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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 12 November, 2024**
Judgment pronounced on: 04 March, 2025

\+ W.P.(C) 934/2023

INTERGLOBE AVIATION LTD .....Petitioner

Through: Mr. V. Lakshmikumaran, Ms. Jyoti Pal, Mr. Yogendra Aldak, Mr. Agrim Arora, Ms. Anjali Singh and Ms. Anjali Singh and Ms. Aditi Sharma, Advs.

versus

PRINCIPAL COMMISSIONER OF CUSTOMS ACC (IMPORT) NEW CUSTOM HOUSE NEW DELHI & ORS. .....Respondents

Through: Mr. Anurag Ojha, SSC along with Mr. Subham Kumar, Adv. for R-1.
Ms. Sonu Bhatnagar, SSC for CBIC along with Ms. Apurva Singh and Ms. K.S. Mary Jonet, Adv. for R-2.
Mr. Niraj Kumar, Sr. CGC for R-3/UOI.
Ms. Avshreya Pratap Singh Rudy, SPC along with Ms. Usha Jamnal and Ms. Harshita Chaturvedi, Advs.

\+ W.P.(C) 7845/2023

INTERGLOBE AVIATION LTD .....Petitioner

Through: Mr. V. Lakshmikumaran, Ms. Jyoti Pal, Mr. Yogendra Aldak, Mr. Agrim Arora, Ms. Anjali Singh and Ms. Anjali Singh and Ms. Aditi Sharma, Advs.

versus

PRINCIPAL COMMISSIONER OF CUSTOMS ACC (IMPORT) NEW CUSTOM HOUSE NEW DELHI & ORS. .....Respondents

Through: Mr. Anurag Ojha, SSC along with Mr. Subham Kumar, Adv. for R-1.
Mr. Niraj Kumar, Sr. CGC for R-2/UOI.

\+ W.P.(C) 4673/2024

INTERGLOBE AVIATION LTD .....Petitioner

Through: Mr. V. Lakshmikumaran, Ms. Jyoti Pal, Mr. Yogendra Aldak, Mr. Agrim Arora, Ms. Anjali Singh and Ms. Anjali Singh and Ms. Aditi Sharma, Advs.

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CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

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PRELUDE

1. These three writ petitions bid us to traverse the unchartered and untested territory of the interplay between the **Customs Act, 1962**[1], and the **Customs Tariff Act, 1975**[2] on one side of the scale when pitted against the **Central Goods and Services Tax Act, 2017**[3] and the **Integrated Goods and Services Tax Act, 2017**[4]. They pose two fundamental questions for our consideration: -

(A) Whether the duty leviable under Section 3(7) of the CTA is independent of the impost created by Section 5 of the IGST?

(B) Whether a supply of service conferred that character by virtue of Schedule II of the CGST would remain unimpeded by the concept of import of goods as ordinarily understood?

2. These questions themselves arise in the backdrop of the paradigm shift which was ushered in by the **One Hundred and First Constitution Amendment Act, 2016**[5] and which brought in a sea

[1] Customs Act
[2] CTA
[3] CGST Act
[4] IGST Act
[5] Constitution Amendment Act

change with respect to the power to levy taxes by the Union and the States and the distribution of taxes and duties amongst the constituents of the Union.

3. The challenge itself emanates from the petitioners having moved aircraft engines and aircraft parts [hereinafter for the sake of brevity to be referred to as **"the subject goods"**] for repair and service outside the territory of India and the levies which could be imposed at the time of their reimport. The petitioners would contend that since the export of the subject goods for repair outside India and their subsequent reimport would fall in the category of a "supply of service", no further impost as envisaged under Section 3(7) of the CTA would stand attracted. It is contended that once a transaction is conferred the character of a supply of service, it would be impermissible for the respondents to bring those transactions to tax by treating them as an import of goods and articles.

4. Undisputedly, the CTA is not concerned with the import or export of services. That statutory instrument stands confined to articles and goods only. A supply of service is a concept which came to be introduced by the CGST and IGST enactments and which owes its genesis to the Constitution Amending Act. It is thus contended that the integrated tax which is spoken of in the CTA can only be construed to be a reference to the tax imposed by the IGST and Section 3(7) being merely a collection mechanism placed at the point of reimport.

5. The respondents, on the other hand, would argue that Section 3(7) of the CTA is an independent charging provision levying an additional duty of customs. According to them, that levy does not stand effaced consequent to the promulgation of IGST. They would commend for our acceptance the principles underlying the "aspect

theory" of taxation which envisages a tax being validly imposed upon two aspects forming part of the same transaction. It was thus argued that notwithstanding the levy of a tax under the principal provision of Section 5(1) of the IGST, the petitioner does not stand absolved of the liabilities created by Section 3(7) of the CTA.

FACTUAL NARRATIVE

6. For the purposes of appreciating the rival contentions which were addressed, we propose to take note of the following principal facts. As we gather from the disclosures made in the writ petitions, the petitioner is principally engaged in the activity of transportation of passengers and goods by air from various places in and outside India. During the course of its business, the petitioner sends the subject goods to **Maintenance, Repair and Overhaul Service**[6] providers. These MROs' are located outside India and the goods so consigned to them post repair and overhaul are reimported. According to the writ petitioners at the time of physical reimport of the subject goods, while a **Basic Customs Duty**[7] would be attracted, the same is exempt by virtue of Notification No. 50/2017 dated 30 June 2017.

7. The writ petitioners assert that the reimport is liable to be treated as a transaction of supply of service or import of service in terms of Section 5(1) of the IGST read along with Entry 3 comprised in Schedule II of the CGST. The IGST component of tax is duly discharged by the writ petitioners. The respondents, however, assert that IGST is payable at the time of import of the subject goods since they are after all goods which are being reimported into the territory of India. According to them, it is at this stage that Section 3(7) of the CTA

[6] MROs''
[7] BCD

gets attracted along with the Proviso to Section 5(1) of the IGST.

8. It is the case of the writ petitioner that it had been claiming exemption from IGST by paying tax at a lower rate by virtue of Notification No. 45/2017 which obligates them to pay only so much of the duty of customs which would be leviable treating the value of the reimported goods after repair as made up of its repair value. The position and stand taken by the writ petitioners came to be accepted by the **Customs, Excise and Service Tax Appellate Tribunal**[8] by virtue of its final orders dated 02 November 2020 and 15 January 2021. The CESTAT had held that the phrase 'duty of customs' as appearing in Notification No. 45/2017 would only mean BCD and not include IGST and compensatory cess. Those final orders of the CESTAT presently form the subject matter of challenge before the Supreme Court in Civil Appeal No. 1853-2198 of 2021 and 5160-5574 of 2021. However, it is pertinent to note that no interim orders operate on those civil appeals. Notification 45/2017 came to be amended on 19 July 2021 by Notification No. 36/2021 in terms of which the phrase 'duty of customs' came to be substituted with the phrase 'said duty, tax or cess'. The issuance of that notification also saw the insertion of an explanation, which essentially held that IGST would be leviable on goods reimported post repairs. This was followed by Circular No. 16/2021 dated 19 July 2021. The aforenoted Circular specifically alludes to the orders of the CESTAT noted above and declares that the amendments were prompted by the felt need for all doubts being allayed and laid to rest insofar as an IGST liability on reimported goods was concerned. The said Circular thus refers to the aforesaid amendments as being clarificatory in nature.

[8] CESTAT

9. As a result of the above, while the petitioners continue to remain exempt from the payment of BCD in terms of Notification No. 50/2017, they now face an additional level of IGST in light of the amendments which have come to be introduced by virtue of Notification 36/2021 read along with Section 3(7) of the CTA.

10. We have had the benefit of hearing elaborate and erudite submissions which were advanced by Mr. Lakshmikumaran, learned counsel who appeared for the writ petitioners and Mr. Ojha, who represented the respondents. However, before we proceed to notice the contentions that were advanced, it would be apposite to take note of the statutory scheme as well as the principal provisions made in the subject notifications which would enable us to appreciate and evaluate the questions which stand posited for our consideration.

CONSTITUTIONAL AMENDMENT: LEGISLATIVE OBJECTIVES

11. Our discussion would necessarily have to be prefaced by taking note of the seminal amendments which came to be introduced by the Constitution Amendment Act. The Constitution Amendment Act came to be passed on 08 September 2016. For the purposes of appreciating the broad objectives underlying the various amendments introduced by virtue of that enactment, it would be pertinent to refer to its Statement of Objects and Reasons as well as the salient parts of the Bill as introduced and which are reproduced hereinbelow: -

> " **Constitution (One Hundred and First Amendment) Act, 2016**
>
> *[September 8, 2016]*
>
> *An Act further to amend the Constitution of India*
>
> Be it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

Statement of Objects and Reasons.— The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.

2. The proposed Bill, which seeks further to amend the Constitution, 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*) levy of an additional tax on supply of goods, not exceeding one per cent in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;

(*f*) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(*g*) 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;

(*h*) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;

(*i*) 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 in accordance with the following principles:—

(A) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(B) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast in that meeting.

Illustration

In terms of clause (9) of the proposed Article 279-A, the "weighted votes of the members present and voting" in favour of a proposal in the Goods and Services Tax Council shall be determined as under:—

WT = WC+WS

Where,

$$WT = WC+WS = \frac{WST}{SP} \times SF$$

Wherein—

WT = Total weighted votes of all members in favour of a proposal.

WC = Weighted vote of the Union = ⅓ i.e., 33.33% if the Union is in favour of the proposal and be taken as "0" if, Union is not in favour of a proposal.

WS = Weighted votes of the States in favour of a proposal.

SP = Number of States present and voting.

WST = Weighted votes of all States present and voting i.e. ⅔, i.e., 66.67%

SF = Number of States voting in favour of a proposal.

(*j*) Clause 20 of the proposed Bill makes transitional provisions to take care of any inconsistency which may arise with respect to any law relating to tax on goods or services or on both in force in any State on the commencement of the provisions of the Constitution as amended by this Act within a period of one year.

3. The Bill seeks to achieve the above objects.

1. Short title and commencement.— (1) This Act may be called the **Constitution (One Hundred and First Amendment) Act, 2016**.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

2. Insertion of new Article 246-A.— After Article 246 of the Constitution, the following article shall be inserted, namely:—

"246-A. *Special provision with respect to goods and services tax*.— (1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.— The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of Article 279-A, take effect from the date recommended by the Goods and Services Tax Council.".

3. Amendment of Article 248.— In Article 248 of the Constitution, in clause (1), for the word "Parliament", the words, figures and letter "Subject to Article 246-A, Parliament" shall be *substituted*.

4. Amendment of Article 249.— In Article 249 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under Article 246-A or" shall be *inserted*.

5. Amendment of Article 250.— In Article 250 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under Article 246-A or" shall be *inserted*.

6. Amendment of Article 268.— In Article 268 of the Constitution, in clause (1), the words "and such duties of excise on medicinal and toilet preparations" shall be *omitted*.

7. Omission of Article 268-A.— Article 268-A of the Constitution, as *inserted* by Section 2 of the Constitution (Eighty-eighth Amendment) Act, 2003 shall be *omitted*.

8. Amendment of Article 269.— In Article 269 of the Constitution, in clause (1), after the words "consignment of goods", the words, figures and letter "except as provided in Article 269-A" shall be *inserted*.

9. Insertion of new Article 269-A.— After Article 269 of the Constitution, the following article shall be *inserted*, namely:—

"269-A. *Levy and collection of goods and services tax in course of inter-State trade or commerce*.— (1) Goods and services tax on supplies in the course of inter-State trade or commerce 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 recommendations of the Goods and Services Tax Council.

Explanation.— For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246-A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under Article 246-A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.".

10. Amendment of Article 270.— In Article 270 of the Constitution,—

(*i*) in clause (1), for the words, figures and letter "Articles 268, 268-A and 269", the words, figures and letter "Articles 268, 269 and 269-A" shall be *substituted*;

(*ii*) after clause (1), the following clauses shall be *inserted*, namely:—

"(1-A) The tax collected by the Union under clause (1) of Article 246-A shall also be distributed between the Union and the States in the manner provided in clause (2).

(1-B) The tax levied and collected by the Union under clause (2) of Article 246-A and Article 269-A, which has been used for payment of the tax levied by the Union under clause (1) of Article 246-A, and the amount apportioned to the Union under clause (1) of Article 269-A, shall also be distributed between the Union and the States in the manner provided in clause (2).".

11. Amendment of Article 271.— In Article 271 of the Constitution, after the words "in those articles", the words, figures and letter "except the goods and services tax under Article 246-A," shall be *inserted*.

12. Insertion of new Article 279-A.— After Article 279 of the Constitution, the following article shall be *inserted*, namely:—

"279-A. *Goods and Services Tax Council*.— (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:—

(*a*)	the Union Finance Minister	…	Chairperson;
(*b*)	the Union Minister of State in charge of Revenue or Finance	…	Member;
(*c*)	the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government	…	Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (*c*) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(*a*) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(*b*) the goods and services that may be subjected to, or exempted from the goods and services tax;

(*c*) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under Article 269-A and the principles that govern the place of supply;

(*d*) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(*e*) the rates including floor rates with bands of goods and services tax;

(*f*) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(*g*) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(*h*) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—

(*a*) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(*b*) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(*a*) any vacancy in, or any defect in, the constitution of the Council; or

(*b*) any defect in the appointment of a person as a Member of the Council; or

(*c*) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute —

(*a*) between the Government of India and one or more States; or

(*b*) between the Government of India and any State or States on one side and one or more other States on the other side; or

(*c*) between two or more States, arising out of the recommendations of the Council or implementation thereof.".

13. Amendment of Article 286.— In Article 286 of the Constitution,—

(*i*) in clause (1),—

(A) for the words "the sale or purchase of goods where such sale or purchase takes place", the words "the supply of goods or of services or both, where such supply takes place" shall be *substituted*;

(B) in sub-clause (*b*), for the word "goods", at both the places where it occurs, the words "goods or services or both" shall be *substituted*;

(*ii*) in clause (2), for the words "sale or purchase of goods takes place", the words "supply of goods or of services or both" shall be *substituted*;

(*iii*) clause (3) shall be *omitted*.

14. Amendment of Article 366.— In Article 366 of the Constitution,—

(*i*) after clause (12), the following clause shall be *inserted*, namely:—

'(12-A) "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;';

(*ii*) after clause (26), the following clauses shall be *inserted*, namely:—

'(26-A) "Services" means anything other than goods;

(26-B) "State" with reference to Articles 246-A, 268, 269, 269-A and Article 279-A includes a Union territory with Legislature;'.

15. Amendment of Article 368.— In Article 368 of the Constitution, in clause (2), in the proviso, in clause (*a*), for the words and figures "Article 162 or Article 241", the words, figures and letter "Article 162, Article 241 or Article 279-A" shall be *substituted*.

16. Amendment of Sixth Schedule.— In the Sixth Schedule to the Constitution, in Paragraph 8, in sub-paragraph (3),—

(*i*) in clause (*c*), the word "and" occurring at the end shall be *omitted*;

(*ii*) in clause (*d*), the word "and" shall be *inserted* at the end;

(*iii*) after clause (*d*), the following clause shall be *inserted*, namely:—

"(*e*) taxes on entertainment and amusements.".

17. Amendment of Seventh Schedule.— In the Seventh Schedule to the Constitution,—

(*a*) in List I — Union List,—

(*i*) for Entry 84, the following entry shall be *substituted*, namely:—

"84. Duties of excise on the following goods manufactured or produced in India, namely:—

(*a*) petroleum crude;

(*b*) high speed diesel;

(*c*) motor spirit (commonly known as petrol);

(*d*) natural gas;

(*e*) aviation turbine fuel; and

(*f*) tobacco and tobacco products.";

(*ii*) Entries 92 and 92-C shall be *omitted*;

(*b*) in List II — State List,—

(*i*) Entry 52 shall be *omitted*;

(*ii*) for Entry 54, the following entry shall be *substituted*, namely:—

"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.";

(*iii*) Entry 55 shall be *omitted*;

(*iv*) for Entry 62, the following entry shall be *substituted*, namely:—

"62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.".

18. Compensation to States for loss of revenue on account of introduction of goods and services tax.— Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for 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.

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.

20. Power of President to remove difficulties.— (1) If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act (including any difficulty in relation to the transition from the provisions of the Constitution as they stood immediately before the date of assent of the President to this Act to the provisions of the Constitution as amended by this Act), the President may, by order, make such provisions, including any adaptation or modification of any provision of the Constitution as amended by this Act or law, as appear to the President to be necessary or expedient for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiry of three years from the date of such assent.

(2) Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

———

[1.] Received the assent of the President on September 8, 2016 and published in the Gazette of India, Extra., Part II, Section 1, dated 8th September, 2016, pp. 1-6, No. 55 "

12. Article 246 of the Constitution postulates that Parliament would have exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule. A similar reservation is

made with respect to the power of the Legislature of States in terms of Article 246(3) thus conferring exclusive power upon the States to legislate on matters enumerated in List II in the Seventh Schedule. Article 246(2) is the repository of the concurrent power that the Constitution vests in Parliament and Legislatures of States over subjects enumerated in List III which is commonly termed as the concurrent list.

13. The Constitution Amending Act sought to introduce the concept of a concurrent taxing power vesting in the Union as well as States thus enabling them to levy a goods and services tax on every transaction concerned with a supply of goods or services or both. The principal objective was declared by Parliament to be the need for the replacement of the innumerable indirect taxes which were at that time being levied by the Union and State Governments and thus the imperative to overcome the "cascading effect of taxes" and the creation of a common "national market" for goods and services. It was with the aforesaid objective that the Constitution Amending Act sought to introduce amendments in the Constitution which were intended to ultimately lead to the levy of an integrated goods and services tax on all inter-state transactions and such a tax subsuming various Union taxes and levies as well as those being imposed by individual States.

14. It was with that avowed objective that Article 246A came to be introduced in the Constitution. That Article reads as follows: -

> "[**246-A. Special provision with respect to goods and services tax**.—(1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
>
> Explanation.—The provisions of this article, shall, in respect of

goods and services tax referred to in clause (5) of Article 279-A, take effect from the date recommended by the Goods and Services Tax Council.] "

15. On a plain reading of that provision, it becomes apparent that both Parliament and the Legislature of a State came to be conferred with the power to make laws for the imposition of a goods and services tax, notwithstanding the inhibitions comprised in Articles 246 and 254 of the Constitution. However, and by virtue of Article 246A(2), Parliament came to be vested with the exclusive power to make laws with respect to the levy of a goods and services tax, where the supply of goods or services or both were to take place in the course of inter-state trade or commerce.

16. Yet another significant provision that came to be included in the Constitution was Article 269A and which reads thus:

"[**269-A. Levy and collection of goods and services tax in course of inter-State trade or commerce**.—(1) Goods and services tax on supplies in the course of inter-State trade or commerce 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 recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246-A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under Article 246-A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or

both takes place in the course of inter-State trade or commerce.] ”

17. As per the aforesaid constitutional provision, a goods and services tax on supplies in the course of inter-state trade or commerce would be levied and collected by the Union Government and such tax thereafter to be apportioned between the Union and the States in accordance with a legislation to be framed and on the recommendation of the Goods and Services Tax Council. Of significance is the Explanation occurring at the end of Article 269A(1) and which declares that the supply of goods or services or both in the course of import into the territory of India shall be deemed to be a supply in the course of inter-state trade or commerce. Article 269 A thus left it to Parliament to formulate principles not only for the determination of the place of supply but also to prescribe instances which would be deemed to be a supply in the course of inter-state trade or commerce.

18. The GST Council, which was spoken of in Article 269A, was given shape by Article 279A. The said Article reads as follows: -

> “ [**279-A. Goods and Services Tax Council.—(**1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.
>
> (2) The Goods and Services Tax Council shall consist of the following members, namely:—
>
> | | | |
> |---|---|---|
> | (*a*) the Union Finance Minister | … | Chairperson; |
> | (*b*) the Union Minister of State in charge of Revenue or Finance | … | Member; |
> | (*c*) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government | … | Members. |
>
> (3) The Members of the Goods and Services Tax Council referred to in sub-clause (*c*) of clause (2) shall, as soon as may be,

choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(*a*) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(*b*) the goods and services that may be subjected to, or exempted from the goods and services tax;

(*c*) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under Article 269-A and the principles that govern the place of supply;

(*d*) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(*e*) the rates including floor rates with bands of goods and services tax;

(*f*) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(*g*) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(*h*) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of

the weighted votes of the members present and voting, in accordance with the following principles, namely:—

(*a*) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(*b*) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(*a*) any vacancy in, or any defect in, the constitution of the Council; or

(*b*) any defect in the appointment of a person as a Member of the Council; or

(*c*) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute —

(*a*) between the Government of India and one or more States; or

(*b*) between the Government of India and any State or States on one side and one or more other States on the other side; or

(*c*) between two or more States, arising out of the recommendations of the Council or implementation thereof.] ”

19. Corresponding amendments were also introduced in Article 366. For our purposes, it would be apposite to extract sub-articles 12, 12A, 26A, and 26B of Article 366 hereunder: -

“**366. Definitions.—**In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

…….

(12) “goods” includes all materials, commodities and articles;

[(12-A) “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;]

xxx xxx xxx

(26) “securities” includes stock;

[(26-A) "Services" means anything other than goods;

(26-B) "State" with reference to Articles 246-A, 268, 269, 269-A and Article 279-A includes a Union territory with Legislature;]"

20. As per Article 366(12A), a goods and services tax was defined to mean any tax on the supply of goods, services or both except for taxes on the supply of alcoholic liquor for human consumption. The expression 'goods' was defined in Article 366(12) to include all materials, commodities and articles. This, however, was a clause that existed even prior to the introduction of the Constitution Amendment Act. The expression 'service' was defined by Article 366(26A) to mean anything other than goods. Article 366(26B) clarified that the word 'State' appearing in Articles 246A, 268, 269, 269A and 279A would include a 'union territory'.

21. Of equal significance are the following amendments which came to be made in the three legislative lists placed in the Seventh Schedule:-

Entry	**Provision prior to amendment**	**Amended Entry**
Entry 84	Duties of excise on tobacco and other goods manufactured or produced in India except: (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 included in subparagraph (b) of this entry	Duties of excise on the following goods manufactured or produced in India, namely: (a) petroleum crude; (b) high speed diesel; (c) motor spirit (commonly known as petrol); (d) natural gas; (e) aviation turbine fuel; and (f) tobacco and tobacco products."
Entry 92	Taxes on sale or purchase of newspaper and advertisements published therein	Omitted
Entry 92 C	Taxes on services	Omitted

Entry 92A	Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.	No Change
Entry 92B	Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.	No Change
Entry 52	Taxes on the entry of goods into a local area for consumption, use or sale therein. (Octroi / Entry Tax)	Omitted
Entry 55	Taxes on advertisements other than advertisements published in the newspapers [and advertisements broadcast by radio or television].	Omitted
Entry 54	Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.	Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods
Entry 62	Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.	Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a

		District Council.

22. Apart from the notable amendments, Entry 84 of List I came to be amended to read as follows: -

> " **[84.** Duties of excise on the following goods manufactured or produced in India, namely:—
>
> (*a*) petroleum crude;
>
> (*b*) high speed diesel;
>
> (*c*) motor spirit (commonly known as petrol);
>
> (*d*) natural gas;
>
> (*e*) aviation turbine fuel; and
>
> (*f*) tobacco and tobacco products.]"

23. Entries 92 and 92C which dealt with the subject of taxes on sale or purchase of newspapers and services, came to be omitted. The amendments so ushered in also saw the insertion of Entry 92A in List I which defined the legislative field to be with respect to the levy of taxes on the sale or purchase of goods, other than newspapers and where such sale or purchase were taking place in the course of interstate trade or commerce. Entry 92B which was concerned with taxes on consignment of goods remained untouched. Of equal import was the omission of Entries 52 and 55 in List II which pertained to the levy of a tax on the entry of goods into a local area for consumption, use or sale as well as on advertisements other than those published in newspapers.

24. Originally, Parliament stood conferred a residuary and exclusive power to make laws with respect to any matter not enumerated in the State or the Concurrent Lists. By virtue of the Constitution Amendment Act, that power was made subject to Article 246A. Thus, the broad residuary power which otherwise stood conferred was restricted so as to

not affect or impact the authority of States to levy a goods and services tax under Article 246A. Similarly, Article 268A had conferred authority upon the Union to levy a tax on services. However, since the Constitution Amending Act was principally concerned with overcoming the multitude of taxes which were at that time being levied to be substituted by a goods and services tax, the said Article came to be omitted.

25. Following that broad pattern, Article 269 which envisaged that a tax on the sale or purchase of goods as well as on consignment would be levied and collected by the Union and thereafter assigned to States, the same came to be amended to specifically exclude taxes as provided in Article 269A and thus removed the levy of a goods and services tax in the course of inter-state trade or commerce from its sweep. Similar amendments came to be introduced in Article 270 so as to ensure that its provisions coalesced with the new regime of distribution of taxes collected under Article 246A amongst the Union and the States. We deem it apposite to reproduce some of the Article noticed above hereinbelow:

Sl No.	**Article**	**Provision it stood prior to 101st Constitutional Amendment**	**Amendment**
1.	248	Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.	The Power of the Parliament has been made subject to Article 246A. In other words, residuary power of the Parliament will not affect the State's power to levy Goods and Service Tax under Article 246A.
2.	249	If Rajya Sabha has	The resolution of

		declared by resolution in national interest that Parliament should make laws with respect to any matter enumerated in the State List, Parliament can make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.	Rajya Sabha can mandate the Parliament to make laws with respect to GST as provided in Article 246A also and not just restrict the same to matters specified in State List.
3.	250	Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws with respect to any of the matters enumerated in the State List	This Power of the Parliament has been extended to Goods and Service Tax under Article 246A
4.	268	Stamp duties and excise duty on medicinal and toilet preparations shall be levied by the Government of India but shall be collected by states where such duties are levied within a state	Duties of excise on medicinal and toilet preparations has been deleted from this Article as GST subsumes the same
5.	268A	Taxes on services shall be levied by the Government of India	Service tax subsumed under GST and so Article 268A Omitted
6.	269	Taxes on the sale or purchase of goods / consignment of goods in the course of inter-state trade shall be levied and collected by Central Government but shall be assigned to the States.	This Article has been amended to exclude Goods on which is GST will be levied under Article 269A in the course of inter-state trade or commerce. Thus this Article will be effective for goods kept out of GST viz. crude, Petrol, HSD, ATF

			etc.
7.	270	Article 270 provides that a portion of all taxes and surcharges on such taxes that are levied and collected by the Central Government shall be distributed to the states in the manner that is prescribed.	This article has been amended to provide that the taxes collected by the Central Government under Article 246A(1) [CGST] shall also be distributed between the states in the manner prescribed. Further, the taxes collected IGST which has been used in payment of CGST and the amount apportioned to central government in IGST shall also be distributed to the states.
8.	271	Parliament has been provided with the power to levy surcharge on any of taxes and duties levied by it.	The power to levy a surcharge has not been extended to GST levied under Article 246A.
9.	368	Any amendment to the Constitution that seeks to make any changes that will affect the rights of states as enumerated in *Proviso* to Article 368(2) shall require ratification of state assemblies of not less that 50% of the states.	Article 279-A has been inserted in the *proviso.* Thus, any change that is sought to be made in relation to GST Council will require the ratification of not less than 50% of the states.

CGST, IGST, CUSTOMS ACT, AND CTA: AN OVERVIEW

26. We then proceed to examine and take note of the following salient provisions comprised in the CGST and the IGST statutes. The

CGST, as its Preamble proclaims, is an enactment promulgated to make appropriate provisions for the levy and collection of taxes on intrastate supply of goods, services or both and for matters connected therewith or incidental thereto. Section 2, which constitutes the definition clause, incorporates the following significant provisions: -

> " **2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> (17) "business" includes—
>
> (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
>
> (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
>
> (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
>
> (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
>
> (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;
>
> (f) admission, for a consideration, of persons to any premises;
>
> (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
>
> xxx xxx xxx
>
> (21) "central tax" means the central goods and services tax levied under Section 9;
>
> xxx xxx xxx
>
> (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;
>
> *Illustration.—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;*
>
> xxx xxx xxx

(32) "continuous supply of goods" means a supply of goods which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, whether or not by means of a wire, cable, pipeline or other conduit, and for which the supplier invoices the recipient on a regular or periodic basis and includes supply of such goods as the Government may, subject to such conditions, as it may, by notification, specify;

(33) "continuous supply of services" means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;

xxx xxx xxx

(36) "Council" means the Goods and Services Tax Council established under Article 279-A of the Constitution;

xxx xxx xxx

(47) "exempt supply" means supply of any goods or services or both which attracts *nil* rate of tax or which may be wholly exempt from tax under Section 11, or under Section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;

xxx xxx xxx

(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

xxx xxx xxx

(57) "Integrated Goods and Services Tax Act" means the Integrated Goods and Services Tax Act, 2017;

(58) "integrated tax" means the integrated goods and services tax levied under the Integrated Goods and Services Tax Act;

xxx xxx xxx

(64) "intra-State supply of goods" shall have the same meaning as assigned to it in Section 8 of the Integrated Goods and Services Tax Act;

(65) "intra-State supply of services" shall have the same meaning as assigned to it in Section 8 of the Integrated Goods and Services Tax Act;

xxx xxx xxx

(70) "location of the recipient of services" means,—

(*a*) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(*b*) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(*c*) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(*d*) in absence of such places, the location of the usual place of residence of the recipient;

(71) "location of the supplier of services" means,—

(*a*) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;

(*b*) where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(*c*) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provisions of the supply; and

(*d*) in absence of such places, the location of the usual place of residence of the supplier;

xxx xxx xxx

(74) "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

Illustration.—A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;

xxx xxx xxx

(78) "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

xxx xxx xxx

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

[*Explanation.*—For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging

transactions in securities;

xxx xxx xxx

(104) "State tax" means the tax levied under any State Goods and Services Tax Act;

xxx xxx xxx

(111) "the State Goods and Services Tax Act" means the respective State Goods and Services Tax Act, 2017; "

27. Chapter III of the CGST deals with the levy and collection of taxes and incorporates the following provisions:-

" Chapter III

LEVY AND COLLECTION OF TAX

7.Scope of Supply.—(1) For the purposes of this Act, the expression "supply" includes—

(*a*) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

[(*aa*) the activities or transactions, by a person, other than an individual, to its members or constituents or *vice-versa*, for cash, deferred payment or other valuable consideration.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions *inter se* shall be deemed to take place from one such person to another;]

(*b*) import of services for a consideration whether or not in the course or furtherance of business; [and]

(*c*) the activities specified in Schedule I, made or agreed to be made without a consideration; [* * *]

[* * *]

[(1-A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) Notwithstanding anything contained in sub-section (1),—

(*a*) activities or transactions specified in Schedule III; or

(*b*) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of [sub-sections (1), (1-A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(*a*) a supply of goods and not as a supply of services; or

(*b*) a supply of services and not as a supply of goods.

8. Tax liability on 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.

9. Levy and collection.—(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption [and un-denatured extra neutral alcohol or rectified spirit used for manufacture of alcoholic liquor, for human consumption], on the value determined under Section 15 and at such rates, not exceeding twenty 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.

(2) The central tax 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.

(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 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.

[(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of 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 such supply of goods or services or both.]

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax."

28. Of significance are Schedules I, II and III of the CGST which broadly classify activities that would constitute a supply of goods or a supply of services as well as composite supply and thereafter enumerate activities that would be liable to be treated as either a supply of goods or a supply of services. Schedules I, II and III are extracted hereinbelow:-

"**SCHEDULE 1**

[*See* Section 7]

Activities to be treated as supply even if made without consideration

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2. Supply of goods or services or both between related persons or between distinct persons as specified in Section 25, when made in the course or furtherance of business:

Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

3. Supply of goods—

(*a*) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or

(*b*) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

4. Import of services by a [person] from a related person or from any of his other establishments outside India, in the course or furtherance of business.

SCHEDULE II

[*See* Section 7]

Activities [or Transactions] to be treated as supply of goods or supply of services

1. Transfer

(*a*) any transfer of the title in goods is a supply of goods;

(*b*) any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;

(*c*) any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods.

2. Land and Building

(*a*) any lease, tenancy, easement, licence to occupy land is a supply of services;

(*b*) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

3. Treatment or process

Any treatment or process which is applied to another person's goods is a supply of services.

4. Transfer of business assets

(*a*) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, [* * *] such transfer or disposal is a supply of goods by the person;

(*b*) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the

business, [* * *] the usage or making available of such goods is a supply of services;

(*c*) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—

(*i*) the business is transferred as a going concern to another person; or

(*ii*) the business is carried on by a personal representative who is deemed to be a taxable person.

5. Supply of services

The following shall be treated as supply of services, namely:—

(*a*) renting of immovable property;

(*b*) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(*i*) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(*ii*) a chartered engineer registered with the Institution of Engineers (India); or

(*iii*) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(*c*) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(*d*) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(*e*) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(*f*) transfer of the right to use any goods for any purpose

(whether or not for a specified period) for cash, deferred payment or other valuable consideration.

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(*a*) works contract as defined in clause (119) of Section 2; and

(*b*) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

7. [* * *]

SCHEDULE III

[*See* Section 7]

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

1. Services by an employee to the employer in the course of or in relation to his employment.

2. Services by any court or Tribunal established under any law for the time being in force.

3. (*a*) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities;

(*b*) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(*c*) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or a State Government or local authority and who is not deemed as an employee before the commencement of this clause.

4. Services of funeral, burial, crematorium or mortuary including transportation of the deceased.

5. Sale of land and, subject to clause (*b*) of paragraph 5 of Schedule II, sale of building.

6. Actionable claims, other than [specified actionable claims].

[**7.** Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.

8. (*a*) Supply of warehoused goods to any person before clearance for home consumption;

(*b*) Supply of goods by the consignee to any other person, by

endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.]

[**9.** Activity of apportionment of co-insurance premium by the lead insurer to the co-insurer for the insurance services jointly supplied by the lead insurer and the co-insurer to the insured in co-insurance agreements, subject to the condition that the lead insurer pays the central tax, the State tax, the Union territory tax and the integrated tax on the entire amount of premium paid by the insured.

10. Services by insurer to the reinsurer for which ceding commission or the reinsurance commission is deducted from reinsurance premium paid by the insurer to the reinsurer, subject to the condition that the central tax, the State tax, the Union territory tax and the integrated tax is paid by the reinsurer on the gross reinsurance premium payable by the insurer to the reinsurer, inclusive of the said ceding commission or the reinsurance commission.]

Explanation [1].—For the purposes of paragraph 2, the term "court" includes District Court, High Court and Supreme Court.

[*Explanation 2*.—For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962.] "

29. The IGST, on the other hand, is a statute that deals with the levy and collection of taxes on the inter-state supply of goods, services or both. Section 2 defines the following pertinent words and expressions appearing in different parts of that statute in the following manner: -

"2. Definitions.—In this Act, unless the context otherwise requires,—

(1) "Central Goods and Services Tax Act" means the Central Goods and Services Tax Act, 2017;

(2) "central tax" means the tax levied and collected under the Central Goods and Services Tax Act;"

xxx xxx xxx

(4) "customs frontiers of India" means the limits of a customs area as defined in Section 2 of the Customs Act, 1962 (52 of 1962);

(5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;

(6) "export of services" means the supply of any service when,—

(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;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange 3[or in Indian rupees wherever permitted by the Reserve Bank of India]; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in Section 8;

xxx xxx xxx

(10) "import of goods" with its grammatical variations and cognate expressions, means bringing goods into India from a place outside India;

(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;

(12) "integrated tax" means the integrated goods and services tax levied under this Act;

xxx xxx xxx

(14) "location of the recipient of services" means,—

(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(d) in absence of such places, the location of the usual place of residence of the recipient;

(15) "location of the supplier of services" means,—

(a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply; and

(d) in absence of such places, the location of the usual place of residence of the supplier;

xxx xxx xxx

(21) "supply" shall have the same meaning as assigned to it in Section 7 of the Central Goods and Services Tax Act;

(22) "taxable territory" means the territory to which the provisions of this Act apply;"

30. The tax envisaged under the IGST is levied in terms of Section 5 and reads thus:-

"**Chapter III**

LEVY AND COLLECTION OF TAX

5. Levy and collection.—(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 7[and undenatured extra neutral alcohol or rectified spirit used for manufacture 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 8[other than the goods as may be notified by the Government on the recommendations of the Council] imported into India shall be levied and collected in accordance with the provisions of Section 3 of the CTA, 1975 (51 of 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 (52 of 1962).

(2) The integrated tax 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.

(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 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.

[(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of 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 such supply of goods or services or both.]

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax."

31. The subject of inter-state supply is elaborated in Section 7 and which is framed in the following words:-

" **Chapter IV**

DETERMINATION OF NATURE OF SUPPLY

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. ”

32. Intra-state supply, on the other hand, is regulated by Section 8 in the following terms:-

“**8. Intra-State supply.—(**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.

Explanation 1.—For the purposes of this Act, where a person has,—

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or

(iii) an establishment in a State or Union territory and any other establishment 11[* * *] registered within that State or Union territory, then such establishments shall be treated as establishments of distinct persons.

Explanation 2.—A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory. ”

33. Sections 10 and 11 introduce provisions which enable one to ascertain the place of supply of goods when imported into or exported from India as well as otherwise. Those sections read as under:-

“ **Chapter V**

PLACE OF SUPPLY OF GOODS OR SERVICES OR BOTH

10. Place of supply of goods other than supply of goods imported into, or exported from India.—(1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,—

(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient;

(b) where the goods are delivered by the supplier to a recipient or any other person on the direction of a third person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to the goods or otherwise, it shall be deemed that the said third person has received the goods and the place of supply of such goods shall be the principal place of business of such person;

(c) where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient;

12[(ca) where the supply of goods is made to a person other than a registered person, the place of supply shall, notwithstanding

anything contrary contained in clause (a) or clause (c), be the location as per the address of the said person recorded in the invoice issued in respect of the said supply and the location of the supplier where the address of the said person is not recorded in the invoice.

Explanation.—For the purposes of this clause, recording of the name of the State of the said person in the invoice shall be deemed to be the recording of the address of the said person;]

(d) where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly;

(e) where the goods are supplied on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, the place of supply shall be the location at which such goods are taken on board.

(2) Where the place of supply of goods cannot be determined, the place of supply shall be determined in such manner as may be prescribed.

11. Place of supply of goods imported into, or exported from India.—

The place of supply of goods,—

(a) imported into India shall be the location of the importer;

(b) exported from India shall be the location outside India."

34. The determination of the place of supply of services where either the location of the supplier or the recipient of service is in India is governed by Section 12 and reads thus:-

"**12. Place of supply of services where location of supplier and recipient is in India.**—(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.

(2) The place of supply of services, except the services specified in sub-sections (3) to (14),—

(a) made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be,—

(i) the location of the recipient where the address on record exists; and

(ii) the location of the supplier of services in other cases.

(3) The place of supply of services,—

(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and

other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or

(b) by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or

(c) by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or

(d) any services ancillary to the services referred to in clauses (a), (b) and (c), shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:

Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.

Explanation.—Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(4) The place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed.

(5) The place of supply of services in relation to training and performance appraisal to,—

(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the location where the services are actually performed.

(6) The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located.

(7) The place of supply of services provided by way of,—

(a) organisation of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or

(b) services ancillary to organisation of any of the events or

services referred to in clause (a), or assigning of sponsorship to such events,—

(i) to a registered person, shall be the location of such person;

(ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

Explanation.—Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of services by way of transportation of goods, including by mail or courier to,—

(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation:

13[* * *]]

(9) The place of supply of passenger transportation service to,—

(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the place where the passenger embarks on the conveyance for a continuous journey:

Provided that where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined in accordance with the provisions of sub-section (2).

Explanation.—For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.

(10) The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the first scheduled point of departure of that conveyance for the journey.

(11) The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall,—

(*a*) in case of services by way of fixed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services;

(*b*) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on the record of the supplier of services;

(*c*) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis through a voucher or any other means,—

(*i*) through a selling agent or a re-seller or a distributor of subscriber identity module card or re-charge voucher, be the address of the selling agent or re-seller or distributor as per the record of the supplier at the time of supply; or

(*ii*) by any person to the final subscriber, be the location where such prepayment is received or such vouchers are sold;

(*d*) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that if such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

Explanation.—Where the leased circuit is installed in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(12) The place of supply of banking and other financial services, including stock broking services to any person shall be the location of the recipient of services on the records of the supplier of services:

Provided that if the location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.

(13) The place of supply of insurance services shall,—

(*a*) to a registered person, be the location of such person;

(*b*) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services.

(14) The place of supply of advertisement services to the Central

Government, a State Government, a statutory body or a local authority meant for the States or Union territories identified in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed."

35. Similar corresponding provisions are made to deal with situations where the supplier of service or recipient thereof is seated outside India. This becomes evident from a reading of Section 13 which is extracted hereinbelow: -

"**13. Place of supply of services where location of supplier or location of recipient is outside India.—(**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.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

[Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or

process;]

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation.—For the purposes of this sub-section, the expression,—

(a) “account” means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident

ordinary account;

(b) "banking company" shall have the same meaning as assigned to it under clause (a) of Section 45-A of the Reserve Bank of India Act, 1934 (2 of 1934);

(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(d) "non-banking financial company" means,—

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(9) [* * *]

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:—

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service."

36. Section 20 reads as follows: -

"**CHAPTER IX**

MISCELLANEOUS

20. Application of provisions of Central Goods and Services Tax Act.—Subject to the provisions of this Act and the rules made thereunder, the provisions of Central Goods and Services Tax Act relating to,—

(*i*) scope of supply;

(*ii*) composite supply and mixed supply;

(*iii*) time and value of supply;

(*iv*) input tax credit;

(*v*) registration;

(*vi*) tax invoice, credit and debit notes;

(*vii*) accounts and records;

(*viii*) returns, other than late fee;

(*ix*) payment of tax;

(*x*) tax deduction at source;

(*xi*) collection of tax at source;

(*xii*) assessment;

(*xiii*) refunds;

(*xiv*) audit;

(*xv*) inspection, search, seizure and arrest;

(*xvi*) demands and recovery;

(*xvii*) liability to pay in certain cases;

(*xviii*) advance ruling;

(*xix*) appeals and revision;

(*xx*) presumption as to documents;

(*xxi*) offences and penalties;

(*xxii*) job work;

(*xxiii*) electronic commerce;

(*xxiv*) transitional provisions; and

(*xxv*) miscellaneous provisions including the provisions relating to the imposition of interest and penalty,

shall, *mutatis mutandis*, apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under this Act:

Provided that in the case of tax deducted at source, the deductor shall deduct tax at the rate of two per cent. from the payment made or credited to the supplier:

Provided further that in the case of tax collected at source, the operator shall collect tax at such rate not exceeding two per cent, as may be notified on the recommendations of the Council, of the net value of taxable supplies:

Provided also that for the purposes of this Act, the value of a supply shall include any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier:

Provided also that in cases where the penalty is leviable under the Central Goods and Services Tax Act and the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, the penalty leviable under this Act shall be the sum total of the said penalties:

[Provided also that a maximum amount of forty crore rupees shall be payable for each appeal to be filed before the Appellate Authority or the Appellate Tribunal.]"

37. This would constitute an appropriate juncture to now notice some of the salient provisions contained in the Customs Act and the CTA. The expressions 'customs area', 'dutiable goods', 'duty', 'export', 'export of goods', 'import' and 'imported goods' are defined by Section 2 in the following terms: -

" **2. Definitions**.—In this Act, unless the context otherwise requires,—

(11) "customs area" means the area of a customs station [or a warehouse] and includes any area in which imported goods or exported goods are ordinarily kept before clearance by Customs authorities;

xxx xxx xxx

(14) "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid;

(15) "duty" means a duty of customs leviable under this Act;

xxx xxx xxx

(18) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19) "export goods" means any goods which are to be taken out of India to a place outside India;

xxx xxx xxx

(23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

xxx xxx xxx

(25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;"

38. Section 12 of the Customs Act constitutes the charging section and reads thus:-

"**Chapter V**

LEVY OF, AND EXEMPTION FROM, CUSTOMS DUTIES

12. Dutiable goods.

1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the [CTA, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from India.

[(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.] "

39. Since the arguments addressed by respective sides pivoted and revolved majorly around Section 3 of the CTA, the same is reproduced hereunder in its entirety: -

" [**3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges**.

1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation.—In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of.—

(*i*) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(*ii*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include—

[(*a*) the duty referred to in sub-sections (1), (3), (5), (7) and (9)];

(*b*) the safeguard duty referred to in sections 8B and 8C;

(*c*) the countervailing duty referred to in section 9; and

(*d*) the anti-dumping duty referred to in section 9A:

[Provided that in case of an article imported into India,—

(*a*) in relation to which it is required, under the provisions of the [Legal Metrology Act, 2009 (1 of 2010)] or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and

(*b*) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is—

(*i*) the goods specified by notification in the Official Gazette under subsection (1) of section 4A of the Central Excise Act, 1944 (1 of 1944), the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of that Act; or

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Explanation—Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.]

[Provided further that in the case of an article imported into India, where the Central Government has fixed a tariff value for the like article produced or manufactured in India under sub-section (2) of section 3 of the Central Excise Act, 1944 (1 of 1944), the value of the imported article shall be deemed to be such tariff value.]

Explanation.—Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of

the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification.

Explanation.—In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.

(6) For the purpose of calculating under sub-section (5), the additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in sub-section (2), or section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of—

(*i*) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(*ii*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include—

[(*a*) the duty referred to in sub-sections (5), (7) and (9);]

(*b*) the safeguard duty referred to in sections 8B and 8C;

(*c*) the countervailing duty referred to in section 9; and

(*d*) the anti-dumping duty referred to in section 9A.

[(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].

(8) For the purposes of calculating the integrated tax under sub-section (7) on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of—

(*a*) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(*b*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section (9).

[(*8A*) Where the goods deposited in a warehouse under the provisions of the Customs Act, 1962 (52 of 1962) are sold to any person before clearance for home consumption or export under the said Act, the value of such goods for the purpose of calculating the integrated tax under sub-section (7) shall be,—

(*a*) where the whole of the goods are sold, the value determined under sub-section (8) or the transaction value of such goods, whichever is higher; or

(*b*) where any part of the goods is sold, the proportionate value of such goods as determined under sub-section (8) or the transaction value of such goods, whichever is higher:

Provided that where the whole of the warehoused goods or any part thereof are sold more than once before such clearance for home consumption or export, the transaction value of the last such transaction shall be the transaction value for the purposes of clause (*a*) or clause (*b*):

Provided further that in respect of warehoused goods which remain unsold, the value or the proportionate value, as the case may be, of such goods shall be determined in accordance with the provisions of sub-section (8).

Explanation.—For the purposes of this sub-section, the expression "transaction value", in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.]

(9) Any article which is imported into India shall, in addition, be liable to the goods and services tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax

(Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10) [or sub-section (*10A*), as the case may be].

(10) For the purposes of calculating the goods and services tax compensation cess under sub-section (9) on any imported article where such cess is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of—

(*a*) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(*b*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section (9).

[(*10A*) Where the goods deposited in a warehouse under the provisions of the Customs Act, 1962 (52 of 1962) are sold to any person before clearance for home consumption or export under the said Act, the value of such goods for the purpose of calculating the goods and services tax compensation cess under sub-section (9) shall be,—

(*a*) where the whole of the goods are sold, the value determined under sub-section (10) or the transaction value of such goods, whichever is higher; or

(*b*) where any part of the goods is sold, the proportionate value of such goods as determined under sub-section (10) or the transaction value of such goods, whichever is higher:

Provided that where the whole of the warehoused goods or any part thereof are sold more than once before such clearance for home consumption or export, the transaction value of the last of such transaction shall be the transaction value for the purposes of clause (*a*) or clause (*b*):

Provided further that in respect of warehoused goods which remain unsold, the value or the proportionate value, as the case may be, of such goods shall be determined in accordance with the provisions of sub-section (10).

Explanation—For the purposes of this sub-section, the expression "transaction value", in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.]

(11) The duty or tax or cess, as the case may be, chargeable under

this section shall be in addition to any other duty or tax or cess, as the case may be, imposed under this Act or under any other law for the time being in force.

[(12) The provisions of the Customs Act, 1962 (52 of 1962) and all rules and regulations made thereunder, including but not limited to those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, exemptions, interest, recovery, appeals, offences and penalties shall, as far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to duties leviable under that Act or all rules or regulations made thereunder, as the case may be.]"

SCHEME OF THE IMPUGNED NOTIFICATIONS

40. Having noticed the salient provisions of the Constitution as well as the CGST and IGST, we then proceed further to take note of the principal notifications pertinent to the question that stands raised. As noted hereinabove, the petitioner claims exemption from the payment of BCD by virtue of the provisions contained in Notification 50/2017. The exemptions with respect to aircrafts and parts thereof stand comprised in entries 279, 540, 543, 544 and 546 read along with notes 26 and 27. The relevant parts of the said General Exemption, as well as the Explanatory Notes are extracted hereinbelow:

"MINISTRY OF FINANCE

(Department of Revenue)

NOTIFICATION

Notification No. 50/2017-Customs

G.S.R. 785(E).— In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) and sub-Section (12) of Section 3, of CTA, 1975 (51 of 1975), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012-Customs, dated the [1][17th March, 2012] published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (i), vide number G.S.R. 185(E) dated the 17th March, 2017, except as respects things done or omitted to be done before such supersession, the Central

Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the said CTA, as are specified in the corresponding entry in column (2) of the said Table, when imported into India,—

(*a*) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table; and

(*b*) from so much of integrated tax leviable thereon under sub-Section (7) of Section 3 of said CTA, read with Section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of the said Table.

S. No.	**Chapter or Heading or sub-heading or tariff item**	**Description of goods**	**Standard rate**	**Integrated Goods and Services Tax**	**Condition No.**
(1)	(2)	(3)	(4)	(5)	(6)
		XXXX			
279.	40	New or retreaded Pneumatic tyres of rubber of a kind used in aircrafts of heading 8802	Nil	—	26
540.	8802 (except 8802 60 00)	All goods	Nil	—	79
		XXXX			
543.	8802 (except 8802 60 00)	All goods	2.5%	—	81
[544-A.	Any Chapter	Components or parts which are prescribed in any of the following manuals— i. Aircraft Maintenance Manual (AMM);	—	5%	—]

		ii. Component Maintenance Manual (CMM); iii. Illustrated Parts Catalogue (IPCL); iv. Structural Repair Manual (SRM); or v. Standard Procedure Manual (SPM) of the OEMs, when imported into India for servicing, repair, maintenance or overhauling, subject to fulfilling respective conditions, the condition number of which is mentioned in the corresponding entry in column (6) against the Serial Number 536, 538 or 544.			
		XXXX			
546.	Any Chapter	Parts (other than rubber tubes), of aircraft of heading 8802	Nil	—	27

Condition No.	**Condition**
26.	If,— (i) imported for servicing, repair or maintenance of aircraft, which is used for operating scheduled air transport service or the scheduled air cargo service, as the case may be; or (ii) the parts are brought into India for servicing, repair or maintenance of an aircraft mentioned in clause (ii) of [Condition No. 79] ***Explanation***.— The expressions "scheduled air transport service" and "scheduled air cargo service" shall have the meanings respectively assigned to them in Condition No.[79]
27.	If,— (i) imported for servicing, repair or maintenance of aircraft imported or procured by Aero Club of India; or (ii) imported for servicing, repair or maintenance of aircraft, which are used for flying training purposes or for operating non-scheduled (passenger) service or non-scheduled (charter) services;

	(iii) imported for servicing, repair or maintenance of aircraft imported or procured by the Airports Authority of India for flight calibration purposes (iv) the importer furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, at the time of importation that:— (a) the imported goods shall be used for the specified purpose only; and (b) he shall pay on demand, in the event of his failure to use the imported goods for the specified purpose, an amount equal to the duty payable on the said goods but for the exemption under this notification. ***Explanation***.— The expressions, "Aero Club of India", "operator", "non- scheduled (passenger) services" and "non-scheduled (charter) services" shall have the meanings respectively assigned to them in [167][Condition No. 80 or 81].

41. Reverting then to the IGST component, the petitioner treats the consignment of the subject goods to MROs' as amounting to a supply of services, by virtue of Schedule II, and more particularly Entry 3 thereof which speaks of any treatment or process which is applied to another person's goods as constituting a supply of services. This the petitioner seeks to co-relate with the principal part of Section 5(1) of the IGST which is concerned with a tax on the supply of services. Insofar as the liability flowing under Section 5(1) of IGST is concerned, according to the writ petitioner, the same is governed by Notification 45/2017. It is here that the respondents had provisioned for a levy of a duty of customs made up of the fair cost of repairs carried out in respect of goods exported for repairs abroad. Serial No. 2 of the General Exemptions which forms part of Notification 45/2017 is reproduced hereinbelow:

"**MINISTRY OF FINANCE**
(Department of Revenue)
NOTIFICATION
Notification No. 45/2017-Customs

G.S.R. 780(E).— In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within any Chapter of the First Schedule to the CTA, 1975 (51 of 1975) and specified in column (2) of the Table below when re-imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, and the 1[* * *] integrated tax, compensation cess leviable thereon respectively under sub-section (7) and (9) of Section 3 of the said CTA, as is in excess of the amount indicated in the corresponding entry in column (3) of the said Table.

SL No.	Description of goods	Conditions
2.	Goods, other than those falling under Sl. No. 1 exported for repairs abroad	Duty of customs which would be leviable if the value of re-imported goods after repairs were made up of the fair cost of repairs carried out including cost of materials used in repairs (whether such costs are actually incurred for not), insurance and freight charges, both ways.

It is on the basis of the provisions comprised in Notification No. 50/2017 and Notification 45/2017 that the petitioner was claiming exemption from the payment of BCD and confining the IGST liability to the fair cost of repairs actually incurred in the course of repair of aircrafts and aircraft parts.

42. Notification 45/2017 thereafter came to be amended by Notification No. 36/2021 dated 19 July 2021. It is this Notification that is primarily challenged in the writ petition. In view of the above, it would be apposite to extract that Notification in its entirety hereinbelow:

"[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification No. 36/2021-Customs

New Delhi, the 19th July, 2021

G.S.R.....(E)- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 45/2017- Customs, dated the 30th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 780(E), dated the 30th June, 2017, namely: -

In the said notification, -

(i) in the Table, against serial numbers 2 and 3, in column (3), for the words 'Duty of customs", the words "Said duty, tax or cess" shall be substituted;

(ii) in the Explanation, after clause (c), the following clause shall be inserted, namely: -

"(d) on recommendation of the GST Council, for removal of doubt, it is clarified that the goods mentioned at serial numbers 2 and 3 of the Table, are leviable to integrated tax and cess as leviable under the said CTA, besides the customs duty as specified in the said First Schedule, calculated on the value as specified in column (3), and the exemption, under said serial numbers, is only from the amount of said tax, cess and duty over and above the amount so calculated.".

[F.No. CBIC-190354/96/2021-TO(TRU-I)-CBEC]

(Rajeev Ranjan)

Under Secretary to the Government of India

Note: The principal notification No. 45/2017-Customs, dated the 30th June, 2017 was published in the Gazette of India, Extraordinary vide number G.S.R. 780(E), dated the 30th June, 2017."

43. As is apparent from a reading of Notification 36/2021, there were two principal amendments which came to be introduced. Firstly, in

serial no. 2 of the original Notification 45/2017, the expression "duty of customs" was substituted by the words "said duty, tax or cess". By the very same Notification, an Explanation also came to be inserted which clarified that goods mentioned at serial nos. 2 and 3 of the table would also be exigible to an integrated tax and cess as leviable under the CTA besides BCD to be calculated on the value as specified and thus holding out that the levy would include the amount of tax as well as cess and duty. It is this Notification which has given rise to the controversy which arises in the instant writ petitions.

44. Notification 36/2021 was followed by the issuance of Circular No.16/2021 of the same date in terms of which the CBIC accorded the following clarification:

"Circular No. 16/2021-Customs
F. No. CBIC-190354/96/2021-TO(TRU-I)-CBEC
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes & Customs)
*****

Room No.156, North Block, New Delhi.
New Delhi, dated 19th July, 2021

To,
All Principal Chief Commissioners/ Chief Commissioners of Customs/ Customs (Preventive),
All Principal Chief Commissioners/ Chief Commissioners of Customs & Central tax,
All Principal Commissioners/ Commissioners of Customs/ Customs (Preventive),
All Principal Commissioners/ Commissioners of Customs & Central Tax

Madam/Sir,

Subject: Clarification regarding applicability of IGST on repair cost, insurance and freight, on goods re-imported after being exported for repairs, on the recommendations of the GST Council made in its 43rd meeting — reg.

References have been received seeking clarification on the issues of the applicability of IGST on repair cost, insurance and freight, on goods re-imported after being exported abroad for repairs.

2. Notification Nos. 45/2017-Customs and 46/2017-Customs, both dated 30th June, 2017, issued at the time of implementation of GST, prescribe certain concession from duty/taxes on re-import of goods exported for repair outside India. These notifications, specifically serial No. 2 *ibid*, clearly specify that goods exported (other than those exported under claim of benefits listed), when re-imported into India, are exempt from so much of the duty of customs leviable thereon which is specified in the said First Schedule of the Customs Act, 1962, and the integrated tax, compensation cess leviable there on respectively under sub-section (7) and (9) of section 3 of the said CTA, 1975 as is in excess of the *duty of customs* which would be leviable if the value of re-imported goods after repairs were made up of the fair cost of repairs carried out including cost of materials used in repairs (whether such costs are actually incurred for not), insurance and freight charges, both ways.

3. Therefore, the said notification prescribes that duties or taxes (including BCD, IGST, etc) at the applicable rates will be payable on such imports, calculated on the value of repairs, insurance and freight, instead of the value of the goods itself. Similar concession existed in pre-GST period too, vide notification No. 94/96-Customs, whereby, the customs duty (BCD, additional duty of customs under section 3 of CTA, 1975, etc.) were payable on the value of repairs instead of the entire value of goods in such imports.

4. GST rate and exemptions are prescribed on the recommendation of the GST Council. The Council, at the time of roll out of GST decided to continue the concession as were available under the said notification No. 94/96-Cus, with only consequential amendment, i.e, replacing additional duties of customs with IGST and Compensation cess, as discussed in the 14th Meeting of the GST Council. Accordingly, under GST, IGST and Compensation cess were made applicable on the value of repairs, insurance and freight on re-import of goods sent abroad for repair.

5. Again, during the 37th GST Council Meeting, while examining the request to make available the credit of ITC paid on aircraft engines and parts exported for repairs and later re-imported, the leviability of IGST on such imports, on the cost of repairs, insurance and freight charges, was affirmed. In fact, this was never disputed in first place and the request was to allow credit of the IGST so paid. Similarly, while examining the question of GST rate on maintenance, repair and overhauling

(MRO) services in respect of aircraft, aircraft engines and other components and parts, the leviability of IGST on such re-imports was again affirmed by the GST Council in its 39th meeting, making it explicitly clear that such goods reimported after repair from outside India attract IGST on the repair, freight and insurance value. In the said discussion, the IGST levied on such goods re-imported after being exported abroad for repairs was a significant factor considered by the GST Council while deciding the rate on MRO services. The above deliberations of the GST Council leave no doubt that the Council had consciously recommended for levy of IGST and cess, albeit at the repair, insurance and freight cost instead of the entire value of goods imports, on the basis of which the said notifications No. 45/2017-Cus and 46/2017-Cus were issued.

6. Recently, in the matter of M/s Interglobe Aviation Limited versus Commissioner of Customs, in its Final Order Nos. 51226-51571/2020 dated the 2nd November, 2020 {2020 (43) G.S.T.L. 410 (Tri. - Del.)}, the Hon'ble CESTAT Principal Bench, New Delhi on analysis of notification No. 45/2017-Customs, has interpreted that intention of legislation was only to impose BCD on the fair cost of repair charges, freight and insurance charges on such imports of goods after repair. The Hon'ble CESTAT has thus concluded that integrated tax and compensation cess on such goods would be wholly exempt. An appeal has been preferred by the Department before the Hon'ble Supreme Court against the said Order.

7. In the above background, the matter was placed before the GST Council in its 43rd Meeting held on the 28th May, 2021. The GST Council deliberated on the issue and recommended that a suitable clarification, including any clarificatory amendment, if required, may be issued for removal of any doubt, to clarify the decision of the GST Council that re-import of goods sent abroad for repair attracts IGST and cess (as applicable) on a value equal to the repair value, insurance and freight.

8. Accordingly, as recommended by the GST Council, it is clarified that notification Nos. 45/2017-Customs and 46/2017-Customs, both dated the 30th of June, 2017 were issued to implement the decision of the GST Council taken earlier, that re-import of goods sent abroad for repair attracts IGST on a value equal to the repair value, insurance and freight. Further, in the light of the recommendations of the GST Council in its 43rd Meeting, a clarificatory amendment has been made in the said notifications, vide notification Nos. 36/2021-Customs and 37/2021-Customs, both dated 19th July, 2021, without prejudice to the leviability of IGST, as above, on such imports as it stood before the amendment.

9. The contents of this circular may please be brought to the notice of trade and industry through issue of Trade/ Public notices. The field formations may also be suitably sensitized in this regard. Difficulty, if any, in the implementation of this Circular may be brought to the notice of this office.

Yours faithfully,

(Gaurav Singh)
Deputy Secretary to the Government of India"

45. As was noticed in the preceding parts of this decision, the CBIC had while issuing that Circular explicitly alluded to the judgment of the CESTAT rendered in the case of the writ petitioner itself and which had held that only BCD could have been imposed on the fair cost of repair charges. The matter also appears to have engaged the attention of the GST Council which in its 43rd meeting held on 28 May 2021 had recommended that a suitable clarification may be issued reiterating its decision that the re-import of goods sent abroad for repairs, would also attract IGST and cess on a value equal to the repair value along with insurance and freight. It is the aforesaid notification read along with the clarification issued by the CBIC which led to the institution of these writ petitions.

46. For purposes of clarity, it may be noted that while WP(C) 934/2023 assails the levy of IGST on the subject goods upon re-import into India as well as the validity of Notification 36/2021 and the Circular of the CBIC referred to above, WP(C) Nos. 7845/2023 and 4673/2023 impugn orders in appeal passed by the Commissioner of Customs (Appeals) vide which numerous appeals instituted by the petitioner in respect of various Bills of Entries have come to be disposed of in light of the Notification 36/2021 and the Circular No. 16/2021 referred to above. It is in the aforesaid backdrop that we are

called upon to answer the challenge which stands raised.

RIVAL SUBMISSIONS

47. Appearing for the writ petitioners, Mr. Lakshmikumaran, learned counsel canvassed the following submissions. It was firstly submitted that the authority to levy IGST is traceable to Article 246A of the Constitution which confers exclusive power upon Parliament to make laws with respect to GST on the supply of goods or services where such supply takes place in the course of inter-state trade or commerce. It was thus submitted that the levy of IGST cannot partake the character of an impost, which is envisaged under Entry 83 of List I and which is concerned with duties of custom. According to Mr. Lakshmikumaran, the power of the Union to make laws by virtue of Entry 83 stands confined to the imposition of a duty of customs as well as export duties on goods. Contrasted with the above, learned counsel submitted that IGST is a tax which comes to be levied by the Union on the supply of goods by virtue of an independent authority conferred by Article 246A(2). It is in the aforesaid backdrop that learned counsel submitted that it would be wholly incorrect to equate IGST with a duty of customs.

48. It was then submitted that undisputedly, the export of aircraft engines or parts for repair is liable to be classified as a supply of service since it would necessarily entail those goods being subjected to a treatment or process and those articles concedely being the property of the petitioner. It was thus contended that once the said transaction came to be characterized as a supply of services in terms of Entry 3 of Schedule II of the CGST, it would be wholly impermissible for the respondents to treat the same transaction as a supply of goods.

49. Mr. Lakshmikumaran argued that if the stand as taken by the respondents were to be accepted, it would clearly amount to the imposition of a "double levy", with a tax firstly being imposed on a supply of services and the very same transaction thereafter being taxed as an import of goods. According to learned counsel, if the stand of the respondents were to be countenanced, it would inevitably result in the petitioner firstly paying BCD on the import of goods by virtue of Section 12 of the Customs Act, an integrated tax on import of goods under Section 3(7) of the CTA and thirdly an integrated tax on the inter-state supply of goods as envisaged under Section 5(1) of the IGST.

50. It was pointed out that the import of goods is undisputedly deemed to be an inter-state supply by virtue of the Explanation contained in Article 269A read along with Sections 7(2) or 7(4) of the IGST. It would be pertinent to recall that the Explanation to Article 269A of the Constitution postulates that a supply of goods, services or both in the course of import into the territory of India would be deemed to be a supply of goods, services or both in the course of inter-state trade or commerce. Undisputedly, a tax on the supply of goods or services in the course of inter-state trade or commerce falls within the exclusive province of the Union. In fact, it is this subject which forms the central piece of the IGST legislation. The position as explained by Article 269A stands reflected in Section 7(2) of the IGST when it stipulates that the supply of goods imported into the territory of India is liable to be treated as being in the course of inter-state trade or commerce. Similarly, sub-section (4) of Section 7 declares that a supply of services imported into the territory of India would also be treated as a supply pertaining to services rendered in the course of inter-

state trade or commerce.

51. It was in the aforesaid light that Mr. Lakshmikumaran had submitted that Section 3(7) of the CTA can neither be construed as being the source of an independent levy of an integrated tax on the import of goods nor can such a dual levy be sustainable in law. The submission in essence was that once the transaction had come to be characterized as a supply of services and taxed as such under Section 5(1), the same transaction could not have been subjected to yet another levy on a perceived reading of Section 3(7) of the CTA or by extension of the Proviso to Section 5(1).

52. Mr. Lakshmikumaran then contended that the duty which is envisaged under the Customs Act or the CTA is one which is defined by Section 2(15). Learned counsel submitted that admittedly, Section 12 of the Customs Act constitutes the charging provision and thus provides for the levy of duties of customs. Rates of duties of customs, learned counsel submitted, are to be derived from the appropriate provisions made in the CTA. This would lead one to refer to the First and Second Schedules of the CTA in order to ascertain and compute the additional duties which are leviable under that statute.

53. According to Mr. Lakshmikumaran, while Section 12 is thus the repository of the power of the respondent to levy a BCD, the CTA is concerned with additional duties which are leviable in accordance with Section 3. However, according to Mr. Lakshmikumaran, once the transaction had been subjected to a levy by treating it to be a supply of services, an additional tax or duty cannot be validly imposed by an exercise of re-characterization or by viewing the very same transaction as amounting to an import of goods.

54. Our attention in this respect was also drawn to the provisions contained in Section 13 of the IGST which reads as follows:

> "**13. Place of supply of services where location of supplier or location of recipient is outside India**—(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.
>
> (2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:
>
> Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.
>
> (3) The place of supply of the following services shall be the location where the services are actually performed, namely:—
>
> (*a*) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:
>
> Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:
>
> [Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;]
>
> (*b*) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.
>
> (4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.
>
> (5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition

or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(*a*) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(*b*) intermediary services;

(*c*) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation.—For the purposes of this sub-section, the expression,—

(*a*) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(*b*) "banking company" shall have the same meaning as assigned to it under clause (*a*) of Section 45-A of the Reserve Bank of India Act, 1934 (2 of 1934);

(*c*) "financial institution" shall have the same meaning as assigned to it in clause (*c*) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(*d*) "non-banking financial company" means,—

(*i*) a financial institution which is a company;

(*ii*) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(*iii*) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(9) [* * *]

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:—

(*a*) the location of address presented by the recipient of services through internet is in the taxable territory;

(*b*) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(*c*) the billing address of the recipient of services is in the taxable territory;

(*d*) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(*e*) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(*f*) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(*g*) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service."

55. While we had an occasion to notice that provision in the earlier parts of this decision alongside Sections 11 and 12, suffice it to note that the designation of the place of supply of services or goods is undoubtedly a power exclusively conferred upon the Union. It is in the

exercise of the aforenoted powers that the Union stands statutorily empowered to notify the description of services and the place of supply of those services. As is manifest from a reading of Section 13(2), the place of supply of services is declared to be the location of the recipient of services, except in respect of those categories which fall within the ambit of sub-section (3) to (13).

56. However, Mr. Lakshmikumaran laid stress on the underlying legislative objective of the Union exercising its powers bearing in mind the imperative of preventing double taxation. It was in this context that learned counsel also alluded to Notifications No.4/2019 and 2/2020. The relevant parts of those two notifications are reproduced hereinbelow:

"**NOTIFICATION NO. 04/2019- CENTRAL TAX (RATE)**

New Delhi, the 29th March, 2019 G.S.R

(E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No.12/2017- Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 691(E), dated the 28th June, 2017, namely:-

In the said notification, -

(i) in the opening paragraph, for the word, brackets and figures "sub-section (1) of section 11" the word, brackets and figures ", sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11,sub-section (5) of section 15 and section 148," shall be substituted;

(ii) in the Table, -

(a) after serial number 41 and the entries relating thereto, the following serial numbers and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)

"41A	Heading 9972	Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under: [GST payable on TDR or FSI (including additional FSI) or both for construction of the project] **x** (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)	Nil	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un- booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner - [GST payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un- booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project) Provided further that tax payable in terms of the first proviso hereinabove shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. of the value in case of residential apartments other than affordable residential apartments remaining un-booked on the date of issuance of completion certificate or first occupation The liability to pay central

				tax on the said portion of the development rights or FSI, or both, calculated as above, shall arise on the date of completion or first occupation of the project, as the case may be, whichever is earlier.
41B	Heading 9972	Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 01.04.2019, for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under: [GST payable on upfront amount (called as premium, salami, cost,	Nil	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, as is attributable to the residential apartments, which remain un- booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner - [GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the residential apartments in the project but for the exemption contained herein] **x** (carpet area of the residential apartments in the project which remain un- booked on the date of issuance of completion certificate or first occupation ÷ Total carpet

		price, development charges or by any other name) payable for long term lease of land for construction of the project] **x** (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project).		area of the residential apartments in the project); Provided further that the tax payable in terms of the first proviso shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. of the value in case of residential apartments other than affordable residential apartments remaining un-booked on the date of issuance of completion certificate or first occupation. The liability to pay central tax on the said proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, calculated as above, shall arise on the date of issue of completion certificate or first occupation of the project, as the case may be.

(iii) after paragraph 1, the following paragraphs shall be inserted, namely, -

"1A. Value of supply of service by way of transfer of development rights or FSI by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.

1B. Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be."

(iv) in paragraph 3 relating to Explanation, after clause (iv),

the following clause shall be inserted, namely: -

"(v) The term "apartment" shall have the same meaning as assigned to it in clause (e) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(vi) The term "affordable residential apartment" shall have the same meaning as assigned to it in 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 GSR number 690(E) dated 28th June, 2017, as amended.

(vii) The term "promoter" shall have the same meaning as assigned to it in clause (zk) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(viii) The term "project" shall mean a Real Estate Project or a Residential Real Estate Project.

(ix) the term "Real Estate Project (REP)" shall have the same meaning as assigned to it in clause (zn) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(x) The term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP;

(xi) The term "carpet area" shall have the same meaning as assigned to it clause (k) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(xii) "an apartment booked on or before the date of issuance of completion certificate or first occupation of the project" shall mean an apartment which meets all the following three conditions, namely-

(a) part of supply of construction of the apartment service has time of supply on or before the said date; and

(b) consideration equal to at least one instalment has been credited to the bank account of the registered person on or before the said date; and

(c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the said date.

(xiii) "floor space index (FSI)" shall mean the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.".

2. This notification shall come into force with effect from the 1st day of April, 2019.

[F. No.354/32/2019 -TRU]

(Pramod Kumar) Deputy Secretary to the Government of India"

"[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

Government of India
Ministry of Finance
(Department of Revenue)

Notification No. 02/2020- Integrated Tax (Rate)

New Delhi, the 26th March, 2020

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1), (3) and sub-section (4) of section 5, sub-section (1) of section 6 and clauses (iii) and (xxv) of section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), read with sub-section (5) of section 15 and section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No. 8/2017-Integrated Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 683 (E), dated the 28th June, 2017, namely:-

In the said notification, in the Table, against serial number 25,

(a) after item (i) and entries relating thereto, in columns (3), (4) and (5), the following items and entries shall be inserted, namely, -

(3)	(4)	(5)
"(ia) Maintenace, repair or ov erhaul services in respect of aircrafts, aircraft engines and other aircraft components or parts	5	-

(b) in item (ii), in column (3), after the brackets and figures "(i)", the word, brackets, and figures "and (ia)" shall be inserted.

2. This notification shall come into force with effect from the 1st day of April, 2020.

[F. No. 354/32/2020- TRU]

(Pramod Kumar)
Director to the Government of India

Note: -The principal notification No. 8/2017- Integrated Tax (Rate), dated the 28th June, 2017 was published in the Gazette of India, Extraordinary, vide number G.S.R. 683 (E), dated the 28th June, 2017 and was last amended by notification No. 25/2019- Integrated Tax (Rate), dated the 22nd November, 2019 vide number G.S.R. 871(E), dated the 22nd November, 2019."

57. As is evident from a reading of the entries forming parts of those notifications, insofar as the subject transaction pertaining to the supply or maintenance, repair or overhaul service in respect of aircraft, aircraft engines, components or parts is concerned, the place of supply is declared to be the location of the recipient of service. As a consequence of the above, learned counsel submitted that services procured by the petitioners from MROS' located outside India are thus liable to be treated and taxed as import of services in terms of Section 2(11) of the IGST read along with Section 5(1) of that enactment. As noted above, Section 2(11) defines the expression "import of services" to mean the supply of any service where the supplier is located outside India, the recipient is located within and the place of supply of service is within the country.

58. Proceeding then to explain when IGST could be levied on goods, Mr. Lakshmikumaran submitted that import of goods in terms of Section 2(10) of the IGST has been defined to mean the bringing of goods into India from a place outside. According to learned counsel, the Proviso to Section 5(1) applies only to contingencies where goods are being imported into India. Insofar as the import of services was concerned, Mr. Lakshmikumaran submitted that the same would be governed exclusively by the principal part of Section 5(1) and to which the Proviso would clearly have no application.

59. It was then submitted that from the plain language in which the Proviso stands constructed, it is apparent that the integrated tax

becomes leviable on goods imported into India. According to learned counsel, the only correlation between the Proviso to Section 5(1) and the CTA is the point at which the integrated tax may be levied and collected. This, according to Mr. Lakshmikumaran, becomes evident in light of the Proviso using the phrase *"shall be levied and collected in accordance with the provisions of"* Section 3 of the CTA. It was in view of the above that Mr. Lakshmikumaran had submitted that Section 3(7) of the CTA is merely intended to designate a collection point of the integrated tax as opposed to a provision contemplating an independent levy of IGST. It was thus submitted that it would be wholly incorrect for Section 3(7) of the CTA being viewed or countenanced as constituting an independent charging provision.

60. According to Mr. Lakshmikumaran, the acceptance of the position as advocated by the respondents would not just lead to evident absurdities but also give rise to a wholly incongruous situation. According to learned counsel, if Section 3(7) of the CTA were to be construed as a provision authorizing an independent levy of an integrated tax, it would travel far beyond the scope of Entry 83 of List I and impinge upon the legislative field reserved by Article 246A. This, according to learned counsel, would clearly infringe the power of levying a GST where the supply of goods or services takes place in the course of inter-state trade or commerce.

61. Acceptance of a stand to the contrary, learned counsel argued, would compel one to hold and acknowledge the levy under Section 3(7) of the CTA as being referable to the legislative field reserved by Entry 83. However, Mr. Lakshmikumaran pointed out that Entry 83 cannot, by any stretch of imagination, be read as envisaging the levy of an integrated tax. It was in the aforesaid background that Mr.

Lakshmikumaran had submitted that Section 3(7) of the CTA was merely introduced in the statute book for the purposes of convenience and designation of the point at which the integrated tax leviable on imported goods classified as such may be collected.

62. It was further submitted that Section 3(7) uses the words "integrated tax" and which expression owes its genesis solely to the IGST. It was in this connection submitted that undisputedly, it is Section 2(12) of the IGST that defines the expression "integrated tax". Mr. Lakshmikumaran submitted that integrated tax finds no mention otherwise either under the Customs Act or the CTA. This too, according to learned counsel, is clearly suggestive of the fact that Section 3(7) of the CTA was solely intended to be the demarcation of a point where a tax under the IGST may be collected.

63. On a more fundamental plane, learned counsel submitted that GST undisputedly is a tax on the supply of goods or services as opposed to one leviable on goods or services per se. The term 'supply', Mr. Lakshmikumaran pointed out, stands duly defined in the IGST, which refers one back to the CGST and thus derives its content from the manner in which it stands defined therein. Supply, as was noted above, is to be understood in accordance with Section 7 of the CGST. That provision defines that expression to include all forms of supply of goods or services, including the import of services for consideration as well as activities specified in Schedule 1.

64. This, according to Mr. Lakshmikumaran, is the activity that becomes the subject matter of a tax under Section 5(1) of the IGST. It was in the aforesaid light that Mr. Lakshmikumaran also questioned the correctness of the stand of the respondents who had sought to invoke

the Proviso to Section 5(1) of the IGST as also being applicable to a supply of services. It was submitted that the contention addressed at the behest of the respondents in this respect fails to bear in mind the well-settled principle of the Proviso to a section merely carving out an exception to the general rule or extracting a subject which may have otherwise fallen within the province of the former. However, learned counsel submitted that the operation of a proviso cannot be countenanced as travelling beyond the main section itself. It was thus submitted that it would be wholly incorrect to view the Proviso to Section 5(1) as authorizing the levy of a tax on an import of goods even where no supply thereof may have occurred. In any case, according to learned counsel, an integrated tax is solely concerned with supply and that, too an inter-state supply of goods or services. It was thus reiterated that once the transaction in question had come to be classified as a supply of services it would clearly fall beyond the scope of the Proviso to Section 5(1) of the IGST and thus clearly not exigible to tax under Section 3(7) of the CTA.

65. Mr. Lakshmikumaran also questioned the invocation of the aspects theory by the respondents and submitted that the arguments addressed on that score were clearly misconceived. Learned counsel contended that while the aspects theory, as was explained by the Supreme Court in **Gujarat Ambuja Cement vs. Union of India & Anr**[9] as well as in **Federation of Hotel and Restaurants Association vs. Union of India**[10], has been recognised as propounding a general rule that the same transaction may involve two or more taxable events, the same would clearly have no application in the facts of the present

[9] (2005) 4 SCC 412
[10] (1989) 3 SCC 634

case. According to learned counsel, the aspects theory would have had relevance provided there were two taxable events that could have been identified. Learned counsel submitted that undisputedly the solitary transaction with which we are concerned was a re-import of aircraft engines and parts which had been sent overseas for repairs. According to Mr. Lakshmikumaran, the said activity already stood classified as a supply of services. In view of the above, it would be wholly impermissible for the respondents to seek to discover or bifurcate one composite taxable event.

66. Mr. Lakshmikumaran explained that two taxable events could have come into being only if it were possible to isolate and identify distinct aspects under different fields of tax legislation. In any case, according to learned counsel, the aspects theory does not sanction the levy of a tax twice over on the same transaction. Mr. Lakshmikumaran in this regard also sought to draw sustenance from the following observations as appearing in the judgment of the Supreme Court in **Union of India & Anr vs. Mohit Minerals Pvt Ltd**[11] and where the respondent's submission of a supply of goods being yet again liable to be taxed as a supply of service came to be negated in the following words:

> **"168.** This Court is bound by the confines of the IGST and the CGST Acts to determine if this is a composite supply. It would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. In a CIF contract, the supply of goods is accompanied by the supply of services of transportation and insurance, the responsibility for which lies on the seller (the foreign exporter in this case). The supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is payable under Section 5(1) of the IGST Act read with Section 20 of the IGST Act, Section 8

[11] 2022 SCC Online SC 657

and Section 2(30) of the CGST Act. To levy the IGST on the supply of the service component of the transaction would contradict the principle enshrined in Section 8 and be in violation of the scheme of the GST legislation. Based on this reason, we are of the opinion that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation. As noted earlier, under Section 7(3) of the CGST Act, the Central Government has the power to notify an import of goods as an import of services and vice versa:

> "**7. *Scope of supply***.—(1)-(2) * * *
>
> (3) Subject to the provisions of [*Subs*. for "sub-sections (1) and (2)" by Act 31 of 2018, Section 3(*c*) (w.r.e.f. 1-7-2017).] [sub-sections (1), (1-A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—
>
> (*a*) a supply of goods and not as a supply of services; or
>
> (*b*) a supply of services and not as a supply of goods."
>
> No such power can be noticed with respect to interpreting a composite supply of goods and services as two segregable supply of goods and supply of services.

169. The High Court in the impugned judgment [*Mohit Minerals (P) Ltd.* v. *Union of India*, 2020 SCC OnLine Guj 49] has observed that: (*Mohit Minerals case* [*Mohit Minerals (P) Ltd.* v. *Union of India*, 2020 SCC OnLine Guj 49], SCC OnLine Guj paras 133-35 & 216)

> "*What has led to the present day problems in the implementation of the GST*
>
> *133*. 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 Constitution (101st) Amendment Act, 2016 to merge all taxes levied on the goods and services to one tax known as the GST.
>
> *134*. 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.

135. 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.

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216. 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."

(emphasis supplied)"

170. We are in agreement with the High Court to the extent that a tax on the supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.

E. *Conclusion*

171. Based on the above discussion, we have reached the following conclusion:

171.1. The recommendations of the GST Council are not binding on the Union and States for the following reasons:

171.1.1. The deletion of Article 279-B and the inclusion of Article 279(1) by the Constitution Amendment Act, 2016 indicates that Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units.

171.1.2. Neither does Article 279-A begin with a non-obstante clause nor does Article 246-A state that it is subject to the provisions of Article 279-A. Parliament and the State Legislatures possess simultaneous power to legislate on GST. Article 246-A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The "recommendations" of the GST Council are the product of a collaborative dialogue involving the Union and the States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST. It is not imperative that

one of the federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation.

171.1.3. The Government while exercising its rule-making power under the provisions of the CGST Act and the IGST Act is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power Article 279-A(4) are binding on the legislature's power to enact primary legislations.

171.2. On a conjoint reading of Sections 2(11) and 13(9) of the IGST Act, read with Section 2(93) of the CGST Act, the import of goods by a CIF contract constitutes an "inter-State" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.

171.3. The IGST Act and the CGST Act define "reverse charge" and prescribe the entity that is to be taxed for these purposes. The specification of the recipient—in this case the importer—by Notification No. 10 of 2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.

171.4. Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction on the delegated legislation.

171.5. The impugned levy imposed on the "service" aspect of the transaction is in violation of the principle of "composite supply" enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the "composite supply", comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the "supply of services" by the shipping line would be in violation of Section 8 of the CGST Act.

172. For the reasons stated above, the appeals are accordingly dismissed. Pending application(s) if any, stand disposed of."

67. Questioning the correctness of the view canvassed for our consideration by Mr. Lakshmikumaran, Mr. Ojha, learned counsel representing the respondents submitted that the stand taken by the writ petitioners is fundamentally flawed since it seeks to confuse the distinction which must be borne in mind between a supply of service

and the import of repaired parts. Mr. Ojha contended that the import of goods constitutes a taxable event under Section 3(7) of the CTA and consequently results in duties being levied thereunder. Learned counsel argued that the IGST is solely concerned with the imposition of a tax on a supply of service or goods as opposed to import. It was submitted that one cannot possibly contend that Section 3(7) of the CTA does not constitute an independent provision envisaging the levy of an additional duty of customs on imported articles and goods. It was his submission that the controversy of the CTA not providing for an independent charge is no longer *res integra* and stands conclusively settled by the Supreme Court in its decision in **Hyderabad Industries vs. UOI**[12].

68. Learned counsel drew our attention, in this respect, specifically to paras 14 to 17 and 19 of the report and which are repeoduced below:-

> "******14.** Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the CTA, 1975. When we turn to CTA 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act 1962 are those which are specified in the First and Second Schedules of the CTA, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the CTA 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.
>
> **15.** On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. <u>This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the CTA, 1975. This apart Sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under Sub-section (1). In Sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under</u>

[12] 1999 SCC OnLine SC 569

this Act or under any other law for the time being in force.

16. There are different types of customs duty levied under different Acts or Rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962; (b) the duty in question, namely, under Section 3(1) of the CTA; (c) additional duty levied on raw-materials, components and ingredients under Section 3(3) of the CTA; and (d) duty chargeable under Section 9A of the CTA, 1975. Customs Act 1962 and the CTA, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the CTA, 1975 arises on the import of the articles into India it does not necessarily mean that the CTA cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

17. The CTA, 1975 was preceded by the Indian Tariff Act, 1934. Section 2A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill 1975 with regard to Clause 3 it was stated that "Clause 3 provides for the levy of additional duty on an imported article to counter-balance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India". Apart from the plain language of the CTA, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the Tariff Act 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance the excise duty leviable on the like article indigenously made. In other words Section 3 of the CTA has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India.

xxxx xxxx xxxx

19 . The decision in Khandewal Metal & Engineering Works case to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India does not appear to be correct inasmuch as the said conclusion is based on the premise that Section 12 of the Customs Act, and not Section 3(1) of the Tariff Act, is the charging section. As we have already observed on a correct interpretation of the relevant

provisions of the two Acts there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of the Customs Act. Secondly, it has been held by the Three Judge Bench in this case that excise duty is leviable if the article has undergone production or manufacture. The observation in Khandelwal Metal & Engineering Works case which seems to suggest that even if no process of manufacture or production has taken place the imported articles can still be subjected to the levy of additional duty does not appear to be correct inasmuch as the measure for levy of additional duty is the quantum of excise duty leviable on a similar article under the Excise Act. Duty under the Excise Act can be levied, as has been held earlier, if the article has come into existence as a result of production or manufacture. In other words when articles which are not produced or manufactured cannot be subjected to levy of excise duty then on the import of like articles no additional duty can be levied under the CTA. The levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied. The decision in Khandelwal Engineering Works case to the extent it takes a contrary view, does not appear to lay down the correct law. Sh. Vaidyanathan contended that this Court should be reluctant to reconsider a judgment which has held the field for a long time, but in our opinion public interest requires that law be correctly interpreted more so in a taxing statute where the ultimate burden may fall on the common man. We hasten to add that we are not over-ruling the Khandelwal Metal & Engineering Works case in its entirety because the Court also held in that case that brass scrap was in any case an item which was manufactured and, therefore, excise duty was leviable. We have not examined, in the present cases, whether brass scrap can or cannot be regarded as a manufactured item for that question does not arise in the present cases."

69. Mr. Ojha submitted that on a plain textual reading of Section 3(7), it is apparent that the following three significant expressions stand embodied therein: 'any article which is imported into India', 'in addition' and 'be liable'. These three expressions, according to learned counsel, when read together give a clear indication of the taxable event and the charge which that statute seeks to create. Mr. Ojha submitted that the import of an article into India manifests the taxable event while the expression 'be liable' underlines the corresponding liability which comes to be statutorily created. It is this according to Mr. Ojha which

leads to the imposition of an additional duty of customs.

70. More fundamentally, Mr. Ojha would contend that the import of goods is not the subject matter of IGST at all. It was his submission that the said statute is merely concerned with the inter-state supply of goods, services or both as distinct from the import of goods. Learned counsel thus sought to draw a distinction between the "import of goods" and a "supply of goods imported into India". Both of those, according to Mr. Ojha, are liable to be viewed as two separate and distinct taxable events.

71. Mr. Ojha further submitted that the use of the expression "integrated tax" in Section 3(7) is not liable to be confused with that expression as it appears in the IGST. According to learned counsel, the phrase "integrated tax at such rate" as occurring in Section 3(7) is merely a measure of tax. It was submitted that this well-known and accepted distinction between a measure of tax and the character of the levy was succinctly explained by the Supreme Court in **Mineral Area Development Authority vs. M/S Steel Authority of India & Anr. Etc.**[13] and where the Constitution Bench had held as follows:-

> "***284**. It now a well-settled principle that the determination of the principles for assessing the amount of tax is within the legislative domain. The quantification or measurement of liability is done on the basis of the procedures laid down by the competent legislature. In situations where the legislature selects one method out of the many available for assessing tax, the courts should not strike down the levy on the ground that the legislature should have adopted another method unless the method is capricious, fanciful, arbitrary or clearly unjust. Although the liability may be quantified or measured in many ways, there is a clear distinction between the subject matter of a tax and the standard by which the amount of tax is measured.
>
> **285**. The pith and substance or true nature and character of the legislation must be determined with reference to the legislative subject matter and the charging section. The charging section

[13] 2024 SCC OnLine SC 1796

levying a tax and defining the persons who are liable to pay the tax constitute the core of a taxing statute. The distinction between the nature of tax and measure of tax can be gathered from the decision of this Court in **Sainik Motors, Jodhpur v. State of Rajasthan**. In that case, the petitioners challenged the levy of taxes on passengers and goods by the State legislature. The charging section provided that the tax was "in respect of all passengers carried and goods transported by motor vehicles at such rate not exceeding one-eight of the value of the fare or freight." This Court held that the tax was on passengers and goods which could be traced to Entry 56 of List II of the Seventh Schedule. As regards the measure of the levy, it was held that that the measure was furnished by the amount of the fare and freight charged.

286. It is a settled position that the measure of tax is not a true test of the nature of tax. The standard adopted as a measure of tax may be a relevant consideration in determining the nature of tax, but is not conclusive. In **Sir Byramjee Jeejeebhoy** v. **The Province of Bombay**, the Bombay Provincial Legislature levied 'urban immovable property tax' at ten percent of the annual letting value of lands and buildings. The Bombay High Court upheld the validity of the levy. Justice Broomfield observed that the power to impose taxes on lands and buildings meant the power to impose taxes on persons, owners, or occupiers as the case may be in respect of these properties. Justice Harilal Kania (as the learned Chief Justice then was) observed that the adoption of the annual letting value as the standard for fixing the tax rate did not necessarily make it a tax on income. The learned Judge further observed that the standard on which the tax is levied does not determine the nature of the tax.

287. In **Ralla Ram** v. **The Province of East Punjab**, the issue that fell for consideration of the Federal Court was whether the provisions of the Punjab Urban Immoveable Property Tax Act 1940 were ultra vires the legislative powers of the Provincial Legislature. Section 3 of the legislation levied a tax on lands and buildings at a rate not exceeding twenty percent of the annual value. It was contended that the levy was in substance a tax on income since the measure adopted, that is the annual value of lands and buildings, was also used to calculate income from property. Justice Fazl Ali observed that annual value is not necessarily actual income, but only a standard by which income may be measured. The learned Judge analysed the substance of the impugned levy to observe that the legislation used annual value merely for the purpose of determining the value of the property to be taxed. The Court observed that if a tax is levied on property, it would not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax without intending to tax income. The levy was held to be in pith and substance a tax on land and buildings even though the basis of the tax was similar to the one adopted to measure income.

288. From the above discussion, we can derive the following principles: (i) the incidence of a tax on lands and buildings will likely be on the owner or occupier, as the case may be; (ii) the legislature may adopt a suitable measure for levying the tax on lands and buildings under Entry 49 of List II; and (iii) the measure adopted by legislature does not determine the nature of the tax.

289. In recent decades, this Court has held that there ought to be a "nexus" between the nature of tax and the measure of tax. In **Union of India** v. **Bombay Tyre International Ltd**., the issue before a three-Judge Bench of this Court was whether the value of an article for the purposes of excise duty must be determined exclusively with reference to the manufacturing cost and manufacturing profit of the manufacturer or the entire wholesale price charged by the manufacturer. The assesses contended that only the measure of manufacturing cost and profit create a direct and immediate nexus between the levy and the manufacturing activity. It was further urged that the post manufacturing expenses and profits ought to be necessarily excluded to preserve the nexus between the nature of tax and the assessment of tax. This Court traced the line of precedent on the measure of tax to observe that a broad standard of reference may be adopted for the purpose of determining the measure of the levy. It was held that any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for the measure of the levy. In **CCE** v. **Grasim Industries Ltd**., a Constitution Bench reiterated that there must be a "reasonable nexus" between the nature of tax and the measure of the levy. It was further observed that the measure cannot be controlled by the rigors of the nature of tax.

290. The discussion above indicates that the nexus between the measure and levy of tax need not be "direct and immediate". The nexus has to be "reasonable" and must have some relationship with the nature of levy. The reasonability of the nexus will largely depend upon the nature of the tax and the means available with the legislature to design the measure of the tax. Since the measure of the levy is a matter of legislative policy and convenience, the reasonability of the nexus between the measure and tax has to be determined by the courts on a case-to-case basis. While doing so, the Court will bear in mind the fundamental principle that the legislature possesses a broad discretion in matters of fiscal levies.
******"

72. It was Mr. Ojha's submission that the phrase "integrated tax" came to be employed as a compendious expression to deal with the subject of an additional duty of customs. Hence, according to learned counsel, the mere use of that expression would not change the character of the levy. It was thus contended that the descriptive words used by the

Legislature for additional duty of customs on imported articles are only clarificatory and seek to underscore the legislative objective of imported goods being subject to an additional duty of customs under the CTA alongside the incidence of IGST. Mr. Ojha also sought to highlight the perceived significance of the usage of the words "duty" and "integrated tax" on goods as those expressions appear in different parts of the CTA. This too, according to learned counsel, would lead one to the inevitable conclusion that the phrase integrated tax was used solely for the purposes of compendiously describing the duties of customs which would get attracted at the time of import of goods.

73. Proceeding further Mr. Ojha submitted that the levy under Section 3(7) is liable to be appreciated with reference to the source of power to legislate itself. The submission was based on the tax on the supply of goods or services being referable to Article 246A while a duty of customs owing its genesis to the plenary powers of legislation comprised in Article 246 of the Constitution read along with Entry 83 contained in List-I of the Seventh Schedule. It was thus submitted that the Court must discern the true character of the levy and the taxable event, both of which are traceable to separate powers of legislation comprised in the Constitution.

74. In order to lend credence to the aforesaid contention, Mr. Ojha also relied upon the following passages as they appear in the judgment of the Constitution Bench in **Godfrey Philips vs. State of U.P[14].**

> "*** In our opinion to read Entry 62 List II as including articles of luxury cannot allow all these constitutional restrictions to be by-passed allowing States to levy tax on the supply of goods by describing them as luxury goods. As has been rightly contended by Mr. Parasaran appearing for the Union of India, the supply of luxury is nothing but the supply of goods since the goods themselves

[14] (2005) 2 SCC 515

constitute the luxury. So even if tobacco is an article of luxury, a tax on its supply is within the exclusive competence of the State but subject to the constitutional curbs prescribed under Article 286 read with Sections 14 and 15 of the Central Sales Tax Act, 1956 and most importantly the ADE Act of 1957 under which no sales tax can be levied on tobacco at all if the State was to take the -"" benefits under that Act. Despite the subtraction of the rights to levy excise or customs duties and the restraint on the States to levy sales tax in cases when the states can levy tax on goods we still have to determine whether Entry 62 of List II covers taxes on goods at all. In view of the decision in the *Sea Customs Act* case, the second premise propounded by Mr. Salve is unacceptable. As we have seen, in that case this Court held that the taxable event of ownership is implicit in the concept of taxes on goods. That the entries on taxable events in the legislative lists are not exhaustive is also recognised and provided for in Art. 248 (2) which provides for the power of Parliament to make any law imposing a tax not mentioned in either the Concurrent or State lists. This residuary power is reflected in Entry 97 of List. Furthermore, if an article or goods are taxable only with respect to a taxable event, and if, as contended by Mr. Salve, all taxable events have been provided for in the different legislative heads, then by that token no object or goods could be taxable. This would render the various entries in the State List including entries 57 and 58 contentless. As we cannot accept that the taxation entries exhaustively enumerate all taxable events, it does not follow that Entry 62 of List II does not cover goods. It is not possible therefore to hold merely on such a construction of the legislative lists and the taxation entries therein, that Entry 62 List II does not permit the States to levy tax on articles of luxury. Having rejected the second premise contended for by Mr. Salve, the next question is whether the language of Entry 62 List II would resolve the issue. The juxtaposition of the different taxes within Entry 62 itself is in our '"view of particular significance. The entry speaks of "taxes on luxuries *including* taxes on entertainments, amusements, betting and gambling". The word "including" must be given some meaning. In ordinary parlance it indicates that what follows the word "including" comprises or is contained in or is a part of the whole of the word preceding. The nature of the included items would not only partake of the character of the whole, but may be construed as clarificatory of the whole. It has also been held that the word 'includes' may in certain contexts be a word of limitation *(South Gujarat Roofing Tiles Manufacturers* v. *State of Gujarat,* [1976] 4 SCC 60 I. In the context of Entry 62 of List II this would not mean that the word 'luxuries' would be restricted to entertainments, amusements, betting and gambling but would only emphasise the attribute which is common to the group. If luxuries is understood as meaning something which is purely for enjoyment and beyond the necessities of life, there can be no doubt that entertainments, amusements, betting and gambling would come within such understanding. Additionally,

entertainments, amusements, betting and gambling are all activities. 'Luxuries' is also capable of meaning an activity and has primarily and traditionally been defined as such. It is only derivatively and recently used to connote an article of luxury. One can assume that the coupling of these taxes under one entry was not fortuitous but because of these common characteristics. Where two or more words are susceptible of analogous meaning are clubbed together, they are understood to be used in their cognate sense. They take, as it were, their colour from and are qualified by each other, the meaning of the general word being restricted to a sense analogous to that of the less general. As said in *Maxwell on the Interpretation of Statues* 12th Edn. P.289. "Words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context .1" Put in other words the included words may be clarificatory or illustrative of the general word. Thus in *UP. State* v. *Raja Anand*, [1967] I SCR 362, while construing Art. 31A (2) as enacted by the Constitution (Seventeenth Amendment) Act, 1964 the relevant excerpt of which read as:-

> "31 A(2) In this article –
> (a) the expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also *include* –
>
> (i)xxx xxx xxx xxx xxx
> (ii) xxx xxx xxx xxx xxx
> (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, *including* waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agriculture labourers and village artisans;

this Court said:-

> "In our opinion the word "including" is intended to clarify or explain the concept of land held or let for purposes ancillary to agriculture. The idea seems to be. to remove any doubts on the point whether waste land or forest land could be held to be capable of being held or let for purposes ancillary to agriculture."

In the present context the general meaning of 'luxury' has been explained or clarified and must be understood in a sense analogous to that of the less general words such as entertainments, amusements, gambling and betting, which are clubbed with it. This principle of interpretation known as 'noscitur a sociis' has received approval in *Rainbow Steels Ltd* v. *C.S.T.*, [1981] 2 SCC 141,145 although doubted in its indiscriminate application in *State of Bombay v. Hospital Mazdoor Sabha*, AIR (1960) SC 610. In the latter case this Court was required to construe Section 2(j) of the Industrial Disputes Act which read:

> "Section 2(j) provides that 'industry' means any business, trade, undertaking, manufacture or calling of employers and includes

any calling, service, employment, handicraft or industrial occupation or avocation of workmen".

It was found that the words in the definition were of very wide and definite import. It was suggested that these words should be read in a restricted G sense having regard to the included items on the principle of *'noscitur a sociis'*. The suggestion was rejected in the following language:

"It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope H of the defined word correspondingly wider. *It is only where the intention of the Legislature in associating wider words with words of A narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the Legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be B pressed into service*."

We do not read this passage as excluding the application of the principle of noscitur a sociis to the present case since it has been amply demonstrated with reference to authority that the meaning of the word "luxury" in Entry 62 is doubtful and has been defined and construed in a different sense.

In *Black Diamond Beverages v. Commercial Tax Officer, [I998] SCC 458*, the definition of 'sale price' with respect to notified commodities under Section 2(d) of the West Bengal Sales Tax Act, I 954 was sought to be restricted with reference to the specific inclusion of sums charged for containers etc. The argument was that since freight charges were not expressly included they must be taken to have been excluded from the 'sale price'. In that context this Court said that the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning and that according to the natural meaning 'sale price' included freight charges. It was said that by the inclusion sale price was extended to mean something which would not ordinarily come within its definition. The decision is not of relevance as it is nobody's contention that luxuries in the sense of enjoyment would not naturally cover entertainments, amusements, betting and gambling.

We are aware that the maxim of noscitur a sociis may be a treacherous one unless the 'societas' to which the 'socii' belong, are known. The risk may be present when there is no other factor except contiguity to suggest the 'societas'. But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as 'including' is sufficiently indicative of the ‘societas’. As we have said the word 'includes' in the present context indicates a commonality or shared features or attributes of the including word with the included. Furthermore where articles

> have been made the object of taxation, either directly or indirectly, the entries in the legislative lists have specifically said so or the impost is such that the subject matter of tax follows by necessary implication. In List II itself, the State legislature has been given the right to levy taxes on the entry of goods under Entry 53, on 'carriage of goods and passengers' under Entry 56, on 'vehicles' under Entry 57 and on 'animals and boats under Entry 58. There is no instance in any of the legislative lists of a tax being leviable only with reference to an attribute. An attribute as an object of taxation without reference to the object it qualifies would lead to legislative mayhem, blur the careful demarcation between taxation entries and upset the elaborate scheme embodied in the Constitution for the collection and distribution of revenue between the Union and the States. For example would a luxury vehicle be subjected to tax under Entry 62 or Entry 57 of List II? In the latter case, the levy would be subject to provisions of Entry 35 of List III and hence capable of being over-ridden by Parliament. If it is referable to Entry 62 there would be no such concurrent power in Parliament.
>
> Hence on an application of general principles of interpretation, we would hold that the word 'luxuries' in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognized as being beyond the necessary requirements of an average member of society and not articles of luxury.
> ******"

75. It was thus submitted that the transaction in question and which are sought to be taxed under the CTA can be broken down into three principal taxable events: (a) supply of repaired goods, (b) supply of services on carrying out repairs in re-imported goods and (c) import of repaired goods. According to Mr. Ojha while aspects (a) and (b) would be governed by IGST, insofar as (c) is concerned, since the same relates to the import of an article or goods, it would clearly be regulated by the Customs Act and the CTA.

76. Mr. Ojha then alluded to the well-known aspects theory and the precept of a tax being validly imposed on two aspects forming part of the same transaction. It was his submission that a singular transaction may itself be comprised of two different taxable events. According to Mr. Ojha, as per the aspects theory, both of those could be validly

subjected to a tax. Learned counsel first referred to the following observations as appearing in the **Federation of Hotel & Restaurant Association of India vs. Union of India**[15]**.**

> "***14. In Lefroy's 'Canada's Federal System' the learned author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e., British North America Act 1867 observed that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of Legislative Power is that 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. Learned author says:
>
> > ...that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon.
>
> In Union Colliery Co. of British Columbia v. Bribery Sec. 1899 AC 580 at 587, Lord Haldane said:
>
> > It is remarkable the way this Board has reconciled the provisions of section 91 and section 92, by recognizing that the subjects which fall within section 91 in one aspect, may, under another aspect, fall under section 92.
>
> 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, Lord Simonds in Governor General in Council v. Province of Madras MANU/FE/0008/1945 : [1945] FCR 179 P.C. at 193 in the context of concepts of Duties of Excise and Tax on Sale of Goods said:
>
> > ...The two taxes the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposes. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....

[15] (1989) 3 SCC 634

15. Referring to the "aspect" doctrine Laskin's "Canadian Constitutional Law" states:

The 'aspect' doctrine bears some resemblance to those just noted but, unlike them, deals not with what the 'matter' is but with what it 'conies within'....

> **...**it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its 'matter'), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is.
>
> **...**I pause to comment on certain correlations of operative incompatibility and the 'aspect' doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the precursory impact of federal Jaw on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subjects...

The distinction between what is "ancillaries" and what "incidentally affecting" the treatise says:

> ...There is one big difference though it is little mentioned. ancillaries is usually associated with an explicit 'statutory provision of a peripheral nature; talk about 'incidentally affecting' crops up in connection with the potential of a non-differentiating statute to affect indiscriminately in its application matters asserted immune from control and others. But it seems immaterial ready whether it is its words or its works which draw the flotsam within the statute's wake.
>
> ****"

Equally profitable would be to place following Excerpt from **A.H. F Lefroy's Treatise on Canadian Constitutional Law under the British North American Act**:

> "We shall find when we proceed to consider how these and other cases illustrate the principle thus expressed, that by ' aspect ' must be understood the aspect or point of view of the legislator in legislating—the object, purpose, and scope of the legislation : that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

77. In this connection, Mr. Ojha also relied upon the following

passages from **Gujarat Ambuja Cement vs. Union of India & Anr.**[16] while seeking to espouse the core principles which form part of the aspects theory as commonly understood in tax jurisprudence*:*

> **"24.** Undisputedly, Chapter V of the Finance 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 Corpn.* v. *State of Haryana* [(1981) 2 SCC 318 : 1981 SCC (Tax) 103] : (SCC pp. 325-26, para 6-A)
>
> > "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 Entry 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 and 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

[16] (2005) 4 SCC 214

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.* [*Godfrey Phillips India Ltd.* v. *State of U.P.*, (2005) 2 SCC 515 : (2005) 1 Scale 465] 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 Ramkrishna* v. *State of Bihar* [(1964) 1 SCR 897 : AIR 1963 SC 1667] where it was said in language which we cannot better: (SCR p. 908)

> "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 authorised 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."

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 summarised 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.* [AIR 1947 PC 60 : 74 IA 23] , AIR at p. 65, *A.S. Krishna* v. *State of Madras* [1957 SCR 399 : 1957 Cri LJ 409] , *State of Rajasthan* v. *G. Chawla* [1959 Supp (1) SCR 904 : 1959 Cri LJ 660] , *Katra Educational Society* v. *State of U.P.* [(1966) 3 SCR 328 : AIR 1966 SC 1307] , *D.C. Johar & Sons (P) Ltd.* v. *STO* [(1971) 27 STC 120 (SC)]

and *Kannan 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* [1957 SCR 399 : 1957 Cri LJ 409] , *A.B. Abdul Kadir* v. *State of Kerala* [(1976) 3 SCC 219 : 1976 SCC (Tax) 270] , SCC at p. 232 and *Federation of Hotel & Restaurant Assn. of India* v. *Union of India*[(1989) 3 SCC 634] , SCC 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* v. *Union of India* [(2004) 1 SCC 712 : (2003) 10 Scale 141]).

(*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 extraterritorially. (See *Poppatlal Shah* v. *State of Madras* [(1953) 1 SCC 492 : 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 have been defined, as we have already noted, in Section 65(41). Each of the sub-clauses of that clause 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 clearing and forwarding agents has been dealt with under clause (*j*) and service provided by goods transport operators has been provided under clause (*l*) [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 a 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 of 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 Sections 65(41)(*j*) and 67(*m-a*) in 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 Assn. of India* v. *Union of India* [(1989) 3 SCC 634] : (SCC pp. 652-53, paras 30-31)

> " '… 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."

78. Mr. Ojha submitted that in the facts of that case, the Supreme Court had found that the transport of goods and passengers by road or inland waterways was based on two separate aspects which had led to the imposition of a tax by both the State as well as the Union. It was submitted that the Supreme Court had held that while Parliament had the legislative competence to tax the service aspect of that transaction,

the States were empowered to legitimately impose a tax by virtue of Entry 56 of List-II falling in the Seventh Schedule.

79. Mr. Ojha then submitted that the contention of the writ petitioners based on Section 5 of the IGST is also clearly misconceived. It was argued that Section 5(1) merely relates to a tax on the inter-state supply of services. The submission was that it is not a charging provision in respect of the import of goods. The aforesaid submission was in essence a reiteration of the distinction which Mr. Ojha bids us to bear in mind between an inter-state supply of imported goods and the import of goods itself. It was then submitted that the mere treatment of the transaction as a supply of service would have no bearing on the liability that stands cast upon the petitioner to pay the additional duty of customs under Section 3(7) of the CTA. It was in this connection argued that undisputedly, the subject goods are sent to MROs' located outside India who undertake the requisite repairs and whereafter the goods are re-imported. It was submitted that as long as a re-import of goods has occurred, the petitioner cannot seek exemption from the payment of an additional duty of customs since the import of goods is not concerned with the supply of services at all. It was thus reiterated that the mere inclusion of import within the scope of inter-state supplies does not absolve the petitioner from the incidence of tax under the CTA.

80. Mr. Ojha also questioned the argument of hardship and double taxation by submitting that as long as a transaction can be said to fall within the ken of a particular tax statute, courts would not be boggled by a perceived hardship that the assessee may assert or allege. Learned counsel in this regard referred to the following celebrated passage from

the **Bank of Chettinad Ltd. vs. CIT**[17]:-

> **"**19.** A passage from the opinion of Lord Russell of Killowen at page 24 may usefully be cited. It is as follows:
>
> I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in Partington v. The Attorney-General (1869) L.R. 4 H.L. 100 : 'As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear***"

81. While on Section 5(1), Mr. Ojha submitted that the fallacy of the argument addressed on that score is manifest from Section 5(1) itself embodying the phrase *"levied and collected in accordance with Section 3 of Customs Tariff Act"*. According to learned counsel, there could be no starker manifestation of a legislative intent to preserve the additional duty which gets attracted by virtue of Section 3(7) of the CTA. According to Mr. Ojha, the only significance of the Proviso to Section 5 is its objective to indicate that the levy of an additional duty under Section 3(7) would be over and above the tax which comes to be attracted on the supply component of the transaction. This too was thus an extension of Mr. Ojha's principal argument of the import of goods being a separate and distinct taxable event.

82. It was further argued that the treatment of a transaction under the GST regime which purports to classify supplies in the distinctive categories of goods or services cannot be stretched to the extent of

[17] 1940 SCC OnLine PC 29

wiping out a charge that is created and a tax which becomes imposable under a plenary statute. The submission was that merely because the CGST and the IGST describe activities or transactions as a supply of goods, services or both, the same cannot apply to all legislations universally. In view of the above, it was his submission that while the transaction would be liable to be treated as a supply of services insofar as IGST is concerned, the same would not wipe out the liability of the petitioner of the tax which gets attracted on the import of goods.

83. Turning then to the merits of the challenge which pertained to the Notifications so issued, Mr. Ojha submitted that if the contention of the petitioner that the respondents have no power to levy an additional duty of customs were to be accepted, then Notification no. 45/2017 would be liable to be struck down in its entirety. The submission was that if the petitioner's challenge were to be accepted at face value, then the entire exemption itself would vanish since the arguments addressed impact the very foundation of the exemption notification.

84. Learned counsel submitted that the power to partially quash or sever applies only within the limited possibility of such a direction not impacting the foundation of the order itself. Learned counsel in this regard cited for our benefit the following observations appearing in **Dy. CIT Central Circle vs. ASM Traxim Pvt. Ltd. And Others**[18]**:**

> **"28.** Mr. Menon had commended for our consideration the invocation of the principle of severability. The power to sever and to disgorge a part which is offending and unsustainable could be wielded, provided it does not impact the very foundation of an order. However, and as we had noticed hereinabove, the considerations for the framing of an order under Section 245D(4) and 245H do not proceed on a consideration of factors which may be said to be distinct or independent. Both are informed by and founded upon cooperation and full and true disclosure and which are the essential

[18] 2024 SCC OnLine Del 7509

> prerequisites for computation of the settlement amount as well as consideration of grant of immunity. The aforenoted two factors thus constitute the very substratum of an application for settlement.
>
> **29.** Interfering with the grant of immunity on grounds as suggested by the writ petitioner would essentially amount to the Court questioning the validity of the acceptance of the application itself by the ITSC. That is not even the suggestion of the writ petitioner in these proceedings. If the twin statutory conditions were found to be satisfied and thus meriting an order of settlement under Section 245D(4) being rendered, the position would not vary or undergo a change when it come to the question of grant of immunity. We thus find ourselves unable to countenance the challenge as raised.
>
> **30.** Accordingly, and for all the aforesaid reasons, the writ petition fails and shall stand dismissed."

85. Mr. Ojha lastly sought to distinguish the judgment of the Supreme Court in *Mohit Minerals* by submitting that unlike the facts as they obtained in that case, here we are concerned with a transaction in respect of a single supply albeit having two aspects. According to Mr. Ojha, *Mohit Minerals* was concerned with a CIF contract and thus the principal question was the service element involved in the case of transportation. However, according to learned counsel, unlike what would obtain in a *CIF* contract where the obligation to transport goods up to the port is on the supplier and which in the facts of that case was the foreign exporter, here the repair services have been received directly by the petitioner. Therefore, according to Mr. Ojha, the decision in *Mohit Minerals* has no application. It is the aforenoted rival submissions which fall for determination.

THE INTERSTATE LEVY ON SUPPLY OF GOODS, SERVICES OR BOTH

86. From a constitutional standpoint, it becomes pertinent to note that for 75 years post the formation of the Republic, the power of the Union and the States to legislate was regulated by Article 246 of the Constitution. In terms of Article 246(1), Parliament stood conferred with the exclusive power to make laws with respect to matters

enumerated in List I of the Seventh Schedule commonly known as the Union list. Subject to clauses (1) and (2) of Article 246, Legislatures of State are granted the exclusive power to make laws with respect to matters set out in List II of the Seventh Schedule and which we generally refer to as the State List. Article 246(2) constituted the source of the concurrent powers which the Constitution conferred upon Parliament and Legislatures of States to make laws with respect to matters enumerated in List III of the Seventh Schedule- the Concurrent List**.**

87. Thus the source of the power to legislate as conferred upon Parliament and States was Article 246 of the Constitution. Apart from the above, Article 248 clothed Parliament with a residuary power of legislation thus enabling it to make laws with respect to matters which may not have been enumerated in either the Concurrent or the State Lists. Sub-article (2) thereof further expanded the residuary power vested in Parliament by providing that the same would include an authority to make a law imposing a tax not otherwise enumerated in either the State or the Concurrent List.

88. Article 254 of the Constitution embodies the principles of repugnancy and guides us in resolving questions which may arise when the law made by the Legislature of a State comes in conflict with a provision of a law which Parliament would have promulgated. Article 254 of the Constitution, however, was principally concerned with legislation which Parliament or the Legislature of a State may come to promulgate in respect of matters falling in the Concurrent List by virtue of sub-article (2) of Article 254. Thus while the Constitution undoubtedly recognizes the preeminence of laws made by Parliament, it incorporated appropriate covenants in terms of which notwithstanding

the law made by a State being repugnant to the provisions of an earlier law framed by Parliament, the former would prevail provided it had been reserved for the consideration of the President and had received its assent. The set of constitutional provisions noticed above thus sought to strike a just balance between the powers of the Union and the States and built a foundation for the broad federal structure which the Constitution intended to espouse. The Articles noticed above were thus intended to act in furtherance of the constitutional goal of fiscal federalism.

89. The Constitution Amending Act and the paradigm shift that it introduced cannot possibly be overemphasized. In 2016, amendments came to be introduced in the Constitution which ushered in seminal changes in the distribution of taxing powers between Parliament and Legislatures of individual States. Article 246A thus ordains that both Parliament as well as the Legislature of every State would have the power to make laws in respect of a goods and services tax that may be imposed either by the Union or a State. Article 246A(2), however, reserves exclusive power in Parliament to make laws with respect to the levy of a goods and services tax where the supply of goods, services or both were to take place in the course of interstate trade or commerce. It is also pertinent to note that Article 246A itself came to be introduced in the Constitution by way of a non-obstante clause which thus accorded primacy to its provisions over and above those contained in Articles 246 and 254.

90. Part XII of the Constitution deals with the subject of finance, property contracts and suits. We are in the present batch concerned primarily with Chapter I as placed in Part XII. For our purposes, it would be Article 269 which would be relevant and which deals with the

distribution of revenues between the Union and States and taxes levied on the sale or purchase of goods as well as consignment thereof. Here too, the tax was to be levied and collected by the Union Government and thereafter assigned to respective States in accordance with the formula set out in sub-article (2).

91. By virtue of the Constitution Amendment Act, Article 269A came to be inserted in Chapter I comprised in Part XII, and it is this Article which principally constitutes the machinery provision for the purposes of levy of a goods and services tax. It thus declares that a goods and services tax on supplies in the course of interstate trade or commerce would be levied and collected by the Union Government and apportioned amongst the Union and the States in a manner that Parliament may by law prescribe based on the recommendation of the Goods and Services Tax Council.

92. Of significance is the Explanation which appears in Article 269A(1) which embodies a deeming fiction to the effect that a supply of goods, services, or both in the course of import into the territory of India would be deemed to be a supply in the course of interstate trade or commerce. The Explanation thus stretched the levy of a goods and services tax not just to supply of goods or services within the constituent States of the Union but also brought within its ambit the supply of goods or services which may have occurred in the course of import. Of equal importance is Article 269A(5) which confers exclusive authority upon Parliament to, by law formulate principles for determining not just the place of supply but also when a supply of goods, services, or both could be said to have taken place in the course of interstate trade or commerce. Article 269A thus constitutes the repository of the power of Parliament to regulate the levy of a goods

and services tax on all supplies which may occur in the course of interstate trade or commerce and with the latter expression being liable to be read as including imports into the territory of India.

93. The Constitution Amendment Act also saw various amendments which came to be introduced in Article 270. As that Article originally stood, it had provided that taxes on income other than agricultural income, though levied and collected by the Union Government, would be distributed between the Union and the States in the manner provided in that provision. That Article had initially undergone amendments by virtue of the Constitution Eightieth Amendment Act, 2000 and whereafter the words "income" and other than "agricultural income" were substituted by the employment of the phrase "all taxes and duties referred to in the Union List". The distribution of taxes and duties which Article 270 sought to regulate was however subjected to the sweep of Articles 268, 269 and 269A post the promulgation of the Constitution Amendment Act. Similar and corresponding provisions which were intended to give effect to the insertion of Articles 246A and 269A came to be inserted with the addition of sub-articles (1A) and (1B) therein. The broad subject of distribution of the goods and services tax amongst the Union and the States came to be made the subject of consideration of the Goods and Services Tax Council which was envisaged by Article 279A.

94. In order to give effect to the shift from a tax imposable on the sale or purchase of goods, which was the major field of taxation under the Constitution as it stood prior to the Constitution Amendment Act, Articles 246A and 269A introduced a significant shift in terms of which the supply of goods or services became the basis for the levy of tax. This necessarily required appropriate amendments being also made in

the three lists that form part of the Seventh Schedule and demarcate the fields of legislation.

95. The underlying intent of the Constitution Amendment Act is evident from a plain reading of its SOR which explains its principal purpose as being the various indirect taxes and levies which were till then being imposed by States as well as the Union in the exercise of the broad division of legislative power which had existed in the Constitution coming to be subsumed in a singular levy, namely, the goods and services tax. The Bill explained the adoption of the goods and services tax as being aimed at ensuring the removal of the "cascading effect" of taxes and for the creation of a "national market" for goods and services. It also explicitly alluded to the intent of Parliament to do away with the innumerable individual taxes and levies which were to include amongst others, central excise duties, additional excise duties, additional customs duties, as well as special additional duties of customs, central surcharges and cesses. It was thus the avowed and stated objective of the Constitution Amendment Act to do away with those individual levies and submerge them in the goods and services tax. The Constitution Amendment Act also represented the clear and stated intent of Parliament to do away with various value-added taxes, sales taxes, entertainment taxes, central sales tax and a host of other taxes which were till then being imposed by individual States. After so expressing the broad intent, the Constitution Amendment Act in unequivocal terms provided for the substitution of those levies with the imposition of a goods and services tax alongside the levy of an integrated goods and services tax on all interstate transactions.

96. For the purposes of lending clarity to some of the principal words

and phrases connected with the goods and services tax regime which was proposed to be promulgated post the Constitution Amendment Act, parallel amendments also came to be inserted in Article 366. For instance, the expression "goods" came to be defined in Article 366(12) as including all materials, commodities and articles. The expression "goods and services tax" was explained by Article 366(12)(a) to mean a tax on the supply of goods, services or both but to the exclusion of taxes on the supply of alcoholic liquor for human consumption. The word "services" was succinctly defined by Article 366(26)(a) as meaning anything "other than goods".

97. Post the fundamental alternation of the landscape pertaining to taxation, Parliament then took upon itself the task of framing an appropriate legislation to deal with the levy and collection of a goods and services tax which was envisioned under the prominent Articles of the Constitution noted hereinabove. However, before we proceed to notice some of the salient provisions forming part of the CGST and IGST, it would also be pertinent to briefly take note of some of the amendments which came to be made in the three legislative lists placed in the Seventh Schedule to the Constitution.

98. As was noticed in the preceding parts of this decision, List I saw the omission of Entries 92 and 92C which had dealt with taxes on the sale or purchase of newspapers and advertisements as well as services. The aforesaid omissions clearly were in implementation of the avowed objective of the Constitution Amendment Act which was principally aimed at the elimination of multiple levies and the taxation regime itself transforming into a uniform levy on the supply of goods, services or both. Entry 92A comprised in List 1, however, was retained and saw no significant changes. Similarly, a tax on the consignment of goods which

constituted the subject of Entry 92B, was also omitted. This since both those Entries were concerned with a tax on the sale or purchase of goods as well as consignment thereof where such events were to take place in the course of interstate trade or commerce.

99. Since the provisions of Article 246A read along with 269A now envisioned a simultaneous or contemporaneous power being conferred upon Parliament and the Legislature of States to levy a goods and service tax, Entries 52 & 55 falling in List II were omitted. These were concerned with the taxes which the States could impose on the entry of goods into a local area as well as on advertisements other than those which may be published in newspapers. Entry 54 which constituted the principal provision governing the authority of States to impose a tax on the sale or purchase of goods, however, was significantly amended and the power of States was restricted to a levy on the sale of petroleum, crude, high-speed diesel, motor spirit, natural gas, aviation turbine fuel and alcoholic liquor for human consumption. Of significance, however, was the carve-out with respect to sales in the course of the interstate trade or commerce including sales in the course of international trade and commerce of such goods. Entry 62, which enabled States to tax luxuries including entertainments, amusements, betting and gambling also came to be amended with a power to levy a tax on entertainments and amusements alone being retained and that too to the extent that those imposts were levied and collected by local bodies and authorities.

100. This would then constitute an appropriate juncture to notice some of the salient provisions made in the CGST and IGST enactments which came to be promulgated by Parliament in terms of the authority to legislate as conferred by the aforenoted Articles of the Constitution. While we have extracted most of the provisions of the CGST and IGST

which in our opinion would have a bearing on the principal issues that are posited for our consideration, we for the purposes of sketching a backdrop for the discussion which follows and to lend context to the same deem it appropriate to briefly revisit some of those provisions.

101. The CGST, as is evident from its Preamble, was envisaged to be a legislation which would make appropriate provisions for a levy and collection of tax on all intra-state supply of goods, services or both. This legislation essentially represented the essay of Parliament in extension of the power conferred by Article 246A(1) which enabled it to levy a goods and services tax on supplies. From out of the various expressions and words which came to be defined by Section 2 of the CGST, it would be pertinent to recall how that provision defines and assigns a meaning to expressions such as composite supply, continuous supply of goods, continuous supply of services, goods, integrated tax, intra-state supply of goods or services, fixing location of the recipient of services, recipient of supply of goods or services, the word services itself taxable supply. From the meaning assigned to the aforesaid expressions, we gather that the statute understood a composite supply to mean one which may consist of two or more taxable supplies of goods or services or both including any combination thereof and which would have been either naturally bundled or supplied in conjunction with each other. Goods were defined to mean every kind of immovable property including actionable claims and other tangible articles. The definition of goods only excludes money and securities. An integrated tax was defined by Section 2(58) to mean the tax levied under the IGST. For purposes of gathering the meaning to be assigned to the expression intra-state supply of goods, the CGST bids one to look at Section 8 of the IGST. Sub-sections (70) and (71) of Section 2 laid out principles for

the location of the supplier or recipient of services.

102. Apart from the concept of composite supply, which was introduced by Section 2(30), Section 2(74) of the CGST defined mixed supply as being two or more individual supplies of goods or services or any combination thereof made in conjunction with each other for a single price and where such supply may not constitute a composite supply. Thus the definition clause not only came to assign a meaning to goods and services, but it also introduced the concepts of composite and mixed supply which we would have an occasion to examine in greater detail in the subsequent parts of this decision.

103. The scope of supply is explained and defined by Section 7 which stipulates that the said expression would include all forms of supply of goods, services or both made for consideration by a person in the course or furtherance of business. Included within the scope of supply are activities undertaken by a person when provided to its members or constituents for cash, deferred payment or other valuable consideration. The expression supply was also defined to include the import of services as well as activities specified in Schedule I when made or agreed to be made without consideration. Of seminal importance is Section 7(1A) which stipulates that where certain activities or transactions constitute a supply in terms envisaged under sub-section (1), they would be treated either as a supply of goods or a supply of services in terms thereof and the manner in which they may be so classified in the Schedule to the CGST. By virtue of sub-section (3) the Union Government was statutorily empowered to specify transactions which would either be treated as a supply of goods as opposed to a supply of service and vice versa on the recommendation of the GST Council.

104. Sections 8 and 9 are the charging sections which speak of the tax which would be leviable and attracted on all intra-state supply of goods and services as well as the manner in which the tax liability of a composite or mixed supply would be determined. By virtue of Sections 12 and 13 the statute fixed a steady point at which a liability to pay taxes on goods or services would arise.

105. This then takes us to the Schedule appended at the end of the CGST Act and which broadly classifies activities and transactions and guides us in determining which would constitute a supply of goods, a supply of services or a mixed supply. Schedule I lists out activities which would be liable to be treated as supplies even if made without consideration. Included within this Schedule is the subject of import of services by a person from a related entity or from any of its other establishments outside India in the course or furtherance of business. Relevant for our purposes is, however, Schedule II which in terms of Entry 3 classifies treatments or processes applied to another person's goods as a supply of services. Supply of services is thereafter also dealt with in Entry 5 which sets out various activities and transactions which would amount to a supply of services. Composite supplies is a subject which is dealt with in Entry 6 and which specifies a certain genre of supplies that are liable to be treated as a supply of services. The classification of supply within the sub-category of goods or services thus is in extension of the power conferred by sub-section (1A) as well as sub-section (3) of Section 7. On a more fundamental plane, the aforesaid classification flows from the provisions comprised in Article 269A(5) itself.

106. While the CGST is concerned with the supply of intra-state supplies, the IGST constitutes an enactment pertaining to the levy and

collection of a tax on the interstate supply of goods or services. What needs to be borne in mind is that while a tax on supplies of goods or services intra-state is one which can now and under the constitutional scheme be levied by both the Union as well as individual States, a tax on inter-state supply, be it of goods or services, is one which can only be imposed by the Union. This flows directly from the broad division of the taxing power which is recognized by Article 246A of the Constitution.

107. From the preceding discussion and on a consideration of the significant constitutional amendments which came to be promulgated followed by the rollout of the goods and services tax regime the key takeaways would appear to be the following. The distribution of the legislative power, including that of imposition of a tax which was otherwise regulated by Articles 246, 269 and the three lists which stand placed in the Seventh Schedule to the Constitution, the Constitution now envisions a contemporaneous and simultaneous vesting of authority in the Union and the State Legislatures to impose a tax in terms envisaged under Article 246A. The said tax is not one related to the sale, purchase or consignment but to the supply of goods and services.

108. Article 246A as noticed above, commences with a non obstante clause and is thus clearly intended to be accorded primacy over the traditional powers of legislation including the power to impose a tax which would flow from Article 246 of the Constitution. It is equally important to bear in mind the indubitable fact that since the Union, as well as the States, came to be empowered to levy a goods and services tax, and what the Supreme Court has aptly chosen to describe as the exercise of simultaneous power, the non-obstante was also ordained to

override Article 254 of the Constitution. Article 246A thus represents and acknowledges the authority of both constituents to have the authority to levy a goods and services tax notwithstanding anything contained in the Seventh Schedule and which in any case saw suitable amendments being introduced to synchronize with the amendments made in the various covenants of the Constitution noticed above.

109. The second key point that merits notice is the treatment of inter-state trade and commerce which was a subject that came to be placed solely in the province of the Union and liable to be regulated by parliamentary legislation. By virtue of Article 269A a goods and services tax which becomes leviable in the course of interstate trade and commerce thus came to be placed in the exclusive domain of the Union which now stands enabled not only to levy that tax but also formulate and determine the principles for identifying the place of supply as well as when a transaction would constitute a supply of goods, services or both when effected in the course of interstate trade or commerce.

110. Equally important is the Explanation which forms part of Article 269A and which introduces a legal fiction to the effect that supplies of goods, services or both in the course of import into the territory of India shall be deemed to be a supply which occurs in the course of interstate trade or commerce. The Explanation assumes significance since the phrase import into the territory of India when viewed from a plain textual angle would ordinarily not be liable to entail the movement of goods or the provision of supplies within States of the Union. This thus undoubtedly represents the objective of levying a goods and service tax on the import of goods and services.

111. Regard must also be had to the fact that neither the Customs Act nor for that matter the CTA at any point of time envisioned a levy of duty on services per se. The two legislations were and continue to be an impost on goods. They thus remain confined to Entry 83 falling in List I of the Seventh Schedule. It is this aspect which constitutes one of the principal questions for our consideration and that being whether the levy of an import duty on a transaction which comes to be classified as a supply of services under the IGST would be sustainable and whether it would be open for the respondent to either re-characterise that transaction as that of goods.

112. Undisputedly, insofar as BCD is concerned, the physical re-import of goods stands exempted by virtue of Notification 50/2017. Turning then to IGST, the petitioner was discharging the liability which accrued in accordance with Notification 45/2017 which valued the re-imported goods after repairs at the fair cost of repair. It is this notification which came to be amended by Notification 36/2021 and saw the substitution of the words "duty of customs" with "Said duty, tax or cess…." Of equal import is the Explanation which came to be inserted and which makes an unambiguous reference to the integrated tax referred to in Section 3(7) of the CTA as being leviable *"…besides the customs duty as specified…."*. It is these amendments that led to the institution of the present writ petitions.

113. However, reverting back to our review of the constitutional amendments, we find upon a consideration of the SOR of the Constitution Amendment Act that its cornerstone was the avowed objective of replacing a multitude of indirect taxes being imposed by the Union and the States. Parliament thus deemed it appropriate to adopt measures which would enable trade and commerce to overcome

the *"cascading effect"* of innumerable individual levies, dismantle the barriers to the free flow of goods and services and the creation of a common market for goods and services. While introducing the amendments, the SOR further explains that the goods and services tax would subsume the various Union and State levies which were otherwise being imposed. These were spelt out to include indirect taxes and levies such as the additional duty of excise, service tax as well as the additional/special additional duties of customs, surcharges and cesses *"so far as they relate to the supply of goods and services"*. It was thus clearly envisaged that all of the aforenoted levies and taxes would get submerged in and replaced by the common goods and services tax.

114. The mandate of Articles 246, and 269A and the corresponding constitutional amendments saw the promulgation of the CGST and the IGST thereafter. The SOR of the IGST in unambiguous terms speaks of the tax introduced by that legislation as being imposable on the import of goods as well as on services albeit on a reverse charge basis. The SOR also adverts to the power sought to be conferred for the determination of the nature of supply which would indubitably include the authority to classify a supply as being either of goods or services. It is this central theme and avowed objective of that legislation which then stands mirrored in the provisions noticed above.

115. The IGST at the very outset borrows the concept of supply from Section 7 of the CGST, adopts principles governing the export and import of services and defines what would constitute an "integrated tax. That expression, as noticed above, is defined to mean the tax imposable under that statute. Section 7 of the CGST assumes significance since it not only sketches out the scope of supply as being applicable to all

forms of goods and services, but it also includes within its ambit the import of services and explains with sufficient clarity what would constitute mixed or composite supplies. We are thus not left to grapple with the discernment of the nature of a transaction, of hybrid contracts, transactions constituting more than one element and thus avoid recalling the whole body of precedent which Article 366(29A) spawned.

116. Section 7(1A) then stipulates that once a supply falls within the ambit of sub-section (1) thereof, it shall be treated "either as" a supply of goods or services as specified in Schedule II to that enactment. Schedule II to the CGST then proceeds to arrange and place transactions in different categories as being either a supply of goods or of services which would constitute composite supplies. Suffice it to note that it was not the case of the respondents that the transaction of repair of the subject goods would fall in the category of a composite supply. The assertion of the writ petitioners of the transaction clearly falling within the ambit of Clause 3 of Schedule II was also not questioned.

117. Before proceeding ahead to notice the salient provisions of the IGST, it becomes important to note that the characterization of the nature of a supply under the CGST Act by virtue of Section 7(1A) and Schedule II is adopted and embraced by the IGST in terms of Section 20 of that statute. This exercise of a statutory classification and characterization of the genre of supply is clearly in accordance with the mandate of Articles 246A and 269A of the Constitution. Although Sections 7 and 8 of the IGST thereafter proceed to declare when a supply of goods or services would be treated as a supply in the course of interstate trade or commerce or intra-state, these provisions do not

undertake a de novo classification or categorization of supplies between that of goods or services. Section 7 thus and insofar as imports are concerned, confines itself to specifying when an import of goods or services would be treated as in the course of interstate trade or commerce.

118. What thus emerges from the aforesaid discussion is the following. The goods and services tax is clearly intended to wipe away the erstwhile regime of multiple taxes and levies and replace it with the imposition of a common levy which could be simultaneously levied by both the Union and the States. The Constitution thereafter proceeds to lay in place an elaborate machinery for the apportionment of those levies amongst the constituents of the Union. The SOR of the Constitution Amendment Act as well as of the IGST at more than one place speaks of the multiple levies which would get submerged and absorbed in the goods and services tax and thus replace all erstwhile and existing taxing regimes. These were spelt out as including additional duties of excise, additional and special additional duties of customs and a host of other surcharges and levies.

119. Of equal significance is the constitutional reservation with respect to the subject of interstate trade or commerce in favour of the Union. This is further explained to include the import of goods, services or both. The power to classify a supply between that of goods or services also came to be contemporaneously reserved in favour of the Union and subject to parliamentary legislation exclusively. In implementation of the broader constitutional theme, Parliament came to enact the CGST and IGST. On a conjoint reading of those two statutes, we further find that the categorization of supplies and whether they would constitute a supply of goods or of services or both comes to be

conclusively settled and attains finality in terms of the Schedules appended to the CGST and which are thereafter adopted under the IGST.

120. For the sake of completeness of the narrative and in order to chronicle the statutory changes which followed this would be an appropriate stage to briefly notice the amendments which came to be made to the Customs Act and which were ushered in by virtue of the Taxation Laws (Amendment) Act, 2017. The amendments which came to be inserted in Section 3 of the CTA owe their genesis to this legislation. From the SOR of that Amending Act, we find that the principal objectives underlying those amendments were the following: -

> "STATEMENT OF OBJECTS AND REASONS
>
> As the goods and services tax is to be introduced with effect from the 1st day of July, 2017, the following four legislations are in the process of being enacted, namely:—
>
> (a) the Central Goods and Services Tax Bill, 2017;
> (b) the Integrated Goods and Services Tax Bill, 2017;
> (c) the Union Territory Goods and Services Tax Bill, 2017;
> (d) the Goods and Services Tax (Compensation to the States) Bill, 2017.
>
> 2. Consequently, the central excise duty on excisable goods [other than Petroleum Crude, Motor Spirit (Petrol), High Speed Diesel, Aviation Turbine Fuel and Natural Gas], the service tax on taxable services, the value added tax on sale or purchase of goods and certain other taxes shall be subsumed in the goods and services tax.Therefore, it requires certain consequential amendments in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Finance Act, 2001 and the Finance Act, 2005 and repeal of certain enactments.
>
> 3. The Customs Act, 1962 provides for removal of goods from a customs station to a warehouse without payment of duty. It is proposed to amend the said Act to include 'warehouse' in the definition of "customs area" to ensure that an importer would not be required to pay the proposed integrated goods and services tax at the time of removal of goods from a customs station to a warehouse. It is also proposed to amend the said Act to insert new provisions therein so as to provide for furnishing of information by specified persons in respect of import or export of goods, on the lines of the Income-tax Act, 1961, the Central Excise Act, 1944,

Chapter V of the Finance Act, 1994 and the legislations referred to in paragraph 1.

4. The Customs Tariff Act, 1975 is proposed to be amended to provide for levy of integrated goods and service tax and goods and services tax compensation cess on imported goods, including valuation thereof, so as to provide a level playing field to the domestic industry vis-à-vis imported goods.

5. Consequent to the proposed repeal of the Central Excise Tariff Act, 1944 vide the Central Goods and Services Tax Bill, 2017, a new Schedule, namely, the Fourth Schedule is proposed to be inserted in the Central Excise Act, 1944 to provide for classification and duty rates for excisable goods, namely, Petroleum Crude, Motor Spirit (Petrol), High Speed Diesel, Aviation Turbine Fuel and Natural Gas, Tobacco and Tobacco products, which are presently covered under Chapter 24 and Chapter 27 of the Central Excise Tariff Act, 1985, so that the said Schedule will continue to attract central excise duty even after the commencement of the legislations referred to in paragraph 1. Certain consequential amendments are proposed to be made in the Central Excise Act, 1944 also relating to certain definitions, charging sections, provisions of deemed manufacture and insertion of emergency powers to increase the rate of duty, on the same lines as are presently provided in the Central Excise Tariff Act, 1985.

6. Consequent to the introduction of goods and services tax, the cesses or surcharges levied or collected as duties of central excise on excisable goods or as service tax on taxable services would become irrelevant, as the supplies of such goods [except Petroleum

Crude, Motor Spirit (Petrol), High Speed Diesel, Aviation Turbine Fuel and Natural Gas, Tobacco and Tobacco products] and such services would be chargeable to goods and services tax.The proposed Bill seeks to abolish certain cesses or surcharges which are levied or collected as duty of excise or service tax under various Acts. The proposed Bill also seeks to abolish the cess levied on water consumed by certain industries and by local authorities under the Water (Prevention and Control of Pollution) Cess Act, 1977.

7. The Bill seeks to achieve the above objectives.

NEW DELHI; ARUN JAITLEY

The 27th March, 2017."

121. The text of the enactment, insofar as it is relevant for our purposes is reproduced below:-

"Taxation Laws (Amendment) Act, 2017

[Act 18 of 2017] *[4th May, 2017]*

An Act further to amend the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Sales Tax Act, 1956, the Finance Act, 2001 and the Finance Act, 2005 and to repeal certain enactments.

Be it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:—

1. Short title and commencement.— (*1*) This Act may be called the **Taxation Laws (Amendment) Act, 2017**.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

CHAPTER I

Customs

2. Amendment of section 2.— In the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Customs Act), in section 2, in clause (*11*), after the words "the area of a Customs station", the words "or a warehouse" shall be inserted.

3. Insertion of new sections 108A and 108B.— In the Customs Act, after section 108, the following sections shall be inserted, namely:—

"108A. *Obligation to furnish information*.— (*1*) Any person, being—

(*a*) a local authority or other public body or association; or

(*b*) any authority of the State Government responsible for the collection of value added tax or sales tax or any other tax relating to the goods or services; or

(*c*) an income-tax authority appointed under the provisions of the Income-tax Act, 1961 (43 of 1961);

(*d*) a Banking company within the meaning of clause (*a*) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934); or

(*e*) a co-operative bank within the meaning of clause (*dd*) of section 2 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (47 of 1961); or

(*f*) a financial institution within the meaning of clause (*c*), or a non-banking financial company within the meaning of clause (*f*), of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934); or

(*g*) a State Electricity Board; or an electricity distribution or transmission licensee under the Electricity Act, 2003, (36 of 2003) or any other entity entrusted, as the case may be, with such functions by the Central Government or the State Government; or

(*h*) the Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908 (16 of 1908); or

(*i*) a Registrar within the meaning of the Companies Act, 2013 (18 of 2013); or

(*j*) the registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988 (59 of 1988); or

(*k*) the Collector referred to in clause (*c*) of section 3 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013); or

(*l*) the recognised stock exchange referred to in clause (*f*) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956); or

(*m*) a depository referred to in clause (*e*) of sub-section (*1*) of section 2 of the Depositories Act, 1996 (22 of 1996); or

(*n*) the Post Master General within the meaning of clause (*j*) of section 2 of the Indian Post Office Act, 1898 (6 of 1898); or

(*o*) the Director General of Foreign Trade within the meaning of clause (*d*) of section 2 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992); or

(*p*) the General Manager of a Zonal Railway within the meaning of clause (*18*) of section 2 of the Railways Act, 1989 (24 of 1989); or

(*q*) an officer of the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934, (2 of 1934)

who is responsible for maintaining record of registration or statement of accounts or holding any other information under any of the Acts specified above or under any other law for the time being in force, which is considered relevant for the purposes of this Act, shall furnish such information to the proper officer in such manner as may be prescribed by rules made under this Act.

(*2*) Where the proper officer considers that the information furnished under sub-section (*1*) is defective, he may intimate the

defect to the person who has furnished such information and give him an opportunity of rectifying the defect within a period of seven days from the date of such intimation or within such further period which, on an application made in this behalf, the proper officer may allow and if the defect is not rectified within the said period of seven days or, further period, as the case may be, so allowed, then, notwithstanding anything contained in any other provision of this Act, such information shall be deemed as not furnished and the provisions of this Act shall apply.

(*3*) Where a person who is required to furnish information has not furnished the same within the time specified in sub-section (*1*) or sub-section (*2*), the proper officer may serve upon him a notice requiring him to furnish such information within a period not exceeding thirty days from the date of service of the notice and such person shall furnish such information.

108B. *Penalty for failure to furnish information return*.— Where the person who is required to furnish information under section 108A fails to do so within the period specified in the notice issued under sub-section (*3*) thereof, the proper officer may direct such person to pay, by way of penalty, a sum of one hundred rupees for each day of the period during which the failure to furnish such information continues.".

CHAPTER II

Customs Tariff

4. Amendment of section 3.— In the Customs Tariff Act, 1975, (51 of 1975) in section 3,—

(*a*) in sub-section (*2*),—

(*i*) in clause (*ii*), for item (*a*), the following item shall be substituted, namely:—

"(*a*) the duty referred to in sub-sections (*1*), (*3*), (*5*), (*7*) and (*9*);";

(*ii*) in the proviso, in sub-clause (*b*), item (*ii*) shall be omitted;

(*b*) in sub-section (*6*), in clause (*ii*), for item (*a*), the following item shall be substituted, namely:—

"(*a*) the duty referred to in sub-sections (*5*), (*7*) and (*9*);";

(*c*) for sub-sections (*7*) and (*8*), the following sub-sections shall be substituted, namely:—

"(*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*).

(*8*) For the purposes of calculating the integrated tax under sub-section (*7*) on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, (52 of 1962) be the aggregate of—

(*a*) the value of the imported article determined under sub-section (*1*) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (*2*) of that section, as the case may be; and

(*b*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, (52 of 1962) and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (*7*) or the cess referred to in sub-section (*9*).

(*9*) Any article which is imported into India shall, in addition, be liable to the goods and services tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (*10*).

(*10*) For the purposes of calculating the goods and services tax compensation cess under sub-section (*9*) on any imported article where such cess is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, (52 of 1962) be the aggregate of—

(*a*) the value of the imported article determined under sub-section (*1*) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (*2*) of that section, as the case may be; and

(*b*) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (*7*) or the cess referred to in sub-section (*9*).

(*11*) The duty or tax or cess, as the case may be, chargeable under this section shall be in addition to any other duty or tax or cess, as the case may be, imposed under this Act or under any other law for the time being in force.

(*12*) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be,

chargeable under this section as they apply in relation to the duties leviable under that Act.".

122. The Notes on Clauses which accompanied the Bill explained the amendments being made in Section 3 of the CTA to provide for a levy of integrated goods and services tax as well as to provision for the imposition of goods and services tax compensation cess on "imported goods and/or services". The relevant part of those notes is extracted hereinbelow:

> "*Clause* 4 of the Bill seeks to amend section 3 of the Customs Tariff Act, 1975 so as to levy Integrated Goods and Service Tax and Goods and Services Tax Compensation Cess on imported goods and/or services.
>
> xxx xxx xxx
>
> *Clause 6* of the Bill seeks to amend section 3, the charging section, so as to replace the reference to the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985, with the reference to the proposed Fourth Schedule to the Central Excise Act, 1944, and to delete the provision for levy of special duty of excise provided under clause (b) of sub-section (1) of section 3."

123. It would also be pertinent to bear in mind the significant textual amendments as a result of which sub-section (7) of Section 3 came to be completely recast. In order to compare how it read pre and post its amendment by the Taxation Laws (Amendment) Act, 2017 we place below the following table: -

PRE- AMENDMENT	POST- AMENDMENT
3(7)The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force	3(*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].

124. The stage now stands set for us to examine Section 5 of the IGST alongside Section 3(7) of the CTA. However, before we proceed to commence down that path, we deem it apposite to render the following prefatory remarks which would guide us in appreciating the interplay between the different Articles of the Constitution and the entries comprised in the three legislative lists placed in the Seventh Schedule. Undisputedly, Article 246 constitutes the source of the legislative power and embodied the broad distribution of subjects between Parliament and the State Legislatures. It is this scheme which also informs Article 246A and which now enables both Parliament and the State Legislatures to frame laws with respect to the levy of a goods and service tax. That power, however, is made subject to the primacy accorded to Parliament insofar as supplies made in the course of interstate trade or commerce are concerned.

125. It is also pertinent to bear in consideration that in the present case, we are not concerned with a conflict arising between competing legislations framed by Parliament and a State Legislature but the claimed right to tax by the Union itself albeit flowing from two separate and distinct sources which the Constitution creates. As was noticed in the preceding parts of this decision, while the authority of the Union to levy a goods and services tax or for that matter, an integrated tax on the import of goods or services is not really questioned, the contestation pivots upon whether Entry 83 enables it to tax the same transaction notwithstanding it having been subjected to a levy under the IGST.

126. Reverting then to the issue of the interplay between the primary provisions contained in the Constitution and the various entries appearing in the three legislative lists placed in the Seventh Schedule, one may usefully refer to the following passages from the decision of the Supreme Court in **Calcutta Gas Co. (Proprietary) Ltd. vs. State of W.B.**[19]

> "**8.** At this stage it would be convenient to read the relevant articles of the Constitution.
>
> "246. (1) Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').
>
> (3) Subject to clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
>
> List I—Union List
>
> Entry 7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
>
> Entry 52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
>
> List II—State List
>
> Entry 24. Industries subject to the provisions of Entries 7 and 52 of List I.
>
> Entry 25. Gas and gas-works.
>
> Entry 26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.
>
> Entry 27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III."
>
> Before construing the said entries, it would be useful to notice some of the well settled rules of interpretation laid down by the Federal Court and this Court in the matter of construing the entries. The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation : they demarcate the area over which the appropriate legislatures can operate. It is also well settled that widest amplitude should be given to the language of the entries. But some of the entries in the different Lists or in the same

[19] AIR 1962 SC 1044

List may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. When the question arose about reconciling Entry 45 of List I, duties of excise, and Entry 18 of List II, taxes on the sale of goods, of the Government of India Act, 1935, Gwyer, C.J., in *In re Central Provinces and Berar Act 14 of 1938* [(1939) FCR 18, 42, 44] observed:

> "A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

The learned Chief Justice proceeded to state:

> "… an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation at empted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If indeed a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail."

The Federal Court in that case held that the entry "taxes on the sale of goods" was not covered by the entry "duties of excise" and in coming to that conclusion, the learned Chief Justice observed:

> "Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning."

The rule of construction adopted by that decision for the purpose of harmonizing the two apparently conflicting entries in the two Lists would equally apply to an apparent conflict between two entries in the same List. Patanjali Sastri, J., as he then was, held in *State of Bombay* v. *Narothamdas Jethabai* [(1951) SCR 51] that the words "administration of justice" and "constitution and organization of all courts" in Item 1 of List II of the Seventh Schedule to the Government of India Act, 1935, must be understood in a restricted

> sense excluding from their scope "jurisdiction and powers of courts" specifically dealt with in Item 2 of List II. In the words of the learned Judge, if such a construction was not given "the wider construction of Entry 1 would deprive Entry 2 of all its content and reduce it to useless lumber". This rule of construction has not been dissented from in any of the subsequent decisions of this Court. It may, therefore, be taken as a well settled rule of construction that every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory."

127. In **State of A.P. vs. National Thermal Power Corpn. Ltd.**[20], an interesting question cropped up before the Supreme Court and that being whether States could tax an interstate sale of electricity notwithstanding the restrictions imposed by Articles 269 and 286. Answering that question, the Supreme Court pertinently observed thus:-

> "**25.** Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53 List II, having been left unamended by the Sixth Amendment from another angle. The Sixth Amendment did not touch Entry 53 in List II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92-A of List I and arguments were advanced, with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92-A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned, even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter, such a plea cannot be countenanced.
>
> **26.** The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in the Seventh Schedule. After the decision of the larger Bench in *Bengal Immunity Co. Ltd.* [AIR 1955 SC 661 : (1955) 2 SCR 603] and the Constitution Bench decision in *Ram Narain Sons Ltd.* v. *CST* [AIR 1955 SC 765 : (1955) 2 SCR 483] there is no manner of doubt that the bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over

[20] (2002) 5 SCC 203

before a State Legislature can impose tax on transactions of sale or purchase of goods. Needless to say, such ban would operate by its own force and irrespective of the language in which an entry in List II of the Seventh Schedule has been couched. The dimension given to the field of legislation by the language of an entry in List II of the Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of the State Legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations : one, arising out of the entry itself, and the other, flowing from the restriction embodied in the Constitution. It was held in *Tata Iron and Steel Co. Ltd.* v. *S.R. Sarkar* [AIR 1961 SC 65 : (1961) 1 SCR 379] (SCR at pp. 387 and 388) that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In *20th Century Finance Corpn. Ltd.* [(2000) 6 SCC 12] the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax Act, 1956, all that has to be seen is whether the sale or purchase (*a*) occasions the movement of goods from one State to another; or (*b*) is effected by a transfer of documents of title to the goods during their movement from one State to another. If the transaction of sale satisfies any one of the two requirements, it shall be deemed to be a sale or purchase of goods in the course of inter-State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibition is spelled out by the description of a legislative entry in the Seventh Schedule or not.

27. It is well settled, and hardly needs any authority to support the proposition, that several entries in the three lists of the Seventh Schedule are legislative heads or fields of legislation and not the source of legislative empowerment. (To wit, see *Calcutta Gas Co. Ltd.* v. *State of W.B.* [AIR 1962 SC 1044 : 1962 Supp (3) SCR 1]) Competence to legislate has to be traced to the Constitution. The division of powers between Parliament and the State Legislatures to legislate by reference to territorial limits is defined by Article 245. The subject-matters with respect to which those powers can be exercised are enumerated in the several entries divided into three groups as three lists of the Seventh Schedule. Residuary powers of legislation are also vested by Article 248 in Parliament with respect to any matter not enumerated in any of the lists in the Seventh Schedule. This residuary power finds reflected in Entry 97 of List I. If an entry does not spell out an exclusion from the field of legislation discernible on its apparent reading, the absence of exclusion cannot be read as enabling power to legislate in the field not specifically excluded, more so, when there is available a specific provision in the Constitution prohibiting such legislation.

> **28.** It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extraterritorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extraterritorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In *Burmah Shell Oil Storage & Distributing Co. of India Ltd.* [AIR 1963 SC 906 : 1963 Supp (2) SCR 216] which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer i.e. the one who consumes. In Entry 53, "sale for consumption" (the meaning which we have placed on the word "sale") would mean a sale for consumption within the State so as to bring a State legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extraterritorial operation of State legislation."

128. It is thus manifest that one cannot lose sight of the pre-eminence which the Constitution accords upon positive covenants enshrined therein and the various entries in the three legislative lists merely intended to broadly delineate and demarcate fields of legislation. An entry in those lists, however, cannot be read or construed as either restricting or impinging upon the primary power to legislate which the body of the Constitution positively confers.

129. Way back in 1952, Patanjali Shastri, the learned Chief Justice, in the **State of Bihar vs. Kameshwar Singh**[21] pithily observed: -

> "**16.** It is true that under the common law of eminent domain as recognised in the jurisprudence of all civilized countries, the State cannot take the property of its subject unless such property is required for a public purpose and without compensating the owner for its loss. But, when these limitations are expressly provided for and it is further enacted that no law shall be made which takes away or abridges these safeguards, and any such law, if made, shall

[21] (1952) 1 SCC 528

> be void, there can be no room for implication, and the words "acquisition of property" must be understood in their natural sense of the act of acquiring property, without importing into the phrase an obligation to pay compensation or a condition as to the existence of a public purpose. The Entries in the Lists of the Seventh Schedule are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures, and such context is hardly appropriate for the imposition of implied restrictions on the exercise of legislative powers, which are ordinarily matters for positive enactment in the body of the Constitution."

130. This conceptual precept though well settled came to be reiterated by the Supreme Court in **Union of India vs. Shah Goverdhan L. Kabra Teachers College**[22] when their Lordships observed: -

> "**6.** In view of the rival submissions at the Bar, the question that arises for consideration is whether the impugned legislation can be held to be a law dealing with coordinated development of education system within Entry 66 of List I of the Seventh Schedule or it is a law dealing with the service conditions of an employee under the State Government. The power to legislate is engrafted under Article 246 of the Constitution and the various entries for the three lists of the Seventh Schedule are the "fields of legislation". The different entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislatures. They neither impose any restrictions on the legislative powers nor prescribe any duty for exercise of the legislative power in any particular manner. It has been a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any list it would not be reasonable to import any limitation therein. The rule of widest construction, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject-matter of an entry. When the vires of enactment is challenged, the court primarily presumes the constitutionality of the statute by putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude and the substance of the legislation will have to be looked into. The court sometimes is duty-bound to guard against extending the meaning of the words beyond their reasonable connotation in anxiety to preserve the power of the legislature.

[22] (2002) 8 SCC 228

> **7.** It is further a well-settled principle that entries in the different lists should be read together without giving a narrow meaning to any of them. Power of Parliament as well as the State Legislature are expressed in precise and definite terms. While an entry is to be given its widest meaning but it cannot be so interpreted as to override another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the court to reconcile them. When it appears to the court that there is apparent overlapping between the two entries the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of "pith and substance" has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made."

131. Therefore, and at the outset, our answer to the question which stands posited would have to be answered from a constitutional standpoint bearing in mind the major and formative changes which Articles 246A and 269A heralded in 2016. Those two Articles of the Constitution, as noticed above, made supplies in the course of interstate trade or commerce subject to the levy of a goods and services tax. They simultaneously empowered Parliament to frame laws to give effect to the proposed changes in the tax structure which in turn came to vest power in the Union to not only levy such a tax on supplies occurring in

the course of interstate trade or commerce but also brought within the fold of interstate trade and commerce the import of goods or services as the case may be.

132. More importantly, the Constitution simultaneously empowered Parliament to classify and categorise supplies as either constituting a supply of goods, services or both. It is this constitutional conferment of power that stands embodied in Section 7(1A) of the CGST and the Schedules forming part of that statute. The provision notably uses the expression *"either as"* a supply of goods or a supply of services. The classification of a supply in accordance with and under the Schedule to the CGST constitutes the basis for its treatment under the IGST.

133. It would consequently and on a fundamental plane be wholly impermissible to attempt to alter or recharacterize the character so accorded from a supply of service to one being a supply of goods. The conferment of character, its placement as a supply of goods or alternatively as a service and how a particular supply is liable to be viewed for purposes of taxation falls within the exclusive domain of Parliament. By virtue of the Constitution, all interstate supplies affected in the course of interstate trade or commerce, and which would include import thereof, thus come to be classified either as a supply of goods or of services. This exercise of classification is embossed with a stamp of finality by virtue of the provisions of the CGST which is then embraced by the IGST without any further modification or amendment. This exercise of classification is neither random nor unregulated nor left to the vagaries of individual perception. The statutory structure with sufficient clarity classifies and categorises supplies between those relating to goods and those pertaining to services.

134. The view that we take in this regard is further fortified by bearing in mind the underlying scheme of the CGST and IGST which principally approaches the issue of supply of goods or services as being subjects which are mutually exclusive. The legislation pertaining to the levy of an integrated tax does not envisage both elements, namely, the supply of goods and services forming part of the same transaction. This is subject to the solitary caveat of those transactions which are treated as composite or mixed supplies under those enactments itself.

135. Therefore, and in our considered opinion, it would be fundamentally impermissible and contrary to the underlying scheme of those statutes to treat a singular transaction as embodying an element of supply of goods as well as services. It is this foundational theme which imbues the provisions of the CGST and IGST which convinces us to hold against the respondents on the question of recharacterization of supply. We are convinced with respect to the correctness of the view that we have expressed above additionally in light of the Customs Act incorporating no provision which could be read as empowering the authorities administering that statute to undertake a fresh rendition of a particular transaction.

SECTION 5 AND ITS PROVISO

136. Let us then move to the core question which is posited for our consideration and which leads us to Section 5 of the IGST. Section 5(1) embodies the statutory mandate for the levy of an integrated tax on interstate supply of goods, services or both to be collected in such manner as may be prescribed. An interstate supply of goods, services or both would undoubtedly include an import of goods or services dependent upon how that transaction would have been classified as per

the provisions of the CGST and the Schedules forming part of that enactment. If the levy as envisaged were to be deconstructed for purposes of clarity it would entail the following steps.

137. One would have to first classify the supply dependent on whether it would be liable to be viewed as one pertaining to goods or services or one constituting an amalgam of both. The second step would involve evaluating whether it is liable to be treated as a supply in the course of interstate trade or commerce in accordance with the principles stipulated by Section 7 of the IGST. Once the aforesaid exercise is completed, the tax would be collected *"in such manner as may be prescribed"*.

138. Significantly, however, while Section 5(1) speaks of goods, services or both, the levy of integrated tax which forms the heart of its Proviso speaks only of goods imported into India. This assumes significance since both the CGST as well as the IGST envisage the levy of a tax on both goods as well as services. What we seek to lay emphasis upon is the existence of a conspicuous, pronounced and critical omission of services in the Proviso to Section 5(1). The Legislature has thus deliberately refrained from providing for the levy of an integrated tax on the import of services into India as part of an additional levy as contended by the respondents.

139. It would be pertinent to recall that Article 366(12) defines goods to include all materials, articles or commodities. The word "services" is however defined by Article 366(26A) as meaning anything other than goods. We would thus necessarily have to bear in mind the distinction in which the Constitution itself creates goods and services. It would be well neigh impossible for one to contend that Parliament was either

unaware of this distinction or that this was a case of a legislative omission or accidental slip. At least this was not even the case of the respondent.

140. It is thus manifest that what the Proviso seeks to regulate is the import of goods alone and is clearly not concerned with the subject of the import of services. The other notable facet of the Proviso is it proclaiming that the integrated tax on the import of goods *"shall be levied and collected in accordance with the provisions of Section 3 of the…"* CTA. It is pertinent to note that it is the integrated tax which Section 5 creates and imposes which is ordained to be levied and collected as per Section 3 of the CTA. It is this facet which lends credence to the submission of Mr. Lakshmikumaran of Section 3(7) constituting a collection mechanism as opposed to an independent levy.

141. As was noticed in the preceding parts of this decision, the expression "integrated tax" stands defined only in the IGST. Although that expression finds space in Section 3(7) of the CTA, the said statute admittedly does not accord an independent or corresponding meaning to the same. We have therefore no hesitation in holding that the phrase "integrated tax" has to necessarily be countenanced and understood as referring to the levy which Section 5(1) creates and imposes. We thus find ourselves unable to construe the words "…levied and collected in accordance with the provisions of …" the CTA as contemplative of a separate or independent levy referrable to the provisions of that statute. All that the phrase appears to convey is that the tax imposable by virtue of Section 5(1) shall be collected in accordance with Section 3 of the CTA.

142. One cannot possibly lose sight of the fact that the amendments in Section 3(7) of the CTA were made contemporaneously, and as is manifest from a reading of the SOR of the Taxation Laws (Amendment) Act, 2017, necessitated by the advent of the CGST as well as the IGST and the impending roll out of those statutes. The amendments were tabled bearing in mind the indubitable fact of the goods and services tax regime likely to come into effect from 01 July 2017. It would therefore be wholly incorrect to even assume that the amendments made in Section 3(7) were either guided by or predicated upon an independent review of the CTA. We thus come to the irresistible conclusion that Section 3(7) came to be amended solely to bring it in sync with the goods and services tax regime which was looming on the horizon.

143. As noticed hereinabove, prior to its amendment in 2017, the levy of an additional duty in terms of Section 3(7) was statutorily ordained to be a duty chargeable in addition to any other duties imposable either under the CTA or under any other law for the time being in force. It was this part which was deleted completely and Section 3(7) was recast to essentially mirror and complement the Proviso to Section 5(1). This becomes even more evident from the language in which that provision stands cast and when it uses the expressions *"integrated tax"* and *"as is leviable under Section 5 of the Integrated Goods and Services Tax Act, 2017……*". Of equal import is the employment of the words 'any article', 'like article' and 'imported article'. The word article would undoubtedly have to draw colour from Article 366(12) when it defines goods. We are fortified in the view that we take in light of the indubitable fact of neither the Customs Act nor for that matter the CTA being even remotely concerned with the levy of a duty on services. We

are thus of the firm opinion that it would be wholly incorrect to view or recognise Section 3(7) as either contemplating or sanctioning an additional levy on the import of services which have already suffered taxation by virtue of Section 5(1).

144. This leads us to examine the scope of the Proviso to Section 5(1) and to discern the true extent of its application. As is manifest upon a reading of Section 5(1), the said provision levies a tax on all interstate supplies of goods or services or both. The only exception to the extent of imposition of that levy is with respect to the supply of alcoholic liquor for human consumption. Section 5(1) however, compendiously speaks of both supply of goods as well as services including transactions which may have been placed in the category of a mixed or composite supply. The Proviso, however, alludes to the integrated tax which would be imposable when goods are imported into India. It is thus, apparent that the proviso is solely concerned with imported goods and the levy of an integrated tax thereon. It is in the aforesaid context that it stipulates that the integrated tax on imported goods would be levied and collected in accordance with the provision of Section 3 of the CTA. It therefore becomes evident that the proviso essentially seeks to only regulate the import of goods under Section 3 of the CTA. It thus creates an exception and provides for the collection of an integrated tax in accordance with Section 3 solely on goods as opposed to an import of services which would form part of Section 5(1).

145. As is well settled the primary function of a proviso is to carve out from the ambit of the principal provision a subject or a facet which would otherwise fall within its ambit. The purpose, as has been repeatedly and consistently explained, is to exclude something which would otherwise fall within the sweep of the general language of the

principal provision. Mr. Lakshmikumaran had in this regard relied upon the following passages as they appear in the decision of the Supreme Court in **Rohitash Kumar vs. Om Prakash Sharma**[23].

> " **20.** The normal function of a proviso is generally to provide for an exception i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. [Vide *CIT* v. *Indo Mercantile Bank Ltd.* [AIR 1959 SC 713] , *Kush Saigal* v. *M.C. Mitter* [(2000) 4 SCC 526 : AIR 2000 SC 1390] , *Haryana State Coop. Land Development Bank Ltd.* v. *Employees Union* [(2004) 1 SCC 574 : 2004 SCC (L&S) 257], *Nagar Palika Nigam* v. *Krishi Upaj Mandi Samiti* [(2008) 12 SCC 364 : AIR 2009 SC 187] and *State of Kerala* v. *B. Six Holiday Resorts (P) Ltd.* [(2010) 5 SCC 186]]
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> **21.** The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision. (Vide *Ram Narain Sons Ltd.* v. *CST* [AIR 1955 SC 765] , AIR p. 769, para 10 and *A.N. Sehgal* v. *Raje Ram Sheoran* [1992 Supp (1) SCC 304 : 1993 SCC (L&S) 675 : (1993) 4 ATC 559 : AIR 1991 SC 1406] , SCC p. 315, para 14.)
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> **22.** In a normal course, a proviso can be extinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially. "

146. As *Rohitash Kumar* explains the principal purpose of a proviso is to exclude and remove from the sweep of the main provision a subject which may otherwise be controlled and regulated by the latter. The

[23] (2013) 11 SCC 451

Proviso to Section 5(1) thus in unequivocal terms embodies the intent of the Legislature of imported goods being subjected to an integrated tax which would be levied and collected in accordance with Section 3 of the CTA and thus be in addition to what is conceived under Section 5(1). Since the proviso speaks only of imported goods, we would be wholly unjustified in seeking to read or construe that provision as also applying to an import of services. At the cost of repetition, it may only be noted that while Section 5(1) envisages the levy of a tax on all interstate supplies of goods, services or both, and which would as a necessary corollary also include the import of goods or services, the proviso makes an exception only in respect of imported goods. We are thus of the firm opinion that the levy and collection of a tax under Section 3 of the CTA would only apply to imported goods and would have no application whatsoever to the import of supplies.

147. This then takes us to consider the submission of the respondents that Section 3(7) constitutes a provision in terms of which an independent and separate levy can be imposed on all goods that may be imported into India irrespective of them having for the purposes of the IGST been classified as an import of services. While we had an occasion to dwell upon that issue briefly hereinabove and had negated this submission for reasons assigned above, we find ourselves unable to sustain this submission for the following additional reasons.

148. As was noted in the previous parts of this decision, Section 3(7) speaks of the levy and collection of an integrated tax which is an expression which is not found in any other provision of either the Customs Act or the CTA. The amendment itself and by virtue of which the expression "integrated tax" came to be inserted in sub-section (7) was contemporaneously moved and promulgated in anticipation of the

CGST and IGST being energised. We had also in the previous parts of this decision had an occasion to notice that the SOR of the Taxation Laws (Amendment) Act, 2017 had in unequivocal terms alluded to the aforenoted developments. It would thus be wholly incorrect to view Section 3(7) as envisaging the levy of a tax independent of the liability that Section 5 creates under the IGST. Both the Proviso to Section 5(1) as well as Section 3(7), in our considered opinion, are liable to be read in conjunction since both parallelly speak of the levy of an integrated tax on imported goods. While Section 5(1) speaks of that tax being levied and collected in accordance with Section 3 of the CTA, Section 3(7) of the latter uses the expression "as is leviable under Section 5". The plain language in which these two provisions stand cast and placed in the statute leaves us in no doubt that Section 3(7) merely constitutes the point at which the integrated tax alluded to in Section 5(1) would be levied and collected.

149. The contention of the respondents, however, was that once the imported articles or goods arrive at the customs frontiers of India, any classification that may have been undertaken or rendered under the IGST would be wholly irrelevant and in any case would not detract from the right of the respondents to acknowledge the import as being that of goods *per se* for the purposes of treatment and taxation under the Customs Act read along with the CTA.

150. The aforesaid submission proceeds on the wholly untenable assumption that Section 3(7) was intended to be the repository of an independent levy of tax thus enabling the respondents to levy a tax separate and independent of that envisaged under Section 5(1) as well as to ignore the classification of such a supply. Undisputedly, the subject goods are exported to MROs and they return to and arrive at the

customs borders of India after undergoing repairs and refurbishment. This transaction is conferred the character of a supply of services under Entry 3 of Schedule II of the CGST. This transaction would undoubtedly constitute an import of services as contemplated under Section 7 of the IGST. Suffice it to note that it was not the case of the respondents that the transaction relating to the subject goods amounted to a composite or a mixed supply. Consequently, it would have to be viewed as being either a supply of goods or a supply of services. In our considered opinion, the respondents proceed on the wholly unsustainable premise of a supply or import or services being capable of being recharacterized as a supply of imported goods. This submission proceeds in ignorance of the indubitable fact that the service rendered on the subject goods comes to be indelibly embedded therein. It would consequently be wholly impermissible for the respondents to either review or revisit the characterization of the subject transaction which in any case is conferred a finality.

151. In our considered opinion, this aspect is no longer res integra and stands conclusively answered by the Supreme Court itself in *Mohit Minerals.* While we had an occasion to extract the relevant passages from that decision of the Supreme Court previously, for the sake of continuity, we deem it apposite to revisit the following pertinent observations which appear in that decision:-

> " **163.** There is no doubt that different aspects of a transaction can be taxed through separate provisions. However, this Court in *BSNL* [*BSNL* v. *Union of India*, (2006) 3 SCC 1] observed that the aspect theory does not allow the value of goods to be included in services and vice versa. In *BSNL* [*BSNL* v. *Union of India*, (2006) 3 SCC 1] , this Court dealt with the question of whether provision of telephone services involved a transfer of goods which would be amenable to sales tax. In this context, the Court observed : (SCC p. 42, para 88)

> "*88*. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax."

164. In the present case, the question is whether the imposition of IGST on supply of services can be sustained when there is a concomitant imposition of IGST on supply of goods. However, we must first analyse the context in which the IGST is levied on the import of goods in this case.

165. The provisions of composite supply in the CGST Act (and the IGST Act) play a specific role in the levy of GST. The idea of introducing "composite supply" was to ensure that various elements of a transaction are not dissected and the levy is imposed on the bundle of supplies altogether. This finds specific mention in the illustration provided under Section 2(30) of the CGST Act, where the principal supply is that of goods. Thus, the intent of Parliament was that a transaction which includes different aspects of supply of goods or services and which are naturally bundled together, must be taxed as a composite supply.

166. It is true that in this case, the first leg of the transaction between the foreign exporter and the Indian importer is a composite supply, while the second leg, between the foreign exporter and the shipping line may, from a perspective, be regarded as a standalone transaction. Both of them are independent transactions and ordinarily, the IGST could be levied on both sets of transactions—one as supply of goods (under the ambit of composite supply) and the other as supply of services. However, the impugned notifications seek to tax the importer as the deemed recipient of the supply of service. The ASG has advanced an interpretation of Sections 5(3) and 5(4) of the IGST Act, read with Section 2(93) of the CGST Act to contend that the importer can be classified as the "recipient" of the services. On this interpretation, we have upheld the validity of the impugned notifications under Sections 5(3) and 5(4) of the IGST Act in Parts D.2-D.5 of this judgment (*see* paras 89 to 152). The respondents as a matter of fact urged that (*i*) the Indian importer is not privy to the contract between the foreign exporter and the foreign shipping line; (*ii*) the Indian importer does not pay consideration to the foreign shipping line; and (*iii*) the Indian importer does not receive any services from the foreign shipping line since the transportation services are provided by the foreign shipping line to the foreign exporter. The ASG, while advancing arguments on behalf of the Union Government, has opposed these submissions.

> **167.** The Union Government has urged that this Court must look beyond the text of the contract between the foreign shipping line and the foreign exporter to identify the Indian importer as the recipient of the services. This Court has upheld the validity of the impugned notifications on this ground. The Union Government is contradicting the main plank of its submission now by contending that the two legs of the transaction are separate standalone agreements. That would imply, that while on the one hand the Union Government seeks to levy tax on the Indian importer by going beyond the text of the contract between the foreign shipping line and foreign exporter (for the purpose of identifying the Indian importer as the recipient of services), on the other hand, as far as the submissions on composite supply are concerned, the Union Government urges that the contracts must be viewed as separate transactions, operating in silos. We are unable to subscribe to this view. The Union of India cannot be heard to urge arguments of convenience—treating the two legs of the transaction as connected when it seeks to identify the Indian importer as a recipient of services while on the other hand, treating the two legs of the transaction as independent when it seeks to tide over the statutory provisions governing composite supply. ”

152. As the Supreme Court pertinently observed in *Mohit Minerals*, the underlying objective of a composite supply being introduced in the CGST was essentially to ensure that separate elements of a transaction are not “dissected” and the levy being imposed treating the transaction as a composite whole. It was, however, observed that once the transaction had come to be taxed as a supply of goods, it would be wholly impermissible for the respondents to tax the very same supply treating it to be one relating to service. As in *Mohit Minerals*, we are in the facts of the present case not concerned with a composite supply, which would in turn be regulated by Section 8 of the CGST but a supply/import of service. It is this transaction of supply which has been subjected to a tax under Section 5(1). As was pertinently observed by the Supreme Court, the supply of goods under a CIF contract is inclusive of a supply of services of transportation which forms a part of a “bundle of supplies”.

153. It is in the aforesaid light that we had observed that the

respondents have clearly failed to bear in consideration the indubitable fact of the rendering of services being embedded in the reimported goods and thus there being no dichotomy which could have been possibly introduced. The Supreme Court in *Mohit Minerals* had ultimately upheld and affirmed the view taken by the High Court which had held that once IGST had been paid on the amount of freight which was included in the value of the imported goods, no further tax could have been legally imposed treating it again as a supply of service. The Supreme Court in *Mohit Minerals* thus pertinently observed that a tax on a supply of service which already stands included by legislation as a component of a composite supply of goods would not be sustainable.

THE ARGUMENT ON ASPECT THEORY

154. While Mr. Ojha had addressed elaborate submissions based on the aspects theory, suffice it to note that the same would have had a bearing provided it was possible to countenance the existence of two separate and distinguishable taxable events. As was succinctly observed in the *Federation of Hotel and Restaurants Association*, a levy of a tax which might appear to overlap is not considered as abhorrent to the constitutional scheme. However, it is pertinent to note that, that very decision recognized the application of the aspect theory being dependent on whether the transaction could be said to involve two or more taxable events.

155. We fail to appreciate how the transaction in respect of the subject goods could possibly be construed as giving birth to two separate and divisible taxable events. The transaction remained that of supply of services in the shape of repair or refurbishment. It clearly did not constitute a supply of goods. The entire edifice of this argument of the respondents based on the aspects theory is itself dependent upon the

premise that Section 3(7) constituted an independent levy of tax. This as held hereinabove, cannot possibly be sustained or countenanced in law. As observed earlier, the transaction remained an import of service with no discernible break in the chain connected with the movement of the articles and their departure from Indian shores. The service rendered upon those articles came to be indelibly embedded in those goods and it was the work expended by the MROs' on those goods which constituted the principal purpose of their movement and imbued the articles. This was, therefore, not a case where one could legitimately assume or perceive the existence of two separate or disconnected taxable events.

156. We are also of the firm opinion that the mere delineation of the field of legislation by Entry 83 would neither overshadow nor eclipse the constitutional command embodied in Articles 246 and 269A. The precedents rendered on this subject, and which we had an occasion to review hereinbefore, clearly command us to bear in mind that an Entry in the Seventh Schedule would not control the extent of the legislative power that stands conferred by virtue of the principal provision in the Constitution itself. More over if the contention of the respondent were to be accepted, it would travel far beyond the ambit of Entry 83 itself. This since we would then have to read the power to levy an integrated tax on supply of services as being an ingredient of Entry 83 and falling within the field of a duty of customs. We have thus no hesitation in holding that the contention of the respondents is clearly untenable.

DISCERNING THE INTENT OF AN 'EXPLANATION'

157. Turning then to Notification 36/2021 and the clarification by way of Circular No.16/2021 which was issued by the CBIC on 19 July 2021,

we are of the firm opinion that the addition of the words "tax" and "cess" over and above the duty of customs which was originally conceived and provisioned for in Notification no. 45/2017 is clearly ultra vires and liable to be declared as an intent to levy an impost which is without authority of law.

158. We also find ourselves unable to sustain the further insertions which were made in Notification No. 45/2017 by Notification No. 36/ 2021 in terms of which an 'Explanation' had come to be inserted in the shape of Clause (d). In our considered opinion, the characterization of that amendment as an 'Explanation' and a provision concerned with the "removal of doubts" is clearly misleading. An 'Explanation' or a removal of doubts provision can be countenanced as such provided it were established that the language of a statute or a notification had clearly conceived of the position which was sought to be advocated. This since that legislative device comes to be deployed primarily to allay doubts and clarify ambiguities. A legislative body adopts those remedies where it finds that its avowed intent has been misinterpreted or misconstrued. An 'Explanation' or the usage of the expression for "removal of doubt" could be validly employed provided it was manifest that the position which is sought to be clarified was inherent and existed in the statute from its very origin.

159. As has been repeatedly explained by our courts, the mere usage of the title 'Explanation' or the phrase 'removal of doubt' is neither conclusive nor determinative of the question of whether the clarification really amounts to an explanation of a position which was implicit and duly recognized by the statue or a notification as it originally stood. This position in law becomes apparent upon a review of the following precedents which we find are pertinent to the issue

which is raised.

160. The true nature of an 'Explanation' was lucidly explained by the Supreme Court in **S. Sundaram Pillai vs. V.R. Pattabiraman** [24] where their Lordships had held as under:

> "**46.** We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in Interpretation of Statutes while dwelling on the various aspects of an Explanation observes as follows:
>
> (a) The object of an Explanation is to understand the Act in the light of the explanation.
>
> (b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute.
>
> (p. 329)
>
> **47.** Swarup in Legislation and Interpretation very aptly sums up the scope and effect of an Explanation thus:
>
> "Sometimes an Explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain.... The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa." (pp. 297-98)
>
> xxx xxx xxx
>
> **49.** The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO [(1961) 1 SCR 902 : AIR 1961 SC 315 : (1960) 11 STC 764] a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus:

[24] (1985) 1 SCC 591

"Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(fl) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."

50. In Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar [(1967) 1 SCR 848 : AIR 1967 SC 389 : 37 Com Cas 98] this Court observed thus:

"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."

51. In Hiralal Rattanlal case [(1973) 1 SCC 216 : 1973 SCC (Tax) 307] this Court observed thus: [SCC para 25, p. 225: SCC (Tax) p. 316]

"On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation."

52. In Dattatraya Govind Mahajan v. State of Maharashtra [(1977) 2 SCC 548 : (1977) 2 SCR 790 : AIR 1977 SC 915] Bhagwati, J. observed thus: (SCC p. 563, para 9)

"It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it.... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations."

53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same. "

161. Reiterating the legal position as enunciated therein, the Supreme Court in **State of A.P. vs. Corporation Bank**[25] pertinently observed that a label or a title accorded by the Legislature would neither be sufficient nor determinative of the 'Explanation' being either clarificatory or one which could be viewed as attempting to explain away an ambiguity in the principal provision. In *Corporation Bank*, the Supreme Court observed that ultimately it would be for courts on a true reading of the 'Explanation' to form an opinion whether it was an attempt to expand the scope of the main section or truly intended to explain away a doubt that could have been harboured. This becomes evident from the following observations appearing therein:-

"**12.** In construing a statutory provision, the first and foremost rule of construction is the literal construction. If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction. The other rules of construction are invoked when the legislative intent is not clear. In Bihta Co-op. Development and Cane Marketing Union Ltd. v. Bank of Bihar [AIR 1967 SC 389] this Court was called upon to consider Explanation to Section 48(1) of the Bihar and Orissa Cooperative Societies Act, 1935. This Court observed that the Court should not go only by the label. The Court observed that an explanation must be read ordinarily to clear up any ambiguity in the main section and it cannot be construed to widen the ambit of the section. However, if on a true reading of an Explanation it appears to the Court in a given case that the effect of the Explanation is to widen the scope of the main section then effect must be given to the legislative intent. It was held that in all such cases the Court has to find out the true intention of the legislature. Therefore, there is no single yardstick to decide whether an Explanation is enacted to clarify the ambiguity or whether it is enacted to widen the scope of the main section. On the facts it was held that before the 1948 Amendment to the Bihar and Orissa Cooperative Societies Act, 1935, there was an Explanation on the statute-book and the

[25] (2007) 9 SCC 55

> subsequent Explanation was only to clarify the earlier Explanation and, therefore, the Court held that the purpose of the subsequent Explanation was not to enlarge the scope of Section 48(1)(e) in the Bihar and Orissa Cooperative Societies Act, 1935. In the present case prior to amending Act 27 of 1996, there was no Explanation covering banks, LICs, etc. As stated above, Explanation IV was added for the first time by the said amending Act 27 of 1996. The definition of the word "dealer" thus stands expanded by the said amending Act 27 of 1996. In our view, therefore, Explanation IV was not to clear any doubt or ambiguity. It has been enacted in order to expand the definition of the word "dealer" in Section 2(1)(e) of the 1957 Act."

162. This question again cropped up for consideration in **Union of India vs. Martin Lottery Agencies Ltd.**[26] The Court in *Martin Lottery Agencies* was concerned with an 'Explanation' appended to Section 65(19) of the Finance Act, 1994 which was asserted to be an expansion of the levy of service tax on various forms of entertainment which had come to be included by way of that 'Explanation'. Upholding the challenge that was raised by the assessees', the Supreme Court held that the 'Explanation' could not be viewed as being a mere clarification since it had introduced a novel concept and an activity to constitute entertainment. We deem it appropriate to extract the following passages from that decision:-

> "**30.** Keeping in view the aforementioned backdrop, it has to be determined as to whether the "Explanation" is declaratory or clarificatory in nature. Clause (19) was inserted in Section 65 of the Act in the year 2003. The notice dated 30-4-2007 shows that according to the authorities sub-clause (*i*) was attracted and not sub-clause (*ii*) of the said provision. The Board issued a clarification on 17-1-2007 which is in the following terms:
>
> > "*Decision*.—The Commissioner (ST) explained the issue of service tax liability on promotion, marketing, distribution of paper lottery. Under the contractual arrangement, the State Government print lottery tickets and deliver them to the distributor. The distributor is free to publicise for promotion, marketing of the lottery tickets received and distribute the same through sub-distributors. The State Governments do not receive back the unsold lottery tickets and the prizes, if any, on such

[26] (2009) 12 SCC 209

unsold tickets could be collected by the distributor. The draws are held by the State Governments.

The Board noted that the Lotteries (Regulation) Act, 1998, governs the activity of organising, conducting or promoting a lottery. As per clause (*c*) of Section 4, '*the State Government shall sell the tickets either itself or through distributors or selling agent*'. This provision thus forbids resale of tickets that have been sold by the State Government. Accordingly, the nature of transaction between the State Government and the distributor is not in the nature of sales. The activities of the distributor are that of promotion or marketing of lottery tickets for their clients i.e. the State Governments. Hence, the Board decided that the services of the distributor fall under the 'business auxiliary service' and, therefore, be chargeable to service tax. The value of taxable service shall be taken into account as the total face value of the tickets sold minus (*a*) the total cost of the tickets paid by the distributor to the State Government, and (*b*) the prize money paid by the distributor. In other words, the value is the mark up between the buying and selling of lottery tickets."

(emphasis supplied)

A bare perusal of the said circular letter would clearly show that lottery tickets were considered to be goods. It is with that mindset, the circular was issued. However, it must have been realised that resale of lottery tickets by the distributor or by others is not permissible.

31. Whether sub-clause (*ii*) of clause (19) of Section 65 had been applied in case of any other distributor or agent of such lottery tickets is not known. If the assertion of Mr Salve that nobody had demanded tax under the second clause is correct, we do not know why the principle of "small repairs" by inserting an Explanation was taken recourse to. The Explanation, in our opinion, cannot be said to be a simple clarification as it introduces a new concept stating that organising of the lottery is a form of entertainment. Introduction of such new concept itself would have a constitutional implication.

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33. The Explanation so read appears to be a charging provision. It states about taxing need. It can be termed to be a sui generis tax. If it is a different kind of tax, the same may be held to be running contrary to the ordinary concept of service tax. It may, thus, be held to be a stand alone clause. A constitutional question may have to be raised and answered as to whether the taxing power can be segregated. If by reason of the said Explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.

34. No doubt, the Explanation begins with the words "for removal of doubts". Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous. There is also nothing to show that

it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of sub-clause (*ii*) had never been in contemplation of the taxing authorities."

163. We in this context deem it equally beneficial to notice two recent decisions rendered by the Supreme Court which have lucidly explained the interpretative rules which would apply to explanations in general as well as the phrase "removal of doubts". The first decision that we propose to consider is that of **Sree Sankaracharya University of Sanskrit vs. Dr. Manu**[27]**.** The issue which arose for consideration therein was whether the Government Order of 29 March 2001 could be said to be clarificatory and promulgated for the purposes of removal of ambiguities purportedly existing in an earlier order. A reading of the report establishes that it was contended that since the clarificatory order itself contained recitals to the effect that it was being issued for purposes of rendering clarity and removing ambiguities, it was not liable to be viewed as an amendment or a modification and would apply retrospectively. This argument came to be stoutly rejected with the Supreme Court holding thus:-

" **45.** It is trite that any legislation or instrument having the force of law, which is clarificatory or explanatory in nature and purport and which seeks to clear doubts or correct an obvious omission in a statute, would generally be retrospective in operation, vide *Ramesh Prasad Verma*. Therefore, in order to determine whether the Government Order dated 29th March, 2001 may be made applicable retrospectively, it is necessary to consider whether the said order was a clarification or a substantive amendment.

46. In order to effectively deal with the aspect as to retrospective operation of the Government Order dated 29th March, 2001 it may be useful to refer to the following extract from the treatise, *Principles of Statutory Interpretation*, 11th Edition (2008) by Justice G.P. Singh on the sweep of a clarificatory/declaratory/explanatory provision:

[27] 2023 SCC OnLine SC 640

"The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court : For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any Statute. Such acts are usually held to be retrospective.

[…] An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. The language 'shall be deemed always to have meant' or 'shall be deemed never to have included' is declaratory and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law."

[Emphasis by us]

47. This Court in *Commissioner of Income Tax, Bombay* v. *Podar Cement Pvt. Ltd.*, (1997) 226 ITR 625 (SC) noted that circumstances under which an amendment or modification was introduced and the consequences thereof would have to be borne in mind while deciding the issue as to whether the amendment was clarificatory or substantive in its nature and whether it would have retrospective effect or not.

48. In *Allied Motors Pvt. Ltd.* v. *Commissioner of Income Tax, Delhi*, (1997) 224 ITR 677 (SC), this Court found that certain unintended consequences flowed from a provision enacted by the Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. This Court held that if the amendment was not read into the relevant provision retrospectively, it would be impossible to reasonably interpret the said provision. That since there was an obvious omission in the provision, an amendment was necessitated which would clarify/declare the law retrospectively.

49. The proposition of law that a clarificatory provision may be made applicable retrospectively is so well established that we do not wish to burden this judgment by referring to rulings in the same vein. However, it is necessary to dilate on the role of a

clarification/explanation to a statute and how the same may be identified and distinguished from a substantive amendment.

50. An explanation/clarification may not expand or alter the scope of the original provision, vide *Bihta Cooperative Development Cane Marketing Union Ltd.* v. *Bank of Bihar*, AIR 1967 SC 389. Merely describing a provision as an "Explanation" or a "clarification" is not decisive of its true meaning and import. On this aspect, this Court in *Virtual Soft Systems Ltd.* v. *Commissioner of Income Tax, Delhi*, (2007) 289 ITR 83 (SC) observed as under:

> "Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement in the statute itself, but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."

51. This position of the law has also been subscribed to in *Union of India* v. *Martin Lottery Agencies Ltd.*, (2009) 12 SCC 209 wherein it was stated that when a new concept of tax is introduced so as to widen the net, the same cannot be said to be only clarificatory or declaratory and therefore be made applicable retrospectively, even though such a tax was introduced by way of an explanation to an existing provision. It was further held that even though an explanation begins with the expression "for removal of doubts," so long as there was no vagueness or ambiguity in the law prior to introduction of the explanation, the explanation could not be applied retrospectively by stating that it was only clarificatory.

52. From the aforesaid authorities, the following principles could be culled out:

i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.

ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.

iii) An explanation/clarification may not expand or alter the scope of the original provision.

iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the

nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.

53. Applying the law as discussed hereinabove to the facts of the present case, we are of the view that the subsequent Government Order dated 29th March, 2001 cannot be declared as a clarification and therefore be made applicable retrospectively. The said order has substantively modified the Government Order dated 21st December, 1999 to the extent of stating that teachers who had already got the benefit of advance increments for having a Ph.D. degree, would not be eligible for advance increments at the time of their placement in the selection grade. As noted above, the law provides that a clarification must not have the effect of saddling any party with an unanticipated burden or withdrawing from any party an anticipated benefit. However, the Government Order dated 29th March, 2001 has restricted the eligibility of lecturers for advance increments at the time of placement in the selection grade, only to those who do not have a Ph.D. degree at the time of recruitment and subsequently acquire the same. "

164. In **Kirloskar Ferrous Industries Ltd. vs. Union of India**[28], the Supreme Court reiterated the aforenoted precepts in the following words:-

"**66.** What can be discerned from the above is that an explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section. An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section. The purpose of an explanation is, however, not to limit the scope of the main provision. The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An "explanation" must be interpreted according to its own tenor. Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus, an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa. Explanation added to a statutory provision is not a

[28] (2025) 1 SCC 695

substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. "

165. The underlying principle which would govern the interpretation liable to be accorded to a subsequent statutory rule or order which purports to be clarificatory or in the nature of a removal of doubts provision arose before this Court in the context of the Income Tax Act in **Commissioner of Income Tax vs. Rajasthan Mercantile Company**[29] In *Rajasthan Mercantile*, we were concerned with an 'Explanation' which came to be appended to Section 37 of that Act. Quite apart from the Court noting that the 'Explanation' itself came to be introduced by an amending legislation which was to come into effect from a particular date and thus dislodging any presumption of retrospectivity, the Court on an independent review of whether the 'Explanation' could, in fact, be accepted as one seeking to expound upon the true import of that provision held as follows:

"**29.** In the instant case, the Explanation 2 in question, actually purports to be a provision defining the concept of entertainment expenditure, by including a few kinds of expenditures within its scope. Only because a provision attached to a section bears the nomenclature, as 'Explanation', it cannot always be considered as conveying the true and natural meaning of the words or the provisions of the Act. The meaning attributable to the relevant provisions of the Act without the Explanations shall have to be considered first, to find out whether, it created an artificial situation, or created ambiguity, and if so, the Explanation may be considered as having injected the true and real meaning to those provisions from the very inception of the provisions to which the Explanation is added.

30. In *C.I.T.* v. *S.R. Patton,* [(1992) 193 ITR 49], the Kerala High Court was considering the effect of the Explanation to Section 9(1)(ii) of the Act. The Bench held at page 55:

"The mere use of the label "Explanation" is not decisive of the true meaning and scope of the provision. Ordinarily, the

[29] 1994 SCC OnLine Del 585

purpose of an Explanation in a statute is to clarify or explain or settle any doubt or ambiguity or controversy. It may even widen the scope of the main provision in rare cases. The words used alone can reflect the true intent and they should be construed on their own terms. In this regard, the context, background and history of the legislation may be looked into—See *Aphali Pharmaceuticals Ltd.* v. *State of Maharashtra*, [(1989) 4 SCC 378 : AIR 1989 SC 2227, p. 393, paragraph 33]—wherein the Supreme Court has analysed the entire law on the point".

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34.*Keshavji Ravji and Co.* v. *Commissioner of Income-tax*, [(1990) 183 ITR Page 1] is also a decision of the Supreme Court. One of the questions that arose for consideration was whether Explanation 1 added to Section 40(b) of the Act in the year 1984 serves as the parliamentary exposition of the true purport of Section 40(b) or whether the said Explanation brought about a change in its meaning. This was considered at page 18 thus:

"An Explanation, generally speaking, is intended to explain the meaning of certain phrases and expressions contained in a statutory provision. There is no general theory as to the effect and intendment of an Explanation except that the purpose and intendment of the "Explanation" are determined by its own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may—this is what Sri Ramachandran suggests in this case—be introduced by way of abundant caution in order to clear any mental cob-webs surrounding the meaning of a statutory provision spun by interpretative errors and to place what the Legislature considers to be the true meaning beyond any controversy or doubt. Hypothetically, that such can be the possible purpose of an "Explanation" cannot be doubted. But the question is whether, in the present case. Explanation 1 inserted into Section 40(b) in the year 1984 has had that effect.

The "Notes on Clauses" appended to the Taxation Laws (Amendment) Bill, 1984, say that clause 10 which seeks to amend Section 40 will take effect from 1st April, 1985, and will, accordingly, apply in relation to the assessment year 1985-86 and subsequent years. The express prospective operation and effectuation of the "Explanation" might perhaps, be a factor necessarily detracting from any advancement of the intent on the part of the legislature that the Explanation was intended more as a legislative exposition or clarification of the existing law than as a change in the law as it then obtained."

35. The above observation in no way advances the case of the Revenue before us. The effect to be given to an Explanatory

amendment depends upon several factors, including its language. The concluding sentence in the above observation indicates that, when the legislature has made the Explanation operative prospectively by words expressed therein, its operation shall have to be confined to the future date. Same reasoning would govern the case when the Parliament limited the retrospectivity of the Explanation with effect from a particular date. In such a situation, giving further retrospectivity to the Explanation will be hijacking the intention of the legislature into an impermissible area.

36. The declaration and the clarification involved in the Explanation 2, are only for the purposes of assessments with effect from 1-4-1976. This provision, widens the concept of 'entertainment expenditure' by including in its scope, such of the expenditures which are otherwise, traditionally understood as the routine business expenditures incurred in connection with the 'business- hospitality'. Therefore, the widened meaning cannot be extended to the past period when the amended Explanation 2 was not in operation. "

166. It would be profitable in this context to notice the following pertinent observations which appear in **CIT vs. Telstra Singapore (P) Ltd**[30].

"**71.** It was the aforesaid precepts which appear to have guided the court in *DIT* v. *New Skies Satellite BV*[(2016) 382 ITR 114 (Delhi); 2016 SCC OnLine Del 796.] and where the amendments introduced in section 9 were sought to be pressed into aid by the Department. In *DIT* v. *New Skies Satellite BV* [(2016) 382 ITR 114 (Delhi); 2016 SCC OnLine Del 796.] , the court firstly doubted the characterization of those amendments as being clarificatory or for that matter being liable to be viewed as an explanation of existing terms of the statute. This becomes apparent from the following discussion which appears in that decision (page 136 of 382 ITR):

"36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the Legislature characterises an amendment as retrospective that the court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands

[30] 2024 SCC OnLine Del 5016.

the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect. In *R. Rajagopal Reddy* v. *Padmini Chandrasekharan* [(1995) 213 ITR 340 (SC); (1995) 2 SCC 630.] , it was held that the use of the words 'is declared' is not conclusive that the Act is declaratory because it may be used to introduce new rules of law. If the amendment changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used is 'it is declared' or 'for the removal of doubts'. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to form. While adjudging whether an amendment was clarificatory or substantive in nature, and whether it will have retrospective effect or not, it was held in *CIT* v. *Gold Coin Health Food (P.) Ltd.*[(2008) 304 ITR 308 (SC); (2008) 9 SCC 622.] and *CIT* v. *Podar Cement Pvt. Ltd.* [(1997) 226 ITR 625 (SC); (1997) 5 SCC 482.] that, (i) the circumstances under which the amendment was brought in existence, (ii) the consequences of the amendment, and (iii) the scheme of the statute prior and subsequent to the amendment will have to be taken note of.

37. An important question, which arises in this context, is whether a 'clarificatory' amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the Legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the court? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the Legislature considers inaccurate, the effect is prospective. Any other result would make the Legislature a court of last resort. *United States* v. *Gilmore* [75 US 330 (1869); 8 Wall. 330; 19 L.Ed. 396.] , *Peony Park* v. *O'Malley* [223 F.2d 668 (8th Cir. 1955).] . It does not mean that the Legislature does not have the power to override the judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a Legislature a court of last resort, the amendments can be made prospective only (*Ref. County of Sacramento* v. *State of California* [134 Cal. App. 3d 428.] , *Marriage of Davies, In re* [(1982) 105 Ill. App. 3d 661.]).

38. The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income

from data transmission services from taxability under section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this court is disinclined to conclusively determine or record a finding as to whether the amendment to section 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given what its nature may truly be. The issue of taxability of the income of the assessees in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the double taxation avoidance agreements. Learned counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the double taxation avoidance agreement. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act."

72. The court thereafter and while speaking of the extent of Parliamentary power to overcome or override treaty provisions significantly observed (page 139 of 382 ITR):

"41. This court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign States prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this court, indefensible….

54. Neither can an act of Parliament supply or alter the boundaries of the definition under article 12 of the Double Taxation Avoidance Agreement by supplying redundancy to any part of it. This becomes especially important in the context of Explanation 6, which states that whether the 'process' is secret

> or not is immaterial, the income from the use of such process is taxable, none the less. Explanation 6 precipitated from confusion on the question of whether it was vital that the 'process' used must be secret or not. This confusion was brought about by a difference in the punctuation of the definitions in the double taxation avoidance agreements and the domestic definition. For greater clarity and to illustrate this difference, we reproduce the definitions of royalty across both double taxation avoidance agreements and clause (iii) to Explanation 2 to section 9(1)(vi)."
>
> **73.** It, however, desisted from rendering a definitive opinion on the scope of those provisions firstly since submissions in that respect had not been advanced and it upon an ultimate analysis coming to the conclusion that the treaty provisions would prevail over the provisions introduced in section 9(1)(vi) of the Act. This is evident from a reading of para 38 which has been extracted hereinabove. In our considered opinion, the test of whether domestic legislation asserts to "supply or alter the boundaries" is the correct enunciation of the legal position. A provision enshrined in the legislation of an individual contracting State would thus be entitled to operate and subsist provided it remains within the perimeters judicially recognised above."

167. As we view Notification No. 45/2017 as it originally stood, it is manifest that it spoke only of a duty of customs. That expression could have only been construed as referable to Section 12 of the Customs Act. It is only by virtue of the subsequent amendments inserted in Notification no. 45/2017 that the words "tax" and "cess" came to be added. As is manifest from a reading of the CBIC circular dated 19 July 2021, the amendments which were sought to be ushered in by virtue of Notification no. 36/2021 were clearly intended to overcome the judgment handed down by the CESTAT in the matter of **M/s Interglobe Aviation Limited vs. Commissioner of Customs Nos. 51226-51571/2020.**[31] The GST Council upon due deliberation appears to have recommended that a suitable clarification "including any clarificatory amendment if required" may be issued for the removal of any doubt. Paragraph 7 of that clarification reads thus:-

[31] 2020 (43) G.S.T.L. 410 (Tri. - Del.)

> "7. In the above background, the matter was placed before the GST Council in its 43rd Meeting held on the 28th May, 2021. The GST Council deliberated on the issue and recommended that a suitable clarification, including any clarificatory amendment, if required, may be issued for removal of any doubt, to clarify the decision of the GST Council that re-import of goods sent abroad for repair attracts IGST and cess (as applicable) on a value equal to the repair value, insurance and freight."

168. Suffice it to note that the Circular of the CBIC does not refer to any prior decision that may have been taken by the GST Council opining that a reimport of goods sent abroad for repairs would attract not just IGST but also an additional duty under the CTA. Notification No. 45/2017 came to be promulgated as per the considered case of the respondents themselves in implementation of a policy decision that a reimport of goods sent abroad for repairs would attract IGST on a value equal to the repair value. This part of the levy is one which is not even questioned by the writ petitioners. The question which, however, merits consideration is whether Notification no. 45/2017 envisaged a duty or a tax other than or over and above the BCD.

169. We find ourselves unable to read or interpret Notification No.45/2017 as embodying an intendment to levy a tax or cess referable to the CTA especially since the original notification only spoke of a duty of customs. It would thus be wholly impermissible to view the amendment sought to be introduced by Notification No.36/2021 as being either in the nature of an explanation, a removal of doubt clause or clarificatory. This more so since as per the stated case of the respondents themselves, those amendments were prompted by the decision of the CESTAT in the case of the writ petitioner itself. The amendments were thus clearly aimed at attempting to remove the basis on which the CESTAT had rendered its decision based on a reading of Notification No.45/2017.

170. Quite apart from there being a grave doubt of whether an authority exercising the power of framing subordinate legislation could have attempted to do that, we in any case are of the firm opinion that Notification No. 45/2017 could have not been possibly construed as envisaging a levy in addition to that which stood attracted by virtue of Section 5(1) of the IGST. We are also of the firm opinion that the amendments introduced were clearly intended to expand the tax net, an aspect which was held in *Martin Lottery Agencies* as detracting from the characterisation of an amendment as clarificatory or one seeking to remove an ambiguity. We are constrained to observe that the introduction of an Explanation in plenary or subordinate legislation cannot be used as an artifice or a guise to expand or reinvent the original provision. That would clearly amount to a legislative overreach. It would thus be principally incorrect to view the amendment as being either clarificatory or an enunciation of a position that was implicit or inherent.

ORDERS OF THE COMMISSIONER OF CUSTOMS (APPEALS)

171. That then takes us to the orders passed by the Commissioner of Customs (Appeals) which has distinguished the earlier judgment of the CESTAT in light of the amendments which came to be introduced by Notification No. 45/2017. We in this respect deem it appropriate to extract the following paragraphs from the impugned order dated 30 November 2022:

> "5.3 Though the issue is common in all appeals, these Appeals have been divided into two sub categories, i.e., appeals for impugned Bills of Entry assessed before the issuance of Notification 36/2021-Customs, dated 19.07.2021 and appeals for impugned Bills of Entry assessed after the issuance of the said Notification. The reason for such division is different grounds on

merit taken by the Appellant and thus they are discussed separately.

For appeals filed for the impugned bills of entry assessed prior to period prior to amendment of Notification No. 45/2017— Customs, dated 30.06.2017 by Notification 36/2021-Customs, dated 19.07.2021 (SI. No. 1 to 163 of Annexure)

5.4 The ground taken by the Appellant for this period is primarily that Notification No. 45/2017— Customs refers to 'duty of customs' at sl. no. '2' and such 'duty of customs' would mean basic customs duty and does not include IGST. It is also observed that in similar matter, Appellant's appeals were accepted by the CESTAT Delhi vide Final Order No 51226-51571/2020 dated 02.11.2020 and 50608-51022 dated 15.01.2021. In both the orders, Hon'ble Tribunal had analyzed the meaning of word "duty of Customs" used in SI. No 2 of the Notification No 45/2017-Cus. The Hon'ble Tribunal also negated the arguments of the Revenue that the Government intended to include integrated tax and compensation cess in the expression "duty of Customs".

5.5 I note that post these judgements, CBIC has issued Circular No 16/2021-Customs dated 19.07.2021 in this matter. The relevant portion of the circular is as below:-

> *"4. GST rate and exemptions are prescribed on the recommendation of the GST Council. The Council, at the time of roll out of GST decided to continue the concession as were available under the said notification No. 94/96-Cus, with only consequential amendment, i.e, replacing additional duties of customs with IGST and Compensation cess, as discussed in the 14th Meeting of the GST Council. Accordingly, under GST, IGST and Compensation cess were made applicable on the value of repairs, insurance and freight on re-import of goods sent abroad for repair.*
>
> *5. Again, during the 37th GST Council Meeting, while examining the request to make available the credit of ITC paid on aircraft engines and parts exported for repairs and later re-imported, the leviability of IGST on such imports, on the cost of repairs, insurance and freight charges, was affirmed. In fact, this was never disputed in first place and the request was to allow credit of the IGST so paid. Similarly, while examining the question of GST rate on maintenance, repair and overhauling (MRO) services in respect of aircraft, aircraft engines and other components and parts, the leviability of IGST on such re-imports was again affirmed by the GST Council in its 39th meeting, making it explicitly clear that such goods re-imported after repair from outside India attract IGST on the repair, freight and insurance value. In the said discussion, the IGST levied on such goods re-imported after being exported abroad for repairs was a significant factor*

considered by the GST Council while deciding the rate on MRO services. The above deliberations of the GST Council leave no doubt that the Council had consciously recommended for levy of IGST and cess, albeit at the repair, insurance and freight cost instead of the entire value of goods imports, on the basis of which the said notifications No. 45/2017-Cus and 46/2017-Cus were issued.

6. Recently, in the matter of M/s Interglobe Aviation Limited versus Commissioner of Customs, in its Final Order Nos. 51226-51571/2020 dated the 2nd November, 2020 {2020 (43) G.S. T.L. 410 (Tri. - Del.)), the Hon'ble CESTAT Principal Bench, New Delhi on analysis of notification No. 45/2017-Customs, has interpreted that intention of legislation was only to impose basic customs duty on the fair cost of repair charges, freight and insurance charges on such imports of goods after repair. The Hon'ble CESTAT has thus concluded that integrated tax and compensation cess on such goods would be wholly exempt. An appeal has been preferred by the Department before the Hon'ble Supreme Court against the said Order.

7. In the above background, the matter was placed before the GST Council in its 43rd Meeting held on the 28th May, 2021. The GST Council deliberated on the issue and recommended that a suitable clarification, including any clarificatory amendment, if required, may be issued for removal of any doubt, to clarify the decision of the GST Council that re-import of goods sent abroad for repair attracts IGST and cess (as applicable) on a value equal to the repair value, insurance and freight.

8. Accordingly, as recommended by the GST Council, it is clarified that notification Nos. 45/2017-Customs and 46/2017-Customs, both dated the 30th of June, 2017 were issued to implement the decision of the GST Council taken earlier, that re-import of goods sent abroad for repair attracts IGST on a value equal to the repair value, insurance and freight. Further, in the light of the recommendations of the GST Council in its 43rd Meeting, a clarificatory amendment has been made in the said notifications, vide notification Nos. 36/2021-Customs and 37/2021- Customs, both dated 19th July, 2021, without prejudice to the leviability of IGST, as above, on such imports as it stood before the amendment."

5.6 From this, it is abundantly clear that the intent of the GST Council, the supreme Constitutional body for making policy in respect of GST, has always been to levy IGST on such imports. In fact, this intent flows from the fact that such imports were subjected to Additional Duty of Customs also prior to introduction of GST in

terms of Notification No 94/96-Cus dated 16.12.1996. It is also evident that the GST Council has made its intent clear on several occasions. In light of this, I respectfully note that the impugned goods shall be liable to integrated tax and the exemption from the same is not available to them. Since position of law and legislative intent has been made abundantly clear by the GST Council itself, the cited judgements of Hon'ble Tribunal are distinguishable and I respectfully follow the clarification issued by the GST Council.

5.7 I also note that, CBIC has issued Notification No 36/2021-Customs dated 19th July, 2021 wherein Notification No 45/2017-Customs has been amended suitably. Said amending notification is reproduced as under:-

Notification No. 36/2021-Customs I Dated: 19th July, 2021

G.S.R. 494(E).— In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 45/2017-Customs, dated the 30th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (0, vide number G.S.R. 781(E), dated the 30th June, 2017, namely: —

In the said notification, —

(i) in the Table, against serial numbers 2 and 3, in column (3), for the words "Duty of customs", the words "Said duty, tax or cess" shall be substituted; (ii) in the Explanation, after clause (c), the following clause shall be inserted, namely: —

"(d) on recommendation of the GST Council, for removal of doubt, it is clarified that the goods mentioned at serial numbers 2 and 3 of the Table, are leviable to integrated tax and cess as leviable under the said Customs Tariff Act, besides

the customs duty as specified in the said First Schedule, calculated on the value as specified in column (3), and the exemption, under said serial numbers, is only from the amount of said tax, cess and duty over and above the amount so calculated."

5.8 Conjoint reading of Circular No 16/2021-Cus dated 19.07.2021 and the said notification make it crystal clear that the explanation `d' is clarificatory in nature. The intentions of GST council amplified in the said circular have been implemented by this amendment. As it had always been intention of the legislature that IGST should be leviable on such re-imports, the explanation added in the notification 45/2017-Cus by Notification No 36/2021-Customs dated 19.07.2021

will have retrospective effect as it does not change position of law but only clarifies it in more specific terms.

5.9 I refer to the ruling of the Hon'ble Supreme Court's judgement in case of W.P.I.L. Ltd. Vs Commissioner Of Central Excise, Meerut, U.P. [2005 (181) E.L.T. 359 (S.C.)] which held that clarificatory notifications shall have retrospective effect. The relevant portion is as under –

*"**14.** In our opinion, therefore, the authorities were in error in upholding the demand and in directing the appellant to pay excise duty.*

***15.** The learned Counsel for the appellant is also right in relying upon a decision of this Court in Collector of Central Excise, Shillong v. Wood Craft Products Ltd., [(1995) 3 SCC 454]. In that case, this Court held that a clarificatory notification would take effect retrospectively. Such a notification merely clarifies the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties.*

16. In view of the consistent policy of the Government of exempting parts of power driven pumps utilized by the factory within the factory promises, it could not be said that while issuing Notification No. 46/94 of March 1, 1994, the exemption in respect of said item which was operative was either withdrawn or revoked. The action was taken only with a view to rescinding several notifications and by issuing a composite notification. The policy remained as it was and in view of demand being made by the Department a representation was made by the industries and on being satisfied, the Central Government issued a clarificatory Notification No. 95/94 on April 25, 1994. It was not a new notification granting exemption for the first time in respect of parts of power driven pumps to be used in the factory for manufacture of pumps but clarified the position and made the position explicit which was implicit. "(Emphasis supplied by us)

As can be noted, in the quoted case, the policy of the Government has remained consistent and hence a clarificatory amendment was held to be retrospective. In present case also, the policy of the Government had been consistent and hence the explanation 'd' has to be considered to have retrospective application.

5.10 I also noted that in cases of M/s M M Aqua and M.s Sedco Forex, cited by the Appellant, such explicit and categoric clarification/ expression of legislative intent was absent. Further in case of lqbal & Co, Hon'ble Court noted as below"-

"*26. In Commissioner of Income Tax Vs Mohanlal Bhagwati Prosad [(1993) 204 ITR 234(Calcutta)], the Court held that Explanations 2 and 3 of Section 40(b) of the Act are*

clarificatory in nature, and this was evident from the circular issued by the Central Board of Direct taxes; hence explanations were given retrospective effect by the Court. It should be noted here that, a literal reading of Section 40(b) resulted in treating every kind of payment of interest, salary, bonus, commission or remuneration made by the firm, to the partners, as not deductible in computing the taxable income of the firm. This ignored bonafide payments and the different capacities in which the partners may receive the payment. In fact, this literal meaning of the words resulted in an unwarranted artificial situation, and therefore, when the Explanations were added to explain the real situation, Court thought it proper to apply these Explanations as giving the true meaning of Section 40(b) all along. In fact, one of us (K. S.Bhat, J) is a party to a similar decision of the Karnataka High Court in Commissioner of income Tax Vs Mangalore Ganesh Beedi Works, [(1992) 193ITR 77].

27. After referring to the several decisions the Karnataka High Court observed at page 87:

"We have quoted elaborately from several decisions to highlight the problem posed by the wording of Section 40(b) without the Explanation now added to it."

28. Again, as to the normal principle governing the Explanation, the Court held: "The normal principle in construing an Explanation is to understand it as explaining the meaning of the provision to which it is added; the Explanation does not enlarge or limit the provision, unless the Explanation purports to be a definition or a deeming clause; if the intention of the Legislature is not fully conveyed earlier or there has been a misconception about the scope of a provision, the Legislature steps in to explain the purport of the provision; such as explanation has to be given effect to, as pointing out the real meaning of the provision all along."

Para 34. An explanation, generally speaking, is intended to explain the meaning of certain phrases and expressions contained in a statuary provision. There is no general theory as to the effect and intendment of an Explanation except that the purpose and intendment of the "Explanation" are determined by its own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. It is also true that an Explanation may- this is what Sri Ramachandran suggests in this case- be introduced by way of abundant caution in order to clear any mental cob-webs surrounding the meaning of a statuary provision spun by interpretative errors and to place what the Legislature considers to be true meaning beyond any controversy or doubt." (Emphasis supplied).

It may be noted that the legislative intent has been clearly indicated in Circular No 16/2021-Cus dated 19.07.2021 and for implementation of the same, explanation 'd' has been introduced. Thus explanation 'd' needs to be considered to have retrospective effect.

5.11 In case of M/s Dilip Kumar & Co. [2018(361) ELT 577 (SC)], the Hon'ble Court noted as under:-

"Para 24. As contended by Ms. Pinky Anand, Learned Additional Solicitor General, the principle of literal interpretation and the principle of strict interpretation are sometimes used interchangeably. This principle, however, may not be sustainable in all contexts and situations. There is certainly scope to sustain an argument that all cases of literal interpretation would involve strict rule of interpretation, but strict rule may not necessarily involve the former, especially in the area of taxation. The decision of this Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs Presiding Officer, Labour Court Chandigarh & Ors ,(1190) 3 SCC 682, made the said distinction, and explained the literal rule-

" The Literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning whatever the result may be. Unless otherwise provided, the same words must normally be construed throughout the Act in the same sense, and in the case of old statutes regard must be had to its contemporary meaning if there has been no change with the passage of time." That strict interpretation does not encompass strict-literalism into its fold. It may be relevant to note that simply juxtaposing 'strict interpretation' with literal rule' would result in ignoring an important aspect that is 'apparent legislative intent'. We are alive to the fact that there may be overlapping in some cases between the aforesaid two rules. With certainty, we can observe that, 'strict interpretation' does not encompass such literalism. which lead to absurdity and go against the legislative intent. As noted above, if literalism is at the far end of the spectrum, wherein it accepts no implications or interferences, then 'strict interpretation' can be implied to accept some form of essential inferences which literal rule may not accept." (Emphasis supplied).

5.12 From above two paragraphs, it is evident that legislative intent is paramount and any interpretation which goes against such intent has to be negated. In the case at hand, the legislative intent has been made amply clear by the Circular No 16/2021-Cus dated 19.07.2021. This leaves no scope in interpreting that explanation `d' in Notification no 45/2017-Cus as added by Notification No 36/2021-Customs dated 19.07.2021 has to be considered to have retrospective effect.

5.13 In view of above discussion and findings, I have not reasons to differ from the impugned assessments wherein IGST has been levied on impugned imports as it is in accordance with the legislative intent.

For appeals filed for the impugned bills of entry assessed post amendment of Notification No. 45/2017— Customs, dated 30.06.2017 by Notification 36/2021- Customs, dated 19.07.2021 (SI. No. 164 to 1274 of Annexure)

5.14 For this period, the Appellant has changed their ground of Appeal and is now contending that their transaction is supply of service and IGST is being discharged on such service and it cannot be levied again on re-import of parts. They have also contended that IGST is leviable only upon inter-state supply of goods and transaction in dispute is a composite supply with principal supply being of service.

5.15 I note that now the Appellant is challenging validity of Notification No. 45/2017— Customs, dated 30.06.2017 as amended by Notification 36/2021-Customs, dated 19.07.2021 on the main ground that it amounts to double taxation. However, examining validity of an exemption notification issued under the Customs Act, 1962 is beyond scope of this Authority. This Office, being creature of the statute has to act as per provisions of the Act and notifications issued thereunder. I specifically note that the Notification No. 45/2017- Customs (as amended) explicitly provides for levy of IGST in present case as no exemption from payment of IGST is available for reimports of aircraft engine or aircraft parts. When IGST has been levied strictly as per said notification, no error can be found with assessment done in this manner and the plea of double taxation does not hold good.

5.16 I must also add that as examined earlier in paras 5.9 to 5.12, the legislative intent is supreme. When the legislature in its wisdom has levied IGST on re-import of repaired parts vide said Notification, this Office cannot find fault with assessment done as per the Notification.

5.17 I must add that validity of levy of IGST as per Notification No. 45/2017— Customs, dated 30.06.2017 as amended by Notification 36/2021- Customs, dated 19.07.2021 is not open to challenge before this Office. In this regard I refer to Order of Hon'ble Tribunal in Sparkle International 2015 (325) E.L.T. 926 (Tri. - Del.) in which it was held-

> *6. We have considered the contentions of both sides. The appellant had claimed exemption from Special Additional Duty under Notification No. 20/2006-Cus. in respect of the impugned goods in terms of entry No. 50 in the table appended to Notification No. 20/2006-Cus. The said entry is reproduced below : -*

50	*Any Chapter*	*All goods specified in the First Schedule to the Additional Duty of Excise (Goods Special Importance) Act, 1957 (58 of 1957)*	*Nil*

It is, thus, evident from the above entry (No. 50) that once the impugned goods were removed from the said 1st Schedule vide Finance Act, 2011, the benefit of exemption Notification No. 20/2006-Cus. no longer remained available to the appellant in respect of the impugned goods. The appellant has not disputed the fact that the impugned goods were not specified in the said 1st Schedule during the relevant period. It is only contesting the demand on the ground that as per law the Central Government could not collect Special Additional Duty (SAD) on the impugned goods when the said goods were exempt from sales taxNAT by virtue of the provisions of Section 3(5) of the Customs Tariff Act, 1975 which allows levy of such SAD only to countervail VAT/sales tax. While the said sub-section allows Central Government to levy SAD not only to countervail sales taxNAT but also other taxes/charges, we must hasten to add that once the Central Government has taken a view in this regard and imposed SAD on the impugned goods, it is not open to CESTAT to challenge the validity of such levy. The Tribunal being a creature of the statute is bound to follow the provisions thereof and this legal position is not under challenge. As regards the judgment in the case of CC (Preventive), Patna v. Katyal Metal Agencies (supra), we reproduce paragraphs 4 and 5 of the said judgment below : -

> *4. We find that the Special CVD is as per sub-section 5 of Section 3 of CETA, 1985. The Special CVD is levied for counterbalancing for Sales Tax/VAT. Undisputedly, the Sales Tax/VAT is exempted in this case. In this regard, learned Commissioner (Appeals) has found that the element of CVD is a tax in lieu of Sales Tax/VAT and that once the Importer fulfils the obligation of paying both the CVD and the Sales Tax/VAT, then he is entitled to refund of the CVD he had paid. The relevant portion of the Commissioner (Appeals) Order is reproduced hereunder : -*
>
> > *"On my observation of the facts of the case, I have come to the conclusion that the element of CVD is a tax in lieu of Sales Tax/VAT and that once the Importer fulfils the obligation of paying both the CVD and the Sales Tax/VAT, then he is entitled to refund of the CVD he had paid. Now in this peculiar circumstance the fact remains*

that there is no Sales Tax on the Item (subject goods) imported as the same has come under the list of exempted List of Commodities, inserted vide Notification No. F.3(77)Fin.(T&E) 2005-06/1424-1433 Kha, dated 14-3- 2006 w.e.f 14th March, 2006 of the First Schedule to Delhi VAT (Section 6). It therefore goes without saying that when the subject goods is exempted from payment of Sales Tax there is no question of asking him whether he has paid the Sales Tax. The very fact that he has produced the Exemption Notification is sufficient enough to admit the refund claim. In other word, when the subject goods is exempted from Sales Tax, it necessary follows that he is not required to pay the CVD. When the Item imported is exempted from Sales Tax/VAT, the same should have also been exempted from. CVD. This would have simplified the matter.

5. It is pertinent to mention here that what is abated cannot be taken away indirectly. In these circumstances, we do not find any reason to stay the operation of the impugned Orders-in-Appeal. Stay Petitions are dismissed."

We find that CESTAT in this order has prima facie disregarded the fact that the appellant was not entitled to the benefit of Notification No. 102/2007- Cus. and in effect held that the Central government could not collect the impugned SAD in that case. As CESTAT is not competent to challenge the legality of a Notification issued by Central Govt., prima facie, the order is issued without jurisdiction and an order issued without jurisdiction is a nullity. More importantly, the said CESTAT order (in the case of Katyal Metal Agencies) is only an interim order dismissing stay petition of Revenue and therefore has no value as a precedent for deciding the issue.

(Emphasis supplied).

Similarly in case of Shree Dodhaganga Krishna SSK Niyamitha vs. CCE Belgaum 2001 (138) E.L.T. 1082 (Tri. - Bang.), Hon'ble Tribunal held that-

5. It was also held by the Supreme Court in the case of Miles India Ltd. v. Assistant Collector of Customs reported in 1987 (30) E.L.T. 641 that Tribunal as well as Customs authorities are bound by the statutory period of limitation. It was also observed therein that proceeding beyond the period can be initiated in the Civil Court. This view was affirmed by the Apex Court in the case of Mafatlal Industries Ltd. (supra). In view of this, it is clear that the refund claim made beyond the period of 6 months, the party is required to file a civil suit or to file a writ petition before the appropriate forum. The Tribunal cannot go into the validity of the constitutional

proceedings and question vires of the statute, being a creature of the statute. In any view of the matter. I do not find any substance in the appeal filed by the party. Refund claim is clearly barred by time. I do not find any infirmity in the impugned order and accordingly I uphold the impugned order dismissing the appeal. (Emphasis supplied).

Thus, the validity of levy of IGST as per Notification No. 45/2017— Customs, dated 30.06.2017 amended by Notification 36/2021-Customs, dated 19.07.2021 cannot be examined by this Authority and it is held that assessment of these bills of entry is as per said notification and is upheld.

ORDER

6. In view of above, I reject the appeals filed by the Appellant as per Annexure and uphold the assessment done therein.

Matter is disposed of accordingly."

172. It is thus apparent that the CESTAT has essentially come to hold that the impugned amendments were clarificatory and would thus be liable to be read as removing the very basis on which its original judgments between the parties inter se had been rendered. However, we have for reasons aforenoted, come to the firm conclusion that the amendments inserted could neither be said to be clarificatory nor could they be viewed as being explanatory of a pre-existing provision.

173. As observed in the preceding parts of this decision the mere use of terms like 'Explanation' or 'removal of doubt' neither results in an automatic validation of an amendment nor does its mere labelling as such make it clarificatory. For an amendment to be legitimately classified as an 'Explanation' or a 'removal of doubts' provision, it must be demonstrably evident that the position it seeks to clarify was already incorporated, contained or rooted in the original statute or the notification or even intended to be as such.

174. An explanation or clarification could be validly construed as meeting the tests as propounded if it attempts to elucidate a pre-existing

legal position that was implicit in the statute or the notification from its inception. It thus seeks to explain and remove ambiguities and uncertainties surrounding the meaning liable to be ascribed to a word or a provision. However, before it can be legitimately accepted to be clarificatory, one would have to be satisfied that its true intent got obscured in the course of judicial interpretation. However and as we have found hereinabove, there was no ambiguity in the notification adverting to a duty of customs alone. We thus find ourselves unable to concur with or uphold the view to the contrary as expressed by the CESTAT.

SUMMATION

175. We accordingly and for all the aforesaid reasons are of the considered opinion that an integrated tax on the import of services can only be imposed under Section 5(1) of the IGST. A supply of service once so classified cannot be recharacterized. The Constitution Amending Act read along with the provisions contained in the CGST and the IGST leave us in no doubt that an import of service could have only been taxed by virtue of a legislation referrable to Articles 246A and 269A. If the submission of the respondents were to be accepted, it would compel us to view Entry 83 falling in List I as the conferment of an authority to legislate and levy a duty on import of service which is clearly not the legislative field or subject of that entry. In fact if Entry 83 were so read, it would impinge upon the the power conferred by Articles 246A and 269A itself.

176. A conjoint reading of the Proviso to Section 5(1) along side Section 3(7) of the CTA clearly establishes that they are a part of a composite and comprehensive machinery laid in place for collection of a goods and services tax. It merely designates the place and the juncture when the tax

liability would be liable to be discharged. The integrated tax which is spoken of in Section 3(7) can only be recognised as being a reference to the integrated tax leviable under the IGST. We find ourselves unable to countenance a power or authority inhering in the respondents to subject a supply or import of service to a tax under the CTA in the garb of levying an additional duty.

177. The reliance placed on the judgment of the Supreme Court in *Hyderabad Industries* is clearly misplaced since the said decision was primarily concerned with the interplay between BCD and an additional duty of customs under the CTA. While there cannot be a cavil of doubt with respect to those two levies being separate and distinct, we are in the present batch concerned with the levy of a tax upon import of services under the IGST and an additional levy which, according to the respondents, would be leviable on a purported reading of Section 3(7) of the CTA. Regard must also be had to the amendments which came to be made in Section 3(7) and which no longer speaks of an authority to levy a tax notwithstanding the provisions contained in any other enactment but restricts its expanse to the imposition and collection of a tax "as leviable" under Section 5(1). In any case, and as we have found, both Sections 5(1) of the IGST and Section 3(7) of the CTA are indelibly connected to the levy and collection of the tax contemplated under the former. We find ourselves unable to construe or interpret Section 3(7) as envisaging an independent levy.

178. The impugned amendments ushered in by virtue of Notification No. 36/2021 together with the clarification issued by the CBIC were clearly intended to expand the tax net and cannot, therefore, be termed to be merely clarificatory. The original notifications were in unambiguous terms restricted to the levy of a BCD. It was this position which was sought to be drastically amended by those changes. In any event, the levy of an

additional duty even after the transaction has been subjected to the imposition of a tax treating it to be a supply of service would be clearly unconstitutional and cannot be sustained.

DISPOSITION

179. We accordingly allow the instant writ petitions. Notification No. 36/2021 insofar as it purports to levy an additional levy over and above the IGST imposed under Section 5(1) by adding the words *"....tax and cess"* is declared unconstitutional, ultra vires the IGST and is quashed to the aforesaid extent. For reasons aforenoted, we also declare the Explanation to clause (d) as introduced by the aforesaid notification as invalid and set aside the same. Circular No. 16/2021 issued by the CBIC is consequentially quashed.

180. We also for all the reasons assigned in the body of this judgment quash and set aside the impugned orders dated 30 November 2022 [WP(C) 7845/2023] and 28 December 2023 [WP(C) 4673/2024] passed by the Commissioner of Customs (Appeals) as also the orders of assessment which were assailed. The petitioners shall be entitled to consequential reliefs.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

MARCH 04, 2025/RW/DR/neha/kk