

NATIONAL JUDICIAL ACADEMY



**NATIONAL WORKSHOP FOR HIGH COURT JUSTICES ON THE REGIME OF GOODS AND SERVICES
TAX (GST) [P-1282]**

12TH & 13TH FEBRUARY, 2022

PROGRAMME REPORT

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OVERVIEW OF THE WORKSHOP

The National Judicial Academy organised a two day online Workshop for High Court Justices on the Regime of Goods and Services Tax (GST) on 12th & 13th February, 2022. The workshop aimed to provide a forum for discussing normative issues concerning the evolution of indirect taxes from a regime of distinct and multiple taxation to one of extensive standardization across diverse tax realms and jurisdictions i.e. Federal and State. It explored the prospective areas of conflict, the constitutional evolution and socio judicial effects that may ascend thereby. The conference deliberated upon the following themes- GST: Constitutional Perspectives; Concept of Supply: Mixed and Composite Supply; Valuation: Time & Place of Supply and Input Tax Credit. Twenty nine High Court Justices from nineteen High Courts participated in the workshop. A brief snapshot of the scheme of the workshop is as follows:

DAY 1

Session 1 - GST: Constitutional Perspectives

Session 2 - Concept of Supply: Mixed and Composite Supply

DAY 2

Session 3 - Valuation, Time & Place of Supply

Session 4 - Input Tax Credit

DAY – 1

Session 1

Theme - GST: Constitutional Perspectives

Speakers: Mr. N. Venkataraman and Mr. Sujit Ghosh

Chair: Justice Manmohan

On the theme of *Goods and Services Tax (GST): Constitutional Perspectives*, the session was commenced by focusing upon the object of the Constitution (One Hundred and First Amendment) Act, 2016. It was expounded that the idea which permeates GST legislation globally is to impose a multi stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfils the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. Therefore, the purpose of tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. It was asserted that the fundamental object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain. Subsequently, the observation made by the apex court in Para 30 of *Union of India v. VKC Footsteps India (P) Ltd., 2021 SCC OnLine SC 706 (Civil Appeal No. 4810 of 2021)* was highlighted on the point of cooperative federalism- “*The One Hundred and First Amendment to the Constitution is a watershed moment in the evolution of cooperative federalism. Since its origin, the Constitution contained a three-fold distribution of legislative power. Under Article 246, the subjects of legislation enumerated in the Union List of the Seventh Schedule were assigned to Parliament, those in the State List were assigned exclusively to the States and those in the Concurrent List were assigned both to Parliament and the States with precedence to Parliament under the provisions of Article 254.*”

Thereafter, it was stressed that GST is a levy which succeeded a dozen plural levies imposed by both the centre and the state in the form of indirect taxation. It has subsumed several union and state taxes and duties into one bucket. It is a taxable event in case of the supply of goods and

services and it is the same taxable unit which both the federal partners (union and states) tax at the same time. It was deliberated that GST Laws primarily intended to provide a common national market for goods and services (one nation one tax) while removing the cascading impact effect of tax. The following illustration was provided to highlight the point-:

Old system		GST system	
Manufacturing cost of Chocolate	2000	Manufacturing cost of Chocolate	2000
Add: Profit @20%	400	Add: profit @20%	400
Total Cost	2400	Total Cost	2400
Add : Excise duty @10%	240	Add : Excise duty @10%	N/A 0
Cost after Tax	2640	Cost after Tax	2400
Add: Vat @10%	264	Add: Vat @10%	N/A 0
Cost to Customer	2904		2400
		Add : GST 20%	480
		Cost to Customer	2880

It was stated that, generally, the source of power for enactment of laws is Articles 245 and 246 and the fields of legislation are normally identified in List I, II and III. However, the source of GST legislation is Article 246A and the field of legislation is also embedded in 246A. Hence, the field is a tax on supply and the source of power is vested both with the parliament and the states to exercise it simultaneously except in case of Integrated Goods and Services Tax (IGST). Thereafter, it was pointed that tobacco products suffer an aggregate duty and tax composition of about 320% constituting essentially of four levies viz. GST, Cess, Excise Duty and National Calamity Contingency Duty. In *V.S. Products v. Union of India 2022 SCC OnLine Kar 35 (Writ Petition No. 52371/2019)* the issue was whether the four levies can be imposed concurrently and whether tobacco products can be taxed under two fields of legislation against the mandate of Article 246A. It was held that merely because the expression ‘notwithstanding’ has been used in Article 246A, it cannot denude the existing power under Article 246. It was stated that Article 246A embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. If

GST laws were put in List III of the Seventh Schedule, it would have been subject to the doctrine of repugnancy giving Parliament the unbridled power (which was not desired).

Further, Article 279A was discussed in light of the formation of the GST Council and it was stated that the entire operability of the law is regulated by it; GST Council is the forum which frames all the rules, concessions, notifications etc. and all the decisions of the GST Council shall be taken at a meeting by a majority of not less than three-fourth of the weighted votes of the members present and voting. Furthermore, the GST Council is empowered to make recommendations on taxes to be subsumed; goods and services subjected to GST; model GST laws, principles of levy, apportionment of IGST, place of supply; threshold limits of turnover for exemption from GST; rates including floor rates and bands of goods and services; any special rates for a specified period, to raise additional resources during any natural calamity or disaster; special provision for north-eastern states; and any other matter relating to GST as the Council may decide. A reference was made to Article 269 and 270 to underscore the harmonized structure of goods and services tax regime as regards apportionment of taxes and distribution of revenue between the union and the states.

Thereafter, the scope of judicial review in tax legislations was elaborately discussed in light of the doctrine of judicial deference, wide latitude and small repairs. On the doctrine of judicial deference it was commented that it is legislative deference which takes center stage as historical accounts suggest that every time judicial review of a tax legislation takes place and a declaration of law is made, retrospective amendments are made to set it to not. For instance, in *Canon India v. Commissioner of Customs* 2021 SCC OnLine SC 200 (Civil Appeal No.1827 of 2018), while the powers of the officer of the Directorate of Revenue Intelligence (DRI) were struck down by the Supreme Court, was reinstated with retrospective effect. Similarly, in *State of West Bengal v. Calcutta Club Limited* (2019) 19 SCC 107, wherein taxation between members of the club and association were held to be non-existent as there was no supply *inter se* between them, were retrospectively brought into the GST umbrella. Subsequently, the history of judicial deference and the circumstances under which the wide latitude doctrine (legislature has all the wide powers to bring about a legislation because they know it best) was introduced in the United States and its application in the Indian Constitutional framework as regards taxing statutes were discussed in detail. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) it was held that legislature is

entitled to its judgment even if the wisdom of the policy be regarded as debatable and its effects uncertain. The application of the wide latitude doctrine in India was elucidated by discussing *Gorantla Butchaiah Chowdary v. State of Andhra Pradesh* 1958 9 STC 104 AP and *R.K. Garg v. Union of India* (1981) 4 SCC 675. Thereafter, the relevancy of the wide latitude doctrine in present times was questioned; it was suggested that every legislative amendment apropos GST have been made through rule making power. Generally, no statutory mechanism in the fiscal legislations have the delegated legislative power being conferred to make retrospective laws, however, in GST there is a specific power conferred on retrospective legislation to the rule making authority (Central Government) and that power has been exercised *ad nauseam*. Therefore, it is a conundrum of balancing the state's legitimate interest of espousing progress and economic development vis-à-vis citizen's rights and expectation of certainty of law. It was stated that GST law has breached the certainty of law principle enunciated in the *Canons of Taxation* by Adam Smith. Thereafter, the doctrine of small repairs (object of the sovereign in bringing about retrospective legislations is to make small repairs, correct inadvertent errors that may have crept in to the legislations) was discussed by referring to *Assistant Commissioner of Urban Tax Land v. The Buckingham & Carnatic Co.* (1969) 2 SCC 5. It was opined that most of the amendments in GST legislation which have been introduced with retrospective effect are not 'small repairs' rather there is a mistake in the design itself.

Finally, the various challenges that are being made to provisions of GST legislation under Article 226 were deliberated:-

- Sections 109(3) & 109(9) dealing with constitution of GST Appellate Tribunal, the manner and appointment of judicial members;
- Arrest provisions under Section 69;
- Anti-profiteering provisions under Section 171 & rules framed thereunder;
- Retrospective amendment under Section 140 defining 'eligible duties and taxes';
- Section 16(2)(c) denying credit to the recipient in case tax is not deposited by the supplier;
- Rule 90(3) which treats rectified refund application as fresh refund application;

- Section 13(8)(b) & 8(2) of the IGST Act which deems that the place of supply in cases of intermediary services will be the location of intermediary;
- Differential tax treatment for services provided through e-commerce operator and through offline mode.

Session 2

Theme - Concept of Supply: Mixed and Composite Supply

Panel - Justice A.K. Jayasankaran Nambiar and Mr. S. Ganesh

On the theme of *Concept of Supply: Mixed and Composite Supply*, the discussion commenced by highlighting classification issues and the conundrum of mixed and composite supply. Subsequently, an overview of the basics of taxing statutes was deliberated. It was iterated that any taxing statute must specify the nature, subject, measure and the rate of tax. It was stated that GST is a tax on the supply of goods/service by a taxable person and is levied on the price at the rate specified in the tariff. The classification of the goods/service for taxation is provided under the Custom Tariffs Act, 1975 which is aligned to the Harmonized System of Nomenclature (HSN).

Thereafter, the concept of supply as a single taxable event in CGST Act was elaborated. The definition of supply was discussed and the ingredients to constitute supply were explained. The various nature of activities that are included in the scope of the term supply were emphasised upon. Concept of Deemed Supply (Schedule I); Declared Supply (Schedule II) and Negative List of Supplies (Schedule III – not taxable) was elaborated. Further, the definition of composite supply as provided under Section 2(30) of the CGST Act was discussed and its constituents were explained. For instance, transportation of goods undertaken along with packing and insurance would be treated as supply of one service/goods that provides the bundle with its essential character i.e, the principal supply; and the tax rate is that applicable to the principal supply. Thereafter, it was iterated that the question of whether a particular supply is a composite supply or a mixed supply would arise only if two or more taxable items are supplied together to a single customer as part of one single inseverable transaction. For instance, a hotel can offer four distinct types of services – room, breakfast, use of swimming pool and gymnasium. These could be individual supplies or can be bundled together as one inseverable supply. Therefore, the question of whether a supply is a mixed supply or a composite supply would arise only if it is part of a one single

integral inseverable transaction. The service of accommodation alongwith complimentary benefits of breakfast, swimming pool and gymnasium for a single inseverable supply, would undisputedly be a composite supply as these are supplies which are ordinarily bundled together. However, if the transactions are broken up so that it is no longer a single inseverable package even though it may be the same hotel it would not be a composite supply, these would instead be treated as separate supplies. Similarly, for an economy class airline ticket which includes meal or refreshments being served onboard and for a business class ticket which includes a value added element of use of the lounge, these will be considered as a single inseverable package since it is not open to the customer to not avail the services being offered along with the ticket. Hence, both will be treated as composite supplies.

Furthermore, the definition of mixed supply as provided under Section 2(74) of the CGST Act was discussed. It was expounded that if the supply of two or more goods/services/combination thereof is naturally bundled then it constitutes as a composite service, otherwise it is a mixed supply. It was pointed that mixed supplies are charged at the highest rates applicable for the individual goods/services. Hamper of dry fruits, sweets, chocolates, aerated drinks and fruits supplied for a single price were cited as examples of mixed supply. Subsequently, certain cases were highlighted on mixed and composite supply:-

- *Torrent Power Ltd. v. Union of India – 2020 (34) GSTL 385* – Whether charges such as application fee, meter rent, testing fee etc., collected in connection with transmission/distribution of electricity to consumers liable to GST? – Held: Since charges were collected as authorised by the Electricity Act & Rules, supply has to be seen as a composite supply comprising of principal supply of electricity which was exempt and other incidental/ancillary services.
- *In Re: HP Sales India (P) Ltd. – 2020 (38) GSTL 505 (AAAR, Maharashtra)* – Supply of electro ink along with other consumables like blanket, photo imaging plate, binary ink developer & other machinery products –Held: there is no principal supply and hence it is only a mixed supply.
- *In Re: Sandvik Asia (P) Ltd. – 2019 SCC Online Raj AAR-GST II (Advance Ruling No. RAJ/AAR/2018-19/21 Dated 18.03.2019)* – Where after sales support services were under

an agreement that showed separate supply of parts and services – Held: it was a mixed supply.

- *In Re: Nikhil Comforts – (GST-ARA-127/2018-19/B-59 Dated 24.05.2019)* – Supply of air conditioning systems; supply included not merely the basic air conditioning machinery but also the complete service of installation of A.C units – Held: it was a composite supply.
- *In Re: M/S. Kundan Mithan Bhandar – (AAR Ruling No. 09/2018-19 Dated 22.10.2018)* – Whether supply of pure food items such as sweetmeats, namkeens, cold drink and other edible items from sweetshop which also runs a restaurant is a transaction of supply of goods or a supply of service? – Held: it was a composite supply.

The cases of *In Re: Taranjeet Singh Tuteja & Brothers (STC/AAR/05/2018 Dated 10.10.2018)*, *In Re: Tata Projects Ltd. (TN/17/AAR/2019 Dated 16.04.2019)* and *In Re: Eapro Global (AAR Ruling No. 09/2018-19 Dated 28.08.2018)* were also referred. Lastly, the session was concluded by emphasising that common sense must be the guide in ascertaining the type of supplies in adjudication of GST disputes.

DAY – 2

Session 3

Theme - Valuation, Time & Place of Supply

Panel - Mr. V. Lakshmikumaran and Mr. K. Vaitheeswaran

On the theme of *Valuation, Time & Place of Supply*, the session dwelt upon the importance of valuation in term of excise and customs which forms part of cases coming before courts. It was emphasized that, classification, exemptions notification, place of supply and availability of credit such as input services and input goods are vital for understanding of the GST Act. A reference was made to Sec. 15 of the GST Act, which exclusively indicate the value of taxable supply, giving direction to old excise and customs law to arrive at the value of goods and services under certain parameters. The session dwelt upon the importance of “price” that includes transfer of title and goods coupled with monetary consideration. It was opined that transaction consist of three components, whereby price and cost of product are prerequisite for the arrival of actual value on

which GST has to be paid. The key elements of Sec. 15 such as- transaction value; price actually paid or payable; supplier and the recipient are not related; and price is the sole consideration were areas discussed at length. A reference was made to the case, *Union of India & Ors. V. Bombay Tyre International Ltd 1983 SCALE (2)449* to address the constitutional validity of Sec. 4 of Central Excises Act. It was pointed that during the VAT regime sale price was taken into account unlike the GST Act wherein price is the sole consideration for the determination. A reference was made to the case of *Commissioner of Central Excise Mumbai v. Fiat India Pvt Ltd*, Civil Appeal Nos. 1648-1649 of 2004 wherein the court addressed consideration that can be perceived as flowing from the dealer to the manufacture.

It was accentuated that inclusions such as - amount incurred by recipient of supply for which supplier is liable; interest/late fee/ penalty for delayed payment of any consideration; subsidies directly linked to the price; and incidental expenses charged by supplier must be include in the transaction value. A reference was made to the valuation rules relating to consideration not wholly in money (rule 27), valuation of supplies to distinct or related person (rule 28), and valuation of supplies made through an agent (rule 29). The session involved deliberations on the forward charge and reserve charge with regard to time of supply with specific reference to Sec. 12 of the GST Act, 2017. It was emphasized that reverse charge was discovered during the service tax regime and authority of purchase tax mechanism was cited to highlight the provisions of reverse charge. Discussion on the legal services and goods transport agency services with regard to the reverse charge and its applicability also formed part of the session. It was stressed that reserve charge should consist of various key points such as - date of receipt of goods, date on which payment is entered into the book of accounts, and debited to the bank. Section 2(33) of the Act with regard to the continuous supply of service and Article 286 of the Constitution that imposes restriction of tax on the sale or purchase of goods were also highlighted. The session underlined the concept of inter-state supply and intra-state supply with a reference to Sec. (s) 7 & 8 of the GST Act. Lastly, Article 45 of the EU VAT directive and Sec. 11A(1)(e) of the Goods and Services Act, 1985 of New Zealand were reflected upon.

Session 4

Theme - Input Tax Credit

Panel - Justice Mohammed Shaffiq Mr. N. Venkataraman Mr. Sujit Ghosh

On the theme of *Input Tax Credit*, the session highlighted that 101st Constitutional amendment mark a paradigm shift in term of the quality of the taxation power which is vested between the center and states. It was emphasized that prior to GST, courts have categorically appreciated the share magnitude of taxing by series of pronouncements on division of taxation power between the union and states to avoid overlaps and have clear demarcation with no concurrent levy. It was stressed that post GST Article 246 enabled both the center and states to levy tax on the same taxable event which is the supply of goods and services. It was pointed that GST does not encompass the entire gamut of indirect tax. It was stressed that certain goods such as petroleum products, alcohol liquor for the human consumption and customs duty are still kept out from the purview of the GST.

The staged payment system for taxes with regard to input tax credit along with the doctrine of neutrality and doctrine of substantial compliance formed part of the discussion. The scope of value addition, OECD guidelines, and destination based tax on consumption were also deliberated upon. The concept of blocked credit and exempted supply were emphasized to break the chain of input tax credit. A reference was made to the case of *ALD Automotive (P) Ltd. v. CTO*, (2019) 13 SCC 225, and *Jayam & Company. v. Commissioner and another*, (2016) 15 SCC 125 to identify the issue of VAT credit. The session threw light on the importance of strict and literal interpretation while referring the case of *Commissioner of Customs (Import) v. M/S. Dilip Kumar and Company & Ors*, Civil Appeal No. 3327 of 2007. A reference was made to the case of *Amrit Banaspati Co.Ltd. v. State of Punjab*, 1992 AIR 1075 wherein the Apex court has extended the benefit of refund.

It was emphasized that input tax credit is the basic structure of GST and holds the position of statutory right. A reference was made to the case of *Union of India v. VKC Footsteps India Pvt Ltd* 2021 SCC OnLine SC 706 where the apex court categorically stated that the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. Further, it was added that the fundamental

object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain during the course of deliberation.

A reference was made to the case of *Plessy v. Ferguson*, 163 U.S. 537 (1896) where the court adopted the separate and equal doctrine which was later on rejected in the case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The doctrines of judicial deference and wide latitude also formed part of the discussion. Various provisions of the GST Act including Sec.17 and Schedule III were also explained during the session.
