

# **National Judicial Academy**

## **NATIONAL JUDICIAL CONFERENCE FOR HIGH COURT JUSTICES ON THE REGIME OF GOODS AND SERVICES TAX (P-1086)**

9th February - 11th February, 2018



Program coordinator – Mr. Sumit Bhattacharya, Faculty  
National Judicial Academy, Bhopal

## REPORT

The National Judicial Academy organized a three day conference on the title “*National Judicial Conference for High Court Justices on the Regime of Goods and Services Tax*” starting 09<sup>th</sup> February to 11<sup>th</sup> February, 2018. It was the second conference of the subject matter in the academy during the academic year 2017-18 post rolling out of the GST.

### Objective of the Conference

The conference aimed to provide an insight to the nascent legislation of the GST Act, 2017. It provided a forum for the High Court justices to discuss the subject matter pertaining to the newly legislated regime of national uniform taxation, and to provide a platform to deliberate upon the best practices, bottle-necks and the status of compliance and implementation of GST at State and Central level with special focus on the ramifications of the novel tax law within each High Court jurisdiction. Moreover, the conference explored the prospective areas of challenges in form of GST litigations. The issues pertaining to substantial question of law in matters of appellate jurisdiction of High Court and other jurisdictional issues was discussed during the discourse. An overview of the constitutional amendments incorporating GST regime by inserting various Articles in the Constitution and their implications were delved in the course of the conference. The conference sought to *inter alia* provide an intellectual and unique forum to the justices to discuss and debate upon the nuances, and advantages of the single tax regime in furtherance to its socio-judicial implications.

A brief overview of the Sessions scheduled for the national conference is as under:

#### Day 1

- Session 1- Overview of the GST Regime: Amalgam of Central Excise, Service Tax & VAT
- Session 2- Introduction of Concepts: CGST, SGST & IGST
- Session 3- GST: Sectoral Impact (*viz.* Exports, SMEs, Service Sector, etc.)

#### Day 2

- Session 4- Administering GST: Dispute Resolution-Appeal & Revision (Adjudication, Appeal, Revision, Demand & Recovery)
- Session 5- Administering GST: Inspection, Search, Seizure, Arrest, Penalties, Prosecution & Compounding
- Session 6- Concept of ‘Supply’ under GST: International Perspectives and Learnings for India

#### Day 3

- Session 7- Time and Place of Delivery: An overview of relevant provisions
- Session 8- Interpretive Challenges & Potential Areas of Conflict

## **Day 1**

### **Session 1**

#### **Overview of the GST Regime: Amalgam of Central Excise, Service Tax & VAT**

*Speakers: Mr. D.P. Nagendra Kumar & Mr. Sujit Ghosh*

Hon'ble Director NJA set the context of the national conference by emphasising over the prospects of the new tax regime brought in by the 101<sup>st</sup> Constitutional Amendment, as a paradigm shift from the prevailing approximately six decade tax structures. The turf war between the Federal and the State tax administration, wherever there was a confluence, particularly in cases of fusion transactions viz. 'Works contract' where there was a service tax component for the sweat of brow portion and a sales tax or value added tax (hereinafter VAT) component for the goods portion. Moreover, other problems included history of poor legislative draftmanship prevalent in India, which leads to judicial evaluation of the economic legislations in general and tax legislations in particular to often fail judicial scrutiny on account of poor drafting. The introduction of the GST regime after the State and the Union policy consensus, may be said to be the first constitutionally introduced structure of cooperative federalism. The regime mandated the administrators of the tax to participate in exercising this federal regime, in a coordinated manner, which until now had been their sovereign, discrete and insular jurisdiction. Therefore, there is a need for a cultural paradigmatic shift in accommodating the features of the new regime. It was opined that since it is a product of compromised positions between the contesting Union propagating the new law and few States (both manufacturing and consuming) apprehensive to paradoxical business ramifications, the language is a compromised resultant like all democratic legislations. There exists not only a democratic lag but an incoherence at the policy level. These are visible in the language indicating compromises and accommodations in the crucible of legislature. Hence, the piece of legislature is beset with syntactic, grammatical and linguistic infirmities.

### **Session 1**

#### **Overview of the GST Regime: Amalgam of Central Excise, Service Tax & VAT**

*Speakers: Mr. D.P. Nagendra Kumar & Mr. Sujit Ghosh*

The session dealt with the contours of the operation of the tax system pre and post GST, and the salient features of the GST tax regime. It was noted that the new legislation after its genesis on 1<sup>st</sup> July, 2017 has already seen more than 100 writ petitions including the challenge that as to whether Art. 246A has an overriding effect over the Art. 246 itself. GST is one of the most profound tax reforms initiated by India post-independence, which is perhaps unparalleled in its magnitude and proposed impact when compared globally.

Interdependence of the tax base between the Union and the State governments had led to myriad issues until the rolling out of GST, notwithstanding the Constitutional separation of the taxing structures in India.

Item 82 – 92 the Union (under List I) levied taxes on Excise, Customs. Moreover, they levied taxes on Services under the Concurrent List (List III). On the other hand the State exclusively administered taxes under item 52 – 62 in the List II. Problem started to show-up when taxation

on goods and services started to evolve. The Government of the day then perhaps could not anticipate services as such a green field, having mammoth revenue potential with the fast changing global economics, having significant national impact. A small intermittent course-correction was done in the erstwhile sales tax regime (which discounted services as a taxable component) by making the 46<sup>th</sup> Constitutional Amendment (thereby amending Arts. 269, 286, 366, in the List I relating to Sales Tax). Wherein, in a composite transaction under a 'works contract' a contract for the performance of a work or a service in which the supply of materials or some other goods is incidental was considered taxable by the States under Sales Tax. Similar examples, were cited as catering contract, right to use, hire purchase etc.

Post 1993 when Service Tax was introduced in India (as an item under the List III), a lot of overlapping issues featured in a transaction involving supply of goods and supply of services, thereby leading to mounting litigation, arrears on the government and loss of ease of doing business. During this point of time Union started levying excise duties on identified (specific commodities) commodities *viz.* kerosene, textile, sugar, yarn etc. (under the 1944 Act). After the amendment in 1966 every commodity which is manufactured was brought under the umbrella of Central excise duty, thereby expanding the scope of levy. Simultaneously, under the State Taxation regime the levy was on the first point Sales. In 1953 the Central Sales Tax was introduced to levy tax on inter-State trade and commerce of goods, which was a non-VAT tax. One of the demerits of the erstwhile sales tax system was that there is a cascading effect of taxation as at every point of consumption of goods as it passes to the next consumer to the ultimate end user at every point of sale there would be a tax over and above the already taxed goods at the preceding point of sale.

References to the L.K. Jha Committee of 1976 and the Raja Chelliah Committee of 1997 was made, wherein adoption of the VAT system to do away with the existing evils of tax cascading was discussed. The advantages of VAT were two folds i) It ensured uniformity in the Tax Rate and the ii) complete seamless flow of credit across the value chain. After having achieved the aforementioned uniformity of the tax across the States at the retail level. Having achieved the milestone in tax reforms, the remainder was, the integration of the administration of taxes collected by the Union and the States respectively, in the continuous supply chain, keeping the Constitutional mandate of respective jurisdictions between the Union and the States.

One of the deficiencies in the tax system prior to the introduction of GST was the truncated nature of the tax administration at the State and the Union level. On the Goods side the Union levied the Excise Duty (a tax on manufacture). The value on the Excise Duty was getting captured only till the ex-factory of manufacturing level. However, the value additions at the Wholesale, Retail etc. (at various other levels in the supply chain) was not getting captured for the Union Excise Duty. This was one of the major disadvantages of the Union Excise Duty. The second disadvantage of the Excise Duty was that the flow of the input tax credit stopped at the manufacturing stage and never flowed forward. At the State level the tax collected at the sale and purchase of goods but not eligible to take the credit of the Excise Duty (hereinafter ED) paid, because the ED was levy & collection controlled solely by the Union. The ED could not have been set off against the payment of VAT or the Sales Tax. Therefore, to that extent the ED component became the cost in the production and distribution of the goods. States were also empowered to collect tax on sales of goods but not on services with a few exceptions *viz.* entertainment tax, luxury tax etc. The power to levy tax on services largely and comprehensively remained exclusively with the Centre. As a result transactions which were

hybrid in nature containing elements of goods as well as services could not be taxed uniformly at any one government level (State or Union). Yet another major issue in the pre GST scenario was that two third of the commercial transactions in our country is of the nature of inter-state commerce. Meaning thereby, the intra-state component of commerce was limited to approximately only one third. The State in case of inter-state will not have an exclusive taxing jurisdiction as the trading partners may be located in more than one State. The levying jurisdiction was with the Union under the Central Sales Tax Scheme (CST), wherein the State was where the manufacturing was done was empowered to collect the tax on behalf of the Centre. This tax so collected by the State was a non-VATable tax which was initially 4% which was reduced to 2%. Hence, the transaction was not VAT attracting one and therefore it became a cost to the product. Generally the tax theory applies for the consumption of a goods or services. The destination tax theory (for a consumer who may be in another State) was completely ignored. Therefore, the CST was a distortion to the theory, wherein the consumer State is completely discounted from taxation. Another aspect which led to be a bottleneck in the free flow of trade was due to the fact that, every State in order to police the system that dealers do not create a shadow transaction by showing an intra state transaction to be an interstate one for the reason of gaining the CST retention. Yet another drawback in the pre-GST system was a multiple number of taxes and multiple rates of taxes. Since, indirect taxes are sources of revenue hence, Governments utilized them to their benefits to influence the economy directly for political reasons. One such misuse was exemptions.

After introduction of the Service Tax the situation changed further. Today 62% of the GDP is contributed by the service sector. The services were taxable by the Union. Post 1993 a very selective approach was adopted by the government for taxing services. The first three services which were considered for levying Service Tax at 5% were on telephones, non-life insurance and stockbrokers. It accounted for around 400 Crores. Today after GST the revenue stands at around 2.6 Lakh Crores. The complications which persisted were that with the evolution of economy there came hybrid transactions which involved both goods and services (e.g. software with upgradation, water filter with warranty etc.). In such a product what needs to be taxed? Goods or the Services? Who will levy the tax? State or the Union? Were the troubling issues. Post 2012 an important reform in the indirect taxes was made, i.e. tax on services in a comprehensive manner. Everything which is other than a supply of goods will be treated as a "Service" minus those which have been specifically listed out negatively not to be treated as a service.

The ideal approach in any economy is to widen the tax base. Increase in tax base eventually leads to reduction in the tax rates. On the other hand a narrow tax base erupts issues of increase in the tax rates and tax evasiveness.

Rate rationalization is the goal of any GST like structure wherein there ideally should exist single or at best two rates. But in India considering its peculiar socio-economic and cultural issues integration could be done with four rates (i.e. 5%, 12%, 18%, 28%). There are two exceptions to this that in case of precious metals (e.g. gold, silver) GST is 3% and on precious stone and gems GST is 0.25%. Moreover, there are 5 petroleum products which have been currently deferred from GST are 1) Crude, 2) Motor Spirit/Petrol, 3) Diesel, 4) Natural Gas, and 5) Aviation Turbine Fuel (ATF). Although these are deferred for the time being they will be covered surely. 40 to 45% of the Union and State revenues come from these 5 products, hence it took almost 4 years for the States and the Centre to develop consensus on these

products. It is a sort of self-restraint put by the GST Council and is well within the reach of the taxable event as provided in the statute. In case of alcohol, it was a unanimous view amongst the States that they cannot part with the power to levy tax on alcohol on the GST Council. Moreover, the very definition of GST says tax levied on goods and services expressly barring alcohol for human consumption. Therefore, for roping in alcohol to the GST net there has to be a Constitutional Amendment made by the Parliament.

One of the important aspect of the uniform tax models is that in an ideal condition the taxation process should enable self-administration and voluntary in nature rather than compelling and involuntary.

An issue was raised as to why GST has been exempted for agricultural produces wherein many products such as tea, coffee etc. are produced and sold by big businesses? To which it was clarified that the exemption is only for the primary produce and not finished products.

Direct taxes are progressive (i.e. higher the income more taxation), the indirect taxation models are regressive in nature.

Yet another point raised was, as to whether GST should apply to land transactions or not? Because the real wealth in India today sits on these transactions. Moreover, tax on land falls in the List II, but as Art. 246 A today has an overriding effect on Art. 246, therefore there is a perceived threat that the tax levying power of State on land issues may be usurped by the Union by virtue of Art. 246A and the concurrent power via List III. This could be a volatile area surfacing in the near future.

The exemption of tax liability (both Income tax and indirect taxes) for agriculturist is a debatable point simply because of the fact that under the garb of this leverage many big agriculturists who are rich escape the tax net. Indirect tax being a tax on consumption is a) regressive; b) does not discriminates consumers on account of their being rich or poor.

More importantly tax being a policy matter is susceptible to industrial lobbying. The systemic issue is selective exemptions and concessions floated by the Government of the day succumbing to these lobbyists. These exemptions and concessions potentially scuttles the concept and objects of GST in India. Because exemptions are antithetical to credit mechanism under the GST policy and since in last 65 years Governments have always fallen a prey to the exemption peril, it becomes imperative to watch as to how do these systemic issues are weeded out to achieve the real objective of GST.

A question was raised as to how far is the recommendations of the GST Council (Constitutional Body) is mandatory for the States to implement? It was stated that if under a situation wherein different States start levying different taxes flouting the recommendations of the GST Council by e.g. providing tax holidays, exemptions, lowered rates then, the objective of having one nation one tax may get seriously challenged.

Further it was apprehended as to whether the Constitutional basis of Gandhian ideology of “Swaraj” (economic, political & social independence of each single State) be defeated with the attempt to centralize the indirect taxing system by virtue of GST?

The flexibility available to the State is that there is a list of goods and services which may be awarded exemption by a State where it is manufactured. This is done for two purposes a) to balance out the perceived losses incurred, considering the new situation under GST

implementation wherein the tax collection flows to the State where actual consumption is done and the input tax credit is adjusted at preceding points of sales; b) the award of exemption is given considering the fact that, all or a significant fraction of the consumption is done intra-State.

The legislative history of the evolution of the GST from the Kelkar Committee onwards was discussed and a comparative was discussed as to the similar foreign legislations. The broad composition of the GST legislation with its four composite parts were discussed and the operational jurisdictions were discussed.

## Session 2

### Introduction of Concepts: CGST, SGST & IGST

*Speakers: Mr. Sujit Ghosh & Mr. D.P. Nagendra Kumar*

The majority of the substantive law pertaining to GST can be found in the CGST Act itself. The State GST legislations are substantially *pari materia*, except for a few State-specific matters. Further, the key provisions under the State GST statutes are largely the same as the CGST Act (except for State-specific aspects). The IGST Act seeks to levy GST on all inter-State supplies of goods and services. Unlike in the case of intra-State Supplies, if effective GST rate on a supply of service is 18%, the whole 18% is levied under the IGST Act itself. The most important substantive aspect that emerges from the IGST Act are:

- ✓ provisions pertaining to ‘place of supply’; and
- ✓ definitions of ‘inter-State’ and ‘intra-State’ supplies of goods and services.

Interpreting “State” it was discussed that the Constitution (One Hundred and first Amendment) Act, 2016, inserted Clause 26B on “State” in Article 366. As per this clause, “State” with reference to Articles 246A, 268, 269, 269A, and 279A includes a *Union Territory with Legislature*. Even for the purposes of GST, ‘State’ includes a Union territory with Legislature. Hence, technically SGST cannot be levied in a Union Territory without legislatures i.e. Chandigarh, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli and Andaman and Nicobar Islands. However, this issue has been addressed under the UTGST. According to UTGST in case of intra-State supplies pertaining to a ‘Union Territory’ as defined (instead of a SGST legislation), GST is levied under the provisions of CGST Act along with the UTGST Act. Whereas, SGST will apply in Union Territories such as New Delhi and Puducherry (since both have their individual legislatures), and can be considered as “States” as per GST laws.

Interpreting “Other Territory” it was discussed that, ‘Union Territory’ is defined under Section 2(114) of the CGST Act to mean the territory of Andaman & Nicobar, Lakshadweep, Dadra & Nagar Haveli, Daman and Diu, Chandigarh and ‘Other Territory’. ‘Other Territory’ has been defined under Section 2(81) of the CGST Act as, it “includes territories other than those comprising in a State and those referred in sub-clauses (a) to (e) of clause 114”. Thus everything other than the States and the 5 specific Union Territories mentioned in Section 2(114) of the CGST Act will qualify as a Union Territory for the purposes of GST.

Now, ‘India’ under GST laws extends upto 200 Nautical Miles from the coastal baseline even though ‘territorial waters of India’ extends only upto 12 nautical miles. Explanation to Section

25(1) of the CGST Act clarifies that “Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State where the nearest point of the appropriate baseline is located”. Therefore, for all contractual assignments (e.g., for oil and gas exploration works, high sea trades etc.) carried out in such offshore areas from 12 nautical miles upto 200 nautical miles, will constitute a ‘Union Territory’ for the purposes of levy of GST and will most likely be subject to the UTGST Act.

Regarding the GST Compensation Cess Act, it was explained that the legislation was brought in to compensate the State Governments for their projected loss of indirect tax revenue owing to introduction of GST. GST Compensation Cess is levied on intra-State/inter-State supply of few notified goods or services (e.g. coal, cars etc.) to create a corpus for providing compensation to the States.

In this session certain salient points were discussed. A few questions raised, explained and answered were:

- ✓ Has ‘supply’ been defined under the CGST Act?
- ✓ Is the said ‘supply’ a ‘supply of goods’ or ‘supply of services’?
- ✓ What is meant by ‘place of supply’?
- ✓ Whether this ‘supply’ will attract CGST and SGST of a particular State or will attract IGST (being inter-State in nature)?
- ✓ What is the value of such ‘supply’ on which GST needs to be paid?
- ✓ What is the rate at which GST has to be paid?
- ✓ What is the point of time at which the above GST liability accrues -what is the point of taxation (or in GST phraseology -what is the ‘time of supply’)? Etc.

Under CGST Act Section 7 defines “supply”. It becomes an *inclusive* taxable event as compared to the earlier 3 taxable events viz. i) provisions of Services, ii) Sale of Goods and iii) Manufacture. Concept of “supply” has been defined globally under the GST and VAT laws almost uniformly. In case of a sale, “supply” must have two major ingredients i) Consideration & ii) A concluded sale. An agreement to sale cannot be a taxable transaction. In case of a service, it is defined as an activity for i) a consideration, and ii) provided by one to another and is not iii) a mere transfer of title in goods in an immovable property. “Consideration” plays a key role in defining a transaction as to whether it is a “supply” and has been defined under Section 2(32) of the CGST Act. However, “consideration” is not a mandatory condition for a taxable supply as it has certain exceptions. There are transactions deemed to be “supply” without a consideration. All such cases have been provided under Schedule I of the GST statute. Examples of such a condition could be when a business organization has offices (branch operations) in several States and transactions take place (without consideration) between them. Such kind of physical movements (when documented) under the erstwhile CST system was allowed to escape the tax net.

There are two components of “supply”, i) Composite Supply and ii) Mixed Supply. It was explained that composite supply shall be taxed based on the principal supply and mixed supply shall be taxed based on the supply which attracts highest rate.

To the provision under GST that, tax on all inter-state transactions between registered branch offices or between registered head office and registered branch offices; and Cross charges of administrative expenses incurred by the Group Head Office (wherein, administrative expenses

including expenses for centralized functions of finance, legal, HR, book-keeping etc. are often cross charged by Group HO to all group companies on the basis of an internal computation based on the headcount of the entity and other factors), it was counter argued that, services rendered by the Centralized Finance teams, HR teams, legal teams etc. which are cross charged to other registered branches/offices in other States would essentially qualify as ‘services rendered by the Employee to the Employer’ (since the actual services in question would be rendered by employees at the centralized location who are employed for the entire company and not merely for that centralized location. It can be argued that the deeming fiction of ‘distinct person’ under GST cannot eclipse the contract of employment which is legal entity specific). Hence, even if such services are provided to the other branches/divisions of the same company, it would not change the nature of such services and they would continue to be services of an Employee to an Employer and thus excluded from GST. The tenability of this argument needs to be tested in the GST regime. Secondly, Cross-charges can also be argued to be cost-sharing arrangements and thus supply of ‘money’ and hence may not qualify as a supply of service and therefore not liable to GST.

Broadly speaking contracts pertaining to supply of services can be classified under two heads:

- Pure Service Contract
- Composite or Comprehensive Contract

“Service” has been defined under Section 2(102). Therefore, “Service” under GST excludes “money” but specifically includes “activities relating to the use of money”. Pure service contracts are liable to CGST+SGST or IGST. However, for composite contract it gets taxed either as a “works contract” or other than as a “works contract” (Section 2(119)). If pertaining to construction/repair/maintenance of an immovable property (‘works contract’) it shall be treated as a service and liable to CGST+SGST or IGST (as per place of supply) or if it is not a “works contract” then test of predominant nature/principal supply as emanating from the concepts of ‘composite supply’ (Section 2(30)) and ‘mixed supply’ (Section 2(74)) would need to be taken into account. Even be it a supply of goods. Thus, a supply would qualify as ‘works contract service’ only if it is in relation to an immovable property as per the GST Act. Clause 6(a) of Schedule II to the CGST Act categorizes ‘works contract service’ as a ‘composite supply’. In case a supply (involving two or more supplies which are naturally bundled) is in relation to a movable property then, such a supply may qualify as ‘composite supply’ and tax on such a supply would depend on the nature of the principal supply (or dominant nature of the supply (Section 8(a)). However, in case of a “mixed supply” e.g. A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price, shall be treated as a supply of that particular product, which attracts the highest rate of tax (Section 8(b)). From the mere definition of “service” it is implicit that, extending interest free loans is merely an exchange of money, is does not qualify as ‘services’ and hence, would not attract GST.

One of the issues anticipated in case of determining the “place of supply” under Section 10 (a) is while in a simple transaction wherein the language renders confusion as to the fact, if the recipient already received the goods ex-factory (thereby the supply being made at that instance itself), where is the question of a subsequent delivery to the recipient again at a different place? The language is reproduced hereunder for clearer understanding:

“(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 goods at the time at which the movement of goods terminates for delivery to the recipient”

### Session 3

#### GST: Sectoral Impact

*Speakers: Mr. Sujit Ghosh*

The speaker discussed three industrial sectors to understand the ramifications anticipated post GST compliance, they are a) Petroleum Sector; b) Power (Energy) Sector and c) Anti-profiteering.

Discussing the petroleum sector it was reiterated that the five items kept outside the scope of GST are i) Crude, ii) HSD (High Speed Diesel), iii) ATF (Aviation Turbine Fuel), iv) MS (Motor Spirit), v) Natural Gas. These goods would continue to operate under current tax regime i.e. VAT, Excise, CST etc. Exclusion from GST is only for HSD; Light Diesel Oil (“LDO”) will be liable to GST. Moreover, goods e.g. Naphtha, kerosene, LSHS, FO etc. will be taxable under GST. This implies that the industry is liable to pay tax under a hybrid model comprising of some items falling under the GST and others on the older structure of CST, VAT, Excise Duty etc. Therefore, compliance would be a matter of concern.

Power sector was explained to be one sector which has faced a raw deal with the advent of GST. Ministry of Finance & Commerce are tax incentive driven in projects of Mega Power Plants (1000 Mega Watt and above of power production capacity) and Ultra Mega Power Plants (4000 MW and above capacity). This was because capital expenditure to build these power projects were hitherto free from excise and customs duty, the only tax levied was CST. A hypothetical example was examined wherein BHEL manufactures a Turbine (manufacturer) for L&T (an aggregator or a turn-key-contractor) who in turn uses it for erecting a power plant for NTPC (power generator). Until GST BHEL – No ED as it was exempted. BHEL sells inter State to L&T (@ 2% Form C). L&T will not pay any tax because it performs an in-transit sale (Section 6(2) Sale or E 1 Form C transaction). Therefore the entire transaction of a very high value (~ 200 Crores) will bear a mere 2% tax. Therefore, say over of an approx. sale of 150 Crores by BHEL it pays only a mere 2% equal to 3 Crores tax (which happens to be the only tax amount in the entire transaction). However, with the advent of GST BHEL firstly pays an 18% ~ to about 27 Crores, which will be available as a credit to L&T, which will bear a tax of 18% on 200 Crore ~ 36 Crores, and further NTPC pays a tax after considering the credit of 18% on the sale price viz. 18% on 300 Crores equal to 48 crores. Hence the tax surge has shifted from a mere 3 Crores to a huge 48 Crores in this hypothetical. The NTPC passes the same ultimately to the consumer (by effecting appropriate modifications in the relevant PPA [Power Purchase Agreement]) and hence the electricity tariff is likely to shoot up in the near future. Moreover, it was cited that this is not exclusive to the Capex only it effects the fuel or the Operating Cost aswell. Coal which was under the declared goods category until now under CST (bearing ~2% tax) is now taxable 5% under the GST plus the GST Cess. Moreover, under the Foreign Trade Policy there were certain goods which when manufactured and supplied to certain projects e.g. mega power project etc. they (domestic supplies) will be considered as “deemed export” (hence exempted). With change in the foreign trade policy, “deemed export”

will be such “deemed export” which are notified under the GST Act, which states that it will be on such projects as may be notified by the union government (which is yet awaited). Therefore the power sector as on day neither has an ED or customs exemption nor does it have a “deemed export” benefit.

Impact on the export sector is that it is faced with the bottlenecks of the procedural lapses in the clearing of the export refunds. The thumb rule of the GST is that export is of the goods and services and not the taxes. The refund on the input taxes is with an SLA period of seven days for 90% of the refund owing to technical snags and procedural cumbersomeness of claiming the refunds.

Anti-profiteering clause in GST Section 171 of the CGST Act. As the ultimate idea behind the introduction of the GST Act was to pass on the benefit of the tax (revenue collected by the Governments) to the last consumer thereby anticipate cost benefit to the customers and the citizen. However, to curb inflation, Anti-profiteering provisions were needed. Introduction of GST in other countries showed that there had been inflation and prices had increased after GST implementation. The first part Section 171(1) casts responsibility to pass on benefit of GST to recipient for following two aspects:

- Benefit on account of reduction in effective rate of tax.  
e.g. if sale of a manufactured good subject to levy of a total tax of approx. 25% (12.5% as ED and 12% as VAT) in the pre-GST regime; it presently attracts 18% GST, there is a reduction in rate of tax of about 6.5%.
- Benefit of increased availability of input tax credit.

As regards passing of benefit due to a better credit chain under GST, it is going to affect almost all industries. In most places, be it service sector, manufacturing, trading or any specific industry, all are going to get advantage of better flow of Input Tax Credit. This is the benefit that is expected to be passed.

Interpretation of the word ‘commensurate reduction’ in Section 171(1) has to be seen in due course. Moreover, the word ‘profiteering’ has not been defined. However, the marginal note to the section states “Anti-profiteering measure”. In *Commissioner of Income Tax, Gujarat vs. Vadilal Lallubhai*, AIR 1973 SC 1016 a, reference was made to marginal note for understanding the intention of the legislature. It stated:

“The marginal note for Section 44-F reads 'avoidance of tax by sales cum dividend'. This marginal note also gives an indication as to what exactly was the mischief that was intended to be remedied. The legislature was evidently trying to circumvent the devices adopted by some of the assesseees to convert their revenue receipts into capital receipts.”

Hence, the phrase ‘commensurate reduction’ needs to be interpreted in a manner that deals with the mischief of profiteering. It was argued that as per Black’s Law Dictionary – ‘Profiteering’ is “taking advantage of unusual or exceptional circumstances to make excessive profits...”

Therefore a possible argument could emerge, that the mischief sought to be tackled under Section 171 is not ‘profit’ *per se*, but ‘profiteering’, i.e., making unjustifiable, excessive and exorbitant profits. Hence, ‘commensurate reduction’ has to be interpreted only in a manner that

tackles unreasonable exploitative profit. If it is interpreted in a manner that prohibits/restricts 'profit' *per se*, then, it would be an unreasonable interpretation.

Issue that may arise is that if an organization (entity) owing to the implementation of GST makes a tax advantage in a few of its products but at the same time incurs losses on other goods and services, then in such a situation whether the entity as a whole should be liable to pass the amount of tax advantage (product wise) or may maintain that since the entity has an overall tax credit loss, hence is not liable to pass such product-wise advantage. Tax authorities will advocate for goods specific benefit sharing but the organisation will argue business specific (because GST is liable ....on furtherance of business). The entire business activity is what makes the organization a "supplier".

Moreover, as per Section 171(3) "The authority shall exercise such powers and functions as may be prescribed" but the Rules 127 (iii)(b) states that "Return the amount along with interest @ 18%" it was argued that, this is substantive provision hence, can it be delegated to a Rule, Levy of interest being an essential legal function; 127 (iii)(b) "Recover the amount and deposit it in Consumer Welfare Fund", again recovery of the amount has not been specified under the Principle CGST Act, hence is that not an overreach? 127 (iii)(c) "Impose penalty as specified in the Act", here again the principle Act does not provides for imposition of penalty, therefore again an overreach. Rule 127 (iii)(d) "Cancellation of registration under the Act", whereas the Section 171 of the Principle Act does not contemplates for cancellation at all. Hence, the delegated legislation indicates overreach. Moreover, Rule 126 of CGST Rule, 2017 provides that the authority may determine the methodology and the procedure for ascertaining whether the benefit has been passed to the recipient, which is a clear travel beyond the scope of the principal Act which is silent on the point.

#### **Session 4**

### **Administering GST: Dispute Resolution-Appeal & Revision Adjudication, Appeal, Revision, Demand & Recovery**

*Speakers: Mr. Porus Kaka, Mr. S. Ganesh, Mr. V. Lakshmikumaran*

*Chair: Hon'ble Justice Kurian Joseph*

It was precluded that today the tax law jurisprudence (both Direct & Indirect Tax) has seen more dynamics in the last two years than the last four decades globally owing to the changing facets of the world economics. GST in India has been described differently as "Good & Simple Tax" in contrast to the counter as "Gabbar Singh Tax". The introduction of the new Art. 279A is perhaps for the first time an introduction into the Constitution of India, dealing with a new concept of combination of the State and Federal Powers in a united finance provision. This is unique because it is not a Concurrent List or the State List type of provision. It is the constitution of the Goods and Services Tax Council (GSTC). The GSTC will make recommendations to both the Union and the States on Taxes, Surcharges & Cesses; what goods will be levied or exempted from Service Tax; the principle of levy, the principle of apportionment; etc. The Council has the powers to make recommendation and take decision on the various issues provided under Article 279A(4). Explaining briefly on the Art 279A it was explained that GSTC consist of the Union Finance Minister as the Chairman and all state Finance Minister or such other minister; The Council is a Constitutional and policy body for GST; The Statutory basis of the

recommendations made by GSTC have been provided under the Section 9 of the CGST Act, 2017.

The meaning a scope of the word “Assessment” (Section 2 (11)) of the CGST Act was discussed. It means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional, summary and best judgement assessment. Case law cited were *Bhopal Sugar Industries v. State of MP* 1979 3 SCC 792, wherein it was held that, to “‘Assess’ in a taxing statute means the computation of income of assessee, the determination of tax payable by him and the procedure for collection or recovering the tax”. However in *Kalavati Devi v. CIT* 65 ITR 386(SC), it was held that “‘Assessment’ can comprehend the whole procedure for ascertaining and imposing liability upon the taxpayer”. The Kinds of Assessment Proceedings under the GST were discussed, w.r.t. Chapter XII section 59 to 64 of the CGST Act as:

- Self-assessment (Section 59)
- Provisional Assessment (Section 60)
- Scrutiny of Returns (Section 61)
- Best Judgement Assessment on non –filing of returns (Section 62)
- Best Judgement Assessment of Unregistered persons (Section 63)
- Summary assessment in certain Special cases (Section 64)

The relevant provisions of Appeal and Revision under the GST were discussed w.r.t the following provisions:

- Order passed by Adjudicating authority
- Appeal to the Appellate Authority (section 107)
- Revision powers of the Commissioner (Section 108)
- Appeal to the Appellant Tribunal (Section 109 to 110)
- Appeal to the High Court (Section 111 to 116)
- Appeal to the Supreme Court (Section 117 to 118)

It was explained that the Adjudicating Authority is an inclusive and exclusive definition the inclusive part of Section 2(11) of the CGST Act states that “Any authority, appointed or authorized to pass any order or decision under the Act”, whereas the exclusive part states by exclusion “not include the Board, the Revision Authority, Authority for the Advance ruling, Appellate Authority for Advance Ruling, the Appellate Authority for Advance Ruling and the Appellate Tribunal”. Appellate Authority (AA) has been discussed under Section 107 of the CGST Act. It provides for who can appeal, the limitation period and the mandatory pre-deposit etc. The provision for Department Appeals to Appellate Authority under (Section 107)(2), (3) and (4) was discussed.

The procedure to be followed by the AA was discussed as under:

- No adjournment shall be granted more than three times

- The AA may allow an additional ground of appeal if satisfied that the omission was not willful or unreasonable
- After making further inquiry pass order in writing, confirming, modifying or annulling and stating the points of determination but not refer back to the Adjudicating authority
- To decided wherever possible the appeal within 1 year unless issuance of order stayed by court or Tribunal (time to be excluded)
- No enhancement or Reduction of Input tax credit unless reasonable opportunity of hearing
- Order disposing of appeal to be reasoned and in writing

While discussing the principles for condonation of delay by the First Appeal Authority appropriate case law were discussed:

- In *Singh Enterprises v. CCE* 2008 3 SCC 70; *Amchong Tea Estate v. UOI* 257 ELT 3 (SC), it was held that, the First Appellant authority has No Power to condone delay.
- In *Uttam Sucrotech International v. UOI* (2011) 264 ELT 502 (Del), it was held that, even one day delay is not condonable.
- In *Om Prakash v. Ashwini Kumar Barsi* (2010) 258 ELT 5 (SC), it was held that, authorities created by Statute cannot apply Limitation Act, 1963. They cannot condone the delay unless empowered by Statute.
- In *Ketan V Paresh v. Director of Enforcement* 29 Taxmann.com 373(SC); *MP Stell Corporation v. CCE* 57 Taxmann.com 399 (SC), it was held that, delay can be condoned if assessee was pursuing Remedy bonafide wrong forum.

It was further expressed that as per the GST Act, CGST & SGST/UTGST officers are empowered to pass orders. As per the Act, an order passed under CGST will also be deemed to apply to SGST. Moreover, If an officer under CGST has passed an order, any appeal/review/revision/rectification against the order will lie only with the officers of CGST. Similarly, for SGST, for any order passed by the SGST officer, the appeal/review/revision/rectification will lie with the proper officer of SGST only.

Similarly the powers of the Revision Authority (RA) under Section 108 of the Act was discussed.

- The Revision Authority (RA) on his own motion or request from the Commissioner of State or Union
- Call for records and examine the record of any proceedings of a subordinate authority
- Can stay the direction or order passed, after giving an opportunity and making further inquiry, pass an order including making an enhancement or modifying or annulling the said direction or order.

Explaining as to when a RA can intervene, three conditions were discussed. a) If the direction or order is erroneous insofar as it is prejudicial to the interest of revenue and is illegal or improper, or b) has not taken into account certain material facts, or c) in consequences of an

observation by the Comptroller and Auditor General of India. Discussing as to when the RA shall not exercise power it was pointed out that, It shall not when, a) The order is subject matter of Appeal to the AA, Appellant Tribunal, High Court or Supreme Court; b) The period for filing department appeal under section 107 (2) has not expired; c) more than 3 years have expired after the passing of the decision or order; d) Order has already taken up for revision and e) The order of revision has already been passed. The discretion of an RA to pass an order are when: a) any point which not been raised and decided in appeal; b) it can be done before the expiry of a period of one year from the date of the order in such appeal or; c) Before expiry of 3 years from the date of passing the decision or order; d) The time limit of 3 years will not apply if there was a decision which is prejudicial to the interest of revenue in some other proceedings and an appeal filed by the department is pending.

The powers and scope of Appellate Tribunal (AT) under Section 111 of the Act was discussed. Who and how an appeal to an AT can be filed was discussed w.r.t Section 112 of the Act.

An appeal to the High Court (HC) was discussed w.r.t Section 117 of the CGST Act. It was discussed that, a person aggrieved by any order passed by Appellant Tribunal may file an appeal to the HC, dealing with Substantial questions of Law. The HC has the power to deal with substantial question of law not formulated after recording reasons and can decide any issue not determined or wrongly determined by the Appellant Tribunal. Moreover, Judgement of the HC shall be given effect to by either side on the basis of a certified copy.

Moreover, the following were elaborately discussed:

#### Period of limitation for filing appeal

- 180 days from the date of receipt of the appellant tribunal order
- May entertain an appeal after the expiry of the said period if it is satisfied by sufficient cause for not filing it within the period.

#### Constitution of the High Court

- The appeal to be heard by a bench of not less than two judges of the HC and shall be decided by the opinion of the majority of Judges
- Where no Majority then the judges shall refer the point of law upon which they differ to be heard by one or more judges
- The Judges shall determine the issues based on the majority which shall include the judges that first heard the matter

Provision for Appeal to the Supreme Court (Section 118) was briefly discussed. An appeal can be filed (by either side) to the Supreme Court against an order passed by the High Court or When the High Court on its motion consider it a fit one for appeal to the supreme court. However, an appeal from any order passed by the Appellate Tribunal, (direct) appeal will lie to the Supreme Court under two conditions, i) a matter where two or more States, or a State and Center, have a difference of views regarding the treatment of a transaction(s) being intra-State;ii) a matter where two or more States, or a State and Center, have a difference of views regarding the place of supply.

A brief account of the limitations to Appeal was given w.r.t. Section 121 of the Act wherein, under four conditions no appeal against any decision or order passed by an officer of central tax if they relate to the following matter. a) An order to transfer the proceedings from one officer to another officer; b) An order to seize or retain books of account and other documents; or; c) An order sanctioning prosecution under the Act; or d) An order allowing payment of tax and other amount in instalments.

However, as a Constitutional Remedy, all actions of the government are subject to Judicial scrutiny before the High Court & Supreme Court, irrespective of the Provision of the Statute. The judicial power is conferred by the Constitution itself and cannot be curtailed by any legislation. It was suggested citing *UOI v. West Coast Paper Mills* 135 STC 265 (SC), that an appeal should be filed even if Writ/SLP is filed as it may become time-barred.

### **Session 5**

#### **Administering GST: Inspection, Search, Seizure, Arrest, Penalties, Prosecution & Compounding**

*Speakers: Mr. V. Lakshmikumar, Mr. S. Ganesh, Mr. Porus Kaka,*

*Chair: Hon'ble Justice Kurian Joseph*

This session commenced with the deliberation that there are five powers provided to officers under the GST legislation during Investigation. These are power to:

- Search
- Seizure
- Summon persons to give evidence and produce documents
- Detention and Arrest
- Seek deposits during investigation before issuance of show cause notice

Hence, it was stated to involve the personal liberty of the tax payer. The jurisdiction to search is wide but the law caps it by providing that the same can be done by a person not below the rank of a Joint Commissioner (i.e. the “proper officer”). It was debated that throughout the Act “proper officer” have been indicated for various persons, which has eventually led to litigation and one such case is subjudiced before the Delhi High Court. Power of inspection has been dealt under Section 68 of the CGST Act. It states that inspection can be done where the proper officer has ‘reason to believe’ that any of the following three causes are there i.e.:

- There is suppression of transaction relating to ‘supply’; or
- Inadmissible input tax credit has been claimed; or
- Contravention of provision of the act or rules to evade tax; or

To the question as to what is a “place of business” or which are the places that can be inspected, it was clarified to be one of the following four. i) Taxable Person himself/herself/itself (Organization); ii) Transporter; iii) Owner or operator of a warehouse / godown; iv) Any other place. Moreover, under Section 68 includes Inspection of ‘goods in movement’ which may be a person in charge of conveyance carrying goods may be required to carry specified documents/devices. It also includes the act of verification of documents/device by proper officer. Perhaps the e-way Bills also.

The scope of the phrase under Section 67 ‘reason to believe’ was discussed. It was been argued citing case law that such a power is not arbitrary and unfettered. In *Tata Chemicals Ltd. - 2015* (320) E.L.T. 45 (S.C.) it was held that, ‘reason to believe’ “does not mean subjective satisfaction of officer concerned. It is not arbitrary power given to an officer”. Moreover, in *Agarwal Iron Industries - 2014* (310) E.L.T. 226 (S.C.) the Court ruled that, “such reasons can be recorded on file and Court can scrutinize them”. Whereas, in *Gopaldas Udhavdas Ahuja - 2004* (176) E.L.T. 3 (S.C.), the supreme court held that, “Propriety of belief or sufficiency of material is irrelevant for court if some material existed on which belief could be formed.”

Discussing the “Power to Arrest” under Section 69 of the CGST Act, it was discussed as to who and when a person can be arrested. It was explained that as per the statutory provisions any person has committed any of the following offence punishable under section 132(1)(d) can be arrested. Section 132 provides for the ‘pecuniary threshold’.

It was debated as to whether there is a power to arrest even before adjudication? It was explained citing the Delhi High Court in *Makemytrip (India) Pvt. Ltd.* Delhi High Court 2016 (44) S.T.R. 481 (Del.), wherein the following guidelines were advised. It cannot be done on mere presumption of guilt. That the power to be used with circumspection and not casually. Person sought to be arrested has to be given opportunity to explain materials and circumstances gathered against him. Adjudication must precede prosecution. It may be exercised for habitual evader of tax; and must not be used as a tool for getting ‘voluntary deposit’ during investigation. It was highlighted that there are twenty-one offences covered for imposition of penalty under Section 122 & Section 132 of the CGST Act. Certain offences have been categorized as non-bailable and cognizable. Section 135 provides for the rebuttable presumption of culpable mental state. While Section provides for offences by the Companies and Section 138 makes provisions for compounding of offences (not in all cases) which is allowed only after payment of tax, interest and penalty on payment of compounding amount.

## **Session 6**

### **Concept of ‘Supply’ under GST: International Perspectives and Learnings for India**

*Speakers: Mr. V. Lakshmikumar, Mr. Sujit Ghosh*

Explaining the meaning and scope of the word “Supply” a comparative was drawn between the law relating to GST and VAT globally. It was highlighted that ‘Supply’ has been defined differently in different jurisdictions – While EU and Malaysia have a restrictive definition, India and New Zealand have expansive definition. It was underscored that “consideration” and “in the course or furtherance of business” are two most important ingredient in the concept of “supply” under the GST law internationally. It was explained even in case of an inclusive definition of the term “supply”, it is finite in nature. This was explained citing case law from New Zealand *Databank Systems Ltd v. Commissioner of Inland Revenue* (NZ)(1987) 9 NZTC 6213, wherein the court held the “supply” means “to furnish or provide”. Meaning thereby that it is necessary that for a supply to take place a voluntary act by the supplier has to be there. Relying upon the Databank case above, under Australian GST, in *Shaw v. Director of Housing and State of Tasmania* (No. 2), [2001] TASSC 2, the Court stipulated that the term ‘supply’ requires a voluntary act by the supplier. Moreover, in *Hornsby Shire Council v. Commissioner of Taxation* [2008] AATA 1060, under the GST law of Australia there is a distinct approach adopted for considering an act to be supply. In contrast to compulsory acquisitions by

government (i.e. doing of a thing that is compelled by statute), when an owner initiates the acquisition by writing to the appropriate authority (i.e. extinguishment of an owner's interest by statute), such acquisition shall be regarded as supply.

Moreover, for "supply" there needs to be an "intention to create legal relationship". The basics of the Intent to create legal relationship could be traced from the leading case *Balfour v. Balfour* [1919] 2 KB 571. Wherein. Lord Atkin held that "many agreements do not result in contracts even though there may be ... consideration for the agreement. ... they are not contracts because the parties did not intend that they should be attended by legal consequences." In *Tolsma's case* Case C-16/93; the issue addressed was, a service which consists of playing music on the public highway, for which no payment is stipulated but payment is nevertheless received, be regarded as supply of services for consideration and hence, leviable to turnover tax. European Court of Justice ("ECJ") held that, 'supply of services' is effected 'for consideration' ....., and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. The Court further noted that a supply of services is effected 'for consideration' within the meaning of Article 2 (1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. Thus, it was held that if a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them. Further, where a person's activity consisted exclusively in providing services for no direct consideration, there was no basis of assessment and the services were therefore not subject to VAT.

However, the GST law of Australia had a contradictory view to the Tolsma's Case. According to the Australian GST Law, in case of voluntary payments for restaurant supplies; A restaurant run by a sole trader accepts tips from its customers which are not passed to the restaurant's employees. Such tips are unsolicited and are in addition to the price stipulated by the restaurant. It was held that tips are voluntary payments made in connection with the restaurant supplies made by the sole trader to its customers and thus form part of the consideration charged for such supplies. Although there is no obligation on the customers to make these payments, the tips form part of the consideration for the restaurant supplies by the sole trader to its customers. On the other hand, if the sole trader passes the tips on to the restaurant's employees then such tips constitute income of the restaurant employees and such payments are not subject to GST as the employees are not carrying on an enterprise for GST purposes.

It was further argued that, "Consideration" should have 'sufficient' nexus with the supply made. The point was discussed citing GST law of Australia and New Zealand. References were drawn from the Goods and Service Tax Ruling 2001/6 issued by the Australian tax Office [which is a public ruling under Division 358 of Schedule 1 to the Taxation Administration Act, 1953]. As per point 71. "Substance Test" in establishing nexus. In determining whether a sufficient nexus exists between supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between parties will be characterised not merely by the description that parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made."

Moreover, it was discussed and pointed out that, any goods/service made available as a condition of contract need not necessarily qualify as a ‘consideration’ (whether monetary or non-monetary).

The term ‘supply’ is wide in its import and includes all forms of supply of goods and / or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. It includes import of service and it also includes certain transactions made without consideration

The Schedule II provides for the activities to be treated as supply of goods or supply of services. Some examples are: Whereas a Transfer of title in goods will be a supply of goods, however, a transfer of right in goods or undivided share in goods without the transfer of title thereof will be a supply of services. Any transfer of title in goods under agreement stating that property in goods will pass at a future date upon payment of full consideration will be a supply of goods. Moreover, in cases of land and buildings, Lease, tenancy, easement, license to occupy land will be considered a supply of services. Similarly, lease or letting out of building including a commercial, industrial or residential complex for business or commerce, either wholly or partly will constitute supply of services. In case of Transfer of Business Assets - Where goods, being the assets of a business are transferred or disposed of, whether or not for a consideration, it will be a supply of goods. However, Goods held/used for the purposes of the business, if used/ put to any private use or purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods will be supply of services. In the act of Construction - Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or before its first occupation is supply of services. “Composite Supply” of services are - Works contract; and Supply of any service or goods being, food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption). Renting of immovable property is a supply of services. Moreover, Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act will be considered as a supply of services.

The activities specified in Schedule I, are those made or agreed to be made without a consideration. The Schedule III provides for activities or transactions which shall be treated neither as a supply of goods nor a supply of service. Example of Schedule III are viz. Services by an employee to the employer in course of his employment; Services by any Court or Tribunal; Functions performed by MPs, MLAs etc.; Services of funeral, burial, including transportation for the same; Sale of land, except construction of complex service, sale of building; Actionable claims, other than lottery, betting and gambling.

While referring to a hypothetical query as to whether GST is payable on incentive payments made by a supplier to its vendors?

It was explained citing Australian Federal Court Case Law *AP Group Ltd. v. Commissioner of Taxation* 2013 FCAFC 105. Wherein it was held that:

“The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were

not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements.”

## Session 7

### **Time and Place of Delivery: An Overview of Relevant Provisions**

*Speakers: Mr. N. Venkataraman & Mr. K. Vaitheeswaran*

The session commenced with the assertion that concept of “place of supply” in the pre-GST era was not even relevant. This was primarily because the erstwhile Central Excise Duty the taxation was on the activity of manufacture at the point of removal, i.e. removal from the factory at Bhopal etc. so there was no issue as to levy excise where or who to be taxed, hence was fairly easy. Similarly in case of Services a person to operate across the country providing his services and be registered at one place. Such person was to pay one service tax to the Central Government and file two returns in a year. Therefore from the standpoint of a Service provider as well the “Place of Service” was not relevant. Inter-State sales attracted CST with the necessary condition of inter-state “movement” (a must). With the advent of GST wherein centre would tax “goods” and give-up the exclusivity to tax “services” to the States, “place of supply” became absolutely important. “Place of Supply” assumes importance to determine as to whether a supply is “Inter-State” or an “Intra-State”, because the tax structures are different in case of Inter-State and Intra-State supply.

Identification of the “place of supply” is one of the basic sutras of the GST legislation. A rudimentary question as to why (rather than asking where) a “place of supply” was delved into. Another basic query is when a State is applying GST in the form of CGST + SGST, What is the role for CGST component, while a State charges GST? Since, the mere word “Central” denotes a notion of Union. This in the pretext to the fact, that in an inter-state supply case (where a centre has to levy tax) it is IGST which charged. For effective internalization and appreciation of the tax statutes and its evolution, it was historically traced in three phases. First phase was prior to 1956. Second phase was 1956 to 2017 (pre-GST) and GST and beyond.

In phase one prior to 1956 the States had the power to taxation in goods. It was only State role of Union could be traced. Now when goods had to travel from State ‘A’ to ‘B’ in a commercial transaction, it involved several components e.g. the contract could have taken place in State ‘C’ whereas the bank account transaction could have been in State ‘D’, moreover, the truck carrying the goods could have travelled through States ‘E’, ‘F’, ‘G’. In such a situation wherein many States were involved the question which arose was ‘who or who all can levy tax’. In such a situation a destination based taxing concept was conceived by the Constitutional Bench of the Supreme Court in case *The State of Bombay v. The United Motors (India) Ltd.* 1953 SCR 1069; 1953 AIR 252. Now, the argument raised by the States was it is ‘destination based’ and not ‘termination’ so if a truck passes through my borders I get domain. Hence, the same transaction was taxed by every such State involved in its own rate of its sovereign tax law, leading to multiple taxation on one transaction. This scenario within one years’ time was challenged and a seven judge bench of the Supreme Court in *Bengal Immunity Co. Ltd v. State Of Bihar*, 1955 ( 2 ) SCR 603, AIR 1955 SC 661 reversed the judgement. In this Supreme Court classics in tax law it was held that, whenever there is a movement of goods outside the boundaries of a State, every State should lay its hands out as none has the authority to tax and the Centre should step in and legislate. And this was the case which was the precursor to the

Central Sales Tax (CST) legislation of 1956. In the second phase, wherein the genesis of the CST came into play, it was based on the fact that, since a commercial transaction has several components, purchase, payment, delivery, signing of contract, etc. the Parliament chose, that the State from where the goods occasioned movement will be the “place of sale”, and that State will have the right to tax. Now, coming to the concept of “place of supply” it was imperative to have a point of taxation whenever there is a multi-State boarder transition. Simply put when more than one State claims a right to tax, the law has to definitely put to rest, as to which State will have such a right. Therefore, the core idea is that, in order to do away with multiple taxation on a single transaction, there needs to be a unitary “place of taxation”.

It was argued that Art 246 A is a unique provision which corresponds to neither concurrent list nor a concurrent levy. It is one of the most creative Article of the Constitution wherein, both the taxing event and the field of taxation is conceived in the same provision. Hence, it is not a “concurrent taxation”, it is “simultaneous taxation”. Because in case of a concurrent fields in case of a conflict one has to yield to the other, which is not the case in this Article. The event is one (single) and two agencies “State” and “Union” are taxing it. Therefore, the subsequent moot question arises as to why two agencies are taxing? The answer is, since in Indirect tax there were four major legislations (where from the States and the Union generated income) a) Customs (Entry 83 of List I), b) Excise (Entry 84 of List I), c) Service Tax (Entry 97 of List I), and d) Value Added Tax (VAT) (Entry 54 of List II). The first three of the aforementioned were Union levy. Inter-State, VAT was in (Entry 92B of List I). Now, two federal bodies State and the Union are taxing independently on the different taxable events. After twenty five years both the federal powers swapped, surrendered and decided to work in concert in the interest of free flow of trade to give birth to the Constitutional moment to legislate GST, wherein, they came to the consensus that, instead of calling excise duty, customs, VAT etc. they will adopt the nomenclature “supply tax”. Therefore, the common acceptable point was event is “supply”. Now since both the federal powers formed the consensus, they decided that if the supply is intra-state then half of the tax should go to State and remaining half to the Union. CGST is levied 50% on intra-state transactions because the Union has surrendered its rights under Excise Duty, CST, Customs etc. Now, the concept of having an IGST was adopted for the reason that, in the case of an inter-state transaction, there will be issues wherein every State will claim the “place of supply” to be their State and hence, in such cases the Union has been empowered to levy the tax. Then the Union becomes the collecting agent and keeps 50% of the taxed revenue and shares the remaining 50% to the concerned State.

It was further explained that under the CST regime it was “origin based” taxation (place of sale was the point of origin for a transaction). Under GST regime there is a complete migration from “origin based” to “destination based” taxation (i.e. the “place of supply” is the destination). The “destination based” taxation is the default rule or the cardinal principle (with four Sections that carve out exceptions). What is generally meant by “destination of supply” or “place of supply” under GST is, the State where the “goods are terminally delivered” or the place where the “services are provided to the recipient” shall be treated as “place of supply” to levy tax. Explaining the reason as to why there was a need for making the transition from an “origin based” taxation regime to a “destination based” taxation system, it was explained that, i) Financial or revenue flow is always forward, therefore capital investment is always forward and never backward. Therefore, one can tax value only when you move forward and not backward. ii) when you go to the destination taxation one can tax the value added and set-off

at every stage moving forward. This was not possible at origin based taxation, where the taxation is done at one single, first point of sale itself and the credit does not pass any further. However, in a destination based taxation until the retailer at the destination is reached every stage that the goods or services pass has got the right to tax and pass on the credit in a chained manner. iii) Place of sale; place of manufacture and place of import has been replaced with “place of supply”. iv) By achieving the destination based taxation the economic growth will not be lopsided. Earlier Service Tax was a Union levy, 80% of the ST came from only 6 States (it was lopsided to such high extent), therefore now the States will have a pie to tax on services.

A query was raised that as on date things seem to be hunky dory, but what happens after a few years when the recommendations made by the GSTC is not uniformly followed by the States? Moreover, what happens to the concept of setting up of a manufacturing industry in a particular State because of the incentives provided (viz. tax holiday, exemption on ED etc.)?

As an advice it was requested to the Hon’ble High Court Justices to consider a paradigm shift in their approach to issues when they come before them. This was w.r.t. the conventional approach viz. is there a leakage of revenue, can the court save govt. money etc. etc. Now it will be good if Courts think on the hard core business line viz. any evasion of tax (take it up severely); If a two State conflict comes before a judge, he should be in a position to raise himself above the State he belongs to and decide in the national interest, such level of thinking change is required from the judiciary after the legislators have done their part by giving birth to the law relating to GST.

Moreover, for interpretation of the “place of supply” under the GST legislation a few basic sutras were pointed. 1) Understanding the scope and differences between ‘inter’ and ‘intra’; 2) concept of “location” of service receiver and service provider (as defined under the Act); 3) distinction between a “taxable” and a “non-taxable”; 4) distinction between a “forward charge” and a “reverse charge”;

It was discussed that as per Supreme Court a customs duty free shop although geographically located in India will not be considered India and will fall before / ahead of the customs frontier. Therefore a transaction done at the shop is not considered a transaction in India but “outside India” Reference was made to *Hotel Ashoka (Indian Tourism Development Corporation Ltd.) v. Assistant Commissioner of Commercial Taxes*; CIVIL APPEAL NO. 2560 OF 2010 it was held that:

When any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India. Though the transaction might take place within India but technically ... the said transaction would be said to have taken place outside India. In other words, it cannot be said that the goods are imported into the territory of India till the goods or the documents of title to the goods are brought into India. Transfer of documents of title to the goods is one of the methods whereby delivery of the goods is affected. Delivery may be physical also. In the instant case, at the duty free shops, which are admittedly outside the customs frontiers of our country, the goods had been sold to the customers by giving physical delivery. It is not disputed that the goods were sold by giving physical possession at the duty free shops to the customers. Simply because the sales had not been effected by transfer of documents of title to the goods and the sales were effected by giving physical possession of the goods to the customers, it would not mean that the sales were taxable under the Act.

Therefore, the event is a sale in the course of import or export. Now in a GST regime if goods are bought, stored in a custom bonded ware house, transfer the stock to the duty free customs outlet and sell it from there. What would be the taxation under the GST regime?

Now as we have seen that the supply of goods is concerned if the supplier is Airport Authority (who rents out the premises) is geographically located in India. The shopkeeper who holds the property is also in India physically. Therefore, with the above pre-text whether the act of renting be considered outside India or within India? Hence, which of the GST Act will apply? Will it qualify as a non-taxable transaction? To the query a few justices expressed that the premises is only deemed to be outside India (courtesy the specific deeming provision), however, the act of renting is of an immovable property physically located in India. To which it was counter argued that the language of Section 13(4) of the IGST Act on “Place of supply of services where location of supplier or location of recipient is outside India” states:

13 (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.

It was explained w.r.t. comparative reading of Section(s) 7(2) and 7(4) of the Act, wherein a subtle distinction has been made for determining the nature of supply (inter-state or intra-state) between “goods” and “services”. It reads as:

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

7 (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.

A comparative shows that the “till they cross the customs frontiers of India” is not captured in Section 7(4) while dealing with the inter-state transaction (IGST). It was underscored while clarification that the deeming fiction is limited in nature (it deems a place to be outside India for a particular purpose, not for any other purpose), a customs frontier is referred to or is relevant for only a physical goods supply. A customs frontier is relevant for an intangible service. Therefore when goods are brought Section 7(2) says customs frontier therefore for home consumption, hence no taxation. But for the Airport Authority for the purposes of rent 13 (4) will not apply and instead Section 12 (3) will apply:

12(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, official, 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.

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.

Yet another matter discussed was what happens to a transaction happening in territorial waters? It was argued that erstwhile Service Tax had an imbalance i.e. when it came for charging West, it was extended to 200 nautical miles from the shore. But, when it extended to Eastern part, it stopped after 12 nautical miles. In an earlier judgment of the Gujrat High Court in the case of *L&T* held that since the definition of India does not extend to the territorial waters tax cannot be levied. This anomaly has been taken care of in the GST legislation i.e. Section 9 of the IGST Act. It states that:

9 Supplies in territorial waters:

Notwithstanding anything contained in this Act,— (a) where the location of the supplier is in the territorial waters, the location of such supplier; or (b) where the place of supply is in the territorial waters, the place of supply, shall, for the purposes of this Act, be deemed to be in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

Hence, the coastal State most proximate to such territorial water transaction will have the power to tax under intra-state sale (not an IGST). Hence under the earlier regime, a) Stock transfer was not taxable; b) Exports was not taxable; c) Territorial water transactions were also not taxable. Today all the above is taxable under IGST except territorial waters, with the exception that export alone is zero rated. In another example, a comparative was explained as to providence of software services to a client abroad. In the erstwhile tax regime it was a service tax “exempted”. However, under the GST regime the concept of “exemption” has been substituted by “discounting”, wherein first taxation on services has to be first paid and then a refund has to be filed.

Concept of “Place of Supply” for “goods” and “services” are different. A departure from the traditional form of understanding “place of supply” can be observed in the provision when a supplier is located in India and the place of supply is outside India. In such a situation traditionally it will be considered as a tax on export transaction. But under GST, it first treats it as an inter-state supply (taxable under IGST) then considered as a zero rated supply. Similarly, a supply to or by an SEZ will be dealt under the IGST Act and not by the SGST Act. A supply in the taxable territory and which is not a local supply and not covered elsewhere in the legislation is treated as an Inter-State supply (e.g. transactions within the 200 nautical miles of the waters surrounding India, oil rig cases etc.). In case of an Intra-State legislation if the supplier is in State ‘A’ and the receiver is in State ‘A’ itself then the tax will be SGST+CGST. Now, currently both the legislations match word by word as on date. As the legislations are not concurrent legislations but it is only a concurrent levying of tax, the power of State legislature is independent. Over a period of time if a particular State amends its State Act for a different tax structure than the CGST not in consonance to the recommendations of the GST Council,

an issue of taxing dissonance would happen. For example, GST Council recommendation to charge 5% was made, immediately CGST notification of 2.5 % was effected, but the SGST notification (to mirror 2.5% SGST as done by CGST) was delayed or not made, then there would be a severe problem of execution.

In the pre GST there was a conflict regarding distinction between “goods” & “services” e.g. litigations and debates on nature of software; electricity; pre-paid vouchers by employees viz. Sodexo; lottery tickets etc. It was expected that come GST (with the concept of one tax for goods or services) the problem would be effectively resolved. But, the legacy of distinction continues as the legislation distinguishes between both “goods” and “services”. The GST taxation was clarified by citing a few examples as under:

Transaction	Applicable GST	Remarks
A Ltd. Chennai supplies valves to B Ltd. Chennai	CGST + SGST – Section 10(1)(a)	
B Ltd. Chennai places a PO on A Ltd. Chennai to deliver valves to its factory in Hyderabad	CGST + SGST – Section 10(1)(b)	Even when the goods are travelling out of State (Chennai) it will be treated as an intra-state supply.
B Ltd. Hyderabad places a PO on A Ltd. Chennai to deliver valves to its factory in Chennai	IGST – Section 10(1)(b)	Even though the supply is done within the state of Chennai, since the instruction is given from outside State it will be treated as inter – state supply.
A Ltd. Chennai stock transfers goods to its branch in Delhi	IGST – Section 10(1)(a)	
M Ltd., Mumbai supplies television sets to M/s. Star Liners at the time of docking in Mumbai Port.	CGST + SGST – Section 10(1)(e)	

It was argued that “place of supply” as compared to “goods” is more complicated in case of “services”. But, it was explained that it is only 10% of the matters which might trigger such anticipated complications because 90% of even the supply of services are destination based. Now if one considers the fraction which seems to be conspicuously complicated to ascertain the “location of the supplier and recipient” in case of a service (because if both of them are in same State CGST + SGST Section 12 applies; if anyone is in a different State it is IGST Section 13 would apply). In such a situation also i) the default rule is location of supplier is the place of business where his registration is there. ii) If the supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere).

## Session 8

### Interpretative Challenges and Potential Areas of Conflict

*Speakers: Mr. N. Venkataraman & Mr. K. Vaitheeswaran*

In the pre-GST era, goods attracted ED, VAT or CST while services attracted Service Tax. Many domains saw the conflict for ascertainment of “goods” or “services” namely, Intellectual Property Rights, Works Contracts, Restaurants, Software, Lease of equipment etc. This led to double taxation of the same transaction in some cases by the State and Centre.

It was raised as to what are the points or areas which distinguished between “goods” and “services”? Distinction between goods and services have been brought by two ways

- a) Through definitions as enacted, and
- b) through rates

It was asserted that internationally in most countries, goods and services are treated as the same for levy of GST or VAT. But, in India we chose differently, and adopted multiple rates for goods and services separately through the vehicle of notification. There is no tariff *like in excise or customs* or standard schedule for “goods” or “services” under the Act. e.g.:

Goods	Exemption, zero rating, 0.12%, 3%, 5%, 12%, 18% and 28%
Services	Exemption, zero rating, 5%, 12%, 18%, 28%

Under definitional distinction as per the statute law, “goods” means:

- every kind of movable property.
- other than money and securities.
- but includes actionable claim, growing crops and things attached to or forming part of the land which are agreed to be severed before supply or under contract of supply.

Whereas “supply” means:

- anything other than goods, money and securities
- but includes activities relating to the use of money or its conversion by cash or by any other mode from one form, currency or denomination for which a separate consideration is charged.

The moot question here is, can services be ‘*anything other than goods*’? Can services be a “thing” at the first place (which can be handled or touched etc.)

Now, considering the second aspect of distinction i.e. “Rate based distinction”, the example of IPR in Software may be examined. IPR with an 18% rate of tax:

- i. in case of a permanent transfer of Intellectual Property (IP) right w.r.t. Information Technology Software under Notification No.1/2017 applicable to ‘goods’.
- ii. Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of Information Technology Software under Notification No.11/2017 applicable to ‘services’.

“Place of supply”: i) for ‘goods’ would be governed by ‘delivery’; and ii) for ‘services’ would be governed by ‘location of recipient’. Hence, if the software is perceived as ‘goods’ the “place of supply” rules would be different than when it is perceived as a ‘service’.

It was conceived that other than packaged software (wherein determination of the kind of it as ‘good’ or ‘service’ might be a little easier), if one considers the case of downloading of a software from an online source, then:

- a) Whether download of software and usage under licence should be considered as supply of ‘goods’ or supply of ‘services’?
- b) Can the medium of delivery alter the nature of the transaction?

The case was further investigated and debated by considering the case law as follows:

- a) The Supreme Court in the case of *Associated Cement Company v. Commissioner of Customs*; (2001) 128 ELT 21 had held that
  - All tangible moveable articles would be goods for the purposes of Customs Act, 1962
  - Any media, whether in the form of books or computer disks or cassettes which contain information technology would necessarily be regarded as goods
  - The moment information or advice is put on a media whether paper or diskettes or any other thing, that what is supplied becomes chattel.
- b) The Constitutional Bench of the Supreme Court in the case of *TCS Vs. State of Andhra Pradesh*; (2004) 178 ELT 22 has held that since software is capable of abstraction, consumption, use, transmission, transfer, delivery, storage, possession it would be ‘goods’ for the purpose of levy of sales tax.

Then, anything other than the above (i.e. not capable of transfer, consumption,...) be considered as ‘service’?

Justice S.B. Sinha in his concurring judgment at para 71 observes that:

*“a software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like – floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining the question as regard levability of the tax under a fiscal statute it may not make a difference. .... What is essential for an article to become goods is its marketability.”*

The European Court of Justice in the case, *UsedSoft GmbH v. Oracle* in case C-128/11, vide decision dated 03.07.2012 has held that:

- Downloading of a copy of a computer program and the conclusion of a user license agreement for that copy form an indivisible whole.

- Downloading of a copy of a computer program is pointless if the copy cannot be used by its possessor. These two operations must therefore be examined as a whole for the purpose of legal classification.
- Where a customer of Oracle downloads the copy of the program and concludes the license agreement and receives the right to use that copy for an unlimited period on payment of a fee, there is a transfer of right of ownership of the copy of the computer programme
- A few more cases discussed were The Delhi Bench of the Tribunal in the case of *Atul Kaushik Vs. Commissioner of Customs* (2015) 330 ELT 417 has held that:
  - Electronic download of software from a server located abroad amounts to import of goods.
  - There is no mechanism for levy of duty on download of software.
  - Entire Customs Act in the present form only provides for collection of customs duty on tangible goods.
  - In the absence of mechanism of collection of tax, the levy paid.
  - *Electronically downloaded software is not leviable to customs duty.*

Civil Appeal of the Revenue against this decision dismissed by the Supreme Court holding that there is no reason to interfere with the order passed by the Tribunal. (2016) 339 ELT A136. Hence, if download of software if it is perceived as import of goods then there is no mechanism to levy customs duty, and hence IGST which is levied only at the customs frontier will not be applicable. This is because Section 12 of IGST will not be applicable in such a case. But the counter view could be if download is a limited access acquired as a service, then import of service does not requires a customs barrier and hence Section 13 of the IGST will be applicable.

The second issue which might arise is in relation to “Works Contract”. In the GST law for the first time “works contract” has been defined under Section 2(119) of the CGST Act, to be an “immovable property.” It states:

a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning **of any immovable property** wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.

Therefore it was observed that, a) In the pre-GST regime, works contract was a composite supply involving material and labour; there were plethora of case law as to what constitutes a “works contract”; b) In the GST regime it should be connected with immovable property. Hence, the issue raised was as to what happens in the transactions which is not linked to an immovable property but has a component of both material and services? *viz.* there could be a contract involving design, supply, engineering, commissioning, and installation of an Air Conditioning plant. Also, there are judgments which held that and AC plant is an immovable property. However, the term immovable property has not been defined under GST. Will such a case (if not considered to be an immovable property) have to be debated in the context of “composite supply”? (driven by the rate of principle supply), moreover, if the principle supply in a composite supply is a goods, then, one needs to ignore the “place of supply” of services

and vice-versa; and c) The 101st Constitutional Amendment Act has not deleted Article 366(29A). In case of a works contract the rate is 18% and the buyer cannot get credit. However, if it is a composite supply then it will be 28% as in the case of an AC.

Another issue which may arise is “Can there be a CGST and SGST levy after the transaction has been considered as an IGST transaction?” Suppose, in a particular case tax is paid as per IGST at rate ‘x’. Subsequently it is found that it is not a case of Inter-State supply of goods but is a case of Intra-State supply and hence tax to be paid is CGST+SGST. Section 19 of the IGST Act provides that where IGST has been paid by a registered person considering the supply as an inter-State supply and subsequently it is held to be an intra-State supply, he shall be granted refund of the IGST paid in such manner and subject to such conditions as may be prescribed. Therefore, the person has to first pay CGST+SGST and only then claim a refund. This repeat taxation will certainly have huge business impact. The law should have provided for backend adjustment between the Governments as against double payment and refund.

It was asserted as to how may Court of law (High Courts) help in ensuring that the GST law adopted by India does not suffers neonatal disabilities or dies in the cradle. In doing so, the myth of State sovereignty to deviate from the uniformity of taxing rate recommended by the constitutional body GSTC was discussed with reference to Article 279A.

The moot question to be considered by the Courts of the country in future is, whenever there is a flash point of dispute between State sovereignty and rates recommended by the GSTC, the Courts should consider “one nation one market theory” rather than considering State sovereignty to the extent to defeat the concept of one nation with a uniform tax structure.

The provision under Article 279A(4) mentions that:

- (4) The Goods and Services Tax Council shall make recommendations to the Union and the States on -
  - (a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
  - (b) the goods and services that may be subjected to, or exempted from the goods and services tax;
  - (c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of Inter-State trade or commerce under article 269A and the principles that govern the place of supply;
  - (d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;
  - (e) the rates including floor rates with bands of goods and services tax;
  - (f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;
  - (g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
  - (h) any other matter relating to the goods and services tax, as the Council may decide.

The provision preferred to employ the word “recommend” and not any other word suggestive of compulsiveness or exhibits binding nature because our Constitution upkeeps federal values. The sub clause (6) of Article 279A was thereafter referred, which lays down the core philosophy and objective of GST which reads as under:

- (6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

It was discussed that the confusion if at all it shows-up as to a choice between a national harmony or a State loyalty. One must look forward to the national interest as suggested by the GST council and stick to the uniformity of taxation as recommended rather than advocate narrow State interest under the garb of State sovereignty and recommendatory language of the Article 279A.

It was further reiterated that the tax is only “one” (i.e. Supply Tax) it is charged or levied by two agencies i.e. (Union and/or the States). The apportionment is for convenience but the market referred by the Constitutional provision is one and the tax is one.

Explaining the essence of the word “recommendation” in order to interpret it in the right spirit attention was drawn to the sub clause (9) of Article 279A, which states as under:

- (9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:-
- (a) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and
  - (b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast,
- in that meeting.

It was underscored that the recommendation is qualified under this sub clause as it is the decision taken by the GSTC following a democratically agreed upon and constitutionally provided procedure established under the law. The procedure has inbuilt mechanism for the State to exercise its freedom to agree or disagree and express the same by its considered vote. Therefore, a recommendation mentioned under the sub clause (4) matures to a consensual decision (after voting) under the sub clause (9). Moreover, the weightage in the voting process of the Union is only 33% whereas the State collectively enjoys 66% of the voting strength. So the State is actually not surrendering its sovereignty, but is aligning its sovereignty in the national interest of development of a harmonised national market for goods and services constitutionally referred under Article 279A (6).

It was further argued that the word “decision” (under 279(9)) is followed by “recommendation” (under 279(4)) or is it the other way round that a “recommendation” made by the GSTC is put to voting and thereafter, the consensual result becomes the “decision”?

One of the school of thought argued that since the entire Article has to be read harmoniously, therefore the sequential reading would suggest that a “recommendation” by the GSTC matures into a “decision” and not the other way.

However, the contesting argument placed its weight on the fact that a subsequent reading further of sub clause 11 of Article 279 A (which speaks on dispute resolution mechanism) would clarify that a consensual “decision” is “recommended” by the Constitutional body

(GSTC), which can be subjected to further adjudication or judicial review. The sub clause (11) of Article 279A reads as under:

- (11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute -
- (a) between the Government of India and one or more States; or
  - (b) between the Government of India and any State or States on one side and one or more other States on the other side; or
  - (c) between two or more States,
- arising out of the recommendations of the Council or implementation thereof.

Moreover, reliance on Article 246A(1) was laid, wherein the sovereign powers of the State and the Union to legislate on levying of tax (i.e. SGST and CGST) thereby establishing sovereignty was emphasized. Article 246A (1) states:

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.

The second school was thereafter counter argued with the fact that, even if it is considered that a “decision” is subsequently “recommended” by the GSTC, it sufficiently explains the nature of the “recommendations” which are actually a body of democratically adopted voted “decisions”, and hence would withstand the subsequent claim of the State to refrain from alteration or non-implementation under the garb of federal sovereignty. It was further submitted as to whether a recommendation can be at variance to the decision? The first school further argued that sub clause (11) is suggestive of the fact that, it provides for a dispute resolution mechanism arising out of the recommendations of the GSTC. It was argued that this sub clause is not essentially exclusive adjudication mechanism limited to a GSTC recommendation only. Moreover, the disputed recommendations (if so be a subject of dispute) once settled is put to vote to mature into a decision. To rebut the same it was referred by the second school that, if a referral is made to the *Explanation* to Article 246A (2) mentioned above.

It would mean that the implementation of rates of the GST would follow the recommendations made by the GSTC. Hence, recommendation succeeds decision.

It was further discussed that since under Article 279A (9) the word used is “decision” it is always a subject matter for judicial review, if there is an arbitrary issue of use, abuse or misuse of sovereign power. Hence, if hypothetically, under a given situation a malafide decision is concocted the same shall be a subject matter for a judicial review.

It was discussed that no matter we are a cooperative federal nation “federal leaning towards Union” (*S.R. Bommai Case*). The constructive federalism is evolving to a cooperative federalism wherein, parochial patriotism of the States must give way to national harmonisation. Moreover, the Union and the State powers (sovereignty on taxation) cannot be understood to

be as it was prior to the GST regime i.e. prior to 101<sup>st</sup> Amendment of the Constitution of India to include the new Articles. The same would otherwise make otiose and fail the very purposes of Article 279A. Hence, the States have to align to the larger interest of the nation for having “one tax” and “one market”. Even if there is a dissent of views during the voting and a State or more have been out voted, it cannot maintain a state of denial constitutionally once the results are consensually and democratically out. Once dissent in minority view is subsumed in the confluence and in the crucible of federal concerns. A mandamus may be issued. The mandamus so issued will not be a mandamus by the judiciary, but a mandamus of the Constitution articulated by the judiciary. And such a mandamus may not be interpreted as against the normative understanding of having legislative sovereignty.

Yet another query raised was, can a common man (a citizen) raise a dispute and set the GSTC into motion for adjudication under Article 279A (11) in context of non-implementation of a particular recommendation by the State? Because the language seems to limit the dispute *locus standii* exclusively amongst and between Union and State. It was enquired as to if a citizen files a writ petition under Article 226 on non-implementation of a particular recommendation, can the High Court ask the GSTC to set a motion for adjudication under Article 279A (11)? Another situation was cited wherein, owing to vigorous notifications issued for reducing/alterations of a particular tax by the GSTC, implementation at some of the States to amend the rates immediately is not uniform (is delayed). Under such a situation two different States for certain period of time operate different tax structures. Therefore, there is an issue. It was suggested that in such situations a *mandamus* for implementation must be brought before the High Court or the Supreme Court having jurisdiction to rectify the situation immediately.

In the concluding remarks Director NJA expressed his opinion regarding the democratic lag. Of all the forms of government, democracy is one of the most difficult counter evolutionary form of social accretion. Because of man’s cultural and genetic ancestry of non- conformity with the social design, democracy becomes troublesome. Democracy requires one to be his own sovereign, who has to subsume his animalistic instincts to preserve a social order.