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CASE LAWS - GST / SERVICE TAX

1. SERVICE TAX – CONSTRUCTION SERVICES TO CHARITABLE TRUST REGISTERED U/S 12AA OF THE INCOME TAX ACT 1961 – EXEMPT UNDER SL.NO.13(C) OF NOTIFICATION NO.25/2012-S.T. DT.20.06.2012 – SERVICE TAX ALREADY PAID CAN BE CLAIMED AS REFUND

CA. VIJAY ANAND

In TalanpurRamsabha Bhawan V. CGST, Cus. & C. Ex., Jodhpur 2020(37) GSTL52 (Tri-Del.), the appellant applied for refund of Service Tax of Rs.4,07,514/- paid on services provided by 'M/s. Balaji Construction Company' on the grounds that these services were not taxable because the appellant is a 'Charitable Trust' registered under Section 12A/12AA of the Income Tax Act, 1961 and have also submitted a copy of Certificate issued under Section 12AA of the Income Tax Act, 1961 [earlier Section 12A(a)]. The trust is running a 'Satsang Bhawan' which is meant predominantly for religious use by general public. They are also registered vide Registration No. AAATT3056FSD001 for discharging their Service Tax liability under reverse charge mechanism, on works contract services availed of by them. Such works contract is related to construction of building for religious use by general public. The service provider issued the invoices and charged Service Tax therein. They paid the Service Tax and value of services to the service provider. As per invoices issued by the service providers, they had charged 50% of the tax payable in their invoices and as per invoices, remaining 50% tax was to be paid by the appellant being service receiver, under reverse charge mechanism. Accordingly, they deposited remaining 50% tax.

Subsequently, they came to know that services provided by the service provider in question was exempt from whole of the tax leviable thereon, vide S.No. 13(c) of Notification No. 25/2012-S.T., dated 20-6-2012. Therefore, they filed the refund claim for Rs.4,07,514/- for whole tax, as paid by them as well as the service provider.

On appeal, the Tribunal observed as under:

1. The appellant is in possession of the certificate of registration under Section 12A(a) read with Section 12AA of the Income Tax Act. The certificate is granted under Section 12A and the procedure for grant of certificate is given in Section 12AA of the Income Tax Act.

2. Furthermore, it is evident from the certificate of registration dated 8-12-1998, that the appellant is having the status of being registered under the provisions of Section 12AA of the Income Tax Act which continues for financial years 2014-15 and 2015-16 by the Income Tax authorities which is applicable to Charitable Trust registered under Section 12AA, as is evident from the intimation under Section 143(1) of the Income Tax Act issued by the Income Tax Department.

3. Consequently, the exemption under S.No. 13(c) of Notification No. 25/2012-S.T., dated 20-6-2012 cannot be denied.

Hence, the appeal was allowed with consequential relief.

2. <u>SERVICE TAX – TURNOVER FOR THE MEGA NOTIFICATION WOULD MEAN AGGREGATE OF SALES AND / OR SERVICES – INCREASE IN INVENTORY DUE TO PURCHASE OF INVENTORY NOT TO BE INCLUDED</u>

In SGS Construction & Developers Pvt. Ltd. V CST, , New Delhi2020(37) GSTL 201 (Tri.-Del.), the appellant is involved in the business of development of properties and are registered under service tax for legal consultancy services, etc.

The appellant paid the service tax on reverse charge basis, in the F.Y. 2012-13 upon receiving legal consultancy services, even though the appellant was eligible for exemption under the Notification No. 25/2012-S.T. (at Sl. No. 6) which exempted a business entity from Service Tax, if the turnover in the previous financial year was equal to or less than 10 lakhs rupees. The appellant's turnover for the F.Y. 2011-12 was Rs.2.04 lakhs and for F.Y. 2012-13 was Rs.6.78 lakhs which was below Rs.10 lakhs, and he was eligible for exemption under Notification No. 25/2012-S.T.

Pursuant to the above, the appellant filed a refund application dated 29-8-2013 for claiming refund of Service Tax wrongly paid on receiving legal consultancy services, for the period of October 2012 to December 2012, along with all relevant documents including its profit and loss account for the year ending 2011-12 which was rejected by the adjudicating authority and the first appellate authority. On further appeal, the tribunal observed as under:

1. The expression "turnover" is not defined in the Notification No. 25/2012-S.T. or in the Finance Act, 1994, and hence in order to interpret the meaning of the said term, in Serial No. 6 of Notification No. 25/2012-S.T., the common parlance meaning of the said term as understood by those dealing in accounts and taxation would have to be taken.

2. The meaning of the said term has already been authoritatively explained by the Hon'ble Apex Court in the in CIT v. Punjab Stainless Steel Indus. 2014 (307) E.L.T. 214 (S.C.) wherein it was held that for a more accurate meaning of the term turnover one can also look into the dictionary meanings or to the materials which are published by bodies of accountants.

3. Thus, as per the law declared by the Supreme Court, turnover means the aggregate amount for which sales are effected or services rendered by an enterprise.

4. Applying the abovesaid principle to the facts of the present case, the amount of increase in inventory, which the lower authorities have treated as turnover, is not a sale by the appellant as it is only purchase of inventory by the appellant and by no stretch of imagination the same can be construed as turnover.

5. Once the amount pertaining to "Changes in Inventory of work in progress" is excluded from turnover, admittedly the amount remaining is less than Rs. Ten lakhs, and hence the benefit of the exemption is available to the appellant.

In view of above, the appeal was allowed and the respondents were directed to grant the refund with interest as per Rules, within 8 weeks from the receipt of the order.

3. SERVICE TAX – INTELLECTUAL PROPERTY SERVICES – SERVICES RENDERED BY FOREIGN COMPANY PURSUANT TO THE AGREEMENT FOR TRANSER OF TECHNOLOGY AND TECHNICAL ASSISTANCE FOR PRODUCTION OF AIRCRAFTS – NOT IN THE NATURE OF IPR – NO LIABILITY UNDER RCM

In Hindustan Aeronautics Ltd. v. CST, Bangalore-I 2020(38) GSTL75 (Tri-Bang.), the appellants are engaged in the manufacture and overhaul of aircraft engines and parts; they are registered under the taxable service category of 'Management, Maintenance or Repair Service'. The appellants have entered into an agreement with Rolls Royce Turbomeca Limited, U.K. as part of Inter-governmental agreement

between Govt. of India and Govt. of United Kingdom. In accordance with the contract, the appellants have made payments towards the transfer of technology, design, drawing, technical know-how, intangible assets etc. to the overseas company. The adjudicating authority confirmed the demand on the same under Reverse Charge Mechanism (RCM) holding that the payments made by the appellants to the overseas entity are in respect of a service received by them under the head "Intellectual Property Rights" (IPR). On appeal, the tribunal observed as under:

1. The appellants received similar services by virtue of Inter-governmental agreements in the manufacture of Sukoi aircraft at different locations in the country. The department has viewed the services received in a different manner at different places while it has been viewed as Consulting Engineer Services in respect of the units in U.K. it was viewed as Scientific and Technical Consultancy Services in respect of the unit at Nashik and in the instant appeal, the department seeks to categorize the services as Intellectual Property Rights Services (IPR).

2. On perusing the agreement and Board's circular issued in this regard, it is clear that there is a certain transfer of know-how involved it is not coming from the records of the case that such technical know-how, design, copy right etc. have been patented in India in view of the clarification given by the Board unless such technical know-how etc. are listed under the law for time being in force in the country and the services cannot be held to be a taxable service.

3. Consequently, the services received by the appellants from Rolls Royce Turbomeca Limited, U.K. are not in the nature of IPR as defined under Finance Act, 1994.

Hence, the appeal was allowed with consequential relief.

4. SERVICE TAX – RAIL TRANSPORT OF SPICES, MASALE ALONG WITH FLOWERS, TEA, COFFEE, JAGGERY, SUGAR, MILK PRODUCTS, EDIBLE OIL ETC. – TRANSPORT OF FOOD STUFF ELIGIBLE FOR EXEMPTION SL.NO.20(i) OF NOTIFICATION NO. 25/2012-S.T. STRICTURES AGAINST THE ADJUDICATING AND APPELLATE AUTHORITIES FOR NOT CONSIDERING THE DOCUMENTS ALREADY SUBMITTED

In S. Narendrakumar And Co. v. Commrr. of CGST, Mumbai East 2020(38) GSTL95 (Tri-Mumbai, the appellants are engaged in the manufacture of various kinds of masala products such as Sabji Masala, Chhole Masala etc. etc. and for this purpose they purchase agriculture produce which enhances the aroma, flavour, taste etc. of the food e.g. chilly, turmeric, black pepper etc. After mixing them together, the appellant packed the product in pouches and cleared them by naming them as Sabji Masala, Chhole Masala etc. For distributing these products across the country, the appellants enter into an agreement with 'GatiKintestsu Express Pvt. Ltd.' (GKEPL) in the year 2012 for transporting these products to the buyers situated in different parts of the country through Rail. During the same period, they also availed services of other transporters in transportation of goods by road. GKEPL i.e. the service provider issued invoices to the appellant for transportation of appellant's products by Rail. GKEPL did not charge any Service Tax in the invoices issued by them to the appellant sincethe said transportation by Rail was clearly exempted from service tax by virtue of Notification No. 25/2012-S.T., dated 20-6-2012. However, the appellants paid the service tax under RCM during the period November, 2012 to April, 2013 on a mistaken belief. Upon realizing their mistake, on 28-5-2013 they filed refund claim of the aforesaid amount along with the requisite documents which was rejected by the adjudicating authority and was also sustained by the Commissioner (Appeals).On appeal, the tribunal observed as under:

1. In this matter the refund claimed by the appellant pertains to transportation of goods by rail on which the appellant had inadvertently paid by the appellant although the same was exempted by virtue of Notification No.25/2012-S.T. Revenue has not established any evidence to the contrary of what was submitted by the appellants along with the invoices.

2. Yet, the above was not taken into consideration by the adjudicating authority nor did the Commissioner (Appeals) record any finding about the admissibility or otherwise of these documents and simply observed that these documents might have been submitted after passing of the Order-in-Original since it did not find mention in the order of the adjudicating authority.

3. Neither the adjudicating authority nor the appellant authority took trouble of going through the invoices

produced by the appellant. Learned Commissioner ought to have taken these documents into consideration while passing the impugned order as they are relevant documents for the just decision of the case.

4. A bare perusal of the documents would establish as to how much tax the appellant have paid on transport of goods by rail and how much on the transport of goods by road.

5. Clause (i) of Serial No. 20 of Notification No. 25/2012-S.T., dated 20-6-2012 exempts the services provided by way of transportation by rail from one place in India to another of 'food stuff' including flowers, tea, coffee, jiggery, sugar, milk products, edible oil, excluding alcoholic beverages. The definition of 'food stuff' has not provided anywhere in the Finance Act, 1994.

6. The word 'food stuff' which has been used of in Clause (i) of Serial No. 20 of the aforesaid notification is 'inclusive' and not 'exhaustive'. It is general principle of interpretation that the word 'includes' or 'including' when used, enlarges the meaning of the expression defined so as to comprehend not only such as things as they signify according to their natural import but also those things which the clause declares that they were included. It also means that the Legislature does not intend to restrict the scope of the clause. It makes the definition enumerative but not exhaustive. That is to say, although the term will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise.

7. When a clause uses the word 'includes' it is prima facie extensive. From time to time, spices have been held to be food stuff by various Courts including the Hon'ble Supreme Court. 'Food stuff' could be any substance that is used as food or to make food and therefore, the spices/masale can be termed as 'food stuffs' and falls within the exemption notification as aforesaid.

8. W.r.t.the amount deposited by the appellant wrongly under different head is concerned, it is clear that the amount of service tax for transportation of goods by rail has been wrongly paid by the appellant therefore paying service tax under wrong accounting code or under wrong head cannot be a valid reason for denying the valid refund claim of the service tax erroneously paid by the appellant.

9. Therefore, the appellants are entitled for the refund claimed by them.

Hence, the appeal was allowed and the impugned order was set aside.

5. GST – ADVANCE RULING – ACCOUNTING ENTRY MADE FOR THE PURPOSE OF INDIAN ACCOUNTING REQUIREMENTS IN THE BOOKS OF THE PROJECT OFFICE FOR SALARY COST OF EXPAT EMPLOYEES – NOT LEVIABLE TO GST IN INDIA

In Re : Hitachi Power Europe Gmbh,2020 (39) G.S.T.L. 99 (A.A.R. - GST - Mah.), the appellant is a project office of a company incorporated under the Laws of Germany has been awarded contracts for supply of goods and supervisory services by M/s. BGR Boilers Private Limited (BGRB) in relation to Projects of M/s. NTPC Limited, M/s. MejaUrja Nigam Private Limited and M/s. Damodar Valley Corporation (DVC) being Mega power projects, located in Maharashtra, Uttar Pradesh and West Bengal respectively.

Under the Foreign Exchange Management Act, 1999, (FEMA, 1999) a Foreign Company executing projects in India is permitted to open an office in India to undertake such project, commonly referred to as Project Office (PO). Accordingly, the Head Office (HO) has constituted 3 Project Offices for undertaking onshore portion of the said Projects in India at Chennai.

The applicant is permitted to undertake only activity of execution of project (wholly or partly) in India that is awarded to the Foreign Company i.e., the HO, outside India.Few employees of the HO (Expat employees) work in the Project Office in India, for whom all the employer's obligation like Form 16 in accordance with Section 203 of the Income-tax Act, 1961 are done by the Project Office.Since most of these Expat employees have their primary bank accounts outside India, salary is paid to these employees from the HO's bank account located abroad, for administrative convenience.

As per the Indian Companies Act, 2013, any PO of a Foreign Company is required to maintain its financial books of accounts in a manner which would reflect a true and fair view of the business of the Company in India. Thus,' in order to keep record of the expenses of salary cost of Expat employees working from India, the Project Office makes an accounting entry in its financial books of accounts in India for the salary cost of the Expat employees.

The Reserve Bank of India (RBI) has framed the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a PO or any other place of business) Regulations, 2016 (FEMA Regulations). The RBI hasgranted general permission to foreign companies to establish POs in India,provided they have seemed a contract from an Indian company to execute a project in India. The contract for execution of project in India would be executed by the Foreign Company in its own name with the Indian Company prior to setting up a PO in India. The PO is set up for a specific project and hence cannot engage in any other activity/business other than the business in relation to the Project. The project should be funded directly or indirectly from abroad by the Foreign Company to the PO.

The funds arising out of the Project can be remitted to the Foreign Company subject to the condition that the remittance of funds to Foreign Company should not affect the completion of projects in India. Any shortfall of funds for meeting any liability of the PO in India would be met by the Foreign Company by way of inward remittance. Hence, the Foreign Company would be responsible for the liabilities outstanding for the PO. The PO cannot directly sign or enter into any contracts/agreements in India for supply of goods/services from the said PO. The PO should close down its operations in India after completion of the specified project.

For carrying out the projects in India, the Expat employees would work from the PO in India. As the PO is not a separate legal entity and merely an extension of Head Office in India, these Expat employees are employees of PO. An application was filed seeking advance ruling as to whether GST is applicable one the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of Project Office for salary cost of Expat employees.The authority observed as under:-

1. Master Direction No. 10/2015-16, dated 1-1-2016 as updated from time to time, issued by the Reserve Bank of India states that "Establishment of branch office/liaison office/project office or any other place of business in India by foreign entities is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification No. FEMA 22(R)/2016-RB, dated March 31, 2016.

2. The Reserve Bank of India has made certain regulations to prohibit, restrict and regulate establishment in India of

a branch office or a liaison office or a project office or any other place of business by a person resident outside India, vide Notification No. FEMA 22(R)/2016-RB, dated 31-3-2016, as amended from time to time [Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016], (hereinafter referred to, as the FEMA Regulations).

3. As per Sr. No. 2(f) of the FEMA Regulations, a "Project Office' means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office. Sr. No. 3 thereon states that "No person resident outside India shall without prior approval of the Reserve Bank open in India a branch office or a liaison office or a project office or any other place of business by whatever name called except as laid down in these Regulations".

4. The eligibility conditions for opening a Project Office (PO), the permissible activities that can be carried out by the Project Office, the application form for opening a PO, etc. are all mentioned in the FEMA Regulations and therefore it is seen that such offices are regulated by law.

5. Accordingly, a company, resident outside India, may initiate business in India by setting up a project office or any other place of business by whatever name called after taking prior approval of the RBI. A foreign company can establish a project office in India either on a temporary basis or a permanent project office, provided the foreign company has been awarded a project to be executed by them in India from the government or private sector. Registration of PO with Reserve Bank of India & Registrar of Companies must be completed before it starts operating and certain conditions are required to be fulfilled before an application can be made for registration of a Project Office.

6. A PO can be considered as a branch office set up with the limited purpose for executing a specific project and to execute the project. The PO can enter into transactions for receipt of supply of goods and services which would enable them to complete the project. Foreign companies engaged in turnkey construction or installation projects normally set up a PO for their operations in India. A PO represents the interests of the foreign company executing a project in India and undertakes commercial activities related to the particular project.

7. Applicant has stated that, as a Project Office in India they supply goods and services for undertaking onshore portion of the project on payment of applicable GST to customers in relation to the specific projects carried out at the various sites in India and for this purpose, the Project Office has obtained registration under the GST legislation in various States in India.

8. The Project Office has its own employees and also some employees of the Head Office (Expat employees) who work in the Project Office in India, for whom all the employer's obligation like Form 16 in accordance with Section 203 of the Income-tax Act, 1961 are done by the Project Office.

9. As per the provisions of the Companies Act, 2013, applicant is required to maintain its financial books of accounts in a manner which would reflect a true and fair view of the business of the Company in India. Thus, in order to keep record of the expenses of salary cost of Expat employees working from India, the Project Office makes an accounting entry in its financial books of accounts in India for the salary cost of the Expat employees even though the salary is paid by the Head Office.

10. PAN and TAN has been allotted to the Project office in the name of the Head Office situated abroad, by the Income Tax Authorities consequent to which one can reckon that the project office is an extension of the foreign Head Office, and as in the subject case shall carry on all activities relating and incidental to execution of the project in India.

11. Thus, the expat employees are employees of the employer i.e. the Head Office and since the PO is an extension of the HO , there is a relation of employer and employee between the PO and the expat employees.

12. For GST to be applicable on the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of PO for salary cost of Expat employees paid by the Head Office, such accounting entry should be seen as a supply of goods, services or both.

13. In view of the fact that there is a relation of employer and employee between the Project Office and the expat employees, the provisions of Schedule-III of the CGST Act comes into play in this case as per which services by an employee to the employer in the course of or in relation to his employment will not be considered as a supply and therefore will not attract GST.

Hence the authority held that GST is not applicable on the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of Project Office for salary cost of Expat employees

6. GST – ADVANCE RULING – MAP MAKING ACTIVITY TO IDENTIFY UNPERMITTED CONSTRUCTIONS AND HELPING GOVT. OR LOCAL AUTHORITY FOR A TOWN PLANNING, URBAN PLANNING & CONTROL OF LAND – EXEMPT UNDER SL.NO.3 OF NOTIFICATION NO.12/2017

In Re : Core Project Engineers & Consultants Pvt. Ltd.,2020 (39) G.S.T.L. 123 (A.A.R. - GST - Mah.), the applicant is providing mapping services to various municipal corporation &councils. The main aim behind doing the map making activity is to identify unpermitted construction areas.

An application was filed seeking advance ruling as to the following:-

1) Whether the services provided by the applicant are covered under Clause 1 & 2 of Twelfth Schedule of Article 243W?

2) Whether the services provided by the applicant fall under the Exemption Notification No. 12/2017, dated 28th June, 2017 (Entry No. 3 of Exemption Notification) as amended from time to time as the services are in the nature of pure labour services.

The authority observed as under:

1. The applicant is providing mapping services to various municipal corporation & councils which enables to identify unpermitted construction areas and helps the government or local authority to do town planning, urban planning & control the land use by the general public, etc. The applicant's activities include identifying properties & customizing the property survey, conducting of tax assessment & property document management, preparation of property tax management information and maintaining of document management system for all properties.

2. Under such facts, one needs to ascertain if the applicant's services are eligible for exemption as per the Serial No. 3 of the Notification No. 12/2017-C.T. (Rate), dated 28-6-2018referred above. For this, we are required to ascertain the nature of exact services being provided in the present case by the applicant and also whether the said services are in relation to any function entrusted to municipality under article 243W of the constitution.

3. The applicant have submitted details of the activities being undertaken by them which are providing mapping services to various municipal corporation & councils which enables them to identify unpermitted construction areas and helps the government or local authority to do town planning, urban planning & control the land use by the general public, etc which are as under:-

a. Identifying properties & Customizing the Property Survey;

b. Conducting of Tax Assessment & Property Document Management; and

c. Preparation of property tax management information and maintaining of document management system for all properties.

4. A perusal of the documents indicate that the applicant's supply does not envisage supply of goods. In other words, there is rendering of pure services in the subject case. The next step would be to find out whether services rendered by them are in relation to any function entrusted to a municipality under article 243w of the constitution.

5. The services are provided by the applicant are in relation to urban planning including town planning and planning of land-use and construction of buildings in as much as all the said activities help the local authorities to do town planning, urban planning & control the land use by the general public. The services supplied by them are covered under article 243W of the constitution, as functions entrusted to the municipality.

6. Consequently, the provisions as per Sl. No. 3 of the Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 as amended applies in their case and therefore, the subject services being pure services, provided by the applicant to the various municipal corporations and councils are in relation to afore said functions entrusted to the said local authority and exempt from GST.

Hence the authority held as under:-

a. The services provided by the applicant are covered under Clause 1 & 2 of Twelfth Schedule of Article 243W; and

b. The services provided by the applicant fall under the exemption Notification No.12/2017, dated 28th June, 2017 (Entry No. 3 of Exemption Notification) as amended from time to time as the services are in the nature of pure labour services.

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THE SAD PLIGHT OF DEALERS WHOSE GST REGISTRATION HAS BEEN CANCELLED AND THE IMPENDING CATASTROPHE

CA. VIVEK RAJAN V

Introduction

The GST Act of 2017 is still evolving in many ways and this article covers the sad plight of those dealers whose GST registration has been cancelled , the difficulties faced by them and the impending catastrophe that they would face once the cancellation is revoked unless the Central Government gives them a relief either sum moto or consequent to the directions of the Supreme Court / High Court.

The Law

Section 29 of the CGST Act, 2017 deals with the cancellation of GST registration. The following are broadly the scenarios under which the GST registration can be cancelled from a retrospective date

- Contravention of the provisions of the GST Act or the rules
- Person paying tax u/s 10 of the GST Act has not furnished returns for 3 consecutive tax periods
- Any registered person has not filed return for a continuous period of 6 months (GSTR 1 and GSTR 3B. **"GSTR 3B"**became a return u/s 39 with retrospective effect from 01st July 2017, vide Notification No.49/2019 dated 09th October 2019 in the light of the decision of Honourable High Court of Gujarat in the case of AAP & Co, Chartered Accountants vs Union of India, Special Civil Application No. 18962 of 2018)
- Person who has taken voluntary registration u/s 25 and has not commenced business within 6 months from the date of registration
- Registration has been obtained by means of fraud, wilful misstatement or suppression of facts.

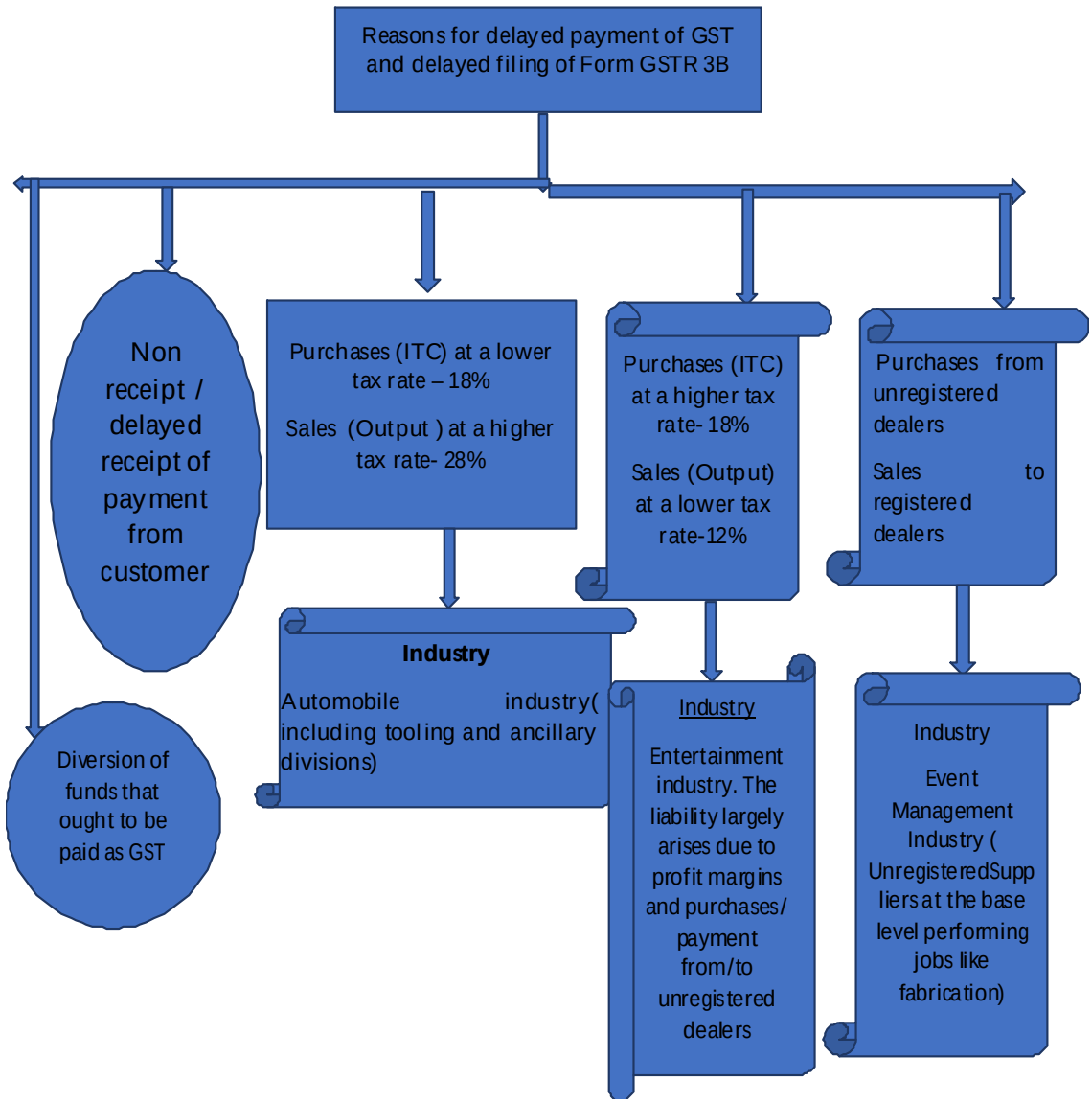
Non-filing of Form GSTR-3B- Reasons

GSTR-1 Return- It is return having the details of outward supplies and enables the flow of information into the GSTR - 2A of the counterpart.

GSTR-3B Return - It is a return that has the details of sales made/ services rendered/ Input Tax Credit etc and also mandates the payment of cash wherever required irrespective of whether the payment is received for the sales made/ services rendered.

The concept of accrual based taxation is a tough precedent to follow especially when the payment for sales made/ services rendered is not received or received belatedly.

There are cases where dealers file GSTR -1 so that the counter part gets the Input Tax Credit in Form GSTR-2A (in some cases this is mandatory for payment processing). There are also cases where the payment is either not received by the supplier or is received belatedly (90 days to 365 days or even more), thereby preventing the filing of Form GSTR-3B in some cases.



For example- Practical Scenario

1. ABC Services, a start-up firm incorporated on January 2018, took a voluntary registration under GST as its customer, XYZ Limited does not want a vendor without GST registration. XYZ Limited has awarded a work contract to ABC Services.

2. ABC Services raises an invoice on XYZ Limited for Rs. 50 Lakhs plus GST of 18% of Rs. 9.00 Lakhs on March 2018. XYZ Limited owes a sum of Rs. 59.00 Lakhs in total.

3. ABC Services has filed its Form GSTR-1 within time limit and the Input Tax Credit has been given to XYZ Limited.

4. ABC Services has to file its Form GSTR-3B for March 2018 within April 20th 2018 to avoid any late fees despite non receipt of money from XYZ Limited. In order to file Form GSTR-3B, ABC Services has to either borrow to pay the GST or rearrange its finance model by diverting of funds earmarked for other purposes for GST payment.

5. ABC Services decides to wait for the payment from XYZ Limited and thereby filing of **Form GSTR-3B comes to a halt**.

6. ABC Services decides not to file the GSTR 3B despite having an ITC of Rs. 3 Lakhs for March 2018.

7. The GST registration of ABC Services is cancelled as it has not filed GSTR3B for six months from March 2018 to September 2018.

8. XYZ Limited makes the payment in December 2018.

9. ABC Services makes the payment of GST in January 2019 and applies for revocation of cancellation in January 2019.

10. The GST officer revokes the cancellation within 3 working days of application for revocation, in January 2019.

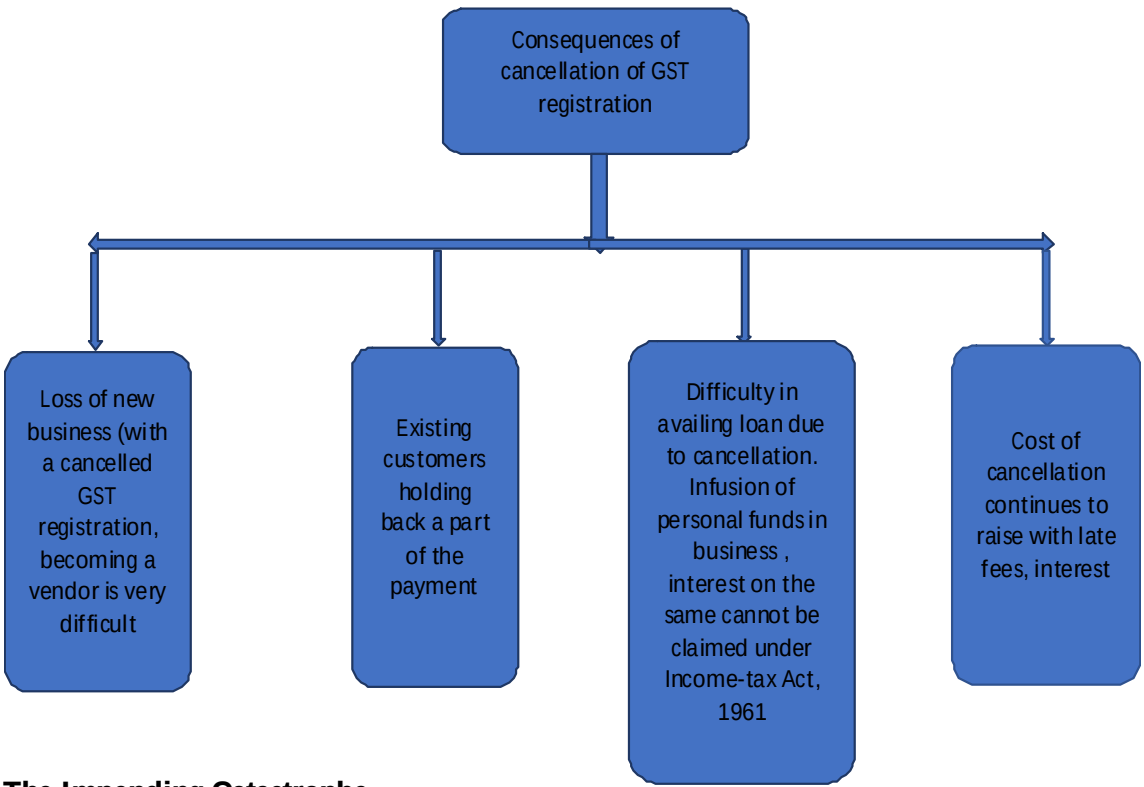
11. ABC Services files the GSTR 3B for the period March 2018 to December 2018 along with late fees in February 2019.

12. The GST officer also levies interest for delayed payment of GST for the month of March 2018 and subsequent months.

13. Finally, after payment of tax, interest, late fees, ABC Services resumes in April 2019.

14. In April 2019, ABC Services receives a communication from the GST that ITC for March 2018 was availed belatedly in February 2019 stating that the time limit for availing ITC was October 2018 and hence the ITC of Rs. 3 Lakhs is proposed to be denied u/s 16 of the CGST Act.

Consequences of cancellation of GST registration



The Impending Catastrophe

In light of the above and in addition to the above, the denial of ITC u/s 16 of the CGST Act citing belated filing of GSTR-3B owing to cancellation of registration, is against the principles of natural justice.

The GSTR 3B is the only form in which the ITC can be availed and for a dealer whose GST registration is cancelled, the GST portal restricts the filing of GSTR 3B unless revocation of cancellation is made. The revocation can be made only when the tax is paid. Therefore, as long is revocation is not done, the dealer who has paid tax by way of ITC cannot avail the credit owing to restriction by the portal (the restriction by the portal is more of a practice at the Information Technology end).

By denial of the ITC, the chain is broken for belated payment by the dealer despite the dealer compensating for the delay with interest payment and by also paying the late fees for belated filing. The exchequer is getting double benefit with this move ,as with denial of ITC for belated payment, for every Rs.10, the exchequer is getting Rs. 20 with interest.

Benefit and relief given under Income-tax Act, 1961

In the Income-tax Act, 1961, for belated payment of TDS, disallowance is made in one year and allowance is given in the year of payment and the delay is compensated by payment of interest and in some cases along with payment of compounding fees by the deductor.

Further, disallowance could be avoided if the deductor furnishes a statement from the deductee in Form 26A stating that the amount received from the deductor has been offered to tax by the deductee. In this option, deductor is liable to pay interest.

The key point to note is the disallowance is only temporary and not a permanent one.

Probable Solution

The Central Government can consider extending relief to the dealers whose GST registration has been cancelled, by allowing their claim of ITC, even if the payment of tax is made belatedly and the GSTR 3B is filed beyond the deadlines prescribed for availing ITC, as long as the delay being compensated with payment of tax, interest and late fees.

The relief is similar to the manner in which it is given under Income-tax Act, 1961 for belated payment of TDS.

The Central Government can also consider extending receipt based taxation in GST than accrual based taxation for selected category of dealers (for example with annual turnover of less than Rs. 2 Crores) like how it was there in erstwhile service tax regime.

By citing the above mentioned situation and giving reference to The Constitution of India, relief can also be claimed by approaching the Hon'ble High Courts and the Hon'ble Supreme Court of India.

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CASE LAWS - GST / SERVICE TAX

CA. VIJAY ANAND

1. SERVICE TAX – SERVICES PROVIDED FOR INDUSTRIAL DEVELOPMENT BY STATUTORY/ PUBLIC AUTHORITY – NOT LIABLE TO TAX

In Karnataka Industrial Areas Dev. Board V. CCT, Bangalore North 2020 (40) G.S.T.L. 33 (Tri. - Bang.),the appellant, KIADB, is established by an enactment of the Legislature of Karnataka Act, 18 of 1966 i.e. Karnataka Industrial Areas Development Act, 1966 (KIAD Act, 1966, for short). The Government of Karnataka, for the purpose of establishing industrial areas and for promoting the rapid and orderly development of industries in the State of Karnataka, enacted this KIAD Act, 1966. The appellant was formed and established under the provisions of Section 5 of the said KIAD Act and performs various statutory / sovereign functions assigned to it under provisions of KIAD Act. KIADB was engaged in providing various taxable services such as Renting of Immovable Property Services, Construction of Commercial and Residential Complexes, Business Support Services, Management, Maintenance or Repair Services, Manpower Recruitment and Supply Services, Works Contract Services, etc., to various clients and did not obtain registration. The adjudicating authority confirmed the demand on the appellant overlooking the appellant's contention that the appellant is a Government undertaking and being a 'State' as defined in Article 12 of the Constitution of India are not liable to payservice tax. Further the appellants are not undertaking any activities for profit motive. On appeal, the Tribunal observed as under:

1. The crucial question in the instantcase is whether at all the appellant, which is a statutory authority (KIADB) constituted under the KIAD Act for carrying out the purposes, is providing any service as defined in the Service Tax legislation (Finance Act, 1994). If, after analyzing the various provisions of the KIAD Act and the submissions of the parties, we come to

the conclusion that there is no service being rendered by the appellant as argued by the Learned Counsel for the appellant, then the question of levy of service tax would not arise.

2. The true character / scope and intent of the Act is to be ascertained with reference to the purposes and the provisions of the Act. The Act is one to make a special provision for securing orderly establishment of industrial areas and industrial estates in the State of Karnataka and for that purpose, to establish the board. A careful reading of the provisions of KIAD Act and KIADB Regulations would clearly go to show that the appellant is a State undertaking and creature of a statute to exercise the power of 'eminent domain'.

3. The appellant is engaged in discharging statutory functions under an act of Legislature viz.KIAD Act, 1966. It is a statutory body performing statutory functions and exercising statutory powers. Once carrying out the objectives of the Act, then it cannot be treated as a service provider under the Finance Act, 1994. Further, there is no service provider-client relationship so as to warrant the levy of service tax under the provisions of Finance Act, 1994.

4. The appellant has undertaken various activities and functions in the State of Karnataka as per the directions of the State Government given from time to time under the provisions of the Act and hence their activities cannot be considered as taxable service and no service tax can be levied for these activities.

5. The issue whether the statutory authority performing statutory functions as provided under a statute is liable to service tax or not has been considered and decided by catena of judgments rendered by various Courts. In the case of Commissioner v. Maharashtra Industrial Development Corporation (MIDC) 2018 (9) GSTL 372 (Bom.), the Hon'ble Bombay High Court has categorically held that no service tax could be demanded on the charges collected by the MIDC, in terms of MID Act, 1961 towards maintenance of industrial areas as the same is in the nature of statutory function performed in terms of the statute.

6. The functions of MIDC under MID Act, 1961 is more or less identical with the functions of the appellant, KIADB under KIAD Act,1966. The Bombay High Court in the above case has relied upon the decision of the Apex Court in the case of Ramtanu Co-Operative Housing Ltd. and Anr.

7. The department's reliance on the cases of N. Nagendra Rao & Co. v. State of AP [AIR 1994 SC 2663 and Agricultural Produce Market Committee v. Ashok Hari Kuni [AIR 2000 SC 3116] to submit that activities carried out by KIADB are not sovereign functions fall flat as the said judgments were rendered in the context of immunity of the State from being sued for a tort claim wherein it was held that the state cannot take the defence of carrying out sovereign functions to claim immunity from an action in tort and do not apply to the case on hand.

8. In the case of PeerappaHanmantha Harijan and Others v. State of Karnataka and Anr. [(2015) 10 SCC 469], it was categorically observed that State Government acquires land only at the instance of KIADB for the purpose of formation of industrial estate in industrial area. Moreover, Section 28(8) of the KIAD Act, in express terms, states that where the land has been acquired by the State Government for KIADB, the State Government after it has taken possession of the land from either owner or interested person may transfer the land to KIADB for the purpose for which the land has been acquired by it.

9. Therefore, it is not correct to say that KIADB has no power of eminent domain. The ratio of the following decisions of the Apex Court clearly considering the scope of 'eminent domain' and sovereign function are applicable to the facts of the present case :-

a. Balmer Lawrie & Co. Ltd. v. ParthaSarathi Sen Roy [2013 (8) SCC 345]

b. MD, HSIDC v. Hari Om Enterprises [AIR 2009 SC 218]

c. JilubhainanbhaiKhachar v. State of Gujarat [1995 Supp (1) SCC 596]

10. In Employee Provident Fund Organisation v. CST [2017 (4) G.S.T.L. 294 (Tri. - Del.)], it was held that the statutory authorities performing statutory functions as per the statute are not liable to pay service tax. He also submitted that the Revenue's appeal against the above decision was dismissed by the Hon'ble Supreme Court on grounds of delay as well as on merits.

Hence, the appeal was allowed and the impugned order was set aideby following the ratios of the Hon'ble Apex Court in the case of Shri Ramtanu Housing Co-

operative Society Ltd., Hon'ble Bombay High Court in the case of MIDC and the Tribunal's decision in the case of Employee Provident Fund Organisation (upheld by Apex Court).

2. GST – ADVANCE RULING – LEASING OF WETLAND BY GRAMA PANCHAYAT FOR REARING FISH – EXEMPT

In RE: George Jacob 2020 (40) G.S.T.L. 389(A.A.R. – GST-Ker.),the applicant is the successful bidder of the auction of wet land conducted by the Chellanam Grama Panchayat for fish farming in the canal for the period from April 2019 to March 2020. The bid amount was Rs.22,22,000/-. The Grama Panchayat informed the applicant that the applicant is also liable to pay GST at the rate of 18% of the bid amount along with the bid amount as the auction of water channel is not covered by the exemption under Notification No.12/2017 Central Tax (Rate) dated 28.6.2017.

Hence, the applicant has sought advance ruling as to whether lease rent charged by the municipality for land i.e., water channel used for fish farming falls within the meaning of "services relating to rearing of all life forms of animals - by way of renting or leasing of vacant land" eligible for GST exemption as per Sl. No.54 of Notification No. 12/2017-Central Tax (Rate) dated 28.6.2017 and corresponding notification under Kerala GST.

The authority observed as under:

1. The applicant submitted that as per Sl. No. 54 of Notification No. 12/2017 - Central Tax (Rate) dated 28.6.2017; under Heading 9986 - services relating to rearing of all life forms of animals by way of renting or leasing of vacant land with or without a structure incidental to its use are exempted from GST.

2. The applicant is carrying out fish and crab farming in wet land taken on lease from the Grama Panchayat. As per the above entry, exemption is available for services relating to cultivation and rearing of all forms of animals. The services can be by way of; (i) agricultural operations; (ii) supply of farm labour; (iii) process carried out at an agricultural farm; (iv) renting or leasing of agro machinery or vacant land; (v) loading and unloading of agricultural produce; (vi) agricultural extension services and (vii) services by any agricultural produce marketing committee.

3. Therefore, the conditions to be satisfied for exemption under the said entry is that the activity carried out should be cultivation or rearing of animals or agricultural produce and the services provided shall conform to any of the descriptions enumerated therein.

4. The term "rearing" means bring up and care for until they are fully grown. They take care of the fish/crab from the point they are eggs until they are fully grown up by providing them with feed and also taking care in all possible ways. The next condition is that the rearing should be of animals. They are rearing fish and crab and there is no dispute that fish and crab are animals.

5. The next condition is that the land should be provided on rent or lease. It is clear from the allotment letter and agreement that the wetland is taken on annual lease. The auction is carried out only to ascertain the person who offers the highest rent and does not affect the nature of activity; i.e; renting.

6. As per the definition in Para 2 (zz) of Notification No. 12/2017 Central Tax (Rate) dated 28-6-2017; "renting in relation to immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property.

7. From the above, it is clear that the arrangement between the applicant and the Chellanam Grama Panchayat is renting of immovable property.

8. The next condition is that the renting should be of vacant land with or without structure incidental for its use. As per Black's Law Dictionary; "Land" includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, whether by nature as water, trees, grass, herbage, other natural or perennial products, growing crops or trees, mineral under the surface, or by hand of man, buildings, fixtures, fences, bridges as well as works constructed for use of water, such as dikes, canals etc.

9. It is therefore, clear that all the conditions stipulated in Sl. No. 54 of the Notification No. 12/2017 Central Tax (Rate) dated 28-6-2017 is satisfied and hence the rent paid to the Grama Panchayat is exempt from GST.

10. The Chellanam Grama Panchayat has confirmed the bid for Paruthithodu water channel fish farming to the applicant. On perusal of the documents, it is evident that the nature of the transaction is renting/lease of water channel for fish farming and hence the activity is covered under the definition of renting of immovable property as per Para 2 (zz) of the Notification No. 12/2017 - Central Tax (Rate) dated 28.6.2017.

11. Now, the issue to be decided is whether the activity is covered by the exemption contained in the entry at Sl. No. 54 of Notification No. 12/2017 - Central Tax (Rate) dated 28.6.2017. On a plain reading of the entry, it is clear that the services relating to cultivation of plants and rearing of all life forms of animals by way of renting or leasing of vacant land with or without structures is exempted under the entry.

12. In the instant case, there is no doubt that the fish and crabs being reared by the applicant in the water channel taken on rent/lease are animals and the service of renting/leasing of the water channel has been availed by the applicant for the rearing of the animals.

13. Therefore, the activity of renting/leasing the water channel by the Grama Panchayat to the applicant for fish farming for a consideration determined through auction is squarely covered under the exemption entry at Sl. No. 54 of Notification No. 12/2017 Central Tax (Rate) dated 28.6.2017 as services relating to rearing of all life forms of animals by way of renting or leasing of vacant land.

In view of the observations stated above, it was answered that the lease rent charged by municipality for land i.e., water channel used for fish farming falls within the meaning of "services relating to rearing of all life forms of animals - by way of renting or leasing of vacant land" is eligible for GST exemption as per Sl.No.54 of Notification No. l2/2017-Central Tax (Rate) dated 28.6.2017 and corresponding notification under Kerala GST.

3. GST – ADVANCE RULING – WORKS CONTRACT UNDERTAKEN AS PER MOU ENTERED WITH NTRO – LEVIABLE TO TAX @ 12%

In RE: Cochin Port Trust 2020 (40) G.S.T.L. 496(A.A.R. – GST-Ker.), the applicant is a body corporate constituted under the Major Port Trusts Act, 1963 and is

engaged in providing port services with modern infrastructure. The Board of Trustees of the applicant had entered into a Memorandum of Understanding dated 22-12-2016 with National Technical Research Organisation (hereinafter referred to as "N.T.R.O.") a Technical Intelligence Agency of the Government of India for construction of Jetty and development of sites for N.T.R.O. at Cochin on "Deposit Work" terms.

The sites on which the activity as per the M.O.U. is undertaken have been acquired by the N.T.R.O. from the applicant on long lease for 30 years as per the Registered Lease Deed dated 24-8-2014 at the Office of the Sub-Registrar of Mattanchery, Cochin. The estimated project cost as approved by the competent authority of N.T.R.O. is Rs. 122.30 Crores. The applicant has commenced the work as per the M.O.U. and the work is undertaken by the applicant by engaging various independent contractors.

The applicant is entitled to get 7% of the actual expenditure for the project as Engineering and Supervision charge which is also termed as project management service charges. The approved estimated cost also includes the 7% project management service charges of the applicant. The procedure presently followed by the applicant is that the contractors engaged by the applicant raise invoice on the applicant and the applicant in turn raise invoice on N.T.R.O. for the M.O.U including the project management service charges. The applicant is charging GST at the rate of 18% in the said invoices.

In addition to the above, the applicant is raising monthly invoices to N.T.R.O. claiming licence fees for the office building allotted to N.T.R.O. on license basis and also charges for electricity and water supplied to N.T.R.O.. They are charging 18% GST on the license fees and no GST is charged on the electricity and water charges as they are exempted from GST.

The applicant requested advance ruling on the following:

a. Whether, having regard to the background and details including the scope of work of the Deposit work contained in the M.O.U. entered into between CoPT and N.T.R.O., what is the nature of the services rendered by CoPT under the M.O.U. entered Into between CoPT and N.T.R.O.? Whether it would be treated as a "Works Contract" as per section 2(119) of the CGST Act or as a Composite Supply

for services as per section 2(30) of the CGST Act or as a mixed supply as defined in section 2(74) of the CGST Act?

b. Whether, having regard to the background and details Including the scope of work of the Deposit work contained in the M.O.U. entered into between CoPT and N.T.R.O., whether CoPT is eligible to take the benefit of reduced rate of 12% GST as per Notification No. 24/2017-IT(R) dated 21-9-2017, in respect of the services provided by it to N.T.R.O. under the M.O.U.?

c. Whether, having regard to the background and details Including the scope of work of the Deposit work contained in the M.O.U. entered Into between CoPT and N.T.R.O., whether the contractors engaged by COPT to execute work as envisaged in the M.O.U., would be eligible to take the benefit of reduced rate of 12% GST as per Notification No. 24/2017 - IT (R), dated 21-9-2017, in respect of the services provided by them to CoPT?

d. If CoPT is eligible to take the benefit of reduced rate of 12% GST as per Notification No 24/2017 - IT (R), dated 21-9-2017; whether it is entitled to claim refund of the excess remittance of GST (6%) remitted from the date of applicability of the said Notification?

e. If the supplies to N.T.R.O. are taxable at 12%, as per Notification No. 24/2017 - IT (R), dated 21-9-2017, whether supply of goods such as electricity and water, which are exempt from GST are also taxable at the rate of 12% as composite supply of services?

The authority observed as under:

1. The rate of GST applicable under both the above entries is 12% IGST [6% CGST and 6% SGST]. The activity undertaken by the applicant as per the M.O.U. is for the National Technical Research Organisation, a Technical Intelligence Agency of the Government of India.

2. In view of the fact that the services rendered by the applicant falls under the definition of "Works Contract" as per section 2(119) of the CGST Act, 2017 and the services being rendered to the Central Government for an original work meant predominantly for use other than for commerce, industry or any other business or profession the rate of GST applicable is 12% as per Sl. No. 3(vi)(a) of the Notification No. 08/2017 - Integrated Tax (Rate), dated 28-6-2017 as amended. Furthermore, the entry at Sl. No. 3(ix) of the Notification No. 08/2017 Integrated Tax (Rate), dated 28-6-2017 as amended the rate of GST applicable to

the contractors/sub-contractors engaged by the applicant to execute the works as per the M.O.U. is also 12%.

3. The next issue that arises for consideration is the liability and rate of GST applicable on the project management service charges, license fees for the building allotted to N.T.R.O. and the supply of electricity and water.

4. As per section 2(30) of the CGST Act, 2017; "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

5. Clause (90) of section 2 of the CGST Act, 2017; defines "Principal Supply" as follows; "principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary.

6. Section 8 of the CGST Act, 2017; which deals with the tax liability on composite and mixed supplies reads as follows.

7. It is evident from the terms and conditions of the M.O.U. that the principal supply is the supply of works contract services for construction of Jetty and Development of Sites for N.T.R.O. and the project management service charges, license fees of building, the supply of electricity and water are components of the main supply which are ancillary to the main supply.

8. Therefore, the rate of GST applicable for such supplies are also the same rate as applicable to the main supply as the activities cannot be segregated or vivisected from the main supply for a differential tax treatment.

Hence, the authority ruled as under:

a. The activity undertaken by the applicant as per the M.O.U. dated 22-12-2016 entered with National Technical Research Organisation of the Government of India are covered under "Works Contract" as defined in section 2(119) of the CGST Act, 2017.

b. The rate of GST applicable on the services provided by the applicant as per the said M.O.U. is 12% as per Sl. No. 3(vi)(a) of the Notification No. 08/2017 - Integrated Tax (Rate), dated 28-6-2017 as amended.

c. The rate of GST applicable on the services provided by the contractors/ sub-contractors to the applicant as envisaged in the said M.O.U. is 12% as per Sl. No. 3(ix) of the Notification No. 08/2017 - Integrated Tax (Rate), dated 28-6-2017 as amended.

d. The applicant is entitled for refund of the excess GST paid if any; subject to the provisions of section 54 of the CGST Act, 2017 and the Rules made thereunder.

e. The supply of electricity and water are components of the main supply and are ancillary to the main supply and hence cannot be segregated or vivisected from the main supply and is liable to GST at the same rate as the main supply.

4. SERVICE TAX – RESTAURANTS WITH BANQUET HALLS – RENTALS NOT CHARGED FOR BANQUET HALLS BUT ONLY ON FOOD SERVED IN CERTAIN CASES – USAGE OF LCD DISPLAY ETC. NOT MEANS THAT BANQUET HALLS ARE LET OUT TEMPORARILY – NOT TAXABLE UNDER 'MANDAP KEEPERS'

Hotel Moti Mahal v. Commrr.of C.EX. & ST, Mangalore 2020 (41) G.S.T.L. 33 (Tri. - Bang.), the appellant is running a restaurant having banquet halls and sometimes charge only for the food served and do not charge any rentals for the banquet halls. Departmental audit disputed this and advised the appellants to pay applicable service tax on such food bills where food wasserved in the banquet halls, the appellants have paid this amount of Rs.6,11,514/-. Thereafter pursuant to the representations made, the Commissioner of Customs and Central Excise, Mangalore clarified that service tax is required to be paid when there was an official, social or business function consequent to which the the appellants have preferred a refund claim stating that the same was in respect of food served on which VAT was paid, which was denied by the adjudicating authority and the Commissioner (Appeals). On further appeal, the Tribunal observed as under:-

1. The crux of the argument of the department was that any prudent man can understand that without any function no person can stay in the hotel for the entire day and have mid-morning tea with biscuit, buffet lunch, evening tea with biscuit and dinner; though no separate rent was collected for the function hall, charges were recovered for use of LCD projector, laptop, white board, mike system,

podium, etc., and service charge on the same was paid; organization of function is evident by the usage of LCD projector, etc., and the rent for the function hall is inbuilt in the value of the food served in the function; the temporary occupation throughout the day is to be construed as social function; and therefore, liable to pay service tax and tax was correctly paid after allowing permissible deduction.

2. The lower authority also found that the clarification given by the Commissioner was based on incomplete information given the appellant and that the mandap or the banquet halls were let out for temporary occupation and some official, social or business function were organized. The appellate authority has upheld the reasoning given by the lower authority.

3. Revenue has proceeded on certain surmises and conjectures. The two major surmiseswere that with the usage of LCD display, etc., it is evident that the banquet halls were let out temporarily for a day and that the charges for the same are inbuilt into the bill raised by the appellant towards the food charges and this inbuilt value needs to be treated as consideration towards the 'Mandap Keeper' services provided by the appellant.

4. It is not open to the Revenue to decide the taxability of a new entry merely on the basis of imagination. For any service to be held to be taxable, there should be a service provider, service recipient and consideration for the service. It cannot be imagined that such consideration was inbuilt. It is incumbent upon Revenue to show such consideration in quantifiable terms in order to levy service tax, though on a discounted value. This becomes more important looking into the fact that the appellants have discharged VAT on the food supplied by them and have also discharged service tax on the items like LCD projector, etc., allowed to be used.

5. Revenue could not place any proof in the form of a bill, etc., to substantiate the allegation that the banquet halls were rented out for a consideration.

6. Therefore, the department's stand is not substantiated so far as the reduction of refund is concerned on merits.

Hence, the appeal was allowed and the impugned order was set aside with consequential relief.

5. SERVICE TAX – APPEALS - AMOUNT DEPOSITED DURING APPEAL BEFORE COMMISSIONER (APPEALS) – REFUND TO BE GRANTED BY THE DEPARTMENT WITHIN THREE MONTHS FROM THE DATE OF ORDER OF COMMISSIONER APPEALS ALLOWING THE APPEAL – DOCTRINE OF UNJUST ENRICHMENT NOT TO APPLY

In Datamax Marketing Consultants v. Commrr.of CGST Ludhiana 2020(41) GSTL 346 (Tri.-Chan), the demand of service tax was raised against the appellant during the period from 2006—07 to 2008-09 on the observations made by the audit party that they were receiving reimbursement of travelling charges incurred by providing taxable service. As they were not paying service tax on reimbursement of travelling charges, therefore, a show cause notice was issued, the demand along with interest sought to be raised against the appellant and the adjudicating authority confirmed thedemand. The said order was challenged before the Commissioner (Appeals) and during the pendency of the appeal before the Commissioner (Appeals), the appellant has made a deposit of Rs.8,10,806/-. The Commissioner (Appeals) dropped the demand against the appellant vide order dated 18.12.2013. Thereafter the appellant filed refund claim on 13.06.2014. Initially the refund claim was allowed by the adjudicating authority but the Revenue was not satisfied with the order of the adjudicating authority and filed appeal before the Commissioner (Appeals), who rejected the whole of the refund claim on the ground of unjust enrichment and also held the part of refund claim is barred by limitation. Against the said order, the appellant is before me.

On appeal, the Tribunal observed as under:

1. The appellant has paid the tax along with interest and penalties on the reimbursement of travelling charges incurred by providing taxable service during the period from 2006—07 to 2008-09. Thiddemand was set aside by the Commissioner (Appeals) on 18.12.2013 and the refund claim was filed on 13.06.2014 by the appellant. These facts are not in dispute.

2. Holding a part of refund claim barred by limitation shows non application of mind as it is settled law that if the amount of duty/tax in dispute has been settled by the higher forum as not payable. Therefore, the assessee is not required to file refund claim.

3. The Commissioner (Appeals) held that the appellant is not liable to pay service vide order dated18.12.2013. Therefore, it is responsibility of the Revenue to grant refund claim to the appellant within three months from the date of the order whereas in this case, the appellant has forced to file refund claim which was ultimately filed on 13.06.2014. Therefore, the refund claim cannot be held barred by limitation.

4. With regard to the unjust enrichment, the Commissioner (Appeals) in his order held that the appellant has failed to show documentary evidence that they have not passed on the duty incidence on the buyers. The facts of the case are very much clear, the demand of service tax has been raised for the 2006-07 to 2008- 09.

5. Admittedly, during the impugned period, neither the appellant has paid service tax on the reimbursement of travelling charges nor submitted a copy of ST-2 return. The service tax in dispute was paid by the appellant along with interest and penalty during the pendency of their appeal before the Commissioner (Appeals).

6. Therefore, the question of passing of tax burden on the service recipient does not arise. Moreover, with regard to the interest and penalty, the question of passing on the service recipient does not arise as none of the assessee can recover the amount of interest and penalty form the service recipient in law.

7. Therefore, the observations made by the Commissioner (Appeals) in the impugned order are totally contrary to the law. The appellant has paid the service tax along with interest and penalty.

8. Further, the adjudication order itself shows that the appellant has not passed on the tax burden on the service recipient for the reimbursement of travelling charges.

9. Therefore, the appellant is able to pass the bar of unjust enrichment.

Hence, the appeal was allowed with consequential relief.

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CASE LAWS - GST / SERVICE TAX

1. GST – IGST CREDIT LYING IN ELECTRONIC CREDIT LEDGER – ASSESSEE BEING SEZ UNIT MAKING ZERO RATED SUPPLIES – ENTITLED TO CLAIM REFUND

In Britannia Industries Limited v. UOI 2020(42)G.S.T.L.3(Guj.), the petitioner is situated in the Special Economic Zone (for short "SEZ") and has filed anapplication for refund in Form GST RFD-01Awith regard to the credit of Integrated Goodsand Services Tax (for short "IGST")distributed by Input Service Distributor (forshort "ISD") for the services pertaining tothe SEZ unit for the year 2018-2019 which was rejected by the department. Thereafter, a writ petition was filed in the high court which observed as under:-

1. The petitioner submits that refund being inclusive in nature, the same is also required to be granted with regard to unutilized input tax credit under section 54 of the CGST Act, relying on the decision in M/s. Amit Cotton Industries Through partner Veljibhai Virjibhai Ranipa v. Principal Commissioner of Customs rendered in Special Civil Application No.20126/ 2018 on 27th June, 2019 wherein in similar facts, the same court allowed the claim made by the petitioner for refund of the IGST in case of an export unit.

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2. In M/s.Amit Cotton Industries (supra), Rule 89 was applicable which is pertaining to refund of the input tax credit. Rule 89 of the CGST Rules provides for procedure for application for refund of tax, interest, penalty, fees and prescribes that in respect of supplies to a SEZ unit, the application for refund has to be filed by the supplier of goods or services.

3. The contention of the respondents is that as the petitioner is not the supplier of the goods and services, the petitioner would not be entitled to file application for refund is not tenable because input service distributor i.e. ISD as defined under section 2(61) of the CGST Act is an office of the supplier of goods and services which receives tax invoices issued under section 31 of the CGST Act towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit of CGST, SGST Or IGST paid on such goods or services.

4. Therefore, in facts of the case, it is not possible for a supplier of goods and services to file a refund application to claim the refund of the input tax credit distributed by ISD.

Hence, the petitionwas allowed& the impugned order denying refund was quashed and set aside. Therespondents were directed to process the claimof refund made by the petitioner forunutilized IGST credit lying in ElectronicCredit Ledger under section 54 of the CGSTAct, 2017.

2. SERVICE TAX – RETAIL AGENT AGREEMENT EXECUTED TO PROVIDE AN EFFICIENT AND EASILY ASSESSABLE PAYMENT COLLECTION SERVICES – INTENTION IS TO APPOINT SOMEONE TO UNDERTAKE TO COLLECT THE BILL PAYMENTS – AGREEMENT USING THE WORDS "PRINCIPAL TO PRINCIPAL" BASIS - NOT TAXABLE UNDER "FRANCHISE SERVICE"

In Easy Bill Limited v. CCE, Gurgaon 2020(42) G.S.T.L 67 (Tri.-Del.), the appellant is engaged in providing an efficient and easily assessable payment collection services for the bill issuers for the collection of payments from the customers who wish to settle their bills from the bill issuer over the counter. The appellant entered into Retail Agent Agreements with various retailers for providing licenses for opening shops in its names i.e. Easy Bill Ltd. and have collected the service fee from them and on which no service tax was paid. The adjudicating authority confirmed the demand on the same along with interest and penalties, against which an appeal was preferred with the Tribunal which observed as under:-

1. The most important characteristics for any service to be called as 'Franchise Service' is the right of representation given by one company to another business company against the consideration paid by the later (franchisee) to the former (franchisor) for the same.

2. The definition of 'Franchise Service' was amended on 16.05.2005. The authorities are of the opinion that the agreement between the Appellant and its agent because of the contents therein amounts to an agreement as that of franchise service.

3. A perusal of the agreement shows that the " Retail Agent Agreement" was executed by the appellant with an intention to provide an efficient and easily assessable payment collection services for the bill issuers (as defined in the agreement itself) for the collection of the payments from the customers (who arealso defined in the agreement itself), who wish to settle their Bills from the Bill issuer over the country.

4. All such persons who wish to become the part of the company's network of retail agents through which the company shall provide such payment collection services may be appointed as the agent of the company. This objective in itself is sufficient for us, when looked into in relation to the definition of franchise service and the meaning of representational right as discussed above, to hold that the agreement is to appoint someone who may undertake to collect the impugned bills payment not absolutely on his own but who undertake to collect the same on behalf of the appellant.

5. Therefore, the objective of the agreement is to merely appoint the agents as different from the franchisee.

6. Although the agreement states that the relationship is on a principal to principal basis, a perusal of the subsequent portions explains that word principle to principle mean that the agreement is not intended to constitute a partnership, joint venture or employer employees relationship between the company and the retail agent.

7. Thus, the mere use of word 'principle to principle' basis cannot be read for the impugned arrangement between appellant and his agents to be called as franchise service more so when the subsequent portions categorically restricts the agent to acquire any representational right on behalf of the company.

8. Arising out of the above, the payment received by the appellant is not at all the consideration towards the purchase of Representational Rights by the agent from the appellant. Contrary thereto the arrangement is that payment to be made by the appellant to the agent per Billbasis. This particular term of agreement is absolutely against the intent of what can be called as franchise service.

9. Consequently, the adjudicating authority committed an error while giving interpretation to the word 'franchise service' and has failed to observe the actual intent of the agreement involved.

Hence, the impugned order was set aside and the appeal was allowed with consequential relief.

3. SERVICE TAX - FORECLOSURE CHARGES COLLECTED BY BANKS AND NON-BANKING FINANCIAL COMPANIES ON PREMATURE TERMINATION OF LOANS – NOT LIABLE

In CST,Chennai v. Repco Home Finance Ltd. 2020 (42) G.S.T.L. 104 (Tri.-LB), the assessee is registered with the Service Tax Department for payment of service tax on 'banking

and other financial services" and is providing housing loan to customers. During the course of verification of the Trial Balance, it had shown income on charges received from the clients for foreclosure of loans under the head "miscellaneous income", but had not paid service tax. The adjudicating authority confirmed the demand on the same against which the appeal filed before the Commissioner (Appeals) was allowed. On departmental appeal before the Tribunal, it was noticed that while in Housing & Dev. Corporation Ltd. (Hudco) v. CST, Ahmedabad [2012 (26) S.T.R. 531 (Tri. - Ahmed)], a Division Bench held that service tax would be leviable on such charges.In Magma Fincorp Ltd. v. CST, Kolkatta [2016 (4) TMI 21 – CESTAT KOLKATTA], it was held that no service tax would be leviable Hence, the Tribunal referred the issue to a Larger Bench of the Tribunal which observed as under:

1. In Small Industries (I) a Division Bench of the Tribunal at Delhi held that foreclosure brings an end to the loan and cannot be treated as 'lending' to the customers. Thus, no service can be said to be rendered by the banks. In fact, it results in withdrawing the services rendered, at the request of the customers, and the foreclosure premium is a kind of compensation for possible loss of interest revenue on the loan amount returned by the customer. The Division Bench, therefore, held that the activity of foreclosure of loan cannot be treated as 'banking and other financial services".

2. In Hudco (supra), a Division Bench of the Tribunal at Ahmedabad in its decision rendered on 25 November, 2011 concluded that there was an element of service involved in considering the request of the borrower for payment of the entire loan amount prior to the agreed term or fixing prepayment charges or closure charges. This service would, therefore, be in relation to 'banking and other financial services', which definition includes 'lending' after 10 September, 2004. The decision of the Division Bench of the Tribunal at Delhi in Small Industries (I) was distinguished for the reason that the period involved therein was prior to 10 September, 2004, when lending was not included in the definition of 'banking and other financial services'.

3. This issue was again examined by a Division Bench of the Tribunal at Kolkata in Magma Fincorp Ltd. Apart from observing that the Commissioner had for an earlier dropped the demand in regard to the same issue and the Department had not filed any appeal against the said order, the Tribunal in its decision rendered on 3 February, 2016, held that service tax

would not be leviable on prepayment charges when the period of loan is cut short. The Division Bench also relied upon the decision of the Tribunal in Small Industries (I).

4. A Larger Bench of the Tribunal in Bhayana Builders (P.) Ltd. v. CST [2013] 32S.T.R. 49 (Tri. - LB) observed that 'implicit in the legal architecture is the concept that any consideration whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter.' In the said decision, a reference was made to the concept of 'consideration", as was expounded in the decision pertaining to Australian GST Rules, wherein a categorical distinction was made between 'conditions' to a contract and 'consideration". It has been prescribed under the said GST Rules that certain 'conditions' contained in the contract cannot be seen in the light of 'consideration' for the contract and merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

5. The Supreme Court in CST v. Bhayana Builders (P.) Ltd. [2018 (2) TMI 1325 = 2018 (10) G.S.T.L. 118 (S.C.)], while deciding the appeal filed by the Department against the aforesaid decision of the Tribunal held that the cost of free supply goods provided by the service recipient to the service provider is neither an amount 'charged' by the service provider nor can it be regarded as a consideration for the service provided by the service provider. This view was reiterated by the Supreme Court inUOI v. Intercontinental Consultants and Technocrafts [2018 (10) G.S.T.L. 401 (S.C)] and it was held that that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro quo for rendering such a service.

6. It would also be pertinent to refer to the judgment of the European Court of Justice (First Chamber) in Case C-277 / 2005, in Societe Thermale d'Eugenic-les-Bains v. Ministere de l'Economie, des Finances et de l'Industrie. Here, the question referred for preliminary hearingwas whether a sum paid as a deposit by a client to a hotelier, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, can be regarded as consideration for the supply of a reservation service, which is subject to VAT, or as a fixed compensation for cancellation, which is not subject to VAT. The Court found

that there has to be a direct link between the service rendered and the consideration received. The same paid must constitute a genuine consideration for an identifiable service supplied in the context of a legal relationship for which performance is reciprocal. In this context, the Court held as under:-

a. The deposit does not constitute the consideration for the supply of an independent and identifiable service; and

b. In situations where performance of the contract follows its normal course, the deposit is applied towards the price of the services supplied by the hotelier and is therefore subject to VAT; and

c. The retention of the deposit is, by contrast, triggered by the client's exercise of the cancellation option made available to him and serves to compensate the hotelier following the cancellation. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes.

7. What follows from the aforesaid decisions is that 'consideration' must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Act. It should also be remembered that there is marked distinction between 'conditions to a contract' and 'considerations for the contract'. A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.

8. The word 'include' is generally used in interpretation clauses to enlarge the meaning of the words or phrases occurring in the body of the statue and when it is so used, such words or phrases must be construed to comprehend, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include, relying on the decision in Dilworth v. Commissioner of Stamps 1899 AC 99.

9. Justice G P Singh in 'Principles of Statutory Interpretation' (Thirteenth Edition) has also remarked that where a word is defined to 'include' such and such, the definition is prima facie not exhaustive and so the natural meaning of the word cannot be narrowed down by the 'includes' part.

10. In this connection it would also be pertinent to refer to TRU Circular dated 20 June, 2012 issued by the

Central Board of Excise and Customs as an Education Guide when the Negative List based taxation regime was introduced to clarify various aspects of the levy of service tax. The Board dealt with 'consideration' in paragraph 2.2 of this Circular and pointed out that since the definition was inclusive, it will not be out of place to refer to the definition of 'consideration' as given in section 2(d) of the Indian Contract Act, 1872 the Contract Act.

11. Sir Guenter Treitel has, in his book 'The Law of Contract', described the manner in which a breach of contract can be remedied. The injured party can be placed in the same position in which he would have been if the contract was not made or the injured party can be placed in a position in which he would have been if the contract had been performed. The former protects 'restitution' or 'reliance interest', while the latter protects 'expectation interest'.

12. The 'expectation interest' is a popular measure for damages arising out of breach of contract. The foreclosure charges, therefore, are not a consideration for performance of lending services but are imposed as a condition of the contract to compensate for the loss of 'expectations interest' when the loan agreement is terminated pre-maturely. In fact, foreclosure charges seek to deter the borrowers from switching over to cheaper available sources of loan, as has been so clearly stated in the Circular dated 26 June, 2012 issued by the Reserve Bank of India.

13. In Hotel Vrinda Prakash v. KSFC ILR 2008 KAR 1311, the writ petitioner had borrowed a loan from the Karnataka State Financial Corporation but before the period of loan could expire made an application for foreclosure of the loan. The Corporation, however, demanded premium on the advance payment/foreclosure amount which demand was challenged in the writ petition. The Karnataka High Court, after noticing that the contract contained a clause giving discretion to the Corporation to impose premium on the balance amount of loan, observed that granting of loans is a business of the Corporation and if the loan is prepaid, the Corporation may have to suffer loss. It is to overcome this situation that premium is charged.

14. It would thus be seen that clauses relating to damages for foreclosure of loan are usually incorporated in contracts as an agreed measure of damages which can be enforced in the event there is a breach of contract with a view to bring about certainty in contracts. These clauses do not and cannot give rise to any 'consideration'. These clauses also come into effect only after the contract comes to end.

15. In Indian Drugs and Pharmaceuticals Ltd. v. Industrial Oxygen Co. Ltd. AIR 1985 Bom 186, it was held that to attract the provisions of section 74 of the Contract Act, it is not necessary that the entire contract should come to an end. The breach of each term thereof can be visualised in advance and taken care of by providing an adequate clause for liquidated damages so that the parties to the contract can proceed to work out the contract in future and settle the question of damages that have accrued on the basis of the rate that has been put as a pre-estimate at the commencement of the contract.

16. A penalty is a sum of money so stipulated in terrorem, and liquidated damages are a genuine pre-estimate of damages. So far as the law in India is concerned, there is no qualitative difference in the nature of liquidated and unliquidated damages, as section 74 eliminates the somewhat elaborate refinement made under the Common Law between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty, which under the Common Law is stipulation in terrorem; a genuine pre-estimate of damages is regarded as liquidated damages, and is binding.

17. It, therefore, clearly follows that foreclosure charges are recovered as compensation for disruption of a service and not towards 'lending' services. In fact, the amount for processing charges and documentation charges or like charges are subjected to service tax because they are essential for the activity of lending and are treated as activities 'in relation to lending'.

18. Foreclosure is anti thesis to lending and, therefore, cannot be construed to be 'in relation to lending'. The phrase 'in relation to lending' cannot be so stretched so as to bring within its ambit even activities which terminate the activity. In Standard Chartered Bank v. CST, Mumbai - I [2015 (40) S.T.R.104 (Tri. – LB)], it was emphasised that this phrase should not be given a very wide meaning.

19. These foreclosure charges should not be viewed as 'alternative mode of performance' of the contract because they arise upon repudiation of specified terms of contract and are intended to compensate the injured party banks and non-banking financial companies. This is because 'alternative mode of performance' still contemplates performance, whereas foreclosure is an express repudiation of the contractual terms giving rise to the levy of foreclosure charges.

20. Thus, merely because the clause relating to damage is featuring in a contract, it would be incorrect to conclude that the party has been given an option to violate the contract. Hence, to treat eventuality of foreclosure as an optional performance is incorrect. The contract cannot be understood to be providing an option to the parties to either perform or not perform / violate.

21. In the case of Hudco, it was concluded that the foreclosure charges would be subjected to service tax after 10 September, 2004 as the definition of 'banking and other financial services' was amended under section 65(12) of the Finance Act by including other financial services like lending in the definition. The Bench observed that when pre-payment is proposed, the borrower is expected to make a request which has to be considered by the banks, charges have to be worked out and informed. Thus there is an element of service involved in considering the request of the borrower for pre-payment of loan, fixing of pre-payment charges collection of the same and closure of their loan. It is not possible to accept the reasoning given by the Bench in Hudco in view of the discussions made above.

22. The decision rendered in Small Industries (I) was distinguished for the reason that it dealt with a period prior to 10 September, 2004.

23. The amount of damages is clearly stipulated in the contracts and no element of service is sought to have been rendered by the banks to borrowers. In fact, the contract has been broken by the borrowers for which the banks are entitled to claim damages. The foreclosure charges are nothing but damages which the banks are entitled to receive when the contract is broken.

24. Revenue's contention that premature closure is a facility available to a borrower at a price in the same manner as a facility for availing a loan for a price and, therefore, the activity would fall within the ambit of 'banking and financial services' cannotbe accepted.

25. Thus, it is not possible to subscribe to the view taken by the Bench of the Tribunal in Hudco. Service tax cannot be levied on the foreclosure charges levied by the banks and non-banking financial companies on premature termination of loans under 'banking and other financial services' as defined under section 65 (12) of the Finance Act.

Hence, the reference was answered by stating that the foreclosure charges collected by the banks and non-banking financial companies on premature termination of loans are not leviable to service tax under 'banking and other financial services' .

4. GST – AGREEMENT ENTERED INTO ON 30.6.2017 FOR TOLL COLLECTION – TOLL COLLECTION ADVERSELY AFFECTED DUE TO IMPLEMENTATION OF GST - NHAI CIRCULAR ACCEPTING GST PROMULGATION AS "CHANGE IN LAW" FOR THE PURPOSE OF THE CONTRACT WITH CONTRACTORS - NO MERIT IN CONTENTION THAT RESPONDENT'S CONSENT TO EXECUTE THE CONTRACT ON 30.6.2017 OUGHT TO BE CONSTRUED AS ACQUIESCENCE TO BEAR CONSEQUENCES OF IMPLEMENTATION OF GST – NO INFIRMITY IN THE AWARD OF ARBITRATOR UPHOLDING THE INVOCATION OF FORCE MAJEURE CLAUSE BY THE RESPONDENT - PETITION DISMISSED

In National Highway Authority of India v. Sahakar Global Ltd. 2020(42) G.S.T.L 205 (Del.), on 23.05.2017, the petitioner invited bids from entities interested in undertaking toll collection from users of the Vaghasia Fee Plaza for the section from KM 183.50 to 254.00 (Bamanbore-Garanore section) of NH-8A in the state of Gujrat. In its Request for Participation (RFP), the petitioner had set out that the potential toll collection on this stretch of the highway would be INR 39.32 crores. The respondent's bid of INR 41,49,00,000 was accepted by the petitioner on 21.06.2017 by way of a letter of acceptance (hereinafter referred to as 'LoA') and, in accordance with the estimated Annual Potential Collection (APC), the respondent submitted the requisite security of INR 39,32,000 by way of a bank guarantee of INR 3,45,75,000 valid for 14 months and a bank draft of INR 3,45,75,000, both dated 28.06.2017. The parties entered into a contract agreement on 30.06.2017 whereunder the toll plaza was to become operational w.e.f. 02.07.2017 at 0800 hours and remain entrusted to the respondent for a period ofone year. Accordingly, the project site was duly handed over to the respondent on 02.07.2017.

However, consequent to the introduction of the GST w.e.f. 01.07.2017, two days prior to the execution of the agreement, on 28.06.2017, the respondentrealized that the petitioner's estimated projections had failed to account for the adverse consequences of a change in the tax regime and there was a heavy fall in the traffic volume of the commercial transport vehicles and user fee collection on the highway owing to the implementation of GST. This resulted in a reduction in toll collections delaying the timely deposit of weekly remittances and the respondent tried to plead its case with the petitioner in order to revisit their agreement pertaining to toll collections or seek grant of leniency and a further request to conduct a three day traffic survey on the Plaza to assess the actual fall in trafficvolume for itself for which the respondent volunteered to even bear the costs of the traffic survey.

Thereafter, the respondent, citing implementation of GST as a force majeure event covered under clause 25(b)(v) of the contract agreement, submitted a statement of the losses suffered by it until 09.07.2017 which was refused and the event denied as a force majeure one by the petitioner stating that GST was originally proposed to be implemented w.e.f. 01.04.2017, instead of 01.07.2017, much before execution of the contract agreement on 30.06.2017 and, consequently, the fact of implementation of GST was always in the respondent's knowledge. This was followed up with coercive threat on the part of the petitioner to terminate the contract and invoke the security,recover its outstanding dues by invoking the performance security deposited, compelling the respondents which was resisted by the respondent.

Thereafter on a reference by the respondent to arbitration, the arbitratorheld that notwithstanding the respondent's prior knowledge regarding the implementation of the GST Act originally scheduled to begin from 01.04.2017, which was subsequently suspended, it could not possibly have known the next scheduled date and rejected the petitioner's contention that the respondent's act of executing the contract agreement on 30.06.2017, despite beingaware of the implementation of the GST w.e.f. 01.07.2017, disentitled it from claiming force majeure.

The arbitrator reasoned that the respondent could not possibly withdraw from the contract agreement considering the fact that this would

have triggered the petitioner to invoke the security deposited by the respondent. Consequently, the arbitrator held that the implementation of the GST was indeed a force majeure event in the light of the petitioner's circular dated 16.03.2018 whereunder it accepted GST w.e.f. 01.07.2017 as a 'change in law' falling under the ambit of force majeure as envisaged in the contract agreement. Being aggrieved by the findings of the arbitrator, a writ petition was filed before the high court which observed as under:-

1. The petitioner's two primary reasons for challenging the award are that, firstly, the respondent had always been aware of the decision of the Government of India to implement GST regime in the country and could not, therefore, claim any damages on the ground that the advent of the new tax regime reduced highway usage and consequent toll collections; the second being that the petitioner had never admitted, in its circular dated 16.03.2018, that the implementation of GST would qualify as a Force Majeure event in all cases and, therefore, the arbitrator's reliance on the same to confirm that the respondent was entitled to invoke the 'force majeure clause' was misplaced.

2. It is a general truth that once the Government of India had proposed implementing the GST all over the country, the respondent was aware of its advent. However, the petitioner's deduction that the respondent's awareness of the regime implied that it had knowledge of the date on which it would be implemented, on the date of submission of the bid is entirely unsupported and presumptuous. It is far-fetched to argue that the respondent's awareness of the existence of a policy would equip it with the ability to predict the date on which the said policy would be implemented.

3. The learned arbitrator has rightly held that once the earlier date of 01.04.2017 was postponed by the Government of India, the next date of implementation was not known or could not be speculated by anybody.

4. The petitioner's assertion that the respondent ought to have refrained from executing the contract agreement if it was unwilling to bear the consequences of the GST regime also proceeds on the presumption that the respondent had the ability to predict the adverse impact of this decision on consumer behavior with respect to utilization of national highways. This line of argument also fails to account

for the fact that by 28.06.2017, the day when the Government of India announced its intention to implement this regime, the parties were already bound contractually owing to the LoA issued by the petitioner on 21.06.2017, which aspect had been elucidated by the learned arbitrator.

5. This implied that on 30.06.2017, had the respondent decided to refrain from executing the agreement based on the notification dated 28.06.2017 issued by the Government of India, it would have had to forfeit the securities it had furnished in favour of the petitioner for a sum of INR 39,32,000 on 28.06.2017.

6. Thus, there is no merit in the petitioner's contention that the respondent's consent to execute the contract agreement on 30.06.2017 ought to be construed as an acquiescence on its part to bear the consequences of the implementation of GST.

7. The issue is whether the implementation of the GST regime qualified as 'any change in law which has a material adverse effect on the obligation of the parties hereto.' as envisaged in the Force Majeure Clause, i.e. Clause 25(b) of the contract agreement. Evidently, implementation of GST ushered a change in the country's sales tax regime and constitutes 'a change in law', but whether it invites the application of Clause 25(b) can be concluded on assessing the impact of this change on the respondent's ability to discharge its obligations under the contract agreement.

8. The respondent claims that the change in sales tax regime sent rippling waves of shock across the country's markets, and severely impactedthe transport and sales of goods across the country, adversely affected inter-state and intra-state movement of goods, which implied that the highway was not being used optimally or at the level anticipated by the petitioner while drawing up its toll collection projections.

9. The respondent gave the petitioner early notice and regular updates regarding the downward dip of highway traffic and toll collections at that point of time. The respondent even requested the petitioner to carry out its own traffic assessment to verify the respondent's claims, but the petitioner refused. It is against this backdrop that the petitioner issued the circular dated 16.03.2018, specifically for the benefit of its toll collection contractors, which stipulated that

while the implementation of the GST Act constituted a 'change in law', but whether this change invited application of the 'Force Majeure' clause in a contract would be determined in the facts of each case by the respondent's representatives.

10. On the basis of the material placed on record, the Arbitrator found merit in the respondent's claims regarding reduction in traffic.

11. Hence, there is no merit in the petitioner's contention that the implementation of GST could not be construed as a 'change in law' to qualify as a Force Majeure event in the respondent's case in view of the following:-

i. In the first place, on 16.03.2018, once the petitioner released a public circular deeming the implementation of GST as a 'change in law' qualifying as a force majeure event, there is no reason to deprive the respondent of the benefit of this declaration.

ii. Even if the petitioner wished to rebut the respondent's contentions on this ground, it was the petitioner's duty to provide the learned arbitrator with a transparent and complete picture of the flow of traffic and toll collections arising therefrom, instead of providing data containing inflated figures owing to exclusion of non-tollable vehicles.

12. The petitioner's sole caveat in the circular that the toll contractors had been unable to prove their claims, stood resolved when the learned arbitrator not only delved into the specifics of the respondent's claims, but also meticulously combed through the specific project inputs provided by the respondent to conclude that it had suffered material losses in toll revenue owing to the implementation of GST.

13. The conducted a thorough examination of the data pertaining to traffic volume arbitrator and toll collections placed before it and arrived upon a sound decision to extend the benefit of the petitioner's circular dated 16.03.2018 to the contract agreement executed between the parties on 30.06.2017, for the purpose of upholding the invocation of force majeure clause of the contract agreement. There is, thus, no infirmity in the award even on this ground.

Hence, the high court held that there is no reason to interfere with the well-considered findings of the arbitrator and dismissed the petition.

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