

**Workshop for High Court Justices on the Regime of Goods and Services Tax
[P-1171]
28-29 September, 2019**

Rajesh Suman, Assistant Professor

The National Judicial Academy organized a “Workshop for High Court Justices on the Regime of Goods and Services Tax on 28 & 29 September, 2019. The conference was conceived to provide insights into the legislation – The Goods and Services Tax [GST] Act, 2017. It aimed to provide a forum for deliberating normative issues relevant to the evolution of indirect taxes, from a regime of distinct and multiple taxation to one of substantial uniformity across diverse tax domains and jurisdictions i.e., Federal and State. It aimed to explore and classify potential areas of conflict and litigation consequential to this legislative shift; the constitutional evolution in the area and the adjudicative and socio-judicial inferences that may arise thereby.

Major Highlights and Suggestions from the Workshop

Session 1: Indirect Taxes – Historical Perspective & GST: Constitutional Perspective and Overview of GST

The speaker commenced the session by highlighting pre Goods and Services taxation [GST] situation in the area of indirect taxation at central and state level in the country. The pre GST era was marked by plethora of laws on legislations which made indirect tax system very complex. The VAT system was discussion highlighting issues of multiple rates, different rates in different States, different definitions, multiple forms, cascading effect due to CST purchases, deviations and refunds. The speakers explained the reasons of implementing GST regime in the country including tax reform, elimination of ‘cascading effect’, equitable taxation, simpler system and one market. In pre GST era there were many technicalities in the indirect tax regime which flooded the high courts with tax matters therefore Central Goods and Services Tax Act was enacted to address this issue. The speaker emphasized that GST regime mark a shift from lists based levies system and aims to provide equal platform to Parliament and State to make laws with respect to GST. The speaker focused on the 101 constitutional amendment and discussed Article 246 A(1) of the Constitution at length. The effects of Article 246A such as right of central government to tax sale of goods, right of state government to tax services along with Centre, and right of both central and state government to tax the entire supply chain were discussed. The issue of loss of revenue to manufacturing states on account of GST was highlighted and Section 18 of the 101 Constitutional (Amendment) Act, 2016 providing for compensation to States for loss of revenue arising on account of implementation of Goods and Services Tax for a period of 5 years was discussed. The speakers referred to judgment in the case Union of India v. Mohit Minerals (2019) 2 SCC 599 (SC) where power provided by Article 246A to make laws with respect to goods and services tax was explained. The impact of Article 246A on levying cess was also highlighted. The speakers then discussed Article 246 A (2) dealing with Parliament’s 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. The speakers referred to impact of the 101 Constitutional Amendment on entries in the Union and State list and changes brought to respective lists by the amendment.

The speakers then referred to Article 366(12A) and Article 366(26A). Definition of 'services' was also discussed at length. The speakers then referred to Article 269A (1) on imposition of tax in inter-state trade and the division of tax earned between Union and the States. Article 269A (5) was referred that deals with Parliament's power of formulating principles for determining the place of supply. The issue of GST on exports was discussed and Article 286(2) of the Constitution that deals with the power of Parliament to formulate principles for determining when a supply of goods or services or both takes place in the course of export out of the territory of India was referred. The issue that whether an export transaction can be treated as a supply in the course of inter-State trade or commerce was deliberated and Section 7(5) of the IGST Act and Section 5(1) of the CST Act were discussed. The powers and functions of the GST Council were highlighted. Article 279A (4), 279A (6) and 279A (11) of the Constitution were referred in the session. The speakers highlighted charging provisions of the CGST Act and discussed Sections 9(1), 9(3), 9(4), 5(3) and 5(4) of the Act. The speaker also explained inter-state supply and intra state supply in pre GST and post GST situations. The speakers highlighted several issues which will reach to the High Courts concerning goods and services tax such as status of GST Council - its decisions and mandates, writ of mandamus on legislature concerning policy matters, retrospective applicability of Regulations, service tax audits in the GST regime, retrospective denial of transition of credit of cess and revised credit returns and restriction of transitional credit only to reduced amount thereunder. The participants asked query regarding benefit of GST regime for general public which was responded by the speakers.

Session 2: Concept of Supply

The session initiated by discussing the definition of supply under the CGST Act. The applicability of GST on activities in Schedule I were discussed. The speakers then discussed impact of 101st Constitutional Amendment on tax on supply. The speaker explained the concept of compensation and consideration by referring to judgment in the case Vania Silk Mills (1991) 191 ITR 647 (SC) and foreign judgments in cases Jurgen Mohr v. Finanzamt Bad Segeberg and Landboden Agrardienste GmbH & Co. LG v. Finanzat Calau. The speakers then explained the concept of supply with reference to situations i.e. in the course or furtherance of business and referred to various judgments in this regard. Impact of Section 7(1A) of the CGST Act on the scope of supply and its links with Schedule II was discussed. The judgment of Federal Court of Appeal, Australia in the case of AP Group Limited v. Commissioner of Taxation was referred to explain the concept of consideration and supply. The issue that whether input tax credit availment can be denied for supplies which are not leviable to tax under the GST Act by including 'non-taxable supplies' within the definition of 'exempt supplies' was discussed. The speakers referred to various sections of the GST Act and said that input tax credit needs to be reversed where outward supply is a free supply thereby being a non-taxable supply. The speakers then highlighted Schedule I to explain situations where activities are treated as supply even if made without consideration. The issue related to Schedule I that whether Parliament can treat activities as supply even in the absence of consideration was deliberated in the session. The speaker referred to Section 2(d) of the Contract Act, Section 7 and Section 15 of the CGST Act, 2017 to explain the issue. The judgment in the case Govind Saran Ganga Saran v. Commissioner of Sales tax (1985) 60 STC 1 explaining components which should be ascertainable for levying of tax was discussed. The speaker then discussed Schedule II mentioning matters to be treated as supply of goods or services. The speaker

also focused on Schedule III where transaction is neither supply of goods nor supply of services. The participant asked a query that whether the arbitration center in the High Court premises is subject to levy of GST which was responded by speakers accordingly.

Session 3: Classification: Mixed/ Composite Supply

The speaker commenced the discussion by explaining the meaning of composite supply. The concept of principal supply when the composite supply comprises of two or more supply. It include supply of goods or services which constitutes the predominant element of the composite supply and to which any other supply forming part of the composite supply is ancillary. The judgment in the case Card Protection Plan Ltd. Vs. CCE of the European Court of Justice was referred where it was ruled that a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied. The judgment in the case Levob Verzekeringen BV and OV Bank NV Vs. Secretary of State for Finance, Netherlands was referred where the European Court of Justice held that when all elements are so closely linked they constitute a single indivisible economic transaction and separate pricing was not relevant, predominance is to be determined considering extent, duration, usefulness and cost of various elements, economic essence and intention of parties.

The speaker then explained the concept of mix supply which is a supply of that particular supply which attracts the highest rate of tax. The speaker discussed illustration of exorbitant prices of banana served in five star hotel to explain the concept. For illustration the speakers referred to the judgment in the case Xerox Modicorp Limited v. State of Karnataka which ruled that maintenance contracts are contracts for supply of goods and services- cannot be treated as simplicitor service contracts. The speaker also referred to judgment in the case British Airways PLC Vs. C&E (QB) to explain the concept of composite supply. Another illustration referred to was the healthcare services where food is provided to patients and visitors and in what conditions food supplied by hospital will be taxable. The transactions in supply of UPS along with battery was discussed to explain the concept of mixed and composite supply.

Session 4: Valuation: Time & Place of Supply

The speaker commenced the session by discussing constitutional scheme of indirect taxation in India. The speaker explained how the States defines tax in their provinces. The speaker referred to Article 286 (1) of the Constitution by which States are barred from levying tax on supply of goods or services taking place outside the State or in the course of Import or Export. The speaker also referred to Article 286(2) which empowers parliament to define supplies taking place outside the State and supplies taking place in the course of import or export. Further the speaker discussed Article 269A (5) which mentions that parliament will define 'place of supply'. The speaker said that the term 'place of supply' is not used elsewhere in the Constitution and the Constitution does not provide the relevance for defining the term 'place of supply'. The speaker discussed relevance of place of supply and discussed various factors necessary for determining whether the supply is an inter-state/ inter-state supply i.e. place of Supply and location of supplier. Various provisions of the IGST Act for determining place of supply were discussed which include Section 10 dealing

with place of Supply of goods other than import and export of goods, Section 11 dealing with place of supply of import and export of goods, Section 12 dealing with place of supply where location of supplier and recipient is in India and Section 13 dealing with place of supply where location of supplier or recipient is outside India. The issues related to supply in taxable territory i.e. the meaning of “supply in the taxable territory” and whether it is same as ‘place of supply’ in the taxable territory were deliberated. The speaker emphasized that all elements or majority of elements of supply should be in the taxable territory and only one element of supply will not make a supply in the taxable territory. In case of clandestine removal, Section 7(5)(c) is required once supply is proved and there is no need to further prove whether it is an intra-state or an inter-state supply. The speaker discussed other examples according to Section 7(5)(c) such as goods imported on lease and later out rightly purchased by the importer and goods imported and sold in exhibition in India. The speaker discussed the issues related to time of supply of services which is determined on the basis of date of issue of invoice, date of receipt of payment and rate of provision of service. The speaker further added that supply shall be deemed to have been made to the extent it is covered by the invoice, or, as the case may be, by payment.

Session 5: Input Tax Credit

The speaker commenced the session with issue related to sharing of revenue between Centre and States. He referred to Article 269(A)(1) of the Constitution in this regard. The issue of apportionment of credit was deliberated and the speaker referred to Section 17 of the CGST Act which mandates that input tax credit shall not be available if goods or services are used for non-business purpose or for effecting exempt supplies. He further discussed Section 2 (47) which deals with exempt supply. The issues related to eligibility to claim credit was discussed and situation under which credit can be claimed was explained. The speaker discussed Section 16 in this regard. The view taken by AAR was discussed in order in Nipro India where AAR denied credit on gardening water supply system since not used in furtherance of business and on internal and domestic water distribution supply system since not used in making outward supply but for compliance under Factory Regulations. Further order in the case Bahl Paper Mills was discussed where AAR relied upon Circular under Cenvat Credit Laws permitting credit on assets used in administrative office within the factory to allow credit on fixtures, furniture, ACs. The speaker said this situation reflects the effect of the earlier regime under service tax and excise law and seeks to defeat the wide precepts of ‘furtherance of business’. The issue of free supplies and restrictions on input tax credit was discussed and section 17 (5) (h) which prohibits availment of input tax where goods are disposed off by way of gift or free samples was explained. The issue that where a supply is made basis the condition of a contract or due to a statutory mandate can qualify as a ‘gift’ was discussed by the speaker. The speaker also discussed the issue that whether ITC availment be denied for supplies which are not leviable to tax under the GST Act by including ‘non taxable supplies’ within the definition of ‘exempt supplies’. The speaker discussed Section 17(2) and Section 2(47) of the CGST Act in this regard.
