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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani)
Aged 48 years)
606-Park Vista, Park Darshan CHS Ltd.)
Lallubhai Park, Andheri (West),)
Mumbai – 400 058.) ...Petitioner

vs.

1. **The Union of India,** through Secretary,)
Ministry of Finance (Dept. of Revenue))
North Block, New Delhi – 1.)

2. **Central Board of Indirect Taxes and Customs)**
Department of Revenue,)
Ministry of Finance, North Block)
New Delhi – 110 001.)

3. **Goods and Services Tax Council**)
through Additional Secretary, 5th Floor,)
Tower II, Jeevan Bharti Building,)
Janpath Road, Connaught Place)
New Delhi – 110 001.)

4. **Principal Commissioner of Goods and**)
Service Tax, Mumbai)
New Central Excise Building,)
M.K. Road, Opp. Churchgate Station)
Mumbai – 400 020.)

5. **State of Maharashtra, through Secretary,**)
Finance Department, Mantralaya,)
Madam Cama Road, Hutatma Rajgur Chowk)
Nariman Point, Mumbai – 400 032) ...Respondents

AND
WRIT PETITION (L.) NO.639 OF 2020

A.T.E. Enterprises Private Limited)
(formerly known as A.T.E. Marketing Pvt. Ltd.))

having its registered office at)
43, Dr. V.B. Gandhi Marg, Fort,)
Mumbai – 400 023.)
through Shri Nikesh Jain, the Chief)
Financial Officer and Authorized Signatory) **...Petitioner**

Vs.

1. **The Union of India,** through Secretary,)
Ministry of Finance (Dept. of Revenue))
No. 137, North Block, New Delhi – 1.)

2. **State of Maharashtra**, through Secretary,)
Finance Department, Mantralaya,)
Madam Cama Road, Hutatma Rajgur Chowk)
Nariman Point, Mumbai – 400 032)

3. **Central Board of Indirect Taxes and Customs**)
through Chairman, Department of)
Revenue, Ministry of Finance, North Block)
New Delhi – 110 001.)

4. **Goods and Services Tax Council**)
through Additional Secretary, 5th Floor,)
Tower II, Jeevan Bharti Building,)
Janpath Road, Connaught Place)
New Delhi – 110 001.) **...Respondents**

Mr. Bharat Raichandani with Mr. Rishabh Jain i/b.UBR Legal for Petitioner in WP No.2031/2018.
Mr. Abhishek Rastogi with Mr. Pratyushprawa Saha, Mr. Mahir Chablani, Ms. Kanika Sharma and Mr. Marmik Kamdar i/b. Khaitan & Co. for Petitioner in WP(L.) No.639/2020.
Mr. Anil C. Singh, ASG with Mr. Pradeep Jetly, Senior Advocate, Mr. J.B. Mishra and Mr. Aditya Thakkar and Mr. Dhananjay B. Deshmukh for Respondent/UOI in both the Writ Petitions.
Ms. Jyoti Chavan, AGP for State in WP No.2031/2018.
Mr. Dushyant Kumar, AGP for State in WP(L) No.639/2020.

CORAM :- G. S. KULKARNI, J.
DATE :- 18 April, 2023

JUDGMENT:

The judgment has been divided into the following sections to facilitate analysis:

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1. Their Lordships of the Division Bench have spoken in different voices in deciding the above Writ Petitions. In view of the cleavage of opinion, by an order dated 16 June 2021 the Division Bench recording the disagreement, ordered that the proceedings be placed before the Hon'ble the Chief Justice. Consequent thereto, by an order passed by the Hon'ble the Chief Justice, the proceedings are referred for the opinion of this Court.

A) PRELUDE

2. The petitioners in both the petitions primarily challenge the constitutional validity of the provisions of Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 (for short "**the IGST Act**").

In Writ Petition No. 2031 of 2018, there is an additional prayer assailing the constitutional validity of Section 8(2) of the IGST Act. The petitioners have commonly contended that the impugned provisions are violative of Articles 14, 19, 245, 246, 246A, 248, 265, 269A, and 286 of the Constitution.

3. As noted in the referral order, one of the Hon'ble Judges of the Division Bench, struck down Section 13(8)(b) of the IGST Act as *ultra vires*, the IGST Act, besides being unconstitutional, whereas the companion Hon'ble Judge upheld the validity of the said provisions on all counts. The referral order dated 16 June 2021 passed by the Division Bench needs to be noted which reads thus:-

> "*1. There is difference of opinion in the Bench.*
>
> *2. Matters relate to constitutionality of section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017. While as per one opinion (opinion of Justice Ujjal Bhuyan) the said provision is unconstitutional, Justice Abhay Ahuja has expressed his disagreement and has rendered his separate opinion today.*
>
> *3. In view of such difference in opinion, Registry to place the matters before Hon'ble the Chief Justice on the administrative side for doing the needful."*

B) FACTS

4. Although the facts are not in dispute and are succinctly set out in both the judgments of the learned members of the Division Bench, reference to the nature of the business and transactions of the petitioners

would aid the discussion.

5. At the bar, Writ Petition No. 2031 of 2018 (Dharmendra M. Jani vs. The Union of India & Ors.) was argued as the lead petition before the Division Bench as also before this Court, hence, in some detail the facts in such petition are being referred hereunder.

6. The petitioner, a proprietary firm, is engaged in providing marketing and promotion services to its customers located outside India. The overseas customers to whom services are provided by the petitioner are *inter alia* engaged in the manufacturing and/or sale of goods. Such customers may or may not have an establishment in India. The petitioner provides services only to its foreign principal and receives consideration in convertible foreign exchange. To provide such services, the petitioner enters into an agreement with its overseas customers. Illustratively, a copy of one such agreement is placed on record at 'Exhibit-C'. Under such agreement, the petitioner provides services to enable his foreign principal to get purchasers for its goods in India or elsewhere. The petitioner thus undertakes activities of marketing and promotion of goods sold by its overseas customers in India.

7. The service as provided by the petitioner fructifies, if an Indian purchaser [importer] directly places a purchase order on such overseas

customer of the petitioner, for supply of goods. Such transaction is enabled as a result of the service so provided by the petitioner to his foreign principal. The goods are directly shipped by the petitioner's overseas customer to the Indian purchaser. This is an independent transaction between these two parties, namely, the Indian importer and the foreign exporter, which has nothing to do with the petitioner. On arrival of the goods in India, they are cleared by the Indian purchaser directly from the port/customs. In regard to the payment of consideration qua such import, such overseas customer raises a sale invoice in the name of the Indian purchaser. The Indian purchaser directly remits the sale proceeds to the overseas customer. Thus, the petitioner has no concern whatsoever qua such import transaction.

8. Once such payment is received by the overseas customer from the Indian importer, the foreign principal pays a commission to the petitioner, against an invoice issued by the petitioner. The entire payment is received by the petitioner in India in convertible foreign exchange.

9. The petitioner's establishment is registered as a supplier under the provisions of the Central Goods Services Tax Act, 2017 (for short **"CGST Act"**). It is not in dispute that the petitioner on such transactions has deposited CGST at the rate of 9% and the State GST under the

Maharashtra Goods and Services Tax Act, 2017 (for short **"MGST Act"**) at the rate of 9% under self-assessment. At no point in time, there was any independent demand by the authorities for payment of GST either under the IGST Act or the CGST Act and the MGST Act.

10. The petitioner has contended that the nature of the transaction(s) entered by the petitioner with its overseas customers are transactions of "export of services", as the petitioner was providing services to its overseas clients, which were consumed and used by the overseas clients outside India, for which valuable foreign exchange was earned by the country, hence, such transactions were outside the purview of the CGST and the MGST Acts. The petitioner, therefore, addressed a representation dated August 22, 2017, to the Superintendent, CGST, Mumbai Range-I *inter alia* recording that with the advent of the Goods and Services Tax, in terms of Section 13(8) of the IGST Act, the place of supply of "intermediary services" has been defined as the place of the supplier of the service. It was stated that by virtue of such provision, the services provided by the petitioner to the overseas clients are being subjected to the Goods and Services Tax in India. The petitioner stated that it has been the policy of the Central Government to promote exports, hence, the inclusion of intermediary services under Section 13(8) of the IGST Act would lead to the closure of business of several such agencies,

resulting in loss of jobs for several employees. The petitioner recorded that the petitioner intended to challenge the said provision, and hence, the petitioner would pay GST on the said commission under protest, as the petitioner did not accept the liability to pay GST on the said transactions. The petitioner, hence, reserved its right to claim refund of the duties so paid. It is on such premise, the petitioner has assailed the provisions of Section 13(8)(b) and Section 8(2) of IGST Act as noted above. The prayers as made in the Writ Petition reads thus:

> *"(a) that this Hon'ble Court may be pleased to issued any writ, order or direction more particularly in the nature of a Writ of Declaration to declare Section 13(8)(b) and Section 892) of the Integrated Goods and Services Tax Act, 2017 as null, void and ultra vires Article 14, 19, 246, 246A, 248, 265, 268A, 286 and 302 read with Entry 41 and 83 of List 1 of VII Schedule of the Constitution of India and as also being beyond the legislative competence of Parliament under Article 269A of the Constitution of India and as also being beyond the legislative competence of Parliament under Article 269A of the Constitution of India and being ultra vires the provisions of CGST Act and MGST Act, 2017 and pass such further or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice.*
>
> *(b) that this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction staying the implementation of the provision to above in prayer clause (a) and stay thereof;*
>
> *(c) For ad-interim reliefs in terms of prayer clause (b)."*

Writ Petition (L) No. 639 of 2020 of A.T.E. Enterprises Private Limited

11. The facts of this petition are not too different from the first petition. The petitioner in this petition is stated to be a company registered under the Companies Act, 1956. It is a multi-faceted

engineering group dealing in representation of textile machinery manufacturers from across the world. It is stated that the petitioner-A.T.E. Enterprises Private Limited (for short **"A.T.E.")** represents over 50 principals in the domains of textile engineering, flow technology, print and packaging solutions and machine-to-machine solutions. The prominent principals for whom A.T.E. acts as a sole selling agent are in Germany, Italy, Austria and China. A.T.E. has entered into several agency agreements with foreign principals. It has enclosed a sample agent agreement dated March 15, 2005 entered into with Karl Mayer Textilmaschinenfabrik GmbH, Germany, which is engaged in the manufacture and sale of textile machinery. Under this agreement, ATE is assigned exclusive rights to distribute within India, the products manufactured by its foreign principal. A.T.E has stated that it has no role to play in the actual sale and purchase of the machinery manufactured by such foreign principal. The machinery manufactured by the foreign principal is directly shipped by the foreign principal to the Indian purchaser [importer]. These goods are cleared by the Indian purchaser from the customs authorities on its own account. Also, the sale invoice is directly issued by the foreign principal in the name of Indian purchaser. The consideration for such transaction is directly remitted by the Indian purchaser to the foreign principal. As a consideration for the services

provided by the petitioner under the agreement, the petitioner is entitled to a commission calculated as a percentage of the ex-works net value of the foreign principal's products sold in India, for which, the payment is realized by the foreign principal. The petitioner raises periodic invoices on the foreign principal for commission. The payment is received by the petitioner in convertible foreign exchange. Thus, the facts of this petition, except nature of service offered, are similar to the first petition. The prayers as made in this petition are required to be noted, which reads thus:

> *"a) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction declaring Section 13(8)(b) of the IGST Act insofar as it stipulates that the place of supply in case of intermediary services shall be the location of the supplier of services in cases where the location of the supplier of services is in India and the location of the recipient of services is outside India as null, void and ultra vires Article 14, 19(1)(g), 265 and 286 of the Constitution of India; and/or*
>
> *b) This Hon'ble Court may be pleased to issue an appropriate writ, order or direction reading down Section 13(8)(b) of the IGST Act insofar as it stipulates that the place of supply in case of intermediary services shall be the location of the supplier of services in cases where the location of the supplier of services is in India and the location of the recipient of services is outside India; and/or*
>
> *c) This Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order of direction staying the implementation of the provision referred to in prayer clause (a) and (b) above; and/or*
>
> *d) This Hon'ble Court may be pleased to direct the Respondent to refund the amount of GST (CGST and SGST) paid by the petitioner on intermediary services provided to its foreign principals till date; and/or*
>
> *e) That such further and other reliefs be granted as this Hon'ble Court may deem fit and proper."*

Stand of the Revenue

12. On behalf of the revenue, a counter affidavit has been filed by the Principal Commissioner, CGST, Mumbai Central Commissionerate. In regard to the petitioners' contention that levy of the Goods and Service Tax (GST) on the export of services as undertaken by the petitioners is *ultra vires* Article 269A of the Constitution of India, it is contended that several intermediaries provide services to overseas suppliers/customers, however, services provided by them to their foreign clients do not qualify as export of services even when consideration is received in foreign exchange. It is stated that _till the year 2014, the place of supply (POS) for intermediary services was governed by the 'Place of Provision of Service Rules 2012' (short "POPSR") *(framed in exercise of powers by sub-section (1) of Section 66(C) and Clause (hhh) of sub-section (2) of Section 94 of the Finance Act, 1994).* brought into effect from July 1, 2012, which defined an intermediary under Rule 2F. It is stated that Rule 9 (c) of the said rules, providing for the place of provision of specified services stipulated that the place of provision of the intermediary services shall be 'location of the service provider'. The affidavit also refers to Rule 3, which speaks in regard to the 'place of provisions' generally to mean the place of provision of a service, to be the location of the recipient of services.

13. The counter affidavit further states that several representations were received seeking modification of Rule 9 of POPSR to the extent it included intermediary services under sub-clause(c). It is stated that the issue was examined and with effect from October 1, 2014, the place of service for all intermediaries [goods and services] was made to be the location of intermediary as stipulated under Rule 9(c). The stipulation as made in Rule 9(c) was *inter alia* for the reasons that many times, same person provides agency services for selling of goods and subsequently selling of AMC (Annual Maintenance Contracts), therefore, making a distinction between the intermediary of goods and services caused hardship. Generally, the value addition of the service provided by an intermediary is at the place where the intermediary is located. Thus, to eliminate any ambiguity between the place of supply of intermediary services provided in relation to goods and services and to bring both at par, PoS for both was made to the location of the intermediary. It is next stated that if the PoS was to be made to be the location of recipient under default rule, PoS for all intermediaries located in the taxable territory providing service to a person, whose usual place of residence is outside India, would be the location of the recipient, i.e., outside India and thus, such services would have gone outside the tax net.

14. The counter affidavit further states that the issue of POS of intermediaries was also discussed during the drafting of the GST laws and same reasoning as above was adopted by the GST Council, a Constitutional body established under Article 279A of the Constitution, entrusted to make recommendations to the Union of India and the States on all matters related to the Goods and Services Tax. It is stated that in regard to the intermediary services provided in relation to goods and services including stocks, transportation of goods, etc., these services are performed and enjoyed at the place where the underlying arranged supply is made. Hence, taxing such services as provided by the Indian service providers to foreign companies, incentivizes the foreign companies to start manufacturing in India to offset the liability against the tax on goods cleared domestically or get refund of taxes on goods exported from India. Hence, taxing such services in India is in consonance with "Make in India" programme. The affidavit further records that taxing intermediaries located in India which provide services to foreign exporters for exporting goods or services to India, make such imports costlier, however, such a situation promotes "Make in India". This would, however, not be true when the service is provided to an Indian importer of goods and services, as he would be entitled to avail input tax credit of GST paid on services provided by the intermediary. Referring to the

definition of "export of services" as contained in Section 2(6) of the IGST Act, it is stated that the services provided by the intermediary are not export of services, as all the five conditions in the definition, are not satisfied and hence, the contention of the petitioner that the levy of tax on export of services is *ultra vires* under Article 269-A of the Constitution, is not tenable.

15. It is next contended that no double taxation is allowed, as in the case of intermediary services in relation to import of goods in India, there are two distinctly identifiable supplies involved; firstly, supply of goods by the overseas supplier to the Indian importer of goods; and secondly, supply of services by the intermediary to the overseas supplier of goods. It is stated that these two supplies are distinct and are liable to tax under two different statutes, namely, the Customs Act, 1962 and the IGST Act, 2017 respectively operating under two different fields of taxation.

16. It is contended that in the first transaction, as the title of the imported goods does not lie with the intermediary service provider, the incidence of Customs duty is on the importer of goods; and in the second transaction, the commission is paid by the overseas supplier to the Indian intermediary for the services provided by the intermediary and IGST on the same is levied in India on the intermediary as the place of supply is

the location of the intermediary as per Section 13(8)(b) of the IGST Act.

17. It is next contended that the services provided by the intermediaries located in India are taxable in India, and if the intermediaries are affecting the procurement of supplies for manufacturers in India, the manufacturers in India can avail input tax credit, and in case of exports, they can avail refund of such taxes. Further, if intermediaries located in India are affecting the import of finished goods, there is no consumption of these input services within India. Whereas the Indian importer would have had to suffer same cost in the event an overseas supplier procured such services from an intermediary in a non-taxable territory. This is a situation akin to a B2C transaction where credit lapses or has no necessity of further continuation. It is stated that such taxable services would cause additional costs, however, it gives an advantage to the counterpart Indian manufacturer. It is stated that if the services of Indian intermediaries are taxed again at the hands of the foreign exporter (under reverse charge in a foreign country), then while making exports from the foreign country, the taxes ought to be zero-rated for the exports from that country. Hence, again there is no double taxation.

<u>Submissions on behalf of the petitioners</u>:-

18. Mr. Bharat Raichandani and Mr. Abhishek Rastogi, learned counsel

for the petitioners have made the following submissions :-

(i) Section 13(8)(b) of the IGST Act read with Section 2(13) and 2(6) to the extent, these provisions seek to levy GST on services provided by the petitioners to its overseas customers, which are consumed by such customers/ recipients outside India, by fiction of law as created by these provisions are treated as intra-state supply making GST leviable on such export of service, under the CGST Act and MGST Act. These provisions are violative of the provisions of Article 246A read with Articles 269A and 286 of the Constitution this more particularly when the nature of the transaction entered by the petitioner with overseas customers is not in dispute and in fact, is accepted by the respondent in the reply affidavit.

(ii) Section 13(8)(b) read with Section 2(6) and Sections 2(13) and 8(2) of the IGST Act creates a fiction to bring about a situation that the place of supply of service by the petitioner for the purposes of the CGST Act and the MGST Act, becomes the location of the petitioner [service provider] thereby making the petitioners liable for the levy under the CGST Act and MGST Act, without such amount being collected by the petitioners from their foreign customers, which otherwise would be collected by a registered dealer if the supply or service was to be either inter-State or intra-state supply of goods or services. Once the service is admittedly an export of service to foreign customers located outside India, except for the provisions of Section 13(8)(b), for all purposes such service is a service used and consumed outside India.

(iii) Section 13(8)(b) read with the other provisions cannot be understood and applied de'hors the fundamental principles

underlying the levy of goods and service tax, namely that GST is levied on the destination-based principle, wherein the place of supply of service, necessarily would be the location of the recipient of the service, which in the present case is the place outside India. The petitioners clearly fall within provisions of Section 2(6) which defines "Export of Service".

(iv) The legislature by the inclusion of an 'intermediary' in Section 13(8)(b) of the Act to which a meaning is attributed as defined under Section 2(13) of the IGST Act, an attempt is made to convert the actuality of the place of supply in foreign territory to a place of supply of such service at the location of the supplier, namely, the location of the petitioners, so that it would be deemed to be an intra-State supply [supply within the State of Maharashtra] leviable with the local GST. Neither the provisions of Article 246A read with Article 269-A and Article 286 of the Constitution would permit such inclusion, nor the basic principles, under which GST would levy, would permit such consequences as created by the impugned provisions.

(v) GST is a destination-based tax on consumption. It is a value-added tax. It is a tax provided on services consumed within the territory of India. Hence, it does not have extra-territorial operation or nexus. This position is sufficiently clarified by a circular dated 18 February 2019 issued by the revenue [circular no.20/16/04/2017-GST]. Paragraph 3 of the circular issues the following clarification:-

> *"3. After introduction of GST, which is a destination-based consumption tax, it is essential to ensure that the tax paid by a registered person accrues to the State in which the consumption of goods or services or both takes place. ….."*

(vi) That the Goods and Service Taxes Council established under Article 279A of the Constitution of India has issued a paper on GST titled as "Paper on GST – Concept and Status" dated 1 April 2018 *inter alia* reiterating in paragraph 7 under the heading "Origin based taxation v/s. Destination based taxation" *interalia* recording that the GST is a destination based consumption tax under which tax accrues at the destination/ place, where consumption of goods and services takes place. The Circular also clarifies that the existing VAT regime was based on origin principles whereas GST Act was assigned to the State of origin where production or sale happened and not to the State where consumption happened. This contention is also supported by relying on the decision of the Supreme Court in *All India Federation of Tax Practitioners v/s. Union of India*[1].

(vii) The Government introduced the draft of the Model GST Law on 14 June 2016, inviting comments and suggestions from the trade, industry, and other stakeholders. In the said draft, "intermediary" services were not placed in the Section 13(8)(b) of the Act and in fact were placed under the general rule under Section 13(2) of the Act. However, the final version of the IGST Act released on 12 April 2017 included "intermediary" services under Section 13(8)(b). It is submitted this is clear in the light of the 139th Parliamentary Committee Report (Clauses 15.1 to 15.3). Such principle is based on the internationally accepted and followed principles laid down by the OECD International VAT Guidelines, 2015, which records that under the destination

[1] 2007(7) STR 625

principles, tax is ultimately levied only on the final consumption that accrues within the taxing jurisdiction, whereas in origin principles, the tax levied in various jurisdiction where the value was added. The key economic difference between the two principles is that the destination principle places all firms competing in a given jurisdiction on an even footing, whereas the origin principle places consumers in different jurisdictions on an even footing. It records that the application of the destination principle in VAT achieves neutrality in international trade. Under the destination principle, exports are not subject to tax with a refund of input taxes (that is, "free of VAT" or "Zero-Rated"), and imports are taxed on the same basis and at the same rates as domestic supplies. Consequently, the total tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption and all revenue accrues within the jurisdiction where the supply to the final consumer occurs. To support this contention, reliance is being placed on the decision of the Division Bench of this Court in *Commissioner of Service Tax vs. SGS India Pvt. Ltd.*[2] although *SGS* rendered in the context of the erstwhile service tax being levied under the Finance Act 1994. It is thus submitted that Section 13(8)(b) is contrary to the fundamental principles of destination-based consumption tax.

(viii) Levy of tax on the export of service by virtue of the impugned provisions is ultra vires Article 246A read with Article 269A and Article 286 of the Constitution. These provisions under the Constitution confer power only on the Parliament to frame laws for inter-State trade or commerce. Such provisions do not permit

[2] 2014(34) STR 554 (Bom)

the imposition of tax on the export of services out of the territory of India by treating the same as a local supply. The Parliament, therefore, could not have enacted Section 13(8)(b) to create and impose a tax on the export of services, being effected out of the territory of India by treating the same as a local supply. Article 286 lays down restrictions as to the imposition of tax on the sale or purchase of goods when in sub-clause (1) it provides that no law of a State shall impose, or authorize the imposition of, a tax on the supply of goods or services, or both, where such supply takes place- (a) outside the State; or (b) in the course of import of the goods, or services, or both into the territory of India, or export of goods or services, or both, out of the territory of India. It is, hence, submitted that the place/destination is required to be recognized. Even the power under sub-clause (2) of Article 286, namely, that Parliament may by law formulate principles for determining when a supply of goods or services, or both, takes place in any of the ways mentioned in clause (1) is sought to be utilized, it cannot be used in a manner which would nullify as to what is provided by sub-clause (1) of such Article. These articles of the Constitution make it clear that it was not permissible for the Parliament to impose a tax on the export of services out of the territory of India by treating the same as a local supply. Hence, Section 13(8)(b) is *ultra vires* Articles 246A and 269A of the Constitution.

(ix) The expressions "export" and "import" have not been defined in the Constitution and hence would be of wide connotation as admittedly when there is a supply of services from India to a country outside India, it is an export of service in terms of Section 13(8)(2). Thus, the export of service is required to be given

its ordinary meaning. Such interpretation would lead to the conclusion that no State has the authority to levy a local tax on the export of services. Once the supply takes place outside the State of Maharashtra during the course of export by virtue of Section 13(8)(b) read with Section 7(5) of the IGST Act, a clear export of service is deemed as a local supply.

(x) The levy is arbitrary, unreasonable and discriminative and, hence, violative of Article 14 of the Constitution. It is submitted that the levy does not provide a level playing field to the petitioners vis-a-vis other exports of services. It creates an unfair advantage for foreign customers to set up a liaison office in India at the cost of the petitioners. Thus, all service providers like the petitioners are required to be placed equally. However, this is not the case with Service providers like marketing agents, marketing consultants, management consultants, market research agents, professional advisors, etc., who provide similar services. However, the said services would not be subject to GST in terms of section 13(2) of the Act. Despite having satisfied all the conditions of section 13(2) read with section 2(6) of the IGST Act, by virtue of exception under section 13(8)(b), the services provided by the petitioners are subjected to GST. Thus, the levy is unreasonable and arbitrary and without any basis. It is submitted that a separate provision can be struck down if it is arbitrary or unreasonable. It is also well settled that tax laws are not outside Article 14, as Article 14 applies to Government policies as well.

(xi) Article 269A provides for the levy and collection of goods and service tax in the course of inter-State trade or commerce. Sub-

clause (1) thereof provides that GST on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India. Further Clause 5 provides that Parliament may, by law, formulate the principles of 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. The submission is that the Constitution only grants power to the Parliament to frame laws for inter-State trade or commerce. In other words, the rules for determining inter-State trade or commerce would not permit the imposition of tax on the export of services out of the territory of India by treating the same as a local supply. It is for such reason that Section 13(8)(b) is ultra vires Article 246A and Article 269A of the Constitution.

(xii) Even otherwise, Article 286 lays down the restrictions as to the imposition of tax on the sale or purchase of goods, as clause (1) of Article 286 provides that no law of a State shall impose or authorize the imposition of a tax on the supply of goods or services or both where such supply takes place (a) outside the State or (b) in the course of import of the goods or services or both into the territory of India or export of goods or services out of the territory of India. There is thus a prohibitive bar. It is submitted that the provision is couched in the negative. Sub-clause (2) provides that Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1). The expression "export" and "import" have not been defined under the Constitution and hence, would be of wide construction. It is submitted that admittedly, there is a supply of service from India to outside India. It is an export of service in

terms of section 13(2). It is an export of service in terms of the ordinary meaning of the term export under the Constitution. Thus, no State has the authority to levy a local tax on the export of services. The supply takes place outside the State of Maharashtra during the course of export. The IGST Act, by virtue of section 13(8)(b) read with section 7(5), has deemed the export of service to be a local supply. This is a violation of Article 286(1), as Central legislation cannot authorize the State to collect the tax which itself is prohibited by the Constitution. Thus, the legislation to such an extent is clearly a colorable legislation. In support of such contention, reliance is placed on the decision of the Supreme Court in *State of Travancore-Cochin and Others vs. The Bombay Co.Ltd.*[3], *Central India Spinning & Weaving and Manufacturing Co. Ltd. The Express Mills Nagpur vs. Municipal Committee Wardha*[4].

(xiii) The levy is ultra vires Article 245 of the Constitution. It is submitted that the question that arises is whether the Parliament is empowered to enact laws in respect of 'extra-territorial' aspects or causes that have no nexus with India and furthermore could such laws be bereft of any benefit to India. The submission is that the answer would have to be emphatic no. In supporting such submission, reliance is placed on the decision of the Supreme Court in *GVK Industries Limited vs. Income Tax Officer & Anr*[5].

(xiv) There could be instances where the supplier of the goods (say, in Germany) and the buyer of the goods (say, in Singapore) are

[3] 1952 AIR SC 366
[4] 1958 AIR SC 341
[5] 2011 332 ITR 130 (SC)

both outside India. Such a transaction would be subject to GST, in the hands of the petitioner by virtue of Section 13(8)(b). Also, exemption from payment of GST provided to such transactions does not validate the levy.

Section 13(8)(b) is ultra vires the charging section

(xv) Section 13(8)(b) of the IGST Act is a provision for the levy and collection of tax on the inter-State supply of goods and services. Section 1 of the IGST Act provides that it shall extend to the whole of India (except the State of Jammu and Kashmir). Section 5 is the charging section. It provides that there shall be levied IGST on all inter-State supplies of goods or services or both. However, the proviso states that IGST shall be levied on goods imported into India, in terms of section 3 of the Customs Tariff Act.

(xvi) In the above context, it is submitted that considering the scheme, scope and object of the provisions of section 7 to 13 of the IGST Act, it is evident that the same provides for the levy of IGST on inter-State supplies. Import and Export of services have been treated as inter-State supplies in terms of section 7(1) and section 7(5). However, section 13(8)(b) seeks to run contrary to the scheme of the Act and deem an inter-State supply as an "intra-State" supply. It is submitted that hence, the said provision is ultra vires the charging section and the provisions of the CGST Act and the MGST Act.

(xvii) Article 265 of the Constitution provides that no tax can be collected without authority of law. Hence, the doctrine of pith and

substance applies. For deciding the true character and nature of a particular levy, with reference to legislative competence, the court has to look into the pith and substance of the legislation. Reliance is placed on the decision of the Supreme Court in *Gujarat Ambuja Cement Limited vs. Union of India*[6].

Section 13(8)(b) is ultra vires Section 9 of the CGST Act and MGST Act

(xviii) Section 9 of the CGST Act, being the charging section, provides for the levy of CGST on all intra-State supplies of goods or services or both. Such levy cannot be extended to cross-border transactions i.e. export of services. Sub-section (2) of section 8 of IGST Act, 2017 provides that where the location of the supplier and place of supply of service is in the same State or Union Territory, the said supply shall be treated as 'intra-State supply'. It is submitted that by an artificial mechanism, where the location of the recipient is outside India, the place of supply is being treated in India by the impugned provision. The same is beyond the charging section. Though ordinarily, courts would not question legislative wisdom, however, if shown that the provision is contrary to the parent act or charging section, it can be struck down. Even legislative policy has to conform to the Constitution.

Violation of the right to carry on business viz. Article 19(1)(g) of the Constitution

(xix) By levying CGST and SGST on the export of service, i.e. the service provided by the petitioners to their overseas customers, the respondents have constituted an unreasonable restriction upon the

[6] 2005 (182) ELT 33 (SC)

right of the petitioners to carry on trade under Article 19(1)(g) of the Constitution of India. This action of respondent no. 1 would result in the closure of the business of the petitioners. It would encourage foreign service recipients to set up liaison offices in India and escape taxation. Reliance is placed on the decision of the Supreme Court in *Bengal Immunity Company vs. State of Bihar*[7]. It is submitted that a similar view has been taken in *Himmatlal Harilal Mehta v. State of Madras*[8].

No Double Taxation is permitted

(xx) It is well settled that any provision which leads to double taxation needs to be struck down. In the instant case, it is submitted that Section 13(8)(b) falls foul of the same vice. The same supply would be taxed at the hands of the petitioners as well as the foreign customer. Following the destination-based principle, it would be an import of service for the foreign service from India and would be taxed at the hands of the importing country. Thus, on the same supply, two taxing jurisdictions would levy VAT/GST. This is specifically why section 13(13) of the IGST Act was enacted i.e. to avoid non-taxation and to avoid double taxation. The import of services by the foreign buyer would be an expense for him. It would, ultimately, form a part of the cost of the goods sold to Indian buyers and thus, the said tax would again be imported into India.

(xxi) It is submitted that the levy of GST would not only amount to Double Taxation but triple taxation since customs duty and/or

[7] 1955 (2) SCR 603
[8] 1954 SCR 1122

CVD are already being paid on the imported CIF value of the goods. The landed cost of the costs would, naturally, obviously and legally, include the commission paid to the petitioners. Thus, the very same commission will suffer tax at the hands of the petitioners (CGST + SGST), at the hands of the foreign buyer and hands of the Indian purchaser (importer) (IGST). This is a classic case of double taxation. In this context, reliance is placed on the decision of the Supreme Court in *BSNL v. Union of India*[9] and on the decision of the Gujarat High Court in *Mohit Minerals vs. Union of India*[10] and *Adani Power Ltd. vs. Union of India*[11].

(xxii) The alternate submission as urged on behalf of the petitioner is that Section 13(8)(b) of the IGST Act may be read down to state that the said provision would apply in a case where the tax escapes in both taxing jurisdictions i.e., India and importing country when the said provision would be applicable. This reading of the provision would be in consonance with section 13(13) of the IGST Act as well. It is submitted that this would be equally applicable to Section 13(2) of the Act. In support of this contention, reliance is placed on the decision of the Supreme Court in *Sunil Batra vs. Delhi Administration and Ors.*[12]

(xxiii) It is submitted that Section 13(8)(b) is ultra-virus Article 286 of the Constitution for the reason that it is not permissible for the State to impose tax on services when the supply takes place outside the State or in the course of export. It is submitted that

[9] 2006(2) STR 161

[10] *2020-TIOL-164-HC-AHM-GST*

[11] 2015 (330) ELT 883 (Guj.)

[12] 1978 Cri LJ 1741

Article 286(1) does not employ the words "place of supply", therefore, deeming fiction cannot be introduced by the impugned provision to empower the State to impose a tax on intermediary services. It is submitted that the impugned provision deems the supply of intermediary services to have occurred within India and treats such services as an intra-State supply thereby leaving state GST.

19. The petitioners have categorically contended that the grievance of the petitioners is in respect of the effect of Section 13(8)(b) categorizing intermediary services which are regarded as 'export of services' undertaken by the petitioners, to be an 'intra-State supply' for the purposes of the CGST and MGST Act. It is thus their contention that the provisions of Section 13(8)(b) remaining in the IGST Act is stated to be of no harm and injury to the petitioners, as any export of services falling under the IGST Act would fall within the ambit of Section 16 providing for ‘zero rated supply’.

20. On the above contentions, the petitions need to succeed is the submission on behalf of the petitioners.

<u>Submissions of learned ASG on behalf of the respondents</u>

21. It is submitted that the case of the petitioners is premised on the plea that service rendered by them amounts to "export of services", and

that "export of services", is not taxable and hence the levy on the petitioners as supplier of intermediary services is invalid. It is submitted that such contention is not tenable, as on a plain reading of the averments as made in the petition and the supporting agreements produced therewith would show that the respondents' case that the services being rendered by the petitioner take place entirely in India, hence, there is no export of service. Three services i.e. soliciting purchase orders, promotion and marketing are all conducted within India though the recipients of the service may be outside India. Thus, on the reading of the petition itself, the services do not amount to export.

22. It is next submitted that even otherwise under the statutory provisions i.e. under Section 2(6) of the IGST Act, an export of service is deemed to be a service that meets the five conditions as mentioned therein. Condition no.3 is the place of supply, whereas condition no.2 is the location of the recipients. The place of supply both in terms of the actual rendering of services is in India, hence, in terms of Section 13 (8) (b) of the IGST Act, the place of supply being the location of the supplier which is in India, hence, there is no export of service in regard to the transactions in question.

23. It is submitted that the plea under Section 13(8)(b) of the IGST

Act introduces a deeming fiction would not arise in the instant case, wherein the services are being rendered in India, although the recipients of services are located outside India. Such an issue may arise for determination in a case where for eg. an Australian principal hires an Indian intermediary to render services in a third country like America.

24. The challenge to the constitutional validity of Section 13(8)(b) as raised by the petitioner is purely academic for the reason that such a challenge is premised on the plea that the petitioner is being taxed as an intermediary. The factual foundation, however, depicts a different picture as seen from the averments made in the petition. The averments show that the petitioner is a simplicitor agent. In paragraph 4.4 of the petition, it is averred that the petitioner rendered services "only to the foreign principal", while so contending the petitioner completely ignores the definition of an 'intermediary' as defined under Section 2(13) of the IGST Act, which provides that the intermediary facilitates or arranges services between two or more persons. Thus, although a challenge is of an intermediary being taxed, the factual foundation as seen in the petition is to the effect that the petitioner is an agent simplicitor. Thus, the challenge itself is vague and bereft of particulars, and thus applying the principles of law in *V.S. Rice and Oil Mills Vs. State of Andhra Pradesh*[13] and *Amrit*

[13] AIR 1964 SC 1784

Banaspati Co. Ltd vs Union Of India And Ors.[14], this Court ought not to delve into the legality and validity of the provisions.

25. The constitutional validity of the impugned provisions would be required to be upheld for the reason that the petitioner is rendering services while being located in India. As the petitioner solicits purchase orders for his foreign customers and undertakes marketing and promoting activities for goods sold by overseas customers in India, hence, on the face of it the services rendered by the petitioner are being rendered in India and not outside India.

26. It is submitted that an intermediary is a distinct category of service provider and is treated as such by the law, since the case of intermediary services there would be two contracts/transactions involved; the first contract is between the intermediary and his client/principal to whom he would render services; and secondly a contract between the principal and his purchaser. In the present case, the question is not of the second transaction but the first transaction which is a transaction/contract of rendering services within India (marketing and promoting) by the intermediary, hence, this would clearly be amenable to tax in India as the contract is of not an extra territorial operation. The reason for prescribing distinct treatment for an intermediary is that the intermediary is acting

[14] 1995(3) SCC 335

between two persons the main service provider and the service recipient. He provides services to both persons, though he may have a contractual agreement with only one or both of them. Hence, it may not be feasible to prescribe one person as a recipient of intermediary services, so as to apply a general rule. For such reasons, the services rendered by the intermediary would be taxed as intra-State services and amenable to tax under the provisions of the CGST Act and MGST Act.

Submissions on the provisions.

27. The IGST, CGST, and MGST laws have been framed pursuant to the specific amendment made to the Constitution of India by the 101st Constitution Amendment. The presumption of constitutionality must be displaced by the petitioner, for which the petitioner needs to establish that the services rendered by them amount to "export of services". The challenge of the petitioner is premised on a plea that the petitioner is being taxed for services rendered outside India which is unconstitutional, which according to the respondents is an erroneous premise as canvassed by the petitioners, for the reason that Article 245(2) of the Constitution provides that no law made by the Parliament shall be deemed to be invalid on the ground that it would have an extra-territorial operation and by application of such article, a challenge to the validity of the provisions

of IGST Act need to fail. In support of such submissions, reliance is placed on the decisions of the Supreme Court in *Shri Ram Krishna Dalmia Vs. Shri. Justice S. R. Tendolkar & Ors.*[15], Government of Andhra Pradesh & Ors. vs. Smt. P. Laxmi Devi[16]; *Union of India & Ors. Vs. Exide Industries Ltd. & Anr.*[17]; *A.H Wadia V. Income Tax Commissioner*[18] ; *GVK Industries Ltd. & Anr vs The Income Tax Officer & Anr.* (supra). Applying the principles of law as laid down in the above decisions, the approach of the Court in determining the constitutional validity of a statutory provision would be that the Court would be required to examine the existence of legislative power and once such power is found to be present, then the next step would be to ascertain whether the enacted provision impinges upon any rights enshrined in Part III of the Constitution. Considering the scheme of IGST, CGST and the SGST laws, it is evident that these laws function harmoniously and as a part of a well thought of statutory mechanism to tax goods and services. These three statutory laws operate harmoniously but in different spheres, as they lay down as to how supply is to be taxed, the nature of supply and their place of supply.

On Legislative Competence.

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[15] AIR 1958 SC 538 AIR 1958 SC 538

[16] AIR 2008 SC 1640

[17] (2020) 5 SCC 274

[18] A.I.R 1949 F.C. 18 S.C.

28. The Constitutional provisions clearly mandate that the powers are vested with the Parliament to frame laws relating to GST which are wide and untrammelled. Not only the Constitution provides power to the Parliament and Legislatures of every State to frame the law in relation to the goods and services tax, but it authorizes and empowers the Parliament to formulate the principles for determining the place and supply. Article 246A(2), 269A(5) and Article 286 specifically empower the Parliament to make laws to determine the place of supply of goods, or services or both. Article 269A(5) specifically provides that 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." Thus, Article 269A authorizes the Parliament to frame the law in respect of two aspects, firstly, to formulate the principles for determining the place of supply; and secondly, when the supply of goods, or services, or both takes place in the course of inter-State trade or commerce. The power is thus two-fold and specific. This power as vested with the Parliament to determine the supply is unbridled and unrestricted. Even power to determine as to what is inter-State trade is unbridled and unrestricted, even when the phrase "in the course of inter-State trade or commerce" is used. Thus, Article 269A(5) empowers the Parliament by authorising it to make law on what is inter-State supply

as also to determine what is not inter-State supply i.e. intra-State supply. It is evident that there can either be inter-State supply or intra-State supply and hence, the power to determine one, would necessarily and concomitantly include the power to determine the other. Any contrary interpretation would lead to an absurd legislative vacuum.

29. Articles 246A and 286 also manifest and grant similar power to the Parliament to frame laws with respect to goods and services tax and determine a place of supply. Alternatively, another way to consider the same would be that there is no prohibition upon the Parliament from doing so in terms of residuary powers granted under Article 248, which provides for the residuary powers of legislation on the subject not mentioned in State or concurrent laws. Although this is subject to Article 246-A. Hence, the Parliament is within its domain to determine the place of supply. Section 13 of the IGST Act which determines the place of supply on service in a certain scenario is within the specific mandate of Parliament as per the provisions of the Constitution. Further, the legislative competence is to be determined with reference to the object of levy and not with reference to its incidence or machinery, as there is a distinction between the object of tax, the incidence of tax and the machinery for calculation of tax. To support such contention, reliance is placed on the decision in *Gujarat Ambuja Cement Ltd. vs. Union of India*

(supra). It is submitted that Section 13(8)(b) is thus validly enacted. Upon applying the provisions of Section 2(64), 2(86) and Section 9 of the CGST Act read with 8(2) of the IGST Act (none of these provisions being challenged) the supplier of services like the petitioners, who are intermediaries, would be taxable as the supply of services by intermediaries is considered as an intra-state supply under the CGST Act and SGST Act.

Other Submissions

30. The petitioners' contention that there is a conflict between Section 13(2) and 13(8) (6) of the IGST Act, resulting in absurdity in law, is not correct, as there is no such conflict. The reason being under Section 13(2) of the IGST Act, the place of supply shall be the location of the recipient unless the services fall within the ambit of sub-section (3) to (13) of the IGST Act, however, under Section 13(8)(b) of the IGST Act the place of supply in case of intermediary services shall be the location of supplier of services. Hence, on bare reading of these provisions, it is seen that both the sub-sections are clear in their nature and what they provide. GST is a destination-based tax wherein, it is taxed in case of an intra-state transaction where a supplier or recipient of services is located.

31. On the aforesaid premise, it is submitted that the petitions deserve

to be dismissed.

Submissions on behalf of the State Government

32. Ms. Jyoti Chavan learned AGP has made submissions on behalf of the State Government. Her first submission is that the principal foreign company had entered into an Agency Agreement with the petitioner, as such foreign party was desirous of selling the goods in India. It is submitted that the commission payable to the petitioner is for a particular item, contract, or buyer, and it may change from time to time by mutual consent, which is also clear from the facts that the invoices raised by the petitioner would show that the petitioner is entitled to commission as per the orders placed by the Indian customers and therefore, the petitioner's commission depends upon the orders placed by the Indian Customers and thus the services rendered by the petitioner are of the peculiar nature and, therefore, under Section 2(13) of the IGST Act, the petitioner has been classified as "Intermediary". This classification of the petitioner is a reasonable classification due to the peculiar nature of services provided by him. In fact, it is the petitioner's case (para 4.7 of the petition) that only on receipt of the payment from the Indian Purchasers the petitioner gets his commission. Therefore, the contentions of the petitioner that the transaction is one of export of services is factually incorrect, as the petitioner is a facilitator. Similar is the position in respect of the petitioner

in Writ Petition Lodging No.639 of 2020 (*A.T.E. Enterprises Private Limited vs. The Union of India & Ors.*)

33. In so far as the legal position is concerned, it is submitted that before the Constitution of 101st Amendment Act, 2016 and more particularly, prior to the 6th Constitution Amendment Act 1956, the State legislature under Article 246(3) had exclusive power to make a law for the State or any part thereof, with respect to any matters enumerated in List II in the Seventh Schedule. Further, before the Constitution of 6th Amendment Act 1956, sub-clause 4 of Article 246 empowered the Parliament to make laws in respect of any matter for any part of the territory of India not included in a State List, notwithstanding that such matter is a matter enumerated in the State List. Thus, the State legislature under Entry No.54 of List II in the Seventh Schedule had powers to levy taxes in respect of the sale or purchase of goods other than newspapers. The power of the State to levy tax was further subject to the provisions of Article 286. It is submitted that Article 286 sub-clause (1) barred the State from imposing tax on the sale or purchase of goods that took place outside the State (Clause 1(a)) and in the course of the import of the goods into or export of the goods out of, the territory of India (Clause 1(b)). However, sub-clause (2) of Article 286 empowers that the Parliament may by law formulate principles for determining when a sale

or purchase of goods takes place in any of the ways mentioned in Clause(1) of Article 286. Thus, the Parliament had the power to make a law to determine the principles of what constitutes sale or purchase of goods outside the States and also what are Imports and Exports.

34. It is submitted that prior to the 101st amendment, the power of the State Government and Central Government to levy taxes germinated in accordance with entries in the State list and Union list under Article 246, namely Entry No.54 (State List) and Entry Nos.92-A, 92-B & 92-C Union List.

35. It is submitted that the 101st amendment to the Constitution has brought a key change to the powers of the Central Government and State Government to levy taxes. The following changes were brought about. The Central Government and the State Government were granted simultaneous powers to levy taxes, by the introduction of Article 246-A, and by introducing Article 269-A, the Union has derived power to levy inter-State tax on supply of services. By virtue of Entry No.54 of the State List, which was amended to include only five goods, and Entry No.92-C of the Union List, which pertains to taxes on services, came to be deleted. Also, by 101st amendment, Articles 246, 248, 249, 250, 268, 270, 286 & 366 and the entire Article 268-A, which pertains to service tax levy by the

Union and collected and appropriated by the Union and State was deleted. The said changes in the Constitution have resulted in bringing about the following position:-

i) The concept of one nation one tax was introduced by this amendment and the Goods and Service Tax was introduced;

ii) Both the Union of India and State Government derived simultaneous powers under Article 246-A to levy Goods and Service tax. This tax is defined under Article 366 (12-A). The Union of India has enacted the CGST Act under Article 246-A and the State has enacted the MGST Act under Article 246-A.

iii) Entry No.54 of the State List was amended to include five goods, similarly Entry No.92 (C) was deleted from the Union List and Article 246-A and Article 269-A were introduced respectively.

36. It is submitted that Article 269-A is in respect of the levy and collection of Goods and Service tax in the course of inter-State Trade and Commerce. Under Article 269-A(5), the Parliament has analogous powers as contained in Article 286(2). The Parliament, under Article 269-A, is powered by law to formulate the principles for determining the place of supply and when a supply of goods or services or both take place in the course of inter-State Trade or Commerce. The source of power of Parliament to enact the IGST Act is under Article 269(A). Article 269(5)

specifically empowers the Parliament to formulate for determining the place of supply and when the place of supply of Goods and Services or both takes place in the course inter-State Trade and Commerce. Thus, the Parliament has power to determine what is a place of supply under the IGST Act, under Article 269-A, and also under Article-286. The Parliament thus has rightly, in the exercise of its power, enacted Section 13(A), (B) of the IGST Act, determining the place of supply in respect of “Intermediary” services.

37. It is submitted that the contention of the petitioner that only in the case of "Intermediary" service provider, there is a 360 Degree deviation on the incidents of levying of tax, and hence it is ultra vires to Articles 14, 19, 245, 246-A, 269-A & 286 is without any substance as "Intermediary" services provider is a separate class of services provider.

38. Furthermore, Section 12 of the IGST Act, in sub-section (2)(ii), determines that the place of supply of services will be the location of supply of services and in other cases, where the service providers are not specified in sub-sections (3) to (14) of section 12 and where the supply is not made to the location of the registered person or the location of the recipient is not on record. Thus, Section 12 of the IGST Act provides that in relations to the incidents as contained herein, the location of the

supplier of services shall be the place of supply.

39. The IGST Act, though enacted for levy and collection of tax on the inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto, provides for what is inter-State supply under Section 8 and under Section 13, which provides the place of services where the location of supplier or location of recipient is outside India. It is submitted that neither the CGST Act nor the MGST Act defines what is inter-State supply of goods or services, however, Sections 2(64) and Section 2(65) define “Intra-State supply of goods” and “Intra-State supply of services”. Thus, Sections 2(64) and 2(65) of both the CGST Act and the MGST Act are the bridging provisions to determine what is inter-State supply, and Section 9 of both the CGST and the MGST Act are the charging Sections for the levy of inter-State tax.

40. It is submitted that once the Parliament has legislative Competence to enact the provisions of law to determine as to what is the place of supply and in exercise of the said powers, the Parliament has enacted Section 13(8)(b) providing that for "Intermediary" services, the place of business is location of the supplier, when the recipient is outside India, the same cannot be said to be ultra vires the provisions of the Constitution.

41. It is submitted that prior to the 101st Amendment to the Constitution. The incidence of tax, and the levy of tax in respect of Union of India and the State were distinct incidences, however, with the introduction of Article 246-A, both the Union of India and State are given simultaneous powers, and therefore the reliance of the petitioner to pass incidences of the manner of levy of the taxes prior to introduction of the GST regime will not hold any substance.

42. It is next submitted that petitioners are not fulfilling the requirement of export as defined under Section 2(6) of the IGST Act as all 5 requirements are required to be fulfilled, and even in the absence of one of the same, it cannot be termed export of service.

43. It is next submitted that once a class of person can be distinguished by the test of reasonable classification and once the Parliament has legislative competence to provide for a distinction between different classes, the impugned provision cannot be violative of the provision of either Article 14 or Article 19(1)(g) of the Constitution. It is submitted that being a distinct class of "Intermediary" service provider, the petitioners cannot contend that there is a violation of Article 14 of the Constitution.

44. In light of the above submission, it is submitted that Section 13(8)

(b) is Constitutional, valid.

Analysis & Conclusion

45. At the outset it is required to be observed that the Division Bench has not framed any formal question to be answered by the referee Judge, as a result of the disagreement between their Lordships.

46. However, on the conspectus of the contentions raised on behalf of the parties and in the context of the difference of opinion between their Lordships of the Division Bench, and as agreed at the Bar, the primary question which is required to be decided by this Court, is whether Section 13(8)(b) of the IGST Act 2017 is *ultra vires* the Constitution and the provisions of the IGST Act or otherwise.

47. At the inception, as to what is the nature of the Goods and Service Tax, which is the subject matter of the three enactments, namely the IGST Act, the CGST Act and the MGST Act, would be required to be discussed.

48. The concept of the GST as succinctly explained by the learned author Shri Avinash Poddar, C.A. can be noted.

> Goods and Service tax (GST) or Value Added Tax (VAT) is a form of consumption tax levied on goods and services. It is categorized

as an indirect tax, as it is not imposed on income or wealth but on the consideration for the supply of goods and services. The liability to discharge such tax is generally with a manufacturer or seller or service provider in the value chain. However, the incidence of the tax is borne by consumers as the tax is passed on along with the price charged by the suppliers. The GST/VAT design of imposing a tax on value addition at each stage of production and distribution and the set-off of taxes paid on purchases by each supplier in the supply chain, except the final consumer, ensures the neutrality of tax. Mr. Maurice Laure, Joint Director of the France Tax Authority, is considered to have built upon the idea of GST/VAT and was the first to introduce such taxation system in France on April 10, 1954. Manufacturing-level VATs were introduced shortly in the 1960s. Brazil also introduced a traditional VAT by the fiscal reform of 1965 that applied at all stages of production. It is said that countries choose to introduce GST/VAT as the preferred form of consumption tax for different reasons, depending on their pre-existing tax systems. In the case of the European Union, which was formerly known as European Economic Community (EEC), adopting VAT was a pre-condition for its membership. The European Union adopted VAT to replace turnover taxes on account of the ease of handling cross-border transactions, facilitating the development of common market, and reducing trade and economic distortions. Another reason for countries adopting GST/VAT was to increase revenue from general consumption to cut down rate of income taxes. Revenue neutral approach was another reasons (Norway, New Zealand etc.*)* and some other countries moved to GST/VAT to consolidate and modernize their existing tax structure, comprising multiple Sales Taxes at different rates. This increasing trend towards GST/VAT can be attributed to key factors such as (i) eliminates weaknesses of single stage taxation system, such as cascading and compounding effect; (ii) GST/VAT preserves tax neutrality by taxing the

Value Added Tax by each factor equally; (iii) Consumption tax is a large and more stable source of revenue; and (iv) It is potentially self-enforcing in nature.

At present, it is stated that more than 162 Countries across the globe have implemented GST/VAT system of taxation. One of the key principles of GST is that as a general rule, place of taxation of goods and services is determined based on the "destination principles". Exports are to be taxed at zero rate and imports are to be taxed under reverse charge i.e., tax is payable by the recipient of imported goods/services. As per the destination-based consumption principle, regardless of the fact that the tax shall be collected by the supplier, the same is retained by the State in which the goods or services are finally consumed. By such principle, wherever there is an inter-State supply, whether of goods or services, the tax also travels along with the goods or services.

49. On the concept of GST, being a destination-based tax, as founded on the principle of Value Added Tax (VAT), a reference to the decision of the Supreme Court in *All India Federation of Tax Practitioner (supra)* is required to be made, when the Supreme Court observed that VAT is a destination based consumption tax, logically leviable only on services provided within the country. The following are the observations of the Supreme Court:-

> *6. At this stage, we may refer to the concept of Value Added Tax (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.*
>
> *7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable*

> *only on services provided within the country. Service tax is a value added tax.*
>
> *8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value additioin by rendition of services. Therefore, for our understanding, broadly services fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc.. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc.*
>
> *17. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax.* ***As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs****. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that service tax is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client.*
>
> (emphasis supplied)

50. The petitioners have placed reliance on the 139th report of the "Department-Related Parliamentary Standing Committee On Commerce" on 'Impact of Goods and Services Tax (GST) on Exports', presented before Rajya Sabha and Lok Sabha on 19 December 2017, being a report made on the place of supply of services observing that Section 13(8) of

the IGST Act needs to exclude "Intermediary services", and make it subject to default Section 13(2), so that benefit of Export of services would be available. The following are the observations in the report:

> *"PLACE OF SUPPLY OF SERVICES*
>
> *15.1 The Committee noted that service provider providing services to overseas suppliers of goods earn commission in convertible foreign exchange. IGST @ 18% is leviable on such commission because the Government does not recognize their services as "Export of Services". Section 13(8) provides that Place of Supply of services will be the location of service supplier and not the location of overseas customers. Even in cases where both supplier and buyer are located outside India, commission earned for such transaction also attract IGST @ 18%.*
>
> *15.2 In view of the fact that GST is a destination based consumption tax, the Committee is of the view that following steps may be taken:*
>
> *. Provided that Place of Supply of Indian Intermediaries of Goods will be the location of service recipient i.e. customers located abroad (and not the location of such intermediaries as is currently provided), so that Intermediary Services will be treated as 'Exports'; or*
>
> *. Providing an exemption to Indian Intermediaries of Goods from levy of IGST, exercising the powers vested under Section 6(1) of IGST Act; or*
>
> *. Notify such services under Section 13(13) of the IGST Act to prevent double taxation (tax in India as well as in the importing country) by treating place of effective use (foreign country) as place of supply.*
>
> *15.3 The Government may also cause amendment to section 13(8) of the IGST At to exclude 'intermediary' services and make it subject to the default section 13(2) so that the benefit of export of services would be available.*
>
> (emphasis supplied)

51. The Division Bench of this Court in *Commissioner of Service Tax, Mumbai-II vs. SGS India Pvt. Ltd. (supra)* in a case where services were consumed abroad, applied the destination based principle and following the decision of the Supreme Court in the case of *All India Federation of*

Tax Practitioners (supra) accepted the contention as urged on behalf of the respondent that the principle that service tax is a destination based consumption tax, is in conformity with international practice and widely accepted, in order to avoid double taxation.

52. Having noted that GST is a destination based consumption tax, it can now be examined as to what is the legal position of the GST regime as embedded by the 101st Constitution Amendment Act, 2016 insofar as levy of GST is concerned, which replaced the prevailing VAT/Service tax regime prevailing under the provisions of the Finance Act, 1994.

Statutory position in respect of the GST regime:

53. The foundation of the GST regime is the 101st Constitution Amendment Act of 2016, by which the Constitution was extensively amended, so as to provide recognition to the introduction, formulation and implementation of Goods and Service Tax (GST) regime. The genesis of the 101st Amendment Act, 2016 is the Constitution (122nd Amendment) Bill, 2014, by virtue of which, inter alia Articles 246-A, 248, 249, 269-A along with the amendments to Articles 286, 366, 368 and the relevant amendments in the VII Schedule to the Constitution in List I (Union List), List II (State List) came to be incorporated. The statement of object and reasons in relation to the Constitution Amendment Act *inter alia* provided that the Constitution was proposed to

be amended to introduce 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. This being one of the significant features considering the federal structure of our Constitution. It was provided that the goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments. It was intended to remove the cascading effect of taxes and provide for a common national market for goods and services. It was provided that the proposed Central and State goods and services tax would be levied on all transactions involving supply of goods and services, except those which were to be kept out of the purview of the goods and services tax. Accordingly, by the 101st Constitution Amendment Act of 2016, with effect from 16 September 2016, such amendments were incorporated to the Constitution.

54. Insofar as the present proceedings are concerned, the relevant Articles of the Constitution are Articles 245, 246, 246-A, 248, 249, 269-A, and 286. Article 246-A makes special provisions with respect to Goods and Services Tax. By virtue of Article 248, the residuary power of the legislation, subject to Article 246A, is conferred on the Parliament. It is provided that the Parliament has exclusive power to make

any law with respect to any matter not enumerated in the Concurrent list or State List. By Clause (2) of Article 248, such power shall include the power of making any law imposing a tax not mentioned in either of those lists. Thereafter, Article 249 also came to be amended by the 101st Constitution Amendment Act, in the manner as provided in Clause (1), whereby the Parliament is empowered to make any law with respect to any matter enumerated in the State List and it is lawful for the Parliament to make laws for the whole or any part of the territory of India or in respect of "Goods and Services Tax" provided in Article 246A, and such power has been conferred considering the national interest. Article 269-A provides for the levy and collection of goods and services tax in the course of inter-State trade or commerce. This apart, there are other articles by which amendments are incorporated by the introduction of the GST regime as provided for in Articles 246-A and 269-A. For convenience, Articles of the Constitution relevant for the present proceedings are extracted hereinbelow:

> *"Article 245 - Extent of laws made by Parliament and by the Legislatures of States -*
>
> *(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.*
>
> *(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.*

Article 246A *- 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 279A, take effect from the date recommended by the Goods and Services Tax Council.]

Article 248*: Residuary powers of legislation*

(1) Subject to Article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Article 249 *: Power of Parliament to legislate with respect to a matter in the State List in the national interest*

(1) *Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to goods and services tax provided under Article 246-A or that matter while the resolution remains in force.*

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Article 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 246A, 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 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of 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.*

Article 286 - Constitution of India:Restrictions as to imposition of tax on the sale or purchase of goods

(1) *No law of a State shall impose, or authorize the imposition of, a tax on [the supply of goods or of services or both, where such supply takes place]-*

(a) Outside the State; or

(b) In the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.

(2) *Parliament may by law formulate principles for determining when a supply of goods or of services or both] in any of the ways*

mentioned in clause (1).”

55. Significantly, Article 246A provides that the Parliament and the legislatures of the State shall have concurrent powers to legislate on the goods and service tax. Thus, Article 246A carves out a special provision with respect to goods and services tax, to provide that notwithstanding anything contained in Article 246*[19] and Article 254*[20], Parliament, and, subject to clause (2), the Legislature of every State, shall have the power to make laws with respect to goods and services tax imposed by the Union or by such State. Clause (2) of Article 246-A provides that 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. Thus, by virtue of Clause (2) of Article 246-A, it is further significant that the State legislature would not have the power to make laws with respect to goods and services tax, where the supply of goods or services, or both takes place in the course of inter-State trade or commerce.

56. Article 269-A of the Constitution provides for levy and collection of goods and services tax, in the course of inter-State trade or commerce. Clause (1) thereof provides that goods and services tax on supplies in the

[19] ***Subject matter of laws made by Parliament and by the Legislatures of States**
[20] ***Inconsistency between laws made by Parliament and laws made by the Legislatures of States.**

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 the Parliament by law, on the recommendations of the Goods and Services Tax Council. Explanation below Clause (1) of Article 269-A, ordains that 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. Clause (5) of Article 269-A provides that Parliament may, by law, formulate the principles for determining the place of supply and when a supply of goods, of services, or both takes place in the course of inter-State trade or commerce. By virtue of Clause (5), the Parliament is empowered by law to 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. The Parliament having exercised such power is seen from the substantive provisions of Section 7 of the IGST Act, which defines "Inter-State supply" and Section 8 of the IGST defines "Intra-State supply". These provisions are adverted to, little later.

57. Having noted Articles 246-A and 269-A, the next Article of immense significance in the present context is Article 286. Article 286

also has underwent an amendment by the 101st Amendment Act, 2016. Article 286 provides for "*restrictions as to imposition of tax on the sale or purchase of goods*". By virtue of the such amendment, clause (1) of Article 286 provides that no law of a State shall impose, or authorize the imposition of a tax on the supply of goods or of services or both, where such supply takes place- (a) outside the State; or (b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India. Clause (2) of Article 286 provides that Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1). It would be appropriate to comparatively notice Article 286 as it stood prior to its amendment by the 101st Constitution Amendment Act, 2016, which is as under:

ARTICLE 286 (PRE AND POST AMENDMENTS)

Prior to 101st Constitution Amendment Act, 2016	Post 101st Constitution Amendment Act, 2016
286. *Restrictions as to imposition of tax on the sale or purchase of goods.*	*286. Restrictions as to imposition of tax on the sale or purchase of goods.—*
(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place— (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Explanation.— For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been	(1) No law of a State shall impose, or authorise the imposition of, a tax on [the supply of goods or of services or both, where such supply takes place— (a) outside the State; or (b) in the course of the import of the [goods or services or both] into, or export of the goods or services or both out of, the territory of India. * * * * *[21]

delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.	[(2) Parliament may by law formulate principles for determining when a [supply of goods or of services or both] in any of the ways mentioned in clause (1).]
(2)Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.	* * * * *[22]
(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent	

58. As to what is the cumulative effect of Articles 246-A, 269-A, and 286 of the Constitution, in the context of the issue in hand can be enumerated thus:-

(i) 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**'. [**Clause (2) of Article 246-A**].

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[21] Explanation to cl. (1) omitted by the Constitution (Sixth Amendment) Act, 1956, s. 4 (w.e.f. 11-9-1956)

[22] Cl. (3) omitted

(ii) 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. **[Clause (1) of Article 269-A]**

(iii) 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'**. **[explanation below clause (1) of Article 269-A]**

(iv) Parliament may, by law, formulate the principles for determining the place of supply and when supply of goods, of services, or both takes place **'in the course of inter-State trade or commerce'**. **[Clause (5) of Article 269-A]**

(v) Where an amount collected as tax levied under clause (1) of Article 269-A has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India. **[Clause (3) of Article 269-A]**

(vi) No law passed by a State Legislature shall impose, or authorize the imposition of a tax, on the supply of goods or of services or both, where such supply **'takes place outside the State'**; or '**in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of**

India'. (Article 286(1))

(vii) The Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways as mentioned in clause (1) of Article 286.(Article 286(2))

59. Thus explicitly, by virtue of clause (1)(b) of Article 286, no law of a State can impose, or authorize the imposition of, a tax on the supply of goods or of services or both, where such supply takes place outside the State; or in the course of the import or export of the goods or services outside the territory of India.

60. The question posed by the petitioners is in the context of their transactions, which is an export of service, as provided by the petitioners to their foreign principals. Factually and/or dehors from the repercussions as brought about by the IGST Act, as the respondents would contend on the nature of the transactions in question, being an export of service undertaken by the petitioners, there appears to be no dispute. The petitioners contend that as the recipient of their services, being a foreign party, the trade in question undertaken by the petitioners would neither amount to 'inter-State trade and commerce' nor any 'intra-State trade and commerce'. The petitioners hence have contented that such transactions are transactions of export of service. The petitioners contend that by application of the basic principles underlying clause (2) of Article 246-A,

read with explanation below clause (1) of Article 269-A and further read with clause (b) of clause (1) of Article 286, the transaction being undertaken by the petitioners can never amount to an intra-State trade, hence , the petitioners cannot be taxed under the CGST Act and the MGST Act, which are legislations applicable to intra-State trade and commerce. In my opinion, the contention of the petitioners appears to be correct that the transactions in question of the petitioners are in fact a transactions of export of service, as the recipient of service is the foreign principal. The destination/consumption of the services as provided by the petitioners takes place in a foreign land. This completely satisfies the test of "export of service" as defined under Section 2(6) of the IGST Act, also as there is no contra indication that "factually" it can be regarded as either inter-State or intra-State sale of services.

61. Once the transactions of the petitioners are of "export of services", as to how the transactions are deemed to be intra-State trade and commerce would be required to be looked into. This is stated to be brought about by the consequences, effect, and interplay of the three enactments, being the legislations consequent to the 101st Amendment to the Constitution, the three enactments being the **IGST Act** (brought into force with effect from 22 June, 2017), the **CGST Act** (brought into effect from 22 June, 2017 and the **MGST Act** (brought into force with effect

from 21 June, 2017)*[23].

62. The relevant provisions of the IGST Act can be firstly noted. They read thus:-

> ***"Section 2(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 [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;*
>
> ***Section 2(13)** **"intermediary"** means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;*
>
> ***Section 2 (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;*
>
> ***Section 2 (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*

[23] *Section 2 (15) "location of the supplier of services"**with effect from 21 June, 2017 in relation to some of the provisions and in relation to the other provisions from 01 July, 2017

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;

***Section 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, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (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 charges 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:

*P*rovided 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.

***Section 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.

Section 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 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.

Section 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.

***Section 13**: Place of supply of services were 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 the 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 45A of the Reserve Bank of India Act, 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;

(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) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

(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.

***Section 16** :- Zero Rated Supply*

(1) "Zero rated supply" means any of the following supplies of goods or services or both, namely:—

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder."

(emphasis supplied)

63. It may be observed that the IGST Act has been enacted to make provision for the levy and collection of tax on *"inter-State supply of goods or services or both",* by the Central Government and for matters connected therewith or incidental thereto. It is to achieve such intent and purpose various provisions are incorporated, so as to enable the Central Government to levy and collect tax on the "*inter-State supply of goods or services".*

64. As noted above, Section 2(6) of the IGST defines "export of

services," to mean 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; 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. As observed above, the case of the petitioners is to the effect that the transactions of the petitioners, subject matter of the present proceedings, is of an export of service. The petitioners in undertaking such transactions are stated to be acting as "intermediaries" as defined in Section 2(13) of the IGST Act, which defines an intermediary as a broker, an agent, or any other person, by whatever name called, who arranges or facilitates the "supply of goods or services or both", or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account. As observed hereinabove, all the ingredients of Section 2(6) are present in regard to the transactions in question being undertaken by the petitioners.

65. Section 5 of the IGST Act is the charging section providing that there shall be levied a tax called the integrated goods and services tax on all "inter-State supplies" of goods or services or both, inter alia as provided

under the said provision. Section 7, providing for "inter-State supply", falls under Chapter IV of the IGST Act, being the chapter pertaining to "Determination of Nature of Supply". It provides that 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. In the context of the present proceedings, we are concerned with sub-section (5)(a) of Section 7, which provides for the supply of goods or services or both, when the supplier is located in India, and the place of supply is outside India; it shall inter alia be treated to be a supply of goods or services or both in the course of inter-State trade or commerce. Thus, a foreign transaction by a legal fiction for the purposes of the IGST Act is treated as an inter-State trade or commerce. Hence, necessarily by virtue of sub-section (5) of Section 7, a transaction as in question wherein the supplier (petitioner) is located in India and the place of supply of goods or services or both is outside India, shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

66. Section 8 of the IGST Act provides for "Intra-State supply". Sub-section (1) thereof provides that 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. The proviso below sub-section (1) provides for three exceptions, which may not be of relevance for the present proceedings. What is significant is as to what sub-section (2) of Section 8 provides, namely, that 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. Thus, sub-section (2) of Section 8 is another relevant provision for the present proceedings, as it incorporates the effect of Section 12 of the IGST Act.

67. Section 10 provides for *"the place of supply of goods, other than supply of goods imported into, or exported from India"*. Section 11 provides for "*the place of supply of goods imported into India or exported from India*". These provisions need not be discussed in the context of the present proceedings.

68. Section 12 is another vital provision providing for *"the place of supply of services where the location of supplier of services and the*

location of the recipient of services is in India". Sub-section (2)(ii) of Section 12 *inter alia* provides that the place of supply of services, except the services specified in sub-sections (3) to (14), if made to any person other than a registered person shall be the location of the supplier of services in other cases. It needs to be observed that Section 12(2) is required to be read in conjunction, as to what has been provided for in sub-section (1), namely, that provisions of Section 12 shall apply to determine the place of supply of services, where location of supplier "**and the"** location of recipient of services is in India and not otherwise. This is gathered from a bare reading of the said provision.

69. Section 13 of the IGST Act, is the provision and subject matter of controversy being assailed by the petitioners, is now required to be discussed. Section 13 provides for *"place of supply of services where location of supplier "or" location of recipient is outside India"*. Sub-section (1) of Section 13 provides that 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 the services is outside India. Sub-section(2) of section 13, provides that the place of supply of services, except the services specified in sub-section (3) to (13) shall be the location of the recipient of services. The proviso to sub-section (2) states 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. Sub-section (3) provides that the place of supply of services in clauses (a) and (b) thereunder shall be the location where the services are actually performed. Sub-sections (4) to (7) may not be discussed, as they are not relevant in the present proceedings. The challenge is to the provisions of Section 13(8)(b), which provide that the place of supply shall be the location of the supplier of services in the case of "intermediary" services. The plain consequence as brought about by Section 13(8)(b) is that when the location of the recipient of service is outside India, then in the context of an "intermediary services", the place of supply shall be (is deemed to be) the location of supplier of services. This provision has a cascading effect on what Section 12 sub-section (1) read with sub-section (2)(ii) would provide, namely, that the place of supply of services for an intermediary shall be where the location of supplier of services, i.e., the location in India. Section 12 has a further reverse cascading effect on what Section 8(2) provides, namely, when the location of the supplier of services and the place of supply by virtue of Section 12 is in India, in that event, such supply of services is to be treated as "intra-State" supply of services. The legal consequence as brought about by such deeming combination is that a supply of service, of the nature of intermediary services, which is in the nature of "export of service" as

defined under Section 2(6) of the IGST Act becomes an “intra-State” sale falling under the charging provision (Section 9) of the CGST Act and the MGST Act. Thus, according to the petitioners, a transaction/trade or commerce which is necessarily a transaction of “export of service” becomes an ‘intra-State’/local transaction, being available to be taxed as an intra-State transaction.

70. The petitioners have contended that Section 13(8)(b) of the IGST Act is unconstitutional primarily on the ground that such provision cannot be read and/or utilized under the provisions of the CGST Act and MGST Act, as what is explicitly not permissible to be incorporated under the CGST Act and the MGST Act cannot be done implicitly, i.e., to tax export of services, by reading Section 13(8)(b) of the IGST Act into the provisions of the CGST and the MGST Acts.

71. It is seen that insofar as the IGST Act is concerned, "export of services" as defined under Section 2(6) fall within the purview of the provisions of Section 16, namely, the provision made for "*zero rated supply*". The contention of the petitioners is also to the effect that once a transaction is of export of services and as defined under Section 2(6) of the IGST Act, in regard to which there is no definition under Section 2 of CGST Act or under section 2 of MGST Act, Section 13(8)(b) cannot by a

legal fiction and/or an implication form any transaction to be taxed under the CGST Act and MGST Act, by categorizing it to be an intra-State sale.

72. To appreciate such contention as urged on behalf of the petitioners, it would be required to be seen as to how the provisions of IGST Act relevant to the controversy in hand find recognition and/or incorporated into the provisions of CGST Act and MGST Act. The question would be, whether the petitioners are correct in their contention that although the transaction in question is a transaction of 'export of services', falling within the meaning of Section 2(6) of the IGST Act, nonetheless it is being treated as an "intra-State trade or commerce" under the CGST Act and the MGST Act. This merely by virtue of the provisions of the IGST Act being incorporated within the provisions of the CGST and MGST Acts, by virtue of a legislation by incorporation and/or by fiction of law, the character of a transaction from 'export of services' is being altered into a transaction of an intra-State supply of services.

73. To appreciate such contention as urged on behalf of the petitioners, it would be first required to be examined as to which of these provisions of the CGST Act/MGST Act bring about an effect, that the provisions of the IGST Act in the context of the "export of services" become integral to the CGST Act or MGST Act. These provisions can be discussed

hereunder. The provisions of the CGST Act and the MGST Act are pari materia, hence reference to only the provisions of the CGST Act would suffice.

74. In such context, at the outset, it may be observed that CGST Act is an act framed by the Parliament to make a provision for levy and collection of tax on the "intra-State supply of goods or services or both", by the Central Government and for matters connected therewith or incidental thereto. Thus, the CGST Act as also the MGST Act concerns only the intra-state supply of goods or services, for levy and collection of GST. Although, the object and purpose of the enactments is such, however, the provisions of the IGST Act stand referred/incorporated under the CGST Act, which is the cause and concern as echoed by the petitioners. The incorporation of the provisions of the IGST Act within the CGST Act begins with the definition clause itself. The relevant definitions in the CGST Act are 2(57), 2(58), 2(62), 2(64), 2(65), 2(70), 2(71), 2(72), 2(86) and 2(98). Further, Section 9 is the charging section. It would be necessary to note these provisions which read thus:-

> *"2. Definitions.— In this Act, unless the context otherwise requires,—*
> *… .. .. …*
>
> *(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;*
… .. … …

*(62) "**input tax**" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—*
(a) the integrated goods and services tax charged on import of goods;
(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;
.. … … …

*(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;*
… … …

*(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;

*(72) "**manufacture**" means processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term "manufacturer" shall be construed accordingly;*
… … …

*(86) "**place of supply**" means the place of supply as referred to in Chapter V of the Integrated Goods and Services Tax Act;*
… … …. …

*(98) **"reverse charge"** means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub- section (4) of section 5 of the Integrated Goods and Services Tax Act;*

… … …

*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, 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."

75. A bare reading of Section 9 of the CGST Act would indicate that subject to the provisions of sub-section (2) thereof, there shall be levy of a

tax called the Central Goods and Services Tax on all "*intra-State supplies of goods or services or both*". By virtue of Section 2(65) of the CGST Act 'intra-State supply of services' is required to have the same meaning as assigned to it in Section 8 of the IGST Act. As noted above, Section 8 of the IGST Act provides for 'intra-State supply'. Section 8(2) of the IGST Act provides that subject to the provisions of Section 12, the 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. Sub-section (2) of Section 8 recognizes the effect of Section 12(2) namely that the place of supply of services made to any person other than a registered person shall be the location of the supplier of services and hence, for transaction of such nature, the supply of services becomes an intra-State supply. The consequence brought about by such provision is that by mere inclusion of Section 8 of the IGST Act within the provisions of Section 2(65) of the CGST Act, which defines 'intra-State supply of services', a legal effect which emerges is that not only Section 8 of IGST Act, but also the accompanying provisions, namely, Section 12 relating to the place of supply of services, stands embedded, implanted and/or incorporated, and are deemed to form an integral part of the CGST Act.

76. Similarly, Section 2(86) of the CGST Act defines 'place of supply'

to mean the place of supply as referred to in Chapter V of the IGST Act. Thus, Chapter V of the IGST Act stands incorporated under the provisions of the CGST Act. Chapter V of the IGST Act, which deals with the place of supply of goods or services or both, contain the provisions from Section 10 to Section 14 incorporating within such Chapter the impugned provision, namely Section 13(8)(b). Thus, it would not be unfounded for the petitioners to contend that not only Section 8 of the IGST Act but all the provisions under Chapter V of the IGST Act stand incorporated in the CGST Act, so as to create a legal fiction, that for the purposes of levy and collection of tax under the CGST Act, place of supply is required to be considered to be the location of the supplier. The provisions of the MGST Act are identical to the provisions of the CGST Act and, therefore, are not required to be separately noted so as to avoid repetition.

77. On the above backdrop, it needs to be examined whether the petitioners are correct in their contention that merely because Section 13(8)(b) as contained in Chapter V of the IGST Act stands incorporated by virtue of Section 2(86) read with Section 2(65) and other provisions of the CGST Act and the MGST Act, the same is required to be held to be illegal and unconstitutional, as the Parliament does not have legislative Competence to permit the CGST Act to tax export of services in relation

to an intermediary under the CGST Act, by classifying the same as an 'intra-State supply of services'. In other words, the petitioner contends that considering the clear effect as brought about under Article 246A, Article 269A and Article 286, explicitly the Parliament does not have legislative competence nor does the State Legislature has the legislative competence to tax export of services under the CGST and the MGST Acts, which indisputedly pertain to intra-State supply of goods and services.

78. In my opinion, there is certainly some substance in the petitioners contention that there is a polarity which is brought about insofar as taxing export of services provided by the intermediaries are concerned, as a consequence of an interplay of the enactments, namely, the IGST Act on one hand and the CGST and the MGST Acts on the other hand. Also, there appears to be some internal friction within the provisions of the IGST Act in this regard, which also needs to be discussed. Firstly such enigma is noticed in the operation of Section 5 which is the charging section and Section 13(8)(b) of the IGST Act. This for the reason that sub-section (1) of Section 5 interalia provides that 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 supply of goods or services or both. The proviso below sub-section (1) of Section 5 ordains

that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975, on the value as determined under the said Act at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962.

79. The conflict is that, the export of services for a commission to be received by the petitioners, fructify only after the goods are supplied by the foreign principals who are beneficiaries of the export of services provided by the intermediaries and the same are received as imports by the Indian purchasers. Thus, applying the destination principle, the amount by way of commission, to be paid to the petitioners are already subsumed in the transaction which the foreign principal may have with its customer (the Indian importer) on which the Indian importer is already being taxed. Thus, once such supply has already been taxed at the hands of the Indian importer, it does not fit into any acceptable parameters that the export of services between the intermediaries and the foreign principal (recipient of services) which is an independent transaction, by any analogy, can be even remotely considered to be a part of the transaction between the foreign supplier and the Indian importer, in the light of a destination based principle on which the Goods and Service Tax is founded. Even statutorily no interlinking of these independent

transactions can be brought about, in view of the destination based principle on which the GST model operates and is founded. If such an analogy is derived from the cumulative reading of Section 13(8)(b) read with Section 8(2) of the IGST Act, so as to be read and applied under the provisions of the CGST and the MGST Act, in my opinion, it would lead not only to a consequence of double taxation but also to an implausible and illogical effect, in recognizing two independent transactions to be one transaction for the purpose of levy of CGST and MGST as intra-State trade and commerce. It is also for such reason, it would be quite fatal nay absurd to recognize two different transactions being clubbed together, merely for the purposes to be included and/or to be brought within the regime of the CGST and the MGST Act.

80. Thus, there appears to be substance in the contention as urged on behalf of the petitioners that applying the principles that the GST is the destination based tax, if an exporter of service, who is regarded as an intermediary by the respondents, exports his services to a foreign principal, who, for example, is based in the United Kingdom and as a benefit of the service provided by such Indian intermediary/exporter of service, the foreign principal enters into a contract with a person in the U.S.A., such transaction between the UK party with the U.S.A. party having materialized, and the Indian intermediary receiving commission

for the services offered by him to the foreign principal, in convertible foreign exchange, in these circumstances, it is not understood as to how such a transaction of export of service, is being categorized as an intermediary services and can amount to an intra-State sale, so as to be liable for levy of GST under the CGST Act and the MGST Act. In regard to such transaction, there is no basis or any hypothesis to conclude that the beneficiary of the services provided by the intermediary, becomes an Indian party so as to apply the destination principle and that too at the hands of the exporter of service. It would be too far-fetched to hold that the intention of Section 13(8)(b) read with Section 8(2) of the IGST Act is to reach out to such foreign transactions so as to tax them as an intra-State trade and commerce, which has no foundation for taxability, either under the IGST Act or CGST/MGST Act. Even otherwise, it is difficult to accept the respondents' contention that even if persons like the petitioners, who are exporters of service and who are regarded as intermediaries within the definition of Section 2(13), the factual character of the transaction, which is of export of service, would stand altered to that of a local/intra-State transaction, merely because the foreign principal is entering into an independent transaction with an Indian party, when such foreign party sales its goods to an Indian party, under such independent transaction. If the contention as urged on behalf of the

respondents is accepted, then the definition of "export of services" as contained in Section 2(6) of the IGST Act and the consequences of export of services as the law would mandate including under Section 16 of the IGST Act, would stand nullified and/or rendered meaningless. Such cannot the intention of the legislature in framing of the IGST Act.

81. There is another apparent incongruity which can be noted from the conjoint reading of sub-Section (5) of Section 7 and the provisions of Section 13(8)(b) of the IGST Act. This is to the effect that sub-section (5) of Section 7, which categorically provides that in regard to supply of goods or services or both, when a supplier is located in India and the place of supply is outside India, such supply of goods or services shall be treated to be a supply of goods or services or both, "in the course of Inter-State trade or commerce", whereas in respect of a clear transaction of export of service as defined under sub-section (6) of Section 2 by virtue of Section 13(1), which provides that such provision shall apply to determine the place of supply of services where the location of the supplier of services or recipient of services is outside India, shall be the location of the supplier of services, when it concerns intermediary services, that is to classify the export of service as an 'intra-State' trade or commerce. Thus, on one hand, sub-section (5) of Section 7 categorizes such supply of services as an "inter-State trade or commerce" and in relation to the same supply of

services by providing that the location of the recipient of the services being outside India, for intermediary services, the place of supply is deemed to be location of the supplier of services. Thus, there is an apparent dichotomy. A transaction of export of services as that of the petitioners, on one hand is treated as inter-State trade or commerce by virtue of sub-section (5) of Section 7, and on the other hand, the same transaction is treated as an intra-State trade and commerce by virtue of Section 13(8)(b) of the IGST Act.

82. In my opinion, certainly, the intention of the legislature is not to tax such transaction of export of services, also categorized as an intermediary services both under the IGST Act as also under the CGST and the MGST Acts. If it is to be such effect, interpretation and operation of these two provisions, it would lead to an absurdity making the provisions unworkable but also creating an uncertainty in the operation of the statutory mechanism, as neither there could be a desire of double taxation nor such a consequence would be acceptable under the regime of both the legislations, namely the legislations governing Inter-State and Intra-State trade and commerce.

83. From the above discussion, what can be discerned and derived, is that it is necessary to confine transactions which are clearly transactions in

the course of Inter-State trade or commerce and more particularly transactions of export of services as defined under Section 2(6) of the IGST Act and the intermediary services, to be subjected, relevant and confined only to the provisions of the IGST Act, and transactions which are in the course of Intra-State trade or commerce, shall remain confined to the provisions of the CGST Act and the MGST Act. Necessarily transactions which are intra-State transactions and those which are inter-State transactions (trade or commerce) are required to be compartmentalized, so as to be recognized under the separate regimes and without creation of any fictional incongruity in regard to the regimes, they need to be taxed, in the given facts and circumstances. It will be too harsh and not fair to the assessees to suffer any uncertainty in regard to the regimes the assessee's would be taxed. Such uncertainty is neither conducive to trade or commerce nor of any real benefit to the interest of the revenue. The intention of the provisions cannot be to generate disputes and litigation but to have a smooth and definite flow under a robust taxing system.

84. In these circumstances, the approach of the Court would be by interpretative process to make the provisions of the respective enactments meaningful for their smooth and effective implementation. The duty of the Court would also to accept the constitutionality of the provision

rather than being tilted to read the provision to be ultra-virus or unconstitutional. It may be observed that it is well-settled that every provision in an enactment is required to be understood and interpreted within the framework of the object and intention the legislation intends to achieve. The provisions are required to be interpreted so as to forward the intent of the legislation and the purpose sought to be achieved. The first approach of the Court would also be to give effect to the legislative wisdom and make an endeavour to presume constitutionality of the legislative provision rather than to have an approach to declare the same invalid. As noted above, this can be achieved by a process of interpretation, so that an attempt can be made to examine whether the provision can be rendered meaningful. Unless the provision falls foul of the well-settled norms to strike down legislations, namely lack of legislative Competence, manifest, arbitrariness and/or the provisions being rendered unconstitutional being contrary to the provisions of the Constitution, the Court would be loath to strike down the validity of the legislative provision.

85. In such context, a reference to the decision of the Constitution Bench of the Supreme Court in *Sunil Batra Vs. Delhi Administration & Ors.*[24] is also required to be made in regard to the principles of statutory

[24] (1978)4 SCC 494

interpretation the Courts would be guided in considering the validity and constitutionality of legislations. In the concurring judgment of Mr. Justice Krishna Iyer, it was observed that a validation- oriented approach becomes the philosophy of the statutory construction recognizing that certain provisions of law construed in one way to be consistent with the Constitution and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The relevant observations of the Court read thus:

> *"39. The jurisprudence of statutory construction, especially when a vigorous break with the past and smooth reconciliation with a radical constitutional value-set are the object, uses the art of reading down and reading wide, as part of interpretational engineering. Judges are the mediators between the societal tenses. This Court in R.L. Arora V. State of Uttar Pradesh (AIR 1964 SC 1230) and in a host of other cases, has lent precedential support for this proposition where that process renders a statute constitutional. The learned Additional Solicitor General has urged upon us that the Prisons Act (Sections 30 and 56) can be a vehicle of enlightened values if we pour into seemingly fossilized words a freshness of sense.*
>
> > *"It it well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction."*
>
> *40. To put the rule beyond doubt, interstitial legislation through interpretation is a life-process of the law and judges are party to it. In the present case, we are persuaded to adopt this semantic readjustment so as to obviate a regicidal sequel. A validation-oriented approach becomes the philosophy of statutory construction, as we will presently explain by application."*

86. Adverting to such principles, the legality of Section 13(8)(b) would be required to be examined. As discussed in some detail in examining

'whether Section 13(8)(b) would be required to be struck down', it is imperative for the Court to examine the context in which the provision stands embedded in the provisions of the IGST Act. As stated earlier, section 13 provides for place of supply of services where the location of the supplier or location of the recipient is outside India. Sub-section 8(b) provides that the place of supply in so far as intermediary services are concerned, shall be the location of the supplier of services. On first principles, the necessary implication of Section 13 would be to the effect that Section 13 is required to be held to be specifically confined only to the IGST Act. This becomes clear from the different legislative indications which are discernible from the provisions of the IGST Act itself, as discussed hereunder.

87. First and foremost, 'export of services' has been defined only under the IGST Act under Section 2(6); 'intermediary' has been defined for the purposes of IGST Act under Section 2(13). Thereafter, 'intra-State supply' has been defined in Section 8 of the IGST Act; Section 12 of the IGST Act defines 'place of supply of services where location of supplier and recipient is in India; and finally, Section 13 of the IGST Act is the provision which determines the place of supply of services where location of supplier or location of recipient is outside India. There is another

provision that is relevant, namely, Section 16 of the IGST Act providing for "Zero Rated Supply", which ordains that export of goods or services or both would amount to a zero-rated supply. A person registered to make 'zero rated supply' shall be eligible to claim a refund, as provided for in sub-section (3). Thus, a cumulative reading of these provisions of the IGST Act gives a complete indication of a statutory mechanism as created for the purpose of the IGST Act, namely, insofar as the transaction of export of services by the intermediary is concerned, the same would necessarily fall within the framework of the IGST Act only. It would be too far-fetched to consider that certain provisions of the IGST Act are framed not of any relevance to the IGST Act but for the CGST and the State GST Acts. This would indirectly mean that something which could be expressly legislated to fall under the CGST or the State GST Acts, has been legislated under the IGST Act for the purposes of the CGST/MGST Acts. Such intention cannot be attributed to the IGST Act, as the provisions incorporated therein are certainly are of relevance and applicability in so far as the inter-State trade and commerce is concerned.

88. Be that as it may, it may also be required to be observed that none of the provisions under the IGST Act can be considered to be meaningless insofar as they are applicable within the framework of the IGST Act. Thus, applying the parameters of Section 13(1) read with sub-Section

8(b) of the IGST Act insofar as 'intermediary services' are concerned, for the purposes of the IGST Act, the place of supply of services in regard to the transaction of export of services shall be the location of the supplier of services namely the location of the intermediary. Hence, by a legal fiction, although the location of the recipient of services is outside India i.e. the transaction itself is consumed outside India, by such fiction, it has been provided that for the purpose of IGST Act, the place of supply shall be the location of the supplier of the intermediary services. By virtue of Section 13(1) read with sub-section 8(b) of the IGST Act, a corresponding effect to such transaction stands recognized by operation of Section 12(2)(b)(ii) of the IGST Act, that for such transaction, the place of supply of services shall include the location of the supply of services. On a cumulative reading of Sections 13 and 12 of the IGST Act, as can be instantly noted, by virtue of Section 8(2), necessarily such supply becomes an 'intra-State supply'. This is the second fiction which is created on a cumulative effect of Section 13(8)(b) read with Section 12(2)(b)(ii) read with Section 8(2), albeit that such a transaction is clearly a transaction of "export of services" as defined under Section 2(6), however, for the purposes of the IGST Act, it would amount to an 'intra-State supply'. It is thus difficult to conceive as to why the IGST Act would take within its ambit any intra-State supply, when the IGST Act itself is a legislation, which concerns GST to

be levied on 'inter-State trade and commerce' and not on 'intra-State trade and commerce'.

89. Be that as it may, as noted above, these provisions under the IGST Act, in my opinion, need to be applied and understood in their applicability only under the IGST Act, even applying the principles of strict construction of the taxing statutes. Under such principles, it is not permissible to recognize any vague and/or non-specific incorporation of the provisions of the IGST Act and/or any incorporation by mere implication, unless such incorporation is explicit and as permissible under the Constitution.

90.

91. In such context, it would also be required to be examined whether Section 13(8)(b), along with the ancillary provisions, namely Section 12 and Section 8 of the IGST Act would have any applicability and/or relevance in the context of export of services under the CGST Act and MGST Act. In forwarding the discussion on this aspect, it may be stated and as noted above, the provisions of the IGST Act find recognition in their applicability in the CGST Act and the MGST Act under the provisions of Sections 2(57), 2(58), 2(62), 2(64), 2(65), 2(70), 2(71), 2(72), 2(86) and 2(120) of these enactments. However, what is most

significant is that such provisions by virtue of what has been provided in the opening part of Section 2 of the CGST and the MGST Act, cannot be read out of the context, and/or can be read and applied only in the context the CGST and the MGST Act(s) warrant their applicability and not otherwise. This is also the legislative intent as clear from the reading of the opening words of Section 2 of the CGST and the MGST Act when such provision begins with the following wording:-

> *"Section 2: Definitions - In this Act, **unless the context otherwise requires**"*
>
> (emphasis supplied)

92. The principles of contextual interpretation are well settled. In "Whirlpool Corporation v. Registrar of Trade Marks, Mumbai"[25], the Supreme Court has held that there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the words have used and that this would be to give effect to the opening sentence in the definition section namely "unless there is anything repugnant in the subject or context.' In this situation the Court is required not only to look at the words but also to look at the context, the collocation and the objection of such words relating to such matter and interpret the meaning intended to be conveyed by the use of such words under the said circumstances. The Supreme Court in paragraph 28 has observed thus:

[25] (1998)8 SCC 1

> *"28. Now the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statues generally begin with the qualifying words, similar to the words used in the present case, namely 'unless there is anything repugnant in thesubject or context'. Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely 'unless there is anything repugnant in the subject or context'. In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under those circumstance". (See : Vanguard Fire and General Insurance Co. Ltd. Madras v.Fraser & Ross, AIR 1960 SC 971)."*

93. In "*TATA Power Company Ltd. v. Reliance Energy Ltd.*[26]" the Supreme Court considered the principles of contextual interpretation in interpreting Section 23 of the Electricity Act, 2003. The Court observed thus:—

> *"Supply - Contextual Meaning*
> *96. It was submitted by the respondents that in any event the word 'supply' as used in Section 23 should be given the same meaning as is given to it in Section 2(70) of the Act i.e. the sale of electricity to a licensee or consumer. Accordingly by its very nature, supply would have a supplier and a receiver and any direction which is aimed at ensuring or regulating supply by its very nature would have to be directed to both the supplier and the receiver.*
>
> *97. However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words 'unless there is anything repugnant to the subject or context'. [See Whirlpool Corporation v. Registrar of*

[26] (2009)16 SCC 659

> *Trade Marks, Mumbai, (1998) 8SCC 1; Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency, (2008) 6 SCC 732 and National Insurance Co. Ltd. v. Deepa Devi,(2008) 1 SCC 414].*
>
> *98. Accordingly the word 'supply' contained in Section 23 refer to 'supply to consumers only' in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) 'supply' refers to both consumers and licensees. In Section 10(2) the word'supply' is used in two parts of the said Section to mean two different things. In the first part it means 'supply to a licensee only' and in the second part 'supply to a consumer only'. Further in first proviso to Section 14, the word 'supply' has been used specifically to mean 'distribution of electricity'. In Section 62(2) the word 'supply' has been used to refer to 'supply of electricity by a trader'.*
>
> *99. To assign the same meaning to the word "supply" in Section 23 of the Act, as is assigned in the interpretation section, it is, in our opinion, necessary to take recourse to the doctrine of harmonious construction and read the statute as a whole. Interpretation of Section indisputably must be premised on the scheme of the statute. ….."*

94. Adverting to the above principles of interpretation of statutes as also the principles of contextual interpretation of statutes as derived from Section 2 of the CGST and MGST Act(s), in my opinion, by virtue of such opening wordings of Section 2 providing that "*In this Act, unless the context otherwise requires*", the provisions of Section 13(8)(b) cannot be applied in a context which is not attracted and/or which is not provided for under the CGST Act and the MGST Act. The CGST Act and the MGST Act both pertain to 'intra-State supply of goods and services'. These enactments do not define what is 'export of services.' They also do not give any indication as to any express incorporation of any provision in regard to "export of services" and/or there is an absence of any specific incorporation, as to what would be the place of supply when the "supply

of services where the location of the supplier or location of the recipient is outside India", in the manner Section 13 more particularly sub-section 8(b) of Section 13, would provide in the case of 'intermediary services'. If the legislature, and it ought not be without a reason, has refrained from making "any specific" reference or incorporation to such provision, it may not be permissible for the respondent to read into the provisions by the CGST and the MGST Act, as to what has been omitted and/or expressly not provided. It clearly appears that the entire concept of "export of services" which has been specifically stipulated and provided only under the provisions of the IGST Act, to be read into the provisions of the CGST and MGST Acts, in my opinion, would not be a correct reading of the provisions of Section 2(86) read with 2(65) of the said Acts, for the respondents to consider that Section 13(8)(b) stands firmly incorporated in the provisions of the CGST Act or the MGST Act. This more particularly, when the Legislature itself has explicitly avoided having any such express incorporation.

95. There is yet another strong reason for the Legislature refraining from incorporating anything to do with the "export of services" and/or falling under the provisions of Section 13 read with Section 7(5) and Section 12(2) of the IGST Act under the CGST/MGST Act(s). This for the reason that having enacted the IGST, the CGST and the MGST Acts,

the Parliament as also the State Legislature has compartmentalized the levy and collection of the GST into two categories, firstly, 'inter State supply of goods and services (IGST Act) and secondly the intra-State supply of goods and services (under the CGST and the MGST Acts). It may also be observed that the Constitutional provisions as noted above also would not permit the State Legislature to legislate on fields that are exclusively reserved and to be legislated by the Parliament. Also the Parliament would not legislate on a field which would de-compartmentalize the inter-State and intra-State regimes. There does not appear to be any intention under the constitutional scheme of the Article as noted above, to permit “export of services” to be expressly brought under the regime of the “intra-State” supply. Further, in regard to levy of goods and services tax on supplies in the course of inter-State trade or commerce, is one such aspect, with which it would be the Parliament which would have the legislative competence, which is clear from the provisions of Clause (1) of Article 269A read with Clause (5) thereof. This position also stands compounded from the reading of Article 286 of the Constitution, which provides that no law of a State shall impose or authorize the imposition of a tax on the supply of goods and services or both, where such supply takes place inter alia in the course of import of the goods or services or both into or export of goods or services or both,

out of the territory of India. However, by virtue of sub-clause(2) of Article 286, it is provided that the Parliament may by law formulate principles for determining when a supply of goods or services or both, takes place in any of the ways mentioned in clause (1) of such Article.

96. In the context of such provisions of the Constitution, it is difficult to conceive that the CGST Act, which has been enacted only for the purpose of levy of GST on intra-State trade and commerce and the MGST Act, which is also an enactment to levy tax on intra-State trade and commerce, would be legislations which would recognize tax on "export of services", as governed and contained within the domain of IGST Act. This position is also supported by significant and glaring indications intrinsic to the CGST Act and MGST Act, namely, that these enactments do not define export of services. As noted above, they do not define an intermediary; they do no contain provisions akin to the provisions of Section 13(8)(b) and Section 12 as contained in the IGST Act. Thus, the cumulative effect of the provisions of Section 13(8)(b) read with Section 8(2) and Section 12 of the IGST Act, in my opinion, can neither be read nor can be said to be of any relevance for the purpose of CGST and MGST Act(s) when it comes to any levy of GST under the said Acts on intermediary services, of the nature export of services falling within the meaning of Section 2(6) of the IGST Act. On first principles as also

applying the golden rule of interpretation, this appears to be an apparent consequence, having noticed not only relevant provisions under the Constitution but also the provisions of IGST Act, which deal exclusively in regard to the inter-State supply of goods and services and the CGST and the MGST, dealing with intra-state supply of goods and services for the purpose of levy of collection of tax under the said enactment.

97. It may thus be observed that the fiction which is created by Section 13(8)(b) would be required to be confined only to the provisions of IGST Act, as there is no scope for the fiction travelling beyond the provisions of IGST Act to the CGST and the MGST Acts, as neither the Constitution would permit taxing of an export of service under the said enactments nor these legislations would accept taxing such transaction. The legal position which may support such conclusion can be discussed.

98. In *Bengal Immunity Co. Ltd. (supra),* the Constitution Bench of the Supreme Court held that the legal fictions are created only for the defined purpose and they are limited to the purpose for which it was created and should not be extended beyond that legitimate field. Such law as laid down in *Bengal Immunity Co.'s* case was reiterated by the Supreme Court in the case of *CIT, Bombay City-I, Bombay vs. Amarchand N. Shroff, by his Heirs and Legal Representatives*[27].

[27] 1963 Supp. 1 SCR 699

99. In *Voltas Ltd., Bombay vs. Union of India & Ors.*[28], it was held that the legislature by a statute may create a legal fiction and in such event, the Court has to give full effect to such statutory fiction after examining and ascertaining, as to for what purpose and between what parties, such statutory fiction has been resorted to. In such context, the Court observed thus:

> "*8. The effect of a statute containing a legal fiction is by now well settled. The legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. In the well known case of East End Dwellings Co. Ltd. vs. Finsbury Borough Council, Lord Asquith has said:*
>
> > *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. … The statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."*

100. In *State of Punjab & Ors. vs. Dr. R.N. Bhatnagar & Anr.*[29], it was held that the deeming fiction cannot be extended by analogy to cover any other field not meant to be covered by its sweep.

101. In *Prafulla Kumar Swain vs. Prakash Chandra Mishra & Ors.*, the Supreme Court referring to the celebrated commentary of Justice G.P.

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[28] 1995 Supp. SCR 498
[29] 1999 2 SCC 330

Singh: Principles of Statutory Interpretation (Fourth Edition 1988), in the context of a statute creating a legal fiction observed thus:

> *"35. Coming to the deeming clause, that creates a legal fiction; the Court is to ascertain for what purpose the fiction is created. In Justice G.P. Singh Principles of Statutory Interpretation (Fourth Edition 1988) at page 208 it is stated thus: "*
>
> > *As was observed by James, LJ. : 'When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what person the statutory fiction is to be resorted to'. 'When a legal fiction is created', stated S.R. Das, J. "for what purposes, one is led to ask at once, is it so created?"*

102. It may also be observed that the incorporation of the limited provisions of IGST Act into the CGST Act and MGST Act, to the extent as noted above, certainly is a piece of legislation by incorporation. In the context of legislation by incorporation, a useful reference can be made to the decision of the Supreme Court in M/s. *Khemka & Co. (Agencies) Pvt. Ltd. vs. State of Maharashtra.* In such case, the Supreme Court was examining the contention as urged on behalf of the assessee that there was no provision in the Central Act for imposition of penalty for delay or default in payment of tax and, therefore, imposition of penalty under the provisions of the State Act for delay or default in payment of tax was illegal. The rival contention on behalf of the revenue was to the effect that the provisions of penalty for default in payment of tax as enacted in the State Act was applicable to the payment and collection of the tax

under the Central Act, which were incidental to and part of the process of such payment and collection. It is in such context, the Court observed that the words in the State Act cannot possibly mean that the tax or penalty imposed under the State Act would be deemed to be tax or penalty payable under the Central Act. As the meaning attributed to some of the provisions of Central Act cannot be enlarged by the provisions under the State Act.

103. In view of the above discussion, I am not inclined to hold that the provisions of Section 13(8)(b) and the provisions of Section 8(2) of IGST Act be struck down as unconstitutional being violative of the provisions of Articles 14, 19(1)(g), 245, 246, 246A, 265, 269A and 286 of the Constitution. This more particularly considering the fact that the impugned provisions insofar as they stand and are applicable only under IGST Act. It may be observed that the legislative wisdom to have the provisions of Section 2(6), Section 7, Section 8(2), Section 12 and Section 13 under the IGST Act and the consequence of any such transaction of export of service being scrutinized for the benefit under Section 16 of a Zero Rated Tax, need not be gone into, suffice it to observe that the mechanism for Section 13(8)(b) to operate is confined only to the provisions of the IGST Act. It also cannot be overlooked that there is likelihood that there are categories of transactions in relation to the

intermediaries which may *stricto sensu* fall under the provisions of the IGST Act only and hence, to dislodge the provisions of Section 13(8)(b) from the IGST Act merely because it is deemed to have an application under the CGST Act and the MGST Act qua the export of service, in regard to such categories of person who can also be classified as intermediaries, would be a fatal proposition. It is for such reason, in my opinion, insofar as the provisions of Section 13(8)(b) is concerned, the same are required to be read to confined only to the provisions of the IGST Act. Constitutionally and for the reasons as discussed in the forgoing paragraphs, it is not permissible for such provision to operate under the CGST Act and the MGST Act. It is not possible to foresee and visualize such provision becoming relevant in case of a particular transaction which may purely fall under the IGST Act.

104. In so far as Mr. Singh's reliance on the decision of the Division Bench of Gujarat High Court in *Material Recycling Association of India vs. Union of India and others*[30] is concerned, in my opinion, it would not take forward the case of the revenue. In fact, the observations as made by Their Lordships would, to some extent, aid the conclusion being arrived in this judgment. This is to the effect that the Division Bench in paragraph 80 has observed that on a conjoint reading of Sections 2(6) and

[30] 2020 SCC OnLine Guj 3205

2(13) of the IGST Act, which defines "export of service" and "intermediary service" respectively, the person who is intermediary cannot be considered as exporter of services. The sequel to such observation of the Division Bench would be that exporter of services cannot be read to fall within the purview of Section 13(8)(b) and/or exporter of services cannot be an intermediary. Thus, the necessary conclusion which can be further derived from such observations of the Division Bench, would be to the effect that an exporter of service although categorized by the respondents as an intermediary, an intermediary would not fall within the purview of Section 13(8)(b), hence, there would be no question of Section 13(8)(b) being applied to an exporter of service. Be that as it may, such observations of the Division Bench appear to be not the case of the respondent-revenue, as the respondents are on record to canvass that persons like petitioners in regard to the transaction in question are required to be regarded as "intermediaries" within the meaning of Section 2(13) of the IGST Act, for the reason that such intermediaries receive commission in convertible foreign currency for the services provided by them as intermediaries. Thus, the consideration, on which the validity of the provisions of Section 13(8)(b) being upheld by the Court, was on a different analogy from what is argued before this Court in the present proceedings. For such reason, the scope of the present proceedings cannot

be considered to be identical to the scope of the proceedings before the Court in such case. In this view of the matter, merely because the territorial jurisdiction to decide an issue of Constitutional validity would be available before different Courts as held by the Supreme Court in the decision in *M/s. Kusum Ingots & Alloys Ltd vs. Union of India And Anr.*[31], in the present context, such decision would not support the respondents.

105. In the context of the present proceedings, the reliance on behalf of the respondents on the decision of the Supreme Court in *G. V. K. Industries Ltd. Vs. Income Tax Officer* (supra) is not well founded for more than one reason. Firstly, there can be no doubt that no law made by the Parliament would be invalid on the ground that it has an extra-territorial operation as Clause (2) of Article 245 would provide. The present case, in my opinion, does not involve any extra-territorial operation of law made by the Parliament inasmuch as the subject matter of legislation purely pertains to inter-State trade and commerce in respect of which goods and services tax can be levied in the spheres as covered by the legislation. Further, in the context of the transaction in question to say that a law has been enacted to have an extra-territorial operation, would be a complete misnomer inasmuch as the IGST Act under Section 13(8)

[31] (2004) 6 SCC 254

(b) has treated the transaction as undertaken by the intermediary who are dealing in export of services as an intra-State trade and commerce. It is, therefore, difficult to accept the proposition as canvassed on behalf of the respondents that the IGST Act is a law having an extra territorial operation, and therefore, would fall within the purview of Clause (2) of Article 245 insofar as its validity is concerned.

106. The respondents have contended that the analogy as under the 'Place of Provision of Services Rules, 2012' framed in exercise of powers conferred under Section 66-C and Clause (hhh) of sub-section (2) of Section 94 of the Finance Act, 1994, would become applicable even in interpretation of the provisions of Section 8 and Section 13(8)(b) of the IGST Act, also cannot be accepted. This for the reason that such Rules pertain to a regime, prior to introduction of the GST regime and in view of 101st Constitution Amendment Act, 2016. By virtue of the new regime, there are three legislations which are in operation namely IGST, CGST and MGST for levy and collection of the GST. Furthermore, by virtue of Section 174 of the CGST Act and the MGST Act, Chapter V of the Finance Act, 1994 under which the Rules were framed, itself have been repealed and now the levy and collection is under the substantive provisions of the IGST Act, CGST Act and the MGST Act. Thus, what would be relevant for the Court is to only look at the substantive

provisions and not to the repealed Rules for any interpretation. The position that such Rules would stand repealed is also conceded on behalf of the respondents, and are no longer in force, although the defence of such Rules is taken in the counter affidavit.

107. As noted above in paragraph 50, it is also clear that there was an appropriate and serious concern on the present issue as raised by the "Department-Related Parliamentary Standing Committee On Commerce" in its 139th Report on Impact of Goods and Services Tax (GST) on Exports, presented before Rajya Sabha and Lok Sabha on 19 December 2017. Such report had made substantive observations that an amendment to Section 13(8) of the IGST Act is required to be thought of, to exclude intermediary services and make it subject to the default Section 13(2) so that, the benefit of export could be made available. Such observations of the Parliamentary Committee certainly must have fell for consideration of the respondents. It would definitely reflect upon the operation of Section 13(8)(2) outside the purview of the IGST legislation.

108. In so far as the contentions as urged on behalf of the State Government are concerned, the contentions on interpretation of the provisions of the Constitution and the CGST and MGST Acts are not different from what has been urged on behalf of the Union of India. The contention as urged on behalf of the State Government that because the

foreign exporter sells its goods to the Indian importer and which is as a consequence of the services provided by the exporter of service, it needs to be accepted that the transaction of export of service changes its character as a intra-State transaction, is untenable in view of the aforesaid discussion. Such contention cannot be accepted on the interpretation of the provisions of the Constitution or on the interpretation of the provisions of IGST Act as discussed in detail in the foregoing paragraphs.

109. In the light of the above discussion in my opinion the provisions of Section 13(8)(b) and Section 8(2) are confined in their operation to the provisions of IGST Act only and the same cannot be made applicable for levy of tax on services under the CGST Act and MGST Act, on such interpretation, the provisions are *intra vires* the Constitution, the IGST, the CGST and the MGST Acts.

110. At this stage, it may be observed that the view I have taken is distinct from the view taken by the Hon'ble members of the Division Bench. As a referral Judge, there would be no bar in expressing an independent opinion while deciding the reference by assigning reasons which would support such opinion, hence, it was available for this Court to render an opinion different from the reasons as arrived by the Hon'ble Members of the Division Bench. In such context, a useful reference can be

made to the decision of a learned Single Judge of the Calcutta High Court in *Amiyo Bhusan Das vs. United Bank of India & Ors.*[32]. Mr Justice Dipankar Datta (as His Lordship then was) speaking for the Court observed thus:

> "18. *Attention of Mr. Chakraborty had been drawn by me to the decisions of learned Judges of this Court, while acting as the referee Judge, in Shivani Properties Private Limited vs. Bank of India, reported in MANU/WB/0656/2014 : 2014 (4) CHN CAL 242 and Tapas Paul vs. State of West Bengal & Ors., reported in 2015 (2) CLJ (Cal) 141. In Tapas Paul (supra), the differing Judges of the Hon'ble Division Bench had framed one point of difference, i.e., whether the decision under challenge is sustainable in law. The learned referee Judge had the occasion to consider the decisions in Jyoti Prokash Mitter (supra) and Shivani Properties (supra) and held that the learned Judges of the Hon'ble Division Bench having differed completely on the conclusions drawn and directions issued by the learned Single Bench and having framed the point of difference, as aforesaid, the decision would necessarily require consideration of four different points as appears from a reading of the impugned order of the learned Single Bench and all such points had to be decided to return a finding whether the order of the learned Single Bench was sustainable in law.*
>
> *19. I am of the clear considered view that no statement of law laid down in Jyoti Prakash Mitter (supra) stands in the way of the course of action that I propose to adopt.* ***There is no bar in expressing an opinion, while deciding a reference, by assigning reason(s) which would support such opinion.*** *It has not been shown to me from Jyoti Prokash Mitter (supra) that the issue as to whether the referee Judge can assign separate reasons for his own conclusions without accepting any of the reasons assigned by the differing Judges in support of their respective decisions arose for decision there. I have also not been referred to any provision in the rules framed by the High Court at Calcutta that precludes the referee Judge from adopting the approach indicated in the decision in Shivani Properties (supra), or, in other words, that such an approach as adopted by the referee Judge in Shivani Properties (supra) is contrary to the rules. The difference of opinion having arisen in the present case in regard to the fate of the appeal, an opinion as of necessity has to be rendered either way based on the reasoning that would support such opinion.* ***Even if the reason in support of the opinion rendered by the referee Judge is different from the reason assigned by one of the differing Judges for arriving at***

[32] AP 508 of 2017 and WP 1050 of 2011 decided on 31.01.2019

> ***the same conclusion, such course of action is not precluded by the rules relating to reference and would not disable me from rendering my opinion on the point as to whether the appeal should succeed.***
>
> *33. For the reasons aforesaid, I find no reason to uphold the conclusion of the learned presiding Judge of the Hon'ble Division Bench that clause 3 applied to the facts and circumstances before His Lordship and the appellant was entitled to the benefit of sub-clause (d) thereof. I also hold the view that the writ petition of the appellant deserved an order of dismissal but not for the reasons assigned by the learned Single Judge and the companion Judge of the Hon'ble Division Bench."*
>
> (emphasis supplied)

111. In the light of the above discussion and the conclusion as reached, it is not necessary to consider the validity of the impugned provisions on the touchstone of Articles 14 and 19(1)(g) of the Constitution as canvassed by the petitioners.

112. The learned counsel for the parties have referred to decisions on the issues as canvassed and noted above, however, considering the above discussion, it is thought appropriate not to burden the judgment by discussing the principles of law which are well-settled, not only on the principles of interpretation of the Constitutional provisions but also on the principles in determination of the legality and/or *vires* of the statutory provisions, as borne out by these decisions, on which there can be no quarrel.

113. In the light of the above discussion, I would propose to dispose of the petition in terms of the following order:

ORDER

(i) The provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are legal, valid and constitutional, provided that the provisions of Section 13(8)(b) and Section 8(2) are confined in their operation to the provisions of IGST Act only and the same cannot be made applicable for levy of tax on services under the CGST and MGST Acts.

(ii) The reference as made to this Court is accordingly answered in the above terms.

114. The office to place the matter before the Division Bench.

(G. S. KULKARNI, J.)