

**National Workshop for High Court Justices**

**on the Regime of Goods and Services Tax**

**(GST)**

**[P- 1306]**

**17<sup>th</sup> & 18<sup>th</sup> September 2022**

The National Judicial Academy organized a two day workshop for Judges of the High Courts on the regime of Goods and Services Tax (GST) which was attended by 38 participants. The constitutional grounding of Goods and Services Tax, fiscal federalism and emerging challenges under the GST regime were the subject of intensive discussion during the workshop. The workshop also provided a forum to deliberate on critical issues regarding supply, valuation and input tax credit under GST.

### **Session 1- Fiscal Federalism and Architecture of GST: Constitutional Perspectives**

The concept of federalism was described as an alliance between various governments and the distribution of powers between such governments and two forms of federalism *viz.* dual federalism (layer cake federalism) and co-operative federalism (marble cake federalism) were elaborated upon. The federal structure adopted in the Indian Constitution was explained with specific reference to the tax regime. The challenges in the erstwhile indirect tax system in terms of multiplicity of taxable events, varying rates of taxes, and absence of portability of tax credit between states were discussed as the factors leading to the adoption of the GST system, in a bid to make the indirect tax system user-friendly. The 101<sup>st</sup> amendment to the Constitution of India was discussed and the objectives of the introduction of the GST System in India *viz.* the adoption of a unified system of tax and the creation of a harmonised national market were highlighted. Discussions were also undertaken on Article 279A with specific regard to the GST Council, its recommendatory role and the procedure of decision-making adopted by the GST Council. The settlement mechanism envisaged under the Article 279A(11) was also highlighted and it was opined that the formulation of a settlement mechanism presupposes that the GST Council has the power to bind which is contrary to the recommendatory nature of the GST Council and would amount to creation of a parallel adjudicatory system.

The judgment of the Supreme Court in *Union of India v. Mohit Minerals Pvt. Ltd.* [(2022) 61 GSTL 257 (SC)] was elucidated wherein it was held that the recommendations of the GST Council are recommendatory and not binding. It was stated that the power to tax is a sovereign power; and the imposition of the decisions of the GST Council would amount to ceding this sovereign power to the GST Council. However, the government would be bound by the recommendations of the GST Council while enacting subordinate legislation and in the exercise of its rule making powers. Further, it was stated that the GST regime in India envisages cooperative federalism which involves a dialogue between the Union and the States.

Concerns were expressed regarding the achievement of consensus in the functioning of the GST Council and implications in cases where such consensus is not achieved. It was also stated that the failure to achieve consensus would lead to disputes. A comparative analysis of the GST system in Canada was also undertaken to present the rationale and necessity for the amendment of the Indian Constitution to introduce the Goods and Services Tax. Furthermore, the judgment of the Supreme Court of Canada in *Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445 was elaborated along with the aspect theory and necessarily incidental doctrine.

## **Session 2- Concept of Supply; Mixed and Composite Supply**

The five main elements in taxation i.e. taxable event; person liable to pay tax; time of incidence of tax; rate of tax and procedure for collection of tax were focused upon. It was stated that in GST the taxable event is supply and the definition and scope of supply as provided in Section 7 was elaborated upon. The contentious issues relating to supply in case of electronics and intangibles were also discussed. The session included deliberations on issues including levy of tax on the re-import of aircrafts, aircraft engines and other aircraft parts into India after repair undertaken abroad; categorization of software as good or supply etc. The various issues

emanating due to HSN classification was the also subject of discussion during the session. In regard to the composite supply and mixed supply, Section 2(30) and 2(74) respectively of the CGST Act were discussed and the concept of principal supply was elaborated upon. Thereafter, the session included discussions of various scenarios regarding GST applicability on varied situations including hotel accommodation; restaurants; eating joints; supply of services onboard airplanes including sale of eatables/ food; supply of medicines, and implants, food to patients and visitors; healthcare services; installation of renewable energy installations; education sector including supply of printed study materials and uniforms etc. Expounding upon the concept of supply, the judgment of the European Court of Justice in *Card Protection Plan Ltd. v CCE* [1999] 2 SC 601 and the judgment of Supreme Court of India in *Union of India v Mohit Minerals* (2022) 61 GSTL 257 (SC) were discussed.

### **Session 3 -Valuation, Time and Place of Supply**

Valuation was highlighted as a fundamental element of the GST which addresses the question of the ‘measure of tax’. Under the GST system, the value of the supply is the measure which is subject to tax. The term ‘value of taxable supply’ was explained to be the transaction value which is the price actually paid or is payable for the supply of goods and/or services; and which has been determined between unrelated parties. Further, this price is accepted if the price is the sole consideration for the transaction, and there are no other consideration or arrangements which influence or impact the price. The inclusions in the transaction value i.e. the amount incurred by recipient of supply for which the supplier is liable; interest/ late fee/ penalty for delayed payment of any consideration; subsidies directly linked to the price excluding subsidies provided by Central or State Government; and additional costs associated with the transaction like shipping, delivery, packaging etc. were discussed. It was emphasized

that the only permissible deduction in the transaction value is the GST paid in the particular transaction. The judgments in *CST v. Rita Sales Corporation* (1984 SCC OnLine MP 47) and *CCE v. Fiat India (P) Ltd.* [(2012) 9 SCC 332] were also discussed. The determination of value in barter transactions was highlighted as a challenge. It was stated that in case of barter of goods or services of varying value and which attract different rate of tax, it is unclear as to which chain of transaction in the barter transaction is to be the basis for determination of transaction value.

The time of supply was stated to be relevant for ensuring certainty in terms of the date on which the liability arises for the payment of GST. It also impacts the value that is taxable due to the exemptions operating on the specified time of supply, and also determines the rate of tax applicable. It was stated that the time of supply for goods is determined on the basis of date of invoicing or the date of receiving the payment. A distinction was drawn between the provisions regarding the time of supply in the erstwhile indirect tax regime and the present GST regime. The determination of time of supply of goods and services as stated in Sections 12 and 13 of the Central Goods and Services Act, 2017 respectively were also explained. The place of supply was emphasized as an important concept in GST as it is a destination based consumption tax. Hence, the place of supply is relevant to determine the nature of supply whether inter-state or intra-state and also to determine the state to which the GST is to be paid.

#### **Session 4 - Input Tax Credit**

It was stated that GST is a multi-stage levy of tax which provides allowance of input tax credit and mitigates the cascading tax burden. The landmark judgments of the Supreme Court in *Collector of Central Excise, Pune v. Dai Ichi Karkaria* [(1999) 7 SCC 448] and *Eicher Motors Ltd. v Union of India* [(1999) 2 SCC 361] were discussed to elaborate upon the

concept of input tax credit in the erstwhile MODVAT regime. The eligibility for ITC provided under Section 16 of the CGST Act, 2017 was highlighted alongwith the situations under Sections 16(2)(c) and 16(2)(d) wherein input tax credit is denied. It was opined that the principle of *lex non cogit ad impossibilia* applies to these provisions of denying credit since the buyer cannot impose upon the supplier to pay his dues and it would be impossible to comply with the requirements. It was also asserted that the provisions are arbitrary since they penalize the purchaser for the breach by the supplier irrespective of the fact that the purchaser has discharged his duty. The operational difficulties in implementation of the GST system were identified as obstacles in the successful implementation of the vision of the GST regime. The anti-profiteering measure under Section 171 of the CGST Act, 2017 was also discussed with regard to benefit of input tax credit due to reduction in rate of tax after enactment of the CGST. The session also involved deliberations on Section 17(5)(d) regarding the absence of input tax credit for construction of immovable property. Furthermore, the restriction of input tax credit under Section 17 (2) was also subject to extensive deliberation. It was stated that there is no one to one correlation and the accumulated input tax credit can be utilized for any goods or service. The problems arising out of issuance of various circulars lowering the rate of GST and withdrawing input tax credit was also highlighted since it had resulted in accumulation of excess credit. It was opined that GST is based on the concept of tax neutrality wherein the taxes in the system are paid by the consumer and the businesses does not bear the tax. It was opined that there must be always strict interpretation of fiscal statutes unless such an interpretation would lead to absurdity. It was also stated that if there are any ambiguity in the statute then it should be read in favour of the assessee. Reference was also made to the concept of judicial deference, wide latitude doctrine and it was stated that scope of judicial review is very narrow in fiscal matters. Lastly, the legal quandary regarding refund of unutilized input credit under Section 54 was elaborated upon with reference to *VKC Footsteps*

*India Pvt. Ltd. v. Union of India* [2020 SCC OnLine Guj 3206] and *Tvl. Transtonnelstroy Afcons Joint Venture v. Union of India*, [2020 SCC OnLine Mad 2570] and *Union of India v. VKC Footsteps* [(2022) 2 SCC 603] .

### **Session 5- Emerging Challenges in GST Regime**

The paradigm shift in the taxation regime with the introduction of GST was highlighted, and the necessity for the constitutional amendment to introduce this regime was noted. It was underscored that judges need to proceed on the assumption that the GST is a new regime with new concepts and systems, rather than viewing it from the lens of the erstwhile regime. The fundamental principles of taxation were dwelt upon to understand the operative concepts of the GST legislations, the need of this law and the objective sought to be achieved. The basic features of tax viz. taxable event, subject, measure of tax, rate of tax, and assessment were explained. These basic features were emphasized upon as a basis to test the validity and legality of any tax. The perception of tax as a coercive extraction of money from the individual was discussion, and the converse perception of tax as voluntary act of the individual as consent to be governed in a welfare state was highlighted. Article 265 was discussed to understand the concepts of 'levy of tax' and 'collection of tax' and the principles of interpretation of taxing statutes was briefly elucidated. It was stated that the GST system is a new system with a vision, but this system will fail if the vision does not percolate to lowest level.

The challenges posed by the multiplicity of rates and the potential litigation that would arise in this aspect was discussed. In this regard it was stated that varied rates generate confusion and in most situations the assessee would attempt to fit the product in the category attracting lower rate. This would lead to litigation where the High Court would be called upon to determine the categorisation under GST. The HSN Classification was emphasised as an

internationally accepted system of classification which is used as a guide to base the tariff and classification. It was also stated that the definition of 'supply' in the GST Act is an inclusive definition which would be subject to interpretation to include evolving nature of transactions. Input tax credit was highlighted as a measure to eliminate the cascading effect of tax and the concept of cascading effect was explained in detail with illustrative examples.

The non-constitution of appellate authorities was underscored as a major issue in the GST system. It was also stated that the assessment officer is the first authority the assessee interfaces with in the GST system, wears two hats i.e. the role of a tax collector and the role of an adjudicator. This introduces a conflict of interest as the assessment officer is bound to achieve a target of tax to be collected, and this could lead to unfair rulings by the assessment officer. Further, the tribunals largely comprise of technical members and hence there could be leaning in favour of the government. All these factors lead to an imbalance between the assessee and the revenue and the hearing of the case may be one-sided till it reaches the High Court. Consequently, it becomes necessary for the High Courts to be vigilant and to examine each case carefully to ensure fair adjudication.

Discussions were also undertaken regarding the mechanism of search, seizure and recording of evidence under the GST Act. It was stated that the statements recorded by the GST authorities are admissible. This provision may be subject to misuse as the employed officials of a company or business entity can be coerced to give a statement implicating the top functionaries of the organisation. Hence, the participant justices were advised to exercise caution while appreciating the evidence in cases before them.