

NATIONAL JUDICIAL ACADEMY



NATIONAL WORKSHOP FOR HIGH COURT JUSTICES ON THE REGIME OF GOODS AND SERVICES TAX (GST) [P-1321]

10TH & 11TH DECEMBER, 2022

PROGRAMME REPORT

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OVERVIEW OF THE WORKSHOP

The National Judicial Academy organised a two day Workshop for High Court Justices on the Regime of Goods and Services Tax (GST) on 10th & 11th December, 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 scheme of the workshop was 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

Session 5 – Emerging Challenges in the GST Regime

DAY – 1

Session 1

Theme - GST: Constitutional Perspectives

Speakers: Justice A.K. Jayasankaran Nambiar and Mr. N. Venkataraman

On the theme of *Goods and Services Tax (GST): Constitutional Perspectives*, the basic tenets of taxation was focused upon. It was iterated that any taxing statute must specify the nature, subject, measure and the rate of tax. While expounding on Article 265 of the Constitution the case of *Mafatlal Industries v. Union of India, 1997 5 SCC 536* was underscored wherein it was held that tax levied or collected without the authority of law must be refunded. Similarly, in *Commissioner v. Larsen and Toubro Limited, (2016) 1 SCC 170* it was held that the absence of charging or machinery provision would render the levy of tax invalid.

Coming to the Constitution (One Hundred and First Amendment) Act, 2016, it was delineated 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. It was stressed that GST is a levy which succeeded a dozen plural levies imposed by both the centre and the states 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 intend to provide a common national market for goods and services while eliminating the cascading effect of tax. Subsequently, the observation made by the apex court in *Union of India v. VKC Footsteps India (P) Ltd., (2022) 2 SCC 603* was highlighted on the point of cooperative federalism.

Thereafter, it was iterated 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). It was stated that Article 246A embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence.

Further, Article 279A was discussed in light of the constitution 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 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. It was opined that Article 279A is a reflection of the concept of 'pooled sovereignty' to which both the centre and states are committed that they will not aggrandize or diminish their plenary power. Thereafter, the case of *Union of India v. Mohit Minerals Pvt. Ltd.*, 2022 SCC OnLine SC 657 was cited and it was reflected that in case of secondary legislation the recommendations of the GST Council are binding.

Lastly, the case of *M/S Hero Moto Corp Ltd v. Union of India Civil Appeal No. 7405 of 2022 (Supreme Court)* was discussed on the point of promissory estoppel. It was held that promissory estoppel would not apply against the exercise of legislative powers of the State. It was further held that the only exception with regard to applicability of the doctrine of estoppel is where it is necessary to prevent fraud or manifest injustice.

Session 2

Theme - Concept of Supply: Mixed and Composite Supply

Panel - Justice B.D. Karia and Mr. S. Ganesh

On the theme of *Concept of Supply: Mixed and Composite Supply*, the discussion commenced by highlighting issues relating to classification and the conundrum of mixed and composite supply. 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 which constitute supply were explained. The various nature of activities that are included in the scope of the term 'supply' were emphasised. 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 elaborated that if the supply of two or more goods/services/combination thereof is naturally bundled then it constitutes a composite service, else 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 Misthan 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.

Session 3

Theme – Valuation, Time and Place of Supply

Panel - Justice B.D. Karia and Mr. K. Vaitheeswaran

On the theme of *Valuation, Time and Place of Supply*, the session elaborated upon the importance of valuation in term of excise and customs which forms part of cases coming before courts. Thereafter, Section 15 of the GST Act was discussed. Section 15 exclusively indicate the value of taxable supply, inclusions and exclusions. Further, 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. A reference was made to the case of *Union of India v. Bombay Tyre International Ltd (1983) 4 SCC 210* in which the constitutional validity of Section 4 of Central Excises Act was challenged. In *Commissioner of Central Excise Mumbai v. Fiat India Pvt Ltd, Civil*

Appeal Nos. 1648-1649 of 2004 the court addressed consideration that can be perceived as flowing from the dealer to the manufacturer. 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 included 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 Section 12 of the GST Act. 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 from 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.

DAY – 2

Session 4

Theme – Input Tax Credit

Panel - Justice M. Shaffiq and Mr. K. Vaitheeswaran

The session on ***Input Tax Credit*** commenced by highlighting the power of the sovereign to levy tax in light of specific judgments. In *Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1* it was held that power to levy taxes has been universally acknowledged as an essential attribute of sovereignty. In *Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411* it was held that even legislature cannot enact a law or issue an order or agree to refund the tax realised by it from people in exercise of its sovereign powers, except when the levy or realisation is contrary to a law validly enacted. Subsequently, the definition of ‘Input’ and ‘Input Service’ was delineated. In *CIT v. Walchand (1967) 3 SCR 214*, it was observed that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue. In *CIT v. Dhanraj Giri AIR 1974 SC 1366*, it was observed

that it is not open to the Department to decide what type of expenditure the assessee should incur and under what circumstances.

On the aspect of payment of tax by supplier the case of *Sri Vinayaga Agencies v. The Assistant Commissioner (CT), Chennai and another* 2013 SCC OnLine Mad 323 was discussed wherein it was held that the department is not empowered under Section 19(16) of the TNVAT Act to revoke the input tax credit availed on the plea that the selling dealer has not paid the tax when the petitioner-dealer has paid tax to the selling dealer and claimed Input tax credit by way of self-assessment. Subsequently, in *Union of India v. Bharti Airtel Ltd.* (2022) 4 SCC 328 it was held that the registered person is obliged to undertake self-assessment of ITC, reckon its eligibility to ITC and of output tax liability including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of account required to be statutorily preserved and updated from time to time.

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. The concept of blocked credit and exempted supply to break the chain of input tax credit were emphasised. 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 deliberate the issue of VAT credit. The session threw light on the importance of strict and literal interpretation while referring the decisions in *Eicher Motors Ltd. v. Union of India*, (1999) 2 SCC 361, *Dai-Ichi Karkaria Ltd. v. Union of India*, (2000) 4 SCC 57, *Commr. of Customs v. Dilip Kumar & Co.*, (2018) 9 SCC 1, *Ramnath and Co v. CIT* (2021) 12 SCC 217 and *State of Kerala v. Mother Superior Adoration Convent*, (2021) 5 SCC 602.

Thereafter, as regards the issue delivery of goods the case of *Poppatlal Shah v. BSNL*, AIR 1953 SC 274 was cited wherein it was held that delivery of goods is essential to the transaction of sale. It was opined that mere payment through bank account is not proof of delivery of goods. In *Rattan Steel v. State of Tamil Nadu*, (2014) 69 VST 402 and *Balaji Enterprises v. CCT*, 128 STC 414 it was respectively held that mere fact of payment by cheque and mere record of bank payment is inadequate to prove movement and delivery of goods. The burden is on the assessee to prove the movement and delivery of goods.

Session 5

Theme – Emerging Challenges in the GST Regime

Panel - Justice A.K. Jayasankaran Nambiar and Mr. K. Vaitheeswaran

On the theme of *Emerging Challenges in the GST Regime*, it was asserted that till there is one rate of tax the litigation pertaining to classification, valuation and rate of tax will be on rise in the High Courts. Additionally, in absence of a specialised GST Tribunal it was opined that a lot of litigation will flow to the High Court under Writ Jurisdiction. It was suggested that the minutes of GST Council meeting may help in gauging the significance of passing a particular circular by the tax authorities and can be of aid to the High Court in adjudicating GST disputes. It was suggested that the circulars should be issued by a centralized body after examining the judgments of the Constitutional Courts. Also, concern was raised regarding the decisions of the Advanced Ruling Authority (AAR) as regards the conundrum of mixed and composite supply.

Thereafter, on the point of transitional credit it was commented that the credit from previous regime should automatically flow to the new regime. This issue was considered to be the major drawback in attracting foreign investments. It was asserted that withholding or blocking of refund affects cash flow and ultimately the business. Thereafter, it was opined that the goal of 5 trillion dollar economy is possible only if the trust deficit is reduced between businesses and tax authorities. The following suggestions were put forth:

- Law should be amended to procure goods and services without GST for exports and also zero rate the same in the hands of the supplier.
- Concept of blocked credit should not exist in the GST regime.
- Amendments linked with receipt of foreign exchange for goods will have to be removed.

It was suggested that data analytics will be of immense significance to make the tax collection system more robust. Similarly, it was opined the e-invoice facility if adopted fully would go a long way in augmentation of revenue. The session concluded by emphasising that common sense must be the guide in ascertaining the various modalities in adjudication of GST disputes.