the Haryana Govt. Excise & Taxation Department Notification No. 47/ ST-2 Dated 30.06.2017 and whether this Entry grants exemption of GST on the Training of Students by Petitioner?
- Whether the Applicant is liable to be registered under the State of Haryana under HGST/CGST in view of facts and circumstances of present case?

Observations & Findings : Services provided to the Central Government, State Government, Union Territory Administration under any training program for which total expenditure is borne by the Central Government, State Government, Union Territory Administration", the rate of tax is nil. Notification Number **12/2017 (CGST) Entry 69 of CGST:**

> *"Services provided to the Central Government, State Government, Union territory administration under any training program for which total expenditure is borne by the Central Government, State Government, Union Territory administration.*

Therefore, the training imparted by the applicant to the students selected through Directorate of Haryana for JEE (Non-Med.) and NEE T (Medical) are exempt from payment of GST.

Further, section 23 of the Act provides that any person engaged exclusively in the business of supplying goods and services or both that are not liable to tax or fully exempt from tax under this Act or under the Integrated Goods and Service Tax Act and therefore the applicant is not liable for registration.

Ruling : The training imparted by the applicant to the students selected through Directorate of Haryana for JEE (Non-Med.) and NEE T (Medical) are exempt from payment of GST.

The applicant engaged exclusively in the business of supplying goods and services or both that are not liable to tax or fully exempt from tax under this Act or under the Integrated Goods and Service Tax Act. So the applicant is not liable for registration under GST.

[2021 (6) TMI 1011 – AAR, Haryana – Sachdeva Colleges Limited]

2. **Intermediary services** :

Facts : The Applicant is operating as a subsidiary of Airbus Invest SAS, France (Holding Company), and its ultimate holding company is Airbus SE, Netherland. Globally, Airbus Group is an international pioneer in the aerospace industry and is a leader in designing, assembling and delivering aerospace products, services and solutions to its customers on a global scale. The applicant provides engineering design and other technical advisory services which include marketing support, customer support services, flight maintenance training, flight operations supports, flight pilot training, etc. They also provide maintenance, repairs and overhaul services, agency services, renting of assets and trading of spares and parts of Helicopter.

The applicant sought advance ruling on whether the service rendered on behalf of their Holding Company can be classified as Export of Service?

Observations & Findings : The activities performed by the applicant involve identifying the local capabilities in India to supply the raw materials, on-site assessment of the suppliers by the applicant to monitor their performance. The applicant assesses the quality of the production, risk evaluation in respect of the supplier and provides guidance to the vendors regarding the product expectation of Airbus Invest SAS, France. They obtain initial quotations and terms of the contract from the suppliers and share the same with the Holding company; review performance and production quality in terms of adhering to the production schedule of the suppliers selected by the Holding Company; create awareness of Airbus ethics and compliance guidelines amongst the suppliers approved and nominated by Airbus Invest SAS, France. The applicant also carries out audit on the procurement process, reports on un-ethical practices of suppliers and provides support to team in India and Europe for special projects. However, the applicant does not select the vendors, does not issue any purchase order, does not decide the price quotation and does not involve in payment to the vendors and does not enter into any agreement with the vendors on any terms and conditions in respect of the supply.

Now, we proceed to examine whether the activities undertaken by the applicant can be called intermediary services. Intermediary is defined, under Section

2(13) of IGST Act, 2017, as ***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***. In this regard, we notice that the applicant has emphasized upon not being an agent or a broker. We notice that there can be difference between agent, broker and an intermediary. Whereas in the case of an agent or broker, activity is undertaken on another's behalf which is not necessary in the case of an intermediary. Therefore, the reliance on principal to principal relationship or calling oneself as an independent contractor is not relevant for the purpose of determining an intermediary as per the definition. An intermediary will merely facilitate or arrange the supply of goods or services between two or more people but will not be providing such supplies on his own account.

Ruling : 1. The activities carried out in India by the Applicant would constitute a supply as "Intermediary services" classifiable under SAC 998599.

2. The services rendered by the Applicant do not qualify as 'export of services' in terms of sub-section 2 of Section 6 of the IGST 2017 and consequently, are exigible to GST at the rate of 18% in terms of clause (iii) of entry no. 23 of Notification No. 11/2017-Central Tax (R) dated 28.06.2017.

[2021 (7) TMI 263 – AAR, Karnataka – Airbus Group India P Ltd.]

3. Supply of second hand goods :

Facts : The Applicant is a Private Limited company registered under the provisions of Central Goods and Services Tax Act, 2017 engaged in the business of buying and selling of second hand gold jewellery.

The applicant has sought advance ruling in respect of the following question: Whether GST is to be paid only on the difference between the selling price and purchase price as stipulated under Rule 32(5) of CGST Rules, 2017, if applicant purchases used/ second hand gold jewellery from individuals who are not dealers under the GST and at the time of sale there is no change in the form / nature of goods?

Observations & Findings : The issues that needs to be addressed is related to whether the applicant is eligible to utilize the sub-rule (5) of rule 32 of Central Goods and Services Tax Rules, 2017.

Rule 32 of the CGST Rules, 2017 stipulates the method of working of the taxable value of a supply and is applicable if the following conditions are satisfied:

(a) The supply made by the supplier must be a taxable supply

(b) The supplier shall be a person dealing in buying and selling of second-hand goods, that means

- *Used goods as such or after such minor processing which does not change the nature of the goods and*
- *Where no input tax credit has been availed on the purchase of such goods.*

In the instant case, the supplier, i.e., the applicant is effecting the supply of second-hand jewellery which is taxable under the GST Act as it is covered under entry no.13 of Schedule V to the Notification No.01/2017-Central Tax (Rate) dated 28th June, 2017 which is taxable at 1.5% under the CGST Act and similarly taxable under the KGST Act, 2017 also at 1.5%. Hence, the supplier satisfies the condition that the supply made by him must be a taxable supply.

Regarding the next condition, the supplier must be a person dealing in buying and selling of second-hand goods. It is seen that the applicant has admitted that he is purchasing used gold jewellery from individuals and selling the same, after cleaning and polishing them. The applicant has also admitted that he is not availing any input tax credit on the purchase of such goods and the goods so purchased are supplied 'as such'. The applicant has stated that he is not melting the jewellery to convert it into bullion and then remaking it to new jewellery but only cleaning the old jewelry and polishing it without changing the nature and form of the jewellery so purchased. These goods are then supplied to other persons. Further, the applicant admits that they are invoicing the goods as "used gold ornaments". Hence, the applicant satisfies the second condition also.

Ruling : In the case of applicant dealing in second hand goods and invoicing his supplies as "second hand goods", the valuation of supply of second hand gold jewellery which are purchased from individuals who are not registered under GST and there is no change in the form and nature of such goods, can be made as prescribed under sub-rule (5) of rule 32 of the Central Goods and Service Tax Rules.

[2021 (7) TMI 548 – AAR, Karnataka – Aadhya Gold P Ltd.]

4. Construction services :

Facts : The applicant is engaged in promotion of gated community villa projects in the State of Kerala for the prospective villa buyers. They are having several projects out of which in one project there are 20 units. Out of the 20 units, 9 units were already booked and got approval for villa from local authorities before 31.03.2019 and the balance 11 units in that project were un-booked and have not got the approval for villa from local authorities before 31.03.2019. They opted (by exercising One time option in Form Annexure IV) for old GST rate of 18% - effective rate being 12% after excluding land portion - (as per SI.No.3, Clause No.(if) of Notification No.11/2017-Central Tax (Rate) dated

28-06-2017 as amended by Notification No. 03/2019 - Central Tax (Rate) dated 29-03-2019) for the 9 units which were already booked and got the approval from local authorities before 31.03.2019 and have not opted the old rate of tax for the balance 11 units since they are unbooked and not got approval from local authorities before 31.03.2019. In the Option Form Annexure IV, only 9 villas were included and balance 11 villas were not included. The Form Annexure IV with only 9 villas was accepted by the proper officer. Since they have not opted for the old rate of 18%, for the balance 11 villas, they are made liable to pay GST at the new rate of 7.5% without ITC, (as per item (ia) in SI.No.3 in the Notification) effective tax rate being 5% after excluding land portion.

The applicant requested advance ruling on the following;

1. Whether the new tax rate of 7.5% (effective rate of 5% after excluding land portion), with no ITC, is applicable to the 11 unbooked units in the project?

2. Whether the answer given for the first question is also applicable to other similar projects in similar situations?

Observations & Findings : A new tax structure for real estate sector was introduced with effect from 01.04.2019 onwards by amendment of Notification No. 11/2017 Central Tax (Rate) dated 28.06.2017 by Notification No. 03/2019 - Central Tax (Rate) dated 29.03.2019. The Notification No. 03/2019 - Central Tax (Rate) dated 29.03.2019 substituted the rate for services related to real estate sector with effect from 01.04.2019 and also made provisions for continuing the old rate of tax (as it existed up to 31.03.2019) for the ongoing projects. The provisions for continuing the old rate of tax for the ongoing projects were incorporated in Items (ie) and (if) of Sl No. 3 of the Notification No. 11/2017 CT (Rate) dated 28.06.2017 as amended and the Item at (if) (ii) being in respect of construction of residential apartments other than affordable residential apartments is the provision that is applicable to the applicant. The condition prescribed under the above provision for continuing with the payment of tax at the old rates in respect of ongoing projects was that the registered person shall exercise within the specified time an option in the prescribed form to pay tax on construction of apartments in the project at the rates as specified for Item (if) of Sl No. 3 of the said notification. Accordingly, the applicant exercised option in the prescribed form for paying tax at the old rate for their ongoing project stating that the option is in respect of 9 units out of a total of 20 units comprised in the project on the ground that only 9 units were booked and approval obtained from the local authorities as on 31.03.2019 and the remaining 11 units were neither booked nor approval obtained from the local authorities. Now, the issue to be determined is whether such option as

prescribed in Item (if) of the said notification can be exercised in respect of part of a project or it should be exercised for the entire project as a whole.

On a reading it is evident that the option envisaged under Item (if) of Sl No. 3 of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 as amended by Notification No. 03/2019-Central Tax (Rate) dated 29.03.2019 is in respect of the entire ongoing project and not in respect of part of the project. Further, as is clarified by CBIC, even if the commencement certificate issued is only for part of the project, the same shall be treated as an ongoing project. Hence, as per provisions of the said notification, the option to pay tax at the old rate can only be exercised project-wise and not for part of project or individual apartments / villas comprised in a project. Therefore, the option exercised by the applicant for paying tax at the rate as specified in Item (if) of S1 No. 3 of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 as amended by Notification No. 03/2019-Central Tax (Rate) dated 29.03.2019 in respect of the ongoing project is applicable for the entire 20 villas comprised in the project and not for the 9 villas as claimed by the applicant.

Ruling : Whether the new tax rate of 7.5% (effective rate of 5% after excluding land portion), with no ITC, is applicable to the 11 un-booked units in the project?

No. Since the applicant has exercised option for paying tax at the rate as specified in Item (if) of S1 No. 3 of Notification No. 11/2017 Central Tax (Rate) dated 28.06.2017 as amended by Notification No. 03/2019 Central Tax (Rate) dated 29.03.2019 in respect of the ongoing project, the old rate of tax at 18% with input tax credit is applicable for all the apartments / villas comprised in the project.

2. Whether the answer given for the first question the project is also applicable to the other similar projects in similar situations?

The answer to Question No. 1 above is applicable to the other similar projects of the applicant in similar situations.

[2021 (7) TMI 541 – AAR, Kerala – Victoria Realtors]

5. Healthcare Services :

Facts : The applicant is a society, holding income tax exemption certificate under Section 12A of the Income Tax Act, incorporated under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 running a multi-speciality hospital and institutes for medical education. They are rendering medical and educational services with professionals like doctors, nursing staffs, lab technicians, pharmacist and others. The applicant is supplying medicine, implants and other supplies to their patients during the course of treatment who are admitted as inpatient and who are not admitted but undergoing treatment in their hospital as outpatients. They are supplying

medicines only to patients who are registered in their hospital as a patient against prescription from their treating Doctors.

The applicant sought for advance ruling on many questions which were answered by the AAR.

Observations & Findings : The applicant is a clinical establishment as defined in Para 2 (s) of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 providing healthcare services as defined _ in Para 2 (zg) of the said notification which is exempted as per entry at SI No. 74 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

Having come to the conclusion that the applicant is a clinical establishment providing healthcare services that are exempted as per entry at SI No. 74 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, In view of the same the taxability of each of the different situations under which healthcare services are provided by the applicant as detailed in the questions raised by them have been answered.

Ruling : Whether GST is leviable on the value of supply of medicine, implants and other supplies issued to our patients during the course of treatment:

1. Who are admitted as inpatients in the following situations?

1.1. In the case where a package is offered to patient which covers the treatment, required medicines, required supplies etc for a consolidated amount. This amount was prefixed by the hospital with respect to treatment of a particular disease or surgery and charged to patient irrespective of the type and quantity of medicine, supplies etc issued to patients.

It is a composite supply of which the principal supply is healthcare services and the other supplies are only incidental or ancillary to the supply of healthcare services. Therefore, the supply of medicines, implants, and other items to the inpatients admitted to the hospital for treatment as per the package offered by the applicant is a composite supply where the principal supply is healthcare services falling under SAC 999311 which is exempted as per entry at SI No. 74 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

1.2. In the case where a package is offered to patient which covers the treatment for a consolidated amount and this amount is prefixed by the Hospital with respect to treatment of a particular disease or surgery. But the supply of medicine and certain other supplies like implants are not included in this package and will be billed extra, according to the type, brand (when choice available to patient) and quantity of items issued to the patient.

The healthcare services supplied by the applicant as per the package is exempted as per entry at SI No. 74 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and the supply of medicines, implants and other items that are not included in the package and which are separately billed shall

attract GST at the rate applicable to such items as per the GST Tariff Schedule.
1.3. In the case where package is not applicable and the treatment, medicines, other supplies and other items are charged to patient separately at actual. In this case supply of medicine and other supplies are being charged separately according to the type, brand (when choice available to patient) and quantity of items issued to the patient.
The supply of each of the individual goods and / or services shall be individually liable to GST at the rates as applicable on the basis of the classification of such supplies.
1.4. In the case where the percentage of value of medicines and other supplies represents major portion of the total expenditure billed to a patient.
The question is vague in nature for the reasons as stated above and hence could not be answered for want of sufficient information.
2. Who are not admitted but undergoing treatment as outpatients in the following situations: -
2.1. In the case where the patients are not being admitted in hospital but the hospital is providing treatment to those patients at the hospital as an outpatient. Ex: - Dialysis, dressing, chemotherapy, minor surgeries, other treatments and procedures that require no admission and preadmission services like causality. The services provided in the course of the treatment of the patients as described above clearly fall within the scope of healthcare services as defined in Para 2 (zg) of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and is exempted from GST as per entry at SI No. 74 of the said notification.
2.2. Issue of medicine and other supplies based on their Doctor's prescription to patients for consumption at home and follow-up. In this case the hospital accepts any such medicines returned by the patient for cessation of the treatment or for replacement, as per the instructions of the treating doctor.
The supply of medicines and allied items by the pharmacy run by the hospital can only be treated as an individual supply of medicine and allied items and therefore is liable to GST at the rates applicable for each such item as per the GST Tariff Schedule. In the case of medicines and allied items returned or replaced by the customers the applicant can adjust the GST paid on such medicines and allied items by issue of credit note as per provisions of Section 34 of the CGST Act read with Rule 53 of the CGST Rules, 2017.
[2021 (7) TMI 543 – AAR, Kerala – Malankara Orthodox Syrian Church Medical Mission Hospital]

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TRANSIT PENALTY UNDER CGST ACT, 2017

Amogh Bansal

TRANSIT PENALTY UNDERCGST ACT, 2017

INTRODUCTION

After the GST regime is implemented in year 2017, e-way bill has been made mandatory, there are many cases wherein vehicles carrying the goods are detained at behest of any sort of discrepancies in documents carried along with the goods. In this article I have tried to compile the necessary sections and rules wherein the law prescribes for interception / detention of vehicle and thereafter, about the law to penalize owner of goods and owner of the vehicle carrying the goods. I will also discuss the amendments made in these provisions by the Finance Act, 2021.

Section 68 of **CGST Act, 2017** read with Section 129 of CGST Act, 2017 read with Rule 138B of **CGST Rules, 2017** gives the right to the respective officer to intercept the vehicle and check the documents relating to goods being carried in the vehicle and Section 130 deals with the Confiscation of goods or conveyances and levy of penalty.

ANALYSIS OF SECTION 129

This Section starts with the non-obstante clause and tells the procedure as to how the goods and conveyances can be released where such goods and conveyances have been detained or seized while in transit.The word "tax & penalty" has been substituted by the word "penalty" through the Finance Act, 2021 which has made the sections clear as compared to before the said amendment. As now entire amount payable to get the goods released is penalty which will have a bearing on income tax payable and shall be disallowed completely for income tax purposes.

Clause 'a' of Section 129(1) prescribes the procedure as to how the goods can be released when owner of the goods comes forward for the payment of such penalty. The goods can be released on payment of penalty equal to two hundred percent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two percent of the value of goods or twenty-five thousand rupees, whichever is less.

Clause 'b' of Section 129(1) prescribes the procedure as to how the goods can be

released when owner of the goods does not comes forward for the payment of such penalty. The goods can be released on payment of penalty equal to fifty percent of the value of the goods or two hundred percent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less.

Clause 'c' of Section 129(1) prescribes the forms[1] and manner[2] in which the payment of the penalty has to be made to get the goods released.

Through the amendment by Finance Act, 2021, the application of provision regarding provisional release under 67(6) has been omitted in section 129(2), as the bond for the value of the goods was not the right fit for the provisional release of the goods under the detention proceeding as envisaged by section 129(2). Because if the person pays the same amount of penalty the goods can be released permanently.

By the Finance Act, 2021, time limit has been introduced for the proper officer detaining or seizing goods or conveyance to issue notice and thereafter to pass order. The time limit to issue notice specifying the penalty payable is seven days and thereafter an order is to be passed within a period of seven days from the date of service of such notice.[3] Earlier there were no time limit prescribed either for issue of the notice or to pass an order making the process time consuming.

Section 129(6) has been amended and has been de-linked with section 130. Now this section states that the goods or conveyance shall be liable to be sold off to recover the amount of penalty, when both, the owner and the person transporting the goods fails to pay the prescribed penalty within the time stipulated i.e., fifteen days from the date of receipt of the copy of the order.[4] It has also been provided that if the goods are of perishable or hazardous nature or are likely to be depreciate in value with the passage of time the said period of fifteen days can be reduced by the proper officer.[5]

It has been further provided under this section that the conveyance shall be released if the transporter comes forward to pay the penalty or Rs. 1,00,000 whichever is

[1]FORM GST INS – 04, CGST Rules, 2017.
[2] Rule 140, CGST Rules, 2017.
[3]Sec – 129(3), CGST Act, 2017
[4]Sec – 129(6), CGST Act, 2017.
[5]Proviso to Sec 129(6), CGST Act, 2107.

less. This clause has been added to de-link this section with section 130. Earlier, the proceeding used to be started under section 130 as the consequence of the non-payment of the penalty within 14 days of such detention and seizure.

ANALYSIS OF CASE ***SYNERGY FERTICHEM PVT LTD VS. STATE OF GUJRAT*** WITH RESPECT TO SECTION 129 & 130

In this case department invoked both sections i.e., 129 & 130. Practically in all cases of detention and seizure of goods and conveyance, the authorities would straightway invoke Section 130 of the Act and thereby would straightway issue a notice calling upon the owner of the goods or the owner of the conveyance to show-cause as to why the goods or the conveyance, as the case may be, should not be confiscated. Once such a notice under Section 130 of the Act is issued right at the inception, i.e., right at the time of detention and seizure, then the provisions of Section 129 of the Act pale into insignificance.

The Gujarat High Court held that the first thing the authorities need to look into closely is the nature of the contravention of the provisions of the Act or the Rules. The second step in the process for the authorities to examine closely is whether such contravention of the provisions of the Act or the Rules was with an intent to evade the payment of tax. Section 135 of the Act provides for the presumption of culpable mental state, but such presumption is available to the department only in the cases of prosecution and not for the purpose of Section 130 of the Act.

For the purpose of issuing a notice of confiscation under Section 130 of the Act at the threshold, i.e., at the stage of Section 129 of the Act itself, the case has to be of such a nature that on the face of the entire transaction, the authority concerned is convinced that the contravention was with a definite intent to evade payment of tax.

The above judgment has made the section 129 & 130 more clear with respect to, whether the proceedings under section 129 & 130 can be invoked simultaneously. This question has been clearly answered by the Court with no scope of ambiguity.

APPLICABILITY OF SECTION 130 AFTER THE FINANCE ACT, 2021

That after the amendment through the Finance Act, 2021 these sections have been amended and have been de-linked and it has been clearly stated under section 129(6) that even is the penalty is not paid the goods or conveyance are liable to be

sold off and the proceedings cannot be invoked under section 130.

Section 130 is also clear as to when the proceedings under this can be invoked and the very first condition for this is the intention to evade tax, if there has been *prima facie* no intention to evade tax then the proceedings under this section to confiscate the goods or conveyance cannot be started. Intention to evade tax is the main essential to initiate the proceedings under Section 130 for the confiscation of goods or conveyance.

CONCLUSION

Concluding the topic, it is fair to say that all the proceedings related to transit policy will be done under Section 129 and no confiscation of goods or conveyance can be done even after the proceedings under Section 129 has been completed. Though the amendments have been made in the CGST Act, 2017 but all these amendments are yet to be notified by the Central Government.

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

CA Sanjay Ghiya
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COMMENTARY ON SECTION-5

Section 6: Extension of Registration

The registration granted under section 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

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

Explanation. — For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

COMMENTS

The promoter is expected to complete the project within the time frame mentioned in the application for registration of project. However, there may be chances that the project may not be completed within the time mentioned by the promoter. This section list out the cases wherein the extension of registration can be granted. Extensions can be granted in case of:

1. Force Majeure ("Force Majeure" means mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular estate project)
2. Reasonable circumstances, without the fault of the promoter, the period of which shall not exceed one year.

No application for extension for the registration can be rejected without an opportunity of being heard given to the promoter.

Rule 7 of Rajasthan Real Estate (Regulation and Development) Rules, 2017,

provided for the manner in which extension for registration of project will be granted by the authority. The application for extension for registration of project shall be made in Form-E. The promoter has to specify the reasons for delay in completion of the project along with the documents supporting such reasons. If authority is satisfied, then extension for registration of project shall be granted in Form-F.

CASE LAWS

TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL

ALLIANCE MALL DEVELOPERS CO. PVT. LTD. V/s TAMIL NADU REAL ESTATE REGULATORY AUTHORITY.

The appellant obtained planning permission dated 22-02-2017 proposing to develop 540 apartments spread over three towers of basement, plus stilt + 18 storey each, Originally the planning permit was valid for 3 years. The validity of the planning permission has been extended up to 5 years from the date of issue. The appellant was granted permission by the Coimbatore Municipal Corporation on 12-03-2018. Though the permission was granted, the appellant could not commence the construction. According to him, GST, demonization and slump in the real estate market were the reasons for not commencing the construction. Under the Town & Country Planning Act, even after the 5 year period, on an application, he can get further extension of 3 years of the building plan approval subject to certain conditions. According to it, if that is obtained, the validity period would be up to 21-02-2025.

But the Learned Authority while granting the registration under RERA act, without considering this fact has granted registration of this project restricting the validity of registration only till 21-02-2022 in respect of the 1st project and 29-05-2019 in respect of the other project. According to the appellant, completion by the above dates is an impossible task. The appellant cannot complete any of the phases in the project within the said time stipulated by the Authority. As it is not in consonance with the declaration given by the appellant, the order passed by the Authority is legally not sustainable.

On a careful analysis of entire papers and the arguments of the counsel, the only grievance of the appellant is restriction by the registering authority up to 2022 only. According to section 4(2)(c) & 4(2)(l)(c) of the Act, the builder is entitled to fix a time as per his calculation and after coming in to force of the RERA Act, dehors any agreement even between the builder and the buyer, a fresh date can be fixed by the builder for completing his project. When that right is exercised by the builder under normal circumstances, the authority would go only by the date as fixed by the builder. When we analyze this aspect, no doubt section 4(2)(l)(c) categorically states that in the declaration, the builder can stipulate within which time he undertakes to complete the project or phase thereof as the case may be.

As regards the power of the authority, they have very clearly stated that it is left to the wisdom of the concerned, which is expected to deal with facts of each case whilst discharging its obligation in implementing the provisions of RERA in letter and spirit". Therefore the authority definitely has got unfettered right to look into the matter independently, dehors the time as stipulated by the builder to strike the balance and pass an order. When dealing under Section 6, which is a provision which grants power to the authority even to extend the time beyond the period as stipulated by the builder, though subject to one year

From this it is very clear that the Judges have categorically pointed out that even in the case of the extension granted under section 6, if the promoter in exceptional cases without any fault of his, has not completed the construction, then the authority is empowered to continue the registration of the project by exercising the powers under sections 7(3), 8 or 37 of RERA, the only restriction is that the authority in those cases shall decide on a case to case basis after hearing all the parties concerned including the allottees. Here one thing is very clear that the authority on deciding the grant of registration of the project has got every right to go into the details as provided by the promoter and on a careful analysis of the entire submissions, the authority can either grant, reject or even modify or restrict the registration. But in so far as rejecting the application, they cannot do so without giving a hearing. Whereas for granting, even without a hearing, they can always grant it. Restriction is only a part of the grant.

The authority, at that point of time has thought it fit to grant time as per the request of the builder, but at the same time made sufficient restrictions/precautions by inserting the words "necessary approval/applications need be made after the expiry". Therefore the intention was clear even at that point of time that the registration could be valid only if there is a valid permit. In that view of the matter, the order by the then authority cannot be construed as wrong. In the present case, the authority taking into consideration of the legal nuances and with full authority considered the legal requirements of the Act, rightly have restricted the time limit. Hence the argument of the learned counsel is not accepted.

KERALA REAL ESTATE REGULATORY AUTHORITY

SMT. SUDHA SOMAN &Ors V/s SRI.A. ABDUL RASHEED ALIAS DR. A.R BABU

The complainant on 28.11.2014 entered to an agreement for sale of flat in the project of the respondent's company namely Heera Construction company pvt Ltd. The date of completion of the Project was 36 months. The Company collected 80 lakhs from the complainant as price of the flat. Now it has been five years, but

the project has not yet been completed or handed over by the respondent.

The respondent filed reply stating that the company is undergoing Corporate Insolvency Resolution Processes from 27.03.2019 as per the provisions of Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal Mumbai Bench in CP (IB)- 44471MB/2018, and NCLT appointed a Resolution Professional and the present complainant has submitted claims before the Resolution Professional. The complainant admitted the same.

As the matter is under consideration of NCLT, in view of the judgment of the Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Ltd & Anr. Vs Union of India and Ors, authority has no jurisdiction to entertain these complaints.

Hence the complaints are hereby dismissed.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

KHUBRAM YADAV V/s NIMAI DEVELOPERS PVT. LTD

The project "Jaypore",situated in Sector-3, Vidhyadhar Nagar Scheme, Jaipur-302023 (Rajasthan),of the promoter firm, is registered with the Authority vide registration No.RAJ/P/2017/203.

Section 11 (2) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') states that "the advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto".

It had come to the notice of the Authority that the promoter firm had published an advertisement for the project in the newspaper "Times of India" dated 27.10.2019 without mentioning therein the website address of the Authority; and thereby committed violation of the aforesaid provisions of section 11 (2) of the Act.

Taking suo moto cognizance of the matter, the promoter firm was issued a notice on 26.12.2019 and was called upon to explain as to why a penalty equal to or upto five per cent of the estimated cost of the project be not imposed on it under section 61 for the said contravention of the provisions of section 11 (2) of the Act. In the notice, the promoter firm was also given the choice of appearing for a personal hearing on 06.02.2020.

Ld Counsel of promoter has stated that inadvertently the website address of the Authority was missed out in the impugned advertisement and there was no malafide intention. He admitted the mistake and apologized for the same.

Having gone through record of the case and looking to the fact that the promoter firm has admitted its default, authority accept the contention of the promoter firm that the alleged violation has happened unintentionally.

Therefore, authority choose to take a lenient view of the matter and, in exercise of the powers conferred on the Authority under section 61 read with section 11 (2) of the Act, do hereby impose a penalty of Rs.10, 000/- only and direct the promoter firm to deposit the said penalty amount with the Authority within 45 days from today and submit a compliance report to the Authority within 15 days thereafter. The promoter firm is also directed to ensure that no violation of the Act, or the rules or regulations made there under, is made by it in future.

NOTIFICATION

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

No. F.1(5) RJ/RERA/2018/Part/D-738 Dated: 15thJune, 2021

Order

In exercise of the powers conferred on it under Regulation 12 of the Rajasthan Real Estate Regulatory Authority Regulations, 2017 (hereinafter called 'the Regulations') the Rajasthan Real Estate Regulatory Authority hereby issues the following directions in the matter of allowing inspection and issuing copies of documents/records available with the Authority:-

1. In response to the applications filed under the Right to Information Act, 2005, the Authority shall provide copies of documents/records as per the provisions of that Act.
2. On the Authority's web portal <rera.rajasthan.gov.in> all details of registered real estate projects, including related documents, are available, which may be downloaded for free. Similarly, scanned copies of the orders passed by the Authority in complaints or otherwise are also available on the web portal and the same may be downloaded for free.
3. Further, a certified copy of each order passed in complaints shall be made available to the authorized representative of all the parties to the complaint, by hand, free of charge. Where there is no authorized representative appointed, or the authorized representative does not collect the copy within 10 days, such certified copy shall be made available to the concerned party, by speed post, free of charge.
4. If any party still requires to inspect or obtain certified copies of any documents/records available with the Authority, such party or its authorized representative shall submit an online application in Form -6 as digitalized and adapted for online processing and hosted on the Authority's web portal.

For this, fee/charges shall be payable to the Authority as under-.

	Description	Amount in Rs.
a.	Application fee for inspection of documents/records	Rs. 100/- per file
b.	Application fee for obtaining certified copies of documents/ records, with additional per page charges as in (c) below	Rs. 100/-
c.	Per-page charges for certified copy of documents/records*	
	if the number of pages is 1 to 10	Nil
	If the number of pages is more than 10	Rs. 5/- for each page in excess of 10
	*Additional fee may be charged on actuals basis, where the special nature of job so demands.	
d.	Postal charges, if the copies are required to be sent by speed post to the applicant at his address	Rs 150/-

5. All fee/charges payable to the Authority shall be paid online on the Authority's web portal.

6. Subject to the provisions of the Right to Information Act, 2005, the Authority may, by an order, direct that any information, documents and papers/ materials maintained by the Authority, shall be confidential or privileged and shall not be available for inspection or supply of certified copies, and the Authority may also direct that such documents, papers or materials shall not be used in any manner except as specifically authorized by the Authority.

7. The Nodal Officer appointed for handling all applications submitted in Form R-6 shall respond to such applications as soon as possible and certainly within a period of 14 working days from the date of online submission of Form R-6. Until further orders, Shri Manohar Kumar Jain, Asstt. Registrar shall be Nodal Officer for the purpose and Shri G.V. Chauhan, Joint Registrar (Law) shall supervise and monitor the work.

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TAXABILITY OFSHIPPING BUSINESS OF NON RESIDENT IN INDIA

CA Paresh Shah

CA Mitali Gandhi

1. Introduction

Maritime industry & logistics is an important component of the Indian economy. It accounts for 95% of export - import trade by volume and 65% by value.The total traffic handled at Indian Ports has risen steadily from 885 MTPA in FY 2010-11 to 1,307 MTPA in FY 2019-20. India's Major Ports have witnessed ~4% CAGR growth over the last 5 years and handled ~54% of the country's total cargo in FY 2019-20.Further, about 90% of India's sea-bound cargo is handled by foreign carriers. With India being the undisputed leading emerging economy, its attractiveness to international businesses is bound to result in enhanced participation by foreign shipping companies.

Hence, shipping income provisions under the Income-Tax Act, 1961 ('ITA') and the various Indian Double tax avoidance treaties ('DTAA') have gained significant importance in recent years. The inter-play between domestic law and DTAA and the complications arising from the complex nature of shipping & air transport business creates unique challenges in determining the jurisdiction and allocation of taxation by the Contracting states involved in the international carriage of cargo and passengers

2. Nature of activities in international transportation and their providers

2.1 The following table gives a list of typical nature & range of activities that are involved in international transportation:

Location	Description
In Source Country	Booking of cargo / passengers
	Movement from factory to intermediate port and to container depot
	Transport of passengers from smaller cities or feeder routes to main airport
	Lodging / Boarding of passengers at intermediate / final city of embarkation
	Demurrage

	Services at port of shipment / airport
	Other incidental services / activities viz. container leasing, port handling, selling tickets for other shipping co.s, Hotel services, Shipyard services
	International high Seas / airspace from port in source country to other country
In Destination Country	Services at port of destination / disembarkation
	Movement from port to container depot and finally to customer
	Transport of passengers from main airport to smaller cities
	Lodging / Boarding of passengers at intermediate / final city of disembarkation
	Other incidental services / activities

2.2 As can be observed, there are a number of activities that are directly arising out of transportation and there are indirect activities, including incidental activities. These activities of carriage can either be provided by Owner / Charterer or the Lessee of the ship or aircraft. Thus evolved the concept of 'Charter' such as Time Charter, Voyage Charter and Bare-boat Charter. The following summarizes the providers of various activities:

- Operating company viz. Ship chartering company / Aircraft lessee company engaged in Shipping & Airline operation
- Ship / Aircraft owner company – Time Charters & Voyage Charters
- Booking Agents
- Ground handling & Engineering Services company in case of airlines
- Other companies providing incidental services

3. Implications under domestic tax law for shipping business

3.1 We now consider the domestic tax law provisions in India, scope of total income of non-residents in general and their shipping income in particular. The broad provisions relating to taxation of non-residents i.e. rule of accrual is provided under Section 5(2) of the I.T. Act that a non–resident is taxable in India on the following income:

– Income received in India

– Income deemed to be received in India

– Income accruing/ arising in India

– Income deemed to accrue or arise in India

In the context of international transportation of goods, one can consider a general principle that in case of cargo exported from India, freight income wherever received accrues in India and is therefore taxable in India. Conversely, in case of cargo imported into India, freight income accrues outside India and hence is not taxable in India unless it is received or deemed to be received in India.

3.2 Specific provisions in ITA relating to taxation of profits from international transportation business are:

- Section 44B - *taxation of shipping business in the case of non-residents*
- Section 172 - *profit of non-resident from occasional shipping business and levy & recovery of tax in respect of a ship belonging to a non-resident*
- Chapter XII-G - *special provisions relating to the income of resident shipping companies popularly known as "tonnage tax"*
- Section 44BBA - *profits and gains arising to a non-resident engaged in the business of operation of aircraft*.

3.3 Section 44B - *taxation of shipping business in the case of non-residents*

3.3.1 Section 44B of the Act applies to non-resident engaged in the business of shipping in India. It starts with a non-obstante clause which overrides sections 28 to section 43A (dealing with deductions from business income) of the ITA.It is a deeming provision whereby 7.5% of the following amounts shall be deemed to be the profits and gains of the said business chargeable to tax in India on a gross basis of charging tax on non-resident:

(i) amounts paid or payable (whether in or out of India) to the assessee(Tax payer) or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India;

(ii) amounts received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

The Explanation to the section provides that the aforesaid amounts shall include demurrage charges or handling charges or any other amounts of a similar nature.

It does not specify whether cargo is exported outside India when it is shipped at any port in India or imported into India whether shipped at any port outside India.

Section 44B is thus a computational mechanism for non-residents engaged in shipping business, profits of which are determined on presumptive basis as deduction for expenses is not allowable. Further, hire charges is not the subject matter of this section as it is applicable only in case of carriage of goods & passengers.

Thus, freight earned on cargo shipped from India is taxed wherever received whether in India or outside India whereas freight for import of cargo is taxed only if it is received in India by the tax payer.

Also, language of Section 44B suggests that cargo movement between two ports within India is covered when exported outside India. It is therefore obvious to presume that non-resident may not engage into these services unless it relates to export cargo or import cargo into India where freight is received outside India.

3.3.2 It should be noted that there is no reference to "international traffic" in the section and the amounts are chargeable to tax irrespective of the places between which the transportation takes place as long as the assesse is non-resident, is engaged in business of shipping in India and derives income of the nature discussed in Paragraph 3.3.1 above.

3.3.3 There have been judicial rulings relating to nature of income that is taxable under Section 44B. The Mumbai Tribunal ruled[1] that inland haulage charges are charges paid for loading, unloading, stacking of containers whereas demurrage charges are in the nature of penalty for non-removal of cargo in time; henceinland haulage charges are basically inland transportation from the exporter's place to the port which separates it from demurrage charges and hence cannot fall within the ambit of the Explanation to section 44B.

3.4 **Section 172 -** ***Profits of Non-Resident from Occasional Shipping Business***

[1] *DDIT v. Safmarine Container Lines N.V. (120 ITD 71) (Mum)*

3.4.1 Section 172 of the Act falls under the Chapter heading "Profits of Non-Resident from Occasional Shipping Business". Accordingly, a ship owned / chartered by a non-resident which only casually visits the Indian port and leaves the Indian port is covered by Section 172 whereas non-residents who do regular shipping business are covered by the provisions of Section 44B.

3.4.2 Key features of Section 172 are:

- It starts with a non-obstante clause which overrides all the other provisions of ITA.
- It is a complete code which provides for charging, computation, levy and recovery of tax from the owner /charterer of the ship in connection with the profits made from the transportation of passengers, livestock, mail or goods shipped at a port in India.
- It provides that each time a ship belonging to or chartered by a non-resident carries passengers, livestock, mail or goods is shipped at a port in India, an amount equivalent to 7.5% of the amount paid or payable on account of such carriage shall be deemed to be the income of the owner or the charterer.
- The above amount shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature.
- The section also provides for furnishing of a return by the master of the ship before departure of the ship (or within 30 days of the departure if the Assessing Officer is satisfied that it is not so possible and that satisfactory arrangements for the filing of the return and payment of thetax by any other person on his behalf has been made) and for a summary assessment of payment of tax before the ship departs from India. The provisions are introduced as there could be challenges in recovery of tax after the ship departs from India. A time limit is specified for completing the assessment within 9 months from the end of the financial year in which return is furnished.
- Port clearance certificate will not be issued by the Collector of Customs / officer till such time the tax assessable has been paid or satisfactory arrangements for payment of tax have been made.

- An option is given to a non-resident to claim an assessment of its income as per the provisions of the ITA. If such an option is made, any payment of tax made under Section 172 shall be treated as payment of advance tax and shall be adjusted against total tax payable as per the provisions of the ITA. The CBDT has clarified[2] that in the case of a regular assessment under section 172(7), the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A of the ITA.

3.4.3 Section 172 and Deduction of Tax at Source:

There can be cases where payments are made to shipping agents of non-resident ship owners or charterers for carriage of passengers etc., shipped at a port in India. Section 172 starts with a non-obstante clause and prevails over all other provisions of the ITA. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source are not applicable. There would, however, be cases where payments are made to shipping agents of non-resident ship-owners or charterers for carriage of passengers etc., shipped at a port in India. The CBDT has issued a Circular[3] to the effect that since the agent acts on behalf of the non-resident ship owner or charterer, he steps into the shoes of the principal. Accordingly, the provisions of section 172 shall apply and those of sections 194C and 195 in respect of withholding obligations of the tax payer will not apply.

3.4.4 Annual No Objection Certificate and Port Clearance procedure:

- The port clearance is granted only after the return of the full amount to be paid is filed, evidence of payment of tax on such income is produced before the Customs authorities, or satisfactory arrangements are made to file the return and pay the tax within thirty days of departure of the ship.
- In cases where such ships are owned by an enterprise belonging to a country with which India has entered into an agreement on avoidance of double taxation, which provides for taxation of shipping profits only in the country of which the enterprise is a resident, no tax is payable by such ships at the Indian ports. Under such circumstances, a 'No Objection

[2]Circular No. 9/2001 dated 9 July 2001
[3]Circular No. 723 dated 19 September 1995

Certificate' is to be obtained by the master of the ship from the concerned income-tax authority. The CBDT has issued a Circular[4] that in such cases, the Assessing Officer shall be competent to issue an annual NOC, valid for a year, in respect of taxation of shipping profits under section 172 of the Income-tax Act, 1961 after carefully verifying the applicability of the relevant provisions concerning taxation of shipping profits in the DTAA with the country of which the owner or the charterer is a resident.

- The CBDT has issued a Circular[5] that in cases where a foreign shipping company eligible for full treaty relief prefers to be assessed on a voyage-wise basis i.e., on a ship basis, the Port Assessing Officer before whom such a voyage return has been filed shall give due credit to the annual NOC issued by the AO.
- The Port Clearance Procedure can be summarized as under:
  - Obtain DIT Exemption Certificate, wherever foreign shipping company ('FSC') is entitled to DTAA benefits, along with Annual NOC from the jurisdictional AO
  - File undertaking with AO at the concerned port (guaranteeing to file voyage return and make arrangement for payment of taxes) before arrival of the ship and obtain Voyage- wise NOC, if annual NOCis not available
  - Obtain Port Clearance Certificate ('PCC') from Customs Authorities on the basis ofAnnual NOC / Voyage - wise NOC
  - Ship is allowed to leave India on the basis of PCCfrom Customs Authorities
  - File Voyage Return u/s 172(3) within 30 days of the departure of the ship along with challans for the taxes paid, or file DIT Relief Certificate, if no tax ispayable
  - Time-limit for passing voyage assessment order u/s 172(4A) – 9 (nine) months fromend of the financial year in which Voyage Return filed – Inserted videFinance Act2007 w.e.f. April 1, 2007
  - Option u/s 172(7) to be taxed under other provisions of the Act to be

[4]Circular No. 732 dated 20December 1995
[5] Circular No. 30 dated 26 August2016

exercised before end ofthe assessment year.

3.4.5 Section 172 and Section 44B of the ITA - differences / comparison:

	Section 172	Section 44B
1.	Overrides all other provisions of the ITA.	Overrides sections 28 to 43A of the ITA only.
2.	Applies to freight income in relation to a ship	Applies to the aggregate income of the non-resident
3.	Applies to occasional shipping activities (Each ship touching Indian port)	Applies to regular shipping activities (shipping business)
4.	It is a machinery provision for timely levy and collection of tax (Each ship a tax event)	It is a presumptive provision. Option of normal provisions does not apply
5.	Covers only export freight	Covers export freight and other freight received in India
6.	Procedure for assessment and collection of tax is provided.	No such procedure for collection of tax is provided. General provisions apply
7.	Return to be filed within 30 days of the departure of the ship.	Return to be filed in accordance with the due date specified under section 139 of the ITA dealing with the time and person responsible for filing the Return of Income and its Form.
8.	The time limit for completion of assessment is governed by section 172(4A) of the ITA.	The time limit for completion of assessment is governed by section 153 of the ITA i.e. general provisions of the ITA.

3.5 Chapter XII-G - special provisions relating to the income of resident shipping companies

Chapter XII-G of the ITA deals with special provisions relating to the income of resident shipping companies popularly known as "tonnage tax". Though the provisions are not applicable to non-residents, they have been briefly summarized below for academic purposes as more than 90% of the shipping

income is taxed on a tonnage basis internationally:

a. The scheme is optional and is applicable only if the shipping company opts to be taxed under the scheme, else it can opt to be taxed as per the general provisions ofthe Act in accordance with financial statements drawn on the basis of the net freight income earned.

b. To be able to opt for Tonnage Tax Scheme ('TTS'), a company is required to be a qualifying company which is defined to mean:

   i. an Indian company;

   ii. which has its place of effective management in India;

   iii. owns at least one 'qualifying ship'; and

   iv. its main object is to carry on the 'business of operating ships'.

c. A company registered under TTS is required to pay taxes on the basis of tonnage of ships operated during the year, irrespective of income earned or expenses incurred. Thus, all expenses are deemed to be allowed.

d. A company registered under TTS needs to pay tax on its tonnage income, even if the company has incurred losses from operation of ships. Further, such losses are not allowed to be carried forward and set off against future income.

e. Minimum Alternate Tax is not applicable on activities of a Tonnage Tax Company

f. The approval granted by revenue authorities is valid for a period of 10 years subject to the satisfaction of certain conditions such as creation and utilization of reserves; minimum training requirements and limit for chartering in (49% of total tonnage)

3.6 Section 44BBA - *taxation of business of operation of aircraft in the case of non-residents*

The key features of section 44BBA of the Act are as under:

a. Income is deemed at the rate of 5 percent of the following:

   i. Export receipts (wherever received) on account of carriage of passengers, livestock, mail or goods from any place in India; and

   ii. Import receipts (only if received/ deemed to be received in India) on account of the carriage of passengers, livestock, mail or goods from

any place outside India.

Section 44BBA starts with a non-obstante clause and overrides sections 28 to section 43A of the Act.

There are no parallel self-contained code provisions similar to section 172 of the Act applicable to air transport.

4. Implications under DTAAs, OECD & UN Model Conventions (Article 8)

4.1 Model DTAAs have historically dealt with income arising out of carriage in a special Article dealing with taxation of profits from shipping, inland waterways transport and air transport. There is a distinction drawn in the model conventions between business profits (typically covered under Article 7) and profits from shipping, inland waterways transport and air transport (typically covered under Article 8).

4.2 Typically, Article 7 of DTAAs deal with ascertainment of taxability of business income in a Contracting State. It incorporates the basic principle that in order to have the business profits taxed in the Contracting State other than the State of which a person is resident, it is essential to prove a permanent establishment ('PE'). There are various criteria prescribed for ascertainment of PE. The model conventions have elaborated and commented on the definition of PE. However, this may result in shipping/ airline enterprises being exposed to the tax laws of numerous countries to which their operations extend. For example, a ship carrying cargo between two Contracting States (say UK and India) would often involve halts in more than one country. As a result, there would be complexity in determining the profits to be attributed to each of the countries. In order to avoid such fragmented taxation of income of shipping/ airline enterprises operating through their PEs in various countries, various DTAAs prescribe that the taxation right of shipping/ airline enterprises be given to the country where the residence of the shipping/ airline company is based.

4.3 Article 8 of the OECD Model Convention deals with income from the operation of ships in international traffic. This Article provides that the profits arising from operation of ships in international traffic will be taxed only in the State where the residence of the enterprise is situated although it may be carrying

on the shipping business through a permanent establishment (PE) in other tax jurisdictions. Prior to the amendment of 2017, the right to taxation was given to the state in which the place of effective management ('PoEM') was situated. Nevertheless, in caseswhere issues exist of dual resident-ship, PoEM would again come into play as provided under Article 4(2)

4.4 Analysis of Article 8 of OECD Model Convention (before and after amendment of 2017 which is shown below by way of '*strikethrough*')

Article 8 as per the OECD& UN (Alternative A) Model convention is reproduced below:

(1) Profits from operation of ships or aircraft in international traffic shall be taxable only in*~~the Contracting State in which the place of effective management of the enterprise is situated~~* ***that state***

~~*(2) Profit from operation of boats engaged in inland water ways transport shall be taxable only in the Contracting State in which the place of effective management is situated.*~~

~~*(3) If the place of effective management of a shipping enterprises or of an inland waterways transport is aboard a ship or a boat, then it shall be deemed to be situated in the Contracting State in which the home harbor of the ship or boat is situated, or if there is no such home harbor, in the contracting state of which the operator of the ship is the resident.*~~

(4) The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

i. Until 2017 paragraph 1 provided the taxing rights would be left to the contracting state in which the place of effective management of the enterprise was situated. However a review of the treaty practices of OECD and non OECD countries revealed that majority of these states preferred assigning the taxing rights to the state of the enterprise. However some states prefer to continue to use the previous formulation and confer the exclusive right on the State on which the Place of Effective Management of the enterprise is situated. Such countries are free to substitute the rule on the basis of the framework given in the OECD commentary

ii. As per the OECD commentary on Article 8, the object of paragraph 1 is to ensure that profits from operation of ships/ aircraft in international traffic are taxed in one State alone. The paragraph's effect is that these

profits are wholly exempt from tax at source and are taxed exclusively in the Contracting State of the enterprise engaged in international traffic. It provides an independent operative rule for these activities and isnot qualified by Articles 5 and 7 relating to business profits governed by the permanent establishment rule.

iii. The OECD commentary states that profits covered under Article 8 consist in the first place of the profits directly obtained by the enterprise from the carriage of passengers or cargo by ships or aircraft (whether owned, leased or otherwise at the disposal of the enterprise) that it operates in international traffic. However, as international transport has evolved, shipping and air transport enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations. The second category covers profits from activities which are not directly connected with the operation of the enterprise's ships or aircraft in international traffic as long as they are ancillary to such operation.

iv. Activities which an enterprise does not need to carry for the purpose of its own operation of ships or aircrafts in international traffic but which may make a minor contribution relative to such operation and such activity cannot be regarded as a separate business or source of income of the enterprise, such activity should be considered to be ancillary to the operation of Ships and Aircrafts in International traffic. The Commentary to the OECD MC lists cases where it could be said that the operations are directly connected or are ancillary to the operation of ships in international traffic some of which are:

- sale of passenger tickets on behalf of the other enterprises;
- the operation of bus service connecting a town with its airport (to complete the journey;
- advertising on behalf of other enterprises;
- transportation of goods by truck connecting a depot with a port or airport;
- interest income directly connected with shipping (income from bonds kept as security for shipping business);
- profit from lease of containers which is supplementary or incidental to international operation of ships or aircraft;
- arrangements in the nature of code sharing/ slot chartering;

- income from activities which are ancillary to the business of operation of ships/ aircraft in international traffic.

v. Various forms of international co-operation exist in shipping and air transport business. In this field international co-operation is secured through pooling agreements or other conventions of a similar kind. Paragraph 4 covers profit from participation in a pool, a joint business or an international operating agency.

4.4.1. The term 'International traffic' is defined in Article 3 of the Model (both OECD and UN Model) as under:

"The term 'International traffic' means any transport by a ship or aircraft except when the ship or aircraft is operated solely between places in a Contracting Stateand the Enterprise that operates the ship or aircraft is not an enterprise of the State"

4.5 Article 8 of UN Model Convention and comparison with OECD Model Convention

4.5.1 A comparison of the OECD Model Convention and the UN Model Convention reveals that the UN Model Convention recognizes two alternatives which can be adopted by the member countriesviz. Alternatives 'A' and 'B'. Alternative A resembles the OECD MC while Alternative B deviates from the OECD MC. A comparison is provided below:

OECD Model	**UN Alternative B (Alternative A is same as OECD model)**
➢ Paragraph 1: Rules of taxability in State of Residence of Enterprise	➢ Paragraph 1: Rules of taxability in State of Residence of Enterprise for air transport only ➢ Paragraph 2:Taxation is also allowed in the State of source in case operation of shipping is more than casual in another State. Taxation on the basis of allocation of profits of the enterprise. Tax rate may be reduced by _____ percentage as per the treaty.
➢ Paragraph 2: Paragraph 1 applies in case pooling and other similar arrangements	➢ Same, but provided as paragraph (3)

4.5.2 The deviation arises on account of divergent views between developed and developing countries. Developed countries prefer to tax the profits only in the State where the residence is situated while developing countries felt that this would deprive them of their lawful revenue. In view of this divergence the UN Model Convention had to provide for an alternative. Alternative B of the UN MC therefore provides that where operations in that country are 'more than casual' (meaning a scheduled or planned visit of a ship to a particular country to pick up freight or passengers), tax has to be distributed on the basis of proper allocation of profits. Each country is entitled to tax such allocated income at an agreed rateto be established through bilateral negotiations.

In the case of *James Mackintosh & Co*[6], the Hon'ble Mumbai tax tribunal held that the expression 'more than casual' means scheduled or planned visits to a particular country and it includes 'regular and frequent' shipping visits as also 'irregular and isolated visits', as long as the same are planned and not merely fortuitous or something happening completely by chance.

4.6 Indian approach

4.6.1 Generally, India tends to follow Alternative A of the UN Model on Article 8 which is similar to the OECD model on Article 8. However, in certain DTAAs taxation right is given to the source state as well based on allocation parameters (viz DTAA with Greece, Ireland, Norway, etc). Thus, each DTAA would have to be read independently to understand the language used therein which could be unique to a particular DTAA.

4.6.2 We have analyzed below the unique features of India's DTAAs as under:

Distinguishing feature	**DTAA with Country**
Place of Effective Management as Connecting factor	Brazil, Canada, Cyprus, Germany, Libya, Mauritius, Mongolia, Namibia, Netherlands, Sri Lanka, Syria, Tanzania (air transport) & Zambia

[6](2005) 92 TTJ 388

State of Residence as Connecting factor	Australia, Austria, Belarus, Belgium, Bulgaria, China, Czech Republic, Denmark, Egypt, Finland, France, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kyrgyzstan, Malaysia, Malta, Morocco, Nepal, New Zealand, Norway, Oman, Philippines, Poland, Portugal, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tanzania (shipping), Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Ukraine, UAE, UK, USA (Reciprocity), Uzbekistan & Vietnam
Alternative B, modified form	Bangladesh, Bulgaria, Finland, Greece, Ireland, Jordan, Kenya, Korea, New Zealand, Norway, Philippines, Poland, Romania, Russia, Sri Lanka, Tanzania (shipping), Thailand, Uzbekistan (source taxation as per domestic law)
Interest income connected to operations	Australia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Japan, Italy, Jordan, Kazakhstan, Kenya, Korea, Malta, Mauritius, Mongolia, Morocco, Namibia, Netherlands, Poland, Qatar, Romania, Russia, Singapore, South Africa, Spain, Sri Lanka, Syria, Tanzania (air transport), Thailand, Trinidad & Tobago, Turkey, Ukraine, UAE, USA, UK, Uzbekistan, Vietnam & Zambia
Capital Gains	Malaysia, UAE & UK
No provision on shipping	Kyrgyzstan, Nepal, Switzerland & Zambia
No air transport	UAE (separate agreement)

5. Important Jurisprudence relating to scope of income from shipping activities

5.1 Time Charter: The issue whether hire charges for charter of ship constitutes

royalty income (and therefore taxable under section 9(1)(vi) and subject to TDS under section 195 of the ITA) has been the subject matter in many cases with differing rulings.

The Chennai Tribunal, in *Poompuhar Shipping Corporation Ltd v. ADIT*[7],has held that payment of hire charges to non-resident shipping companies under a time charter arrangement is not "royalty" under section 9(1)(vi) of the ITAas it was not for the use of industrial, commercial or scientific equipment and the charter does not create any right of property or any interest in a ship but payment was towards contractual rights for services of ship provided by the non-resident ship owner. The Tribunal further concluded that income of the ship owner would be liable to tax in India under the deeming provisions of section 172 of the Act dealing with taxation ofnon-resident shipping companies. It further observed that the assessee did not place on record any document to show that ship owner was exempted by tax treaties from payment of tax and accordingly, the assessee was held liable to deduct tax under the provision of section 195 of the Act.

While the above decision holds that the income is covered under Section 172 of the IT Act, it is useful to point out here that in case of a tax treaty situation, the provisions of Article 8 should be considered if the payment is to a foreign shipping company which is resident of a country with which India has a tax treaty. Under Article 8 (dealing with taxability of shipping income of foreign shipping companies), right of taxation is generally given to the country of residence of the foreign shipping company and, hence, not liable to tax in India.

5.2 Bare-boat Charter: In West Asia Maritime Ltd. vs ITO[8], the Tribunal held that Bare-boat charter charges paid to non-resident is not treated as operation of ship in international traffic andis to be treated as Equipment Royalty as payment was for use or hire of Equipment / Vessel and not for services.

5.3 Inland haulage charges (cost of moving container to inland destination):

Inland transportation and haulage charges was held as covered within the

[7]ITA Nos. 145 to 148/Mds/2012) (Chennai)
[8]109 TTJ 617 ITAT (Chennai)

definition of"international traffic" –

- ADIT vs Safmarine Container Lines, NV[9]
- DDIT vs Delmas Shipping South Africa (Pty) Ltd.[10]
- ADIT vs Federal Express ITAT Mumbai[11]

5.4 Slot Charter: Income from 'Slot Charter' was ruled to be exempt under Article 9 of the India-UK DTAA as it is income from 'operation of ships'. The Bombay High Court held that Article 9 does not require the ships to be owned by the enterprise. Slot hire agreements have a nexus to the main business of operation of ships of the enterprise and are an integral part of the enterprise's business of operating ships. They are ancillary to and complement the operation of ships by the enterprise. The High Court dealt with two situations. Under the first situation, the goods were transported from a port in India to an intermediary port outside India (hub port) by availing slot hire facilities on ships belonging to another enterprise (typically known as a feeder vessel). Thereafter, transhipment would take place at the hub port where the goods would be offloaded from the feeder vessel and loaded onto a vessel which would be owned/chartered by the enterprise (typically known as a mother vessel) for transportation to its ultimate destination. Under the second situation, the goods would be transported from a port in India directly to its ultimate destination to a port abroad by availing of the slot hire facility on ships operated by another enterprise. The High Court held that both the situations will be covered by Article 9 of the India-UK DTAA if the enterprise is otherwise engaged in the business of operation of ships.

- DIT vs Balaji Shipping UK Ltd.[12]
- DIT vs Balaji Shipping UK Ltd.[13]

5.6 Lease of aircraft:

- In Caribjet Inc.[14], Mumbai Tribunal held that it is outside the scope of Section 44BBA hence chargeable to tax under normal provisions of ITA.

[9]24 SOT 211 ITAT (Mum)
[10]2008-TIOL-547-ITAT (Mum)
[11] 2009-TIOL-179-ITAT (Mum)
[12] Mum. High Court decided on 23/8/2012
[13][2009] 121 ITD 61 (Mum.)
[14]

Further, if fully equipped with crew, then it is covered by Article 8. Ground operations &Engg. services are not covered by Section 44BBA.

- Pool of resources for ground services &engg. was ruled upon in Lufthansa German Airlines vs DCIT[15] where ITAT held that the amount received from various IATP pool members airlines for services rendered in India was not taxable in India under Article 8
- In the case of British Airways PLC vs DCIT[16], ITAT held that the amount for services rendered unilaterally to various airlines without availing reciprocation of services could not be treated as having rendered under pooling arrangement and hence cannot be brought under Article 8 ofthe India-UK Treaty

6. Conclusion

- Section 172 is a complete code which provides for charging, computation, levy and recovery of tax from the owner /charterer of the ship in connection with the profits made from the occasional transportation of passengers, livestock, mail or goods shipped at a port in India. Accordingly, normal TDS provisions under Section 194C and 195 do not apply. Return has to be filed within 30 days of the departure of the ship. However, in general practice, assessment is usually done similar to Section 44B. Tax is payable at the rate applicable to foreign companies on 7.5% of its income as discussed in Paragraph 3.4.2 above
- Unlike provisions of Section 172, the provisions of Section 44B applies to aggregate income of non-resident from its regular shipping activities. Normal TDS provisions under 194C and 195 apply and Return has to be filed as per the provisions of Section 139. Tax is payable at the rate applicable to foreign companies on 7.5% of its income as discussed in Paragraph 3.3.1 above.

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[15]90 ITA 310 ITAT (Delhi)
[16]73 TTJ 519 ITAT (Delhi)

HIGH COURT OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

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

WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani
an Indian resident, aged 48 having his residence at
606-Park Vista, Park Darshan CHS Ltd., Lallubhai Park,
Andheri (West), Mumbai 400 058 ....**..Petitioner**

V/s.

1. The Union of India Through the Secretary Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 001.
2. Central Board of Indirect Taxes and Customs (erstwhile CBEC) Department of Revenue, Ministry of Finance, North Block, New Delhi 110 001.
3. Goods and Service Tax Council Through its Additional Secretary, 5th Floor, Tower II, Jeevan Bharti Building, Janpath Road, Connaught Place, New Delhi-110 001.
4. Principal Commissioner of Goods and Service Tax, Mumbai New Central Excise Building, M.K. Road, Opp. Churchgate Station, Mumbai 400 020.
5. State of Maharashtra Through the Secretary, Law & Judiciary, Ministry of Finance, Finance Department, Mantralaya, Nariman Point, Mumbai 400032 .

.....Respondents

—

Judgment-WP 2031-18-1.odt Mr. Bharat Raichandani alongwith Ms. Pragya Koolwal i/by UBR Legal for Petitioner.

Mr. Anil C. Singh, ASG alongwith Mr. Pradeep S. Jetly, Senior Advocate and Mr.J.B. Mishra for Respondent Nos.1 to 4. Mr.S.G. Gore, AGP with Smt. Jyoti Chavan, AGP for Respondent No.5-State.

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CORAM : UJJAL BHUYAN AND ABHAY AHUJA, JJ. RESERVED ON : 2ND DECEMBER, 2020.

PRONOUNCED ON : 16th JUNE, 2021.

JUDGMENT AND ORDER : (PER ABHAY AHUJA, J.) (DISSENTING)

67. On 9th June 2021, I had passed the following order:-

> "1. Having noted the Judgment and Order dated 9th June, 2021 as pronounced by my Respected Learned Brother Shri Justice Ujjal Bhuyan, with greatest respect being unable to persuade myself to share the opinion of my Learned Brother, I would like to record my separate opinion in the matter.
>
> 2. List the matter on 16th June, 2021 for pronouncement of my opinion."

68. I have now had the privilege and advantage of perusing the erudite judgment and order in the above matter delivered by my learned respected Brother Shri Justice Ujjal Bhuyan. I am unable to share the conclusion arrived at by him holding that Section 13(8)

(b) of the Integrated Goods and Services Tax Act, 2017 ("IGST Act") Judgment-

WP 2031-18-1.odt offends Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India and is also ultra vires the IGST Act besides being unconstitutional. For reasons discussed in the following paragraphs, I am of the opinion that Section 13(8)(b) cannot be considered to be unconstitutional or ultra vires the IGST Act. Section 13(8)(b) of the IGST Act would in my view be constitutionally valid and operative for all purposes.

69. Pursuant to this Petition under Article 226 of the Constitution of India, Petitioner seeks to declare section 13(8)(b) and section 8(2) of the IGST Act as ultra vires Articles 14, 19(1)(g), 245, 246, 246A, 269A, 286 of the Constitution of India and also ultra vires the provisions of the IGST Act and section 9 of the Central Goods and Services Tax Act, 2017 ("CGST Act") and Maharashtra Goods and Services Tax Act, 2017 ("MGST Act").

70. Although, the facts in the matter as well as the pleadings and submissions on behalf of Petitioner and Respondents have been very meticulously set out in my learned Brother's judgment, it would be in the ftness of things to briefy narrate the same.

71. Petitioner is proprietor of M/s. Dynatex International, having offce in Mumbai. It is submitted that Petitioner is a registered supplier under the provisions of the Goods and Services Tax Act, 2017 and has annexed certifcate of provisional registration dated 28th June, 2017 to the Petition. It is further submitted that the Petitioner provides marketing and sales promotion services to customers/principals located outside India who in turn export goods to importers in India on the basis of agreements, illustrative copy Judgment-WP 2031-18-1.odt whereof has been annexed as Exhibit "C" to the Petition. In terms of such agreements, Petitioner solicits purchase orders for its overseas customers by undertaking activities of marketing and promotion of goods of its overseas customers.

72. The Indian purchaser, i.e., importer directly places purchase order on the overseas customer of Petitioner for supply of goods, which are then shipped by the overseas customer to the Indian importer/purchaser. Such goods are cleared by the Indian purchaser from the customs by payment of applicable customs duty. The overseas customer raises 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 Petitioner against invoice raised by Petitioner, upon his overseas customer, which it is submitted is received by Petitioner in India in convertible foreign exchange.

73. It is submitted that the transaction entered into by Petitioner with the foreign customer is one of export of service from India. Reference is made to Section 2(6) of the IGST Act, which defnes export of service and to Section 2(13) of the IGST Act, which defnes intermediary. It is submitted that Petitioner's case is an export of service by an intermediary.

74. It is submitted that Section 7 of the IGST Act deals with interstate supply, whereas, Section 8 deals with intrastate supply. Section 7 provides as to when a supply would be considered as interstate supply in India, i.e., supply between two or more States or Union Territories of India and Section 8 provides for intrastate Judgment-WP 2031-18-1.odt supply, i.e., supply within one State or within one

Union Territory. Section 13 of the IGST Act deals with a situation where location of the supplier or the location of the recipient is outside India. Sub- Section (2) provides that the place of supply of services shall be the location of the recipient of services. Sub-Sections 3 to 13 provide exceptions. As per Sub-Section 8, the place of supply shall be the location of the supplier of services and which includes the intermediary services in Clause (b), which are the services rendered by Petitioner.

75. Further, it is submitted that by way of deeming fction under Section 13(8)(b) of the IGST Act, where the location of the recipient of service is outside India, the place of supply is treated as the location of the supplier of servispecces which is in India, thereby bringing into the tax net export of services. Reference has also been made to Section 8(2) of the IGST Act, 2017, which provides that in case 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 intrastate supply. With reference to these provisions, it is submitted that the export of service by Petitioner as an intermediary is being treated as intrastate supply of services, rendering such a transaction liable to payment of CGST and SGST.

76. In the above circumstances this Petition has been fled challenging the constitutional validity of Section 13(8)(b) read with Section 8(2) of the IGST Act, on various grounds, essentially covering the following points :-

Judgment-WP 2031-18-1.odt i. GST is a destination based tax on consumption and section 13(8)(b) of the IGST Act is contrary to the said principle;

ii. Section 13(8)(b) read with Section 8(2) of the IGST Act is ultra vires Article 246A read with Article 269A, Article 286 as well as Article 245 of the Constitution of India as the section results in levy on export of services as intra- State supply;

iii. Section 13(8)(b) is ultra vires the charging section 5; iv. Section 13(8)(b) is ultra vires Section 9 of the CGST Act and MGST Act;

v. Section 13(8)(b) results in violation of Article 14 of the Constitution being arbitrary, unreasonable and discriminatory;

vi. Section 13(8)(b) results in violation of right to carry on business viz. Article 19(1)(g) of the Constitution; vii. No Double Taxation is permitted.

77. Respondents have fled Reply. Petitioner has fled Rejoinder. On behalf of the Parties written submissions have also been fled for the assistance of the Court. I have also heard Learned Counsel for Petitioner, Shri Bharat Raichandani as well as Learned Additional Solicitor General, Shri Anil C. Singh for the Respondent Revenue alongwith Shri Pradeep Jetly, learned Senior Counsel and Shri

J.B. Mishra, Learned Standing Counsel for Revenue and with their able assistance, we have perused the papers and proceedings in the matter. The issue that arises for consideration, is whether the provision of Section 13(8)(b) read with Section 8(2) of the IGST Act Judgment-WP 2031-18-1.odt is unconstitutional or ultra vires the IGST Act, Section 9 of the CGST Act/MGST Act.

78. In short the issue is that Petitioner is aggrieved that his supply of intermediary services as intermediary to his overseas customers, which according to him is export of service by virtue of section 13(8)(b) of the IGST Act read with section 8(2) of the said Act is being treated as an intra-State supply making him liable to pay CGST

and MGST, which he submits cannot be permitted. Petitioner is therefore challenging Section 13 (8) (b) read with Section 8(2) of the IGST Act as being ultra vires Articles 14, 19 (1)
(g), 245, 246A, 269A and 286 of the Constitution of India as well as the IGST Act and section 9 of the CGST and MGST Act.
79. Before commencing the examination of the aforesaid challenge, it would be helpful to set out the principles of judicial review.
80. Whether a law or a provision is unconstitutional or not, has to be decided by the Court on the touch-stone of the Constitution. It is also settled law that Courts should proceed to construe a statute with a view to uphold its constitutionality.1
81. In the case of State of Madhya Pradesh v/s. Rakesh Kohli & Another2 the Supreme Court had set out the following principles to be considered while examining the validity of statutes on taxability. In paragraph 32, the Supreme Court stated thus:- 1 ITC Ltd. v. Agricultural Produce Market Committee (2002) 9 SCC 232, Asst. Director of Inspection Investigation v. A.B. Shanthi (2002) 6 SCC 259, Shri Krishna Gyanoday Sugar Ltd. v. State of Bihar, (2003) 4 SCC 378 and Welfare Association A.R.P. Maharashtra v. Ranjit P. Gohil (2003) 9 SCC 358, State of A.P. v. K. Purushottam Reddy and Others, (2003) 9 SCC 564 (SC). 2 (2012) 6 SCC 312 Judgment-WP 2031-18-1.odt "32:- While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:-
(I)there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,
ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infrmity has to be found,
(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,
(iv) hardship is not relevant in pronouncing on the constitutional validity of a fscal statute or economic law, and
(v) in the feld of taxation, the legislature enjoys greater latitude for classifcation..."
82. Also the following paragraphs in the decision in the case of Government of Andhra Pradesh & Ors Vs. P. Laxmi Devi 3 may be helpful:-
" 30. The frst decision laying down the principle that the Court has power to declare a Statute unconstitutional was the well-known decision of the US Supreme Court in Marbury v. Madison 5 U.S. (1Cranch) 137 (1803). This principle has been followed thereafter in most countries, including India.
B. How and when should the power of the Court to declare the Statute unconstitutional be exercised? Since, according to the above reasoning, the power in the Courts to declare a Statute unconstitutional has to be accepted, the question which then arises is how and when should such power be exercised.
3 AIR 2008 SC 1640 Judgment-WP 2031-18-1.odt
31. This is a very important question because invalidating an Act of the Legislature

is a grave step and should never be lightly taken. As observed by the American Jurist Alexander Bickel "judicial review is a counter majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it." (See A. Bickel's `The Least Dangerous Branch')

32. The Court is, therefore, faced with a grave problem. On the one hand, it is well settled since Marbury V. Madison (supra) that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of confict, on the other hand the Court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people. The Court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.

33. We have observed above that while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection. This requires clarifcation, since, sometimes Courts are perplexed as to whether they should declare a statute to be constitutional or unconstitutional.

34. The solution to this problem was provided in the classic essay of Prof James Bradley Thayer, Professor of Law of Harvard University entitled 'The Origin and Scope of the American Doctrine of Constitutional Law' which was published in the Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy- making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to that wide margin of considerations which address

themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only Judgment-WP 2031-18-1.odt when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of great outlines broadly drawn for an unknowable future. Often reasonable men may differ about its meaning and application. In short, a Constitution offers a wide range for legislative discretion and choice. The judicial veto is to be exercised only in cases that leave no room for reasonable doubt. This rule recognizes that, having regard to the great, complex ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specifc opinion, but leaves open this range of choice; and that whatever choice is not clearly in violation of a constitutional provision is valid even if the Court thinks it unwise or undesirable. Thayer traced these views far back in American history, fnding, for example, that as early as 1811 the Chief Justice

of Pennsylvania had concluded: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt" vide Commonwealth ex. Rel. O'Hara V. Smith 4 Binn. 117 (Pg.1811).

35. Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is fagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is Judgment-WP 2031-18-1.odt broad separation of powers under the Constitution, and the three organs of the State - the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

36. Apart from the above, Thayer also warned that exercise of the power of judicial review "is always attended with a serious evil", namely, that of depriving people of "the political experience and the moral education and stimulus that comes from fghting the question out in the ordinary way, and correcting their own errors" and with the tendency "to dwarf the political capacity of the people and to deaden its sense of moral responsibility".

37. Justices Holmes, Brandeis and Frankfurter of the United States Supreme Court were the followers of Prof. Thayer's philosophy stated above. Justice Frankfurter referred to Prof Thayer as "the great master of constitutional law", and in a lecture at the Harvard Law School observed "if I were to name one piece of writing on American Constitutional Law, I would pick Thayer's once famous essay because it is the great guide for judges and therefore, the great guide for
understanding by non-judges of what the place of the judiciary is in relation to constitutional questions". (vide H. Phillip's 'Felix Frankfurter Reminisces' 299-300, 1960).

38. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specifc provision of the Constitution (other than the directive principles). But before declaring the statute to be Judgment-WP 2031-18-1.odt unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction

or narrowing down its scope vide Mark Netto V. Government of Kerala and Ors. [1979]1SCR609. Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

39. In a dissenting judgment in Bartels V. Iowa 262 US 404 412(1923), Justice Holmes while dealing with a state statute requiring the use of English as the medium of instruction in the public schools (which the majority of the Court held to invalid) observed "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".

The Court certainly has the power to decide about the constitutional validity of a statute. However, as observed by Justice Frankfurter in West Virginia V. Barnette 319 U.S. 624 (1943), since this power prevents the full play of the democratic process it is vital that it should be exercised with rigorous self restraint.

46. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges personal preferences. The Court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in State of Bihar V. Kameshwar Singh AIR 1952, SC 252 (274); "The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence".

Judgment-WP 2031-18-1.odt In our opinion, the Court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

47. As observed by the Constitution Bench decision of this Court in M.H. Quareshi V. State of Bihar: [1959]1SCR629 : The Court must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may confne its restrictions to those cases where the need is deemed to be the clearest, and fnally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, common report, the history of the times, and may assume every state of facts which can be conceived existing at the time of the legislation. (See also Moti Das V. S.P. Sahi MANU/SC/0021/1959 : AIR 1959SC942.

48. In the light of the above observations, the impugned amendment is clearly constitutional. The amendment was obviously made to plug a loophole in the Stamp Act so as to prevent evasion of stamp duty, and for quick collection of the duty. There are other statutes e.g. the Income Tax Act in which there are provisions for deduction at source, advance tax, etc. which aim at quick collection of tax, and the constitutional validity of these provisions have always been upheld".

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83. In the case of Hamdard Dawakhana & Another v/s. Union of India4, the Supreme Court has observed that another principle that is to be borne in mind while examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people, that the laws it enacts are directed

to problems which are made manifest by experience, and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted.

84. In the case of Union of India v. Exide Industries Ltd.5, the Supreme Court, (in the decision authored by Hon'ble Shri Justice A.M. Khanwilkar) has reiterated that the examination of the Court begins with a presumption in favour of constitutionality. This presumption, the Supreme Court states is not just borne out of judicial discipline and prudence, but also out of the basic scheme of the Constitution wherein the power to legislate is the exclusive domain of the Legislature/ Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the legislature and, in exercise of judicial review, the Court starts with a basic presumption in favor of the proper exercise of such power. There has to be a delicate balance of powers or rather separation of powers to be preserved under the Constitution.

85. In paragraph 30 of the decision of Exide Industries (supra) the Supreme Court, while observing that the time tested 4 (1960) Cri LJ 671 5 (2020) 5 SCC 274 Judgment-WP 2031-18-1.odt principle of checks and balances does not empower the Court to question the motives or wisdom of the legislature, except in circumstances when the same is demonstrated from enacted law, quoted the following passage from United States v/s. Butler et al (297 US (1936)) in support as under:-

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness.
>
> One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of the power by the executive is subject to judicial restraint, the only check upon our own exercise of power by the executive is subject to judicial restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the process of democratic government. "

The Court further held that in the Indian constitutional jurisprudence, the above principle has been reckoned by this Court in its early years in1954 in K. C. Gajapati Narayan Deo & Ors. v/s. The State of Orissa 15 (1954) SCR 1 wherein the Court observed thus:-

> ". If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specifc legislature entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers."

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86. But before we proceed further, a word on the background/history of GST.

86.1 GST is goods and services tax. It is an indirect tax, levied on supply of goods or services or both. GST has been in operation in more than 160 countries after being introduced in France in 1954. Different countries follow different models of GST. Most countries do not have full GST. They have partial GST. Full GST means all indirect taxes are covered under it and calculated as Value Added Tax (VAT). Some countries have GST calculated as VAT or comprehensive VAT or just VAT. The differences refect the diversity of situation prevailing in different countries. GST is applicable all across Europe. UK has had VAT since 1993. New Zealand introduced GST in 1986. Australia introduced VAT in 2000. Canada initiated GST in 1991. Ukraine has VAT. Singapore has GST. USA does not have GST/VAT. Malaysia introduced GST in 2015 but was dismantled in 2018.

86.2 Historically, Indian experience with GST like tax began in late 1970s. The frst proposal being the Indirect Taxation Enquiry Committee Report of 1978 by L.K. Jha. The Jha Committee suggested introduction of manufacturing VAT as MANVAT. This could not be implemented due to inter linkage issues. Then came the Long Term Fiscal Policy (LTFP) report in 1985 that suggested MODVAT. Thereafter there was a Tax Reform Committee Report of 1992 with focus on requirements for opening up the economy which was initiated in 1991 under New Economic Policy (NEP). There was a proposal to tax services also. Services were brought into the indirect tax net by 1994 by imposing service tax on them as the Judgment-WP 2031-18-1.odt services sector had been expanding rapidly. In 1994 the MODVAT scheme was expanded to include capital goods and to shift to comprehensive VAT. MODVAT was replaced by CENVAT in 2000. Full-fedged CENVAT came into operation in July 2001. MODVAT on goods was also expanded by bringing in more commodities in its purview. Then came the Task Force on Indirect Taxes, which recommended moving towards comprehensive VAT on goods and services. It became necessary to bring goods and services on the same platform so that credit for inputs could be given across goods and services and not just separately for each of them. The rules of CENVAT credit were introduced along with credit on service tax. These were a precursor to introducing GST. For sales tax, VAT was introduced in the states and almost all the states added VAT by 2005. CENVAT was for the Centre and VAT was used by the states.

86.3 The sales tax regime in India was complex. Since states were free to levy sales tax on goods and services at the rate they thought ft, residents would buy necessities from States which had lower sales tax. Across various indirect taxes - sales tax, services tax, excise duty - input credit was not available so the cascading effect continued. To eliminate this, GST was proposed in the Budget for 2006 - 2007. The important change that would come with the introduction of GST in the country was that earlier the indirect taxes were imposed on the “act of” production, sales, transportation etc. but under GST it was going to be on the transaction of supply.

86.4 Though, India has had several indirect taxes, the diffculty that was faced was that input credit was not available from Judgment-WP 2031-18-1.odt one tax to another and there was cascading effect. This is sought to be taken care of under the

GST regime.

86.5 In 2009 the Empowered Committee of State Finance Ministers was set up for comprehensive indirect tax reform by the introduction of GST in India.

86.6 On March 11,2011 the Constitution (115th Amendment) Bill was introduced in the Lok Sabha and the bill was referred to the standing committee on Finance for examination. The committee submitted its report on 7 August 2013. However, since the bill in the Lok Sabha had lapsed due to the dissolution of the 15 th Lok Sabha on March 2014, the same could not be considered.

86.7 Thereafter, the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 to introduce the GST and confer simultaneous powers on the Centre and States was introduced in the Loksabha on December 19, 2014 by the then Finance Minister. The Statement of Objects and Reasons of the 122 nd Constitutional Amendment Bill, 2014 (which became the 101st Constitutional Amendment Act, 2016), reads as under:

> "1. The Constitution is proposed to be amended to intro- duce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to re- move cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, Judgment-WP 2031-18-1.odt except those which are kept out of the purview of the goods and services tax.
>
> 2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for-
>
> (a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Ex- cise Duty levied under the Medicinal and Toilet Prepara- tions (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Sur- charges and Cesses so far as they relate to the supply of goods and services;
>
> (b) subsuming of State Value Added Tax/Sales Tax, Enter- tainment Tax (other than the tax levied by the local bod- ies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;
>
> (c) dispensing with the concept of 'declared goods of spe- cial importance' under the Constitution;
>
> (d) levy of Integrated Goods and Services Tax on inter- State transactions of goods and services;
>
> (e) levy of an additional tax on supply of goods, not exceed- ing one per cent in the course of inter-State trade or com- merce to be collected by the Government of India for a pe- riod of two years, and assigned to the States from where the

supply originates;

(f)conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and ser- vices tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, Judgment-WP 2031-18-1.odt it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notifed on the recommendation of the Goods and Services Tax Coun- cil.

(h) compensation to the States for loss of revenue aris- ing on account of implementation of the Goods and Ser- vices Tax for a period which may extend to fve years;

(i) creation of Goods and Services Tax Council to examine issues relating to goods and services tax and make recom- mendations to the Union and the States on parameters like rates, exemption list and threshold limits. The Council shall function under the Chairmanship of the Union Fi- nance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It is fur- ther provided that every decision of the Council shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting in ac- cordance with the following principles. "

86.8 The Bill after being passed in the Loksabha on May 6, 2015 was sent to the Rajyasabha. On 12 th May 2015, the bill was sent to the Select Committee for examination. The Select Committee submitted its report on July 22, 2015. It would be relevant to quote from paragraph 1.10 of the said report under the head RATIONALE BEHIND MOVING TOWARDS GST as under:

"1.10 The introduction of GST would mark a clear departure from the scheme of distribution of fscal powers envisaged in the Constitution. The proposed dual GST envisages taxation of the same taxable event i.e., supply of goods and services, simultaneously by both the Centre and the States."

Judgment-WP 2031-18-1.odt 86.9. The Bill was passed with amendments in the Rajyasabha on August 3, 2016 and in the Loksabha on 8 th August 2016 and after ratifcation by half of the States, the Constitution (One Hundred and First Amendment) Act 2016 ("Constitution (101st) Amendment Act") received the assent of the Hon'ble President of India on 8 th September 2016. The said proposed dual GST which envisages taxation of the same taxable events i.e. supply of goods and services, simultaneously and concurrently by both the Centre and the State.

This has led inter alia to the introduction of Articles 246A, 269A, 279A, 366(12A) (defning Goods and Services Tax), 366 (26A) (defning services) and omission of Article 268A, Entry 92, Entry 92-C in the Union List to Schedule VII of the Constitution of India to make way for IGST, CGST and MGST.

86.10. The amendment to the Constitution has defned "goods and services tax" to mean any tax on supply of goods, or services, or both (except taxes on the supply of alcoholic liquor for human consumption) by including the same in sub-Clause 12A

of Article 366 of the Constitution of India. The expression "supply" has been defned under the GST Law and not under the Constitution to keep the process of future amendment simple whereas the terms "goods and services" are defned under both i.e. the Constitution and the GST legislation. The expression "goods" was already defned under sub-clause (12) of Article 366 to include all the materials, commodities and articles; the expression "services" has been defned in sub-Clause 26A of Article 366 to mean anything other than goods.

Judgment-WP 2031-18-1.odt 86.11. At this stage it would also be appropriate to refer to the Supreme Court decision in the case of Union of India and another versus Mohit Minerals Private Limited and

Another 6 where while considering challenge to the Goods and Services Tax (Compensation to States) Act, 2017 as well as the Goods and Services Tax (Compensation) Rules, where the following observations in paragraph 7 with respect to the amendment to the Constitution.

> "7. The Constitution (122nd Amendment) Bill, 2014 was introduced in the Lok Sabha to seek amendment in the Constitution, inter alia, providing for subsuming of various indirect taxes and central and states' surcharges and cesses so far as they relate to supply of goods and services both on Intra State and Interstate. The Constitution 101 st Amendment Act 2016 was passed to levy goods and services tax. On 12 April 2017, Parliament enacted 3 acts namely (1) the Central Goods and Services Tax Act, 2017; (2) Integrated Goods and Services Tax Act, 2017; and (3) the Goods and Services Tax (Compensation to States) Act, 2017."

86.12. The Supreme Court in the case of Mohit Minerals (supra) has relied upon the statement of Objects and Reasons to the Constitution 101st Amendment Act, 2016 as set out above and in paragraph 23, has observed as under:

> "23. The Constitution (101st Amendment) Act, 2016 dated 08.09.2016 was passed to amend the Constitution of India. By Constitution (101st Amendment) Act, 2016, new Articles 246A, 269A and 279A were inserted. Amendments were also made in Articles 248, 249, 250, 268, 269, 270, 271, 286, 366 and 368. Article 268A was omitted. Amendments were also made in Seventh Schedule to the Constitution in List I and List II. "
>
> Judgment-WP 2031-18-1.odt 86.13. Thereafter, the Supreme Court went on to quote Article 246A, Article 269A and other Articles and sections of the Constitution (101st) Amendment Act which were relevant in respect of deciding the challenge relating to the Compensation to States for loss of revenue on account of introduction of Goods and Services Tax to fnally hold that that the Compensation Act as well as the Rules were not unconstitutional or ultra vires the Constitution of India.

86.14 Pursuant to the above referred amendments to the Constitution of India, including Articles 246A, 269A, 366(12A), 366(26A), the Parliament has enacted the Central Goods and Services Tax Act, 2017 ("CGST Act") as well as the Integrated Goods and Services Tax Act, 2017 and the State Legislature has enacted the Maharashtra Goods and Services Tax Act, 2017 ("MGST Act"). The CGST Act and the MGST Act have been enacted to make a provision for levy and collection of tax on intra-State supply of goods or services or both respectively by the Central

Government and the State Government. The IGST Act has been enacted to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government.

86.15 The Statement of Objects and Reasons of the IGST Act, are quoted as under:

"Presently, Article 269 of the Constitution empowers the Parliament to make law on the taxes to be levied on the sale or purchase taking place in the course of inter-State trade or commerce. Accordingly, Parliament had enacted the Central Sales Tax Act, 1956 for levy of central sales tax on the sale taking place in the course of inter-State trade or commerce. The central sales tax is being collected and retained by the exporting States.

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2. The crucial aspect of central sales tax is that it is non- vatable i.e. the credit of this tax is not available as set-off for the future tax liability to be discharged by the purchaser. It directly gets added to the cost of goods purchased and becomes part of the cost of business and thereby has a direct impact on the increase in the cost of production of a particular product. Further, the fact that the rate of central sales tax is different from the value added tax being levied on the intra-State sale creates a tax arbitrage which is exploited by unscrupulous elements.

3. In view of the above, it has become necessary to have a Central legislation, namely the Integrated Goods and Services Tax Bill, 2017. The proposed Legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place in the course of inter-State trade or commerce. The proposed Legislation will remove both the lacunas of the present central sales tax. Besides being vatable, the rate of tax for the integrated goods and services tax is proposed to be more or less equal to the sum total of the central goods and services tax and state goods and services tax or Union territory goods and services tax to be levied on intra-State supplies. It is expected to reduce cost of production and infation in the economy thereby making the Indian trade and industry more competitive, domestically as well as internationally. It is also expected that introduction of the integrated goods and services tax will foster a common or seamless Indian market and contribute signifcantly to the growth of the economy.

4. The Integrated Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely-

(a) to levy tax on all inter-State supplies of goods or services or both except supply of alcoholic liquor for human consumption at a rate to be notifed, not exceeding forty percent as recommended by the Goods and Services Tax Council (the Council);

(b) to provide for levy of tax on goods imported into India in accordance with the provisions of the Customs Tariff Judgment-WP 2031-18-1.odt Act, 1975 read with the provisions contained in the Customs Act, 1962;

(c) to provide for levy of taxes on import of services on reverse charge basis under the proposed Legislation;

(d) to empower the Central Government to grant exemptions by notifcation or by special order, on the recommendation of the Council;

(e) to provide for determination of the nature of supply as to whether it is an inter-State or intra-State supply;

(f)to provide elaborate provisions for determining the place of supply in relation to goods or services or both;

(g) to provide for payment of tax of a supplier of online information and database access or retrieval services;

(h) to provide for refund of tax paid on supply of goods to tourists leaving India;

(i) to provide for apportionment of tax and settlement of funds and for transfer of input tax credit between the Central Government, State Government and Union territory;

(j) to provide for application of certain provisions of the Central Goods and Services Tax Act, 2017, inter alia, relating to defnitions, time and value of supply, input tax credit, registration, returns other than late fee, payment of tax, assessment refunds, audit, inspection, search, seizure and arrest, demands and recovery, appeals and revision, offences and penalties and transitional provisions, in the proposed Legislation; and

(k) to provide for transitional transactions in relation to import of services made on or after the appointed day. "

87. With the above prefatory observations and the back drop, let us now examine the challenge by Petitioner.

88. The approach of the Court in testing the constitutional validity of a provision is well settled. In the case of Exide Industries Ltd. (supra), the Supreme Court has observed that the fundamental Judgment-WP 2031-18-1.odt concern of the Court should be to inspect frstly the existence of enacting power and once such power is found to be present, then next is to ascertain whether the enacted provision impinges upon any right enshrined in Part-III of the Constitution. The process of examining validity of a duly enacted provision as envisaged under Article 13 of the Constitution is based on the aforesaid two steps.

89. It would therefore be appropriate to frst consider the challenge with respect to Articles 246, 246A, 269A, Article 286 and Article 245 of the Constitution of India, which are quoted as under:

89.1 Article 246 is quoted as under:

"246. Subject matter of laws made by Parliament and by the Legislatures of States:- (1) 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 in the Seventh Schedule (in this Constitution referred to as the Union List) (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 in the Seventh Schedule (in this Constitution referred to as the Concurrent List) (3) Subject to clauses (1) and (2), the 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 in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) 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".

Judgment-WP 2031-18-1.odt 89.2. Article 246A is quoted as under:

"Art. 246A:- (1) 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 goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation - The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."

89.3 Article 269A of the Constitution of India is quoted as under:

"Art. 269A :- (1) Goods and services tax 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. Explanation. - For the purposes of this clause, 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.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246A, such amount shall not form part of the Consolidated Fund of India.

Judgment-WP 2031-18-1.odt (4) Where an amount collected as tax levied by a State under Article 246A has been used for payment of the tax levied under Clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principal 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".

89.4 Article 286 of the Constitution of India is reproduced as under:

"Article 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 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.

(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)."

89.5 Article 245 of the Constitution of India is quoted as under:

"245. Extent of laws made by Parliament and by the Legislatures of States - (1)

Subject to the provisions of this 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. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

Judgment-WP 2031-18-1.odt 89.6. Article 366(12A) defnes "Goods and Services Tax" to mean any tax on supply of goods or services or both except taxes on the supply of the alcoholic liquor for human consumption.

89.7. Article 366 (26A) defnes "services" to mean anything other than goods.

90. It is well known that taxation is recognized as an instrument of raising revenue. Under Article 336 (28), of the Constitution of India taxation is defned to include imposition of any tax, whether general or local or special. Article 265 says that no tax shall be levied or collected except by authority
of law. The Constitution of India is quasi federal in nature with clear precise demarcation of legislative powers between the Center and the States.

91. As can be seen, Article 246 of the Constitution of India deals with the distribution of legislative powers as between Union and the State legislatures as contained in the VIIth Schedule of Constitution. The VIIth Schedule to the Constitution of India gives three lists. List - I is known as the Union list, list -II is the State list and list - III is the concurrent list. If an item is listed in list- I then the Union or the Parliament would have competence to legislate on such item. If the item is in list-II, then the State would have the power. If the item is in the concurrent list, then both the Union or the State can legislate. And, under Article 248 of the Constitution of India but subject to Article 246A, Parliament has exclusive (residuary) power to make any law with respect to any matter not Judgment-WP 2031-18-1.odt enumerated in the Concurrent List or State List. The power read with the Union List under Seventh Schedule implies that the Parliament has residuary powers to legislate any law with respect to any tax not mentioned in either of the Concurrent or State List.

91.1 Pursuant to the Constitution (One Hundred and First Amendment) Act, 2016, from the 16 th day of September 2016, and with the operation of Article 246A through the Constitution (101st) Act, 2016, the legislative relations between the Union and the States have evolved and the said amendment has created 'special provision with respect to goods and services tax such that the Parliament and the Legislature of every State, now have power to make laws with respect to goods and services tax imposed by the Union or by that State. Entry 92 as well as 92C stand deleted by this amendment in order to facilitate the operation of this special provision.

91.2 It is seen that the power to make laws under Article 246A is a non obstante power to anything contained in Article 246 and Article 254 i.e. the general power of the Parliament and States to make laws with respect to subject-matters covered in the lists under Seventh Schedule and supremacy of central legislation in case of repugnancy between a central Act and State legislation. Therefore, Article 246A will override the general powers, even if a subject-matter of taxation is contained in the Seventh Schedule, and the Parliament and legislature of every State have simultaneous power to make laws with respect to any tax imposed on supply of goods and services other than supply of alcoholic liquor for human consumption.

Judgment-WP 2031-18-1.odt 91.3. Under Article 246A (2), Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods or services takes place in the course of inter State trade or commerce.

91.4. It is therefore apparent that the IGST Act has been enacted by the Parliament for levy of IGST on inter-state supply of goods or services, inter alia, pursuant to the exclusive power contained in Article 246A(2).

92.1 Under Article 269A, Parliament has powers to make laws (i) with respect to goods and services tax where the supply of goods or services or both takes place in the course of inter-State trade or commerce (Article 269A(1)) or (ii) on the principles determining place of supply, and when a supply of goods or services takes place in the course of inter-state trade or commerce (Article 269A(5)).

92.2 Under Article 269A of the Constitution, any law pertaining to supply of goods or services in the course of inter-State trade or commerce is to be enacted by the Parliament. Under Article 269A(5) the rules or principles for place of supply are also to be formulated by the Parliament.

92.3 The GST on supplies in the course of inter-State trade or commerce is levied and collected by the Government of India and such tax is apportioned between the Union and the State. The Judgment-WP 2031-18-1.odt manner of apportionment may be provided by the Parliament by law on the recommendations of the GST Council.

93. Pursuant to the aforesaid powers under Article 246A and Article 269A, the IGST Act has been enacted.

94. Before moving further, it would be apposite to refer to the following provisions of the IGST Act which are relevant for our discussion.

94.1 Section 2(6) defnes “export of services” as under:

“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; or in Indian rupees wherever permitted by the Reserve Bank of India; 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;

92.2 Section 2(13) defnes “intermediary” 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;”

94.3 Section 2 (21) of IGST Act defnes “ supply” as under:-

“supply” shall have the same meaning as assigned to it in section 7 of the Central Goods and Services Tax Act;

Judgment-WP 2031-18-1.odt 94.4. Section 5 of the IGST Act is the charging section and deals with the levy and collection of IGST as under:

"Levy and collection.

1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax 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 Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notifed by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

(2) The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notifed by the Government on the recommendations of the Council. (3) The Government may, on the recommendations of the Council, by notifcation, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The Government may, on the recommendations of the Council, by notifcation, specify a class of registered persons who shall, in respect of supply of specifed categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, Judgment-WP 2031-18-1.odt and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both. (5) The Government may, on the recommendations of the Council, by notifcation, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

94.5 Section 7 of the IGST Act deals with inter-State supply as under: "Inter-State supply.

(1) Subject to the provisions of section 10, supply of goods, where the location

of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory, shall be treated as a supply of goods in the course of inter- State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated Judgment-WP 2031-18-1.odt to be a supply of goods in the course of inter-State trade or commerce.

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in—

(a) two different States; or

(b) two different Union territories; or

(c) a State and a Union territory, shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) 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.

(5) 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 this section, shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

94.6 Section 8 of the IGST Act deals with inter-State supply as under:

Intra-State supply (1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply: Provided that the following supply of goods shall not be treated as intra-State supply, namely:—

(i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;

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(ii) goods imported into the territory of India till they cross the customs frontiers of India; or

(iii) supplies made to a tourist referred to in section 15. (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 same Union territory shall be treated as intra-State supply: Provided that the 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.—For the purposes of this Act, where a person has,

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or

(iii) an establishment in a State or Union territory and any other establishment registered within that State or Union territory, then such establishments shall be

treated as establishments of distinct persons.

Explanation 2.—A person carrying on a business through a branch or an agency or a representational offce in any territory shall be treated as having an establishment in that territory.

94.7 Section 10 of the Act deals with place of supply of goods other than supply of goods imported into, or exported from India as under:

"(1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,—

(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the Judgment-WP 2031-18-1.odt goods at the time at which the movement of goods terminates for delivery to the recipient;

(b) where the goods are delivered by the supplier to a recipient or any other person on the direction of a third person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to the goods or otherwise, it shall be deemed that the said third person has received the goods and the place of supply of such goods shall be the principal place of business of such person;

(c) where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient;

(d) where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly;

(e) where the goods are supplied on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, the place of supply shall be the location at which such goods are taken on board.

(2) Where the place of supply of goods cannot be determined, the place of supply shall be determined in such manner as may be prescribed.

94.8 Section 11 of the Act deals with place of supply of goods other than supply of goods imported into, or exported from India as under:

"Place of supply of goods imported into, or exported from India. The place of supply of goods,—

(a) imported into India shall be the location of the importer;

(b) exported from India shall be the location outside India."

Judgment-WP 2031-18-1.odt 94.9. Section 12 deals with place of supply of services where location of supplier and recipient is in India.—

(1) The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.

(2) The place of supply of services, except the services specifed in sub-sections (3) to (14),—

(a) made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be,-

(i) the location of the recipient where the address on record exists; and

(ii) the location of the supplier of services in other cases.

(3) The place of supply of services,—
(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co- ordination of construction work; or
(b) by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or
(c) by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto, offcial, social, cultural, religious or business function including services provided in relation to such function at such property; or
(d) any services ancillary to the services referred to in clauses (a), (b) and (c), shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:
Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.
Judgment-WP 2031-18-1.odt Explanation.—Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.
(4) The place of supply of restaurant and catering services, personal grooming, ftness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed.
(5) The place of supply of services in relation to training and performance appraisal to,—
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the location where the services are actually performed.
(6) The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientifc, educational, entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located.
(7) The place of supply of services provided by way of,—
(a) organisation of a cultural, artistic, sporting, scientifc, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or
(b) services ancillary to organisation of any of the events or services referred to in clause (a), or assigning of sponsorship to such events,—
(i) to a registered person, shall be the location of such person;
(ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be

the location of the recipient.
Judgment-WP 2031-18-1.odt Explanation.—Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.
(8) The place of supply of services by way of transportation of goods, including by mail or courier to, —
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation:
[Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods.] (9) The place of supply of passenger transportation service to, —
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the place where the passenger embarks on the conveyance for a continuous journey:
Provided that where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined in accordance with the provisions of sub-section (2).
Explanation.—For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.
(10) The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the frst scheduled point of departure of that conveyance for the journey.
Judgment-WP 2031-18-1.odt (11) The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall, —
(a) in case of services by way of fxed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services;
(b) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on the record of the supplier of services;
(c) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis through a voucher or any other means,—
(i) through a selling agent or a re-seller or a distributor of subscriber identity module card or re-charge voucher, be the address of the selling agent or re-seller or

distributor as per the record of the supplier at the time of supply; or

(ii) by any person to the fnal subscriber, be the location where such prepayment is received or such vouchers are sold;

(d) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that if such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

Explanation.—Where the leased circuit is installed in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services Judgment-WP 2031-18-1.odt separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(12) The place of supply of banking and other fnancial services, including stock broking services to any person shall be the location of the recipient of services on the records of the supplier of services:

Provided that if the location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.

(13) The place of supply of insurance services shall,—

(a) to a registered person, be the location of such person;

(b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services.

(14) The place of supply of advertisement services to the Central Government, a State Government, a statutory body or a local authority meant for the States or Union territories identifed in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specifc to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

94.10 Section 13 deals with place of supply of services where location of supplier or location of recipient is outside India.—

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

Judgment-WP 2031-18-1.odt (2) The place of supply of services except the services specifed in sub-sections (3) to (13) shall be the location of the recipient

of services:
Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.
(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—
(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services: Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:
Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;
(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.
(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co- ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.
Judgment-WP 2031-18-1.odt (5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientifc, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.
(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section
(5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.
(7) Where the services referred to in sub-section (3) or sub- section (4) or sub-section
(5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specifc to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—
(a) services supplied by a banking company, or a fnancial institution, or a non-banking fnancial company, to account holders;
(b) intermediary services;
(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.
Explanation.—For the purposes of this sub-section, the expression,—
(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;
(b) "banking company" shall have the same meaning as assigned to it under clause
(a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);
(c) "fnancial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
(d) "non-banking fnancial company" means,—
(i) a fnancial institution which is a company;
(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notifcation in the Offcial Gazette, specify.
(9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.
(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.
(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the frst scheduled point of departure of that conveyance for the journey.
(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.
Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following noncontradictory conditions are satisfed, namely:—
(a) the location of address presented by the recipient of services through internet is in the taxable territory;
(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;
(c) the billing address of the recipient of services is in the taxable territory;
(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f)the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fxed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

Section 16 deals with Zero rated supply.—

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, Judgment-WP 2031-18-1.odt in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

95. Petitioner's case is that his supply is export of services as defned in section 2(6) of the IGST Act. But because of (i) Section 13(8)(b) of the IGST Act which in the case of Intermediary services (as well as two other services), provides the place of supply to be the location of supplier (and not the location of the recipient and which according to him should have been the case) as the service recipient is outside India read with

(ii) section 8(2) which provides that where the location of the supplier and the place of supply of services are in the same State, the supply is being treated as intra State supply, Petitioner's export is being deemed as intra -state supply making him liable to CGST and MGST. Petitioner has therefore questioned the vires of these two provisions or the competence of the Parliament to enact these provisions with reference to Articles 246A, 269A, 286 and 245 of the Constitution of India. According to Petitioner, Parliament cannot legislate to deem an export of services to be an intra -state Supply as is purportedly being done by virtue of section 13(8)(b) read with section 8(2) of the IGST Act.

96. Admittedly, Petitioner is an Intermediary (as defned in section 2(13)) above rendering Intermediary Services (as provided for in section 13(8)(b) above) to its overseas customers based on which the overseas customers export their goods to importers in India for which Petitioner receives commission.
97. From the above referred provisions it emerges that the only exception is if the intermediary has provided the service on his Judgment-WP 2031-18-1.odt own account in which case he may claim to be an exporter of the service if he otherwise falls within the defnition. This would not be an export of services in as much as Intermediary Services are specifcally provided in Section 13 (8)(b) under the authority of the Constitution of India provided in Article 269A read with Article 246A. Petitioner is providing intermediary service of arranging, marketing, facilitating the export of his overseas customers to Indian importers and that is the reason he receives commission. It is in respect of these intermediary services that Section 13(8)(b) refers to the place of supply of such service as the location of the supplier.
98. The legislature keeping in mind the peculiar exigencies of fscal affairs and underlying concerns of public revenue enacts provisions. Section 13(8)(b) of the IGST Act in respect of intermediary services is one such provision. Intermediary services are specifcally dealt with, where it has been specifcally provided that where the supplier or the recipient is outside India, then in respect of Intermediary services, the place of supply shall be the location of the supplier. There is no quarrel with the defnition of export of services contained in Section 2 (6) of the IGST Act, though it is stated in the Affdavit of the Revenue that Petitioner does not satisfy the conditions of the said Section. It is admitted position that Petitioner is an Intermediary (Section 2 (13) of IGST Act) providing Intermediary Services to service recipient located outside India. Therefore, for the purposes of place of supply Section 13(8) (b) comes into play.
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99. In my view, when there is a specifc provision defning Intermediary as in section 2(13) of the IGST Act and Intermediary Services are specifcally dealt with in section 13(8)(b), the question of application of general provision of Section 2(6) of export of services would not arise. The following Latin phrase is apt here, Specialia derogant generaliabus, which means special provisions are never limited or explained by the general, i.e., special provisions derogate from general, but generalia specibus non derogant which means general provisions do not derogate from special provisions.
100. There would therefore be no question of deeming Petitioner's supply of intermediary services to be intra-State supply.
101. It is pursuant to the powers invested by the Constitution, that the Parliament, in Sections 7 and 8 of IGST Act has provided for determination of the nature of supply, whether inter-state or intra- State; Section 7 provides for what supply is inter-State and Section 8 provides for what is treated as intra-State.
102. It is pursuant to the power in Article 269A(5) that Chapter V of the IGST Act entitled "Place of Supply of Goods or Services or Both" containing Sections 10 to 14 has been enacted by the Parliament.
103. It is observed that the Explanation to Article 269A(1) deems supply of goods or services in the course of import into India to be supply in the course of inter-State

trade or commerce. A plain reading indicates that the said Explanation clearly limits itself to clause (1) of Article 269A. Article 269A empowers the Parliament to levy and collect GST on supplies in the course of inter-state trade Judgment-WP 2031-18-1.odt or commerce. In my view, just because the import into India has been deemed to be inter-state trade or commerce, that under Article 269A, in no way would take away the power of the Parliament to stipulate any other type of supply to be a supply in the course of inter-State trade or commerce; frstly because the Explanation deeming import to be inter-state is restricted to clause (1) of Article 269A and secondly clause (5) (which not being bound by the Explanation to clause (1) of Article 269A), empowers the Parliament to legislate on principles for determining the place of supply and when the supply would be in the course of inter-state trade or commerce. A conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law on what is inter-state supply and what is not which obviously includes what is intra-state in contradistinction to what is inter-state and that power is exclusively with the Parliament. In my considered opinion, the power to enact provisions determining the nature of supplies (as inter state supply in section 7 of IGST Act or intra state supply in section 8 of IGST Act) or place of supply (as contained in sections 10 to 14 of the IGST Act including section 13(8)(b) where in the case of intermediary services, where supplier or the service recipient is located outside India, the place of supply has been stipulated to be the location of supplier) originates from these Articles. The power of the Parliament to stipulate principles on place of supply or to legislate on the same as contained in the IGST Act is empowered by the Constitution Amendment Act, 2016. Therefore, there is no doubt that the power to stipulate the place of supply as contained in Sections 13 (8)(b) of the IGST Act is pursuant to the provisions of Article 269A (5) read with Article 246A and Article 286 of the Constitution. The impugned provisions Judgment-WP 2031-18-1.odt are in my view constitutional and are not in any way ultra vires the Constitution. If the Parliament pursuant to

powers invested in it by the Constitution has in its wisdom dealt with Intermediary Services as that rendered by Petitioner, that is a matter within the Parliament's domain.

104. In this context it will also be useful to refer to Chapter 21 of the GST fyer of CBIC (www.cbic.gov.in) where in paragraph 10.1 it has been stated that considering the intangible nature of supply of services, in respect of certain categories of services, the place of supply is determined with reference to a proxy. The said paragraph is quoted as under:

> "10. Place of supply 10.1Place of supply provisions have been framed for goods & services keeping in mind the destination/consumption principle. In other words, place of supply is based on the place of consumption of goods or services. As goods are tangible, the determination of their place of supply based on the consumption principle is not diffcult. Generally the place of delivery of goods becomes the place of supply. However, the services being intangible in nature, it is not easy to determine the exact place where services are acquired, enjoyed and consumed. In respect of certain categories of services, the place of supply is determined with reference to a proxy.....

105. Coming to Petitioner's case of Section 13(8)(b) invoking Section 8(2) to

deem inter-state supply as intra-state supply, it is observed that Section 8 deals with nature of supply and Section 13 deals with place of supply. Both the provisions have different purposes. One is to determine the nature of supply whether it is intra-State and the other is to stipulate place of supply in the case where the supplier or Judgment-WP 2031-18-1.odt the recipient of the services is located outside India; Whereas Section 8(2) refers to a situation to be intra-state if location of supplier and place of supply is in the same State, Section 13(8) refers to place of supply being the location of the supplier of service in case of intermediary services whereas in the instant case the service recipient is outside India. In Section 8(2) the reference is to the same State in India, whereas in Section 13 (1) read with Section 13(8)(b) it is location of the service recipient being outside India. Besides Petitioner is admittedly an intermediary rendering intermediary services to a service recipient located outside India. Therefore, Section 13(8)(b) comes into the picture in the case of Petitioner. Once the Parliament has in its wisdom stipulated the place of supply in case of Intermediary Services be the location of the supplier of service, no fault can be found with the provision by artifcially attempting to link it with another provision to demonstrate constitutional or legislative infraction.

105.1 In any event Section 8(2) in my view is not applicable to the case of Petitioner as location of supplier and place of supply is not within same State (in India) but in taxable territory viz. India.

105.2 Therefore, to say that by virtue of Section 13 (8) (b) read with Section 8(2) of the IGST Act, Parliament has sought to impose tax on export of services out of the territory of India by treating the same as local supply in violation of Articles 246A and 269 is completely fallacious and untenable and the argument deserves to be rejected in view of what has been observed. In fact Section 16 as quoted above clearly has zero rated the supply involving export of services (as defned in Section 2(6) of the IGST Act) and therefore Judgment-WP 2031-18-1.odt also the issue raised by Petitioner that the impugned provisions seek to make a levy on the same is untenable. However, as noted earlier that when there is a specifc provision defning Intermediary as contained in section 2(13) of the IGST Act and Intermediary Services are specifcally dealt with in section 13(8)(b), the question of application of a general provision would not arise, particularly when the constitutionality of both the above provisions has been upheld.

105.3 Therefore, there would be no question of Section 13(8)

(b) or Section 8(2) being unconstitutional. Rather these provisions are clearly intra vires Articles 246, 246A and 269A of the Constitution.

106.1 With respect to Article 286, Petitioner submits that no State has the authority to levy local tax on export of services as that would be in violation of Article 286 (1), which states that no law of the State shall impose or authorise the imposition of tax on the supply of goods or services or both where such supply takes place outside the State. It has also been submitted that Section 13 (8) (b) read with Section 7(5) has deemed an export of service to be a local supply which is in violation of Article 286 (1) and that a central legislation cannot authorise the State to collect tax which has been prohibited by the Constitution.

106.2 Article 286 of the Constitution of India is reproduced as under:

"Article 286. Restrictions as to imposition of tax on the sale or purchase of goods.—

Judgment-WP 2031-18-1.odt (1) No law of a State shall impose, or authorise 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.

(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)."

106.3 A plain reading of Article 286 of the Constitution of India as quoted above suggests that Article 286 frstly prevents one State in India from imposing any tax on supply of goods and services within another State as that is the prerogative of individual States i.e no authority to any State to impose tax on intra state supply within another State except that other State; Secondly it does not permit any State in India to authorize imposition of tax on import into or export out of the territory of India of goods and services as that is the prerogative of the Central Government; Thirdly it states that the Parliament alone and not the State Legislatures will formulate the principles for determining when supply of goods or of services or both in any of the ways mentioned in clause (1) above i.e outside the State or import into or export out of India.

106.4 In fact it is in view of the language of newly amended Article 286 (2) pursuant to the Constitution (101 st) Amendment Act, 2016 that the Parliament can formulate principles for determining when a supply of goods or services or both have taken Judgment-WP 2031-18-1.odt place either outside the State or in the course of import into or export out of the territory of India.

106.5 Even the omission of Article 286(3) pursuant to the Constitution (101st) Amendment Act, 2016 signifes that the power to legislate on any matter relating to inter-state supply is with the Parliament and not with the State.

106.6 The whole purpose of Article 286(2) is to empower the Parliament to formulate principles to determine the situs of supply. This is also stated in Article 269A(5).

106.7 It is in furtherance of the powers under Article 246A, 269A and 286 of the Constitution of India, the Parliament by legislation, in Sections 7 (inter-State supply) and 8 (Intra-State supply) of the IGST Act has provided for determination of the nature of supply and in Sections 10 to 14 for place of supply.

106.8 The impugned provision does not in any manner deem an export of service to be a local apply whereas Section 13 pertains to place of supply and Section 7 pertains to the nature of inter-state supply as enacted by the Parliament pursuant to Article 246A read with Article 269A of the Constitution. Both the Sections as discussed have different purposes.

106.9 The submission by Petitioner that in terms of Section 13(2), Petitioner's service is an export of service appears to be Judgment-WP 2031-18-1.odt misplaced as Section 13(2) clearly stipulates that except for the services specifed in sub-sections (3) to (13), the place of supply to be the location of the recipient of services. And one of such exception in Section 13(8)(b) clearly stipulates that the place of supply

for "intermediary services" shall be the location of the supplier of services. Therefore this submission appears to be misplaced.

106.10 The argument that a central legislation cannot authorize the State to collect tax which is prohibited by the Constitution or that the provisions are a colorable legislation is without any legs to stand in view of provisions under Articles 245, 246A, 269A of the Constitution of India.

106.11 Therefore, the argument of Petitioner that the impugned provisions are violative of Article 286(1) do not hold any water.

106.12 Petitioner's reliance on the decision in the case of State of Travancore, Cochin & Ors. V. The Bombay Co. Ltd .7 admittedly refers to the unamended Article 286, and refers to a series of integrated activities in the course of export sale of goods whereas in the case at hand, we are dealing with supply of intermediary services which are specifcally covered under Section 13(8)(b) of the IGST Act and defned as such and not integrated with the supply of goods taking place and therefore the decision is clearly distinguishable. In the decision of The Central India Spinning & Weaving and Manufacturing Co. Ltd., The Empress Mills, Nagpur v.

7 AIR 1952 SC 366 Judgment-WP 2031-18-1.odt The Municipal Committee, Wardha8 the Supreme Court construed the terms export and import in terms of Article 286(1). However, as mentioned earlier, we are concerned with the supply of services of an intermediary as provided in Section 13(8)(b) read with Section 2(13) of the IGST Act and therefore these decisions would in my view be distinguishable.

106.13 It is, therefore, not relevant in the circumstances that export and import have not been defned under the Constitution or that the same would be of wide construction.

106.14 As discussed earlier, Article 246A (2) has invested exclusive power in the Parliament to make laws in respect of supply of goods or services in the course of inter-state trade or commerce. Article 269A(5) authorizes the Parliament to make law for determining place of supply and when a supply of goods or services takes place in the course of inter-state trade or commerce. Article 286(2) also authorizes Parliament to make law for determining when supply of goods or services take place outside a State in India or in the course of import of goods or services into or export of goods or services out of the territory of India. There is no confict between Article 246A, Article 269A or Article 286 which clearly empower the Parliament to formulate laws for determining 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 or as to when supply of goods or services or both take place outside a State or in the course of import into or export out of the territory of India. 8 AIR 1958 SC 341 Judgment-WP 2031-18-1.odt 107.1. On behalf of Petitioner in the written submissions, counsel has sought to canvass that the provisions of section 13 (8)

(b) of the IGST Act are ultra vires Article 245 of the Constitution of India. According to him by stipulating place of supply in the case of intermediary services to be the location of the supplier of services is to levy tax on the overseas recipient thereby attracting the provisions of Article 245. In the written submissions a question is raised whether the Parliament is empowered to enact laws in respect of extra-territorial

aspects or causes that have no nexus with India. Counsel has also alluded to a hypothetical situation where the supplier of goods is in Germany and the buyer of goods is in Singapore to question whether such a transaction would be subject to GST at the hands of petitioner by virtue of the impugned section even though payment of GST in respect of such transactions is exempted under the IGST law. He has sought to rely upon paragraph 76 of the decision in the case of GVK Industries Ltd Vs. ITO9.

107.2 At the outset we observe that this challenge by way of written submissions on behalf of petitioner has been taken up for the frst time during the course of arguments and does not fnd place in the petition, either in the facts or the grounds or the prayers even though petition has been amended pursuant to leave granted earlier. Also the hypothetical situation in respect of which this new challenge seems to be taken up is not the case of petitioner. It has been clearly stated in paragraph 4.6 of the petition that Indian purchaser i.e. the importer directly places a purchase order on the overseas customer for supply of the goods and the goods are directly 9 2011 332 ITR 130 (SC) Judgment-WP 2031-18-1.odt shipped by the overseas customer to the Indian purchaser. There is no discussion or factual submission that Indian intermediary i.e. Petitioner is purportedly a commission agent to a supplier in Germany who is exporting goods to an importer in Singapore. In

fact the agreements, illustrative copy whereof has been annexed to the petition are only in respect of counterparty from Japan. Firstly, as has been observed by the Supreme Court in the case of Exide Industries (supra), the Court, cannot venture into hypothetical spheres which are not contemplated in the enactment while adjudging the constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. Secondly, the very fact that Counsel for Petitioner is seeking to include these facts during the course of hearing it would not be necessary for us to deal with the challenge on the basis of these facts. The Supreme Court of India in the case of Government of National Capital Territory, Delhi Vs. Inder Pal Singh Chadha 10, has held that constitutional issues should not be decided unless that it is necessary to do that for the purpose of giving relief in given case. It would, therefore, not be necessary for us to deal with this hypothetical situation to consider the challenge under Article 245 of the Constitution of India. Moreover, since the hypothetical situation canvassed by Petitioner with respect to levy of IGST in cases where both supplier and buyer of goods are located outside India, it is admitted position that there is already an exemption notifcation in that regard providing 'Nil' rate of tax and therefore I do not consider it necessary to dwell on it.

107.3 For the sake of convenience it would be appropriate to quote Article 245 of the Constitution of India as under: 10 (2002) 9 SCC 461 Judgment-WP 2031-18-1.odt "245. Extent of laws made by Parliament and by the Legislatures of States - (1) Subject to the provisions of this 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. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

107.4 A plain reading of Article 245, makes it clear that the impugned section in no way violates this provision as from the plain language of the said section it is clear that the same do not seek extra territorial operation nor seek to levy tax on service recipient outside India. All that Section 13(8)(b) does is to provide for place of supply in respect of intermediary services where the service recipient is outside India (as in the case of the Petitioner), to be the location of the supplier of services. Therefore, there is no question of extra territorial legislation here. In the facts of the present case, the recipient is located outside India and the intermediary services supplier is located in India and therefore section 13 (8)(b) would become applicable in that the place of supply would be the location of the supplier of services viz. in the taxable territory in India. Even if the supplier of services was located outside India in which case as per this provision the place of supply would be the location of the supplier i.e. outside India and would not be taxable in India; and there would be no question of extra territorial legislation.

107.5 It is further clear from the charging section 5 of the IGST Act that the levy of IGST is within the taxable territory i.e. India and Judgment-WP 2031-18-1.odt therefore also there would also be no case of extra-territorial legislation.

107.6 Even otherwise as can be seen, Article 245(1) begins with the language, subject to the provisions of this Constitution; which means that Article 245 is subject to the other provisions of the Constitution such as Article 246A, Article 269A, the bringing in of the new GST law as well or legislations on interstate supply of goods and services as well as on principles regarding place of supply.

107.7 We are in complete agreement with the principles laid down by the Hon'ble Supreme Court in the case of GVK Industries (supra). However, having observed that this is not a case of extra territorial legislation it would not be necessary to comment on the same.

107.8 Therefore, Section 13(8)(b) of the IGST Act cannot be said to be ultra vires Article 245 of the Constitution of India.

108. It is clear from the above provisions, that only the Parliament is empowered to legislate on matters pertaining to the supply of goods or services that take place in the course of inter state trade or commerce. As far as the Petitioner's supply is concerned admittedly the same is supply in the course of inter-state trade or commerce pursuant to the provisions of Section 7 of IGST Act. Also as can be seen from subsection (5) of Article 269A of the Constitution that it is only the Parliament that can formulate the principles for determining the place of supply or when a supply of goods or of services or both takes place in the course of interstate trade or Judgment-WP 2031-18-1.odt commerce. In fact the language of article 286 (2) also refers to that the Parliament can formulate principles for determining when a supply of goods or services or both have taken place either outside the State or in the course of import into or export out of the territory of India. Section 13(8)(b) and Section 8(2) operate for different purposes and as we have held that Section 13(8)(b) read with Section 8(2) is not ultra vires the Constitution of India.

109. Having held that the IGST law is constitutional, and the provisions pertaining to the place of supply contained in section 13(8)(b) of the IGST Act in respect of

intermediary services would not be violative of Articles 246A, 269A, 286, 245 of the Constitution of India, we now move on to consider Petitioner's challenge under Articles 14 and 19(1)(g) of the Constitution of India.

110.1. Petitioner's grievance of violation of Article 14 of the Constitution of India is on two counts:

(1) One is despite having purportedly satisfed the defnition of export of services as defned in Section 2(6) of the IGST Act, by virtue of Section 13(8)(b), the intermediary services provided by the Petitioner to its overseas customer are not being treated as export of service thereby discriminating against Petitioner and other exporters of service;

(2) secondly the intermediary services provided by Petitioner in India are subject to GST, whereas that is not the case with other service providers like marketing agents, management consultants, market research agents, professional advisers as such services are not subject to GST pursuant to Section 13(2) of the IGST Act.

Judgment-WP 2031-18-1.odt 110.2. Before we discuss Petitioner's challenge to this Article, a brief introduction to the principles on the subject.

110.3 The Constitution Bench of the Supreme Court in the case of R.K. Garg Vs. Union of India and Ors.11 has stated the principles to be borne in mind while considering the constitutional validity of a

statute under Article 14 as under :-

> "Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the Courts as rules of guidance in discharge of its constitutional function of judicial review. The frst rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil 11 AIR 1981 Supreme Court 2138 Judgment-WP 2031-18-1.odt rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight - jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislature judgment in the feld of economic regulation than in

other areas where fundamental human rights are involved..."

110.4 In the aforementioned case of R.K. Garg Vs. Union of India and Ors. (supra), the Supreme Court has once again laid down that in order to pass the test of reasonable classifcation, the classifcation must fulfll two conditions, namely, (l) that the classifcation must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is a basis of the classifcation and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. This means that Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it however does not forbid classifcation provided such classifcation is not arbitrary. In other words, what is necessary in order to pass the test of permissible classifcation under Article 14 is Judgment-WP 2031-18-1.odt that the classifcation must not be arbitrary, artifcial or evasive, but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.

110.5 It would also be pertinent to refer to the case of Shri Ram Krishna Dalmia v/ s. Shri Justice S. R. Tendolkar & Others 12, the larger bench of the Supreme Court while considering the challenge to a notifcation issued under the Commissions of Enquiry Act,1952 has in paragraph 11 of its decision referred to various principles based on which the constitutionality of a statute or a provision would need to be considered.

" ....
....

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classifcation for the purposes of legislation. In order, however, to pass the test of permissible classifcation two conditions must be fulflled, namely (a) that the classifcation must be funded on an intelligible, differentia which distinguishes persons or things that are grouped together from others left out of the group and (b) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classifcation may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classifcation and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but by a law of procedure."

(i) that a law may be constitutional even though it relates to a single individuals if, on account of some special circumstances or reasons applicable to him and not 12 AIR 1958 SC 538 Judgment-WP 2031-18-1.odt applicable to others, that single individual may be treated as a class by himself;

(ii) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a

clear transgression of the constitutional principles;
(iii) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(iv) that the legislature is free to recognize degrees of harm and may confne its restrictions to those cases where the need is deemed to be the clearest;
(v) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge,
matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
(vi) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed,, if there is nothing on the face of the law of the surrounding circumstances brought to the notice of the Court on which the classifcation may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The above principles will have to be constantly borne in mind by the Court when it is called upon, to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

110.6 The Supreme Court, in the case of V.S. Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.13 has stated that :-

> "This Court has repeatedly pointed out that when a citizen wants to challenge the validity of any statute on the ground that it contravenes Article 14, specifc, clear and 13 AIR 1964 Supreme Court 1781 Judgment-WP 2031-18-1.odt unambiguous allegations must be made in that behalf and it must be shown that the impugned statute is based on discrimination is not referable to any classifcation which is rational and which has nexus with the object intended to be achieved by the said statute".

110.7 In the case of G.K. Krishnan etc. Vs. State of Tamil Nadu and Anr. etc.14 held as under:-

> "...A person who challenges a classifcation as unreasonable has the burden of proving it. There is always a presumption that a classifcation is valid, especially in a taxing statute. The ancient proposition that a person who challenges the reasonableness of a classifcation and therefore, the constitutionality of the law making the classifcation, has to prove it by relevant materials, has been reiterated by this Court recently."

110.8 The Supreme Court in the case of Exide Industries Ltd., (supra), has observed that the approach of constitutional courts ought to be different while dealing with fscal statutes. The Supreme Court has observed that the legislature is the best forum to weigh different problems in the fscal domain and form policies and address the same including creation of liability, constitution of liability, exemption of liability, or subject an existing provision to new regulatory measures. In the very nature of taxing statutes, legislature holds the power to frame laws to plug in specifc revenue

leakages. Such laws are always pin-pointed in nature and are only meant to target a specifc avenue of taxability. It was further observed that no doubt, fscal statutes must comply with the tenets of Article 14, but it is to be noted that a larger discretion is given to the legislature in taxing statutes than in other spheres.

14 AIR 1975 Supreme Court 583 Judgment-WP 2031-18-1.odt 110.9. There is no discrimination between Petitioner's case and other exporter of services. The intermediary services rendered by Petitioner are specifcally provided as one of the services in addition to banking services and transport hiring services where the place of supply has been provided as the location of the supplier of services as per Section 13(8)(b) of the IGST Act. Intermediary has been specifcally defned and which as discussed earlier does not include a person who renders the services for himself. Here, because of the intermediary, the export of goods is taking place from the overseas customer to the Indian importer, which is the transaction of import of goods for which the intermediary services have been provided by Petitioner. Therefore, between Petitioner and others there is no discrimination. Section 13(8)(b) would not be hit by Article 14 on this ground. For the same reason the second ground of discrimination, is also not tenable in as much as the Act has specifcally provided for such intermediaries. Petitioner who is providing Intermediary Service to recipient outside India is on a different footing, the objective in my view would be to prevent revenue from escaping.

110.10 In my view, therefore there is a reasonable classifcation founded on intelligible differntia which has a rational relation/nexus to the object sought to be achieved. The objectives could be, as stated in the Respondent's reply, to encourage the Make in India program and create the level playing feld. It is however clarifed that no view is being expressed with respect to the claims or counter-claims on the Make in India program referred to above as that is clearly a matter of the policy of the Government of India, which needless to say is the prerogative of the Government. Also in Judgment-WP 2031-18-1.odt the second ground the objective in my view would be to prevent revenue from escaping and therefore, there is reasonable classifcation and the same is neither arbitrary nor unreasonable and cannot be said to be discriminatory in any manner. This is also not a case of class discrimination.

110.11 Further, as far as the judgments referred to by Petitioner in support of his contention, there cannot be any disagreement on the principles laid down in those judgments. However in my considered view, they are not applicable to the case of the Petitioner in view of the above discussion.

110.12 The levy on account of Section 13(8)(b) of the IGST Act is therefore neither arbitrary nor unreasonable nor discriminatory.

110.13 Therefore the challenge under Article 14 must fail and fails.

111.1 Let us now examine Petitioner's challenge to Article 19(1) (g) of the Constitution of India.

111.12 Petitioner has submitted that by virtue of Section 13(8)

(b), the service provided by Petitioner to its overseas customers has resulted in an unreasonable restriction upon the right of Petitioner to carry on trade under Article 19(1)(g) of the Constitution of India, which action could result in closure of business

of Petitioner and that it would encourage the foreign service recipient to set up liaison offces in India and escape taxation.

Judgment-WP 2031-18-1.odt 111.3. At the outset, we are unable to appreciate as to how by virtue of Section 13(8)(b) of the IGST Act, Petitioner would be restricted to carry on its business or for that matter result in closure of business of Petitioner. As has been discussed earlier, Petitioner is a marketing/sales agent for overseas exporters of products imported by customers in India, for which he earns commission. All that Section 13(8)(b) seeks to do is to impose a levy on Petitioner by stipulating that in respect of Intermediary Services, where the recipient is outside the country, in those cases, the place of supply shall be the location of the supplier. As to how that would result in a restriction or closure of business of the Petitioner is unfathomable particularly when the submission is devoid of my details. There is no restriction imposed on the intermediary services of a person like Petitioner. It is a legitimate power of the parliament, as discussed earlier, to enact IGST Act including Section 13 (8)(b). If the submission of Petitioner was to be considered, then any tax levied by the Central or State Government would be a restriction to carry on trade under Article 19(1)(g) of the Constitution of India.

111.4. Further, whether a foreign exporter would set up a liaison offce in India is a matter which is in the individual freedom of such an exporter subject of course to the other applicable laws. As to what Section 13(8)(b) of the IGST Act has to do with it or as to how that would infringe on Petitioner's right is not understood. Even otherwise, as on date there is no grievance of Petitioner that his overseas customer has set up liaison offce in India.

Judgment-WP 2031-18-1.odt 111.5. On behalf of Petitioner, Paragraph 6 of the decision of the Supreme Court in the case of Bengal Immunity Company Vs. State of Bihar15 has been cited in support of his contentions.

111.6 A plain reading of Paragraph 6 suggests that no such restriction as set out in the said paragraph has been imposed by virtue of Section 13(8)(b) of the IGST Act. It appears that Petitioner has failed to appreciate that the Parliament has power to legislate on place of supply and on inter-state supply of goods and services pursuant to Article 269A read with Article 246A and Article 286 of the Constitution of India, by virtue of which the IGST Act and Section 13(8)(b) have been enacted.

111.7 Therefore, Section 13 (8) (b) of the IGST Act is not unconstitutional or ultra vires Article 19(1)(g).

112.1. On behalf of Petitioner it is submitted that levy of GST on intermediary services by Petitioner is contrary to fundamental concept of GST as a destination based consumption tax. It is asserted 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 artifcial exception carved out in Section 13(8)(b) of the IGST Act is contrary to all principles of interpretation, and, therefore, liable to be struck down as ultra vires to the fundamental principle of destination based consumption tax.

15 1955(2)SCR603 Judgment-WP 2031-18-1.odt 112.2. GST has three main aspects viz. it is calculated as VAT, it brings goods and services together on the same platform. Of course it is an indirect tax but it is not levied on the act of production, sale and so on. It is levied on all transactions called supply from start to the end. So primarily GST is a tax levied on supply of goods and services. The earlier excise duty, sales tax, service tax and so on, which were on the "act of" are eliminated and the tax is no more on the act of producing or on point of sales. Since GST is to be calculated as value added tax with input tax credit available from one level of supply to the next in the chain of production and distribution, the cascading effect of one tax on to the other is eliminated.

112.2 The Goods and Services Tax as envisaged pursuant to the newly introduced GST law is a tax on the supply of goods and services. This can be borne out not only from paragraph 1.10 of the Report of the Select Committee of the Rajya Sabha on the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 as quoted earlier, but also from the statement of objects and reasons thereof which became the Constitution (101 st Amendment) Act, 2016 as well as from the Statement of Objects and Reasons of the IGST Act as set out earlier. Even Article 366 (12A) defnes Goods and Services Tax to any tax on supply of Goods and Services or both, therefore the charging sections in GST laws, CGST as well as IGST is to levy GST on supply.

112.4 Even Section 2 (21) of IGST Act defnes " supply" as under:-

Judgment-WP 2031-18-1.odt "(21) "supply" shall have the same meaning as assigned to it in section 7 of the Central Goods and Services Tax Act; and

(ii) Section 7 of the CGST Act, 2017 refers to scope of supply and reads as under: "7. (1) For the purposes of this Act, the expression "supply" includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specifed in Schedule I, made or agreed to be made without a consideration; and (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II. "

112.5 Therefore, the scheme of the GST law in India is taxation on supply. Concepts cannot be imposed upon clear, unambiguous Articles of the Constitution of India as well as the language in the provisions of the statute. There is no dispute that the supply under consideration is an inter-State supply of service. The inter- State levy is on supply within the taxable territory i.e. within the boundaries of India and not extra-territorial in accordance with Article 245 of the Constitution of India. Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner, the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is in breach of this principle as the place of supply has been specifcally provided.

Judgment-WP 2031-18-1.odt 112.6. There are three methods of calculation of indirect taxes viz. specifc duty, ad valorem tax and value added tax (VAT). GST uses the method of value added tax of calculation which removes the cascading effect. GST is calculated on "value added" and not the value of the goods or services; value addition is the value added to the raw materials and other things purchased by the producer which means that the cost of purchase inputs would be excluded. This method of levy of tax is intended to remove the cascading effect of tax on tax and proft on tax. Therefore the IGST Act in my view is not VAT but only calculated as VAT.

112.7 In the decision in the case of All India Federation of Tax Practitioners v. Union of India16 (which relied on the principles laid down in Moti Laminates Pvt. Ltd. v. Collector of Central Excise Ahmedabad17) relied upon by Petitioner where the constitutional validity on the levy of service tax and the legislative competence of the Parliament to impose such tax was considered, and it was observed by the Supreme Court that 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 to conclude that VAT is a consumption tax borne by the consumer. The Supreme Court further want on to hold that service tax is a VAT, which in turn is a destination based consumption tax and not a charge on the business but on the consumer and it would logically be leviable only on services provided within the country. In my respectful view the said decision may be distinguishable. As described herein GST is a tax on supply and not on the sale. One of the elements of GST as 16 2007

(7) STR 625 17 1995 (76) ELT 241 (SC) Judgment-WP 2031-18-1.odt mentioned is that the calculation of GST is like VAT, which is on the value addition to reduce the cascading effect of the various taxes thereby reducing the effective rate of indirect taxes. This is one of the three methods of calculation of indirect taxes, viz., specifc duty, ad valorem tax and value added tax. That was a different context and the constitutional amendments introducing special provisions of Article 246A, Article 269A and Article 279A, have brought in the new GST regime. It is also observed that the Constitutional Amendment bringing an end to the service tax regime has omitted Article 268A and Entry 92C (though the same was not notifed).

112.8 As regards the decision in the case of Commissioner of Service Tax v. SGS India Pvt. Ltd.18 Petitioner therein was providing technical inspection and certifcation agency services and technical testing and analysing agency service on behalf of its foreign customers who imported goods from India whereas in the case at hand the Petitioner is admittedly an "intermediary" defned in the IGST Act and providing intermediary services to its foreign customers who were exporting goods into India. The Court in that case held that the services provided by SGS were fully covered by a clarifcation issued by the Revenue and also referred to the decision of All India Federation of Tax Practitioners (supra) . However, that was also a decision under the service tax regime and would be distinguishable in view of the amendment to the Constitution bringing in the GST law. Also it is observed that an appeal in the said matter is pending fnal adjudication before the Hon'ble Supreme Court.

18 2016 (34) STR 554 (Bom) Judgment-WP 2031-18-1.odt 112.9. Therefore, as observed earlier, there does not appear to be any confict between this principle and Section 13 (8) (b) of the IGST Act as the scheme of GST in India is a levy on supply.

113.1 I now come to the Petitioner's challenge that Section 13(8)(b) seeks to runs contrary to the scheme of the Act and deems an inter-State supply as intra-State supply and, therefore, the Section is ultra vires the charging section as well as the scheme of the IGST Act. Petitioner has cited Sections 1, 5, 7, 7(1), 7(2), 7(3), 7(5), 12 and 13 have been cited by learned counsel for Petitioner to submit that from the scheme, scope and object of the IGST Act, the levy of IGST is on inter-State supplies. It has also been submitted that import and export of services have been treated as inter-State supplies in terms of Sections 7(1) and 7(5).

113.2 Since the supply, being discussed here, is an inter-State supply, as has been discussed by us earlier, the following portion of the charging section may be reproduced here. Section 5 of the IGST Act, is quoted as under :-

"5. Levy and Collection - (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax 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 Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notifed by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in Judgment-WP 2031-18-1.odt accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

...."

113.3 The above Section clearly states that all that on inter- State supplies of goods and services, there shall be levied a tax called the Integrated Goods and Service Tax, which shall be paid by the taxable person. There is no divergence of view that the scheme, scope and object of the IGST Act is a levy on inter-State supplies and the supply in this case is an inter-State supply. But what the argument of Petitioner seems to miss is that the Parliament as discussed earlier, can by law determine the place of supply, which pursuant to Article 269A(5) of the Constitution of India, it has done by enacting Chapter V containing Sections 10 to 14 on place of supply. Section 13(8)(b) as discussed earlier pertains to the case of intermediary services, where the service recipient is outside India and where the place of supply has been provided to be the location of the supplier. When the Constitution has empowered the Parliament to formulate principles determining the place of supply, in my view, Section 13(8)(b) cannot be said to be ultra vires the charging section as Section 13(8)(b) does not violate the levy on the supply made by the intermediary, particularly

in view of Section 7, which designates such supplies to be inter-State supplies. And which power to designate inter-State supply also comes from Articles 246A, 269A(1) read with 269A(5) as discussed earlier. In my view, Section 13(8)(b) does not and cannot deem an inter-State supply to be an intra-State supply. When there is a specifc provision for levy Judgment-WP 2031-18-1.odt and collection of IGST, then, in my view, referring to the charging section of another Act is not called for or rather it would be irrelevant. Section 13(8)(b) of the IGST Act has been enacted pursuant to the powers under Article 269A(5) of the Constitution of India and in accordance with the scheme of the IGST Act by which IGST is levied on all inter-State supplies of goods and services.

113.4 There cannot be any dispute as to the doctrine of pith and substance as canvassed by Petitioner while deciding on legislative competence or that under Article 265 no tax can be levied without authority of law. Having already held that Section 13(8)(b) has been enacted pursuant to the authority of law and that the said Section 13(8)(b) cannot be linked with Section 8(2) of the IGST Act to deem an inter-state supply as an intra-state supply, the said concerns are unfounded.

113.5 Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner, the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is ultra vires the charging section or the scheme of the Act.

114.1 Petitioner is also concerned that Section 13(8)(b) of the IGST Act is ultra vires the charging Section 9 of the CGST Act as well as corresponding Section 9 of the MGST Act which provides for a levy of CGST/MGST on intra-state supplies of goods and services or both since according to Petitioner in view of Section 13(8)(b) read Judgment-WP 2031-18-1.odt with Section 8(2) the subject supply would be treated as intra-state supply.

114.2 It would be useful to quote Section 9 (1)of the CGST Act as under :-

> "9. Levy and collection. - (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax 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 and at such rates, not exceeding twenty per cent., as may be notifed by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

114.3 Similar is the provision under the MGST Act and is therefore not being reproduced.

114.4 Firstly there is no dispute that the supply under consideration is an inter-State supply of service. Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner and the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is in breach of Section 9 of the CGST Act/MGST Act as both these provisions operate in different felds. When there is a specifc provision dealing with the case of Petitioner viz. Section 13 (8)(b) of the

IGST Act, which has been enacted pursuant to the powers under Article 269A Judgment-WP 2031-18-1.odt (5) of the Constitution of India, then also in my view the challenge appears to be without substance.

114.5 Petitioner has also referred to Section 8(2) to submit that Section 13(8)(b) of the IGST Act by stipulating the place of supply in the case of intermediary services to be the location of supply of services would invoke Section 8(2). Both the provisions have different purposes. As stated earlier Section 8 deals with nature of supply whereas Section 13 deals with place of supply and the attempt to artifcially link Section 8(2) with Section 13(8)(b) is misplaced and unfounded as discussed earlier. In my considered opinion, Section13 (8) (b) cannot be linked with Section 8 (2) of the IGST Act. Therefore, in my view, the challenge with reference to the charging sections of Acts which operate in different felds in respect of supplies of different natures appears to be unnecessary.

114.6 Hence Section 13 (8) (b) is not ultra vires Section 9 of the CGST Act and MGST Act.

115.1 Coming to the Petitioner's grievance on double taxation; On behalf of Petitioner it has been frstly asserted that GST is being levied twice on the same commission, once on the Petitioner and then on the Indian purchaser of goods. Secondly the same supply would be taxed in the hands of Petitioner and on the basis of the destination based principle would also be taxed in the hands of the service recipient in the importing country.

115.2 I am unable to appreciate any of these arguments. As far as the frst argument is concerned, there are, in my view, two Judgment-WP 2031-18-1.odt distinctly identifable supplies involved, i.e.,

(i) supply of services by the intermediary to the overseas supplier of goods and (ii) supply of goods by overseas supplier to the Indian importer. The frst supply attracts Section 13 (8)(b) of the IGST Act. The second supply is liable to tax under the Customs Act, 1962 and the incidence of customs duty would be on the importer of goods and not on the intermediary service provider. Moreover, the principle is well settled that two taxes which are separate and distinct imposts on two different transactions/supplies is permissible as in law there is no overlapping.

115.3 With respect to the second assertion that the same supply would be taxed by foreign service recipient in his hands in the importing country, that in my view is also not really tenable in the eyes of law as IGST is not extra-territorial and generally speaking a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. Moreover, that would depend on the laws of that country . It is also pertinent to refer to the earlier discussion that Petitioner is providing intermediary services as an intermediary as defned in the IGST Act to the overseas customer and not as an exporter of service.

116.1 It is observed that Petitioner has placed much reliance upon the 139th Department related Parliamentary Standing Committee on Commerce in support of

his contentions In support of his contention, Petitioner has extracted paragraphs 15.1 to 15.3 of the recommendations regarding amendment to section 13(8) of the Judgment-WP 2031-18-1.odt IGST Act to exclude 'intermediary' services and make it subject to the default section 13(2) so that the beneft of export of services would be available."

116.2 Without commenting on the necessity for the Parliament, GST Council/ Government to take steps to implement or effectuate the above recommendations, it is pertinent to appreciate that the recommendations, do not have any binding value nor are they enforceable.

116.3 Reliance upon reports of Parliamentary Committees are external aids to construction to be used only when there is ambiguity in the statute. The law relating to reliance upon Reports of Parliamentary Standing Committees has been once again reiterated in the decision of the Constitution Bench of the Supreme Court in the case of Kalpana Mehta v. Union of India 19. Paragraph 134 in the said judgment authored by the then Chief Justice of India Justice Dipak Misra and Justice A.M. Khanwilkar as well as paragraph 257 authored by Justice Dr. D. Y. Chandrachud are apt and are quoted as under:

> "134.....it is clear as day that the Court can take aid of the report of the parliamentary committee for the purpose of appreciating the historical background of the statutory provisions and it can also refer to committee report or the speech of the Minister on the foor of the House of the Parliament if there is any kind of ambiguity or incongruity in a provision of an enactment.

257. The validity of the advice which is tendered by a Parliamentary Committee in framing its recommendations for 19 (2018) 7 SCC 1 Judgment-WP 2031-18-1.odt legislation cannot be subject to a challenge before a court of law. The advice tendered is after all what it purports to be: it is advice to the legislating body. The correctness of or the expediency or justifcation for the advice is a matter to be considered by the legislature and by it alone."

116.4 In any event, it is always open to Petitioner to make appropriate representation to give effect to the above recommendations and for the Respondents to consider the same.

117. Learned Additional Solicitor General, Shri Anil Singh has drawn our attention to the decision of the Gujarat High Court in the case of Material Recycling Association of IndiaVs. Union of India and Others (R/Special Civil Application No. 13238 of 2018 with R/Special Civil Application No. 13243 of 2018) decided on 24 th July, 2020, wherein, he submits a similar challenge as in this Petition was made in respect of Section 13(8)(b) of the IGST Act and which had been rejected. It is observed that the said decision challenged the constitutional validity of Section 13(8)(b) of the IGST Act under Articles 14, 19, 265 and 286 of the Constitution of India. The Gujarat High Court after considering the submissions made by the counsel for the parties and after analysis in Paragraphs 63 to 68, has upheld the constitutional validity of Section 13(8)(b) read with Section 2(13) of the IGST Act. Though, the challenge before this Court is with respect to some more Articles of the Constitution of India, however I am in respectful agreement with the conclusion of the Gujarat High Court

in the said case. True also that the decision in the case of Material Recycling Association of India (supra) cannot be treated as a binding precedent, however I am persuaded to rely on the following paragraphs :-

Judgment-WP 2031-18-1.odt "64. The introduction of Goods and Service Tax in India in the year 2017 is with an object of providing one tax for one nation so as to harmonize the indirect tax structure in the country. For the said purpose, the Constitution is amended by the Constitution (One Hundred First Amendment) Act, 2016 to bring on to introduce Article 246A which provides for special provision with respect to Goods and Service Tax. Article 246A begins with non-obstante clause stipulating that notwithstanding anything contained in Articles 246 and 254, the parliament subject to Clause-2, Legislature of every State, have power to make laws with respect to Goods and Service Tax imposed by the Union or by such State. Clause 2 of Article 246A empowers the parliament, who has exclusive power to make laws with respect to goods and services tax where the supply of goods or of services or both takes place in the course of inter State trade or commerce. Thus, the parliament has exclusive power under Article 246A to frame laws for inter State supply of goods of services. The basic underlying change brought in by the GST regime is to shift the base of levy of tax from point of sale to the point of supply of goods or service. In that view of the matter, Section 13(8)(b) of the IGST Act,2017 which is framed by the parliament inconsonance with the Article 246(2) of the Constitution of India is required to be considered.

65. Section 8 of the IGST Act, 2017 provides for intra- State supply so as to take care for the supply of goods to or by a special economic zone and the goods imported in the territory of India till they cross the Custom in India. Section 8 is subject to provision of Section 10 of the IGST Act, 2017 where as Section 12 of the IGST provides for place of supply of services where the location of supplier and recipient is in India. Section 12(1) and 12(2) o the IGST Act,2017 reads as under :-

"12. Place of supply of services where location of supplier and recipient is in India.—(1) The provisions of this section shall apply to determine the place of supply of Judgment-WP 2031-18-1.odt services where the location of supplier of services and the location of the recipient of services is in India. (2) The place of supply of services, except the services specifed in sub-section (3) to (14),-

(a) Made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be, -

(I)the location of the recipient where the address on record exists; and

(ii) the location of the supplier of services in other cases." The aforesaid provision of sub-section 12(2)(b) stipulates that the place of supply of service made to any person other than registered person shall be the location of the recipient where the address on record exists and location of supply of service in other cases. Sub-section 3 to 14 of Section 12 stipulates the place of supply of service in various eventualities. However, the same does not cover the case of intermediary. Section 13 of IGST Act, 2017 stipulates that the place of supply of

services where the location of the supplier of services or the location of the recipient of services in outside India. Sub-section 2 of Section 13 stipulates that the place of supply of service except the services described in sub-section 3 to 13 shall be the location of the recipient of the services and if the location of recipient of service is not available in the ordinary course of business, the place of supply shall be location of supplier of service. Thus, sub-section 3 to 13 carves out an exception to the place of supply of services to be the place of recipient of services where the location of supplier or location of recipient is outside India. On perusal of provision of Section 13 of IGST Act, 2017, sub-section 3 to 13 thereof provide different eventualities to determine the place of supply of services. Sub-section 3 describes place of supply of services where the services are actually performed, Sub-section 4 refers to place of supply of services supplied directly in relation to an immovable property, Sub-section 5 refers to supply of Judgment-WP 2031-18-1.odt services supplied by way of admission to, or organization of a cultural artistic etc. and Sub-section 6 provides that when services as provided in sub-sections 3, 4 and 5 are at more than one location, the place of supply shall be location of taxable territory, Section 7 refers to the location of supply of service, if it is Union territory or State, then it would be in proportion to the value for services separately collected or determined as per the contract or agreement. Sub-section 8 of Section 13 refers to place of supply of the services shall be the location of supplier of services in case of banking company, intermediary services and services consisting of hiring of means of transport. Intermediary services is defned in Section 2(13) of IGST Act, 2017 which 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 and accordingly, when intermediary services are provided by brokers, the place of supply could be either the location of service provider or the service recipient. 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 ft 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 defnition 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 defnes 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 Judgment-WP 2031-18-1.odt 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. .....

68. The contention of the petitioner that it would amount to double taxation is also

not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. If the services provided by intermediary is not taxed in India, which is a location of supply of service, then, providing such service by the intermediary located in India would be without payment of any tax and such services would not be liable to tax anywhere. In such circumstances, the contentions raised on behalf of the petitioner are not tenable in view of the Notifcation No.20/2019 issued by the Government of India, Ministry of Finance whereby Entry no.12AA is inserted to provide Nil rate of tax granting exemption from payment of IGST for service provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory i.e. India. Therefore, the respondents have thought it ft to consider granting exemption to the intermediary services viz. service provider when the movement of goods is outside India.

69. In view of the foregoing reasons, it cannot be said that the provision of Section 13(8)(b) r.w. Section 2(13) of the IGST Act,2017 are ultra vires or unconstitutional in any manner. It would however, be open for the respondents to consider the representation made by the petitioner so as to redress its grievance in suitable manner and inconsonance with the provisions of CGST and IGST Act.

Judgment-WP 2031-18-1.odt The petition is, therefore, disposed of accordingly. Rule is discharged with no order as to costs."

118. In the circumstances, a position of law, as discussed, regarding the legitimacy of Section 13(8)(b) or Section 8(2) of the IGST Act cannot be doubted. Petitioner has neither made a case of non- existence of competence nor demonstrated any constitutional infrmity in Section 13(8)(b)or Section 8(2) of the IGST Act, nor a case of applicability of Section 8(2) of the IGST Act to the case of Petitioner. Petitioner has also failed to make out a case that Section 13 (8) (b) or Section 8(2) of the IGST Act are ultra vires the scheme of the IGST Act. Petitioner has failed to demonstrate that Section 13(8)(b) of the IGST Act is ultra vires Section 9 of the CGST Act or the MGST Act. Therefore the challenge fails.

119. In the light of the above, I am of the view that neither Section 13(8)(b) nor Section 8 (2) of the IGST Act are unconstitutional. Also neither Section 13 (8) (b) nor Section 8 (2) of the IGST Act are ultra vires the IGST Act. Section 13 (8) (b) is also not ultra vires Section 9 of the CGST Act, 2017 or the MGST Act, 2017. Section 13(8)(b) as well as Section 8(2) of the IGST Act are constitutionally valid and operative for all purposes.

120. Petition is accordingly dismissed. There shall be no order as to costs.

[ABHAY AHUJA, J.] [UJJAL BHUYAN, J.]

COMMERCIAL NEWS

CA Deepak Khandelwal

PRESS RELEASE

Comprehensive measures taken to curb incidence of frauds in Banks

As per the information received from RBI, the number of cases of frauds of Rs 500 crore and above reported by Public Sector Banks/ Indian Banks (Except Foreign Banks) / Select Financial Institutions are 79 cases in 2019-20, 73 cases in 2020-21 and 13 cases in 2021-22 (up to 30th June 2021). This was stated by Union Minister of State for Finance Dr Bhagwat Kisnrao Karad in a written reply to a question in Rajya Sabha today.

The Minister further stated that the RBI Master Circular on Frauds, 2015, observes that frauds are committed by unscrupulous borrowers by various methods including, inter alia, fraudulent discount of instruments, fraudulent disposal of pledged / hypothecated stocks, fund diversion, criminal neglect and mala fide managerial failure on the part of borrowers. The Master Circular also refers to certain other methods, which include forged instruments, manipulated account books, fictitious accounts, unauthorized credit facilities, fraudulent foreign exchange transactions, exploitation of "multiple banking arrangement", and deficiency on the part of third parties with role in credit sanction/disbursement.

Giving details of the steps the Government has taken comprehensive measures to curb the incidence of frauds in banks, the Minister said, they include, *inter-alia*, the following:

1. Government has issued "Framework for timely detection, reporting, investigation etc. relating to large value bank frauds" to Public Sector Banks (PSBs), for systemic and comprehensive checking of legacy stock of their non-performing assets (NPAs), which provides, inter-alia, that-

i. all accounts exceeding Rs. 50 crore, if classified as NPAs, be examined by banks from the angle of possible fraud, and a report placed before the bank's Committee for Review of NPAs on the findings of this investigation;

ii. examination be initiated for wilful default immediately upon reporting fraud to RBI; and

iii. report on the borrower be sought from the Central Economic Intelligence Bureau in case an account turns NPA.

2. Fugitive Economic Offenders Act, 2018 has been enacted to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts. The act provides for attachment of property of a fugitive economic offender, confiscation of such offender's property and disentitlement of the offender from defending any civil claim.

3. PSBs have been advised to obtain certified copy of the passport of the promoters/directors and other authorised signatories of companies availing loan facilities of more than Rs. 50 crore and, decide on publishing photographs of wilful defaulters, in terms of Reserve Bank of India (RBI)'s instructions and as per their Board- approved policy and to strictly ensure rotational transfer of officials/employees. The heads of PSBs have also been empowered to issue requests for issue of Look Out Circulars.

4. For enforcement of auditing standards and ensuring the quality of audits, Government has established the National Financial Reporting Authority as an independent regulator.

5. Instructions/advisories have been issued by Government to PSBs to decide on publishing photographs of wilful defaulters, in terms of RBI's instructions and as per their Board-approved policy, and to obtain certified copy of the passport of the promoters/directors and other authorised signatories of companies availing loan facilities of more than Rs. 50 crore.

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