

Landmark Judgments relevant under GST

CA Ashish Chaudhary
Partner, Hiregange & Associates



Index

1. Scope of Levy
2. Input Tax Credit
3. Exemptions
4. Composite Supplies
5. Valuation
6. Compliance and procedures
7. Miscellaneous Advance Rulings

Unconstitutionality of Levy – Ultra vires

Mohit Minerals Pvt Ltd vs UOI (2020 (33) G.S.T.L. 321 (Guj.)

- **Facts:** Petitioner importing non cooking coal under CIF terms with the supplier/exporter outside India.
- Transportation services availed by the foreign exporter from foreign shipping line.
- Question arises whether GST Liability arises under RCM on alleged import of services on deemed value of services

Petition was admitted on the following grounds:

- Extra territorial jurisdiction – Taxable territory is the territory to which the Act applies i.e. India. Services supplier, receiver and provision of service is outside India.
- No levy to be imposed twice under the Act. Goods already suffered IGST on import. Composite supply of goods would include the freight charges also
- ‘Deeming fiction of value’ in the Notification is illegal and there is no concept of ‘value of taxable service’ in the Act

Unconstitutionality of Levy – Ultra vires

Mohit Minerals Pvt Ltd vs UOI (2020 (33) G.S.T.L. 321 (Guj.)

- Liability can be shifted on recipient of service. Importer is not recipient of service hence entry 10 of Notification No. 10/2017 is ultra virus the Act. Beneficiary of services cannot be said recipient of service.
- Time of supply in case of RCM (import of service) cannot be determined by the importer of goods as he is not privy to the transaction with foreign shipping line.
- Importer of goods is not recipient of service and not entitled to claim ITC. Thus, the claim that it is revenue neutral on account of ITC eligibility is not valid as he cannot avail ITC (being not recipient).
- Article 265 does not entitle delegated legislation to impose the tax in the absence of express legislative provision. Thus, it is unconstitutional.

Unconstitutionality of Levy – Ultra vires

Mohit Minerals Pvt Ltd vs UOI (2020 (33) G.S.T.L. 321 (Guj.)

Way forward

- Applicability to other States
- Refund of taxes paid in the past beyond time limit of 2 years – unconstitutional levy – Mafatlal Industries Limited (SC)
- ITC to the recipient – not falling within definition of “recipient”
- Interest paid in the past for delayed payment of tax - Refund

Scope of Supply – damage constitutes supply?

Bai Mamubai Trust vs Suchitra 2019 (31) G.S.T.L. 193 (Bom.)

- **Facts:** Commercial property owned by the plaintiff was illegally occupied by defedendent.
- Court appointed Receiver to collect formal possession but not physical possession of the property.
- Court receiver is entitled to receive:
 - His service charges towards function assigned by Court
 - Receipt of royalty of Rs. 45,000/- pm from defendant
- Held that:
 - Service charges payable to the Receiver appointed by the Court is covered by “*Services by any Court or Tribunal established under any law for the time being in force*”

Scope of Supply – damage constitutes supply?

Bai Mamubai Trust vs Suchitra 2019 (31) G.S.T.L. 193 (Bom.)

- Supply denotes Positive Act.
- Compensation paid towards damages or towards securing any future determination of compensation or damages for a violation of the legal rights of the landlord (plaintiff) in the tenanted premises. The **basis of payment is illegal possession or trespass and hence lacked necessary reciprocity** to make it a supply – Para 55, 57;
- Damages represent an award in money for a civil wrong which is in contrast to ‘consideration’. While damages are towards restitution for loss caused on account of violation, consideration is towards an identifiable supply. The law of damages is not restricted to only unpaid consideration, i.e. what ought to have been paid, but also expands to compensating the loss to a party which may not even be privy to the agreement (e.g. in torts) – Para 60;
- The measure for computation cannot be the litmus test for ascertaining the character of a supply – Para 72 & 73;
- Even though business and supply definitions are inclusive, a positive act of supply is a necessary concomitant of a supply transaction

Scope of Supply – damage constitutes supply?

- **GE T & D India Ltd v. D.C.C.E, Chennai 2020-TIOL-183-HC-MAD-ST** held Noticee pay recovery would not fall under the entry of ‘toleration to act etc.,’ s. 66E(e) of FA, 1994
- **Lemon tree hotel vs. CCE 2019 (7) TMI 767 - CESTAT NEW DELHI** held that room cancellation charges does not undergo a change after receipt - no service tax is attracted under the provisions of Section 66 E(e)
- **Monnet Ispat & Energy Ltd v. CCE 2018 (9) TMI 1514 - CESTAT NEW DELHI - Declared Service** covers those cases where service provider has agreed to take on himself an obligation to refrain from an Act. The UI Charges have been received by the appellant only in those cases where the buyer has drawn more electricity than what was scheduled for him - such an act cannot be considered as agreeing to an obligation to refrain from supply of electricity.
- **K.N. Food Industries Pvt. Ltd. C.G & C.E 2020 CESTAT** held that invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc.
- **M/s Repco Home Finance Ltd.,: (LB) – Foreclosure charges** is not liable to ST as the amount paid is not consideration of service. Distinction between condition to a contract and consideration of a contract

Immovable Property – Works Contract/ Section 17 (5)

In re, WeWork India Management Pvt. Ltd. 2020 (37) GSTL 136 (AAAR-Kar.)

- The Appellant is engaged in providing shared workspace/Office Space to the freelancers, start-ups, small businesses and large enterprises. The appeal stems from the Karnataka AAR ruling that ITC is not permissible on detachable wooden flooring and detachable sliding and stacking glass partitions.
- The key consideration before the AAAR is the interpretation of expression “immovable property” in Section 17 (5) (c) and (d).
- IMP is defined under Section 3 (26) of the General clauses Act – *“immovable property” shall include land, benefits to arise out of land, and things **attached to the earth**, or permanently fastened to anything attached to the earth.*
- Attached to earth can be understood from Section 3 of TOPA – *means as means – (a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;*

Immovable Property – Works Contract/ Section 17 (5)

- To ascertain whether the item is permanently attached to earth, many Courts have consistently used two-fold tests (i) the extent of annexation and (ii) the object of annexation.
- **Permanency Test:** *The extent of annexation means annexing the fixture or object by which it ceases to be detachable. It would need to be demolished if one were to remove it. The object of annexation test lays down that where a movable property gets annexed with an immovable property, if the intent of annexation is of permanent beneficial enjoyment of the immovable property, then the fixture becomes an immovable property.*
- **Object Test:** *If the intent of annexation is the beneficial enjoyment of the movable property, then the property remains movable.*
- The glass partitions are not permanent and are not embedded to the earth. They can be dismantled and moved according to the requirements of the clients. Although they are fixed to the earth with nuts and bolts, they can be dismantled without demolishing the civil structure. Therefore, the detachable sliding and stackable glass partitions do not qualify as immovable property. [also Jarrold vs John Goods & Sons Ltd. HC (TC) 1959-63]

Immovable Property – Works Contract/ Section 17 (5)

- **Object Test:** In CCE vs Solid & Correct Engineering Works 2010 (252) E.L.T. 481 (S.C.), it was held that machinery which was installed with nuts and bolts to concrete base is not installed for beneficial use of land but of the machinery. Doors, windows and shutters of a house are attached to the house, Th object of annexation is use of house. They have no separate existence from the house.
- **Permanency Test:** In Municipal Corporation of Greater Bombay vs Indian Oil Corporation AIR 1991 SC 686, the Supreme Court had held that where the chattel is movable to another place of use ‘in the same position’, it is movable property and where it is liable to be dismantled and re-erected at the later place, it is attached to the earth and hence immovable property.
- Illustrative cases
 - Installation of Air-condition plants, ETP,
 - Water Tanks, Boiler Housing
 - Server Rooms

ITC on construction of immovable property

Safari Retreats Pvt Ltd vs Chief Commissioner of CGST 2019 (25) G.S.T.L. 341 (Ori.)

Question: Whether GST paid on inputs (i.e, goods or services) purchased for the purpose of construction of immovable property can be taken to set off GST obligations in respect of renting of immovable property

Arguments of the petitioner:

- Section 17(5)(d) must apply only in cases of constructions where tax chain is broken. Its purport must be restricted to cases where the intention to construct a building, is to sell it after issuance of completion certificate.
- The sale of a property after issuing of a completion certificate is not taxable in the GST regime as per entry 5 of III Schedule to CGST Act. Therefore, the chain of taxation gets broken and restricting ITC in such cases would be completely valid.
- However, in the instant case the tax chain continues as the mall which has been constructed generates rental income which is liable to GST. Hence, the taxation which starts when the petitioner buys goods and services for the construction of the mall, continues till the taxation of rental income arising out of the same construction.
- Further, under section 16 of the CGST Act, GST registered persons are entitled to take credit of input tax charged on any supply of goods or services *to him* which are used or intended to be used in the *course or furtherance of his business*. It contemplates availment and utilization of ITC by persons who have a uniform tax chain in their transactions from input till output.

ITC on construction of immovable property

Safari Retreats Pvt Ltd vs Chief Commissioner of CGST 2019 (25) G.S.T.L. 341 (Ori.)

Held:

- The very purpose of the CGST Act is to make uniform provisions for levy and collection of tax and to prevent multi-taxation.
- Input tax credit accumulated on account of inputs purchased/used for construction of immovable property against renting of immovable property is that supply of input goods for construction of a shopping mall and the same being used for renting out units in the mall constitute a single supply chain and benefit of ITC should be available to the assessee.
- Section 17(5)(d) of the CGST Act was read down by allowing use of ITC on goods and services consumed in construction of shopping mall against paying GST on rentals received from tenants in shopping mall as the very purpose of credit is to give benefit to the assessee.

ITC on construction of immovable property

Safari Retreats Pvt Ltd vs Chief Commissioner of CGST 2019 (25) G.S.T.L. 341 (Ori.)

Way Forward:

- Matter is pending before Supreme Court.
- Meaning of term “own account”
- Course of actions for the past period – applicability of interest and/or penalty – availment with/without utilization *viz a viz* availment/ protest reversal.
- Applicability of the provision to property not intended for renting i.e. factory, shed construction etc.

Food supply at subsidized rate – ST liability?

Bhimas Hotels Pvt Ltd vs UOI 2017 (3) G.S.T.L. 30 (A.P.)

- **Facts:** Petitioner provided subsidized food to the employees though some amount was recovered from the employee
- Department contended that it constitutes provision of services and liable to service tax.
- Petitioner already discharged VAT on the foods recovery made.
- **Held:** Definition of service under Finance Act positively excluded services provided by employee to the employer
- Concessional food to the employees in the course of employment gets covered within expression of “wages” as per Factories Act and Industrial Dispute Act.
- Any supply of subsidized food to workers by management of company, has to be seen as part of pay package that workers have negotiated with employer.

Electricity – goods or services

Srijan Realty (P) Ltd. vs CST 2019 (24) GSTL 169 (Cal.)

- The petitioner has a commercial complex - “Galaxy Mall” with various occupants. In order to effect electric supply to the commercial complex, the petitioner entered into an agreement with Electricity distribution company (DISCOM).
- The DISCOM provides **high tension** electric supply through substation installed at the commercial premises and issues a single consolidated electricity bill upon the petitioner.
- The petitioner on receipt of electric supply redistributes **low tension electricity** to the occupiers and based on sub-meters readings the petitioner raises bills upon such occupiers.
- The petitioner claims service tax exclusion under following entries of Section 66D (e) and 66D (k) arguing that electricity supplied by him are goods relying upon NTPC judgment and reference of power in CTH 2711 60 00 of the Central Excise Tariff.
- He further argued that merely because he is not authorized to distribute electricity does not change the very nature of electricity

Electricity – goods or services

- The High Court held that the petitioner is not a GENCOM, does not trade in electricity and it does not have license to undertake trading in electricity as per the Electricity Act, 2003 → *Sale, trading and distribution being taken out of the contention, the only other thing that remains to describe the activity undertaken by the petitioner, is service. Any other interpretation will render the steps taken by the petitioner in receiving high-tension electric supply and making over low-tension electric supply to the occupants, violative of the provisions of the Electricity Act, 2003.*
- **Validity of propositions**
 - Whether electricity is goods or services?
 - Whether implication of another legislation affects treatment under the tax statute?
 - The status quo of landlords, RWAs?

Revision of Return under GST

Bharti Airtel Limited vs Union Of India & Ors. on 5 May, 2020

- **Facts:** Appellant filed GSTR-3B by availing ad-hoc ITC in initial period of GST implementation.
- ITC availed was substantially short of available ITC during the period. It resulted in excess payment of tax in cash.
- Circular 26/2017 provided for adjustment in subsequent period returns.
- ITC availed subsequently cannot be utilised considering reduced output tax liability on account of lower turnover.
- Refund of tax paid cannot be claimed as it does not fall under any of the provisions of sec 54.

Petition: On account of failure of Government to implement GSTR-1, GSTR-2 and GSTR-3 with inbuilt self-check mechanism, the petitioner had to suffer.

Circular not permitting revision of GSTR-3B of the same month is in violation of provisions of the Act and thus ultra virus.

Revision of Return under GST

Bharti Airtel Limited vs Union Of India & Ors. on 5 May, 2020

- **Held:**
- Suppliers cannot expect to have immaculate Return filing system when Government itself failed to implement GSTR-2 and GSTR-3.
- Legitimate benefit of supplier cannot be curtailed by permitting them not to amend the original return. Revision of return to be allowed with consequential relief.

Way Forward:

- Revision of past returns where benefit not availed/wrong nature of ITC availed etc.
- Revision of returns for not able to disclose the Credit Note resulting in excess payment of tax liability.

Interest on Net/ Gross

- Section 50

“Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.”

- Megha Engineering 2019 (26) GSTL 183 (Tel.) - Mere availability of credit without being brought in form of credit entry into electronic credit ledger not to tantamount to payment
- Refex Industries 2020 (34) GSTL 588 (Mad.) - Use of word ‘delayed’ connotes situation of deprivation, where State deprived of funds representing tax component till such time return filed accompanied by remittance of tax. Availability of ITC connotes enrichment of State.
- Interest cannot be demanded before adjudication – Mahadeo Consturction, Godawari Commodities (Jhar.),
- 39th GST Council - proviso to Section 50 would be applicable retrospective from 01-Jul-2017

Conversion into Electricity – Job work

In re, JSW Energy Limited [MAH/AAAR/SS-RJ/01A/2019-20 – MH AAAR]

- The Applicant had approached the AAR to get a ruling on whether undertaking process on coal and other consumables by JSW Steel to for conversion into Energy tantamount to job work under Section 2 (68) of the CGST Act.
- The AAR had held that activity do not amount to job work in as much as job work does not incorporate complete transformation of the goods – conversion to a distinct commodity is not envisaged by treatment or process.
- The AAAR in appeal reversed the ground taken by AAR that even manufacture tantamount to job work, however denuded the job work treatment on following grounds;
 - The electricity is bought back through 3rd person – MSEDCL [grid] - The return of the inputs being converted into electricity through grid does not ensure return of goods
 - The VA by JEL on account of air and water is substantially high
 - Coal → usable for electricity → steel - not mentioned in SION of steel

Conversion into Electricity – Job work

- The Applicant approached Bombay High Court, which set aside the AAAR order and remanded back to ensure to hear the petitioner to give rebuttal on ‘new grounds’
- The AAAR in remanded order reversed its earlier order and observed as follows regarding job work;
 - Coal amounts to inputs despite being used for electricity rather than manufacture of steel in as much as electricity is captive consumption
 - Inputs even if consumed and irretrievable – would not disentitle the process from being job work
 - The VA of water and air is less than 5%, as per Cost Accountant Certificate
- Pertinent questions relating to job work;
 - Whether value addition by job worker is a criterion
 - Meaning and scope of treatment or process

Aggregate consideration to include interest?

Shree Sawai Manoharlal Rathi (Guj AAR)

- Interest earned on saving bank deposit, PPF account and personal loans and advances to be included in the computation of aggregate turnover?

Held:

- Interest income is included in the exemption notification. Hence, it becomes exempt supply.
- Definition of aggregate turnover is very wide to include exempt supply. Hence, interest income to be included in the computation of aggregate turnover.

Food for thought:

- Exemption to be interpreted for determination of levy?
- Scope of term business. If everything to be included – need of definition ?
- Madhav Prasad Jatia vs Commissioner Of Income Tax 1979 AIR 1291 (SC) – loan for personal purpose – not allowable expenses

Secondment of Employee

TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION LIMITED 2020-VIL-175- AAR

- Employee on the roll of one company but working for other group company also. Whether recovery of cost is liable to GST?

Held:

- The applicant and TANTRANSCO are two different persons. When the applicant extends the services of their employees to TANTRANSCO and collect the considerations payable to such employees from TANTRANSCO, the said activity is a 'Supply of Service' and GST is applicable to this supply of service.

Secondment of Employee

Hitachi Power Europe GmbH (Mah AAR)

- Employee on the roll of foreign company but working under the Indian Project office. TDS etc deducted by Indian project office but payment made to employees (expat employees) by Foreign Company. Expenses booked in the Indian Books to reflect true and fair view. Whether liable to GST under RCM?

Held:

- Project office is an extension of foreign head office and as in subject case shall carry on all activities relating and incidental to execution of projects in India. Thus we find that expat employees are employees of the employer i.e. head office and since the project office is an extension of head office, there is relationship of employer and employee between project office and the expat employees.
- No liability on accounting entry of booking salary cost.

Secondment of Employee

Food for Thought:

- Cost sharing vs supply
- Role of Schedule III
- Franco India Pharmaseutical (P) Ltd vs CST, Mumbai -2016 (42) STR 1057 (Tri- Mumbai)

Services rendered in course of employment - Legislature has kept them outside purview of Service Tax levy - It is true even under new Negative List Regime of taxation post-2002 - Whether such service are rendered by employee to one employer or to many, as in case of joint employment, cannot make any difference to tax treatment of emoluments earned by employee - If employer-company who takes employee in its own rolls does not insist on some mark-up or margin being given to it, over and above actual cost, payments received against debit notes by one employer-company upon other employer-companies, do not have character of consideration for any service; they are mere reimbursement of shared costs

Transportation Services by one GTA to another

M/s Liberty Translines (Mah AAR)

- There is a company named POSCO ISDC Pvt. Ltd (POSCO) which provides GTA service and has opted for GST payable on forward charge basis at 12%, by claiming the related ITC.
- POSCO further sub-contracts GTA service to the Applicant due to lack of its own fleet, who provides the GTA service as a sub-contractor.

Held

- GTA is the person issuing consignment note. In this case, POSCO issues consignment note acknowledged by consignee, hence he is GTA.
- Applicant providing transportation services to POSCO cannot issue consignment note. Services exempted from GST.
- There cannot be multiple CN for single movement.

Transportation Services by one GTA to another

Points To Ponder

- GTA vs. Consignment Note
- Explanation to Entry 9(iii) of Notification No. 20/2017

"goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called.

- Consignment note – Not defined unlike erstwhile Rule 4B
- Commonly understood that it is a document given by the transporter while receiving the goods to be transported.
- **The Carriage by Road Act, 2007**

Entry no. 18 of Notification no. 12/2017: Where the same is applicable?

“Services by way of transportation of goods- (a) by road except the services of— (i) a goods transportation agency;”

Plotting of Land

SHREE DIPESH ANILKUMAR NAIK 2020-VIL-148-AAR

- The applicant has submitted that he is having a vacant land outside the municipal area of town on which he has some proposed business activity. The applicant is having all the necessary approvals for the proposed project from the Plan Passing Authority (i.e. Jilla Panchayat).
- The applicant has further submitted that as per the Plan Passing Authority, the seller of land is required to develop the primary amenities like Sewerage and drainage line, Water line, Electricity line, Land levelling for road, Pipe line facilities for drinking water, Street lights, Telephone line etc..

Held

- The activity of the sale of developed plots would be covered under the clause 'construction of a complex intended for sale to a buyer'. Thus, the said activity is covered under 'construction services' and GST is payable on the sale of developed plots in terms of CGST Act / Rules and relevant Notification issued time to time.

Hostel services not liable to GST

Ramnath Bhimsen Charitable Trust (CG AAR)

- Applicant providing hostel services along with canteen etc. Charges collected are Rs. 24,000 per quarter. Whether liable to GST?
- **Held**
- Canteen etc is not a separate supply but composite supply where principal supply is accommodation service.
- Amount collected is less than Rs. 1000 per day or equivalent. Entitled for exemption.

Discount offered to customer by principal

Santhosh Distributors, In re [2019] 110 taxmann.com 496 (AAR – KERALA)

Held:

Issuance of commercial credit note by the OEM – whether ITC reversal is required	No. The supplier paid tax on original gross amount. Recipient is not entitled to reverse ITC
Discount given by OEM to compensate for the reduction in market price. Liable to be added in the hands of recipient	Yes,, the discount represents additional consideration and thus liable to be added

Food for Thought:

- Effect of withdrawal of Circular No. 105/2019-GST Dated 28th June 2019
- Matter referred to Law Committee by GST Council

OTC Sale – liable to IGST?

Case-Penna Cement Industries Ltd. [2020] 116 taxmann.com 876 (AAR- TELANGANA)

Applicant making sale of goods to the customers of different States on ex-factory basis. Whether subject to CGST:SGST or IGST

Held

- Movement of goods may be undertaken by the supplier or recipient.
- Sale to interstate customer on ex-factory basis where further movement is undertaken by the customer would fall within section 10 (1) (a). Liable to IGST.

37th Council Meeting: Divergent views by various States. Matter referred to law Committee for reconsideration.

Payment by book adjustment and ITC reversal

Sanghvi Movers Ltd., In re [2020] 113 taxmann.com 24 (AAAR – TAMILNADU)

Applicant receive services of hiring of equipment from head office on which IGST was paid. Question raised as to whether branch would be required to remit money to head office for availment of ITC?

Held

- AAR held that the payment has to be made by recipient for availment of ITC.
- There is no need of payment of as per proviso to Rule 37 (1).
- Netting off of receivable and payable is valid for discharge of

Applicable for all transactions of book adjustment. Payment need not be in cash only.

Any Queries???

For any clarification
ashish@hiregange.com
8510950400



THANK YOU!