IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 726 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 4857 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 1984 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 1988 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 6875 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 4420 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 7330 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 6220 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 6117 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 8087 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 7402 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 8208 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 9284 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 9282 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11234 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11207 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11209 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 9726 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 10479 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 10480 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 10957 of 2019
With

R/SPECIAL CIVIL APPLICATION NO. 11410 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11732 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11885 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11887 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11889 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 12681 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 16313 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 652 of 2019
With
CIVIL APPLICATION NO.1 of 2019
in R/SPECIAL CIVIL APPLICATION NO. 11410 of 2019

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR.JUSTICE J.B.PARDIWALA **Sd/-**
HONOURABLE MR.JUSTICE A.C. RAO **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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MOHIT MINERALS PVT LTD
Versus
UNION OF INDIA & 1 other(s)

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Appearance:
MR JK MITTAL WITH MR HARDIK P MODH for the Petitioner(s) in SCA No.726 of 2018.
MR VIKRAM NANKANI, SR.ADVOCATE with MR PARITOSH R.GUPTA for the Petitioner(s) in SCA No.9726 of 2019.

MR SHASHANK SHEKHAR with M/S. PARITOSH GUPTA AND MIHIR GUPTE for the Petitioner(s) in SCA No.11410 of 2019.
DR C.MANICKAM with M/s. AJAYKUMAR GUPTA AND GAURAV K.LAKHWANI for the Petitioner(s) in SCA No.6117 of 2019.
MR TUSHAR P.HEMANI, SR.ADVOCATE with M/S.VIJAY H.PATEL AND APURVA MEHTA for the Petitioner(s) in SCA Nos.9284-9282 of 2019.
MR V.SRIDHARAN, SR.ADVOCATE with M/S.JIGAR SHAH AND ANAND NAINAWATI for the Petitioner(s) in SCA No.7330 of 2019.
MS AMRITA M.THAKORE for the Petitioner(s) in SCA No.11732 of 2019.
MR PARESH M.DAVE with AMAL PARESH DAVE for the Petitioner(s) in SCA Nos.1984, 1988 and 4420 of 2019.
MR DHAVAL SHAH with MR S.S.IYER for the Petitioner(s) in SCA Nos.6875 and 10957 of 2019.
MR UCHIT N.SHETH for the Petitioner(s) in SCA Nos.6220, 10479, 10480, 11885, 11887 and 11889 of 2019.
MR ANAND NAINAWATI for the Petitioner(s) in SCA No.4857 of 2019.
MR HIRAK P.GANGULY for the Petitioner(s) in SCA No.7402 of 2019.

M/S.NIRZAR S DESAI, PARTH H.BHATT, ANKIT SHAH AND DHAVAL D.VYAS for the Respondent(s).

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 23/01/2020

CAV COMMON JUDGMENT
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ-applications are the same, those were heard analogously and are being disposed of by this common judgment and order.

2. In all the captioned writ-applications, the writ-applicants have challenged the levy of the IGST on the estimated component of the Ocean Freight paid for the transportation of the goods by the foreign seller as sought to be levied and collected from the writ-applicants as the importer of the goods.

3. The Central Government has introduced the Notification No.8 of 2017 – Integrated Tax (Rate) dated 28th June 2017, wherein vide Entry No.9, the Central Government has notified that the IGST at the rate of 5% will be leviable on the service of transport of goods in a vessel including the services provided or agreed to be provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs stations of clearance in India.

4. The Central Government, thereafter, issued the Notification No.10 of 2017 – Integrated Tax (Rate) dated 28th June 2017, by which the Central Government has notified that for the said category of service provided at Serial No.10 to the said Notification, the importer as defined in clause 2(26) of the Customs Act located in the taxable territory shall be the recipient of service.

5. We had the benefit of hearing the learned senior counsel appearing in various writ-applications. We heard Mr.Vikram Nankani appearing with Mr.Paritosh Gupta, Mr.J.K.Mittal with Mr.Hardik P.Modh, Mr.Sridharan with Mr.Jigar Shah, Mr.C.Manickam with Mr.Gaurav K.Lakhwani, Mr.Tushar P.Hemani with Mr.Apurva Mehta, Mr.Shashank Shekhar with Mr.Paritosh Gupta and Mr.Uchit Sheth.

6. We also heard Mr.Nirzar S.Desai, Mr.Parth H.Bhatt, Mr.Ankit Shah and Mr.Dhaval D.Vyas, the learned standing counsel appearing for the Union of India.

7. For the sake of convenience, we treat the Special Civil Application No.726 of 2019 as the lead matter.

8. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, a company engaged in the business of import of non-cooking coal from Indonesia, South Africa and U.S.A., has prayed for the following reliefs :

> *"(A) ...this Hon'ble High Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ/order/direction against the Respondents by quashing the impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.6.2017 by declaring that same lack legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017 and hence unconstitutional;*
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> *(B) this Hon'ble High Court be pleased to issue a writ of certiorari/mandamus or any other appropriate writ/order/direction against the Respondents by declaring that no tax is leviable under the Integrated Goods and Services Tax Act, 2017 on Ocean Freight for services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India and levy and collection of tax on such Ocean Freight under the impugned Notifications is not permissible under the law;*
>
> *(C) this Hon'ble High Court be pleased to issue a writ of mandamus/order/direction to the Respondent No.2 to place*

before this Hon'ble Court the records of the recommendation given and all decision taken in respect of impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and the Notification No.10/2017-Integrated Tax (Rate) dated 28.6.2017;

(D) that pending the hearing and final disposal of the petition, this Hon'ble Court be pleased to :

i. stay the operation of impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.6.2017 and/or;

ii. stay the levy and collection of integrated tax Ocean Freight on transport of goods in a vessel from a place outside India upto the customs station of clearance in India by a person located in non-taxable territory; and/or;

iii. Restrain the Respondent No.1 and all its officers, agents to take any coercive measure against the petitioner and its officers during the pendency of writ petition; and/or;

(E) issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case."

9. The facts as stated in the writ-application giving rise to this litigation are as under :

10. The writ-applicant company is engaged in importing non-cooking coal from Indonesia, South Africa and U.S.A. and supplying it to various domestic industries including power, steel, etc. It has business based at various parts of the country, however, the main business place is in Gujarat and most of the imported coal comes at the port located at Gujarat. The writ-applicant company is registered under the GST laws for payments of GST/IGST besides being paying the customs duty on import of coal. The writ-applicant discharges the customs duty on the imported products at the time of each import and such value includes the value of freight on which customs duty is demanded and paid. The writ-applicant is liable to pay integrated tax in terms of provisions of the Integrated Goods and Services Tax Act, 2017 (IGST/Integrated Tax Act) and accordingly the writ-applicant is paying the integrated tax at the time of import itself, which also includes value of Ocean Freight involved in imported coal.

11. The respondent no.1 is responsible for the implementation of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST') and the Integrated Goods and Services Tax Act, 2017 (for short, 'the IGST') and has also issued the Notifications in question under the said Acts.

12. The respondent no.2 is a constitutional body constituted under Article 279A of the Constitution of India, as made applicable w.e.f. 12.9.2016, and it is mandatory on the part of the respondent no.2 to make recommendations on various matters relating to the Goods and Services Tax (GST) and further provisions have been made under the respective GST laws,

whereby the respondent no.1 have to act on the recommendations of the respondent no.2. To the best of the knowledge of the writ-applicant, the respondent no.2 has not placed, at their own, any such recommendations for public at large.

13. The writ-applicant in the present writ-application is challenging the legality and validity of the impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.6.2017 as the same are lacking legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017, and hence unconstitutional. The respondent no.1 has levied again the integrated tax on reverse charge basis under the impugned Notifications on the Ocean Freight, for which the writ-applicant is already paying the integrated tax at the time of import with the value of imported coal, which is not permissible under the law.

14. The present writ-application has been filed seeking various reliefs, more particularly, seeking quashing of the impugned Notification No.8/2017-Integrated Tax (Rate), dated 28.6.2017 and Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated 28.6.2017, by declaring that the same lack legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017, and hence unconstitutional. The writ-applicant also seeks declaration that the levy of the integrated tax again on the Ocean Freight under the impugned Notifications is not permissible and amounts to double taxation, as the 'Integrated Tax' (under IGST Act, 2017) has been paid on

the imported coal at the time of importation (the value which includes Ocean Freight also).

15. The writ-applicant is importing coal from various countries on FOB (Free on Board) and CIF (sum of Cost, Insurance and Freight) basis. The writ-applicant also has the High Sea sale and purchase transactions.

(a) In case of purchases made on CIF basis, the freight invoice is issued by the foreign shipping line to the foreign exporter, the writ-applicant neither has any invoice of such freight and nor has any idea of payments and the amount of such freight;

(b) In case of purchases made on FOB basis, the writ-applicant engages foreign shipping line and pays the Ocean Freight to the foreign shipping line;

(c) In case of the High Sea purchase, the coal is purchased before landing it in Indian port, from the original buyer who purchased the coal. In this case, the writ-applicant neither has any invoice of such freight nor has any idea of payments and the amount of such freight. It is similar to the purchases of coal on CIF basis;

16. The writ-applicant discharges the customs duty on the imported coal at the time of importation and such customs duty is paid on the value of the imported coal which includes the value of Ocean Freight, as determined on the value under Section 14 of the Customs Act, 1962 and Rules made thereunder.

IGST PAID ON IMPORT :

17. The writ-applicant, at the time of importation, in addition to the customs duty, pays the 'Integrated Tax' (known as IGST) under the IGST Act, 2017, on the imported coal on the value as determined under the Customs Tariff Act, 1975 (vide proviso to Section 5(1) of the IGST Act, 2017). The said value also includes the value of the Ocean Freight, when the goods are purchased on FOB basis, whereas in case of goods purchased on CIF basis, the cost itself is the sum of cost, insurance and freight basis.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

18. Mr.Mittal, the learned senior counsel assisted by Mr.Modh made the following submissions :

No levy, but for the impugned Notifications, is ultra vires to the IGST Act and on the supply made beyond the territory to which the Act applies :

19. The impugned Notification No.8/2017, through Entry 9(ii), has sought to levy the tax on the transactions including 'service provided by a person located in a non-taxable territory to a person located in non-taxable territory', by way of transportation of goods by a vessel. Indisputably, both, the service provider and the service recipients are outside India and such a levy goes beyond the mandate of Section 1 of the IGST Act, 2017, which extends to the whole of India and not outside India. No levy exists in law but for the impugned Notification.

20. As per Section 1(2) of the Act, the provisions of the Act apply to the whole of India. As per Section 2(24) of the Act, the words and the expression used and not defined in the IGST Act but defined in the CGST Act, shall have the same meaning as assigned to them in the CGST Act. As per Section 5(1) of the Act, the Integrated Tax is levied on all the inter-state supplies. As per Section 2(108) of the CGST Act, 'taxable supply' means a supply of goods or service or both which is leviable to tax under this Act. As per Section 2(109) of the CGST Act, the 'taxable territory' means the territory to which the provisions of the Act applies, i.e. the whole of India. It is submitted that the combined reading of the aforesaid provisions indicates that the supply made within the 'taxable territory' is leviable to tax.

21. Strong reliance is placed upon the judgment in the case of Indian Association of Tour Operators v. Union of India and others, reported in 2017(5) GSTL 4 (Del.) (paras 5, 18, 19, 26, 48), which is under the Finance Act, 1994, which also had the similar provisions under Section 64 of the said Act, where the Act was applied to the whole of India except the State of Jammu & Kashmir and the taxable territory was defined as the territory to which the provisions of the said Act was applicable. In this context, reliance is also placed on a decision of the Delhi High Court, wherein it is held that the services rendered outside India cannot be brought to tax by a delegated legislation by fixing a deeming provision without amending Section 64 of the Finance Act, 1994. It is an essential legislative function. The same analogy is sought to be extended in the present case also.

22. It is submitted that the provisions of Section 1 of the Customs Act, 1962, as amended by the Finance Act, 2018,

extend its operation to offence committed outside India. Therefore, the IGST Act, 2017, which is not extended to the supply made outside India, through the impugned Notifications, cannot be brought to tax. Therefore, the levy has been imposed but for the impugned Notifications, on the supply which happened outside India, which is impermissible under the law. Therefore, the impugned Notifications lack the legislative competency, ultra vires to the IGST Act, 2017, and are liable to be quashed.

The principle of extra-territorial levy applies to both; CIF and FOB purchases :

23. In case of purchases made on the CIF basis, indisputably, both, the service provider and the service recipients are outside India and the writ-applicant - purchaser is concerned only with the purchases of goods and having no idea of payments made towards the freight for vessel. Therefore, the supply has happened outside India. Similarly, when purchases are made on FOB basis by the writ-applicant, the Ocean Freight is paid by the writ-applicant to the foreign shipping line. The transportation of goods by a vessel is done from a place outside India upto the port in India. Thus, the supply happened outside India. Such activity takes place outside the territory of India, and thus, it is outside the purview of the tax. Hence, the impugned Notification is ultra vires to the Act.

No levy could be imposed twice under the same Act :

24. The writ-applicant has already paid the 'Integrated Tax' (Known as the IGST) under the IGST Act, 2017, on the imported

coal, which includes the value of the Freight (FOB basis), whereas in the case of goods purchased on the CIF basis, the cost includes the sum of cost, insurance and freight. The impugned Notifications again seek to levy the 'Integrated Tax' under the IGST Act, 2017, on freight components (Ocean Freight) on the reverse charge basis. In such circumstances, to levy and collect once again the Integrated Tax under the same Act on the 'supply' (same aspect) amounts to double taxation under the same Act, which is impermissible under the law. Therefore, the impugned Notifications are illegal and unconstitutional.

25. The levy under the impugned Notification is contrary to the concept of 'composite supply' under the Act. In Section 2(30) of the CGST Act, the term 'composite supply' has been defined, wherein an illustration has been given, where the goods are supplied with transportation, insurance, etc. will be a composite supply and the supply of goods is a principal supply. As per Section 8 of the CGST Act, the tax liability in case of the composite supply shall be determined by treating it as a supply of such principal supply. In other words, the tax will be levied on the principal supply. Therefore, when the goods are imported and integrated tax is levied and collected on the value of goods (coal), which includes the Ocean Freight, the Ocean Freight cannot be taxed as a separate supply under the impugned Notification, which is ultra vires to the provisions of Section 2(30) read with Section 8 of the CGST Act, also.

'Deeming fiction of value' in the Notification is illegal and there is no concept of 'value of taxable service' in the Act :

26. It is submitted that para-4 inserted by the Corrigendum dated 30.6.2017 has a deeming fiction for the 'value of taxable service' as 10% of the CIF value of the imported goods. In case of import on the CIF value basis, the writ-applicant is not concerned about the freight and is not knowing even about the charges for the same, which is the sole responsibility of the supplier of the coal outside India.

27. First, in the Act, there is no concept of 'taxable service', which has been the concept only in the erstwhile Finance Act, 1994, to levy the service tax.

28. Secondly, through the delegated legislation there cannot be a deeming fiction to ascertain the value on which the tax is payable as it is an essential legislative function (see Indian Association of Tour Operators v. Union of India and others, reported in 2017(5) GSTL (Del.) (para 48).

29. Thirdly, as per the settled law, the vagueness in the measure or value on which the rate will be applied for computing the tax liability makes the levy fatal to its validity (see Govind Saran Ganga Saran v. CST, AIR 1985 SC 1041: 1985 Supp (1) SCC 205 (para 6) and also Mathuram Agrawal v. State of MP, AIR 2000 SC 109 : (1999)8 SCC 667 (para 12)). Therefore, the deeming fiction for the valuation inserted in the impugned Notification is illegal and liable to be quashed.

30. The expression 'service provided or agreed to be provided' used in Entry 9(ii) of the impugned Notification No.8/2017 is not to be found in the Act. In the Entry 9(ii) of the impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017,

the expression used is 'service provided or agreed to be provided', whereas such expression is not to be found under the IGST Act/CGST Act. Such an expression was there in the erstwhile Finance Act, 1994. The present Act has used the terms 'supply' and 'taxable supply'. Similarly, in para 4 of the impugned Notification, the expression used is the 'value of taxable service provided', which is also used in the erstwhile Finance Act, 1994. Therefore, while issuing the impugned Notification, the delegated legislature had in mind the provisions of the Finance Act, 1994, instead of the object of bringing the GST by making the Constitutional (101st) Amendment Act, 2016, to merge all the taxes levied on the goods and services to one tax known as the GST. Despite having levied and collected the Integrated Tax under the IGST Act, 2017, on all the import of coal/goods on the entire value, which includes the Ocean Freight, through the impugned Notifications, once again the Integrated Tax is sought to be levied under the misconception that a separate tax could be levied on the services components (freight), which is impermissible under the scheme of the GST legislation made under the Constitutional (101st) Amendment Act, 2016. Therefore, the impugned Notifications are beyond the legislative competency and liable to be quashed.

<u>The impugned Entry 10 of the Notification No.10/2017 is ultra vires to the Act :</u>

31. It has been argued that as per Section 5(3) of the Act, the tax liability could be shifted on the 'recipient' on reverse charge basis by issuing the Notification. However, as per the impugned Entry 10 of the Notification No.10/2017 – Integrated Tax (Rate), dated 28.6.2017, the liability has been shifted on the 'importer'

and not on the 'recipient'; that too, the transaction not exigible to tax under the Act.

32. It is contended that in the first place the supply itself has to be made taxable and then only such provisions of shifting of the liability on the recipient can be made applicable. Therefore, when the activity takes place outside the taxable territory, the provisions of the Act itself could not be made applicable and the recipient could not be held liable to pay the tax, as otherwise it will amount to making a non-taxable supply as taxable supply, which is ultra vires to the Act itself.

33. Secondly, under the impugned Entry 10 of the Notification No.10/2017, the tax liability has been shifted on the 'importer' and not on the 'recipient', which is contrary to the provisions of Section 5(3) of the Act, under which the said Notification has been issued.

34. It is submitted that in Govind Saran Ganga Saran v. CST, AIR 1985 SC 1041 : 1985 Supp (1) SCC 205 (para 6), it has been held that any vagueness of the person on whom the levy is imposed and who is obliged to pay the tax make the levy fatal. Also referred to Mathuram Agrawal v. State of MP, AIR 2000 SC 109 : (1999)8 SCC 667 (para 12).

35. Therefore, the impugned Entry 10 of the Notification No.10/2017 – Integrated Tax (Rate), dated 28.6.2017, is ultra vires to sub-section (3) of Section 5 of the Act, under which the said Notification has been issued, and it also makes a non-taxable supply as taxable supply. Therefore, the same is liable to be quashed.

The concept of 'Chapter', 'Section' or 'Heading' 'scheme of classification of services' or 'description of services' introduced in the impugned Notification No.8/2017 is beyond the competency of delegated legislation :

36. As per clause (ii) of para 5 of the impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017, 'Reference to 'Chapter', 'Section' or 'Heading', wherever they occur, unless the context otherwise requires, shall mean respectively as the 'Chapter', 'Section' and 'Heading' in the scheme of classification of services annexed to the Notification No.11/2017 – Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i), dated 28th June, 2017, vide number G.S.R. 690(E), dated 28th June, 2017'. It is pointed out that the respondents in their counter affidavit have not disputed the writ-applicant's contention that there is no 'scheme of classification of services' or 'description of services' in the Act, and the Respondents have also not disputed that no power is vested with the Respondents under the Act, to specify the 'scheme of classification of services' or 'description of services' at all, as done in the impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017 read with Notification No.11/2017 – Central Tax (Rate), dated 28.6.2017. The Respondents have also not disputed the contentions of the writ-applicant that specifying the 'scheme of classification of services' or 'description of services' etc. are essential functions of the Parliament, which are neither delegated nor could have been delegated but assumed by the Respondents while issuing the impugned Notification.

37. It is submitted that in Vasu Dev Singh and others v. UOI and others (2006)12 SCC 753 (para 118) – it has been held that

'It is impermissible for the legislature to abdicate its essential legislative functions'.

38. It is pointed out that in Municipal Corporation v. Birla Cotton, Spinning and Weaving Mills, AIR 1968 SC 1232 (para 89), the Supreme Court, by majority decision, took the view that '(ii) Essential legislative function cannot be delegated by the legislature'.

39. The Respondents have not disputed that in the impugned Notification also the given chapter, section and heading in respect of different services, which is nowhere defined in the Act and neither there is any power to refer to such chapter, section and heading and such scheme of classification has not been provided under the parent Act at all. Thus, the Notifications are beyond the scope of the Act and do not conform to the provisions of the statute under which these are issued.

40. It is argued that in General Officer Commanding-in-Chief v. Subhash Chandra Yadav (1988)2 SCC 351 (para 14), it was held that rule must conform to the statute and come within rule making power, if either of these two conditions is not fulfilled, the rule so framed would be void.

41. In Union of India v. S.Srinivasan, (2012)7 SCC 683, at page 690 (para 21) held that : '21....If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared ultra vires'. However, the Respondents may justify that the impugned Notifications after their issuance have been placed before the Parliament, which is not tenable in law.

42. The Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427 held that : 'The fact that the rules framed under the Act have to be laid before each House of the Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act'.

43. The Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India, 2013(29) S.T.R. 9 (Del.), while declaring Rule as ultra vires, observed that : 'It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule'.

The 'scheme of classification of services' or 'description of services' in the impugned Notification No.8/2017 are without any legislative policy and arbitrary :

44. It is submitted that without prejudice to the foregoing contentions and without admitting even if it is assumed that the function of the 'scheme of classification of services' or 'description of services' etc. can be delegated, the Parliament has not laid down clearly the legislative policy and the guidelines which serve as guidance for the authority on which the function is delegated (see Municipal Corporation v. Birla Cotton, Spinning and Weaving Mills, AIR 1968 SC 1232 (para 89).

45. It is argued that the respondents have wrongly assumed as if such functions have been delegated to them and given in the the impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017, artificial classification of services or description

of services as well as to specify the rates, which has no basis at all. Thus, the Respondents have acted arbitrarily while issuing the impugned notification, therefore, it is also hit by Article 14 of the Constitution of India and liable to be quashed.

Various provisions are cited for exercising the power for issuing the impugned Notification No.8/2017, whereas no power can be traced under the said provisions which are for different purposes :

46. The impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017, has been issued by referring as the power conferred under the various provisions of the Integrated Goods and Services Tax Act, 2017, as well as the Central Goods and Services Tax Act, 2017, all such provisions are for different purposes.

(a) the said Notification No.8/2017 has also been issued under sub-section (1) of Section 6 of the IGST Act, 2017, under which the power of exemption has been granted, but the impugned Notification is not for the purpose of exemption, but to specify the 'rate', therefore, is totally misconstrued by the Respondents.

(b) the said Notification No.8/2017 has also been issued referring to the power under clauses (iii) and (iv) of Section 20 of the IGST Act, 2017, whereas under these provisions, there is no power to issue any such notification but it only incorporate the provisions by reference of the CGST Act, 2017.

(c) the said Notification No.8/2017 has also been issued referring to the provisions of Sections 15(5) and 16(1) of the Central Goods and Services Tax Act, 2017 (CGST Act), whereas under these provisions, there is no power to issue any such notification, but only to make the Rules, which have already been framed separately by the Respondents (Valuation Rules, under Section 15(5) and Input Tax Credit Rules, under Section 16(1) of the said Act) under Chapters IV and V of the CGST Rules, 2017, respectively.

(d) the said Notification No.8/2017 has also been issued referring to Section 5(1) of the IGST Act, 2017, but it only empower to issue the notification to specify rates and not for any other purpose, whereas the notification is ultra vires to the Act, as already discussed in the preceding paras, which are not repeated for the sake of brevity.

47. It has been argued that the respondents have issued the notifications under the various provisions which are not applicable for issuing rate notifications. Thus, the impugned Notifications are beyond the scope and mandate of the Act. The impugned Notifications are ultra vires the Act and liable to be struck down.

<u>The conditions specified in column 5 of the impugned Notification No.8/2017 is ultra vires to the Act :</u>

48. The impugned Notification No.8/2017 – Integrated Tax (Rate), dated 28.6.2017 has also placed various conditions in column 5 of the said Notification, without any basis and dehors such power available to the respondents to impose such conditions while issuing the rate notification under Section 5(1)

of the Act. The conditions so specified under the said rate notification to deny the input tax credit are directly in conflict with Sections 16 and Section 17 respectively of the CGST Act, 2017, which deal with the conditions of eligibility of availment of the input tax credit. Hence, the impugned Notification is ultra vires to the said Act and liable to be struck down.

49. The learned senior counsel placed strong reliance on the following decisions :

(i) Indian Association of Tour Operators v. Union of India and others, reported in 2017(5) GSTL 4 (Del.) (paras 5, 18, 19, 26, 48), wherein it was held that the legal fiction treating the service rendered outside India to be a service rendered in India cannot be introduced by way of Rules as it is an essential legislative function which cannot be delegated to the Central Government.

(ii) The Supreme Court, in GVK Industries Ltd. v. ITO (2011)4 SCC 36 (para 124), clearly stated that the Parliament may exercise its legislative powers with respect to the extra-territorial aspect, that too when they have an impact on or nexus with India. Therefore, it does not empower the delegated legislation to exercise such power and nor such power can be delegated by the Parliament.

(iii) Ishikawajma-Harima Heavy Industries Ltd. v. Director of Income Tax, Mumbai, AIR 2007 SC 929, held that the 'entire services having been rendered outside India, the income arising therefrom cannot be attributable to the permanent establishment so as to bring within the charge of tax'. The Court further held that the taxation

liability of the oversea services would not arise in India. The Court also observed that 'in cases such as this, where different severable parts of the composite contract is performed in different places, the principle of apportionment can be applied to determine which fiscal jurisdiction can tax that particular part of the transaction'.

(iv) The Supreme Court in the case of Mathuram Agrawal v. State of MP, AIR 2000 SC 109, held that : '12... The statute should clearly and unambiguously convey the three components of the tax law, i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law'.

(v) The Supreme Court in the case of Govind Saran Ganga Saran v. CST, AIR 1985 SC 1041, held that : '6... The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity'.

(vi) In Vasu Dev Singh and others v. UOI and others (2006)12 SCC 753 – it is held that : '18... It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions'.

(vii) In Municipal Corporation v. Birla Cotton, Spinning and Weaving Mills, AIR 1968 SC 1232 (para 89), by majority decision took the view that : '(ii) Essential legislative function cannot be delegated by the legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of a particular topic or matter entrusted by the Constitution to the legislature;' Therefore, the legislature can delegate non-essential legislative functions, but while delegating such functions, there must be a clear legislative policy which serves as guidance for the authority on which the function is delegated.

(viii) In Hukam Chand v. Union of India, AIR 1972 SC 2427 (para 13) it has been held that : '13... The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act'.

(ix) The Delhi High Court in the case of Intercontinental Consultants and Technologies Pvt. Ltd. v. Union of India 2013(29) S.T.R. 9 (Del.) while declaring Rule as ultra vires

observed that : 'It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule'.

(x) In General Officer Commanding-in-Chief v. Subhash Chandra Yadav (1988)2 SCC 351, it has been held as follows : '14... before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void'.

(xi) The Supreme Court in the case of Union of India v. S.Srinivasan, (2012)7 SCC 683, at page 690 (para 21) held that : '21... If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared ultra vires'.

SUBMISSIONS ON BEHALF OF THE UNION OF INDIA :

50. The learned standing counsel appearing for the Union of India have tendered written submissions. The written submissions are as under :

51. It is a settled legal preposition by now that a subordinate/ delegated legislation can be challenged only on the limited grounds as held by the Supreme Court in the case of State of

T.N. and others v. P.Krishnamurthy and others, reported in 2006(4) SCC 517. The Supreme Court in paras 15 and 16 of the aforesaid judgment observed as under :

"Whether the rule is valid in its entirety ?

15. There is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a sub-ordinate legislation can be challenged under any of the following grounds :-

a) Lack of legislative competence to make the sub-ordinate legislation.

b) Violation of Fundamental Rights guaranteed under the Constitution of India.

c) Violation of any provision of the Constitution of India.

d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

e) Repugnancy to the laws of the land, that is, any enactment .

f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

16. The court considering the validity of a subordinate Legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate Legislation conforms to the parent Statute. Where a Rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non- conformity of the Rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity."

52. The aforesaid ratio was considered and followed by the Supreme Court once again in the case of Cellular Operators Association of India and others v. Telecom Regulatory Authority of India and others, reported in 2016(7) SCC 703 and reference to the same has been made in para 34 of the aforesaid judgment and, therefore, this Court may consider the challenge to the impugned Notifications No.8/2017 and 10/2017 in light of the aforesaid ratio.

Why Ocean Freight was necessitated

53. Prior to 1.6.2016 (Budget 2016-17), the services of transportation of goods in a vessel from a place outside India upto the customs station of clearance in India was exempted from service tax. As a result, the Indian shipping lines were unable to avail input tax credit paid on the input goods and services and such tax formed a part of their transportation costs. So they were rendered uncompetitive vis-a-vis foreign shipping

lines. In view of the requests from the Indian Shipping Industries and other stakeholders, to provide them the level playing field vis-a-vis the foreign shipping lines, service tax was imposed on the service of inward transportation of goods to enable the Indian shipping lines to use the ITC available with them, which they could not otherwise utilize, as outward transportation of the goods was also exempted from service tax. As per the Place of Provision of Services Rules, 2012, the service of export of goods was not leviable to the service tax as the place of provision of service was outside the taxable territory of India. However, the shipping lines were permitted to avail the ITC of the excise and service tax suffered on the input goods and/or services (i.e. the export of goods/services was zero rated). This ITC could be availed by the shipping lines for paying the service tax on the service of inward transportation of goods.

54. Subsequently, many representations were received from the shipping lines that in view of the levy of the service tax on the inward transport, FOB contracts were being converted to CIF contracts and these were being entered into in the non-taxable territory (i.e. outside India). Thus, the entire purpose of the amendments affected in the Budget 2016-17 and was not being fulfilled. In order to see that tax is suffered by both Indian shipping lines and foreign shipping lines on inward transportation of goods, the importers had been made liable to pay tax on the service of inward transportation of import cargo, as it was not possible to collect it from the foreign shipping lines entering into contract with a foreign supplier for transportation of goods to India. Thus, the provision is not arbitrary and is aimed at providing level playing field to the Indian shipping lines. In this regard, it is submitted that the issue has been examined

by the Ministry in consultation with the Ministry of Shipping. The collective view of the Ministries is that there is no double taxation in case of levy of the IGST on import freight service and it does not result in any additional cost to the importer as the GST paid by the importer on the inward transportation of goods as well as on the import freight services is available to them as the ITC and are not adversely affected by this measure because it does not add to their cost.

55. It is submitted that under the aforesaid circumstances the Ocean Freight was decided to be levied.

56. In reply to the argument canvassed on behalf of the writ-applicant that the levy of the IGST on the Ocean Freight in respect of transport of goods in a vessel from a place outside India to the customs station of clearance in India is illegal and ultra vires the Constitution and the IGST Act, it is submitted that in the 'transport of goods' which is carried out by a person other than the importer himself is an activity which gives rise to the aspect of providing transportation services of the said imported goods and as such gives rise to a taxing incident distinct from the tax on import of goods.

57. It is submitted that in Gujarat Ambuja Cements vs. U.O.I. & Anr. (2005) 4 SCC 214, the petitioners had challenged the legislative competence of the Centre to impose service tax on transport of goods as the same could only be imposed by the States under Entry 56 of List II, which reads as "taxes on goods and passengers carried by roads or inland waterways". The Supreme Court held that the legislative competence must be determined in accordance with the object of the tax.

58. It is further submitted that the Supreme Court, relying upon the aspect theory, stated that since the tax was a tax on the event of service and not a levy on passengers and goods and since the service tax could only be imposed under Entry 97, List I, the Centre had the legislative competence to enact the law as the same related to taxation on service. Furthermore, the Supreme Court held that the imposition of tax by the Centre did not tantamount to usurpation of power of the State or a colorabale exercise of power and was not in violation of the doctrine of separation powers. The Parliament has the legislative competence to tax the service aspect even if the legislative competence to tax the other aspects involved in the transaction is vested with the State. The Supreme Court upheld the legislative competence in similar circumstances in a catena of decisions and in that view of the matter, it could be said that the legislative competence is there and therefore the challenge to the notifications is not sustainable in law.

59. The Supreme Court, in All India Federation of Tax Practitioners case cited in 2007 (7) S.T.R. 625 (S.C.), has held as follows :-

> *In the light of what is stated above, it is clear that Service Tax is a VAT <u>which in turn is destination based consumption tax</u> in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.*

On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country.

60. Under Section 5(1) of the IGST Act, the IGST is levied on all the inter-State supplies of goods or services or both. The GST on goods imported into India is being levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975, on the value as determined under the said Act at the point when the duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962. Section 7(4) of the IGST Act provides that supply of services imported into the territory of India shall be treated to be a supply of services in the course of the inter-State trade or commerce.

61. Further, as per Section 11 of the IGST Act, the place of supply of goods imported into India shall be the location of the importer. As per Section 13(9) of IGST Act, the place of supply of services of transportation of goods other than by way of mail or courier, shall be the place of destination of such goods. Thus, with respect to goods destined for India, services by way of transportation of such goods by a vessel are taxable in India.

62. In Gujarat Ambuja Cements Vs UOI 2005 (182) ELT33 (SC): 2005(182) ELT 33 SC, the Supreme Court has stated that the legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery and that there is a distinction between the object of tax, the incidence of tax and the machinery for collection of the tax.

63. In A.H. Wadia v. CIT [AIR 1949 PC 18], the Supreme Court stated that : 'In the case of a sovereign Legislature, the question of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity.'

64. In GVK Industries Limited v. Income Tax Officer [(2011) 4 SCC 36], the Supreme Court examined the limitation of the Parliament in enacting the legislations with respect to the extraterritorial aspects that do not have any direct or indirect, tangible or intangible impact(s) on or effects in or consequences for :- (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians. It stated that the Parliament is indeed limited with respect to the extra-territorial aspects, however, in 'such extraterritorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for : (a) the territory of India; or (b) the interest of, welfare of well-being of or security of inhabitants of India, and Indians', the Parliament may exercise its legislative powers with respect to the extra-territorial aspects or causes which may occur naturally or on account of some human agency and can 'seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes'.

> *"125. It is important for us to state and hold here that the powers of Legislation of the Parliament with regard to all aspects or causes that are within the purview of its*

competence, including with respect to extra-territorial aspects or causes as delineated above and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength, All that would be required would be that the connection to India be real or expected to be real and not illusory or fanciful.

126. Whether a particular law enacted by the Parliament does show such a real connection, or expected real connection, between the extraterritorial aspect of cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself and not of the Constitution.

127. (2) Does the Parliament have the powers to legislate 'for' any territory, other than the territory of India or any part of it ?

The answer to the above would be no. It is obvious that the Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with

respect to the extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to the Parliament to make laws 'for the whole or any part of the territory of India', and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by the Parliament with respect to the extra-territorial aspects or causes that have no impact on or nexus with India would be ultra vires, as answered in response to the Question 1 above, and would he laws made 'for' a foreign territory."

65. It is submitted that the levy which is introduced by way of the impugned notifications on import freight service does not result in additional cost to the importer as the GST paid by the importer on the invert transportation of goods as well as on the import freight services is available to them as the ITC and are not adversely affected by this measure as it does not add to their cost. The impugned provision is aimed at collection of tax with minimum disruption. Since the importer of the goods is the beneficiary on whose behalf the impugned services are being taken by the foreign exporter from the foreign shipping line, both of which are outside the taxable territory of India, the tax on such services can be collected from the end-beneficiary or recipient of such services in accordance with Section 5(3) of the IGST Act, 2017.

66. The Supreme Court, in Gujarat Ambuja Cements Vs UOI 2005(182) ELT33 (SC) = 2005(182) BLT 33 SC, held that, 'the

point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realization and recovery of the tax. Subject to the legislative competence of the Taxing Authority, a duty can be imposed at the stage which the authority finds it to be convenient and the most effective at whatever stages it may be. The Central Government is, therefore, legally competent to evolve a suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. It is outside the judicial ken to determine whether the Parliament should have a specified common mode for the recovery of the tax as a convenient administrative measure in respect of a particular class. That is ultimately a question of policy, which must be left to the legislative wisdom.'

67. There are two separate taxable events. The levy under the notification draws power from the charging section of the Act. In the present case, the levy on the transportation services received by the importer under the impugned notification draws power under Section 5 of the IGST Act, 2017, and that the levy on the import of goods is a separate taxable event, the levy of which is under Section 3(7) of the Customs Tariff Act, 1975.

68. Further, there is no violation of Article 14 or Article 19(1)(g) of the Constitution of India inasmuch as the importers are free to carry on their trade. This levy is on all importers and does not interfere with the right of the importers to practice any profession, or to carry on any occupation, trade or business.

69. It is submitted that the column no.4 of the said notification is only explanatory in nature and does not widen the definition of 'recipient'. In fact, column no. 4 only explains as to who can be said to be a recipient in respect of that particular service mentioned in column no. 2 mentioned in the category of supply of service. This explanation is given to ensure that a person who is liable to pay the tax may not shift the burden of paying the tax on the ground that he is not the one who is the recipient of the service and it is actually the end user for whom the goods are imported is the recipient of service. To clear this confusion, the explanation is given in column no. 4 which is strictly in accordance with and within the meaning of definition of 'recipient' as defined in Section 2(93) of the GST Act which reads as under:

> *"Section 2(93): "recipient" of supply of goods or services or both means-*
>
> *(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;*
>
> *(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and*
>
> *(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply*

and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied."

70. If the definition is read closely, after (c) in the later part of the definition, it is very categorically stated as under :

"and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;"

71. The aforesaid portion of the definition indicates that the definition of the recipient is inclusive in nature and includes an agent acting on behalf of the recipient in relation to the goods or service or both, supplied. Now, in view of this, the definition of 'agent' can be seen as defined in Section 2(5) of the GST Act which is stated as under :

"Section 2(5): "Agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another."

72. The definition of agent is also inclusive definition and carries a much wider meaning. It also says that an agent may be a person by whatever name called, who carries on business of supply or receipt of goods or services or both on behalf of

another. Meaning thereby, that even an importer who receives services on behalf of another, also acts as the agent of the recipient and, therefore, as per the definition of the recipient even an agent is also a recipient. Therefore, if we read together Section 2(93) and Section 2(5) of the 'recipient' and 'agent', it can be understood that the definition of recipient has a much wider scope and meaning than what is projected before the Court and therefore, even the importer also falls within the definition of recipient and hence it cannot be said that the Notification No.10/2017 has an excessive delegation of powers and, therefore, is contrary to the powers conferred under the Act and hence ultra vires.

73. It is submitted that the term composite supply is defined in Section 2(30) of the GST Act as under :

> *"Section 2(30): "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.*
>
>
>
> *<u>Illustration:</u> Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply."*

74. The composite supply is defined in the GST Act. In Section 8, it is specifically mentioned as to how the tax liability on

composite and mix supplies are to be determined. Section 8 of the GST Act reads as under :

> *"8. Tax liability of composite and mixed supplies - The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:*
>
> *(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and*
>
> *(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax."*

75. Section 15 of the GST Act which is in respect of the value of taxable supply reads as under :

> *"15. Value of taxable supply.- (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*
>
> *(2) The value of supply shall include——*
>
> *(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods*

and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation.— For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) The value of the supply shall not include any discount which is given—

(a) before or at the time of the supply if such discount has

been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if—

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

Explanation.— For the purposes of this Act,—

(a) persons shall be deemed to be "related persons" if—

(i) such persons are officers or directors of one another's businesses;

(ii) such persons are legally recognised partners in business;

(iii) such persons are employer and employee;

(iv) any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related."

76. It is submitted that if Sections 8 and 15 are read together, it suggests that, in case of a composite supply comprising of two or more supplies, one can be said to be the principal supply and shall be treated as supply of such principal supply, meaning thereby that if it is claimed that the supply is a principal supply, in that case, in the invoice, every services are required to be mentioned, and out of the services mentioned, one can be

determined as a principal supply and the entire supply shall be treated as supply of such principal supply. Meaning thereby, a supply can be said to be a principal supply only in case if in the invoice all the supplies are separately mentioned and one of the supplies is identified as principal supply and not otherwise. In case of CIF, it is only the total value of the cost, insurance and freight are stated in the invoices and therefore, it cannot fall within the definition of composite supply and therefore, the argument, that tax is charged on composite supply and hence it should not be charged again, cannot stand.

FOB contracts

77. The importer has been made liable to pay the GST on the service in question in accordance with the provisions contained in Section 5, sub section (3) of the IGST Act, 2017, which provides that the Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable to pay the tax in relation to the supply of such goods or services or both. The goods are transported from a place outside India upto the customs station in India for the importer and therefore, he is directly or indirectly the recipient of service. It is submitted that it cannot be said that the notification has been issued without the authority of law and is ultra vires the IGST Act.

78. Taxability of Ocean Freight under different situations is as

under:

Indian recipient taking services of			
Service availed	Shipping Company	Legal Provision	Implication
Import	Indian	The place of supply of services by way of transportation of goods, including by mail or courier to, - (b) a registered person, shall be the location of such person [Section 12(8), IGST Act	The transaction is liable for tax, and the tax amount paid by the importer can be claimed back as input tax credit.
Export	Indian		The transaction is liable for tax, and the exporter can get refund of input tax credit used for export.
Import	Foreign	The place of supply of services of transportation of goods, other than by way of mail or courier, shall be place of destination of such goods. [Section 13(9), IGST Act]	The transaction will be liable for tax, as the place of supply will be in India. Tax will be paid under reverse charge and can be claimed back as input tax credit.
Export	Foreign		Since the place of supply will be outside India, transaction will not be liable for tax

79. Referring to the aforesaid table, it is pointed out that the service of transportation of goods is taxable both in case of imports as well as exports for the domestic shipping line and for import for the foreign shipping line. Since the exports by the domestic shipping line are already zero rated, the ITC will not be available to Indian shipping lines if the service of inward transportation of goods is not made taxable in India. The domestic shipping lines would be put to disadvantage against

the policy objective of 'Make in India'. Thus, there is rational nexus between the levy and its objective.

80. Section 3(7) of the Customs Tariff Act, 1975, provides for the levy of the IGST on the import of goods into India, on the value of the imported goods which shall be determined in accordance with Section 14 of the Customs Act, 1962. The term 'import of goods' [as per Section 2(10) of IGST Act] and 'imported goods' [as per Section 2(25) of the Customs Act] are overlapping. The term imported has been defined in Section 2(26) of the Customs Act as 'importer' in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer'. Thus, after a high sea sale, the importer for the purposes of levy of customs duty shall be the beneficial owner or a person holding himself out to be the importer of the goods and shall be eligible for ITC for the IGST paid on the goods and on the transportation services in respect of the same.

81. Vide notification No. 10/2017 - Integrated Tax (Rate), the categories of supply of services for which the whole of the integrated tax shall be paid on the reverse charge basis by the recipient of such services has been notified. The services supplied by a person located in the non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India is taxable under the reverse charge and the person liable to pay tax is the recipient of service, i.e. importer, as defined in clause (26) of Section 2 of the Customs Act, 1962 (52 of 1962), located in the

taxable territory.

82. The transportation of goods by a vessel service is not complete till the goods arrive at their destination. "High Sea Sales" is a terminology used in the common parlance for "sales in the course of import." In such cases, sale taking place by transfer of documents of title to goods before goods are cleared from customs, is a sale in the course of import. The service of transportation of goods by a vessel is not complete before the goods arrive at the port of discharge. Hence, a high sea sale win always occur before the completion of transportation service. The high sea sale buyer purchases the goods along with the service element involved in the transportation of goods.

83. It was pointed out that in the 18th GST Council Meeting held on 30.06.2017, it was decided to clarify by way of a circular that when goods sold on high sea sales basis are imported for the first time, the IGST would be levied at the time of importation and the value addition due to high sea sales shall be the part of the value on which the IGST is collected. Vide Circular No.33/2017-Cus dated 01.08.2017, it has been clarified that the 'High Sea Sales' is a common trade practice whereby the original importer sells the goods to a third person before the goods are entered for customs clearance. After the high sea sale of the goods, the customs declarations, i.e. Bill of Entry, etc., is filed by the person who buys the goods from the original importer during the said sale. In the past, the CBIC had issued various instructions regarding the high sea sales appropriating the contract price paid by the last high sea sales buyer into the customs valuation [see Circular No. 32/2004-Cus., dated 11.5.2004]. Further, in the Circular dated 01.08.2017, it has

been stated that 'The council has decided that the IGST on high sea sale(s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation, i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, the value addition accruing in each such high sea sale shall form part of the value on which the IGST is collected at the time of clearance'. Therefore, from the above, it is amply clear that the buyer of the goods on high seas becomes the importer who is responsible for filing the bill of entry and is also the recipient of the service.

84. It is submitted that the supplier of the transportation service has not provided transportation service in piecemeal to the different buyers of goods and is a continuous service, the eventual recipient of the same being the 'importer' of such goods. Hence, the beneficial owner of the goods at the time of clearance of the goods, that is the importer, is the recipient of the entire transportation service. Therefore, he is the person liable to pay the GST on the entire transportation service and he can claim the ITC of the same. It is also pertinent to mention that the Notification No. 8/2017-IGST provides in para 4 that where the value of taxable service provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India is not available with the person liable for paying the integrated tax, the same shall be deemed to be 10% of the CIF value (sum of cost, insurance and freight) of the imported goods.

<u>On discrimination, Unreasonable classification, Hardship</u>

& adverse effect on business

85. It is submitted that the powers of the Government in respect of a taxation statute are much wider and flexible so as to enable the Government to adjust its system of taxation in all proper and reasonable ways and hence it cannot be termed as discriminatory or unreasonable unless there is no nexus or unreasonable nexus between the classification and the object sought to be achieved. In the instant case, there is a clear nexus between the object and classification as stated herein above and hence the impugned notification cannot be said to be suffering from vise of discrimination or unreasonable classification.

86. Similarly, merely because of the imposition of the levy if the business become uneconomical or may cause any hardship, the same cannot be a ground for striking down the said levy.

87. Reliance has been placed on the decision of the Supreme Court in the case of Malwa Bus Service (Private) Ltd. and others v. State of Punjab and others, reported in 1983(3) SCC 237, wherein the Supreme Court in paras 21 and 22 observed as under :

"21. The next submission urged on behalf of the petitioners is based on Article 14 of the Constitution. It is contended by the petitioners that the Act by levying Rs. 35,000/- as the annual tax on a motor vehicle used as a stage carriage but only Rs.1,500/- per year on a motor vehicle used as a goods carrier suffers from the vice of hostile discrimination and is, therefore, liable to be struck down. There is no dispute that even a fiscal legislation is subject to Art. 14 of the

Constitution. But it is well settled that a legislature in order to tax some need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. A law of taxation cannot be termed as being discriminatory because different rates of taxation are prescribed in respect of different items, provided it is possible to hold that the said items belong to distinct and separate groups and that there is a reasonable nexus between the classification and the object to be achieved by the imposition of different rates of taxation. The mere fact that a tax falls more heavily on certain goods or persons may not result in its invalidity. As observed by this Court in Khandige Sham Bhat v. The Agricultural Income-tax Officer, (1963) 3 SCR 809: (AIR 1963 SC 591), in respect of taxation laws, the power of legislature to classify goods, things or persons are necessarily wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways. The Courts lean more readily in favour of upholding the constitutionality of a taxing law in view of the complexities involved in the social and economic life of the community. It is one of the duties of a modern legislature to utilise the measures of taxation introduced by it for the purpose of achieving maximum social goods and one has to trust the wisdom of the legislature in this regard. Unless the fiscal law in question is manifestly discriminatory the Court should refrain from striking it down on the ground of discrimination. These are some of the broad principles laid down by this Court in several of its decisions and it is unnecessary to burden this judgment with citations. Applying these principles it is seen that stage carriages

which travel on an average about 260 kilometres every day on a specified route or routes with an almost assured quantum of traffic which invariably is over crowded belong to a class distinct and separate from public carriers which carry goods on undefined routes. Moreover the public carriers may not be operating every day in the State. There are also other economic considerations which distinguish stage carriages and public carriers from each other. The amount of wear and tear caused to the roads by any class of motor vehicles may not always be a determining factor in classifying motor vehicles for purposes of taxation. The reasons given by this Court in G. K. Krishnan's case, (AIR 1975 SC 583) (supra), for upholding the classification made between stage carriages and contract carriages both of which are engaged in carrying passengers are not relevant to the case of a classification made between stage carriages which carry passengers and public carriers which transport goods. The petitioners have not placed before the Court sufficient material to hold that the impugned levy suffers from the vice of discrimination on the above ground.

22. It was lastly urged that the levy is almost confiscatory in character and the petitioners would have to close down their business as stage carriage operators. It is stated that the passenger fares were permitted to be raised by about 43 per cent just before the levy was increased in this case and it is even now open to the operators to move the State Government to increase the rates if they feel that there is a case for doing so. But on the facts and in the circumstances of the case, we feel that it is not possible to hold that the

impugned levy imposes an unreasonable restriction on the freedom of the petitioners to carry on business. The considerations similar to those which weighed with this Court in upholding the Mustard Oil Price Control Order, 1977, in Prag Ice and Oil Mills v. Union of India, (1978) 3 SCR 293(AIR 1978 SC 1296), ought to be applied in this case also. Though patent injustice to the operators of stage carriages in fixing lower returns on the tickets issued to passengers should not be encouraged, a reasonable return on investment or a reasonable rate of profits can not be the sine qua non of the validity of the order of the Government fixing the maximum fares which the operators may collect from their passengers. It cannot also be said that merely because a business becomes uneconomical as a consequence of a new levy, the new levy would amount to an unreasonable restriction on the fundamental right to carry on the said business. It is however, open to the State Government to make any modifications in the fares if it feels that there is a need to do so. But the impugned levy cannot be struck down on the ground that the operation of stage carriages has become uneconomical after the introduction of the impugned levy. Moreover the material placed by the petitioners is not also sufficient to decide whether the business has really become uneconomical or not. We do not, therefore, find any merit in this ground also."

88. The learned counsel appearing for the Union of India have also placed reliance on the following decisions :

(1) Gujarat Ambuja Cements Ltd. v. Union of India,

2005(182) E.L.T. 33 (S.C.);

(2) All India Fedn. Of Tax Practitioners v. Union of India, 2007(7) S.T.R. 625 (S.C.);

(3) Malwa Bus Service (Private) Limited and others v. State of Punjab and others, (1983)3 SCC 237;

(4) State of Mysore and others v. M.L.Nagade and Gadag and others, (1983)3 SCC 253.

SUMMATION OF THE SUBMISSIONS CANVASSED ON BEHALF OF THE WRIT-APPLICANTS :

89. Thus, the sum and substance of the submissions canvassed on behalf of the writ-applicants is that, in the CIF cases, the importer and the seller of the goods enter into an agreement for sale and purchase of goods at a negotiated and predetermined price. The purchaser/importer of the goods, in such cases, is not concerned with the manner and/or expenses incurred by the seller for arranging the delivery of the goods to the purchaser/importer and the entire responsibility of ensuring the safe delivery of the goods is on the seller. In such transactions, the purchaser/importer is alien to the terms of arrangement between the seller and the transporter (shipping line) and is even otherwise not concerned with the said arrangement. There are, therefore, two important elements in the CIF cases. First, that the purchaser/importer is only interested with purchase of the goods and is not concerned with the arrangement of transportation and insurance; and secondly, there is no decipherable component of transportation charges in

the price negotiated between the purchaser/importer and the seller in the hands of the purchaser/importer. Thus, in such cases, the only transaction between the foreign seller and the purchaser/importer is of purchase of goods and there is no service element involved as regards the purchaser/importer. As an importer of the goods, the writ-applicant declares the entire CIF value for the purpose of customs Act and pays the appropriate amount towards the customs duty and the integrated tax. Reference was, thereafter, made to Section 2(102) of the CGST Act which defines the term 'services' to mean anything other than goods, money and security for which a separate consideration is charged. It is an admitted fact that there no separate consideration is charged. It is an admitted fact that there is no separate component paid by the purchaser/ importers for transportation of the goods and hence the demand of the department based on the premise that there was service rendered attracting the levy of the IGST is completely baseless and without merit. In support of the same, the writ-applicant further highlighted the provisions of the Customs Act and more specifically Section 14 of the Customs Act read with the Customs Valuation Rules to show that the value of the goods declared by the writ-applicant upon import of the goods is the CIF value and no separate value is declared for any transportation charges. The writ-applicants have discharged leviable customs duty and integrated goods and service tax on the import of the goods and there was no other amounts paid or payable by the writ-applicant.

90. Strong reliance has been placed upon Section 5 of the IGST Act which provides for levy and collection of the integrated tax on inter-state supply. Section 7 of the said Act, thereafter, provides

for cases which are covered under the term 'inter-state supply'. Sub-section (4) to the said section provides that supply of services imported in the territory of India shall be treated to be the supply of services in the course of the inter-state trade or commerce, thereby implying that the IGST would be leviable on import of service.

91. Reference may, therefore, be made to Section 2(11) of the said Act which defines the term 'import of services' to mean supply of any service, where (i) the supplier of service is located outside India; (ii) the recipient of service is located in India and (iii) the place of supply of service is in India. Section 2(24) of the IGST Act further provides that the words and expression used and not defined in this Act but defined in the Central Goods and Services Tax Act shall have the same meaning as assigned to them in those Acts. Section 2(93) of the CGST Act defines the term 'recipient' of supply of goods or service or both to mean (a) where the consideration is payable for supply of goods or services or both, the person who is liable to pay the consideration; (b)... and (c) where no consideration is payable for supply of service to the person to whom the service is rendered. In the facts of the present case, the demand of the IGST is on the freight component provided by the shipping lines but to the foreign seller. The writ-applicants are not party to the agreement of transportation that may be executed between the foreign seller and the foreign shipping line, which may be on case to case basis, vessel basis or under an annual contract. Moreover, the consideration for such services is a matter exclusively between the foreign seller and the shipping line and it is the foreign seller who pays the consideration to the shipping line. In such circumstances, it is clear that there is no import of service and

the writ-applicant is not the service recipient to attract any IGST liability on the said component.

92. During the course of hearing of these matters, a query was raised by us as to the scope of the definition of 'recipient of service' provided under Section 2(93) of the CGST Act and a question was put to the learned counsel as to whether the beneficiary of service can be considered as a recipient of service. In reply, the reference was made to the definition of 'recipient' provided under Section 2(93) of the Act and it was highlighted that a person would step into the shoes of the recipient only when he is liable to pay consideration for such services. In the CIF cases, the purchaser/importer of goods does not have any contract or arrangement with the shipping line and therefore, the purchaser/importer can never be said to be the person who has paid the consideration for receipt of any services. Liability of payment of consideration, whether on single container basis, vessel basis or annual basis, is a matter of concern between the seller and the shipping line and it is the foreign seller who pays for the consideration and is de jure recipient of service. In support of the said submission, it was highlighted that the difference between the term 'pay' and 'bear' would have to be appreciated. As an ultimate recipient of the goods, the writ-applicant may have borne the expenses entailed for transportation of the goods in the cumulative price paid for the purchase of goods on CIF basis, but in no circumstances can it be said that the writ-applicant has paid the consideration for receipt of any service. Reference was then made to an identical domestic transaction where the domestic seller undertakes to supply the goods at the premises of the buyer at a predetermined price. It was pointed out that in such cases, the seller

undertakes to transport the goods and independently enters into an agreement with the transporter in this regard. It was pointed out that the case of import of service, goods transport services under the domestic regime is also under reverse charge mechanism where the tax is payable by the service recipient. In such cases, it is the understanding and stand of the department that the recipient of the service of transportation is the seller as he has paid the consideration. It was submitted that the term 'recipient' as defined under the Act does not differentiate between a domestic transaction and a foreign transaction and the interpretation of the same cannot be on different yardstick. To further highlight that the writ-applicants were not the recipient of any service, it was specifically submitted that in case the foreign supplier fails to pay the consideration for the services rendered by the shipping line, the shipping line would have no basis for taking any legal action against the purchaser of the goods for such non-payment by the supplier.

93. The writ-applicant further submitted that the levy of the IGST on the Ocean Freight arranged by the foreign seller through a foreign shipping line in a CIF case was a colourable exercise of delegated legislation and beyond the purview of the Act itself. Reference in this regard was made to Section 1 of the IGST Act read with Section 2(109) and Section 2(56) of the CGST Act to show that the provisions of the Act were applicable only to the territories of India. Reference was thereafter made to the fact that the contract for supply of service of transportation whether on case to case basis, vessel basis or annual basis was between the foreign seller and the foreign shipping line. It was submitted that once it is clear that the service transaction did not amount to import of service, as submitted herein above, it would be clear

that the service transaction was beyond the purview of the Act and no levy could be imposed on such foreign transaction.

94. A perusal of the Act shows that the liability to pay for supply of goods or services is on the supplier. Departure to the said rule is however, made in sub-section 3 of Section 5 which provides that the Government may, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both. In the present case, the writ-applicant is neither the supplier nor the recipient of the services and hence, levy sought to be imposed on the importer, a third party to the transaction of service of transportation, is clearly illegal and invalid.

95. In such circumstances, it was submitted that the levy of the IGST on Ocean Freight in CIF cases is without jurisdiction. It was further submitted that assuming that such levy was legal and valid, under no circumstances, the importer of the goods can be treated as recipient of services to demand the IGST from such importer.

SUMMATION OF SUBMISSIONS CANVASSED ON BEHALF OF THE UNION OF INDIA :

96. The sum and substance of the submissions canvassed on behalf of the Union of India while defending the notifications are that it received many representations from the shipping lines stating that in view of the levy of service tax on the inward

transport, the FOB contracts were being converted to the CIF contracts and those were being entered into in a non-taxable territory (i.e. outside India). In order to see that the tax is suffered by both, i.e. the Indian Shipping Lines and the Foreign Shipping Lines on the inward transportation goods, the importers are sought to be made liable to pay tax on the service of inward transportation of import cargo, as it was not possible to collect it from the foreign shipping lines entering into a contract with a foreign supplier for transportation of goods to India.

97. It is the case of the Union of India that the notification is not arbitrary and is aimed at providing level playing field to the Indian Shipping Lines.

98. The sum and substance of the submissions canvassed on behalf of the Union of India is that the levy introduced by way of impugned notifications on the import freight service does not result in additional cost to the importer as the GST paid by the importer on the inward transportation of goods as well as on the import freight services is available to them as ITC.

DISCUSSION

99. As we are examining altogether a new tax regime, we must look into the salient features of the GST. The salient features of the GST have been very exhaustively examined and discussed by the Kerala High Court in the case of Sheen Golden Jewels (India) Pvt. Ltd. vs. State Tax Officer, reported in (2019) 62 GSTR 207.

GST – Introduction:

100. In a federal constitutional set up, coordination, rather than subordination, is the guiding spirit. The States and the Union as the constituents have demarcated spheres of legislation and governance. With clearly delineated legislative fields, neither can trespass upon the other's legislative territory-the residuary powers lying with the Union, though. The division of powers is zealously guarded in no other sphere than fiscal. Taxation as the backbone of a welfare nation, which India is; the legislative fields are as distinct, yet interconnected, as the spinal segments do.

101. That said, 101st Constitutional Amendment is the epoch-making federal feat unparalleled in constitutional democracies-almost. It is, I may say, a constitutional *coup de grace* delivered against the fiscal confusion compounded by conflicting taxation regimes. This amendment, perhaps, marks the crest of cooperative federalism. It has created even a constitutional institution - GST Council.

102. As constitutional democracies have gained experience, Utopian vision of justice has given way to utilitarian view. Material comfort or upliftment has become the hallmark of good governance. So economic analysis of law substitutes the notion of simple justice with that of economic efficiency and wealth maximisation. True, nations like France successfully embraced GST regimes in the 1950s. Even federal polities like Canada replaced MST (Manufacturer's Sales Tax) with GST (Goods and Services Tax) in the 1980s. India joined the fiscal reform bandwagon a little late. Tentative it was to begin with, but

determined it is in this new federal fiscal path.

103. To put the concept in perspective, GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the later stage of value addition. This process makes GST a tax on value addition at each stage. The consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

104. In other words, the focus was shifted from taxable event to destination-based taxation. It avoids the evil of cascading taxation or tax on tax trouble. So goes the motto: One Nation-One Market-One Tax.

105. A nascent enactment in a nebulous field of taxation will have many teething troubles. GST is no exception. In its path to perfection, GST has much dust to settle-legislatively and judicially. These are the days of confusion and cacophony: many views, many interpretations, and many jurisprudential mumblings.

GST: The Origins:

106. Before its advent as a revolutionary indirect tax regime, Goods and Services Tax (GST) had been on the parliamentary anvil for more than a decade. Its need as a harmonised indirect tax, encompassing all goods and services was documented as early as in 2004. That year the Task Force on Implementation of

the Fiscal Responsibility and Budget Management in its Report stressed the need. The first official announcement for a transition to GST, though, was made by the Government of India in 2006-07 (the Budget Speech). The Government's commitment stood reiterated in the Budget Speech of 2008-09, too. But the Government of India took the first step towards the transition to GST when it announced certain policy changes in the 2009-10 budget.

107. The next major landmark was the "First Discussion Paper on Goods and Services Tax in India" released by the Empowered Committee in November 2009. This was the first official document publicly delineating the contours of the proposed reform and nuances of the GST Model.

108. The First Discussion Paper, in fact, explained the rationale for a constitutional amendment to introduce GST. It noted that while the Centre is empowered to tax services and goods up to the production stage, the States have the power to tax sale of goods. The States do not have the powers to levy a tax on the supply of services while the Centre does not have the power to levy a tax on the sale. Thus, it suggested for a constitutional amendment that would contain a mechanism for a harmonious structure of GST that would not affect the federal fabric.

109. Then, with the deliberations between the Centre and States, aided by the Empowered Committee, the constitutional amendment process to usher in GST began. It resulted in the "Constitution (One Hundred and Fifteenth Amendment) Bill,

2011" After that one got lapsed, came the 2014 Amendment Bill (as passed by Parliament). Passed on 8 September 2016, this Bill became "the Constitution (One Hundred and First Amendment) Act, 2016".

110. The GST Council, constituted in September 2016, is a constitutional institution comprising as its members the Finance Ministers of the Union and the States including Union Territories with Legislatures. It has the authority "to recommend to the Union and the States on various facets of GST, including Model GST laws, principles to determine the place of supply, levy of the tax, design of GST, dispute settlement, special provisions for a special category of States, and so forth".

111. Adopting the recommendation of the GST Council, Parliament has enacted these pieces of legislation:

(1) The Central Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and services in all supplies within a State

(2) the Integrated Goods and Goods and Services Tax Act, 2017: it levies a tax on inter-State supplies of goods and services;

(3) the Union Territory Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and service.

112. Tarun Jain's Goods and Services Tax, already copiously

quoted, observes that in the constitutional terms, the GST is unique because of these aspects of its design: (1) It provides for the concurrent exercise of taxing powers by the Centre and the States on the same subject-a unique and unprecedented measure. (2) Both the Centre and the States are to act in tandem based on the GST Council's recommendations.

Salient features of the GST:

113. The salient features of GST are these:

(i) GST applies on supply of goods or services as against the present concept on the manufacture of goods, or on the sale of goods, or on the provision of services.

(ii) GST is based on the principle of destination-based consumption taxation as against the present principle of origin-based taxation.

(iii) It is a dual GST with the Centre and the States simultaneously levying a tax on a common base. GST to be levied by the Centre is called Central GST(CGST) and that to be levied by the States called State GST (SGST).

(iv) An Integrated GST (IGST) is levied on inter-state supply (including stock transfers) of goods or services. This shall be levied and collected by the Government of India, and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by

Law on the recommendation of the GST Council.

(v) Import of goods or services is treated as inter-state supplies and is subject to IGST, besides the applicable customs duties.

(vi) CGST, SGST & IGST are levied at rates to be mutually agreed upon by the Centre and the States. The rates would be notified on the recommendation of the GST Council. To begin with, the GST Council has decided that GST would be levied at four rates viz. 5%, 12%, 18% and 28%. The schedule or list of items that would fall under each slab has been worked out. Besides these rates, a cess would be imposed on "demerit" goods to raise resources for compensating States as States may lose revenue owing to implementing GST.

(vii) GST will apply to all goods and services except Alcohol for human consumption.

(viii) GST on five specified petroleum products (Crude, Petrol, Diesel, ATF & Natural Gas) be applicable from a date to be recommended by the GSTC.

(ix) Tobacco and tobacco products would be subject to GST. Besides, the Centre will have the power to levy Central Excise duty on these products.

(x) A common threshold exemption would apply to both CGST and SGST. Taxpayers with an annual turnover not

exceeding Rs.20 lakh (Rs.10 Lakh for special category States) would be exempted from GST. For small taxpayers with an aggregate turnover in a financial year up to 50 lakhs, a composition scheme is available. Under the scheme, a taxpayer shall pay tax as a percentage of his turnover in a State during the year without the benefit of Input Tax Credit. This scheme will be optional.

(xi) The list of exempted goods and services would be kept to a minimum, and it would be harmonized for the Centre and the States and across States as far as possible.

(xii) Exports would be zero-rated supplies. Thus, goods or services that are exported would not suffer input taxes or taxes on finished products.

(xiii) The credit of CGST paid on inputs may be used only for paying CGST on the output, and the credit of SGST paid on inputs may be used only for paying SGST. Input Tax Credit (ITC) of CGST cannot be used for payment of SGST and vice versa. In other words, the two streams of Input Tax Credit (ITC) cannot be cross-utilised, except in specified circumstances of inter-state supplies for payment of IGST.

(xiv) Accounts would be settled periodically between the Centre and the States to ensure that the credit of SGST used for payment of IGST is transferred by the Exporting State to the Centre. Similarly, IGST used for payment of SGST would be transferred by the Centre to the Importing

State. Further, the SGST portion of IGST collected on B2C supplies would also be transferred by the Centre to the destination State. The transfer of funds would be carried out based on information contained in the returns filed by the taxpayers.

(xv) The laws, regulations, and procedures for levy and collection of CGST and SGST would be harmonized to the extent possible.

114. The GST replaces these taxes currently levied and collected by the Centre:

(a) Central Excise Duty,

(b) Duties of Excise (Medicinal and Toilet Preparations),

(c) Additional Duties of Excise (Goods of Special Importance),

(d) Additional Duties of Excise (Textiles and Textile Products),

(e) Additional Duties of Customs (commonly known as CVD),

(f) Special Additional Duty of Customs(SAD),

(g) Service Tax,

(h) Cesses and surcharges, in so far as they relate to the supply of goods and services.

The State taxes that get subsumed within the GST are:

(a) State VAT,

(b) Central Sales Tax,

(c) Purchase Tax,

(d) Luxury Tax,

(e) Entry Tax (All forms),

(f) Entertainment Tax and Amusement Tax (except those levied by the local bodies),

(g) Tax on advertisements,

(h) Tax on lotteries, betting and gambling,

(i) State cesses and surcharges in so far as they relate to the supply of goods and services,

115. To have the whole GST system backed by a robust IT system, Parliament has set up the Goods and Services Tax Network (GSTN). It will provide front end services and will also

develop back end IT modules for States who chose the same.

Constitutional Amendment Act, An Overview:

116. As we shall see, the CA Act inserts, repeals, and amends certain parts of the Constitution. Inserted are the Articles 246A, 269A, and 279A; repealed is the Article 268A; amended are Articles 248, 249, 250, 268, 269, 270, 271, 286, 366, and 279A. Besides that the Sixth and the Seventh Schedules, too, have been amended.

117. Article 246A, inserted through Section 2 of the Amendment Act, is a marvel of the federal fiscal mechanism. By this Article, the State Legislatures now have the power to make laws regarding GST tax imposed by the Union or by that State and to implement them in intra-state trade. The Centre, of course, continues to have exclusive power to make GST laws regarding inter-state trade. Both the Union and States in India now have simultaneous powers to make law on the goods and services.

118. Article 269A, inserted through Section 9 of the Act, deals with levy and collection of goods and services tax in the course of inter-State trade or commerce. That is, in case of inter-state trade, the amount collected by the Centre is to be apportioned between the Centre and the States as per the GST Council's recommendations. Under the GST, if the Centre collects the tax, it assigns State's share to the State concerned; on the other hand, if the State collects the tax, it assigns the Centre's share to the Centre. Those proceeds will not form a part of the Consolidated Fund of India, so it avoids having an Appropriation

Bill passed every time a deposit is made.

119. Article 279A provides for the constitution of a GST Council, besides prescribing its powers and positions. Earlier, Article 268A dealt with the service tax levied by Union and collected and appropriated by the Union and States. Now, this Article stands repealed. As to the amended constitutional provisions, Article 248 confers residuary legislative powers on Parliament. Now this provision is subject to Article 246A of the Constitution. Article 249, amended through Section 4 of the Act, now stands changed so that if Rajya Sabha approves the resolution with 2/3rd majority, Parliament will have powers to make necessary laws regarding GST, in the national interest. So has Article 250 been amended; Parliament will have powers to make laws on GST during the emergency period.

120. At a different plane are the other amendments. Article 268 has been amended so that excise duty on medicinal and toilet preparation are omitted from the State List and are subsumed in GST. And Article 269 would empower the Parliament to make GST related laws for inter-state trade or commerce. Article 270 now provides for collection and distribution of tax to be done according to Article 246A. Then, under Article 271, GST has been exempted from being part of the Consolidated Fund of India. The amended Article 286 includes the supply of goods and services under its ambit, rather than just sale or purchase of goods; Article 366 now includes the definitions of Goods and Service Tax, Services and State. And finally, Article 279A has also been brought under the ambit of Article 368.

121. As with the Schedules, the Sixth Schedule has been amended to give power to the District Councils to levy and collect taxes on entertainment and amusements. And the Seventh Schedule has also been amended. In the Union List, petroleum crude, high-speed diesel, motor spirit (petrol), natural gas, and aviation turbine fuel, tobacco and tobacco products have been removed from the ambit of GST and have been subjected to Union jurisdiction. Newspapers advertisements, and Service Tax have been brought under GST (entries 84, 92, 92C). Similarly, in the State List, petroleum crude, high-speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel, and alcoholic liquor for the human consumption have been included, unless the sale is in the course of inter-State or International trade and commerce. Entry tax and Advertisement taxes have been removed. Taxes on entertainment are only to be included to the extent of that imposed by local bodies. (entries 52, 54, 55, 62).

122. To be explicit, in Article 366 of the Constitution, after clause (12), clause (12A) was inserted: “Goods and Services Tax” means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption. After clause (26), clauses (26A) and (26B) were inserted: 'Services' means anything other than goods; 'State' with reference to Articles 246A, 268, 269, 269A and Article 279A includes a Union territory with Legislature.

123. Section 18 of the Amendment Act provides for compensation to States for loss of revenue because of the introduction of goods and services tax. Parliament shall, by law,

on the recommendation of the GST Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for five years.

124. The overarching provision for our discussion is Section 19 of the Amendment Act. It reads thus;

> **"*Section 19 – Transitional provisions:***
>
> *Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier."*

125. Until the Constitution suffered its 101st Amendment-that is, The Constitution (One Hundred & First Amendment) Act, 2016 - the Union and the State Governments have been collecting, as is relevant here, the indirect taxes under dearly demarcated legislative fields as shown in the Seventh Schedule. Then, there were 97 Entries in List-I, 66 in List-II, and 47 in List-III, not all those dealings with the Legislature's taxing power though. In List I, principal among the Entries concerning taxes are Articles 41, 42, 83, 84, 87 to 92, 92A, 92B, 92C, 97; and in List II are Entries 26, 45, 47 to 61 and 63.

126. The CA Act has brought drastic changes in the federal taxing powers of the State; it has introduced a couple of Articles, amended a few, and done away with a few more. At a glance we can appreciate the changes:

Before Amendment		After Amendment	Impact
246A	Not existing	Introduced	Special provision on goods and services tax conferring simultaneous legislative powers on both the Union and the States.
248	Residuary power	Amended	The Union's residuary legislative power is subjected to Article 246A.
249	Power of Parliament to legislate regarding a matter in the State List in the national interest	Amended	It gives power to the Parliament to enact any law applicable to states on the matters mentioned even in states list. GST, no mentioned in States list, now explicitly mentioned.
250	Power of Parliament to legislate regarding any matter in the State List if a Proclamation of Emergency is in operation	Amended	It has a similar impact as does the amended Article 249.
268	Duties levied by the Union but collected and appropriated by the States	Amended	Additional Duties of Excise (Medicinal and toilet preparations) Stand subsumed into GST.
268A	Service tax levied by Union and Collected and appropriated by the Union and the States:	Omitted	Service tax has been subsumed into GST. So Entry No. 92C of List-I too stands omitted.
269	Taxes levied and	Amended	The arrangement under

	collected by the Union but assigned to the States		Article 269 is subjected to Article 269A, a new provision.
269A	Not existing	Inserted	Levy and collection of goods and services tax during inter-State trade or commerce. The power to levy and collect GST during inter-State trade or commerce is vested with the Government of India. The taxes so collected will be apportioned between the Union & the States in manner prescribed.
270	Taxes levied and distributed between the Union and the States.	Amended	Now Article 268A an Entry No. 92C of List-I stand omitted; so service tax is subsumed under GST. So in Article 270, a reference to Article 268A has been omitted, and a new reference to Article 269A for levy of GST for Inter-state transactions has been introduced.
271	Surcharge on certain duties and taxes for purposes of the Union	Amended	Parliament's powers to levy an additional surcharge on Union taxes under Article 271 now stands amended: Parliament can levy no additional surcharge on GST.
279A	Not existing	Inserted	Provision for creating the GST Council, a constitutional body.
286	Restrictions on the imposition of tax on the sale or purchase of goods	Amended	First, the word "sales" is replaced with "supply" and the word "goods" is replaced with "goods or services or both". States cannot legislate on the supply of goods or

			services if such supply is outside their state or is in the course of import or export. Originally, States could not levy and collect tax on specific Inter-state transactions. With omitting Clause (3), now even inter-state transactions of that nature would attract GST.
366.	Definition	Inserted	The definitions have been added to the Constitution: (12A) Goods and Services Tax; (26A) Services; and (26B) State.
368	Power of Parliament to amend the Constitution and procedure therefore	Amended	As regards provisions and laws regarding GST Council, Parliament has been vested with the power to amend the Constitution.
Sixth Schedule	Provisions on the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura, and Mizoram 8. Powers to assess and collect land revenue and to impose taxes.	Amended	It concerns powers to assess and collect land revenue and to impose taxes in the Tribal Areas of a few States.
Seventh Schedule			
List I : Entry 84	Barring those excluded, the Union could levy excise duty on all other goods, including tobacco, manufactured or produced in India. The excluded ones	Amended	Now excise duty is levied only on the enumerated items: (a) petroleum crude; (b) high-speed diesel; (c) motor spirit (commonly

	are these: (a) alcoholic liquors for human consumption; (b) opium, Indian hemp, and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance in sub-paragraph (b).		known as petrol); (d) natural gas; (e) aviation turbine fuel; and f) tobacco and tobacco products"
Entry 92	Taxes on the sale or purchase of newspapers and on advertisements published.	Omitted	Now, taxes on the sale or purchase of newspapers and on advertisements published therein have been subsumed into GST.
Entry 92C	Taxes on services	Omitted	Service tax has also been subsumed into GST.
List II Entry 52	Taxes on the Entry of goods into a local area for consumption, use or sale therein.	Omitted	Purchase tax, too, has been subsumed into GST.
Entry 54	Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I. (Entry 92A of List I concern inter-State trade or commerce.)	Amended	Now the taxes are confined to the sale of petroleum crude, high speed diesel, motor spirit (petrol), natural gas, aviation turbine fuel, and alcoholic liquor for human consumption. But excluded is the sale in the course of inter-State trade or commerce. (Now the sale or purchase of goods stands subsume by GST)
Entry 55	Taxes on advertisements other than advertisements	Omitted	Taxes on advertisements other than advertisements broadcast by radio or

	published in the newspapers and advertisements broadcast by radio or television.		television has also been subsumed into GST.
Entry 62	Taxes on luxuries, including taxes on entertainments, amusements, betting, and gambling.	Amended	(a) Taxes on Luxury betting, and gambling have been subsumed into GST. (b) Right to levy Tax on entertainments and amusements has been restricted to Panchayats, municipalities, Regional Councils, and District Councils.

CONCEPT OF GST IN BRIEF :

127. The GST is a multi-tier tax where the ultimate burden of tax falls on the consumer of goods/services. It is called as the value added tax because at every stage, tax is being paid on the value addition. Under the GST scheme, a person liable to pay tax on his output, whether for the provision of service or sale of goods, is entitled to get the input tax credit (ITC) on the tax paid on its inputs, i.e. for the purchase of goods or services. Thus, ultimately tax is being paid on the value additions, which is being paid to the Government. In a situation, where the output tax exceeds the input tax, the person is entitled to refund for the difference or the same may be carried forward.

128. The definition of Goods and Services Tax (GST) has been given in clause (12A) of Article 366 to the Constitution of India, where it has been defined as “goods and services tax” means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption.

129. In India, on the intra-state supply of goods and services, there shall be dual GST, with equal rate, i.e. Central GST (CGST) and State GST (SGST) but for the inter state supply of goods and services, there shall be integrated GST (IGST), which shall be at the rate which is a sum total of CGST and SGST rate.

130. The real headway to introduce the GST in India was made, when the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was introduced in the Parliament on 19th December 2014, which paved way to introduce the Goods and Service Tax in India. The said Bill was passed by the Parliament and enacted as the Constitution (One Hundred and First Amendment) Act, 2016, to levy the Goods and Services Tax and received the assent of the President of India on 8th September 2016. The Constitution has been amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including the Union Territories with the Legislature to make laws for levying the Goods and Services Tax on every transaction of supply of goods or services or both. The Goods and Services Tax has replaced a number of indirect taxes being levied by the Union and the State Governments and is intended to remove the cascading effect of multiple taxes and provide for a common national market for the goods and services. The Central and State Goods and Services Tax is being levied on all the transactions involving the supply of goods and services, except on the supply of alcoholic liquor for human consumption those which are kept out of the purview of the goods and services tax. However, the GST on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the

Government on the recommendations of the Council and in the mean time the taxes on the same shall be governed by the pre-GST regime. The provision related to the GST Council (Article 279A) was made applicable w.e.f. 12th September 2016 vide Notification No.S.O. 2915(E) dated 10th September 2016, and the other provisions of such amendment to the Constitution were made applicable from 16th September 2016 vide the Notification No.S.O. 2986(E) dated 16th September 2016. The Goods and Services Tax Council (GSTC) is a constitutional body constituted under Article 279A of the Constitution of India and plays a pivot role under the GST, which brings uniformity in the law as also a cooperative federalism.

131. The Constitution (One Hundred and First Amendment) Act, 2016, inter alia, provides for –

a. Subsuming of various central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

b. Subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry Tax, Purchase Tax, Luxury Tax, Taxes on lottery, betting and gambling; and State Cesses and Surcharges in so far as they relate to

supply of goods and services;

c. Dispensing with the concept of 'declared goods of special importance' under the Constitution;

d. Levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

e. Conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

f. Coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of Goods and Services Tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

g. Compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period of five years;

h. Creation of Goods and Services Tax Council to examine issues relating to Goods and Services Tax and make recommendations to the Union and the States on parameters like rates, exemption list and threshold limits. The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along

with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It is further provided that every decision of the Council shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting.

What has led to the present day problems in the implementation of the GST :

132. The GST is implemented by subsuming various indirect taxes. The difficulty which is being experienced today in proper implementation of the GST is because of the erroneous misconception of law, or rather, erroneous assumption on the part of the delegated legislation that service tax is an independent levy as it was prior to the GST and it go vivisect the transaction of supply to levy more taxes on certain components completely overlooking or forgetting the basic concept of composite supply introduced in the GST legislation and the very idea of levying the GST. Prima facie, it appears that while issuing the impugned notification, the delegated legislature had in mind the provision of the Finance Act, 1994, rather than keeping in mind the object of bringing the GST by making the Constitutional (101st) Amendment Act, 2016 to merge all taxes levied on the goods and services to one tax known as the GST.

133. It appears that despite having levied and collected the integrated tax under the IGST Act, 2017, on import of goods on the entire value which includes the Ocean Freight through the impugned notifications, once again the integrated tax is being levied under an erroneous misconception of law that separate tax can be levied on the services components (freight), which is

otherwise impermissible under the scheme of the GST legislation made under the CA Act, 2016.

134. All the learned senior counsel are right in their submission that if such an erroneous impression is not corrected and if such a trend continues, then in future even the other components of supply of goods, such as, insurance, packaging, loading/ unloading, labour, etc. may also be artificially vivisected by the delegated legislation to once again levy the GST on the supply on which the tax is already collected.

FINAL ANALYSIS :

135. We first deal with the vociferous submission canvassed on behalf of all the writ-applicants that Section 5(3) of the IGST Act provides for the collection of tax under the reverse charge basis only from the recipient of supply. The writ-applicants are not recipients of the ocean freight service. In such circumstances, the writ-applicants cannot be made liable to pay the integrated tax.

136. Section 5 of the IGST Act is the charging section which provides for the levy and collection of the integrated tax on the inter-state supply. Sub-section (1) of Section 5 provides for the levy and collection of tax on all the inter-state supplies of goods or services or both (other than alcoholic liquor for human consumption) and that the tax shall be paid by the taxable person. Thus, sub-section (1) levies tax on the forward charge basis, i.e. from the supplier of goods or services.

137. Sub-section (2) of Section 5 provides that the tax on supply

of petroleum crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council. In the litigation on hand, we are not concerned with sub-section (2) of Section 5.

138. Sub-section (3) of Section 5 of the IGST Act provides that in case of specified categories of supply, the tax shall be payable by the recipient of supply and all the provisions shall apply as if he is the person liable for paying the tax The relevant extract of sub-section (3) of Section 5 is as under:

> *"(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be made on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both."*

139. Further, sub-section (4) of Section 5 provides for collection of tax, on certain specified supplies, under reverse charge basis from the recipient of supply, where the supplier is not registered under the Act. Sub-section (5) of Section 5 provides for collection of tax, on certain specified supplies, from electronic commerce operator. We are also not concerned with sub-sections (4) and (5) of Section 5 for the present purposes.

140. Thus, the scheme of the Act is that generally the tax shall

be payable by the person who is making the supply of goods or services, i.e. supplier. However, in case of certain specified supplies, the recipient of supply can be made liable to pay tax. Thus, a meaningful reading of the charging section would entail that the person who is neither the supplier nor the recipient of the supply cannot be made liable to pay tax under the IGST Act (except for the provisions under sub-section (5) of Section 5 where the electronic commerce operator can be made liable to pay tax if the services are supplied through him).

141. The term 'recipient' is not defined in the IGST Act. However, sub-section (24) of Section 2 of the IGST Act states that the words and expression not defined in the IGST Act but defined in the Central Goods and Services Act, 2017 (CGST Act), the Union Territory Goods and Services Tax Act, 2017 and the Goods and Services Tax (Compensation to States) Act, 2017 shall have the same meaning as assigned to them in the said Acts.

142. Sub-section (93) of Section 2 of the CGST Act defines the term 'recipient' as under:

> *"(93) 'recipient' of supply of goods or services or both, means*
>
> *(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;*
>
> *(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and*

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered.

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied."

143. Thus, the term 'recipient is defined as a person liable to pay consideration, where the consideration is payable for the supply or the person to whom the services are rendered, where no consideration is payable for the supply of service.

144. In the present case, the writ-applicant is importing goods on the CIF basis, i.e. the contract is for supply of goods delivered at the Indian port. Thus, the transportation of goods in a vessel is the obligation of the foreign exporter. The foreign exporter enters into contract with the shipping line for availing the services of transportation of goods in a vessel. The obligation to pay consideration is also of the foreign exporter. The writ-applicant is not at all concerned with how the foreign exporter delivers the goods at the Indian port or whether the consideration of the shipping line has been paid by the foreign exporter or not. Even in a case of non-payment of the consideration of the freight by the foreign exporter, the shipping line cannot recover the consideration from the writ-applicant.

145. Thus, the writ-applicant could be said to have neither availed the services of transportation of goods in a vessel nor he is liable to pay the consideration of such service. Hence, the

writ-applicant is not the 'recipient' of the transportation of goods in a vessel service as per Section 2(93) of the CGST Act.

146. We are construing the provisions of taxing statute and that too the charging section of a taxing statute. It is a settled principle of construction of tax laws that there is no room for any intendment or presumption in tax statutes and one has to look only at the language used.

147. The principle of construction in tax statutes is that if the person sought to be taxed comes within the letter of the law he must be taxed. In a taxing Act one has to merely look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

148. In our opinion, the writ-applicant cannot be made liable to pay tax on some supposed theory that the importer is directly or indirectly recipient of the service. The term 'recipient' has to be read in the sense in which it has been defined under the Act. There is no room for any interference or logic in the tax laws.

149. If the definition of the term 'recipient' is overlooked or ignored, then the writ-applicant would become the recipient of all the goods which goes into the manufacture/production of goods and all the services which have been availed by the foreign exporter for such purposes. Such reasoning which leads to harsh and arbitrary result has to be avoided, particularly when the term has been expressly defined by the legislature. Thus, the writ-applicant cannot be said to be the recipient of the supply of

the ocean freight service and no tax can be collected from the writ-applicant.

150. The Notification No.8/2017 – Integrated Tax (Rate) and Notification No.10/2017 – Integrated Tax (Rate) both dated 28.6.2017, makes the importer of the goods as the person liable to pay the integrated tax on the supply of service by a person located in the non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by vessel from a place outside India to a place in India. The impugned notifications have been issued in exercise of the powers conferred by Section 5(3) of the IGST Act. The said section provides power to the Government to specify the categories of supply on which the tax shall be paid by the recipient of the supply. The section does not further provide that the Government may also specify the other person (other than the recipient of supply) liable to pay tax. Under Section 5(3), the person liable to pay can only be the recipient of supply.

151. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires. The delegated legislation derives power from the parent statute and not without it. The delegated legislation is to supplant the statute and not to supplement it.

152. In the aforesaid view of the matter, the impugned notifications levying tax on supply of service of transportation of goods by a person in a non-taxable territory to a person in a non-taxable territory from a place outside India upto the customs station of clearance in India and making the petitioner,

i.e. the importer, liable for paying such tax, are ultra vires the provisions of the IGST Act.

153. The supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India upto the customs station of clerance in India, is neither an inter-state supply nor an intra-state supply. Thus, no tax can be levied and collected from the writ-applicant.

154. We now proceed to deal with the second part of the submission canvassed on behalf of the writ-applicants that the supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India upto the customs station of clearance in India is neither inter-state supply nor an intra-state supply. In such circumstances, no tax can be levied and collected from the writ-applicants.

155. As stated above, Section 5 of the IGST Act is the charging section and it levies tax on all the inter-state supplies of goods or services or both. Section 7 of the IGST Act defines what is an inter-state supply. The said section is extracted as under :

"7. Inter-State supply.-

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

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

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) Supply of goods or services or both,—

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce. ”

156. Section 8 of the IGST Act provides for what is an intra-state supply. The relevant extract of Section 8 is reproduced hereunder for ready reference :

“8. (1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the following supply of goods shall not be treated as intra-State supply, namely:—

(i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;

(ii) goods imported into the territory of India till they cross the customs frontiers of India; or

(iii) supplies made to a tourist referred to in section 15.

(2) Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit. ”

157. At the outset, sub-section (1) of Section 8 states when a supply of goods is an intra-state supply and sub-section (2) of Section 8 states when a supply of services is an intra-state supply. Both sub-sections apply only where the location of the supplier and the place of supply are in the same State or Union Territory. Here, the State or the Union Territory means a State or Union Territory in India. Thus, for Section 8 to apply, both the location of the supplier and the place of supply should be in India. In the present case, the location of the supplier, i.e. the foreign shipping line is outside India. Thus, the impugned transaction is not an intra-state supply under Section 8 of the IGST Act.

158. The third submission canvassed on behalf of the writ-applicants is that sub-sections (1), (2) and (3) of Section 7 are not applicable to the cases on hand.

159. Now, Section 7 provides for what is an inter-state supply. Sub-sections (1) and (2) of section 7 deal with the supply of goods and are not relevant for the present purpose. Sub-section

(3) provides that where the location of the supplier and the place of supply are in two different States or two different Union Territories or in a State and a Union Territory, the supply shall be treated as an inter-state supply. Thus, the provisions of sub-section (3) only applies when both the supplier and the place of supply are in India (i.e. either in a State or Union Territory). Further, sub-section (3) is subject to the provisions of Section 12 of the IGST Act which applies only when both the supplier of service and the recipient of service are in India. In the present case, the location of the supplier, i.e. the shipping line, is outside India. Thus, sub-section (3) will also not apply in the present case.

160. The fourth submission canvassed on behalf of the writ-applicants is that sub-section (4) of Section 7 of the Act is not applicable to the cases on hand.

161. Sub-section 4 of Section 7 is not applicable in the present case. Sub-section (4) of Section 7 provides that the supply of services imported into the territory of India shall be treated as inter-state supply. Sub-section (11) of Section 2 of the IGST Act defines the term 'import of services'. The relevant extract of the said section is reproduced as under:

> *"2(11) 'import of services' means the supply of any service, where(i) the supplier of service is located outside India; (ii) the recipient of service Is located in India; and (iii) the place of supply of service is in India;"*

162. Thus, the import of services means the supply of service where the supplier of service is located outside India, the recipient of services is located in India; and the place of supply of

service is in India.

163. In the present case, the location of the recipient of the service, i.e. the foreign exporter, is not in India but outside India. Thus, the provisions of sub-section (4) of Section 7 are also not applicable in the present case.

164. The fifth submission canvassed on behalf of the writ-applicants is that sub-section (5) of Section 7 of the Act is not applicable to the cases on hand.

165. There are three clauses in sub-section (5) of Section 7. Clause (a) applies in case where the supplier is located in India and the place of supply is outside India. In the present case, the supplier of service, i.e. the shipping line, is located outside India. Thus, the present case is not covered within the ambit of clause (a). Clause (b) is also not applicable in the present case as it only applies to supplies made to or by a Special Economic Zone developer or a Special Economic Zone unit.

166. Now, clause (c) provides that the 'supply of goods or services or both in the taxable territory', not being an intra-state supply and not covered elsewhere in Section 7, shall be treated as inter-state supply. The phrase 'supply of goods at services or both in the taxable territory' is nowhere defined in the Act.

167. At the outset, the phrase 'supply of goods or services or both in the taxable territory' cannot be equated with 'place of supply' in India. If the intention of the legislature was to cover all the supplies where the 'place of supply' is in India within the

ambit of the IGST Act by virtue of clause (c) of sub-section (5) of Section 7, nothing prevented the legislature from expressing its intention in clear words as used elsewhere in Section 7 and Section 8. Further, it is submitted that the provisions relating to the 'place of supply' under Sections 10 to 13 of the IGST Act does not determine where the supply takes place in its ordinary sense. They are artificial provisions enacted for fixing the situs of supply to determine the nature of supply as inter-state or intra-state and has to be used only where provided by the Act, i.e. under Sections 7(1), 7(2), 7(5)(a) and Section 8. The said provisions cannot be applied to Section 7(5)(c) of the IGST Act.

168. In any case, there is no provision for determining the place of supply where both the location of the supplier and the location of the recipient is outside India. Sections 12 and 13 of the IGST Act provide for determination of the place of supply in case of supply of services. Section 12 applies for determining the place of supply of services where the location of the supplier of services and the location of the recipient of services is in India. Section 12 applies for determining the place of supply of services where the location of the supplier of service or the location of the recipient of service is outside India. The relevant extract of Sections 12 and 13 are reproduced as under:

> *"12(1) The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India."*

> *"13(1) The provisions of this section shall apply to determine*

the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India."

169. Sections 7 and 8 of the IGST Act determine whether a supply is an inter-state supply or an intra-state supply and the 'place of supply' is an element which has to be considered for such determination. As stated above, sub-sections (1) and (2) of Section 7 and sub-section (1) of Section 8 deals with the supply of goods. Sub-section (3) of Section 7 and sub-section (2) of Section 8 deals with the supply of service and they are subject to the provisions of Section 12 of the IGST Act.

170. Now, the only provisions which deal with the supply of services and are not subject to Section 12 of the IGST Act are sub-sections (4) and (5) of the IGST Act. Thus, the place of supply for the said sub-sections will have to be determined in accordance with the provisions of Section 13 of the IGST Act.

171. Sub-section (4) of Section 7 deals with the supply of services imported into the territory of India. The phrase 'import of service' has been defined under Section 2(10) of the IGST Act as the supply of any service, where –

(i) The supplier of service is located outside India,

(ii) The recipient of service is located in India;

(iii) The place of supply of service is in India.

172. The term 'place of supply' is used in clause (a) of sub-section (5) of Section 7 of the IGST Act. As per the said clause, when the supplier is located in India and the place of supply is outside India, such supply is an inter-state supply. This is to enable exports of goods and service so that they can be made zero-rated, i.e. practically no tax on outward supply and refund of taxes paid at input stage. Section 2(6) of the IGST Act defines the term 'export of service' and the following conditions are required to be fulfilled inter alia for a supply of service to be an export of service:

(i) The supplier of service is located in India;

(ii) The recipient of service is located outside India;

(iii) The place of supply of service is outside India.

173. As seen above, Section 13 is applicable to sub-sections (4) and (5) of Section 7, where either the supplier of service or the recipient of service has to be in India. If both the supplier and the recipient are outside India, Section 13 does not apply.

174. Hence, the scheme of the IGST Act only contemplates transactions of intra-state supply, inter-state supply and exports & imports.

175. It is submitted that the phrase 'supply of goods or services or both in the taxable territory' under Section 7(5)(c) of the IGST Act has been enacted to cover the transactions of tax evasion.

Thus, in a case where the factum of supply has been proved, either by way of inquiry, investigation or audit, but it is not possible to ascertain whether the supply is an inter-state supply or intra-state supply, the law enacts a deeming fiction and treats such supply as an inter-state supply. It is a residual category and it cannot be so broadly construed to cover a substantial transaction, as in the present case, which is not expressly covered by the rest of the provisions of Section 7.

176. Hence, the phrase 'supply of goods or services or both in the taxable territory' shall mean a supply, all the aspects, or majority of the aspects, of which takes place in the taxable territory and which cannot be covered under the rest of the provisions of Section 7 or Section 8 of the IGST Act. Where none of the aspects of supply or only a minuscule part of supply takes place in India, such supply cannot be said to be in the taxable territory.

177. In the present case, the entire transaction takes place outside the taxable territory, i.e. outside India. The supplier is located outside India, the recipient of the supply is located outside India, the contract for the supply has been entered into outside India, the payment for the supply has been made outside India, the goods have been handed over to the supplier outside India and the transportation, for the most part, takes place outside India. The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.

178. A supply where both the supplier and the recipient are

outside India can be made leviable to tax only under Section 7(5)c) of the IGST Act provided that the supply is in the taxable territory. Thus, the provision may cover the cases such as a foreign tour operator conducting a tour in India for a foreign tourist.

179. In this case, even if both the supplier and the recipient are outside India and the supply is in India, the same can be levied to tax.

180. The tax, even in such cases, can be collected only from the supplier or the recipient of supply under the IGST Act. It is administratively difficult to collect the tax from a person located outside India and as such cases would be minimum, the Government has granted exemption to such supplies. However, the exemption entry provides that the 'services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India received by persons specified in the entry' will not be covered by the exemption.

181. It is submitted that the said exception has been carved out under mis-belief that the ocean freight services would be otherwise taxable. It is submitted that the supply of ocean freight service is not covered either by Section 7 (inter-state supply) or Section 8 (intra-state supply) of the IGST and thus not leviable to tax. Hence, since the supply is not leviable to tax under the Act, the granting of exemption from payment of tax does not arise.

182. Thus, the impugned notifications are liable to be struck

down as ultra vires the IGST Act.

183. The sixth submission we need to deal is that the scheme of the IGST does not contemplate levy and collection of tax from a person who is neither the supplier nor the recipient of supply.

184. Apart from the above submission that the supply of services by a person located in a non-taxable territory to a person located in a non-taxable territory is neither an inter-state supply nor an intra-state supply and thus not covered by the charging section, the writ-applicant further submits as under :

That there is no provision for determining the time of supply of the ocean freight service. The time of supply of services is determined in accordance with Section 20 of the IGST Act read with Sections 12 and 13 of the CGST Act. Section 12 of the CGST Act deals with the time of supply of goods. Section 13 of the CGST Act deals with the time of supply of services.

185. Sub-section (1) of Section 13 of the CGST Act states that the liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section. Sub-section (2) of Section 13 provides for determination of time of supply when the tax is payable under forward charge basis by the supplier of service.

186. Sub-section (3) of Section 13 of the IGST Act deals with the time of supply of service on which tax is payable under reverse charge basis. The clauses under the section applies only to the person who is the actual recipient of the supply. A person who is

not the recipient of supply cannot determine the time of supply under the provisions of Section 13(3) of the CGST Act. The relevant extract of the said section is as under:

> *"(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—*
>
> *(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
>
> *(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*
>
> *Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:*
>
> *Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier."*

187. Thus, the time of supply of services in case where the tax

is payable under the reverse charge basis is the earliest of the date of payment entered in the books of accounts of the recipient or the date of debit in the bank account or sixty days from the date of issue of invoice by the supplier. Thus, a person other than a recipient of supply cannot determine the time of supply as per the provisions of Section 13(3) of the IGST Act.

188. The seventh submission canvassed on behalf of the writ-applicant is that the value of the ocean freight service cannot be determined by the importer of goods.

189. Section 15 of the CGST Act provides for the determination of the value of supply. Sub-section (1) of Section 15 reads as under :

> *"15(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."*

190. Thus, the value of supply is the price actually paid or payable for the said supply and where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

191. Thus, a person other than the supplier or the recipient of the supply will not be able to determine the value of supply as such person will not be knowing the price actually paid or

payable for the supply.

192. The eight submission canvassed on behalf of the writ-applicant is that the input tax credit can only be availed by the recipient of the supply.

193. Section 16 of the CGST Act provides for taking of Input Tax Credit. Sub-section (1) of Section 16 of the CGST Act reads as under :

> *"16(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."*

194. Thus, Section 16 of the CGST Act provides that every registered person shall be entitled to take input tax credit on any supply of goods or services or both to him, which are used or intended to be used in the course or furtherance of business.

195. Section 2(93) of the CGST Act defines the term 'recipient' and states that any preference to a person to whom the supply is made shall be construed as a reference to the recipient of supply. The relevant extract of the said section is as under :

> *"2(93) 'recipient' of supply of goods or services or both, means –*
>
> *...*
>
> *and any reference to a person to whom a supply is made*

shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;"

196. Thus, when Section 16(1) states that a person to whom supply is made shall be entitled to take input tax credit, the same shall be construed as a reference to the recipient of supply. Thus, the input tax credit on the supply can be availed only by the recipient of supply.

197. In the case of ocean freight services, the importer of goods is not the recipient of supply of ocean freight services and may not be able to avail the input tax credit, which is sought to be recovered under the impugned notifications. Thus, the impugned notifications are not in conformity with the object of laws relating to the Goods and Services Tax, i.e. credit shall be available at each stage and the burden of tax shall only be on the customer.

198. The ninth submission we need to deal with is that the provisions relating to the filing of returns apply only to the outward and inward supplies.

199. The provisions relating to the filing of returns apply only to the inward and outward supplies made by a registered person. Section 2(67) of the CGST Act defines the term 'inward supply' as 'inward supply in relation to a person, shall mean recipient of goods or services or both whether by purchase, acquisition or any other means with or without consideration'. Section 2(83) of

the CGST Act defines the term 'outward supply' as 'outward supply in relation to a taxable person means supply of goods or services or both, whether by sale, transfer, barter, exchange, license, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business'. The supply in the present case is neither an inward supply nor an outward supply for the writ-applicant.

200. Thus, even the provisions relating to the returns apply where either the person is a supplier or a recipient of the supply. If the person is neither a supplier nor a recipient of supply, such provisions do not apply.

201. In view of the above, it is submitted that the scheme of the Goods and Services Tax is that it is a transaction/contract based on value added tax. The tax is levied on each transaction and the tax paid at early stage is available as credit. Hence, it is a tax on consumption and not on business. It is a contract based levy which depends on the contract between the supplier and the recipient. Thus, where the tax is sought to be levied and collected by a person other than the supplier or the supplier of service, distortions and contingency which the Act does not covers, are bound to occur.

202. Hence, it is humbly submitted that the transaction of supply of services by a person located in a non-taxable territory to another person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India is not leviable to the Goods and Services Tax.

203. The next submission we need to deal is that the impugned notifications are contrary to the provisions of Article 265 of the Constitution of India.

204. Article 265 of the Constitution provides that: "No tax shall be levied or collected except by authority of law." Thus, both the levy and collection of tax shall be provided by a statute enacted by a competent legislature. A delegated legislation, i.e. a rule, regulation or notification, cannot provide for levy or collection of tax which is not authorized by the parent statute.

205. In a fiscal matter it is not proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. Such power of imposition of tax and/or fee by a delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

206. Thus, the impugned notification levying the tax on supply of ocean freight service and making the import of goods as the person liable for paying the tax are also unconstitutional as there is no statutory sanction for levy and collection of such tax.

207. The next submission we need to deal with is that the IGST is leviable on a transaction treated as an import of goods under the IGST Act read with the Customs Tariff Act, 1975. Once the freight has already suffered the IGST as a part of the value of the

goods being imported, the dual levy of the IGST cannot be imposed on the same freight amount by treating it as supply of service.

208. Section 5 of the IGST Act provides for levy and collection of integrated tax on inter-state supply of goods or services or both. The proviso to sub-section (1) of Section 5 provides that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975, on the value as determined under the said Act at the point when the duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962. The relevant portion of Section 5 of the IGST Act is extracted as under :

> *"5(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both; except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:*
>
> *Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point*

when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962."

209. Sub-section (7) of Section 3 of the Customs Tariff Act, 1975 reads as under :

"(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent. as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be."

210. Thus, the goods imported into India are subjected to the integrated tax under Section 5(1) of the IGST Act read with Section 3(7) of the Customs Tariff Act, 1975.

211. The writ-applicant imports the goods on CIF basis and thus the amount charged by the foreign exporter includes the freight amount till the place of customs clearance in India. The writ-applicant discharges the basic customs duty on the value of goods under Section 12 of the Customs Act, 1962. In addition, the writ-applicant also discharges the IGST on such value under Section 5 of the IGST Act read with Section 3(7) of the Customs Tariff Act, 1972.

212. The impugned Notification No.8/2017 - Integrated Tax (Rate) read with Notification No.10/2017 - Integrated Tax (Rate) both dated 28.06.2017 seek to levy and collect the integrated tax

again on the amount of freight as a supply of service by deeming the importer in India as the recipient of supply of transportation service.

213. It is a fundamental principle of construction of tax statutes that if the words of the Act on one construction results into double taxation of the same transaction, that result will be avoided by adopting another construction which may reasonably be open. Further, double taxation, by way of delegated legislation, when the statute does not expressly provide, is not permissible.

214. In the case of United Shippers Ltd. v. CCE, 2015(37) STR 1043(T), the Tribunal held that there can be no levy of service tax on barge charges and the handling charges which is part of the import transaction into India and form an integral part of the transaction value on which the customs duty is leviable. The judgment of the Tribunal has been affirmed by the Supreme Court in the case of CCE v. United Shippers, 2015(39) STR J369 (SC).

215. Thus, having paid the IGST on the amount of freight which is included in the value of the imported goods, the impugned notifications levying tax again as a supply of service, without any express sanction by the statute, are illegal and liable to be struck down.

216. It was also argued that the purpose/object for which the tax is levied will not validate an ultra vires or unconstitutional

tax.

217. Prior to 01.06.2016, the services of transportation of goods in a vessel from a place outside India up to the customs station of clearance in India were exempted from service tax. As a result, the Indian Shipping Lines were unable to avail the input tax credit of tax paid on the goods and services and such tax formed part of their transportation cost. To provide them the level playing field, service tax was imposed on the service of inward transportation of goods to enable the Indian Shipping Lines to avail the input tax credit. Further, the services of the outward transportation of goods were treated as export of service and thus the credit of the excise and service tax was available. It is further stated that subsequently, many FOB contracts were being converted into CIF contracts. In order that the tax is suffered by both, the foreign shipping line and the Indian shipping line, the services of the inward transportation of goods provided by a person in a non-taxable territory to a person in a non-taxable territory were made liable to service tax.

History of taxation of international transportation service prior to Finance Act, 2016.

218. Chapter V of the Finance Act, 1994, for the first time, introduced taxation of services in India. Till 1.7.2012, the service tax was levied on selected categories of services. Thus, the services which were specifically included within the tax ambit, were only taxable. Section 65(105) of the Finance Act, 1994, defined the term 'taxable services'. Clause (zzzzl) was introduced in Section 65(105) w.e.f. 1.9.2009 which provided levy of service

tax on the service of transportation of coastal goods, transportation of goods through national waterways and through inland waterways. The relevant extract of the said section is as under :

> *"65(105) 'taxable service' means any service provided or to be provided, -*
>
> *(zzzzl) to any person, by any other person, in relation to transport of –*
>
> *(i) coastal goods;*
>
> *(ii) goods through national waterway; or*
>
> *(iii) goods through inland water.*
>
> *Explanation.- For the purposes of this sub-clause, –*
>
> *(a) 'coastal goods' has the meaning assigned to it in clause (7) of Section 2 of the Customs Act, 1962;*
>
> *(b) 'national waterway' has the meaning assigned to it in clause (h) of section 2 of the Inland Waterways Authority of India Act, 1985;*
>
> *(c) 'inland water' has the meaning assigned to it in clause (b) of Section 2 of the Inland Vessels Act, 1917;*

219. Thus, only the service of transportation of coastal goods or

through national waterways or inland waterways was made taxable. The service of international transportation was not leviable to service tax.

220. With effect from 1.7.2012, the negative list regime was introduced for levy of service tax and all services were made taxable except those provided under the negative list of service. Section 66D of the Finance Act, 1994, provided such negative list of services. The relevant extract of clause (p) of Section 66D (before its amendment by the Finance Act, 2016) is reproduced hereunder for ready reference:

> *"66D. The negative list shall comprise of the following services, namely:*
>
> *(p) services by way of transportation of goods--*
> *…*
> *ii) by an aircraft or a vessel from a place outside India up to the customs station of clearance;"*

221. Thus, the service of inward international transportation was put under the negative list and thus it was not leviable to service tax. The place of provision of transportation of goods (other than by way of mail or courier) is the place of destination of goods as per Rule 10 of the Place of Provision of Service Rules, 2012. Thus, even though the place of such service was in India, the same was expressly made not leviable to tax by including a specific entry in the negative list.

222. Further, the service of the outward international

transportation of goods was not leviable to service tax as the destination of goods was outside India and thus the place of provision of such service was outside India.

Rationale for not levying service tax on ocean freight services

223. The rationale behind not levying the tax on service of the inward international transportation is that the value of the imported goods for the purpose of payment of customs duties includes the amount of freight paid on their inward transportation. The tax on such transportation service, instead of being collected from the supplier of service is collected from the importer of goods by including the same in the value of imported goods.

224. Even international, the service of international transportation both relating to imports and exports is GST-free (i.e. no tax is payable on the outward supply and the tax paid on the inward supplies can be claimed as refund). The tax is collected from the importer of goods by including it in the value of imported goods. The relevant extract from the Australian GST Handbook (2017-18) by Ian Murray-Jones at page 418 and 419 is as under:

"[21 571] Transport of goods--

The table in s 38-355(1) of the GST Act specifies the circumstances in which the provision of transport and related supplies are GST-free: see [21 550].

The transportation of goods both to and from Australia is GST-free under item 5 of the table. In other words, this concession applies to both import and exports of goods.

...

Importers incur GST liability on transport costs--

Note, however, that the cost of the international transport of imported goods is subject to GST in the hands of an importer through s 13-20(2)(b)(i): see [9 015]. In other words, the international transport provisions in item 5 (and item 5A) operate in conjunction with value of taxable importation rules in s.13-20(2)(b). The exemption in item 5 ensures that the same amount is not taxed twice, i.e. once in the hands of the supplier and then again by the importer. It means that the liability on the Australian leg of the international transport of imported goods is shifted from the transport service suppliers to the importer of goods. From a policy point of view, it is easier to recover a GST liability from an importer rather than the supplier of the transport, who may not have a presence in Australia."

225. In the United Kingdom, the Value Added Tax Act, 1994 provides that the services of transportation relating to the import and export is zero-rated (i.e. no tax is payable on the outward supply and the tax paid on the inward supplies can be claimed as refund). The relevant extract from VAT Notice 744B - Freight transport and associated services is as under:

"5.3 VAT liability of import, export and non-EU freight

transport Where the place of supply is the UK, zero rating applies to:

the supply of transport of goods from a place within to a place outside the EU and vice versa."

226. Thus, the services of transportation relating to export and import are governed by the international considerations and all countries treat the same as zero-rated or GST-free.

Amendment vide Finance Act, 2016 and thereafter.

227. Vide Finance Act, 2016, the sub-clause (ii) of clause (p) of Section 66D of the Finance Act, 1994, which provided that the service of transportation of goods from a place outside India upto the customs station of clearance is not leviable to service tax, was omitted.

228. Notification No.9/2016-ST dated 1.3.2016 effective from 1.4.2016 was issued, which inserted entry no.53 in the Mega Exemption Notification No.25/2012-ST dated 20.6.2012 as below :

"53. Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India."

229. The effect of the above amendment was that the service of transportation of goods in a vessel from a place outside India upto customs station of clearance in India became taxable whereas the same services by an aircraft were made exempted

from payment of tax.

230. The amendments were made with the objective that the Indian Shipping Lines which were hitherto not eligible to avail credit of taxes paid on the input side as the services provided by them were not leviable to service, became eligible to avail the credit and pass on the same to the consumer.

231. However, by such an amendment, the Indian Shipping Lines were placed at a disadvantageous position than the Foreign Shipping Lines who were exempted from paying the service tax vide entry no.34 of the Notification No.25/2012-ST dated 20.6.2012. The relevant extract of the said entry is reproduced hereunder :

> *"34. Services received from a provider of service located in a non-taxable territory by –*
>
> *…*
>
> *(c) a person located in a non-taxable territory;"*

232. Thus, to bring both the Indian Shipping Lines and the Foreign Shipping Lines at par, the services provided by the Foreign Shipping Lines were also made leviable to service tax by inserting the following proviso in clause (c) of entry no.34 of the Notification No.25/2012-ST dated 20.6.2012:

> *"Provided that the exemption shall not apply to –*
>
> *…*

(ii) services by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India;"

233. Further, the person in India who complies with Sections 29, 30 or 38 read with Section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods, was notified as the person liable to pay the service tax vide Notification No.2/2017 and 3/2017–ST both dated 12.1.2017.

234. However, as the above-mentioned person would not be able to pass on the credit, the importer of the goods was made the person liable to pay tax vide Notification No.15/2017-ST and 16/2017-ST both dated 13.4.2017 w.e.f. 23.4.2017. Further, vide Notification No.14/2017-ST dated 13.4.2017, the point of taxation was provided and vide Notification No.16/2017-ST dated 13.4.2017, an alternative mechanism for paying the service tax at the rate of 1.4% of the CIF (Cost, Insurance and Freight) value of the goods.

235. Further, vide Notification No.10/2017-C.E. (N.T.) dated 13.4.2017 effective from 23.4.2017, the importer of the goods has been allowed to avail the Cenvat Credit on the basis of the challan of payment of service tax by the said importer.

Power to levy tax on the ocean freight service by the sub-ordinate legislation under the erstwhile service tax regime and under the present GST regime.

236. Under the erstwhile service tax regime, Section 66B of the

Finance Act, 1994 was the charging section which levied the tax on the value of all the services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another. Section 68 provided for collection of tax. Sub-section (1) of Section 68 provided that every person providing taxable service shall pay the service tax. Further, sub-section (2) of Section 68 provided that, in respect of such taxable services as may be notified by the Central Government, the service tax shall be payable by such person and in such manner as may be prescribed. The relevant extract of Section 68 is as under :

"68. Payment of service tax.--

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service :

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining

part of the service tax shall be paid by the service provider. "

237. Section 663 of the Finance Act, 1994, levied the service tax on the value of all services (other than those specified in the negative list). Further, Section 68(2) of the Finance Act, 1994, provided the power to the Central Government to specify the categories of services and also the person by whom the service tax shall be paid.

238. Under the IGST Act, the integrated tax is leviable only on inter-state supplies made or agreed to be made. As stated above, the supply of services provided by a person in a non-taxable territory to a person in a non-taxable territory by way of transportation of goods in a vessel from a place outside India to the place of customs station of clearance in India is not an inter-state supply as per the provisions of Section 7 of the IGST Act.

239. Further, as per Section 5(3) of the IGST Act, the Government is only authorized to specify the categories of supply on which the tax is to paid by the recipient of the supply under the reverse charge basis. The Government cannot further specify the person liable to pay tax as other than the recipient of the supply.

240. There is no doubt that in the taxing legislation, the legislature deserves the greater latitude and the greater play in joints. This principle, however, cannot be extended so as to validate a levy by a subordinate legislation which has no sanction of law, however, laudable may have been the object to

introduce it.

241. The legislature, while enacting the IGST Act, was aware of the wide provisions under the Finance Act, 1994, which provide the Government the power to collect tax under the reverse charge basis only from the recipient of the service but from any other person as may be prescribed. However, while enacting the IGST Act, the legislature consciously curtailed the power of the Government to collect tax under the reverse charge basis from any person and restricted it only to the recipient of the supply.

242. If the intention of the Government was to allow the credit of the taxes paid on the goods and services used for providing the supply of the inward transportation, the same could have been made a zero-rated supply. A zero-rated supply is provided under Section 16 of the IGST Act, wherein it is provided that zero-rated supply can be made either without the payment of tax or with payment of tax along with an option to claim refund of tax later. Further, the person making the zero-rated supply will be eligible to avail the input tax credit and claim refund if the same remains unutilized. The same approach has been adopted even internationally.

243. Alternatively, such services could have been exempted from payment of tax and simultaneously excluded from the value of exempt supply for the purpose of determining reversal of the input tax credit. The said mechanism has been provided in case of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India (exempted from payment of tax till 30.09.2019 vide Notification

No.9/2017 - Integrated Tax (Rate) dated 28.06.2017). Simultaneously, the said service has been excluded from the aggregate value of exempt supply for the purpose of reversal of input tax credit under Rule 42 and 43 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) via Explanation to Rule 43(2) of the CGST Rules.

244. Further, prior to 1.2.2019, before the amendment of the IGST Act, the supply of services to a person in Nepal and Bhutan for which the payment was received in Indian rupees was not an export of service. Thus, to bring the said supply of service at par with the export of service, the Government granted exemption from payment of tax on supply of service (vide Notification No.9/2017-Integrated Tax (Rate) dated 28.6.2017 as amended vide Notification No.42/2017-Integrated Tax (Rate) dated 27.2.2017) and simultaneously provided that no reversal will be required to be done under Rule 42 and 43 of the CGST for such exempted supply of services to a person in Nepal and Bhutan.

245. We shall now proceed to look into the three decisions of the Supreme Court upon which strong reliance has been placed by the respondents.

246. In the case of Gujarat Ambuja Cements Limited and another v. Union of India and another, (2005)4 SCC 214, the Supreme Court has observed as under :

> *"23. The next question is whether the levy of service tax on carriage of goods by transport operators was legislatively competent. Laghu Udhyog Bharati did not consider the*

question of legislative competency. Before we consider the scope of the impugned Act, it is necessary to determine the scope of the two Legislative Entries namely Entry 97 of List I and Entry 56 of List II. It has been recognized in Godfrey Phillips (supra) that there is a complete and careful demarcation of taxes in the Constitution and there is no overlapping as far as the fields of taxation are concerned. This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the Court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field.

24. Undisputedly, Chapter V of the Finance Tax Act, 1994 was enacted with reference to the residuary power defined in Entry 97 of List I. But as has been held in International Tourist Corporation v. State of Haryana (1981) 2 SCC 319:

> *"Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those Lists."*

25. In that case Section 3(3) of the Punjab Passengers and Goods Taxation Act, 1952 was challenged by transport operators. The Act provided for the levy of the tax on passengers and goods plying in the State of Haryana. According to the transport operators, the State could not levy tax on passengers and goods carried by vehicles plying entirely along the national highways. According to them this was solely within the power of the Centre under Entry 23 read with 97 of List I. The submission was held to be patently fallacious by this Court. It was held that Entry 56 of List II did not exclude national highways so that the passengers and goods carried on national highways would fall directly and squarely within Entry 56 of List II. It was said that the State played a role in the maintenance of the national highway and there was sufficient nexus between the tax and passengers goods carried on the national highway to justify the imposition.

26. The writ petitioners in this case have, relying on this judgment, argued that the Act falls squarely within Entry 56 of List II and, therefore, could not be referred to Entry 97 of List I. We do not agree.

27. There is a distinction between the object of tax, the incidence of tax and the machinery for the collection of the tax. The distinction is important but is apt to be confused. Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. There is a further distinction between the objects of taxation in our constitutional scheme. The object of

tax may be an article or substance such as a tax on land and buildings under Entry 49 of List II, or a tax on animals and boats under Entry 58 List II or on a taxable event such as manufacture of goods under Entry 84 of List-I, import or export of goods under Entry 83 of List-I, entry of goods under Entry 52 of List II or sale of goods under Entry 54 List II to name a few. Theoretically, of course, as we have held in Godfrey Phillips India Ltd. v. State of U.P. and others, 2005 Scale Page 367, ultimately even a tax on goods will be on the taxable event of ownership or possession. We need not go into this question except to emphasise that, broadly speaking the subject-matter of taxation under Entry 56 of List II are goods and passengers. The phrase 'carried by roads or natural waterways' carves out the kind of goods or passengers which or who can be subjected to tax under the Entry. The ambit and purport of the entry has been dealt with in Rai Ramakrishna and others v. State of Bihar 1963 (1) SCR 897) where it was said in language which we cannot better:-

> *"Entry 56 of the Second List refers to taxes on goods and passengers carried by road or on inland waterways. It is clear that the State Legislatures are authorized to levy taxes on goods and passengers by this entry. It is not on all goods and passengers that taxes can be imposed under this entry; it is on goods and passengers carried by road or on inland waterways that taxes can be imposed. The expression "carried by road or on inland waterways" is an adjectival clause qualifying goods and passengers,*

that is to say, it is goods and passengers of the said description that have to be taxed under this entry. Nevertheless, it is obvious that the goods as such cannot pay taxes, and so taxes levied on goods have to be recovered from some persons, and these persons must have an intimate or direct connection or nexus with the goods before they can be called upon to pay the taxes in respect of the carried goods. Similarly, passengers who are carried are taxed under the entry. But, usually, it would be inexpedient, if not impossible, to recover the tax directly from the passengers and so, it would be expedient and convenient to provide for the recovery of the said tax from the owners of the vehicles themselves."

(See also: Sainik Motor Jodhpur v. The State of Rajasthan 1962 (1) SCR 517).

28. Having determined the parameters of the two legislative entries the principles for determining the constitutionality of a Statute come into play. These principles may briefly be summarized thus:

a) The substance of the impugned Act must be looked at to determine whether it is in pith and substance within a particular entry whatever its ancillary effect may be. (Prafulla Kumar Mukherjee v. Bank of Commerce Ltd. and others (AIR 1947 PC 60, 65; A.S. Krishna v. State of Madras, 1957 SCR 399; State of Rajasthan v. G. Chawla (1959 Supp. (1) SCR 904; Katra Education Society v. State of U.P., 1996 (3) SCR

328; D.C. Johar and Sons (P) Ltd. v. STO Ernakulam, 1971 (27) STC 120; Kanan Devan Hills Produce v. State of Kerala (1972) 2 SCC 218).

b) Where the encroachment is ostensibly ancillary but in truth beyond the competence of the enacting authority, the statute will be a colourable piece of legislation and constitutionally invalid (A.S. Krishna v. State of Madras (supra); A.B. Abdul Kadir v. State of Kerala (1976) 3 SCC 219, 232; Federation of Hotel and Restaurant v. Union of India (supra at p.651). If the statute is legislatively competent the enquiry into the motive which persuaded Parliament or the State legislature into passing the Act is irrelevant. (Dharam Dutt and others v. Union of India and others 2004(1) SCALE 425).

c) Apart from passing the test of legislative competency, the Act must be otherwise legally valid and would also have to pass the test of constitutionality in the sense that it cannot be in violation of the provisions of the Constitution nor can it operate extra-territorially.

(See: Poppat Lal Shah v. State of Madras 1953 SCR 677).

29. The provisions relating to service tax in the Finance Act, 1994 make it clear under Section 64(3) that the Act applies only to taxable services. Taxable services has been defined, as we have already noted, in Section 65(41). Each

of the clauses of that sub section refers to the different kinds of services provided. Most of the taxable services cannot be said to be in any way related to goods or passengers carried by road or waterways. For example, Section 65(41) (g) provides for service rendered to a client by a consulting engineer, Section 65(41)(k) refers to service to a client by a manpower recruitment agency, Section 65(41)(o) refers to service by pandal or shamiana contractors and so on. The rate of service tax has been fixed under Section 66. Section 67 provides for valuation of taxable service for the purposes of charging tax. The provision for valuation of service rendered by collecting and forwarding agents has been dealt with under sub-clause (j) and service provided by goods transport operators has been provided under clause (j). (subsequently renumbered as clause (m-a). These clauses read respectively as under :-

> *"67.(j) in relation to service provided by a clearing and forwarding agent to a client, shall be the gross amount charged by such agent from the client for services of clearing and forwarding operations in any manner."*
>
> *"67.(m-a) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges."*

30. As far as clause (j) is concerned it does not speak of

goods or passengers, nor to carriage of goods nor is it limited to service by road or inland waterways. Clause (m-a) shows that the valuation of the service tax includes the freight charges, but is not limited to it.

31. It is clear therefore that Section 66 read with Section 65(41)(j) and (m-a) Chapter V of the Finance Act, 1994 do not seek to levy tax on goods or passengers. The subject matter of tax under those provisions of the Finance Act, 1994 is not goods and passengers, but the service of transportation itself. It is a levy distinct from the levy envisaged under Entry 56. It may be that both the levies are to be measured on the same basis, but that does not make the levy the same. As was held in Federation of Hotel and Restaurant Association of India etc. v. Union of India and others (1989) 3 SCC 634 :

> *"...'subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power....'*
>
> *Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way, but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects."*

32. Since service Tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States exclusive power under Entry 56 of List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I.

33. Incidentally a similar challenge to the legislative competence of Parliament to levy service tax was negatived in Tamil Nadu Kalyana Mandapam Assn. v. Union of India, 2004 (167) ELT 3 (SC) which was a case where the levy of service tax was challenged by owners of Kalayan Mandapam/Mandap Keepers. By virtue of the 1997 amendment service provided to a client by Mandap keepers including the services if any rendered as a caterer was treated as a taxable service. The challenge, inter alia, was that service tax on Mandap Keepers was colourable legislation as the said tax was not on service but was in pith and substance only a tax on the sale of goods and/or a tax on land. The writ petition filed before the Madras High Court was rejected and the constitutionality of the levy was upheld. It was then urged before this Court by the appellants that Entries 18, 14 and 54 of List II covered the

levy in question and, therefore, resort could not be had to Entry 97 in List I of the Seventh Schedule of the Constitution. It was held by this Court that although certain items of the service might have been referable to any other entry, the service element was the "more weighty, visible and predominant". Therefore, the nature and character of the levy of the service tax was distinct from a tax on the sale or hire purchase of goods and from a tax on land.

34. The point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realization and recovery of the tax. The manner of the collection has been described as "an accident of administration; it is not of the essence of the duty" 2. It will not change and does not affect the essential nature of the tax. Subject to the legislative competence of the Taxing Authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective whatever stage it may be. The Central Government is therefore legally competent to evolve a suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. By Sections 116 and 117 of the Finance Act, 2000, the tax is sought to be levied from the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to them.

35. In a similar fact situation under an Ordinance the Central Government was authorized to levy and collect a

duty of excise on all coal and coke dispatched from collieries. Rules framed under the Ordinance provided for collection of the excise duty by the railway administration by means of a surcharge on freight recoverable either from the consignor or the consignee. The imposition of excise duty on the consignee was challenged on the ground that the consignee had nothing to do with the manufacture or production of the coal. Negativing this submission this Court in R.C. Jall v. Union of India, AIR 1962 SC 1281, 1286 said :-

> *"The argument confuses the incidence of taxation with the machinery provided for the collection thereof."*

36. In Rai Ramakrishna (supra) the tax under Entry 56 of List II was held to be competently levied on the bus operators or bus owners even though the object of levy was passengers (which they were not) because there was a direct connection between the object of the tax viz., goods and passengers and the owners of the transport carrying the goods or passengers. There is thus nothing inherently illegal or unconstitutional to provide for service tax to be paid by the availer or user.

37. The writ petitioners have relying upon the decision in Dwarka Prasad v. Dwarka Das Saraf, 1976 (1) SCC 128, contended that the amendment to section 68 by the introduction of a proviso in 2003, was invalid. It is submitted that as the body of the section did not cover the subject matter, there was no question of creating an

exception in respect thereto by a proviso. According to the writ petitioners, the proviso cannot expand the body by creating a separate charge. It is submitted that by merely amending the definition of the word "assessee" it could not be understood to mean that thereby all customers of the services in question were liable.

38. The submission is misconceived for several reasons. Section 68 is a machinery section in that it provides for the incidence of taxation and is not the charging section which is Section 66. The amendments to Section 66 brought about in 2000 changed the point of collection of tax from the provider of the service to 'such manner as may be prescribed'. Section 68(1A) as it stood in 1997 provided for the collection and recovery of service tax in respect of the services referred in clauses (g) to (r) of Section 65(41), which included both the services with which we are concerned, from such person and in such manner as may be prescribed. The 1998 Finance Act maintained this. Now the Service Tax Rules, 1994 provided for the collection and recovery of tax from the user or payers for the services. This was the prescribed method. All that the proviso to Section 68(1A) did was to prescribe the procedure for collection with reference to services of goods transport operators and clearing agents which services had already been expressly included under the Finance Act, 2000 into the definition of taxable service.

39. The decision in Dwarka Prasad v. Dwarka Das Saraf (supra) relied upon by the writ petitioner does not in any

way forbid a proviso from supplementing the enacting clause. All that the decision says is that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or an independent enactment. The introduction of the proviso to Section 68(1)(A) by the Finance Act, 2003 does not seek in any manner seek to expand that sub-section. In fact it gives effect to it.

40. The final challenge to the 2000 amendment to the Service Tax Act, 1994 is that it operated in a discriminatory manner in that it chose the recipient of the services to be the assessee only in the case of services rendered by goods transport operators and clearing and forwarding agents. We are unable to accept the submission. Because of the inherent complexity of fiscal adjustments of diverse elements in the field of tax, the legislature is permitted a large discretion in the matter of classification to determine not only what should be taxed but also the manner in which the tax may be imposed. Courts are extremely circumspect in questioning the reasonability of such classification but after a "judicial generosity is extended to legislative wisdom, if there is writ on the statute perversity, madness in the method or gross disparity, judicial credibility may snap and the measure may meet with its funeral".
(Vide: Ganga Sugar Corporation v. State of U.P.) (1980(1) SCC 223)

41. The same judicial wariness was expressed in Federation of Hotel and Restaurant Association of India etc.

v. Union of India and Ors., (1989) 3 SCC 634 where it was said :

> *"It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory . Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes."*

42. In the case before us the discrimination is not, even according to the writ petitioners, by reason of the subject matter of tax. It is also not the writ petitioners' case that within the separate classes of services covered by the different clauses in Section 65(41), there is any discrimination or that the law operates unequally within the classes. According to them the discrimination lies in the method of collection of the tax followed. But as we have said

this is not of the essence of the tax and the mere difference in the machinery provisions between the different classes of service cannot found a challenge of discrimination. If the legislature thinks that it will facilitate the collection of the tax due from such specified traders on a rationally discernible basis, there is nothing in the said legislative measure to offend Article 14 of the Constitution. It is therefore outside the judicial ken to determine whether the Parliament should have specified a common mode for recovery of the tax as a convenient administrative measure in respect of a particular class. That is ultimately a question of policy which must be left to legislative wisdom. This challenge also accordingly fails."

247. In the aforesaid decision of the Supreme Court, the subject-matter of challenge was the constitutional validity of Sections 116 and 117 respectively of the Finance Act, 2000, on the ground that it encroached upon the power of the State Legislature under Entry 56 of List II of the 7th Schedule to the Constitution and also on the ground that the levy of the service tax on the customers of goods transport operators and clearing & forwarding agents was discriminatory as the other recipients were not subjected to such imposition. The Supreme Court, while rejecting both the contentions, held that the Legislature has the competence to collect tax from the recipients of services. The ratio of Gujarat Ambuja Cements Ltd. (supra) is in no way helpful to the respondents for the purpose of defending the notifications.

248. In the case on hand, there is no challenge to the competence of the Legislature in enacting Section 5(3) of the

IGST Act which empowers the Government to notify the goods or services upon which tax is liable to be paid by the recipients. The issue in the present case is, when the statutory provision empowers collection of tax from the recipient of goods or services, then whether the delegated legislation by way of notification can stipulate imposition of tax on a person who is neither the supplier nor the recipient of service. Thus, this decision is of no avail to the respondents.

249. In All India Federation of Tax Practitioners v. Union of India, (2007)7 STR 625 (SC), the Supreme Court heard an appeal filed by the All India Federation of Tax Practitioners against a Division Bench judgment of the Bombay High Court upholding the legislative competence of the Parliament to levy service tax vide the Finance Act, 1994, and the Finance Act, 1998. The Bombay High Court took the view that the service tax would fall in Entry 97 of List I of the 7th Schedule to the Constitution. The issue before the Supreme Court was one concerning the constitutional status of levy of service tax and the legislative competence of the Parliament to impose service tax under Article 246(1) read with Entry 97 of List I of the 7th Schedule to the Constitution.

250. The issue that arose in the appeal before the Supreme Court questioned the competence of the Parliament to levy service tax on the practicing Chartered Accountants and Architects having regard to Entry 56 of List II of the 7th Schedule to the Constitution and Article 276 of the Constitution of India. The challenge was rejected by the Supreme Court relying upon the aspect theory and it was held that the Parliament has the competence to impose tax on the services rendered by the

professionals. The ratio of this decision is also of no avail to the respondents as the pivotal issue in the case on hand is, whether the delegated legislation can travel beyond the scope of the powers conferred by the parent legislation.

251. In Phulchand Exports Limited v. O.O.O. Patriot, (2011)10 SCC 300, the Supreme Court in para 21 has referred to and relied upon the decision in the case of Johnson v. Taylor Brothers and Company Limited, 1920 AC 144 (HL) in the context of determination of rights of the sellers and buyers under the Indian Contract Act, 1872. Johnson (supra) referred to by the Supreme Court explains the nature of a CIF contract. Johnson (supra) lays down the following :

(i) To make out an invoice of the goods sold.

(ii) To ship at the port of shipment goods of the description contained in the contract.

(iii) To procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract.

(iv) To arrange for an insurance upon the terms current in the trade.

(v) To send forward and tender to the buyer the shipping documents namely the invoice, bill of lading and policy of assurance.

252. The view taken in Johnson (supra) is that in a CIF contract, the seller is obliged to procure a contract of

affreightment under which the goods would be delivered at their destination.

253. In our opinion, such observations, on the contrary, supports the case of the writ-applicants that in a case of CIF contract, the contract for transportation is entered into by the seller, i.e. the foreign exporter, and not the buyer, i.e. the importer, and the importer is not the recipient of the service of transportation of the goods.

254. In view of the aforesaid discussion, we have reached to the conclusion that no tax is leviable under the Integrated Goods and Services Tax Act, 2007, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not permissible in law.

255. In the result, this writ-application along with all other connected writ-applications is allowed. The impugned Notification No.8/2017 – Integrated Tax (Rate) dated 28th June 2017 and the Entry 10 of the Notification No.10/2017 – Integrated Tax (Rate) dated 28th June 2017 are declared as ultra vires the Integrated Goods and Services Tax Act, 2017, as they lack legislative competency. Both the Notifications are hereby declared to be unconstitutional. Civil Application, if any, stands disposed of.

(J. B. PARDIWALA, J.)

(A. C. RAO, J.)

After the judgment is pronounced, Mr.Nirzar Desai, the learned standing counsel appearing for the Union of India, made a request to stay the operation, implementation and execution of the judgment.

Having taken the view that the impugned Notification and the Entry No.10 therein are ultra vires the IGST Act, 2017, we decline to stay the operation of our judgment.

(J. B. PARDIWALA, J.)

(A. C. RAO, J.)

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