GIFT GULATI INSTITUTE OF FINANCE AND TAXATION

# JUDICIAL PRONOUNCEMENTS

# GOODS AND SERVICES TAX

## A Brief Analysis of Significant Judgments of Supreme Court and Various High Courts in 2018

Tax litigation occupies a large portion of judicial time in India. According to the Economic Survey 2018, there were approximately 1.37 lakh direct and 1.45 lakh indirect tax cases under consideration by the various judicial institutions. Even though the success rate of disposal of cases by the tax department at all three levels of appeal---Appellate Tribunals, High Courts and the Supreme Court---is below 30 per cent for both direct and indirect tax litigations, it remains undeterred and persists in pursuing litigation at every level of the judicial hierarchy, making it the largest litigant in the country.

Despite continuous efforts of the government in the last several months, the Goods and Services Tax (GST) law has witnessed many litigations and disputes from its implementation stage to the introduction of e-way bill system. Issues related to transition, non-filing of returns, clarification on rates, classification of goods and services, refund, complexities of export and import duties, penalties, input tax credit, e-way bill structures, advance rulings, anti-profiteering, etc. are still under litigation, creating a scope for future disputes and litigations. This special issue provides a summary of significant judgments related with GST issued by the Supreme Court and various High Courts during 2018.

### SUPREME COURT

#### GST (Compensation to States) Act, 2017 is Constitutionally Valid

*Union of India vs Mohit Mineral Pvt. Ltd.*

The petitioner, a company incorporated under the Companies Act, is a trader of imported and Indian coal. The company challenged the constitutional validity of levy of the GST compensation cess. While granting interim order, the Delhi High Court held that there is a prima facie case made out as regards the legislative competence of the Parliament to enact the impugned Act. The Court further barred any coercive steps against the petitioner by the department.

Allowing the appeal by the tax department, the Supreme Court Bench comprising Justice AK Sikri and Justice Ashok Bhushan held that the Preamble of Compensation to States Act, 2017 expressly mentions the Act to provide for compensation to the States for the loss of revenue arising on account of implementation of the GST in pursuance of the provisions of the Constitution Amendment Act, 2016. Thus, the Compensation to States Act, 2017 has been enacted under the express Constitution (One Hundred and First Amendment) Amendment Act, 2016. It was, therefore, held that "Parliament has full legislative competence to enact the Act and the Act having been enacted to implement the Constitution Amendment Act and the object being clearly to fulfill its objective, we reject the submission of the petitioner that Compensation to States Act, 2017 is a colourable legislation." With regard to the question that whether the levy of Compensation to States Cess and GST on the same taxing event is permissible in law, the bench observed that "GST imposed under the 2017 Acts as noticed above and levy of cess on such intrastate supply of goods and services or both as provided under Section 9 of the CGST Act and such supply of goods and services or both as part of Section 5 of IGST Act is, thus, two separate imposts in law and are not prohibited by any law so as to declare it invalid."

*Source*: Civil Appeal No. 10177 of 2018, DoJ: 03/10/2018

### HIGH COURT OF KERALA

#### Detention of Goods under GST Justifiable for Mere Infraction of Procedural Rules

Indus Towers Ltd. vs Assistant State Tax Officer

The petitioner engaged in the establishment and maintenance of towers for telecom service providers transported batteries with proper tax invoice. However, the tax department officials detained the vehicle of the petitioner by invoking section 129 of the GST Act stating that the petitioner has not fulfilled the requirements of Rules 55 and 138 of the State GST Rules. The petitioner approached the High Court for relief.

The single bench of the High Court allowed the same and clarified that goods cannot be detained merely for infraction of Rule 138(2) of the State SGST Rules when there is no taxable supply and goods are transported on delivery challans and so long as the authenticity of the delivery challan is not doubted. Further, the Court stated that the detention of goods on the ground of non-compliance of Rule 55 and 138 of the SGST Act is not

justified. On appeal, the division bench reversed the order and held that "when a delivery challan is issued under Rule 55, it is a mandate under sub-rule (3) of Rule 55 that there should be a declaration as specified in Rule 138. The fact that there was no such declaration uploaded in the site as an intimation to the Department of the transport of such goods raises a reasonable presumption of the attempt to evade tax, against the respondents herein. We cannot agree with the learned Single Judge that merely because there was no suspicion raised against the delivery challan there is an admission of non-taxability of the goods transported." Quashing the order, the bench held that "the finding that the transaction would not fall within the scope of taxable supply under the statute, cannot be sustained for reason of there being no declaration made under Rule 138. The resultant finding that mere infraction of the procedural rules cannot result in detention of goods though they may result in the imposition of penalty cannot also be sustained. If the conditions under the Act and Rules are not complied with, definitely Section 129 operates and confiscation would be attracted. The respondents are entitled to an adjudication, but they would have to prove that in fact there was a declaration made under Rule 138 before the transport commenced. If they do prove that aspect, they would be absolved of the liability; otherwise, they would definitely be required to satisfy the tax and penalty as available under Section 129."

*Source*: Appeal No : W.P. (C) No. 196 of 2018, DoJ: 17/01/2018

### Insistence on GST Payment by Cash or DD is against the Spirit of GST

Pioneer Polyleathers Limited vs Assistant State Tax Officer

The petitioner, a registered dealer, was detained u/s 129(3) and tax demanded of Rs 528,834. Petitioner paid the amount through the portal and obtained payment receipt, but the state tax officer refused to release the goods insisting that the tax and penalty ought to have been paid through cash or demand draft. The counsel for revenue submitted that the amount must be apportioned between the Centre and State as the liability is under the IGST head, and that it is not within the State's purview to effect the apportionment and that if the Court could have before it the GST Network, the problem would be solved. The counsel for GST Network submitted that they are only an infrastructure provider and have no statutory role to play in apportionment of taxes between Centre and State.

The Court observed that "Governments both at the Centre and in the State have ushered in the GST regime to ensure that everything is made online with minimum manual interventions. Yet strangely, the authorities still insist that the payment should be by physical means, i.e., either in cash or through DD. Such insistence seems to be archaic and out of tune with the very spirit of the GST regime. In apportionment, there may be delays and difficulties, but the taxpayer cannot be made to suffer, the Assistant State Tax Officer is directed to release the goods and the vehicle forthwith."

*Source*: Appeal No : WP(C). No. 37082 of 2018, DoJ:16/11/2018

### Detention Process cannot be Resorted if Dispute is Bonafide

*N.V.K. Mohammed Sulthan Rawther and Sons vs Union of India*

The first petitioner, a manufacturer of "Ground Betel Nuts (Arecanuts)" with the brand name "Roja", consigned a load of Roja betel nuts to the second petitioner in Kerala. He entrusted the consignment to the ABT Parcel Service for transportation. In the invoice, the first petitioner described the commodity with "HSN 0802", and paid the tax at 5 per cent. The first petitioner also raised the e-way bill. On 26.09.2018, the Assistant State Tax Officer (ASTO), intercepted the lorry when it reached Palakkad. The lorry had been carrying other goods too. The ASTO detained the goods alleging that the first petitioner's product fits the description "HSN 2106" and attracts 18 per cent and not 5 per cent tax.

The Court held that if the records the ASTO seizes truly reflect the transaction and the assessee's explanation accords with his past conduct, for example, the returns he has filed earlier, the detention is not the answer. At best the inspecting authority can alert the assessing authority to initiate the proceedings "for assessment of any alleged sale, at which the petitioner will have all his opportunities to put forward his pleas on law and on fact." The process of detention of the goods cannot be resorted to when the dispute is bona fide, especially, concerning the eligibility of tax and, more particularly, the rate of that tax.

*Source*: Appeal No.: WP(C).No. 32324 of 2018, DoJ:16/10/2018

## HIGH COURT OF MADHYA PRADESH

### No GST Exemption to the Goods and Services Supplied to Duty Free Shops at International Airports in India

M/s. Vasu Clothing Private Limited Vs Union of India and Others

The petitioner is a manufacturer and exporter of garments with the customer base in the Gulf, Africa and USA. Specialising in high-quality products for children, the petitioner intends to supply goods to Duty-Free Shops (DFSs) situated at international airports in India. The petitioner claimed that the benefit available to him under the erstwhile central excise regime of removing goods from his factory to DFS located in the international airports without payment of duty is not available to him under the GST regime.

The High Court Division Bench observed that under the IGST Act, 2017 a DFS situated at the airport cannot be treated as territory out of India. The petitioner is not exporting the goods out of India. He is selling to a supplier, who is within India and the point of sale is also at Indore, as the petitioner is receiving the price of goods at Indore. The bench noted that for the purpose of CGST Act, India extends up to the Exclusive Economic Zone (EEZ) up to 200 nautical miles from the baseline. It was held that "The location of the DFS, whether within customs frontier or beyond, shall be within India as long as it is not beyond EEZ. Therefore, DFS cannot be said to be located outside India. Instead, the DFS is located within India. As the supply to a DFS by an Indian supplier is not to 'a place outside India', therefore, such supplies do not qualify as 'export of goods' under GST. Consequently, such supplies cannot be made without payment of duty by furnishing a bond/letter of undertaking under rule 96-A of the CGST Rules, 2017. Also, he cannot claim the refund of an unutilized Input Tax Credit (ITC) under Section 54 of the CGST Act, 2017." "The petitioner cannot escape the liability to pay GST. He is manufacturing certain goods and supplying to a person, who is having a DFS. It is true that we cannot export our taxes but the facts remain that it is not the petitioner, who is exporting the goods or taking goods out of India. He is selling to a person, which is located in India as per the definition clause as contained under the GST Act. In light of the aforesaid, this Court does not find any reason to issue the writ of mandamus directing the respondents not to charge GST on the petitioner or to legislate on the subject granting exemptions as prayed by the petitioner."

*Source*: W. P. No.17999, DoJ: 17/12/2018

### State GST Officers are Authorised to Exercise Powers under IGST Act, 2017

Advantage India Logistics Private Limited vs
The Union of India & Ors.

The petitioners were transporting goods for an inter-state supply of goods from Gurugram to Pune. As per the E-way bill system, the number of the vehicle was mentioned as HR-38-0823 whereas, the correct vehicle number was HR-38-X-0823. Finding that the E-way bill was defective and not updated, the department initiated proceedings against the petitioners. According to the petitioners, Madhya Pradesh Government or officials authorised under the MPGST Act, 2017 have no jurisdiction to exercise the powers under the Section 4 of the Integrated Goods and Services (IGST) Act, 2017. They contended that

there is no separate notification authorising officials of the State Government under the IGST Act to exercise powers under the said Act. According to them, in the absence of any notification under Section 4 of IGST Act, 2017, the respondent No.4 is not competent to issue show cause notice and the impugned seizure memo dated 15.07.2018 is wholly without jurisdiction.

The High Court Division Bench, after analysing the provisions of section 4 of the IGST Act, said that the officers appointed under the MPGST Act, 2017 was authorised to be proper officers for the purposes of the IGST Act. "On due consideration of the arguments of the learned counsel for the parties so also the provisions of Section 4 of the IGST Act, we are of the view that officers appointed under the MPGST Act are authorized to be proper officers for the purpose of IGST and, therefore, the contention of the petitioner that no notification was issued and in absence of any notification under Section 4 of the IGST Act has no force, we cannot accept the contention of the petitioner that the action of the respondent No.4 is wholly without jurisdiction."

*Source*: Appeal No. WP No.16266 of 2018, DoJ: 23/08/2018

## HIGH COURT OF GAUHATI

### Petition Challenging Service Tax Demand Post-GST Dismissed

Laxmi Narayan Sahu vs Union of India

The petitioner challenged the jurisdiction to recover service tax demand after the GST rollout on 1st July 2017. The learned counsels for the petitioner pleaded that with the implementation of the Central Goods and Services Tax (CGST) and omission of Entry 92C of the Constitution, the Service Tax department has no jurisdiction to levy Service Tax. For the State, it was argued that an omission of the provisions of a statue do not render any proceeding initiated under it to be not maintainable any further, relies upon the provisions of Section 6 A of the General Clauses Act.

The High Court Division Bench observed that a reading of Section 6-A of the General Clauses Act clearly shows that even if an enactment stands omitted by a subsequent amendment, a proceeding initiated under the omitted enactment on its own does not come to an end upon omission and further continuance cannot be said to be impermissible under the law. "In view of such conclusion, we find the writ petition to be devoid of any merit and the relief sought for interfering with the demand-cum-show cause notices of various dates issued by the Assistant Commissioner CGST of the different districts would have to stand rejected. Accordingly, the writ petitions stand dismissed". Before concluding, the Court added that "Although the claim of the petitioners for interfering with the demand-cum-show cause notices had been refused but it is clarified that the respondents, if desire, may proceed ahead with the said demand-cum-show cause notices, and the same be done strictly in accordance with law, but from the point of view that the demand-cum-show cause notices came into effect from the date of this judgment."

*Source*: Appeal No: WP(C) No.2059/2018, DoJ:12/10/2018

## HIGH COURT OF CALCUTTA

### Lottery can be Treated as 'Goods' Taxable under CGST Act

Teesta Distributors & Ors. vs Union of India & Ors.

The petitioners challenged that lottery cannot come within the definition of 'goods' under the CGST Act, 2017 or any of the SGST Acts. According to them, the definition of 'tax' on the sale or purchase of 'goods' is an inclusive definition. However, there has to be a transfer of property. The petitioners contended that the ticket holder has a contingent interest in the prize money, which he may or may not get in the future, but does not get to possess any benefit for such payment in return. The sale of the lottery ticket is, therefore, a sale of chance. Consideration is paid for the chance to win. The sale of a lottery ticket, therefore, does not entail the transfer of any 'goods' or even beneficial interest in a movable property. Hence, the person who sells the lottery ticket is neither selling any 'goods' nor is the purchaser buying any 'goods'.

Justice Debangsu Basak noted that "Schedule III under Section 7 of the CGST Act, 2017 deals with activities or transactions which shall be treated neither as a supply of goods nor as a supply of services. Entry 6 of Schedule III of CGST Act, 2017 takes out 'actionable claims' other than the lottery, betting and gambling from the scope of such Act. Consequently, since lotteries are generally speaking 'goods' and come within the definition of 'actionable claims', and since, lotteries are kept out of the purview of 'actionable claims' which do not attract the CGST Act, 2017, the lottery can, therefore, be charged to tax under the CGST Act, 2017. On the parity of the same reasoning, the lottery is chargeable to tax under the WB GST Act, 2017 also." "CGST Act, 2017 and WB GST Act, 2017 cannot be held to be unconstitutional. Lotteries come within the scope and ambit of the above Acts. Therefore, lottery can be taxed under the CGST Act, 2017 and WB GST Act, 2017.

*Source*: Appeal No. W.P. No. 18424 (W) of 2017, DoJ: 10/10/2018

## HIGH COURT OF GUJARAT

### One Year Restriction to Claim Transitional Credit is Unconstitutional

Filco Trade Centre Pvt Ltd vs Union of India

The petitioners are engaged in trading of specialised industrial bearings of various types. They also imports certain goods. Before introduction of GST, the excise duty on local goods or the countervailing duty paid on imports was not to be borne by the petitioners. The credit could be utilised for payment of tax. According to the petitioners, the company has to maintain sufficient stock of different kinds of such bearings, many of which items may not be immediately sold. The petitioners would therefore, have longer cycle of such goods remaining with the petitioners after purchasing from the manufacturer before they are sold. They claimed that with the introduction of GST they could avail their CENVAT credit of the stock of goods lying with them, on which, the purchases were made not earlier than one year under section 140(3)(iv) of the CGST Act. Before the bench, they contended that they have the sizable stock of goods purchased prior to the said period and on which, by virtue of the said condition, no CENVAT credit would be available.

Admitting the petition, the High Court Division Bench issued notice to the Central Government considering the fact that the legislation itself is under challenge.

The division bench, while annulling the provision, held that the duty paid on inputs is as good as tax paid and creates a vested right and the credit cannot effectively be taken away with retrospective effect by introducing a condition that no credit will be available for goods purchased prior to one year. The division bench also observed that "the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140A such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year". "Though the impugned provision does not make hostile discrimination between similarly situated persons, the same does impose a burden with retrospective effect

without any justification", the bench also added.

*Source*: Appeal No. Special Civil Application No. 18433 of 2017, DoJ: 05/09/2018

### PIL Challenging GST Late Fee Dismissed

Raj Sanjaybhai Tanna vs Union of India

The petitioners are practicing tax lawyer and tax consultant. They challenged the constitutional validity of section 47 of the CGST Act, 2017, which provides for levy of late fee for filing returns beyond the prescribed time limit. As per section 47(1) of the Act, any registered person who fails to furnish the details of outward or inward supplies or returns by the due date, shall pay a late fee of Rs 100 for every day of such delay subject to a maximum of Rs 5000. The petitioners urged that the government is trying to recover penalty in the guise of late fee charges and consequently, the dealers are losing their valuable right of appeals as well as right to point out that there was sufficient cause preventing them from filing the return within the due date. According to them, in the old tax regime, such charges were categorised as penal in nature. The petitioners also pointed out various practical difficulties in filing the returns including such as malfunctioning of the official portal, which prevents uploading of the returns often.

Dismissing the petition, the High Court Division Bench noted that it is not a case where PIL jurisdiction should be exercised. "By the account of the counsel for the petitioners, there are not less than 1.30 crore dealers affected by the said provision. There is nothing to suggest that none of these affected persons can take up the cause and approach the Court of law as may be advised. Majority if not all of them would be persons with proper means who can also avail proper legal advice. This is not a case where the petitioners are espousing the cause of a weaker section of the society who, on account of hardships and handicaps inherently faced by them, are unable to knock the door of justice," the bench said. In the present petition, the petitioners who are themselves active tax consultants and tax practitioners have challenged the vires of section 47 of CGST Act. They are obviously indirectly concerned with the same.

*Source*: Appeal No: Writ Petition (PIL) NO. 161 of 2018, DoJ: 30/08/2018

## HIGH COURT OF BOMBAY

### GST on Long-Term Lease Premium

Builders Association of Navi Mumbai vs Union of India

The petitioners challenged an order levying/collecting GST on the one-time lease premium charged by the City Industrial and Development Corporation (CIDCO) while letting plots of land on the lease basis. They obtained plots in the said areas, but what they are questioning is that when the allotment letter was issued, the allottee was called upon to pay GST on the one-time lease premium amount separately by a DD drawn in the name of the fourth respondent payable at Mumbai/Navi Mumbai. The CIDCO collected GST on the total one-time lease premium amount payable by the successful allottee at the rate of 18 per cent. The Counsel for the petitioner contended that GST cannot be levied, assessed and recovered. A long-term lease of 60 years tantamount to the sale of the immovable property since the lessor is deprived of, by the allotment, the right to use, enjoy and possess the property. The petitioners relied on section 105 of the Transfer of Property Act, 1882. The one-time premium amount is the lump sum consideration paid for entering into the lease. The Counsel for Union of India contended that this is a petition which seeks to pre-empt the levy assessment and recovery of GST. In any event, if the GST is now paid, then, the issue raised is purely academic. Apart therefrom, the law does not make any distinction between governmental and nongovernmental agencies and supply of goods or services attracts GST. Once the legal provisions are clear, unambiguous and plain, then, regardless of the consequences, the tax is leviable.

Dismissing the petition, the bench said that "We are, therefore, of the clear view that the demand for payment of GST is in accordance with law. The said demand cannot be said to be vitiated by any error of law apparent on the face of the record."

*Source*: Appeal No: Writ Petition No. 12194 of 2017, DoJ: 28/03/2018

## HIGH COURT OF KARNATAKA

### VAT Re-Assessment Order Passed after GST Rollout is Valid

Prosper Jewel Arcade LLP vs The Deputy Commissioner Commercial Taxes

The petitioners challenged a re-assessment order passed under the Karnataka Value Added Tax Act. They contended that post 101st Amendment to the Constitution, there are certain lacunas in not saving Entry 54 of List II in its original form prior to the Constitutional Amendment which received the Assent of the President on 08/09/2016. Since it was notified to be effective from 16/09/2016 and therefore the impugned re-assessment Order passed by the Assessing Authority does not legally stand the test of an Order passed under due authority of law. It was also contended that the imposition of tax by its levy, assessment and collection, all have to be supported by the now existing law and since the impugned Order has been passed by the Assessing Authority on 31/03/2018 after the said KGST Act, 2017 has come into existence with effect from 01/07/2017.

Rejecting the contentions, the Court observed that the taxable event under the VAT law is individual transaction of sale or purchase by the dealer and the law applicable on the date of taxable event is the relevant law for imposition of tax. "Merely because the re-assessment order is passed under KVAT Act, 2003 after the KGST Act, 2017 under GST regime came into effect from 01/07/2017, it does not mean that the said order passed on 31/03/2018 under the KVAT Act, 2003 is nun-est or void in the eye of law," the Court said. "Section. 174 of the KGST Act, 2017 clearly saves all the rights, obligations or liabilities acquired, accrued or incurred under the repealed Acts enumerated under Section 173 of the said Act which includes KVAT 2003. The ground of attack on Section 174 of the KGST Act, 2017 does not affect the validity of KVAT Act, 2003 and the Orders passed under that enactment," the Court added.

*Source*: Appeal No.: Writ Petition No.20642/2018, DoJ: 25/10/2018

Comments and Feedback: relfipaul@gmail.com

Chief Editor : Prof. (Dr.) D. Narayana
Director, GIFT
Compiled and Edited by : Dr. Relfi Paul
Printed & Published by : Shri Kiran Lal P.S, Registrar, GIFT
Date of Publication : 23 January 2019

We would like to thank Adv. Raji Joseph, Shri Anil Kumar for their valuable inputs to this document. We also acknowledge typesetting and design services rendered by Smt. Sheeja N., Smt. Vrintha and Shri Aneesh A., Kasargod.



Gulati Institute of Finance and Taxation (GIFT)
(An Autonomous Institute of the Government of Kerala)
Sreekaryam P.O, Thiruvananthapuram - 695017, Kerala
Ph: 0471- 2596960, 2596970, 2596980, 2590880, Fax: 0471-2591490
E-mail: giftkerala@gmail.com, www.gift.res.in