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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
DR. DHANANJAYA Y. CHANDRACHUD; J., SURYA KANT; J., VIKRAM NATH; J.
MAY 19, 2022
Union of India & Anr. *Versus* **M/s Mohit Minerals Pvt. Ltd. Through Director**

Summary: GST Council's recommendations not binding on Parliament or State Legislatures- Both Union and States have simultaneous legislative powers on GST -Separate IGST on Indian importer for ocean freight not sustainable when tax has already been paid on "composite supply".

Constitution of India; Article 246A - vests Parliament and State Legislature with simultaneous law-making power on GST - GST Council entrusted with duty to make recommendations concerning GST - Recommendation of the GST Council is not based on unanimous decision, but on three-forth majority of members present and voting; States' vote have weightage of two-thirds and Union's vote have weightage of one-third - the notion that the recommendations of the GST Council transform into legislation in and of themselves under Article 246A would be farfetched. *[Paras 46 & 54]*

Constitution of India, 1950; Article 279A (4)(h) - GST Council has plenary powers to make recommendations on 'any other matter' related to GST as the Council may decide - recommendation is to be made to the 'Union and the States'- the recommendation under the provision being non-qualified there is no explanation on the value of such a recommendation. *[Para 54]*

Constitution of India, 1950; Articles 246A and 279A - if the GST Council were intended to be a constitutional body whose recommendations transform into legislation without any intervening act, there would have been an express provision in Article 246A - Article 279A does not mandate tabling the recommendations in the legislature like the provisions in category 3, where the recommendations have to be mandatorily tabled in the legislature along with an explanatory note - use of the phrase 'recommendations to the Union or States' indicates that the GST Council is a recommendatory body aiding the Government in enacting legislation on GST. *[Paras 54 & 56]*

Constitution of India, 1950; Article 279A - Under IGST Act and the CGST Act, recommendation of the GST Council is binding on the Government when it exercises power to notify secondary legislation to give effect to the uniform taxation system - the recommendations of the Council by virtue of its power under Article 279A does not have a binding force on the legislature - they are recommendatory in nature - to regard them as binding edicts would disrupt fiscal federalism where both Union and States are conferred equal power to legislate on GST. *[Paras 59 & 148]*

Central Goods and Services Tax Act, 2017; Section 2(30) - defines composite supply - may have two or more taxable supplied, one of them is a principal supply

- in case of Cost-Insurance-Freight (CIF) contract for supply of goods is a composite supply; principal supply is the supply of goods.

Central Goods and Services Tax Act, 2017; Section 8 - a composite supply comprising two or more supplies, one of which is a principal supply shall be treated as a supply of such principal supply - in CIF contract, principal supply is supply of goods - tax to be levied as if the transaction was on of supply of goods.

Integrated Goods and Services Tax, 2017; Section 20 - provision relating to composite supply under the CGST Act apply mutatis mutandis under the IGST Act - IGST in transaction of composite supply to be levied on principal supply of goods - in CIF contract, principal supply is supply of goods - In CIF contracts, supply of goods is accompanied by supply of services of transportation, insurance etc - supply of service of transportation by foreign shipper is a part of the bundle of supplies between the foreign exporter and the Indian importer, on which IGST is payable under the IGST Act - imposition of IGST on supply of services cannot be sustained when there is a concomitant imposition of IGST on supply of goods.

Central Goods and Services Tax Act, 2017; Section 2(30) - defines composite supply - may have two or more taxable supplied, one of them is a principal supply - in case of Cost-Insurance-Freight (CIF) contract for supply of goods is a composite supply; principal supply is the supply of goods. *[Paras 135 & 136]*

Central Goods and Services Tax Act, 2017; Section 8 - a composite supply comprising two or more supplies, one of which is a principal supply shall be treated as a supply of such principal supply - in CIF contract, principal supply is supply of goods - tax to be levied as if the transaction was on of supply of goods. *[Para 137]*

Integrated Goods and Services Tax, 2017; Section 20 - provision relating to composite supply under the CGST Act apply mutatis mutandis under the IGST Act - IGST in transaction of composite supply to be levied on principal supply of goods - in CIF contract, principal supply is supply of goods - in CIF contracts, supply of goods is accompanied by supply of services of transportation, insurance etc - supply of service of transportation by foreign shipper is a part of the bundle of supplies between the foreign exporter and the Indian importer, on which IGST is payable under the IGST Act - imposition of IGST on supply of services cannot be sustained when there is a concomitant imposition of IGST on supply of goods. *[Paras. 138, 142, 143 & 145]*

Civil Appeal No. 1390 of 2022 with C.A. No. 1390/2022 with C.A. No. 1394/2022 with C.A. No. 1417/2022 with C.A. No. 1419/2022 with C.A. No. 1445/2022 with C.A. No. 1414/2022 with C.A. No. 1402/2022 with C.A. No. 1412/2022 with C.A. No. 1411/2022 with C.A. No. 1413/2022 with C.A. No. 1415/2022 with C.A. No. 1418/2022 with C.A. No. 1420/2022 with C.A. No. 1446/2022 with C.A. No. 1447/2022 with C.A. No. 1409/2022 with C.A. No. 1416/2022 with C.A. No. 1395/2022 with C.A. No. 1407/2022 with C.A. No. 1406/2022 with C.A. No. 1398/2022 with C.A. No. 1401/2022 with C.A. No. 1391/2022 with C.A. No. 1403/2022 with C.A. No. 1393/2022 with C.A. No. 1410/2022 with C.A. No. 1405/2022 with C.A. No. 1397/2022 with C.A. No. 1404/2022 with C.A. No. 1400/2022 with C.A. No. 1396/2022 with C.A. No. 1408/2022 with C.A. No. 1399/2022 and with C.A. No. 1392/2022

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A Introduction

1 The Union of India[1] is in appeal against a judgment of a Division Bench of the Gujarat High Court dated 23 January 2020. The High Court allowed a petition instituted by the respondents under Article 226 for challenging the constitutionality of two notifications of the Central Government. The bone of contention is whether an Indian

[1] "**Union Government**" or "**Central Government**"

importer can be subject to the levy of Integrated Goods and Services Tax[2] on the component of ocean freight paid by the foreign seller to a foreign shipping line, on a reverse charge basis.

2 The respondents import non-coking coal from Indonesia, South Africa and the U.S. by ocean transport on a 'Cost-Insurance-Freight'[3] basis which is supplied to domestic industries. The goods are transported from a place outside India, up-to the customs station in India. The respondent pays customs duties on the import of coal, which includes the value of ocean freight. In the case of a CIF contract, the freight invoice is issued by the foreign shipping line to the foreign exporter, without the involvement of the importer. Ocean freight is paid by the importer only when goods are imported under a 'Free-on-Board'[4] contract. In the case of a high seas sale transaction, the coal is purchased from the original buyer before it arrives at Indian ports.

3 Prior to the enforcement of the Goods and Services Tax[5] regime, service tax on ocean freight was exempted by Notification No. 25/2012-ST (Serial No. 34) dated 20 June 2012. This exemption was withdrawn by Notification No. 01/2017-ST dated 12 January 2017 which levied service tax on the importer, by a reverse charge mechanism. With the advent of the GST regime, Notification No.8/2017- Integrated Tax (Rate) dated 28 June 2017[6] was issued by the Central Government on the advice of the Goods and Services Tax Council[7], in exercise of powers under Section 5(1), Section 6(1) and Section 20(iii)-(iv) of the Integrated Goods and Services Tax Act 2017[8], read with Section 15(5) and Section 16(1) of the Central Goods and Services Act[9]. Entry 9 of Notification 8/2017, effective from 1 July 2017, levied an integrated tax at the rate of 5 per cent on the supply of specified services, including transportation of goods, in a vessel from a place outside India up to the customs station of clearance in India.

4 On 28 June 2017, the Central Government issued Notification 10/2017[10]. Serial 10 of Notification 10/2017 categorized the recipient of services of supply of goods by a person in a non-taxable territory by a vessel to include an importer under Section 2(26) of the Customs Act 1962.

5 Section 5(1) of the IGST Act authorises the levy of an integrated tax on all inter-state supplies of goods and services or both. The integrated tax can also be levied on goods imported into India on the value determined under Section 3 of the Customs Tariff Act 1975[11] at the point when customs duties are levied on the goods under Section 12 of the Customs Act 1962[12]. Section 11 of the IGST Act stipulates that the place of supply

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[2] "**IGST**"
[3] "**CIF**"
[4] "**FOB**"
[5] "**GST**"
[6] "**Notification 8/2017**"
[7] "**GST Council**"
[8] **"IGST Act"**
[9] "**CGST Act**"
[10] "**Notification 10/2017**"
[11] "**Customs Tariff Act**"
[12] "**Customs Act**"

of goods in the case of goods imported into India shall be the place of the importer. Section 13(9) of the IGST Act contemplates that the place of supply of services, in the case of transportation of goods shall be the destination of the goods. The respondent alleges that the impugned notifications create an element of double taxation, as ocean freight is included in the value of goods for the purpose of customs duty which the importer is liable to pay. The respondent does not dispute the liability of integrated tax on supply of service of transportation when it imports goods on an FOB basis.

6 The respondent filed a writ petition before the Gujarat High Court challenging Notification 8/2017 and Notification 10/2017[13] on the grounds that: (i) the notifications are ultra vires the IGST Act and CGST Act; (ii) customs duty is levied on the component of ocean freight and the levy of IGST on the freight element in the course of transportation would amount to double taxation; (iii) though in the case of high sea sales, the importer is a different entity yet this regime would tax the respondent as the importer and the recipient of service; (iv) in the case of a CIF contract, the supply of service of transport of goods in a vessel is by a foreign shipping line located in a non-taxable territory to an exporter located in a nontaxable territory by a vessel outside the territory of India which cannot be subject to tax under the IGST Act; (v) Notification 10/2017 transgresses the provisions of Section 5(3) of the IGST Act as instead of the "recipient" mentioned therein, the "importer" as defined in section 2(26) of the Customs Act, is made liable to pay tax; and (vi) Entry 9(ii) and para 2 of Notification 8/2017, read with Notification 10/2017, creates a deeming fiction and a separate taxable event which is not permissible in law.

7 The Union of India urged before the High Court that although tax is being paid twice on the value of ocean freight, it is not unconstitutional as the tax is on two different aspects of the transaction, namely, the supply of service and import of goods. The rationale for the impugned notifications, according to the Union Government, is to remove the disparity between Indian and foreign shipping lines, as the former are unable to claim input tax credit[14] that forms a part of their transportation costs, since supply of goods was hitherto exempt from service tax. The levy of the integrated tax does not, according to the Union of India, impose an additional cost on importers as the cost paid on inward transportation of goods and import freight services is available to them as ITC.

8 Under the existing GST regime (presently under challenge), taxability of ocean freight under different situations is tabulated below :

Service Availed	**Shipping**	**Legal Provision**	**Implication**
	Company		

[13] Collectively referred as "**impugned notifications**"
[14] Interchangeably referred as "**ITC**"

Import	Indian	Section 12(8) of the IGST Act - the place of supply of services shall be the location of the recipient	Transaction is liable for tax. Importer can claim the amount paid as tax as input tax credit
Export	Indian	Section 12(8) of the IGST Act - the place of supply of services shall be the location of the recipient.	Transaction is liable for tax. The exporter can get refund of input tax credit used for export.
Import	Foreign	Section 13(9) of the IGST Act - the place of supply of services of transportation of goods shall be place of destination of such goods.	Transaction is liable for tax as the place of supply is India. Tax will be paid under reverse charge and can be claimed as input tax credit.
Export	Foreign	Section 13(9) of the IGST Act - the place of supply of services of transportation of goods shall be place of destination of such goods.	Since the place of supply will be outside India, the transaction is not liable for tax.

9 The Division Bench of the Gujarat High Court held that the impugned notifications are unconstitutional for exceeding the powers conferred by the IGST Act and the CGST Act. The High Court held:

(i) The importer of goods on a CIF basis is not the recipient of the transport services as Section 2(93) of the CGST Act defines a recipient of services to mean someone who pays consideration for the service, which is the foreign exporter in this case;

(ii) Section 5(3) of the IGST Act enables the Government to stipulate categories of supply, not specify a third-party as a recipient of such supply;

(iii) There is no territorial nexus for taxation since the supply of service of transportation of goods is by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India up to the Indian customs clearance station and this is neither an inter-state nor an intra-state supply;

(iv) Section 2(11) of the IGST Act defines “import of service” to mean the supply of service where the supplier of service is located outside India, the recipient of service is located in India and the place of supply of service is in India;

(v) In this case, since the goods are transported on a CIF basis, the recipient of service is the foreign exporter who is outside India;

(vi) Section 7(5)(c) of the IGST Act dealing with intra-state supply cannot be read so extensively that it conflates the “supply of goods or services or both in the taxable territory” to “place of supply”;

(vii) Sections 12 and 13 of the IGST Act deal with determining the place of supply. Neither of them will apply if both the supplier and recipient of service are based outside

India. The mere fact that the service terminates at India does not make the service of supply of transportation to be taking place in India;

(viii) The provisions regarding time of supply, as contemplated in Section 20 of the IGST Act and applicable to Section 13 of the IGST Act dealing with supply of services, are applicable only vis-à-vis the *actual* recipient of the supply of service, which is the foreign exporter in this case;

(ix) Section 15(1) of the CGST Act enables the determination of the value of the supply, only between the actual supplier and actual recipient of the service;

(x) Since the importer is not the "recipient" of the service under Section 2(93) of the CGST Act, it will not be in a position to avail ITC under Section 16(1) of the CGST Act; and

(xi) Since the importer pays customs duties on the goods which include the value of ocean freight, the impugned notifications impose double taxation through a delegated legislation, which is impermissible.

B Submissions

B.1 Union of India

10 Mr N Venkataraman, learned Additional Solicitor General[15] appearing on behalf of the appellant – the Union of India – urged the following submissions:

A. Constitutional Architecture of IGST

(i) Under Article 286(2), Parliament is empowered to formulate *inter alia* the principles for determining when a supply of goods or services takes place in any of the ways mentioned in Article 286(1), which includes imports;

(ii) Article 269A enables the Union Government to levy GST on inter-state supplies. The explanation to Article 269A(1) creates a deeming fiction that a supply of goods or services in the course of imports is to be considered as a supply of goods or services or both in the course of interstate trade;

(iii) Article 269A(5) enables Parliament to formulate the principles for determining the place of supply and when a supply of goods and services or both takes place in the course of inter-State trade or commerce. This constitutional mandate finds legislative effect in the IGST Act;

(iv) As contemplated in Article 286(2) read with Article 269A(1), the IGST Act enacts provisions relating to the levy and collection of integrated tax (Section 5(1)), export of goods [Section 2(5)], export of services [Section 2(6)], import of goods [Section 2(10)], import of services [Section 2(11)], location of recipient of services [Section 2(14)] and location of supplier of services [Section 2(15)];

(v) In terms of Article 269A(5), the IGST Act contemplates provisions for determining the nature of inter-State supply (Section 7), supplies in territorial waters (Section 9), place of supply of goods imported into or exported out of India (Section 11), place of supply of

[15] "**ASG**"

services where the location of supplier and recipient is in India (Section 12) and place of supply of services where the location of supplier and recipient is outside India (Section 13).

B. Charging Section

(vi) The charge created by Section 5(1) of the IGST Act can extend to an ocean freight transaction to be taxed in the hands of the importer. This creation of a charge is in compliance with the essential components of taxation identified by a Constitution Bench in **Mathuram Agrawal** v. **State of Madhya Pradesh**[16] and further elaborated on by this Court in **Gobind Saran Ganga Saran** v. **Commissioner of Sales Tax**[17].

(vii) The four fundamental principles of a taxing enactment are: the taxable event, the person on whom the levy is imposed, the rate at which the levy is imposed and the measure or the value to which the rate will be applied;

(viii) Section 5(1) fulfils the above components of taxation:

- Taxable event → "*There shall be levied a tax called 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*."
- Taxable value → "*On the value determined under Section 15 of the CGST Act*"
- Taxable rate → "*At such rates not exceeding 40% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed*"
- Taxable person → "*Shall be paid by the taxable person*"

C. Concept of Reverse Charge

(ix) Section 2(98) of the CGST Act defines "reverse charge" to mean 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 of the CGST Act or under sub-Section (3) or subSection (4) of Section 5 of the IGST Act. The impugned notifications are issued in exercise of the powers of the Union Government vested by the aforesaid sections of the IGST Act or the CGST Act;

(x) A person covered by reverse charge becomes a taxable person in terms of Section 2(107) of the CGST Act read with Section 24(iii) of the CGST Act. Pertinently, Section 24(iii) of the CGST Act employs the language of "persons who are required to pay tax under reverse charge" and not "*persons who are recipient of services under Section 2(93) of the CGST Act 2017*";

(xi) Section 5(3) of the IGST Act and Section 9(3) of the CGST Act permit the Government, on the recommendation of the GST Council, to specify the categories of goods or services or both, the tax for which shall be paid on reverse charge basis by the recipient of such goods or services or both;

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[16] 1999 (8) SCC 667 ("**Mathuram Agrawal**")
[17] AIR 1985 SC 1041 ("**Gobind Saran Ganga Saran")**

(xii) Presently, neither the provisions nor the rules have identified the taxable persons for reverse charge. Hence, the impugned notifications are a legitimate exercise of delegated legislation. Notification 10/2017 identifies an importer as a recipient for the purposes of reverse charge. The power to issue such a notification can be traced back to Sections 5(3) and 5(4) of the IGST Act;

D. Inter-state supply and Place of Supply

(xiii) The import of service in this case is an inter-state supply in terms of Section 7(4) read with Section 13(1) and 13(9) of the IGST Act. Although the contracting parties are foreign, the critical limb of the transaction happens in the taxable territory, namely, India. Hence, the transaction can also fall under Section 7(5)(c) read with Section 13(1) and Section 13(9) of the IGST Act;

(xiv) Section 13(9) of the IGST Act stipulates that 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. Even though the contracting parties – the foreign shipping line and the foreign exporter – are outside the territory of India, the provision of service is for the Indian importer and consequently the consumption and exhaustion of service which is a critical limb, both commercially and legally, happens only in the hands of the Indian importer;

E. Time of Supply

(xv) Section 13(5) of the CGST Act contains a residual provision for determining time of supply to be the date on which the tax is paid. Since the other subsections in Section 13 are not applicable for construing the time of supply, Section 13(5) of the CGST Act would be applicable;

F. Composite Supply

(xvi) The CIF transaction and IGST on ocean freight are two independent transactions, entitled to suffer independent levies and do not qualify as a composite supply under Section 2(30) of the CGST;

(xvii) GST and customs duties are not exclusive means of taxation. GST is a destination-based tax. The integrated tax is being sought to be imposed on the supply of service and not on the goods. Separate aspects are being taxed, hence it cannot be termed as overlapping. Moreover, the tax is on the value of goods, and not the freight. Tax paid at an anterior stage is not double taxation if it is included in the overall value;

(xviii) The discharge of reverse charge taxation does not make two independent contracts as a composite contract. The contract between the foreign shipping line and the foreign exporter is distinct and independent of the contract between the foreign exporter and the Indian importer. Their concomitance does not make them composite;

(xix) What is sought to be taxed on the supply of goods on CIF value basis is traceable to the proviso to Section 5(1) read with Sections 3(7) and 3(8) of the Customs Tariff Act. On the other hand, what is sought to be taxed under IGST on reverse charge basis derives power under Section 5(1) (taxable person) read with Section 24(iii) of the CGST Act and Section 5(3) of the IGST Act and the impugned notifications;

(xx) A Constitution Bench of this Court in **McDowell and Company Ltd.** v. **Commercial Tax Officer**[18] has held that a single element can constitute the basis of a levy and can also form part of the value for another transaction. This cannot be termed as double taxation.

G. Extra-territoriality

(xxi) There is sufficient territorial nexus for the purpose of taxation since the importer is the final beneficiary of a service provided by a foreign shipping line by way of transportation up to the customs station of clearance in India. The transaction between the foreign exporter and the foreign shipping line has a nexus to the taxable territory of India. The importer is the beneficial owner of the goods at the time of clearance. The appellant relies on the decisions of this Court in **M/s Electronic Corporation of India** v. **Commissioner of Income Tax**[19] and **GVK Industries** v. **Income Tax Officers**[20] where this Court has upheld taxing statutes having a territorial nexus to India;

H. Service recipient

(xxii) There are six reasons to term an Indian importer as the recipient of service:

(a) Section 2(93)(c) of the CGST Act envisages a recipient of an intangible service as one who does not pay consideration. In CIF transactions, the Indian importer does not pay for ocean freight and yet receives the benefit of transportation;

(b) Section 2 of the CGST Act is prefaced with "*In this Act, unless the context otherwise requires*" which warrants a broad interpretation of statutory definitions therein;

(c) Section 24(iii) read with Section 2(98) of the CGST Act, read with Section 5(3) of the IGST Act and the impugned notifications issued thereunder, allow any person to become a taxable person and such a taxable person becomes the recipient of supply of goods or services or both. Once '*any person*' is identified as a taxable person for reverse charge under a notification issued under 5(3) of IGST Act, by sheer default of the definition of reverse charge under Section 2(98) of the CGST Act, such a taxable person on reverse charge becomes a service recipient;

(d) Section 5(3) of the IGST Act clearly enables the identification of service recipients, and not just categories of goods or services or both. Any contrary interpretation would be against the legislative intention. On a conjoint reading of Section 5(3) of the IGST Act read with Section 2(93) of the CGST Act, a service recipient can be identified through a notification;

(e) The definition of "supply" without consideration under Section 7(c) of the CGST Act is not an exhaustive definition. Further, Section 2(31) of the CGST Act defines consideration and does not restrict its payment to only the owner of such goods and services; and

(f) Section 2(93)(c) of the CGST Act reads "..*and any reference to a person to whom a supply is made, shall be construed as a reference to the recipient of the supply*…". A

[18] 1985 (3) SCC 230 ["**McDowell**"]
[19] 1989 Supp 2 SCC 642
[20] 2011 (4) SCC 36 ["**GVK Industries**"]

supply can be made to 'a person', 'a registered person' and 'a taxable person' and such a supply shall be construed to be a supply to a recipient. Since the Indian importer would qualify under all the aforementioned categories, it can be termed as recipient of the service.

I. Applicability of Section 5(4) of the IGST Act

(xxiii) In the alternative, the impugned notifications would be saved by Section 5(4) of the IGST Act which permits the Union Government, on the recommendations of the GST Council, to specify a class of registered persons who shall in respect of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient and all the provisions of the Act would apply to such a recipient;

(xxiv) It is admitted that the impugned notifications do not refer to Section 5(4) of the IGST Act. However, it is settled law that once a power is available to grant or identify the taxable person, taxable event, rate and measure, non-reference of the source of power will not vitiate its exercise and application in given facts and circumstances of the case;

J. Parliamentary legislation v. Excessive delegation

(xxv) This Court in **Municipal Corporation of Delhi** v. **Birla Cotton Spinning and Weaving Mills**[21] and **Avinder Singh** v. **State of Punjab**[22] has held that only essential legislative functions, such as policy guidelines and framework, need to be performed by Parliament and the state legislatures. Once these are made available through the exercise of plenary power, the rest of the details can always emerge through the exercise of delegated powers;

(xxvi) The constitutional mandate of Articles 269A and 286 finds effect under the IGST Act. The IGST Act, and specifically Section 5(1) therein, has defined the subject matter of taxation (inter-state supply of goods and services), the taxable person under Section 2(107) read with Section 24(iii) of the CGST Act, a maximum cap of 40 per cent and determination of taxable value in terms of Section 15 of the CGST Act. Only the identification of the taxable person is delegated to the Union Government which makes its decisions on the basis of the recommendations of the GST Council;

K. GST Council recommendations- Cooperative federalism and collaborative federalism

(xxvii) GST is a consumption tax and the tax jurisdiction extends to the place the supply is consumed. Since the foreign shipping line or foreign exporter are located in a non-taxable territory, the Indian importer has to be taxed on a reverse charge basis since the service is consumed in India. The purpose is to make the Indian shipping lines as competitive as foreign shipping lines. ITC is available to the importer and the tax paid on such a reverse charge can be offset in the importer's output tax liability. Therefore, there is no additional burden on the importer- it is a mere alteration of the mechanism;

[21] 1968 (3) SCR 251
[22] 1979 (1) SCC 441

(xxviii) The integrated tax was essential to level the playing field between foreign shipping lines and Indian shipping lines since the former were not required to charge any tax on the recipient of supply of service;

(xxix) The spirit of the cooperative federalism must guide the functioning of the GST Council as envisaged in Article 279A(6). This was espoused by this Court in **Union of India** v. **VKC Footsteps India Private Limited**[23] where it was held that there is a need for a harmonised structure of goods and service tax. The GST Council is empowered to decide on every aspect of the GST law. The recommendations of the GST Council are binding on the executive and the legislature-while it frames laws relating to GST by the power under Article 246A;

(xxx) The GST Council recommends the law, rules and notifications through a voting architecture that is prescribed in Article 279A(6) and quorum requirements in Article 279A(7). Every decision flows from one common source;

(xxxi) The GST Council is the only constitutional body which acts as a converging point or a platform for both the federal units to work in a harmonious manner in structuring the goods and service tax, in the process of developing a harmonised national market for goods and services;

(xxxii) Article 246A states that the power to legislate GST laws is only with the Union of India and the States. Neither can Article 279A override Article 246A nor can Article 246A be made subject to Article 279A. Judicial interpretation must strike a harmony such that Parliament, the state legislatures and the GST Council work in unison and harmony; and

(xxxiii) The constitutional scheme therefore envisages a two-step process. At the first level of the GST Council, Article 279A(6) envisages cooperative federalism and in the absence of either a non obstante clause in Article 279A or a 'subject to' clause in Article 246A, the need or requirement is that both the Union and the States should be supportive of this cooperative federalism through the process of collaborative federalism; and

(xxxiv) Section 5(1) of the IGST Act, by design, chooses to delegate certain functions to the GST Council in order to achieve the legislative object. Even though Article 246A does not subject Article 246A to Article 279A, the Union and States after exercising their legislative power and discretion under Article 246A(1) have agreed to go by the recommendations of the GST Council in every aspect of the GST law wherever required. This is the spirit of collaborative federalism which must be respected by upholding the constitutional validity of the impugned notifications.

11 The learned ASG has urged the following supplementary submissions by way of rejoinder:

(i) The purpose of the integrated tax is to introduce a level playing field between foreign shipping lines and Indian shipping lines. It is a settled principle that to tax one subject, the revenue does not have to tax everything;

(ii) The respondents have contended that the tax on an Indian importer is on a reverse charge basis, and therefore the importer does not fall under the definition of a 'taxable

[23] (2022) 2 SCC 603 ("**VKC Footsteps**")

person'. However, Section 2(107) of the CGST Act defines a taxable person as any person registered or liable to be registered under Section 22 or Section 24 of the CGST Act. Section 24 classifies persons liable for compulsory registration, and Section 24(iii) includes persons governed by the reverse charge mechanism;

(iii) In **Laghu Udyog Bharati** v. **Union of India**[24], this Court struck down the imposition of service tax on a reverse charge basis since the legislature had failed to identify the persons on whom service tax could be imposed, enforced and collected. However, Section 2(107) read with Section 24(iii) of the CGST Act specifically identifies the importer as a taxable person who is liable to pay tax on a reverse charge basis. Section 24(iii) of the CGST Act also defines persons liable to pay tax on reverse charge as taxable persons;

(iv) The respondents have argued that under Section 5(1) of the IGST Act, the taxable value can be determined only through Section 15 of the CGST Act and its corresponding rules. It was contended that Notification 8/2017 prescribes the valuation of 10% of CIF value for the first time, which violates Section 5(1) of the IGST Act. The appellant submits that in terms of Section 15(4) and Section 15(5) of the CGST Act, Rules 27 to 31 of the Central Goods and Service Tax Rules 2017[25] have been formulated. The Revenue can also assess the transaction by taking aid of a residual method prescribed under Rule 31 of the CGST Rules. Any discretion vested in quasi-judicial authorities must be regulated. The corrigendum dated 30 June 2016 amending Notification 8/2017 and prescribing the methodology for determining valuation can be read as a guideline for dealing with infirmities in assessment practices. It is only a reference or a guideline for making assessments. Even if it were to be held inapplicable, the revenue can assess the transaction under Rule 31 of the CGST Rules. Thus, Notification 8/2017 does not impinge on Rule 31 of the CGST Rules but only aids uniformity;

(v) The respondents rely on Section 2(87) of the CGST Act and Section 5 of the IGST Act to argue that prescription can only be through rules, and not notifications. However, Section 15(1), (2) and (3) of the IGST Act prescribes values. Section 15(4) and 15(5) of the IGST Act deals with cases where the valuation cannot be determined under Section 15(1). Rule 31 of the CGST Rules also enables the valuation to be conducted through "reasonable means". Thus, delegation is envisaged in the statutory mechanism;

(vi) If the expression "by the recipient" is to be given a static meaning as those falling under Section 2(93) of the CGST Act, then one would be denuding the power to notify persons for reverse charge under Sections 5(1) and 5(3) of the IGST Act read with Section 24(iii) of the CGST Act.

(vii) Alternatively, the concept of reverse charge and notifying persons liable for reverse charge is envisaged in the statutory mechanism. Section 2(98) of the CGST Act defines reverse charge as imposed "only on the recipient". Section 2(93) of the CGST Act defines a recipient. An Indian importer can be a recipient in six ways that have been elaborated in the submissions. The Indian importer does not pay any consideration of service in CIF

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[24] 1999 (6) SCC 418 ("**Laghu Udyog**")
[25] "**CGST Rules**"

imports since consideration is paid by the foreign exporter. Section 2 is illustrative and not rigid. A "person", as defined under Section 2(84), is deemed to be the recipient of a service if such person satisfies the conditions under 2(93) of the CGST Act. Section 5(3) of the IGST Act contemplates the applicability of all provisions of the Act to the recipient. The fact that consideration is paid by the foreign exporter to the foreign shipping line does not vitiate the IGST Act's scheme which enables payment of tax on a reverse charge basis;

(viii) Section 13(9) of the IGST Act states that the destination of the goods shall be the place of supply, which is on Indian territory. This Court in **Union of India** v. **Jalyan Udyog**[26] has held that deeming fictions can be created even by the executive, i.e. through delegated legislation.

(ix) In case of a foreign exporter and a foreign shipping line, there is a nexus with India since the importer would be Indian. Forward charge taxation is envisaged in direct tax. Section 9(1)(6) of the Income Tax Act 1961 taxes a non-resident outside India since the income is generated in India;

(x) The decision of this Court in **BSNL** v. **Union of India**[27] on double taxation has no applicability to this case since that was on the question of the overlap of VAT and service tax in the pre-GST regime and was decided on the ground of the impingement on the exclusive domain of the Union to impose service tax under Entry 97, List I;

(xi) In the alternative, the integrated tax derives authority from Section 5(4) of the IGST Act which permits the government to specify a class of registered persons who receive goods or supplies from an unregistered supplier, who shall pay the tax on a reverse charge basis as the recipient. If this section is deemed applicable, then the importers would be liable for tax with effect from 1 February 2019, though exempted for the period from 13 October 2017 till 31 January 2019;

(xii) The creation of the GST Council under Article 279A embodies the spirit of collaborative federalism. The GST Council is constitutionally mandated, particularly under Article 279A(6), to promote harmony and alignment amongst the federal partners;

(xiii) Under Article 279A(4), decisions of the GST Council transform into recommendations to the Unions and the States. The GST Council is the only constitutional body that acts as a converging space or platform for the federal units to work in a harmonious matter. The principal function of the GST Council is to take decisions, which are conveyed as recommendations. These recommendations have a unique constitutional status and they are overridden in exceptional circumstances;

(xiv) It was contended by the respondents that instead of course correcting the input tax mechanism, the revenue has chosen to tax the Indian importer on reverse charge. This is more a policy than a perceptional issue. As long as the tax is legal and valid, the manner and mode of taxation need not be questioned. A better manner and mode would

[26] 1994 (1) SCC 318
[27] 2006 (3) SCC 1 ("**BSNL**")

not result in the exercise of legislative discretion being declared to be invalid or illegal; and

(xv) The integrated tax was introduced to ensure a level playing field between foreign and Indian shipping lines. This objective must be appreciated while determining constitutionality.

B.2 Respondent-assessees

12 Mr V Sridharan, learned senior counsel appearing on behalf of the respondents[28] has urged the following submissions:

(i) Under Section 5(4) of the IGST Act, the Government cannot specify the person liable to pay service tax on a reverse charge basis:

(a) Section 5(3) of the IGST Act provides that the Government may specify the categories of supply of goods or services or both on which the tax shall be paid on reverse charge basis by the recipient of the goods or services. Thus, the power under Section 5(3) is only to specify the categories of supply, while the liability to pay tax is fixed on the recipient. The Government cannot specify the person liable to pay tax on reverse charge basis under Section 5(3);

(b) Notification 10/2017 has been issued under Section 5(3) of the IGST Act. Since the power flows from Section 5(3), the Government can by a notification only specify the 'categories of supply', as the liability for tax has been determined by Parliament;

(c) In contrast with Section 5(3), prior to the introduction of GST, Section 68(2) of the Finance Act 1994 provided that the service tax shall be paid by "such person…as may be prescribed". In that case, the liability of tax was not determined by the legislation;

(d) Under the CGST Act and the IGST Act, the only place where a person other than a supplier or recipient is made liable to pay tax is under Section 5(5) of the IGST Act, where an electronic commerce operator through whom supply is made is taxed; and

(e) In case the Parliament desired the tax to be collected from a person other than a supplier or recipient, it would have expressly provided so in the legislation. Since Parliament has specified the person liable for tax, it is not a matter to be governed by delegated legislation;

(ii) Section 2(98) of the CGST Act defines 'reverse charge' as 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. In other words, only the recipient can be made liable to pay tax under reverse charge basis and the reverse charge cannot be disintegrated from the recipient of supply;

(iii) Section 5(3) clearly stipulates that (i) the tax shall be paid on a reverse charge basis and (ii) the tax is payable by the recipient;

(iv) GST laws contemplate only one recipient for one supply:

[28] In SLP(C) No. 3081 of 2021, SLP(C) No. 1625 of 2021 and SLP(C) No. 3760 of 2021

(a) The interpretation of the ASG that the foreign exporter is the recipient under clause (a) of Section 2(93) of the CGST Act and the Indian importer is the recipient under clause (c) of Section 2(93) of the CGST Act leads to absurdity;

(b) Under Section 2(93) of the CGST Act, a 'recipient' is defined with reference to three situations- (a) where consideration is payable for the supply of goods or services or both, (b) where no consideration is payable for the supply of goods and (c) where no consideration is payable for the supply of a service. Clauses (a), (b) and (c) of Section 2(93) are mutually exclusive and cannot apply simultaneously. In case the supply of goods or services is for consideration, clause (a) applies and the recipient is the person who is liable to pay the consideration;

(c) The question of who is the beneficiary of the supply or who has received the supply are irrelevant in determining the 'recipient' under Section 2(93) of the CGST Act;

(d) Whether a supply of service is an 'inter-state supply' under Section 7(3) or 'intra-state supply' under Section 8(2) of the IGST Act depends on the location of the supplier and the place of supply. In case there are two recipients of a single supply, as argued by the ASG, then the transaction may become inter-state as well as intra-state supply. Such a situation has not been envisaged by Parliament;

(e) Only the recipient of the supply is entitled to avail input tax credit. In case there are two recipients of a single supply, two persons will be allowed to avail credit of tax by the supplier;

(f) The rate of tax is often dependent on the recipient of the supply. For instance, services supplied to Government, local authorities or charitable institutions, are exempted or liable to a lower rate of tax. If there are two recipients, this would result in an anomaly; and

(g) Even in case of a three-party transaction involving supply of goods, Section 10(1)(b) of the IGST Act provides that the place of supply of goods is the principal place of business of the recipient, and not the person to whom the goods are delivered;

(v) The last leg of Section 2(93) of the CGST Act does not create a separate category of recipient:

(a) Section 2(93) provides three categories of recipients, namely, where consideration is payable for supply of goods or services; where no consideration is payable for supply of goods; and where no consideration is payable for supply of services;

(b) Section 2(93) also provides that any reference to a person to whom supply is made shall be construed as a reference to the recipient of supply and shall include an agent acting on behalf of the recipient; and

(c) The above provision implies that if the Act does not use the term 'recipient' but makes a reference to the person to whom supply is made, then they shall be construed as a 'recipient'. It does not however, create a new category of recipient.

(vi) The taxable event for levy of GST is 'supply' of goods or service. In the absence of supply, no tax can be levied under IGST, CGST or State Goods and Services Tax Act[29]:

(a) Article 366(12A) of the Constitution defines the 'goods and services tax' as the tax on 'supply' of goods or services or both;

(b) Section 5 of the IGST Act, which is the charging section for levy of tax, also states that the IGST will be levied on all inter-State 'supplies' of goods or services or both; and

(c) Each transaction has to be evaluated independently to determine its taxability. The transaction of supply takes place between the contracting parties, that is, at whose instance the supply is made;

(vii) The CGST Act does not envisage a taxable supply without consideration, other than those specified in Schedule I:

(a) Clause (a) of Section 7(1) of the CGST Act defines the term 'supply' as all forms of supply of goods or services made for a consideration in the course of or in furtherance of business. Clause (b) of Section 7(1) of the CGST Act provides that import of service for a consideration will be included in the term 'supply' even if it is not made in the course or furtherance of business. Clause (c) provides that activities specified in Schedule I will be included in the term 'supply' even if they are made without consideration;

(b) Clause (a) requires two conditions to be satisfied: (i) that the activity has been made in the furtherance of business and (ii) made for a consideration. In clause (b), the condition of the supply being made in the course of business is absent. In clause (c), the condition of supply being made for a consideration has not been incorporated but this only for activities provided in Schedule I; and

(c) The argument that supplies can be made without consideration for activities other than those specified in Schedule I would make clause (c) of Section 7(1) redundant.

(viii) Notification 10/2017 cannot be sustained under Section 5(4) of the IGST Act: (a) The unamended Section 5(4) of the IGST Act provides that integrated tax in respect of supplies made by an unregistered supplier to a registered person shall be paid by such person on reverse charge basis as a recipient of supply;

(b) The section was a standalone section, operating on its own, and did not require anything to be specified by way of a notification. Thus, Notification 10/2017 cannot be sustained under Section 5(4);

(c) Pursuant to the Goods and Services Tax (Amendment) Act 2018, Section 5(4) was amended w.e.f. 1 February 2019 to provide that the Government may, based on the recommendations of the GST 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;

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[29] "**SGST**"

(d) The reliance placed by the Government on the amended Section 5(4) of the IGST Act to justify Notification 10/2017 is erroneous as:

- There was no power to issue a notification specifying the class of registered person liable to pay tax under reverse charge basis under Section 5(4) at the time when the impugned notification was issued on 28 June 2017. The power has been granted by amendment w.e.f. 1 February 2019;

- Section 2(93) of the CGST Act provides that any reference to a person to whom supply is made shall be construed as reference to the recipient of supply. Thus, the person under Section 5(4) who has received the supply is the recipient of the supply. Even after the amendment of Section 5(4), only the recipient can be specified as a person liable to pay tax; and

- Section 2(98) of the CGST Act defines 'reverse charge' as the liability to pay tax by the recipient of the supply instead of the supplier. Thus, only the recipient can be made liable to pay tax on a reverse charge basis;

(ix) Section 13(9) of the IGST Act is only relevant to determine the place of supply and not the recipient of supply. Whether the supply of service is an export of services under Section 2(6)(a) of the IGST Act or an import of services under Section 2(11), read with Section 7(4) of the IGST Act; or an inter-State supply of service, is not determined by Section 13(9);

(x) Notification 10/2017 has been issued on the recommendation of the GST Council under Section 5(3) of the IGST Act and not under Article 279A of the Constitution. If the GST Council intended to make a recommendation deeming the importer as recipient of supply, then the proper course of implementation would be to make an amendment in the IGST Act and seek Parliamentary approval;

(xi) The objective of the tax or levy cannot validate an *ultra vires* levy:

(a) The Government has contended that the levy of tax on services of transportation of goods into India provided by a person in a non-taxable territory to a person in a non-taxable territory, has been introduced to create parity for Indian shipping lines with foreign shippers;

(b) The notification for the levy and reverse charge has been lifted from the erstwhile service tax regime into the GST regime without considering the changes in language in Section 5(3) of the IGST Act as opposed to Section 68(2) of the Finance Act 1994. Thus, the notification is ultra vires the Act;

(xii) The scheme of IGST Act does not envisage a person other than the supplier or the recipient as a person liable to pay tax:

(a) The time of supply of services is determined according to Section 20 of the IGST Act along with Section 12 and 13 of the CGST Act. Section 12 deals with the time of supply of goods and Section 13 deals with the time of supply of services;

(b) Section 13(1) states that the liability to pay tax on services arises at the time of supply. Sub-section (2) determines the time of supply on forward charge basis. Sub-section (3) deals with time of supply when tax is payable on reverse charge basis. Under

this sub-section, time of supply of services is the earliest date of payment entered in the books of accounts of the recipient or the date of debit in the bank account or sixty days from the date of last issue of invoice by the supplier. Thus, a person other than a recipient cannot determine the time of supply;

(c) Section 13(5) of the CGST Act is only relevant for determining the time of supply in case of clandestine supply or evasion of tax and cannot be used to determine time of supply for ocean freight services;

(d) The provisions relating to filing of returns apply whether a person is a supplier or a recipient of supply, or apply only to an outward supply and an inward supply. The supply of ocean freight service is neither an inward supply nor an outward supply;

(xiii) In case of CIF contracts, the customer contracts for a supply of delivered goods at the port of destination. The contract for transportation of goods is entered into by the foreign exporter with the foreign shipper. Thus, the person liable to pay consideration to the foreign shipper is the foreign exporter. The importer of goods in India is not the person liable to pay the consideration, and is thus, not the 'recipient' of the service;

(xiv) The contract of the Indian importer with the foreign exporter is for supply of delivered goods. The service of transportation is a component of the supply of goods similar to raw material, manufacturing cost or employee cost of the supplier. To contend that the purchaser has received the supply of raw material or the services of an employee is illogical. Similarly, the argument that the Indian importer has received transportation services is irrational; and

(xv) Serial No. 9(ii) of Notification 8/2017 read with Para 4 and Serial No. 10 of Notification No. 9 of 2017-Integrated Tax (Rate) dated 28 June 2019 describe the services as provided by a person located in a non-taxable territory to a person located in a non-taxable territory. These notifications recognise the exporter as the recipient of the service of ocean freight;

(xvi) The argument of the ASG that the IGST paid on goods at the time of import is a customs duty and not a tax, and thus, there is no dual levy of tax recovered on ocean freight from the exporter is erroneous:

(a) The present case involves outright purchase of goods and thus, it is a supply of goods under GST and an import of goods according to customs law. The issue is whether the transaction is an import of goods under customs law, but a supply of service under GST law;

(b) Section 5(1) of the IGST Act is the charging section. The proviso to Section 5(1) states that integrated tax on goods imported into India shall be levied and collected in accordance with Section 3 of the Customs Tariff Act on the value as determined under the Customs Tariff Act and at the point when duties of customs are levied under Section 12 of the Customs Act;

(c) Section 3(7) of the Customs Tariff Act provides that any article imported into India shall, in addition, be liable to integrated tax;

(d) Both the proviso to Section 5(1) of the IGST Act and Section 3(7) of the Customs Tariff Act provide that goods imported into India shall be liable to integrated tax;

(e) The contention that the proviso to Section 5(1) of the IGST Act does not contain the word 'supply' and thus, the tax is imposed on import of goods irrespective of whether the transaction is supply or not, is erroneous;

(f) The absence of the word 'supply' in the proviso will not lead to an extreme result that the transaction of import of goods becomes leviable to IGST even if it is not supply;

(g) The CGST Act has at various instances, such as Section 11(1), Section 12(1), Section 13(1) and Section 49(9), omitted the word 'supply' and merely mentioned the liability to pay tax on goods or services;

(h) The proviso under Section 5(1) of the IGST Act read with Section 3(7) of the Customs Tariff Act implies that the tax is leviable only on *supply* of goods imported into India;

(i) The amount collected as IGST on import of goods is apportioned between the Union and States as per Article 269A of the Constitution which provides for apportionment of GST on inter-state supply of goods or service. If import IGST was a customs duty, then the revenue proceeds would be distributed in accordance with Article 270 of the Constitution;

(j) At the introduction of GST, the understanding of the Government was in consonance with the above legal position and accordingly, the Government issued a notification exempting goods and services imported from an SEZ unit or developer under the IGST Act. Subsequently, the Government rescinded the above exemption notifications and issued separate notifications under the Customs Act and IGST Act; and

(k) The Government has also issued various notifications exempting payment of IGST in case of import of goods on lease or temporary import basis. The intention of Government is not to impose IGST in case of import of goods that do not amount to supply.

13 Mr Harish Salve, learned senior counsel, appearing on behalf of the respondent[30] has submitted:

(i) A CIF contract is an inclusive price covering cost of goods, insurance and freight payable for carriage of goods to the destination specified in the contract. The essence of the contract is that a seller having shipped the goods in accordance with the contract, can fulfil his part of the bargain by tendering to the buyer the proper shipping documents. If he does this, he is not in breach even if the goods are lost before such tender. In the event of a loss, the buyer must pay the price on tender of documents and his remedies lie against the carrier but not the seller;

(ii) A CIF contract has two components: (i) price is paid for the freight, and (ii) the buyer is never obligated to pay it. The owner of the vessel who enters into a contract of affreightment has a privity of contract with the supplier of goods and is rendering a service

[30] CA No. 13958 of 2020

to the supplier. If the service is not received, then the question of reverse charge does not arise;

(iii) Sections 5(3) and 5(4) of the IGST Act are merely machinery provisions for collection of tax, and not the charging provision:

(a) Section 5(1) is the charging section which levies IGST. Since there is no separate levy under Section 5(1) on ocean freight, as it is an import of goods which already suffers IGST on CIF value, the question of reverse charge does not arise;

(b) The proviso to Section 5(1) clarifies that the 'value as determined' is only the measure of tax and not the subject of tax; and

(c) Section 5(3) cannot be treated as the charging section as it would make it possible for the Government to impose separate taxes under Sections 5(1) and 5(3) and charge for the services at both ends;

(iv) There must be a taxable event in the CIF contract of the kind contemplated under the IGST Act. In case there is no such event, it cannot be created through delegated legislation by the GST Council. There is an absence of a statutory fiction by which a CIF contract can be split into a contract for supply of goods and services, and creating a second layer of fiction by which the shipper is rendering a service to the supplier of goods. Thus, the question of levy of tax by the GST Council does not arise;

(v) In the transaction of import of coal on CIF basis in the present case, the recipient will fall under clause (a) of Section 2(93) of the CGST Act as consideration is payable for the service of shipping. The mere fact that an Indian is the recipient will not lead to the Indian recipient making the payment separately under the contract of affreightment. The Indian recipient is only a recipient of goods, not of service;

(vi) The law recognises and maintains the integrity of a CIF contract under Section 2(30) read with Section 2(93), and Section 8. These sections maintain the integrity of a composite contract by providing that where the goods come with insurance and freight, the tax is imposed only on supply of goods;

(vii) The High Court has held that that the notifications under challenge were *ultra vires*. The Government has not urged that any of these findings are incorrect and has only contended that Section 5(1) of the IGST Act satisfies all ingredients of a valid tax law;

(viii) Notification 8/2017 is ultra vires the IGST Act. Section 5(1) of the IGST Act only empowers the issuance of notifications for rates and requires other provisions to be prescribed. Section 5(1) does not empower the Government to define 'description of service' which is an essential legislative function;

(ix) Entry 9(ii) of Notification 8/2017 imposes a tax on ocean freight in import of goods. Such a power however, has not been provided in the statute;

(x) Para 4 of Notification 8/2017 determines the 'value of service' as 10% of the CIF value, which is contrary to Section 15(1) of the CGST Act which says 'transaction value';

(xi) Article 366(12A) defines goods and services tax as involving only supply of goods or services or both. Section 7 of the IGST Act has made a clear distinction between

standalone supply of goods, standalone supply of services and standalone supply of 'goods or services or both'. Section 7(4) treats standalone services imported into India as inter-State supply and does not artificially bifurcate by assuming ocean freight in the transaction of import of goods;

(xii) Section 13 of the IGST Act has no application in the case which relates to import of goods and not services standalone. Section 13 applies to place of supply of services, referring to standalone services, and does not use the term 'both' to apply to supply of goods or services; and

(xiii) IGST Act has no extra-territorial application as the Act extends to the whole of India. Under Section 2(109) of the CGST Act, taxable territory means the territory to which the Act applies. Further, **GVK Industries** (supra) states that Parliament may exercise its powers with respect to an extra-territorial aspect when it has a nexus with India. It does not however empower delegated legislation to exercise such power. Thus, the activity brought within the tax net by the impugned notifications is contrary to the IGST Act.

14 Mr Arvind Datar, learned senior counsel, appearing on behalf of the respondent[31] has submitted:

(i) The levy of IGST on ocean freight by way of Notification No. 10/2017Integrated Tax (Rate) is extra-territorial and *ultra vires* Section 1 read with Section 2(22) of the IGST Act:

(a) The levy imposed is on the service of transportation of goods rendered by the shipping line to the foreign vendor/exporter, occurring outside the territory of India, that is outside the taxable territory;

(b) The only nexus of the service with India is that the service results in the import of goods into India. However, this activity is already subject to IGST under the IGST Act and customs duty under the Customs Act;

(c) For a levy to be imposed under the IGST Act, the service must be a 'supply' under the provisions of IGST Act read with Section 7 of the CGST Act. However, Section 1 of the CGST Act and IGST Act are limited to the territory of India. Thus, any service received outside the territory of India cannot be considered to be 'supply' under the IGST Act or the CGST Act;

(d) To impose a levy on a service that is extra-territorial, there has to be a deeming fiction in the form of a statutory provision which deems the supply of transportation by a vessel to a non-resident exporter. In this case, such a deeming fiction does not exist. Thus, the transportation service cannot be deemed as a 'supply' under the IGST Act;

(e) Only once the service provided outside the territory of India is deemed as a 'supply' by way of statute, can there be a determination of the supplier and the recipient;

(f) By way of the impugned notification, the freight charges incurred abroad are sought to be taxed in India on the ground that the service recipient is in India. If this argument is

[31] SLP (C) No. 3462 of 2021

accepted, then any service (such as insurance or incidental services) rendered abroad can be taxed in India on the ground that the recipient is in India. This practice is in contrast with international taxation laws and will lead to hardship for Indian importers;

(g) Article 245(2) of the Constitution states that a law made by the Parliament will not be invalid on the ground that it has extra-territorial operation. However, the expression 'law made by the Parliament' does not include executive notifications, even if made on the recommendations of the GST Council; and

(h) Tax can be levied outside the territory of India by way of primary legislation. For instance, under Sections 6 and 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, a legal fiction is created by which India has the power to levy tax in the Exclusive Economic Zone and Continental Shelf. Pursuant to this fiction, notifications levying customs duty on supplies made to oil drilling rigs in the Continental Shelf have been issued. In the absence of a primary legislation or statutory provision to this effect, notifications cannot impose duties on activities occurring outside India;

(ii) The value of a CIF contract is indivisible, making the computation of tax on such a contract impossible:

(a) The only way to artificially dissect the value of a CIF contract is by way of statute, which is absent in this case;

(b) If such a division is allowed, then the Government will be able to tax not just ocean freight, but also insurance services; and

(c) Levy on contracts on a CIF basis will lead to hardships for the Indian recipients. The advantage of entering into CIF contracts is to ensure that the foreign supplier is responsible for arranging transportation and insurance. However, if a CIF contract is made subject to GST, then the Indian importers will have to make their own arrangements to transport the goods, book an insurance policy and arrange for shipping;

(iii) The ASG's reliance on the nexus theory to justify the levy of GST on ocean freight, by equating it to the imposition of income tax on income accruing in India or customs duty imposed on goods imported into India- is erroneous:

(a) In case of imposition of income tax, the nexus is provided by way of a deeming fiction under Section 5(2) of the Income Tax Act 1961, where a non-resident is liable to tax only if the income is deemed to accrue or arises in India;

(b) In case of customs duty, the taxing event is the goods entering the territory of India; and

(c) In the absence of such a provision, the freight services rendered outside India cannot be deemed to be received in India merely because the recipient is in India.

(iv) The importer is not the 'recipient' of services under Section 2(93) of the CGST Act:

(a) Under clause (c) of Section 2(93), when there is no consideration payable for the supply of services, then the person to whom the services are rendered is the service

recipient. However, in this case, the importer is not the service recipient as the importer does not pay the consideration or receive the services;

(b) The argument of the ASG that the importer is a 'recipient' as they are the ultimate beneficiary enlarges the scope of Section 2(93) by adding words that are absent in the statute;

(c) Even if the ultimate beneficiary is considered to be the recipient, the importer is not the beneficiary of the service of transportation of goods. Under the terms of a CIF contract, the foreign vendor is obligated to arrange for transportation of goods for which he engages the services of a shipping line. Thus, the foreign vendor is the ultimate beneficiary;

(d) The importer is only the beneficiary of the imported goods, whose value is taxable as customs duty under the Customs Tariff Act as well as under the IGST Act; and

(e) Additionally, reliance cannot be placed on clause(c) of Section 2(93) as it only refers to those supplies for which consideration is not paid as mentioned in Schedule I of the CGST Act. This schedule enumerates the activities deemed as supplies without consideration.

(v) Imposition of IGST on ocean freight will lead to double taxation:

(a) Section 3(7) of the Customs Tariff Act states that goods imported into India will be subject to IGST under Section 5 of the IGST Act, on the value as determined by Section 3(8) and Section 3(8)(a). Under Section 3(8), the value includes value of freight; and

(b) Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 includes cost of transportation and insurance in the value of goods, which forms the basis of the levy of IGST under the proviso to Section 5 of the IGST Act. The impugned levy of IGST on ocean freight would thus amount to double taxation on the same transaction;

(vi) The ASG's reliance on 'aspect theory' to justify the impugned levy is erroneous:

(a) The ASG relied on the 'aspect theory' and submitted that the impugned notification taxes the 'service' element of ocean freight, while the 'goods' element is taxed under the proviso to Section 5 of the IGST Act. However, such an approach is impermissible according to the decision of this Court in **BSNL** (supra);

(b) The aspect theory is inapplicable as the freight element is included by levying IGST; and

(c) The aspect theory in India permits taxation of two different aspects or features of a transaction. For instance, in a catering contract, supply of food was subject to value added tax and the service aspect was subject to service tax. However, the aspect theory does not permit double taxation of the same amount or value

(vii) The GST Council which has been created by Article 279A of the Constitution is a recommendatory body, whose recommendations can be implemented by either amending the CGST Act or the IGST Act or by issuing a notification. However, notifications issued cannot be ultra vires the parent legislation;

(viii) The principles of cooperative federalism are not relevant in this case as they were not adjudicated before the High Court. The appeal must test the correctness of the impugned judgment without expanding its scope; and

(ix) Interpretation of Article 279A of the Constitution was not an issue before the High Court and the present appeal should be restricted to the validity of the impugned notification.

15 In addition to the above, Mr Vikram Nankani, learned senior counsel, appearing on behalf of the respondent[32] urged the following submissions:

(i) Section 7(4) of the IGST Act provides that supply of services imported into the territory of India shall be treated as a supply of services in the course of interstate trade or commerce. Section 2(11) of the IGST Act defines "import of services" when the supplier of service is located outside India, the recipient of service is located in India and the place of supply of service is in India. When these provisions are read together, it implies that in case of import of services into the territory of India, the location of the supplier of services is outside India and the location of the recipient is in India. Thus the IGST Act covers either import of goods or import of services and not services subsumed into the value of goods imported into India;

(ii) The IGST Act was never intended to apply to the importer of goods on a CIF basis as the services are provided and consumed before the goods reach India and have no nexus with the Indian importer;

(iii) The transaction between two persons located outside India is not chargeable under Section 5(1) read with the proviso and Section 7(4) read with Section 2(11) of the IGST Act. Thus, Notification 8/2017 is ultra vires and Notification 10/2017, providing for reverse charge is also ultra vires the IGST Act;

(iv) Section 13(9) of the IGST Act, which states that the place of supply of services of transportation of goods is the destination of the goods, cannot be read in isolation. Read with Section 7(4) of the IGST Act, it implies that in case of import of services, the supplier must be outside India while recipient must be in India; and

(v) The test of 'ultimate beneficiary' relied upon by the ASG does not have statutory backing since the charging section, that is Section 5, makes the recipient of the services liable to pay tax. The Indian importer is not a party to the CIF contract between the foreign exporter and the shipping line.

16 Mr Uchit Sheth, counsel appearing on behalf of the respondents[33] submitted:

(i) The importers in a CIF contract do not have any privity of contract with the supplier of the transportation service since they neither make payment of consideration to the service provider, nor avail any service. The importers only purchase and import goods;

(ii) The impugned levy is contrary to the object and purpose of the IGST Act. Section 5 of the IGST Act clarifies that so far as imported goods are concerned, IGST is levied

[32] SLP(C) No. 843/2021
[33] In SLP(C) No. 3540/2021, SLP(C) No. 1281/2021, SLP(C) No. 1277/2021, SLP(C) No. 2242/2021, SLP(C) No. 2198/2021, SLP(C) No. 2736/2021

at the point of clearance of goods for home consumption and on the total value (including value additions till that point). This was also clarified by Circular no. 3/1/2018-IGST dated 25 May 2018 issued by the Central Board of Indirect Taxes and Customs. The impugned levy of IGST on the freight element of CIF contracts and high seas purchase contracts is *ultra vires* as IGST is paid on the total value of goods;

(iii) In **Ispat Industries Ltd.** v. **Commissioner of Customs**[34], in the context of imposition of customs duty, it was held that in a CIF contract, the freight is part of the price paid to the seller and further addition of transportation charges is contrary to the statutory provisions; and

(iv) The judgment of this Court in **Union of India** v. **Jalyan Udyog**[35] which states that a legal fiction can be created even by delegated legislation, is inapplicable as in that case, the fiction created was within the parameters of the parent provision. In this case, the fiction violates Section 5(3) of the IGST Act.

17 Mr Rajesh Kumar Gautam, learned counsel appearing on behalf of the intervenor[36] in SLP(C) No. 13958/2020, has submitted that the argument of the ASG that the levy has been introduced to create a level playing field is fallacious as:

(i) Prior to 2016, all import transportation, whether undertaken by Indian or foreign shipping lines was outside the scope of levy. Service tax was imposed on import transactions undertaken by Indian shipping lines only to allow them to avail CENVAT credit. This credit was protected even though no service tax was payable on export transportation. Further, Indian importers availing services of foreign shipping lines were liable to pay service tax under reverse charge. This position continued under the GST regime and the only transaction outside the ambit was when the foreign exporter availed the services of a foreign shipping line to transport goods to India; and

(ii) The introduction of levy of service tax or GST on import transactions was by way of an incentive to Indian shipping lines. Thus, it cannot now be contended that the level playing field has been affected because of this levy.

18 Similar submissions have been addressed by Dr C Manickam[37], Mr Rajat Mittal[38]and Mr Abhishek A Rastogi[39], which we have not recorded separately for the sake of brevity.

19 The rival submissions will now be analysed.

C Constitutional Architecture of GST

20 Before we proceed to analyse the vires of the impugned notifications, it is pertinent to contextualize the constitutional architecture of the GST. The Constitution (One Hundred and First Amendment Act) 2016[40] was enacted on 8 September 2016

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[34] (2006) 12 SCC 583
[35] (1994) 1 SCC 318
[36] IA No. 118754/2021 in SLP(C) No.
[37] Appearing for the respondent in SLP(C) No. 3680/2021
[38] Appearing for the respondent in SLP(C) No. 1798/2021
[39] Appearing on behalf of the intervenor in IA No. 74108/2021 in SLP(C) No. 13958/2020
[40] **"Constitution Amendment Act 2016"**

introducing Article 246A and 279A. Article 246A stipulates that both the Parliament and the State legislatures have the power to legislate on GST:

"246A. Special provisions 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 279A constitutes the GST Council which shall make recommendations to the Union and the States on a wide range of subjects relating to GST:

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

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

(a) the Union Finance Minister..... Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance..... Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.....Members.

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

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on— (a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

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

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269A and the principles that govern the place of supply; (d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax; (e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster; (g) special provision with respect to the States of

Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and (h) any other matter relating to the goods and services tax, as the Council may decide.

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

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

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

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

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

(a) the vote of the Central Government shall have a weightage of one third of the total votes cast, and (b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

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

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

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

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

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

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

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

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

21 The Union Government has contended that the recommendations of the GST Council are binding on the legislature and the executive. It was submitted that since the recommendations are binding, the rule making power of the Government under the provisions of the IGST Act and CGST Act, exercisable on the 'recommendations' of the GST Council, are also very wide. The arguments of the Union Government are as follows:

(i) A combined reading of Articles 246A and 279A elucidates that the GST Council is the ultimate decision-making body in framing the GST law since it is a constitutional body that acts as a converging platform for both the Union and the States;

(ii) The functions and role of the GST Council are unique and incomparable to other constitutional bodies. Therefore, interpretations of other provisions of the Constitution do not have precedential value while interpreting the role of the GST Council;

(iii) The power of the Parliament and the State Legislature under Article 246A and the power of the GST Council under Article 279A must be balanced and harmonised, such that neither overrides the other:

(a) Though Article 279A does not begin with a non-obstante clause overriding Article 246A, the latter would not override the former. The core theme of GST law – as it emanates from Article 279(6) – is cooperation and harmony. A system premised on cooperation cannot provide *inter se* supremacy. Therefore, Article 279A has rightly not been given an overriding effect over Article 246A; and

(b) Article 246A vests the Parliament and the State legislatures with the power to enact laws on GST. This function, if delegated would amount to abdication of the Parliament's constitutional function. Therefore, Article 246A cannot be made subject to Article 279A.

(iv) The ordinary legislative process for enacting a statute is that bills are introduced and voted on by the legislature. However, Article 264A departs from this as the framing of the policy, discussion on the policy, and decision making are vested with the GST Council. The Parliament or the State Legislature cannot legislate a law on GST under Article 246A independent of the recommendations of the GST Council. A reading of Sections 5, 6 and 22 of the IGST Act indicates that the legislature and the executive are bound by the recommendations of the GST Council on three preliminary provisions, namely charge, exemption and rule-making power. Therefore, Parliament bound itself to the recommendations of the GST Council by enacting the IGST Act and CGST Act; and

(v) The recommendations by the GST Council are transformed into legislation on a combined reading of Article 279A and Sections 5,6, and 22 of the IGST Act 2017 and Sections 9,11, and 164 of the CGST Act.

C. 1 Legislative History of the Constitution Amendment Act 2016

Statement of Objects and Reasons

22 As early as in 2004, the Task Force on implementation of the Fiscal Responsibility and Budget Management Act 2003 had recommended a shift to consumption taxes to increase efficiency in production and enhance international competitiveness of Indian goods and services. The need for such an enormous change in the tax regime arose out of the distortions in the then existing indirect tax regime which suffered from the drawback of multiplicity of taxes, taxable events, compliances, and authorities. For instance, the rate of the sales tax and value added tax on the same goods would differ across India. Several states would impose entry taxes on goods before the goods entered their boundaries. The First Discussion Paper on Goods and Services Tax in India released by the Empowered Committee in November 2009 explained the rationale for introducing the GST regime in the following terms:[41]

[41] Empowered Committee, *First Discussion Paper on Goods and Services Tax*, (2009) Pars 1.13-1.14

"The introduction of GST at the Central level will not only include comprehensively more indirect Central Taxes and integrate goods and service taxes for the purpose of set-off relief, but may also lead to revenue gain for the Centre through widening of the dealer base by capturing value added addition in the distributive trade and increased compliance.

In the existing State-level VAT structure there are also certain short comings as follows. There are, for instance, even now, several taxes which are in the nature of indirect tax on goods and services, such as luxury tax, entertainment tax, etc., and yet not subsumed n the VAT. Moreover, in the present Statelevel VAT scheme, CENVAT load on the goods remains included in the value to be taxed under State VAT, and contributing to that extent a cascading effect on account of CENVAT element. This CENVAT load needs to be removed.

[…]

However, for this GST to be introduced at the State-level, it is essential that the States should be given the power of levy of taxation of all services. This power of levy of service taxes has so long been only with Centre. A Constitutional Amendment will be made for giving this power also to the States. Moreover, with the introduction of GST, burden of Central Sales Tax (CST) will also be removed. The GST at the State-level is, therefore, justified for (a) additional power of levy of taxation of services for the States, (b) system of comprehensive set-off relief, including set-off for cascading burden of CENVAT and services taxes, (c) subsuming of several taxes in the GST and (d) removal of burden for CST. Because of the removal of taxes in the GST, the burden of tax under GST on goods will, in general, fall."

23 Parliament introduced the Constitution (One Hundred and Fifteenth Amendment) Bill 2011[42] which sought to amend the provisions of the Constitution to introduce the GST regime. The Speaker of the Lok Sabha referred the 2011 Amendment Bill to the Parliamentary Standing Committee on Finance. The Constitution (One Hundred and Twenty-Second Amendment) Bill 2014 [43] was introduced after incorporating the recommendations of the Standing Committee. The 2014 Amendment Bill was introduced to replace almost all the indirect taxes that were levied by the State Governments and the Union Government, with a singular tax system to eliminate the cascading effect of multiple taxes and to provide for a common national market. The Statement of Objects and Reasons of the 2014 Amendment Bill reads as follows:

"The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. **The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services**. The proposed Central and State

[42] **"2011 Amendment Bill"**
[43] **"2014 Amendment Bill"**

goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax."

(**emphasis supplied**)

24 The Finance Minister while introducing the 2014 Amendment Bill in Parliament noted that the object of the constitutional amendment is to bring about a "*certain amount of convergence between these taxes so that the taxation mechanism becomes extremely simple*".[44] He also highlighted the fact that there was no uniformity in the tax rates and structure across the States. The Statement of Objects and Reasons and the debates and speeches in the legislature indicate the intent behind the introduction of the Bill.[45] The legislative history, the statement of objects and reasons of the Bill and the speech made when the bill was introduced indicate the mischief that Articles 246A and 279A to the Constitution sought to remedy, which is to simplify the indirect tax regime to prevent the complexities inherent in and the cascading effect of a multiplicity of taxes.

Simultaneous Legislative distribution

25 Article 246 read with the Seventh Schedule vests Parliament and the State Legislatures with the power to make laws on subject matters listed in the Seventh Schedule of the Constitution. Before the introduction of Articles 246A and 279A by the Constitution Amendment Act 2016, the legislative powers of the Union and the States on taxation were exclusive. The general subjects of legislation constitute one group in the Union List (entries 1 to 81) and the State List (entries 1 to 44). The subject heads related to taxation are clubbed together in both the Union and the State lists (entries 82 to 92B in the Union list and entries 45 to 63 in the State list). The concurrent list does not include any entry related to taxation.[46] For example, while the Union primarily has the power to impose income taxes, except from agriculture[47], the State has the power to impose tax on agricultural income[48]. Therefore, both the Union and the States had a separate and an exclusive domain over specific heads of taxation. The Union and the State could not impose tax under the same head since the concurrent list did not include an entry for taxes. This Court, in its decision in **Hoecst Pharmaceuticals Ltd.** v. **State of Bihar**[49], recognised the exclusive powers held by the Union and the State on taxation. The three-Judge Bench observed that:

"75**.** Legislative relations between the Union and the States inter se with reference to the three Lists in Schedule VII cannot be understood fully without examining the general features disclosed by the entries contained in those Lists" : Seervai in his *Constitutional Law of India*, 3rd Edn., Vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following

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[44] Speech by Arun Jaitley in Lok Sabha on 24.4.2015; Tarun Jain, *Goods and Services Tax: Constitutional Law and Policy* (EBC 2018) 16

[45] Abhiram Singh v. CD Commachen, (2017) 2 SCC 629

[46] Entry 47 of the concurrent list mentions that "fees in respect of any of the matters in this List, but not including fees taken in any court."

[47] Entry 82 of List I

[48] Entry 46 of List II

[49] (1983) 4 SCC 45

the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation arc dealt with in one group of entries and power of taxation in a separate group. In *M.P.V. Sundararamier & Co.* v. *State of A.P.* [AIR 1958 SC 468 : 1958 SCR 1422 : (1958) 9 STC 298] this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 of the Act and para 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play."

26 In the pre-GST regime, the Union had the exclusive power to impose indirect taxes, that is, on inter-state sale of goods, customs duty, service tax, and excise duty. The States had the exclusive power to impose tax on intra-State sale of goods, luxury tax, entertainment tax, purchase tax, and taxes on gambling and betting. The GST regime has subsumed all the indirect taxes. Article 246A which was introduced by the Constitution Amendment Act 2016 vests the Parliament and the State legislatures with the concurrent power to make laws with respect to GST.

27 The distribution of legislative power between federating units- the Union and the States, is among the paramount features of a federal Constitution.[50] Articles 246 and 254 have been central to the debate on the federal nature of the Indian Constitution. Article 246A, is a 'special provision with respect to goods and service tax,' and begins with a non-obstante clause overriding Articles 246 and 254. Article 246 sets down the constitutional framework defining the legislative competence of Parliament and the State legislatures. Article 254 provides the framework for addressing inconsistency between central and state laws on matters in the Concurrent list. Article 246A entrusts Parliament and State legislatures the power to legislate on the goods and services tax. The power

[50] H.M Seervai, *Constitutional Law of India*, (NM Tripati Private Limited, 4th Edition, vol 1) 289; SR Bommai v. Union of India, (1994) 3 SCC 1

of the States is however subject to the conferment of an exclusive domain to Parliament to levy the goods and services tax where the supply of goods or services takes place in the course of interstate trade and commerce.

28 In **Union of India** v. **Mohit Mineral Pvt. Ltd.**[51], this Court while deciding the constitutional validity of the GST (Compensation to States) Act 2017 noted that the Constitution Amendment Act 2016 introduced changes in the legislative powers of the Parliament and State legislature relating to indirect taxation. It observed that the amendment "*confers concurrent taxing powers on the Union as well as the States for levying GST on transactions of supply of goods or services or both*". In **Baiku** v. **State Tax Officer, GST**[52], a writ petition was filed challenging the legality of the notices and assessment orders issued under the Kerala Value Added Tax Act 2003[53] for the assessment years 2010-11 and 2011-12. The notices and orders were challenged on the ground that the authorities did not have the jurisdiction to issue them since the amendments introduced to Section 25(1) of the KVAT Act through the Kerala Finance Acts 2017 and 2018 did not operate retrospectively. The Kerala High Court had to decide whether the Kerala State legislature had the legislative competence to amend the KVAT Act after the introduction of Article 246A to the Constitution, and the repeal of KVAT pursuant to the amendment. The Court noted that the special power introduced by Article 246A allows Parliament and the State legislatures to 'simultaneously' make laws.[54] Subsequently, while explaining the 'simultaneous' nature of power held by Parliament and State legislature, it was observed that the power under Article 246A can be exercised simultaneously by the State legislature and Parliament and none hold any 'unilateral or exclusive' legislative power.[55]

29 In its decision in **VKC Footsteps** (supra), this Court noticed the changes in the constitutional scheme introduced by Article 246A. One of us (Dr DY Chandrachud) writing for the two-judge Bench observed:

"52. Article 246-A has brought about several changes in the constitutional scheme:

52.1.*Firstly*, Article 246-A defines the source of power as well as the field of legislation (with respect to goods and services tax) obviating the need to travel to the Seventh Schedule.

52.2.*Secondly*, the provisions of Article 246-A are available both to Parliament and the State Legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce.

52.3.*Thirdly*, Article 246-A **embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. Concurrence, which operated within the fold of the Concurrent List, was regulated by Article 254**."

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[51] (2019) 2 SCC 599
[52] 2019 SCC OnLine Ker 5362
[53] **"KVAT Act"**
[54] Paragraph 19 of the judgement.
[55] Paragraph 22 of the judgment.

(**emphasis supplied**)

30 Article 246A provides Parliament and the State legislature with the concurrent power to legislate on GST. Article 246A has a non-obstante provision which overrides Article 254. Article 246 A does not provide a repugnancy clause. Unlike Article 254 which stipulates that the law made by Parliament on a subject in the Concurrent list shall prevail over conflicting laws made by the State legislature, the constitutional design of Article 246A does not stipulate the manner in which such inconsistency between the laws made by Parliament and the State legislature on GST can be resolved. The concurrent power exercised by the legislatures under Article 246A is termed as a 'simultaneous power' to differentiate it from the constitutional design on exercise of concurrent power under Article 246, the latter being subject to the repugnancy clause under Article 254. The constitutional role and functions of the GST Council must be understood in the context of the simultaneous legislative power conferred on Parliament and the State legislatures. It is from that perspective that the role of the GST Council becomes relevant.

Role of the GST Council

31 The Thirteenth Finance Commission set up the Task Force on GST. The Task Force recommended that the Empowered Committee of State Finance Ministers may, upon the introduction of GST, be transformed into a permanent constitutional body known as the 'Council of Finance Ministers'. The Task Force had recommended that:

(i) The Council would be responsible for modification in the design of dual GST regulating the indirect tax system;

(ii) The Council would make decisions on the principle of majority and not unanimity. The initial decision would be approved by the Union and threefourths of the States. The subsequent changes to the decision could be made upon an agreement of the Union and two-third of the States;

(iii) The body would maintain the 'existing balance of federal fiscal powers' since both the Union and the States would surrender their fiscal autonomy to change to the GST regime;[56]

(iv) The basis for levy should be common for both the Union and the States upon agreement. This could be on the lines of the GST law in Australia, where both the Union and the States will have to agree before any change in the rate or base of GST could be implemented;[57] and

(v) If the States deviate from the collectively agreed position on GST rates, a mechanism ought to be established by which the defaulting State pays penalty[58].

32 The 2011 Amendment Bill sought to include Article 279A in the Constitution which constituted the GST Council. The provision stipulated the constitution of the Council, the role of the Council and the quorum necessary for making decisions:

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[56] Tarun Jain, *Goods and Services Tax: Constitutional Law and Policy* (EBC 2018) 117
[57] Thirteenth Finance Commission, *Report of the Task Force on GST* (2009) Para 10.5
[58] Ibid, paragraph 9.8

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

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

(a) the Union Finance Minister – Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance – Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government- Members.

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

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

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

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

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

(d) the rates of goods and services tax; and

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

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

(6) One-third of the total number of members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

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

(8) Every decision of the Goods and Services Tax Council taken at a meeting shall be with the consensus of all the members present at the meeting.

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

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

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

(c) any irregularity in the procedure of the Council not affecting the merits of the case.

Explanation.—For the purposes of this article, "State'' includes a Union territory with Legislature."

33 According to the draft of Article 279A, as it found place in the 2011 Amendment Bill, every decision of the GST Council had to be taken with the consensus of all the members present at the meeting. The Bill also provided for the establishment of a GST Dispute Settlement Authority to adjudicate on any complaint referred to it by a State Government or the Union Government, arising out of deviation from any recommendations of the Council that resulted in the loss of revenue or which affected the harmonised structure of the GST. The draft provision also provided that Parliament may by law provide that no Court other than the Supreme Court shall exercise jurisdiction in respect of the dispute. The draft of Article 279B, as in the 2011 Amendment Bill, reads as follows:

"279B. (1) Parliament may, by law, provide for the establishment of a Goods and Services Tax Dispute Settlement Authority to adjudicate any dispute or complaint referred to it by a State Government or the Government of India arising out of a deviation from any of the recommendations of the Goods and Services Tax Council constituted under article 279A that results in a loss of revenue to a State Government or the Government of India or affects the harmonised structure of the goods and services tax.

(2) The Goods and Services Tax Dispute Settlement Authority shall consist of a Chairperson and two other members. (3) The Chairperson of the Goods and Services Tax Dispute Settlement Authority shall be a person who has been a Judge of the Supreme Court or Chief Justice of a High Court to be appointed by the President on the recommendation of the Chief Justice of India.

(4) The two other members of the Goods and Services Tax Dispute Settlement Authority shall be persons of proven capacity and expertise in the field of law, economics or public affairs to be appointed by the President on the recommendation of the Goods and Services Tax Council.

(5) The Goods and Services Tax Dispute Settlement Authority shall pass suitable orders including interim orders.

(6) A law made under clause (1) may specify the powers which may be exercised by the Goods and Services Tax Dispute Settlement Authority and provide for the procedure to be followed by it.

(7) Notwithstanding anything in this Constitution, Parliament may by law provide that no Court other than the Supreme Court shall exercise jurisdiction in respect of any such adjudication or dispute or complaint as is referred to in clause (1).

Explanation.— For the purpose of this article, "State'' includes a Union territory with Legislature."

34 The Standing Committee on Finance, Ministry of Finance in its 73rd report on the 2011 Amendment Bill explained the salient features of the Amendment Bill introducing

the GST regime.[59] It was noted that the GST Council will be a joint forum for the Union and the States to discuss issues on GST and the recommendations of the GST Council will be a benchmark and guiding force for the Union and State Governments.[60] In the same vein, it was observed that the legislature will be free to exercise its power on all issues recommended by the Council:[61]

"(c) A Goods and Services Tax Council (Article 279A) will be created, which will be a joint forum for the Centre and the States to discuss important issues relating to GST so that the objective of having a harmonized structure for GST and a harmonized national market can be achieved. This Council would function under the Chairmanship of the Union Finance Minister and will have Minister in charge of Finance/Taxation or Minister nominated by each of the States and UTs with legislatures, as members. The Council will make recommendations to the Union and the States on important parameters like rates, exemption list, threshold limits, etc. The recommendations made by this Council will act as benchmark or guidance to Union as well as State Governments. **The Parliament and well as State Legislatures will be free to exercise their power on all issues recommended by the Council.** One-third of the total number of Members of the Council will constitute the quorum of GST council. It is further provided that the decisions of the GST Council shall be with the consensus of all members present at the meeting. This is to protect the interests of each State and the Centre when the Council takes a decision.

(d) In exercise of their powers, **these legislative bodies may deviate from the recommendations of the Council** and may act in a manner which is prejudicial to the harmonious working of GST or which adversely impacts the revenue of some other State/Central Government. **Such deviations or actions are required to be kept to the minimum, if the objective of having a common national market and smooth working of GST is to be achieved**. It is accordingly proposed to set up Goods & Services Tax Dispute Settlement Authority (Article 279B), which may be approached by the affected Government (whether the Centre or the States) seeking redressal for any loss caused by any action due to a deviation from the recommendations made by the Goods & Services Tax Council or for adversely affecting the harmonious structure and implementation of the GST."

(emphasis supplied)

35 The Committee also sought the opinion of the Attorney General through the Department of Legal Affairs on whether the recommendations of the GST Council would undermine the power of the legislature. In response, the Attorney General stated that though the GST Council has the power to make recommendations, both Parliament and State legislatures, have the power to either accept or reject those recommendations.[62] The Attorney General stated:

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[59] Standing Committee on Finance, The Constitution (One Hundred and Fifteenth Amendment) 2011 (73rd report, 2013)

[60] Ibid, paragraph 12

[61] Ibid

[62] Ibid, paragraph 63

"This is an important point which has been raised and the short answer to it is that it is certainly open to Parliament to approve any recommendation. However, this does not mean that the GSTC recommendations will have no value. Having regarding to the nature of the Constitution of GSTC, the Council would have performed useful role in making recommendations but the ultimate authority whether to accept such recommendations can and must rest only in the Legislatures, namely, Parliament and the State Legislatures. In this view of the matter, the setting up of the GSTC does not strike at the root of the legislative powers over Finance. The powers of the legislature over Finance are sacrosanct and are not affected by the setting up of the GSTC."

36 The States raised concerns over the establishment of the GST Dispute Settlement Authority on the ground that such authority would have the power to override the supremacy of Parliament and the State Legislatures since a legislation, though constitutional, could be struck down if it deviated from the recommendations of the GST Council. The Committee, while addressing the concerns raised by the States recommended that the provision establishing the GST Dispute Settlement Authority be omitted since it would affect the fiscal autonomy of the States. It was further recommended that a provision be made in Article 279A itself empowering the GST Council to resolve disputes arising out of its recommendations:

"60. On the GST Dispute Settlement Authority, the Chairman, Empowered Committee of State Finance Ministers stated that most of the States have expressed the view that the provision pertaining to the GST Dispute Settlement Authority should be omitted as this authority shall have powers of overriding the supremacy of the Parliament and the State Legislatures. It shall affect the fiscal autonomy of the States.

61. The **Constitution confers autonomy on the Parliament and the State Legislatures to legislate within the respective fields assigned to them and the fact that a statute enacted by a competent Legislative body can be called into question on grounds of deviations from the recommendations of an essentially executive body, albeit Constitutional, is being construed as undermining the supremacy of the Legislature. Keeping in view the concerns expressed by the States, and the fact that the proposed provision of GST Dispute Settlement Authority will affect the fiscal autonomy of the Parliament and the State Legislatures, the proposed Article 279B providing for GST Dispute Settlement Authority may be omitted.** However, any dispensation involving multiple partners does require a mechanism to resolve disputes. A provision can be made in Article 279A itself empowering the GST Council to decide about the mechanism to resolve the disputes arising out of its recommendations."

(emphasis supplied)

37 The Committee reiterated in its conclusion that the GST Council would only play a 'constructive and enabling role' vis-à-vis the legislature and would not override the role of the legislature[63]:

[63] Ibid, paragraph 15

"The Committee would thus expect the proposed GST Council to follow the principles of cooperative federalism and democratic governance. As this will be a political and a recommendatory body, it would be in a position to play a constructive and enabling role vis-à-vis the Legislature, which needless to emphasise, would remain supreme in matters of legislation including taxation. In the Committee's view the mandate entrusted to the GST Council under the proposed Article 279A of the Constitution (Amendment) Bill does not in any way alter the existing constitutional scheme in so far as the Legislature, both Union and State, is concerned."

38 Taking into account the recommendations of the Standing Committee, Parliament introduced the 2014 Amendment Bill in which Article 279B was deleted and the GST Council was given the power under Article 279A(11) to devise a mechanism of dispute resolution. The GST Council consists of the Union Finance Minister as the Chairperson, the Union Minister of State in charge of Revenue or Finance and the Minister in charge of Finance or Taxation or any other Minister nominated by the State Government. The role of the GST Council is to make recommendations to the Union and the States on seven specific categories revolving around GST including principles of levy and apportionment of GST. Clause (h) of Article 279A(1) also provides the Council with plenary power by which it can make recommendations with respect to 'any other matter relating to GST', as the Council may decide. Clause (6) stipulates that the recommendations of the GST Council shall be guided by the 'need for a harmonised structure of goods and services tax'. One half of the total number of members of the Council shall constitute the quorum for meetings. Clause (9) provides that the Council shall take a decision with three-fourths majority of the members present and voting. The vote of the Union Government is given the weightage of one-third of the total votes cast, and the votes of the State Governments are given a weightage of two-thirds of the total votes.

Parliamentary Debates

39 The inclusion of Article 279A in the 2014 Amendment Bill raised two important concerns in Parliament: *first,* the GST Council could effectively override the legislative sovereignty of Parliament and the State legislatures; and *second,* the fiscal autonomy of the States would be diminished since the Centre has the power to stall a consensus reached by all the States. On 5 May 2015, a Member of Parliament from the State of Tamil Nadu raised the concern that the GST Council would diminish the role of the States in fiscal policy:[64]

"The GST Council as proposed in the Amendment will make recommendations on a whole range of issues relating to subsuming of taxes, cesses and surcharges under GST, exemption for goods and services, model GST laws, etc. This will override the supremacy of the legislature both at the Centre and the States in taxation matters. In the GST Council, the Union Government has one-third weightage in vote and only two-third of the weightage in vote is given to States and Union Territories. Voting rights of States and Union Territories are equal irrespective of their size. We, are therefore, opposed to the

[64] Speech of T.G Venkatesh Babu in Lok Sabha on 05.05.2015

idea of GST Council as a constitutional body as it compromises the autonomy of the States including in fiscal matters."

In response, the Finance Minister had said[65]:

"Once you get into the GST pipeline, the States and the Centre will have to interact together; and once they interact together, the State of Tamil Nadu will be involved in determining and taking decisions relating to the States. So, none of us is going to be surrendering his or her authority or autonomy. We are both going to be pooling our sovereignty together so that we are able to create a new taxation mechanism."

40 A Select Committee of the Rajya Sabha examined proposed Article 279A. It was suggested before the Select Committee that a 'dispute settlement body' to adjudicate on disputes arising from the non-compliance of recommendations of the GST Council should be constituted.[66] There was, in other words, a suggestion to reintroduce Article 279B as it found place in the 2011 Amendment Bill. The Government submitted that Article 279A(11) provides the GST Council with the power to decide the 'modalities' of dispute resolution, which may range from mediation, arbitration or even judicial adjudication depending on the nature of dispute:

"2.71 It may further be mentioned that Article 279A (11) only provides that GST Council may decide the 'modalities' to resolve disputes arising out of its recommendations. The 'modalities' could include any dispute resolution mechanism which could be inter-alia negotiation, mediation, arbitration or even a judicial authority as deemed appropriate by the GST Council depending on the nature of dispute before it. Thus, as per the proposed Bill, the GST Council shall, by itself, not be resolving the disputes but decide on the modalities for resolving the disputes."

41 The Government also submitted that the voting pattern between the Union and the States does not provide unequal power to any one of the constituent units:

"2.68 The structure of GST Council represents the federal nature of governance in this country. This has been done as per the recommendations of the Empowered Committee after their meeting in Bhubaneswar in January 2013, and also the recommendations of the Parliamentary Standing Committee. This provision has been consciously adopted to ensure the federal balance in the functioning of the GST Council, and also to enhance co-operative federalism. The existing pattern of vote-share in the GST Council ensures that no decision can be taken by the Council either by the Centre or the States acting on their own. Hence, neither the States nor the Centre alone can take a decision in the Council. Providing 3/4th weightage to the States would upset the federal balance between the Centre and the States. Presently, in the concurrent list, in case of any difference between Central and State legislation, the Central legislation prevails. The present weightage of votes in the GST Council would ensure that neither the Centre nor the States are able to take a decision without the support of the other. In other words both would enjoy a veto.

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[65] Speech of Mr. Arun Jaitley in Lok Sabha on 08.08.2016

[66] Select Committee, *Report on the Constitution (One Hundred and Twenty Second Amendment) Bill , 2014,* (Submitted to the Rajya Sabha, 2015)

2.69 Further, with Centre holding only 1/3rd of the votes, the Centre would require support of 20 States/Union Territories to get a resolution passed. This shows that Centre would need co-operation of States to get any decision taken at the GST Council."

42 Though the traditional view of interpretation of statutes is that legislative history is not readily used in interpreting a law, the modern trend of thinking on the subject has enabled courts to look into the history of a legislation to understand the full purport of the words used and the mischief sought to be remedied by the law. In **K.P Varghese** v. **ITO**[67], this Court held that the "speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted." In **Kalpana Mehta** v. **Union of India**[68], Chief Justice Dipak Misra held that reports of the Parliamentary Committees and the speeches made in the Parliament can be referred to identify the circumstances that led to the enactment of the legislation along with the intention of the legislature:

"129. We have referred to these authorities to highlight that the reports or speeches have been referred to or not referred to for the purposes indicated therein and when the meaning of a statue is not clear or ambiguous, the circumstances that led to the passing of the legislation can be looked into in order to ascertain the intention of the legislature. It is because the reports assume significance and become relevant because they precede the formative process of a legislation."

43 The parliamentary debates and the legislative history of the constitutional amendment, and the committee reports on Articles 246A and 279A indicate that:

(i) The draft of Article 279B, in the 2011 Amendment Bill, which sought to introduce a GST Dispute Settlement Authority to adjudicate on any dispute 'arising out of deviation' from the recommendations of the GST Council was deleted. The current Article 279A(11) provides that the GST Council shall devise a mechanism to adjudicate on any dispute that 'arises out' of the recommendations of the Council. The deletion of Article 279B while introducing the 2014 Amendment Bill and the inclusion of Article 279(11) in the text of the Constitution has brought about two substantial changes: *one*, that instead of the creation of a dispute settlement authority, the Council is vested with the power to decide on 'modalities' of dispute resolution; and *second,* while Article 279B stipulated that the authority shall adjudicate on '*disputes arising out of the deviation from the recommendations'*, Article 279(11) states that the *disputes arising out of recommendations* shall be resolved. The phrase 'deviation' has been omitted. Before the Select Committee of the Rajya Sabha, the Government had stated that disputes shall be resolved by modalities including mediation and arbitration. The Standing Committee of Finance in its report specifically recommended the deletion of Article 279B due to the concerns raised by the States; and

(ii) Under the 2011 Amendment Bill, the GST Council could recommend only when a unanimous decision would be reached. However, the Standing Committee of Finance

[67] (1981) 4 SCC 173.
[68] (2017) 7 SCC 295

had recommended that since it would be difficult to arrive at a consensus due to the socio-economic diversity amongst the States, the recommendations be made with a majority instead of unanimity. While making this recommendation, it was observed that if the GST Council functions like the present Empowered Committee where the differences are resolved amicably in an institutional mode, it would foster the spirit of cooperative federalism.

C.2 The nature of the recommendations of the GST Council

Indian federalism: Dialogue of cooperative federalism

44 The arguments in favour of reading the 'recommendations' of the GST Council as binding are two-fold[69]: *first,* if the GST Council cannot make binding recommendations, the entire structure of GST will collapse as each State would then levy a conflicting tax and collection mechanism; and *second*, if the recommendations are non-binding, then there would be no dispute to be resolved under Article 279(11) as the States would be free to disregard the recommendations. The arguments against interpreting the 'recommendations' of the GST Council as binding on the Union and the States are two-fold[70]: *first,* it would violate the supremacy of Parliament and State legislatures since both have a simultaneous power to legislate on GST; and *second,* it would violate the fiscal federalism of the States since the Centre has a one-third vote share and the States collectively have a two-third vote share. Therefore, no recommendation on a three-fourths majority can be passed without the consent of the Centre.

45 One of the important characteristics of a federal polity is the distribution of legislative power between the Union and the States. Mr H M Seervai while arguing that India is a federal nation, referred to the exclusive power of taxation held by the States to establish that the States were not merely given the power to legislate on 'subordinate' matters:

"If by 'subordinate' is meant 'not important', then, with respect, the present writer does not agree with Prof. Wheare's assessment of the exclusive State List. Public order, the police, administration of justice, local government, public health and sanitation, to mention but a few, are matters of great importance; and so are agriculture, water (subject to Union control of the waters of inter-State rivers), land, and fisheries. Again, the allocation of taxes between the Union and the States is mutually exclusive, and the taxes allotted exclusively to the States are not negligible. Thus sales tax is an expanding source of revenue in India as it becomes increasingly industrialized under the successive five year plans. In the industrialized State of Maharashtra, the yield from Sales Tax was about Rs. 1,580 million for the year of 1971-72, and the estimate for the year 1972-3 was about Rs. 1,780 million.

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[69] Alok Prasanna, 'For a mess of Potage: The GST's promise of increased revenue to states comes at the cost of the federal structure of the Constitution' National Law School of India Review. Vol. 28, No. 2(2016), pp-97-113.
[70] Ajitesh Kir, 'India's Goods and Services Tax: A Unique Experiment in Cooperative Federalism and a Constitutional Crisis in Waiting' Canadian Tax Journal (2021) 69:2, 391-445.

(k) The view that unimportant matters were assigned to the States cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the States, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union."

Justice PB Sawant writing for himself and Justice Kuldip Singh in **SR Bommai** v. **Union of India**[71], referred to the exclusive and equal legislative distribution of heads of taxation to establish the federal nature of the Indian Constitution.[72] Therefore, the exclusive powers held by the States and the Centre on matters of taxation was regarded as an important feature of India's federal polity. The Constitution Amendment Act 2016 alters the legislative distribution between the Centre and the State on indirect taxation by providing Parliament and State legislatures with 'simultaneous powers' and no provision for repugnancy. Therefore, according to Article 246A, both Parliament and the State Legislature possess equal power to legislate on aspects of GST. It is the contention of the Union that the recommendation of the GST Council should be binding on Parliament and the State Legislatures precisely because equal power is granted to both the federal units. The Union has argued that if the recommendations are not binding, then it would lead to an impasse where different Central and State legislations could be guiding the same field.

46 Article 246A vests Parliament and the State Legislatures with a unique, simultaneous law-making power on GST. It is in this context that the role of the GST Council gains significance. The recommendations of the GST Council are not based on a unanimous decision but on a three-fourth majority of the members present and voting, where the Union's vote counts as one-third, while the States' votes have a weightage of two-thirds of the total votes cast. There are two significant attributions of the voting system in the GST Council. *First,* the GST Council has an unequal voting structure, where the States *collectively* have a two-third voting share and the Union has a one-third voting share; and *second,* since India has a multi-party system, it is possible that the party in power at the Centre may or may not be in power in various States. Therefore, the GST Council is not only an avenue for the exercise of cooperative federalism but also for political contestation across party lines. Thus, the discussions in the GST Council impact both federalism and democracy. The constitutional design of the Constitution Amendment Act 2016 is *sui generis* since it introduces unique features of federalism. Article 246A treats the Centre and States as equal units by conferring a simultaneous power of enacting law on GST.. Article 279A in constituting the GST Council envisions that neither the Centre nor the States can act independent of the other.

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[71] (1994) 3 SCC 1

[72] Prasanna (n 69)

47 The dual federalism model or the autonomy model views the constituting units of the Centre and States as autonomous, independent and competing units. This model is also termed as competitive federalism, where the constituent units 'compete' with each other. Proponents of the cooperative federalism model argue that it is a mistake to view each unit as a separate autonomous entity. According to the theory of cooperative federalism, integration and not autonomy is the objective that federalism seeks to achieve.[73] While dual federalism is termed as 'layer cake federalism' due to the delineation of the structures of power, cooperative federalism is known as 'marble cake federalism' due to the integrated approach of the federal units.[74] This Court in **State (NCT of Delhi)** v. **Union of India**[75], has observed that India follows the model of cooperative federalism where the Union and the State Governments need to iron out the differences that arise in the course of the path of development. Chief Justice Dipak Mishra elucidated on the concept of cooperative federalism:

"119. Thus, the idea behind the concept of collaborative federalism is negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development. The Union Government and the State Governments should endeavour to address the common problems with the intention to arrive at a solution by showing statesmanship, combined action and sincere cooperation. In collaborative federalism, the Union and the State Governments should express their readiness to achieve the common objective and work together for achieving it. In a functional Constitution, the authorities should exhibit sincere concern to avoid any conflict. This concept has to be borne in mind when both intend to rely on the constitutional provision as the source of authority. We are absolutely unequivocal that both the Centre and the States must work within their spheres and not think of any encroachment. But in the context of exercise of authority within their spheres, there should be perception of mature statesmanship so that the constitutionally bestowed responsibilities are shared by them. Such an approach requires continuous and seamless interaction between the Union and the State Governments."

48 The Indian Constitution has sometimes been described as quasi-federal or a Constitution with a 'centralising drift'. This is because when the Constitution is read as a whole, the Union is granted a larger share of the power. Instances of this centralising drift can be traced to Articles 254, 248, and 353. However, there are instances such as Article 246A, where the Centre and the States are conferred equal power. Merely because a few provisions of the Constitution provide the Union with a greater share of power, the provisions in which the federal units are envisaged to possess equal power cannot be construed in favour of the Union. The Union and the States have a simultaneous power to legislate on GST. The GST Council has the power to make recommendations on a wide range of subjects relating to GST. Since the Constitution does not envisage a repugnancy provision to resolve inconsistencies between the Central and State laws on GST, the GST Council must *ideally* function, as provided by

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[73] Robert A. Schapiro, 'Justice Steven's theory of Interactive Federalism' 74 Fordham L. Rev. 2133 (2006)
[74] Jessica Bulman-Pozen and Heather K. Gerken, 'Uncooperative Federalism' Yale Law Journal, Vol. 118. No. 7 (May, 2009), pp. 1256-1310
[75] (2018) 8 SCC 501

Article 279A(6), in a harmonised manner to reach a workable fiscal model through cooperation and collaboration.

49 The federal system is a means to accommodate the needs of a pluralistic society to function in a democratic manner. It attempts to reconcile the desire of unity and commonality along with the desire for diversity and autonomy. Democracy and federalism are interdependent on each other for their survival such that federalism would only be stable in well-functioning democracies. Additionally, the constituent units in a federal polity check the exercise of power of one another to prevent one group from exercising dominant power. The Indian Constitution, though necessarily federal does confer the Union with a higher share of power in certain situations to prevent chaos and provide security.[76] However, even if the federal units are not entirely autonomous as in the traditional federal system, the units still wield power. The relationship between two constituent units that are not autonomous but rely on each other for their functioning is not in practice always collaborative or cooperative. If the States have been conferred lesser power they can still resist the mandates of the Union by using different forms of political contestation as permitted by constitutional design. Such contestation furthers both the principle of federalism and democracy. When the federal units are vested with unequal power, the collaboration between them is not necessarily cooperative. Harmonised decision thrives not just on cooperation but also on contestation. Indian federalism is a dialogue in which the States and the Centre constantly engage in conversations. Such dialogues can be placed on two ends of the spectrum - collaborative discussions that cooperative federalism fosters at one end of the spectrum and interstitial contestation at the other end. Jessica Bulman and Heather K, in their essay connote interstitial contestation as 'uncooperative federalism'.[77] They argue that the States which possess lesser power could use licenced dissent, dissent by using regulatory gaps or by civil disobedience such as passing a resolution against the decision of the Central Government as means of contestation. Differentiating the forms of cooperative federalism from the dissent in uncooperative federalism, the authors state:

"We think the best proxy for distinguishing dissent from routine negotiations is whether the state's action can be fairly understood as an effort to change national policy. An attempt to obtain an accommodation or modification of federal policy within the state should usually be understood as an example of cooperative bargaining. An attempt to contest and alter national policy is rightly understood as dissent."

50 Such form of contestation or as the authors term it, 'uncooperative federalism' is valuable since "it is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system."[78] Therefore, the States can use various forms of contestation if they disagree with the decision of the Centre. Such forms of contestation are also within the framework of Indian federalism. The GST Council is not merely a constitutional body restricted to the indirect tax system in India but is also an important focal point to foster federalism and democracy.

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[76] Seervai (n 50)

[77] Bulman-Pozen and K. Gerken (n 74)

[78] Ibid, page 1284

51 One of the important features of Indian federalism is 'fiscal federalism'. A reading of the Statement of Objects and Reasons of the 2014 Amendment Bill, the Parliamentary reports and speeches indicate that Articles 246A and 279A were introduced with the objective of enhancing cooperative federalism and harmony between the States and the Centre. However, the Centre has a one-third vote share in the GST Council. This coupled with the absence of the repugnancy provision in Article 246A indicates that recommendations of the GST Council cannot be binding. Such an interpretation would be contrary to the objective of introducing the GST regime and would also dislodge the fine balance on which Indian federalism rests. Therefore, the argument that if the recommendations of the GST Council are not binding, then the entire structure of GST would crumble does not hold water. Such a reading of the provisions of the Constitution diminishes the role of the GST Council as a constitutional body formed to arrive at decisions by collaboration and contestation of ideas.

The contextual meaning of 'recommendations'

52 The phrase 'recommendation' is used in numerous provisions in the Constitution but the import of the phrase differs contextually. Based on the submission of the Union Government, there are five categories into which the phrase 'recommendation' has been deployed in the Constitution:

(i) Category 1: Recommendation by the President prior to laying before the Parliament for voting: Articles 3, 109, 111, 113, 117, 203, 207, 255 and 274 discuss the recommendations of the President or the Governor. Here the authority recommending the initiation of the discussion and the decisionmaking authority are different.

(ii) Category 2: Recommendation followed by consultation: Article 233 uses the phrases 'consultation' and 'recommendation'. Article 233(1) states that the district judge shall be appointed by the Governor in 'consultation' with the High Court. Clause 2 states that the criteria for the appointment of a person who is not already in the service of the Union or the State is that he should have been a pleader or an advocate for at least seven years and he should be recommended by the High Court for the appointment to the post of a District Judge. There is a two-step process for appointment, *first,* the candidature must be recommended by the High Court; and *second,* the recommended candidate is appointed by the Governor in 'consultation' with the High Court.

(iii) Category 3: Recommendation with accountability: Articles 243I, 243Y, 280, 281, 338, 338B and 340. Articles 243I and 243Y stipulate that the Finance Commission shall make 'recommendations' to the Governor on apportionment of taxes to the Panchayats and Municipalities. Article 280 states that it "shall be the duty of the Commission to make recommendations to the President" on the principles governing distribution of taxes between the Union and the States. Article 281 fosters accountability by providing that every recommendation made by the Finance Commission shall be laid before the House together with an explanatory memorandum on the action taken on such recommendations. Article 338(5)(e) states that the National Commission for Scheduled Castes shall present a report to the President annually listing the measures that should be taken to enhance the protection and development of the Scheduled Caste. Article 338(6) states that the President shall cause the report to be laid before the Parliament

along with a memorandum explaining the action taken on the recommendations or the reason for non-acceptance, if any. Article 338A is a similar provision on the recommendatory nature of the National Commission for Scheduled Tribes. The President has the power to appoint a Commission to investigate the conditions of Backward Classes. The Commission is required to investigate the matters referred to them and present a report along with recommendations to the President which shall be laid before the Parliament along with an explanation memorandum.

(iv) Category 4: Non-qualifying recommendation: The Presidential Order to establish an Inter State Council dated 28 May 1990 issued by the Ministry of Home Affairs, and Article 263. Article 263 provides that the President may, in public interest, establish an Inter-State Council which shall make recommendations for better coordination of policy and action. The Inter-State Council was constituted by the Inter-State Council Order 1990 consisting of the Prime Minister, Chief Ministers of all States, Chief Ministers of Union Territories and six Ministers of Cabinet rank.

(v) Category 5: Recommendations which are obligatory in nature: Articles 270,

275, 344, 349 and 371A: Article 344 establishes the Commission and Committee of Parliament on Official Languages. Article 344(2) states that it shall be the duty of the Commission to make recommendations to the President on the usage of official languages. Clause 3 states that recommendations shall be made having due regard to the industrial, cultural and scientific advancement of India and the claim of non-Hindi speaking persons. Article 344(4) constitutes a Committee of the members of the Lok Sabha and Rajya Sabha. The Committee will have to examine the recommendations of the Commission and report its opinion to the President.

The President after considering the report, shall issue directions in accordance with the whole or any part of the report. Article 349 deals with the special procedure for enactment of law relating to language in the first fifteen years from the commencement of the Constitution. Articles 270 and 275 stipulate that the percentage of tax apportionment and fixation of the grants for the States from the Consolidated Fund of India shall be ordered by the President on the recommendation of the Finance Commission.

53 A survey the above provisions indicates that the nature and meaning of the term 'recommendation' differs contextually. All the provisions qualify the nature of recommendation. For instance, in category one, the recommendation of the President is for the initiation of the discussion; in category two, a decision on the recommendation is arrived upon 'consultation'; in category three, the decisionmaking authority has to submit an explanatory note on the action or inaction taken on the recommendations.; in category four, the recommendations are not qualified. Article 263 only states that the Inter-State Council has a duty to recommend. There is no further explanation on whether the recommendation ought to be mandatorily accepted, or deliberated upon; in category five, the recommendations of the authority are expressly stated to be 'binding' on the decision-making authority.

54 The GST Council which is a constitutional body is entrusted with the duty to make recommendations on a wide range of areas concerning GST. The GST Council has

plenary powers under Article 279A (4)(h) where it could make recommendations on 'any other matter' related to GST as the Council may decide. The GST Council has to arrive at its recommendations through harmonised deliberation between the federal units as provided in clause 6 of Article 279A. Unlike the other provisions of the Constitution which provide that recommendations shall be made to the President or the Governor, Article 279A states that the recommendations shall be made to the 'Union and the States'. The recommendation of the GST Council made under Article 279A is non-qualified. That is, there is no explanation on the value of such a recommendation. Yet the notion that the recommendations of the GST Council transform into legislation in and of themselves under Article 246A would be farfetched. If the GST Council was intended to be a decision-making authority whose recommendations transform to legislation, such a qualification would have been included in Articles 246A or 279A. Neither does Article 279A begin with a non-obstante clause nor does Article 246A provide that the legislative power is 'subject to' Article 279A.

55 The Constitution employs the phrase 'consultation' in certain contexts. For example, Article 320(3) states that the Public Service Commission shall be 'consulted' on matters relating to civil posts. Article 320(3) reads as follows:

"(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, **shall be consulted**—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers; […]"

(emphasis supplied)

56 If the GST Council were intended to be a constitutional body whose recommendations transform into legislation without any intervening act, there would have been an express provision in Article 246A. Article 279A does not mandate tabling the recommendations in the legislature like the provisions in category 3, where the recommendations have to be mandatorily tabled in the legislature along with an explanatory note. Only the secondary legislation which is framed based on the recommendations of the Council under the provisions of the CGST Act[79] and IGST Act[80] is mandated to be tabled before the Houses of the Parliament. The use of the phrase 'recommendations to the Union or States' indicates that the GST Council is a recommendatory body aiding the Government in enacting legislation on GST.

57 In **Manohar** v. **State of Maharashtra**[81], a two-judge Bench of this Court while interpreting Section 20(2) of the Right to Information Act 2005 observed that the phrase 'recommendation' must be interpreted in contradistinction to 'direction' or 'mandate'. It was observed as follows:

[79] Section 166 of the CGST Act
[80] Section 24 of the IGST Act
[81] (2012) 13 SCC 14

"22. We may notice that proviso to Section 20(1) specifically contemplates that before imposing the penalty contemplated under Section 20(1), the Commission shall give a reasonable opportunity of being heard to the officer concerned. However, there is no such specific provision in relation to the matters covered under Section 20(2). Section 20(2) empowers the Central or the State Information Commission, as the case may be, at the time of deciding a complaint or appeal for the reasons stated in that section, to recommend for disciplinary action to be taken against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the relevant service rules. Power to recommend disciplinary action is a power exercise of which may impose penal consequences. When such a recommendation is received, the disciplinary authority would conduct the disciplinary proceedings in accordance with law and subject to satisfaction of the requirements of law. It is a "recommendation" and not a "mandate" to conduct an enquiry. "Recommendation" must be seen in contradistinction to "direction" or "mandate". But recommendation itself vests the delinquent Public Information Officer or State Public Information Officer with consequences which are of serious nature and can ultimately produce prejudicial results including misconduct within the relevant service rules and invite minor and/or major penalty."

In **Naraindas Indurkhya** v. **State of Madhya Pradesh**[82], a Constitution Bench observed that a 'recommendation' has persuasive value. In this case, this Court was dealing with the question of whether textbooks 'recommended' by the Board could be held to be in effect immediately. The Court observed:

"15. … there is a basic distinction between recommendation and prescription of a text book. When a text book is prescribed by an appropriate authority having legal power to do so, it has to be followed by the schools. Prescription of a text book carries with it a binding obligation to follow the text book. There is no such obligation when a text book is merely recommended. Recommendation has merely a persuasive effect, it being open to the schools to accept the recommendation or to reject it as they think fit. The schools may use the recommended text book or they may not according as the Principals choose. That is why no conferment of statutory power is needed to enable the Board to recommend text books and no question of ultra vires can arise in such a case. Now the text books which formed the subject matter of the notifications dated April 5, 1972, April 25, 1972, April 26 and May 17, 1972 were merely recommended and not prescribed by the Board and being only recommended text books as distinguished from prescribed text books, they obviously could not be said to be 'in force' immediately before the appointed day. Section 4, sub-section (2) did not, therefore, apply in respect of these text books and they could not be regarded as text books prescribed under Section 4, sub-section (2)."

[82] (1974) 4 SCC 788

In numerous cases, this Court has reiterated that recommendations cannot create binding and enforceable rights, in contradistinction to a 'direction' or 'mandate'.[83]

Interpretation of 'recommendation' vis-à-vis the provisions of IGST Act and CGST Act

58 The contention of the Union is that the recommendations of the GST Council are binding since Parliament and the State legislatures have agreed to align themselves with the recommendations as is evident from the provisions of the IGST Act and CGST Act. Certain provisions of the IGST Act, CGST Act and SGST Acts expressly provide that the rule-making power delegated to the Government shall be exercised on the recommendations of the GST Council. For instance, Section 5 of the IGST Act provides that the taxable event, taxable rate and taxable value shall be notified by the government on the "recommendations of the Council". Similarly, the power of the Central Government to exempt goods or services or both from levy of tax shall be exercised on the recommendations of the GST Council under Section 6 of the IGST Act. Section 22 provides that the Government may exercise its rule making power on the recommendations of the GST Council. The CGST Act also provides for similar provisions in Sections 9, 11 and 164.

59 The provisions of the IGST Act and CGST Act which provide that the Union Government is to act on the recommendations of the GST Council must be interpreted with reference to the purpose of the enactment, which is to create a uniform taxation system. The GST was introduced since different States could earlier provide different tax slabs and different exemptions. The recommendations of the GST Council are made binding on the Government when it exercises its power to notify secondary legislation to give effect to the uniform taxation system. The Council under Article 279A has wide recommendatory powers on matters related to GST where it has the power to make recommendations on subject matters that fall outside the purview of the rule-making power under the provisions of the IGST and CGST Act. Merely because a few of the recommendations of the GST Council are binding on the Government under the provisions of the CGST Act and IGST Act, it cannot be argued that all of the GST Council's recommendations are binding. As a matter of first principle, the provisions of the Constitution, which is the grundnorm of the nation, cannot be interpreted based on the provisions of a primary legislation. It is only the provisions of a primary legislation that can be interpreted with reference to the Constitution. The legislature amends the Constitution by exercising its constituent power and legislates by exercising its legislative power. The constituent power of the legislature is of a higher constitutional order as compared to its legislative power. Even if it is Parliament that has enacted laws making the recommendations of the GST Council binding on the Central Government for the purpose of notifying secondary legislations, it would not mean that all the recommendations of the Council made by virtue of its power under Article 279A have a binding force on the legislature.

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[83] Union of India v. Pradip Kumar Dey, (2000) 8 SCC 580; Kesoram Industries and Cotton Mills Ltd. v. CWT, (1966) 2 SCR 688; Som Mittal v. Government of Karnataka, (2008) 3 SCC 753; State of AP v. T. Gopalakrishnan Murthi, (1976) 2 SCC 883.

60 With this background and context, we shall now proceed to analyse the scheme of the GST legislation and whether the impugned levy, imposed on the recommendations of the GST Council, is valid and permissible under law.

D Analysis

D.1 Statutory Provisions and Scheme of the IGST Act[84]

61 The IGST Act enables the Central Government to impose IGST on inter-state supply of goods and services. The Preamble to the IGST Act describes it as:

"An Act to make a provision for levy and collection of tax on interState supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto."

In aiding the levy and collection of IGST, the IGST Act provides for a comprehensive scheme for determining the nature of supply, time of supply and place of supply.

62 Statutory interpretation will determine whether the IGST Act confers the powers on the Central Government, in consultation with the GST Council, to designate imports as a supply of services under Section 5(3) of the IGST and whether the importer can be considered as the recipient of such supply, liable to pay tax on a reverse charge basis. Further, it will determine if the Central Government, in consultation with the GST Council, has the powers to designate the importer as a recipient of a service under 5(4) of the IGST Act, when goods are imported on a CIF basis. The critical fact in this case is that the service of shipping in these CIF contracts is availed by the non-taxable exporter who engages and pays a foreign shipping line of their choice, without the involvement of the importer. In contrast, in FOB contracts, the Indian importer pays for the services of shipping and directly deals with the shipping line. The respondents herein are importers of non-coking coal on a CIF basis.

63 Section 5 of the IGST Act provides for the levy and collection of tax on interState supplies of goods or services. The power to impose such tax is derived from Article 286(2) read with Article 269A(1). Sub-Section (1) of Section 5 provides for the levy of the integrated goods and services tax on all inter-State supplies of goods or services or both. Section 5 reads as follows:

"5. Levy and collection.— (1) Subject to the provisions of subsection (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

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

[84] Note: In order to facilitate convenience while reading the judgment, some of the statutory provisions are reflected in more than one place in the judgment.

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."

The proviso to Section 5(1) of the IGST Act clarifies that the tax is levied on goods imported into India, in accordance with Section 3 of the Customs Tariff Act 1975. The value is determined under the Customs Tariff Act at the point when the customs duties are levied in accordance with the Customs Act.

64 The payment of IGST on a reverse-charge basis is contemplated in subsections (3) and (4) of Section 5. Sub-section (3) provides that IGST may be paid on a reverse charge basis on specified categories of supply of goods or services or both. The Central Government is empowered to specify these categories on the recommendations of the GST Council. Hence, on its plain terms, the payment of IGST on a reverse charge basis is envisaged on specific categories of supply of goods or services, or both as notified by the Central Government. The tax on a reverse charge basis is payable by the recipient of such goods or services, or both. The power, in other words, is to specify categories of goods or services (or both). The provision does not empower the government to specify the recipient of the supply of goods or services. The unamended Sub-section (4) of Section 5[85] provided that the tax in respect of the supply of goods or services by an unregistered supplier, shall be paid on a reverse charge basis by a specified registered person, as the recipient of such supply of goods or services. The above provisions read as follows:

"(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 integrated tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient 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."

65 On 28 June 2017, the Central Government issued Notification 8/2017, in exercise of its powers under Section 5(1), Section 6(1) and Section 20 of the IGST Act, read with Section 15(5) and Section 16(1) of the CGST Act. Entry 9(ii) of Notification 8/2017 reads as follows:

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[85] Sub-Section 4 of Section 5 was amended by The Integrated Goods and Services Tax (Amendment) Act 2018 w.e.f. 1 February 2019 and reads as follows:

"(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."

Sl No.	***Chapter, Section or Heading***	***Description of Service***	***Rate (per cent)***	***Condition***
9	***Heading 9965*** *(Goods transport services)*	[…]	[…]	[…]
		(ii) Transport of goods in a vessel including services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India up to the customs stations of clearance in India.	5	Provided that credit of input tax charged on goods (other than on ships, vessels including bulk carriers, tankers) used in supplying the service has not been taken ***Explanation:*** This condition will not apply where the supplier of service is located in nontaxable territory. [Please refer to ***Explanation*** no. (iv)]

By Entry 9(ii) of Notification 8/2017, an integrated tax of 5 per cent was levied on supply of specified services, including transportation of goods in a vessel from a place outside India up to the customs station of clearance in India.

66 On 28 June 2017, Notification 10/2017 was issued by the Central Government in exercise of powers conferred by Section 5(3) of the IGST Act. Notification 10/2017 specified the importer as the recipient of transportation of service when the supplier is location in a non-taxable territory and the service of transportation is supplied by a person in a non-taxable territory. Entry 10 of Notification 10/2017 states the following:

Sl No.	***Category of Supply of Services***	***Supplier of***	***Recipient of Service***
0)	***(2)***	***(3)***	***(4)***

10	Services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India	A person located in nontaxable territory	Importer, as defined in clause (26) of section 2 of the Customs Act 1962 (52 of 1962), located in the taxable territory

Thus, Entry 10 of Notification 10/2017 deems an importer of goods as the 'recipient of service' of transportation of goods by a foreign shipping line.

67 Both the impugned notifications, Notification 8/2017 and Notification 10/2017, have been challenged as *ultra vires* the IGST Act. Before adverting to the challenges raised by the parties, it becomes necessary to advert to some of the key provisions contained in the CGST Act, IGST Act and Customs Act. These provisions are necessary to respond to several contentions raised by the respondents, including: (i) whether the taxable event stipulated by the impugned notifications constitutes a 'supply' under the IGST Act; (ii) whether the importer of goods on a CIF basis can be deemed to be the 'recipient' of shipping services when they do not pay the consideration; and (iii) whether the import of goods constitutes a composite supply, among others.

68 The provisions of the IGST Act apply to the whole of India as provided under Section 1. Section 5 of the IGST Act is the charging section. Sub-section (1) of Section 5 provides that the levy of IGST shall be paid by the taxable person. The term 'taxable person' is defined in Section 2(107) of the CGST Act:

"(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24"

69 Section 2(98) of the CGST Act defines 'reverse charge':

"(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;"

As defined in the above clause, under the reverse charge mechanism, the liability to pay is on the recipient of the supply of goods or services, as opposed to the supplier of goods or services. Section 24(iii) of the CGST Act provides for compulsory registration of "*persons who are required to pay tax under the reverse charge*".

"24. Compulsory registration in certain cases.—Notwithstanding anything contained in sub-section (1) of Section 22, the following categories of persons shall be required to be registered under this Act,—

(i) persons making any inter-State taxable supply;

(ii) casual taxable persons making taxable supply;

(iii) **persons who are required to pay tax under reverse charge;**

[…..]

(*xii*) such other person or class of persons as may be notified by the Government on the recommendations of the Council."

(**emphasis supplied**)

70 Section 2 (105) of the CGST Act defines the 'supplier' in relation to goods or services as:

"(105) "supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;"

71 Section 2(93) of the CGST Act defines the 'recipient' of supply of goods or services or both and provides:

"(93) "recipient" of supply of goods or services or both, means— (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

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

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

72 Sections 2(14) and 2(15) of the IGST Act define the location of the recipient of services and the supplier of services as follows:

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

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

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

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

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

(15) "location of the supplier of services" means,— (a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;

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

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

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

73 Chapter IV of the IGST Act determines the nature of the supply. Section 7 of the IGST Act determines the nature of supply as inter-State supply, Section 8 provides for intra-State supply and Section 9 provides for supplies in territorial waters.

74 Section 7 of the IGST Act lay down the conditions for a supply to be construed as an "inter-State supply". The relevant provisions, particularly subSections (3) and (4) of Section 7 are as follows:

"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.

[…..]

(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 interState 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**."

(**emphasis supplied**)

75 The term 'supply' has been defined in the IGST Act with reference to the CGST Act. Section 2(21) of the IGST Act provides that:

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

Section 7(1) of the CGST Act provides that:

"7. Scope of supply.

(1) For the purposes of this Act, the expression "supply" includes-

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

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

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

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

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

(**emphasis supplied**)

The term 'taxable territory' is defined in Section 2(22) of the IGST Act to mean the *"territory to which the provisions of this Act [IGST Act] apply"*.

76 Section 13 of the IGST Act deals with determining the place of supply of services where the location of supplier or location of recipient is outside India:

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

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

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

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

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

[…..]

(6) Where any services referred to in sub-section (3) or subsection (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.

[….]

(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.

(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;

(f) 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."

(**emphasis supplied**)

77 Chapter IX of the IGST Act contains miscellaneous provisions, under which Section 20 of the IGST Act provides that the provisions in the CGST Act relating to the scope of supply, composite or mixed supply, time and value of supply, shall apply *mutatis mutandis* to integrated tax. In this regard, the time of supply of services is provided in Section 13 of the CGST Act, while the value of taxable supply is determined under Section 15 of the CGST Act.

78 Section 13 of the CGST Act states that the liability to pay tax on services arises at the time of supply. Sub-section (3) of Section 13 provides for the time of supply when tax is paid on a reverse charge basis:

"13. Time of supply of services.

[…]

(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:--

(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or

(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:

Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier."

Sub-section (5) of Section 13 provides for the time of supply when it cannot be determined under sub-Section (2), (3) or (4):

"(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section

(4), the time of supply shall—

(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or

(b) in any other case, be the date on which the tax is paid."

79 Section 15 of the CGST Act provides for the determination of the value of taxable supply. Sub-section (1) provides that the value of supply of goods or services shall be the transaction value; sub-section (2) provides that the value of supply shall include taxes, duties, fees etc. charged separately under the goods and services tax regime, incidental expenses, interest, late fee penalty, etc. Sub-sections (4) and (5) provide for the value of the supply of goods or services if it cannot be determined under sub-section (1).

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

[….]

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

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

D.2 Do the impugned notifications suffer from excessive delegation?

80 Article 286(1) stipulates that the State shall not levy tax when the supply of goods or services takes place outside the State or in the course of import or export of goods or

services from the territory of India. Clause (2) of Article 286 states that Parliament may by law formulate principles for determining when there is a supply of goods or services as prescribed by clause (1):

"286(1): No law of a State shall impose, or authorize the imposition of, a tax, 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, 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)."

81 Article 269A provides that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Union Government. The manner of apportionment between the Union and the States has to be provided by Parliament on the recommendations of the GST Council. The explanation to Article 269A(1) states that supply of goods or services in the course of import shall be deemed to be supply in the course of inter-State trade or commerce. Clause (5) provides that Parliament may by law formulate principles for determining the place of supply and when the supply of goods or services takes place in the course of inter-state trade or commerce:

"269A. (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.**

[…]

(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."

(**emphasis supplied**)

82 Articles 269A stipulates that Parliament may by law formulate principles for determining: (a) the place of supply and; (b) when the supply of goods or services or both takes place in the course of inter-State trade or commerce. Article 286(1) empowers Parliament to formulate the principles by law for determining when a supply of goods or services, or both, takes place (a) outside the state; and (b) in the course of import into or export outside the territory of India. Parliament enacted the IGST Act prescribing the principles as required under Articles 269A and 286(1). The provisions of the IGST Act deal with the levy and collection of tax (Section 5(1)), export of goods and services (Section 2(5) and 2(6)), import of goods and services (Section 2(10) and 2(11)),

identification of the location of the supplier and recipient of services (Sections 2(14) and 2(15)), determination of the nature of inter-State supply (Section 7), supplies in territorial waters (Section 9), place of supply with respect to import to India and export from India (Section 11), and place of supply of services where the location of the supplier and recipient is in India and outside India (Sections 12 and 13).

83 The contention of the respondents is that Section 5(3) of the IGST Act only delegates the power to identify the categories of goods or services on which the tax shall be paid on reverse charge basis. It is contended that since Notification 10/2017 identifies an importer as a service recipient for the purposes of Section 5(3), it is *ultra vires* the parent Act on the ground of excessive delegation.

84 The legislature is required to perform its essential legislative functions. Once the skeletal structure of the policy is framed by the legislature, the details can emerge through delegated legislations.[86] It is a settled position that the legislature cannot delegate its 'essential legislative functions'.[87] The essential legislative functions with respect to the GST law are the levy of tax, subject matter of tax, taxable person, rate of taxation and value for the purpose of taxation. The principles governing these essential aspects of taxation find place in the IGST Act: Section 5(1) identifies the subject matter of taxation as inter-State supplies of goods, services or both; Section 2(107) of the CGST Act identifies a taxable person; Section 5(1) provides a maximum cap of 40% as the rate of taxation; and Section 5(1) stipulates that the value of taxation be determined under Section 15 of the CGST Act.

85 Section 2(98) of the CGST Act defines "reverse charge" as the liability of the recipient of the supply of goods or services or both to pay tax instead of the supplier. Section 2(93) of the CGST Act defines "recipient" with reference to three situations (i) when consideration is payable for the supply of goods or services or both; (ii) when no consideration is payable for the supply of goods; and (iii) when no consideration is payable for the supply of services. In the first situation, the recipient is the person by whom consideration is payable. In the second situation, the recipient is the person to whom (a) the goods are delivered or made available; or (b) possession or the use of the goods is given or made available. The CGST Act also stipulates a two-fold requirement for a recipient to be taxed on reverse charge basis- the recipient must be a 'person' as defined under Section 2(84) of the CGST; and the person is a "taxable person" only if registered or is liable to be registered under Section 22 or Section 24. Section 24(iii) of the CGST Act states that persons who are required to pay tax under reverse charge must be registered. Therefore, both the IGST and CGST Act clearly define reverse charge, recipient and taxable persons. Thus, the essential legislative functions vis-à-vis reverse charge have not been delegated.

86 Section 5(3) of the IGST Act provides the Government the power to specify categories of supply of goods or services or both on which tax shall be paid on a reverse

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[86] Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills, AIR 1968 SC 1232; Avinder Singh v. State of Punjab, 1979 1 SCC 137

[87] In re Delhi Laws Act 1912, AIR 1951 SC 332; Edward Mills Co. Ltd. v. State of Ajmer, AIR 1955 SC 25; A.N Parasaran v. State of Tamil Nadu, (1989) 4 SCC 683

charge basis by the recipient. The Government is to exercise this power on the recommendation of the GST Council. The Government in exercise of its power under Section 5(3) of the IGST Act issued the impugned Notification 10/2017 specifying the 'categories of the supply' which shall be subject to reverse charge. The notification, besides specifying the criteria, has also mentioned the corresponding recipient in those categories. As discussed above, the IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. Therefore, the stipulation of the recipient in each of the categories is only clarificatory. The Government by notification did not specify a taxable entity different from that which is prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.

D.3 Charging Section: taxable person, taxable rate and manner of determining value

87 In determining the vires of the impugned notifications, a few preliminary contentions raised by the respondents would have to be addressed. The respondents have argued that no charge has been created for the ocean freight transaction to be taxed in the hands of the importer. It has been alleged that only Section 5(1) is a charging provision and Sections 5(3) and 5(4) cannot independently create a charge.

88 In assessing this claim, this Court is bound by a decision of the Constitution Bench in **Mathuram Agrawal** (supra) which has identified three essential elements of taxation:

(i) The subject of the tax;

(ii) The person who is liable to pay the tax; and (iii) The rate at which the tax is to be paid.

This test has been further elaborated by a two-judge Bench of this Court in **Gobind Saran Ganga Saran** (supra) by further requiring the designation of the measure or the value to which the rate of the tax will be applied. Thus, the four canons of taxation are as follows:

(i) The taxable event;

(ii) The person on whom the levy is imposed;

(iii) The rate at which the levy is imposed; and

(iv) The measure or the value to which the rate will be applied.

89 Section 5(1) of the IGST Act specifically identifies the four canons of taxation: (i) the inter-State supply of goods and services as the taxable event; (ii) the "taxable person" as the person on whom the levy is imposed; (iii) the taxable rate as such a rate notified by the Union Government on the recommendation of the GST Council, capped at forty per cent; and (iv) the taxable value as the value determined under Section 15 of the CGST Act.

90 Section 5(3) and Section 5(4) of the IGST Act are inextricably linked with Section 5(1) of the IGST Act which is the charging provision. They must be construed together in

determining the vires of the taxation. In **CIT** v. **B C Srinivas Setty**[88], a three-judge Bench of this Court has held that the machinery provisions of an Act and the charging sections are inextricably linked. The Court observed:

"A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions of the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. **The character of the computation provisions in each case bears a relationship to the nature of charge. Thus the charging section and the computation provisions together constitute an integrated code.** When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

(**emphasis supplied**)

Taxable person

91 The respondents have alleged that the importer cannot be validly termed as a taxable person. However, this argument has to fail on a close reading of the impugned notifications alongside Sections 2(107) and 24 of the CGST Act. Section 24(iii) of the CGST Act mandates persons required to pay tax under reverse charge to be compulsorily registered under the CGST Act. Section 2(107) of the CGST Act defines a "taxable person" to mean a person who is registered or liable to be registered under Section 24 of the CGST Act. Neither Section 2(107) nor Section 24 of the CGST Act qualify the imposition of reverse charge on a "recipient of service" and broadly impose it on "the persons who are required to pay tax under reverse charge". Since the impugned notification 10/2017 identifies the importer as the recipient liable to pay tax on a reverse charge basis under Section 5(3) of the IGST Act, the argument of the failure to identify a specific person who is liable to pay tax does not stand.

92 The decision in **Laghu Udyog** (supra), rendered by a two-judge Bench of this Court, invalidated certain service tax rules formulated under the Finance Act 1997 to give effect to the collection of service tax. Section 66 read with Section 68(1)(a) of the Finance Act 1997 specifically identified the taxable person to include only those persons responsible for collecting the service tax. The rules had sought to effect a reverse charge by identifying the customers of goods transport operators and of clearing and forwarding agents as the assessee, even though they were not responsible for collecting the service tax. The basis for nullifying the rules was that the Finance Act 1997 did not enable the imposition of such a reverse charge on the person who is not supplying the service. The Court held:

"9. Section 68(1-A) is a special provision which has been inserted by the Finance Act, 1997. According to Section 68(1) "every person who was providing the taxable service is the one who is required to collect the service tax at the rate specified in Section 66". With respect to the taxable services referred in Items (*g*) to (*r*) of clause (41) of Section 65, Section 68(1-A) provides that the service tax for such service shall be collected from

[88] AIR 1981 SC 972

such person and in such manner as may be prescribed and to such person all the provisions shall apply as if he is the person responsible for collecting the service tax in relation to such service. As we read Section 68 it does not in any way seek to alter or change the charge of service tax levied under Section 66, which is on the person responsible for collecting the service tax. It also does not to our mind, in any way, amend any of the clauses of Section 65 which contain the definitions of different expressions. All that Section 68(1-A) enables to be done is that with regard to the assessees or the persons who are responsible for collecting the service tax, the individual or the officer concerned can be identified and it is that person who would be a person responsible for collecting the service tax. In other words this provision, namely, **Section 68(1-A) cannot be so interpreted as to make a person an assessee even though he may not be responsible for collecting the service tax. The service tax is levied by reason of the services which are offered. The imposition is on the person rendering the service. Of course, it may be an indirect tax; it may be possible that the same is passed on to the customer but as far as the levy and assessment are concerned it is the person rendering the service who alone can be regarded as an assessee and not the customer.** This is the only way in which the provisions can be read harmoniously.

[…]

10. By amending the definition of "person responsible for collecting of service tax" in the impugned rules with regard to services provided by the clearing and forwarding agents and the goods transport operator a person responsible is said to be the client or the customer of the clearing and forwarding agents and the goods transporter. In relation to the services provided by others and referred to in sub-rules (*i*) to (*xi*) and (*xiii*) to (*xvi*) of Rule 2(*d*), the definition of the person responsible is in consonance with the definition of that expression occurring in Section 65 of the Act. However, with regard to the services rendered by the clearing and forwarding agents and the goods transport operator the definitions contained in Rule 2(*d*)(*xii*) and (*xvii*), which seek to make the customers or the clients as the assessee, are clearly in conflict with Sections 65 and 66 of the Act."

(**emphasis supplied**)

The decision in **Laghu Udyog** (supra) has no applicability to the facts of the present case since Parliament has statutorily incorporated the concept of a reverse charge under Sections 5(3) and 5(4) of the IGST Act. The impugned notification 10/2017 clearly specifies a taxable person who is liable to pay a reverse charge that is envisaged in the statute. Thus, the impugned notifications cannot be invalidated for an alleged failure to identify a taxable person.

Taxable value

93 By a corrigendum dated 8 June 2016, Notification 8/2017 was amended to include the measure of taxable value to be ten per cent of the CIF value. Section 5(1) of the IGST Act enables the taxable value to be determined under Section 15 of the CGST Act. The

respondents have argued that the value has to be strictly determined by Section 15(1)[89] of the CGST Act and not by way of delegated legislation. However, Sections 15(4) and 15(5) enable delegated legislation to prescribe methods for determination of value, on the recommendations of the GST Council. Section 15 is extracted below :

"Section 15- Value of Taxable Supply:

[…]

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

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

Rules 27 to 31 of Chapter IV of the CGST Rules 2017, prescribe the manner of determining value of supply. Rule 31 also provides for residual powers to the GST Council for prescribing modes of valuation.

"31. Residual method for determination of value of supply of goods or services or both.— Where the value of supply of goods or services or both cannot be determined under Rules 27 to 30, the same shall be determined using reasonable means consistent with the principles and the general provisions of Section 15 and the provisions of this Chapter:

Provided that in the case of supply of services, the supplier may opt for this rule, ignoring Rule 30."

94 The respondents have urged that the determination of the value of supply has to be specified only through rules, and not by notification. However, this would be an unduly restrictive interpretation. Parliament has provided the basic framework and delegated legislation provides necessary supplements to create a workable mechanism. Rule 31 of the CGST Rules 2017 specifically provides for a residual power to determine valuation in specific cases, using reasonable means that are consistent with the principles of Section 15 of the CGST Act. This is where the value of the supply of goods cannot be determined in accordance with Rules 27 to 30 of the CGST Rules 2017. Thus, the impugned notification 8/2017 cannot be struck down for excessive delegation when it prescribes 10 per cent of the CIF value as the mechanism for imposing tax on a reverse charge basis.

D.4 Taxable event: Is an ocean freight transaction for import of goods a valid category of supply of services under Section 5(3) of IGST Act?

95 The other limb for contesting the validity of the impugned notification is with respect to its identification of a "taxable event". The question that falls for the determination is whether the impugned notifications issued in 2017, under Section 5(3) of the IGST Act,

[89] "Section 15: Value of Taxable Supply- (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."

validly prescribe a taxable event that constitutes an inter-State supply of goods and services with the importer being a recipient of shipping services in CIF transactions.

96 The analysis of whether import of goods under CIF contracts constitutes a valid import of service has to be answered on two prongs: (i) whether classification of imports as a specific category of supply of shipping service is valid under Section

5(3) read with Section 5(1) of the IGST Act; and (ii) whether the recipient of the imported goods is also a recipient of shipping services in CIF transactions under Section 5(3).

D.4.(a) Do imported goods procured on a CIF basis constitute an inter-state supply or is it an extra-territorial tax?

97 Notification 8/2017 specifically delineates the service that is accompanied with the transportation of goods from a non-taxable territory as a specified category of service under Section 5(3) of the IGST Act. This categorization taxes the recipient of such transportation service on a reverse charge basis. The respondents have argued that the supply of service of shipping in a CIF contract is from the foreign shipping line to the foreign exporter. It is alleged that this transaction has no territorial nexus to India and does not constitute "supply" that can be taxed within the meaning of the CGST Act and IGST Act.

98 We shall now advert to certain key provisions relevant to determine whether the taxable event in the present case that is, "services supplied by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India" constitutes an 'interState supply' for the purposes of the charging Section 5(1) of the IGST Act, read with Sections 5(3) and the unamended Section 5(4).

99 Section 5(1) levies IGST on all "inter-state supplies" of goods or services or both. Section 5(3) of the IGST Act confers power on the Central Government, on the recommendation of the GST Council, to specify categories of supply of goods or services or both where the tax shall be paid on a reverse charge basis by the recipient. While analysing the respondents' contention, it is important to contextualize the purpose of GST and the constitutional amendment to effect it. In modern commerce, the distinction between goods and services is increasingly becoming a matter of degree than substance. GST seeks to focus on the taxation of "supply" of goods or services. The provisions of the IGST and CGST Act focus on implementing a workable machinery to adequately capture the complexities of *supply* in a global and digital age.

100 The term 'supply' has been defined in the IGST Act with reference to the CGST Act. Section 2(21) of the IGST Act provides that:

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

Section 7(1) of the CGST Act provides thus:

"7. Scope of supply.

(1) For the purposes of this Act, the expression "supply" includes-

-

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

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

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

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

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

[….]

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

as—

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

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

(**emphasis supplied**)

Further, Section 7 of the IGST Act defines the scope of inter-State supply. Section 7(4) of the IGST Act states that "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":

"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 interState 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.**

[…]"

(**emphasis supplied**)

101 Section 7 of the CGST Act defines the term "supply" with a broad brush and provides for an inclusive definition. Section 7(1)(b) of the CGST Act considers import of services for a consideration to constitute "supply". Section 7(1)(c) of the CGST Act captures any and all activities in Schedule 1 of the CGST Act, irrespective of whether they are made for a consideration. Additionally, Section 7(3) confers the power on the Central Government to specify which transactions are to be treated as a supply of goods and not a supply of services, and vice-versa. Section 7(4) of the IGST Act states that supply of services imported into India would be considered as a supply of services in the course of "inter-State trade or commerce". Thus, an Indian importer could also be considered as an importer of the service of shipping which is liable to IGST on inter-state supply, if the activity falls within the definition of "import of service" for the IGST Act and CGST Act.

102 The term 'importer' is not defined in the IGST Act or the CGST Act. Section 2(26) of the Customs Act defines an 'importer' as:

"(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes [any owner, beneficial owner] or any person holding himself out to be the importer"

The term 'import of goods' is defined in Section 2(10) of the CGST Act as:

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

"Import of services" is defined in Section 2(11) of the CGST Act as:

"(11) ''import of services" means the supply of any service, where—

(i) the supplier of service is located outside India;

(ii) the recipient of service is located in India; and

(iii) the place of supply of service is in India;"

The conditions for an "import of service" would entail three aspects: (i) the supplier of service must be located outside India; (ii) the recipient of the service must be located in India; and (iii) the place of supply of service ought to be in India. The respondents have

argued that conditions (ii) and (iii) are not satisfied in the case of CIF contracts since the recipient of shipping services would be the foreign exporter and the place of supply would be the place of business of such foreign exporter. However, in interpreting the expressions "recipient" and "place of supply", this Court would have to analyse these terms vis-à-vis the IGST Act and the CGST Act and not exclusively from the provisions of the contract between the foreign exporter and the foreign shipping line.

103 Chapter V of the IGST Act provides for methodologies to determine the place of supply of goods or services or both. Section 13 of the IGST Act provides the place of supply of services where the location of the supplier or location of recipient is outside India:

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

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

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

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

[…]

(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**."

(**emphasis supplied**)

Section 13(9) of the IGST Act appears to create a deeming fiction, where in case of supply of services of transportation of goods by a supplier located outside India, the place of supply would be the place of destination of such goods. The supplier, the foreign shipping line, in this case would be a non-taxable person. However, its services in a CIF contract for transport of goods would enter Indian taxable territory as the destination of such goods. The place of supply of shipping service by a foreign shipping line, would thus be India.

104 The respondents argued that since Section 7(1)(b) of the CGST Act does not define "supply" of import of service without consideration, other than the ones specified in Schedule 1, this would be inapplicable to importers with CIF contracts as the consideration is paid by the exporter. Thus, the importer of goods cannot be said to be an importer of shipping service since the latter is not an import of service for a consideration under Section 7(1)(b) of the CGST Act. However, this argument misses out on some crucial definitions. The term 'supply' has been defined in the IGST Act with reference to the CGST Act. Thus, the three conditions for "import of services" under Section 2(11)(iii) must be understood with reference to the provisions of the CGST and IGST Acts, including the provisions for determination of place of supply under Section 13(9) of the IGST Act. As mentioned previously, Section 13(9) of the IGST Act creates a

deeming fiction of place of supply of transportation services to be in India when the destination of goods is in India. In this case, it is clear the supplier of service- the foreign shipping line - is located outside India; and the place of supply is India. Accordingly, Section 13 of the CGST Act would be applicable to determine the time of such supply.

105 The respondents have argued that the ocean freight transaction cannot be considered as "supply" since Section 7(1)(b) of the IGST act requires the import of service to be for a "consideration". The definition of "consideration" in Section 2(31) of the CGST Act is instructive:

"(31) "consideration" in relation to the supply of goods or services or both includes—

(a) **any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person** but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;"

(**emphasis supplied**)

Thus, Section 2(31) of the CGST Act defines 'consideration' to include payment made or to be made, in money or any other form, for the inducement of supply of goods or services to be made by the recipient or by any other person. Thus, in the case of goods imported on a CIF basis, the fact that consideration is paid by the foreign exporter to the foreign shipping line would not stand in the way of it being considered as a "supply of service" under Section 7(4) of the IGST Act which is made for a consideration, thereby constituting "supply of service" in the course of inter-state trade or commerce that can be subject to IGST under Section 5(1) of the IGST Act.

106 At this stage, we note that the respondents have also challenged the impugned levy on the ground that the transaction takes place beyond the territory of India and is thus, extra territorial in nature. Mr Arvind Datar and Mr Harish Salve, learned senior counsel have urged that the service of transportation occurs outside India, that is outside the taxable territory and bears a nexus with India only as the destination of goods is India. However, the submission is that since the import of goods is taxed under Section 5(1) as 'supply of goods', there remains no territorial nexus of the transportation service with the Indian territory. An extension of this argument is that in case Parliament seeks to levy a tax outside its territory, it makes a deeming fiction in the statute and not by way of delegated legislation.

107 A Constitution Bench in **GVK Industries** (supra), considered the question whether Parliament is competent to enact legislation with regard to extra-territorial aspects of

certain events. Answering the question in affirmative, Justice B Sudarshan Reddy, speaking for the Constitution Bench, held:

"124. […]

The answer to the above would be yes. However, Parliament may exercise its legislative powers with respect to extraterritorial aspects or causes—events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like—**that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extraterritorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, *only when* such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (*a*) the territory of India, or any part of India; or (*b*) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.**

125. It is important for us to state and hold here that the powers of legislation of Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a predetermined degree of strength. **All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful.**

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

(emphasis supplied)

The decision in **GVK Industries** (supra) clearly recognises the power of Parliament to legislate over events occurring extra-territorially. The only requirement imposed by the Court is that such an event must have a real connection to India.

108 The impugned levy on the supply of transportation service by the shipping line to the foreign exporter to import goods into India has a two-fold connection: *first,* the destination of the goods is India and thus, a clear territorial nexus is established with the event occurring outside the territory; and *second,* the services are rendered for the benefit of the Indian importer. Thus, the transaction does have a nexus with the territory of India.

109 As an alternative, the respondents submitted that though the levy may have a nexus with the Indian territory, the levy of tax extra-territorially must be provided by Parliament through statute and not by the Union Government through delegated legislation. We do not find any applicability of this submission to the facts at hand. As stated above, the IGST Act under Section 13(9) recognises the place of supply of services as the destination of goods when the supplier is located outside India. Since the destination of goods is India, the statute itself is broad enough to cover a taxable event that has extra-territorial aspects, which bears a nexus to India.

110 In determining the vires of the impugned notifications, the only question that falls for determination is whether the importer of goods can be considered as the recipient of the service of shipping in CIF contracts.

D.4.(b) Are importers service recipients under CIF contracts?

111 The impugned notification 8/2017, *inter alia*, identifies several categories of supply of services such as hotels, restaurants, transportation by rail/road/air and legal and accounting services. The respondents, as importers of goods under CIF transactions, are aggrieved by the following categorization:

"Transport of goods in a vessel including services provided or agreed to be provided by a person located in non-taxable territory to person located in non-taxable territory by way of transportation of goods by a vessel from a, place outside India up to the customs station of clearance in India up to the customs station of clearance in India."

The respondents are aggrieved by the fact that this categorization, coupled with impugned notification 10/2017, deems the importer of goods as the recipient of the service of shipping, irrespective of whether the import of goods was on the basis of a CIF or FOB contract.

112 Section 5(3) of the IGST Act enables taxation of the recipients of certain specified categories of supply of services on a reverse charge basis. It is pertinent to note that the tax is payable "by the recipient" of such services, in contradistinction to broad language such as "any person as may be prescribed" which was otherwise used in Section 98(2) of the Finance Act 1994 which taxed services. Section 5(3) states:

"(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…"

(**emphasis supplied**)

The term "recipient" of a supply of service has been exhaustively defined by Section 2(93) of the CGST Act:

"(93) "recipient" of supply of goods or services or both, means— (*a*) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

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

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

(**emphasis supplied**)

Thus, the language employed in Section 2(93)(a) of the CGST Act clearly stipulates that when a consideration is payable for the supply of services, the recipient would mean the person who is liable to pay that consideration. However, when no consideration is payable for the supply of a service, Section 2(93)(c) states that the recipient shall be the person to whom the service is rendered. Further, Section 2(93) provides that "any reference to a person to whom supply is made shall be construed as a reference to the recipient". Hence, where the statute refers to a person to whom a supply is made, it has to be construed as a reference to the recipient of service. 113 In a CIF transaction, the foreign exporter contracts with a foreign shipping line. The service of shipping is rendered by the foreign shipping line to the foreign exporter and the consideration is accordingly payable by the latter to the former. The cost of such shipping may form a component of the price that is eventually charged to the importer, based on the negotiated terms. If an FOB contract were to be negotiated, the importer would independently avail of the service of shipping and pay for the consideration. The Union Government has argued that import of goods on a CIF basis would be construed as import of services where sub-clause (c) of Section 2(93) applies to determine the recipient. The respondents have argued that the importer in a CIF contract can be considered as a recipient of the service only in a colloquial sense. The mere destination of the service of shipping would not convert it into a service vis-à-vis the importer without any elements of a contract. Hence, they urge that in the absence of specific deeming provisions in the statute, overarching principles of privity of contract are relevant for interpreting the term "recipient" deployed in Section 5(3) of the IGST.

114 The Union Government has argued that Section 2 of the CGST Act is prefaced with the term "unless the context otherwise requires", and hence would enable taxation of the importer on a reverse charge basis as the "recipient" of service under Section 2(93). However, this argument overlooks the context of Section 5(3) of the IGST Act which reiterates the taxable person to be the recipient of the service and only enables the Union Government to notify *categories* of interstate supply of goods and services.

115 The Union Government has attempted to make a far-fetched argument that Section 24(iii) of the CGST Act mandating compulsory registration of persons liable to pay tax on a reverse charge basis extends to designating any person to pay the tax on a reverse charge basis, irrespective of their status as either a recipient or a supplier of service. This argument inverts the identification of a category of goods and services under Section

5(3) and the recipient therein, who is then liable to compulsorily register themselves under Section 24(iii) of the CGST Act. The power of the Central Government to designate persons and categories of supply for reverse charge derives from Sections 5(3) and 5(4) of the IGST Act and not Section 24(iii) of the CGST Act which mandates the compulsorily registration as a logical corollary to ensure tax collection. Section 2(98) of the CGST Act, which defines "reverse charge" reiterates that it means the "*liability to pay tax by the recipient of supply of goods or services or both instead of the supplier*…". It cannot be construed to imply that any taxable person identified for payment of reverse charge would automatically become the recipient of such goods or service. The deeming fiction of treating the importer as a recipient must be found in the IGST Act. As it currently stands, Section 5(3) of the IGST Act enables the delegated legislation to create a deeming fiction on categories of supply of goods/services alone.

116 Interpreting the term "by the recipient" vis-à-vis the categories of goods and services identified in Section 5(3) of the IGST Act should necessarily be governed by the principles governing the definition of "recipient" under Section 2(93) of the CGST Act. Contrary to the arguments of the Union Government, such an interpretation would not annihilate the mandate of compulsory registration under Section 24(iii) of the CGST Act. It would be applicable to suitably worded provisions in the CGST or IGST Act which permit the Central Government to identify a taxable person for a reverse charge. In any event, it would be applicable to all the recipients liable for reverse charge under Sections 5(3) and 5(4) of the IGST Act. The ineffectiveness of a tax collection mechanism under Section 24(iii) of the CGST Act cannot be argued to obfuscate the concept of a "recipient" of a good or service that is uniformly understood across the IGST Act, CGST Act and tax jurisprudence.

117 The Union Government has argued that the expression "by the recipient" in Section 5(3) of the IGST Act does not impede the authority of the GST Council in making recommendations for issuance of notifications for identifying such persons who shall be governed by reverse charge and once the identification is complete, such taxable person would automatically be interpreted as "the recipient". This argument requires the Court to completely discard the principles of determining the recipient of a service and replace it with whichever taxable person is identified. The appellant may argue for such an interpretation to achieve a favourable outcome in this case. However, in matters of inter-state supply when the supplier and recipient are within the territory of India, this Court would have to follow this artificially bifurcated interpretation which identifies recipients vis-à-vis the nature of service and supply in some cases, and by a simple equation of the identified taxable person in others without considering the literal and contextual definition of recipient. This is against settled rules of interpretation and would be an act of judicial legislation. If Parliament's intention were to designate certain persons for reverse charge, irrespective of them being the recipient of such goods and services, it must make a suitable amendment to confer such power for exercise of delegated legislation.

118 The only argument that supports the case of the appellant is that of Section 13(9) of the IGST Act read together with Section 2(93)(c) of the CGST Act which defines a "recipient". As noted in Section D.4.(a) above, Section 13(9) of the IGST Act creates the deeming fiction of place of supply of service to be the destination of goods when they are

transported by means other than mail or courier. No specific exemptions for importers have been carved out. This Court is inclined to accept this reasoning and read it into the definition of recipient in Section 2(93) of the CGST Act which is as follows:

"(93) "recipient" of supply of goods or services or both, means—

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

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

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

(emphasis supplied)

Since a reference to a person to whom a supply is made, is a reference to the recipient, the place of supply is critical. By virtue of Section 13(9) of the IGST Act, the place of supply is the destination of goods. The time of supply is then determined through the provisions of Section 13 of the CGST Act. Sections 2(14) and 2(15) of the IGST Act also define the location of the recipient and supplier of services with respect to the physical location where the supply of services is made or received.

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

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

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

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

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

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

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

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

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

(**emphasis supplied**)

In such a scenario, when the place of supply of services is deemed to be the destination of goods under Section 13(9) of the IGST Act, the supply of services would necessarily be "made" to the Indian importer, who would then be considered as a "recipient" under the definition of Section 2(93)(c) of the CGST Act. The supply can thus be construed as being "made" to the Indian importer who becomes the recipient under Section 2(93)(c) of the CGST Act.

119 This conclusion comports with the philosophy of the GST to be a consumption and destinated based tax. The services of shipping are imported into India for the purpose of consumption that is routed through the import of goods. Although the consideration for shipping is payable by the foreign supplier to the foreign shipping line in CIF contracts, the price is consequently factored into the price of the shipment. The ultimate benefactor of the shipping service is also the importer in India who will finally receive the goods at a destination which is within the taxable territory of India. Thus, the meaning of the term "recipient" in the IGST Act will have to be understood within the context laid down in the taxing statute (IGST and CGST Act) and not by a strict application of commercial principles.

120 Some of the respondents have argued that the possibility of two different recipients of services would create absurdities since whether a supply of service is an inter-state supply under Section 7(3) or intra-state supply under Section 8(2) of IGST Act depends on the location of the supplier and the place of supply, which in most cases is the location of the recipient of service. Since there can effectively be two recipients on a reading of Section 2(93)(a) and (c) of the CGST Act, the respondents argue that the transaction may simultaneously become an inter-state or intra-state supply. This could also mean that two recipients can claim ITC. However, this argument is inapplicable to the case at hand since Sections 7(3) and 8(2) of the IGST Act do not conflate the concept of imports. Section 8(2) deals with a scenario where the location of the supplier and place of supply are within the same State/Union Territory in India. This is inapplicable to determining imports where the supplier is located outside India. Similarly, Section 7(3) deals with inter-state supply within the territory of India. Further, both these sections are subject to the provisions of Section 12 of the IGST Act where both- the supplier and recipient are located in India. Section 12 of the IGST Act does not create the deeming fiction under Section 13(9) of the IGST Act which is applicable *only* when the supplier is located outside India. The applicable section in this case would be Section 7(4) of the IGST Act which clearly stipulates that "*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*". Thus, no absurdity is created by the deeming fiction argued by the Union Government. In no scenario would the foreign exporter be claiming ITC in India.

121 The respondents' arguments of identification of two recipients do not have any bearing on the determination of the present dispute as the foreign exporter is not sought to be taxed in this case. In the digital age, the concepts of supplier and recipient of service have also been altered and are not necessarily understood as two parties with a direct chain of supply. The IGST Act tends to create several such deeming fictions to adequately capture such complexities. For instance, Section 5(5) of the IGST Act taxes the electronic commerce operator as the supplier of service in spite of it only being a conduit, in the commercial sense. These deeming fictions need to be respected for the purpose of the statute, as long as they have constitutional and parliamentary sanction. Similarly, Section 2(14)(c) of the IGST Act recognizes the possibility of the supply being received in more than one establishment:

"(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;"

122 Section 13 of the IGST Act is critical to effectively meet the aim of the GST statute to tax the destination of supplies, as opposed to their origins. The deeming fiction therein is critical to interpret the charging provision under the IGST Act (Section 5). The respondents' argument for the irrelevance of determining the beneficiary of the supply or who has received the supply in view of the definition of 'recipient' of Section 2(93) of the CGST Act mis-reads Section 2(93) which identifies the recipient, *inter alia*, on the basis of the person to whom "supply is made" i.e. the place of supply.

123 GST laws mark a departure from the previous policy of taxing sale/consignments and focuses on the taxing of supplies. The concept of a supplycentric and destination-based tax runs through the scheme of the statutory provisions and the proposals issued by the GST Council. Thus, an amendment to the Constitution was introduced in the form of Article 366(12-A) to create a tax on the *supply* of goods, or services, or both. In the commercial reality of the times, the conceptual lines between goods and services wear thin. Hence, the focus is on the taxation of *supply*, as opposed to the creation of neat compartments between goods and services. Section 7(1)(c) of the CGST Act specifically characterizes import of services for a consideration to constitute "supply". The only question that falls for determination is whether the imports of goods on a CIF basis would also constitute import of shipping services, by way of deeming fiction. We have held that Section 5(3) of the IGST does not confer the powers on the Central Government to create a deeming fiction vis-à-vis who constitutes the recipient. Section 5(3) merely enables the

Central Government to identify certain categories of goods and services, where the *recipient* of such services is subject to a reverse charge, as opposed to the usual mode of taxation where the supplier of the service is charged on a forward charge basis. However, Section 13(9) of the IGST Act read with Section 2(93)(c) of the CGST Act inherently create a deeming fiction of the importer of goods to be the recipient of shipping service.

D.5 Applicability of Section 5(4) of IGST Act

124 By way of an arguendo, the Union Government has argued that if the importers do not qualify as service recipients, the impugned notifications would derive their validity from Section 5(4) of the IGST Act. The unamended Section 5(4) of the IGST Act stated as follows:

"(4) **The integrated tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient** 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."

(**emphasis supplied**)

On 29 August 2018, Section 5(4) was amended by Amending Act 32 of 2018, to state the following:

"(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."

(**emphasis supplied**)

The amended Section 5(4) came into effect on 1 February 2019[90]. Amending Act 32 of 2018 enables the Central Government to create a deeming fiction of declaring a class of registered persons "as the recipient" of the supply of taxable goods or service. In deploying the language "as the", and not "by the" recipient, the applicability of the definition of recipient vis-à-vis Section 2(93) of the CGST Act is no longer necessary for determining the validity of such a notification. The effect of the Amending Act 32 of 2018 has been as follows:- (i) the powers of the Central Government to specify through a notification has been clarified; and (ii) the power to specify a class of registered persons as the recipient has been recognised.

125 The Union Government has argued that Notifications 8/2017 and 10/2017 dated 28 June 2017 issued under Section 5(3) may also be read as issued under Section 5(4)

[90] Notification No. G.S.R. 67(E) dated 29 January 2019

of the IGST, in which case, the importers would be liable to tax with effect from 1 February 2019 though exempted for the period 13 October 2017 – 31 January 2019.

126 The respondents have argued that the amended and unamended Section 5(4) do not save the impugned notifications since they still make the reference to the term "recipient". However, the respondents crucially miss out that Section 5(4) employs the language "*as the recipient*", in contradistinction to Section 5(3) of the IGST Act which uses "*by the recipient*". We have held that recipient includes the importer in Part D above. Further, Section 5(4) clarifies that it may designate a class of registered persons *as* the recipient, thereby broadening the scope of Section 2(93) of the CGST Act, which is anyway an inclusive definition since Section 2 is prefaced with "*unless the context otherwise requires*".

127 It is settled law that non-reference of the source of power may not vitiate its exercise and application in given facts and circumstances of a case. In **Union of India** v. **Tulsi Ram Patel**[91], a Constitution Bench held that when a source of power legally exists, a non-reference or an incorrect reference during its exercise does not vitiate the action. Speaking in the context of the Railway Service Rules which did not account for the power of the Disciplinary Authority under Article 311(2), this Court held:

"126. As pointed out earlier, the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules while the source of his power to dispense with the disciplinary inquiry is derived from the second proviso to Article 311(2). There cannot be an exercise of a power unless such power exists in law. If such power does not exist in law, the purported exercise of it would be an exercise of a non-existent power and would be void. The exercise of a power is, therefore, always referable to the source of such power and must be considered in conjunction with it. The Court's attention in *Challappancase* [(1976) 3 SCC 190 : 1976 SCC (L&S) 398 : (1976) 1 SCR 783] was not drawn to this settled position in law and hence the error committed by it in considering Rule 14 of the Railway Servants Rules by itself and without taking into account the second proviso to Article 311(2). **It is also well settled that where a source of power exists, the exercise of such power is referable only to that source and not to some other source under which were that power exercised, the exercise of such power would be invalid and without jurisdiction. Similarly, if a source of power exists by reading together two provisions, whether statutory or constitutional, and the order refers to only one of them, the validity of the order should be upheld by construing it as an order passed under both those provisions. Further, even the mention of a wrong provision or the omission to mention the provision which contains the source of power will not invalidate an order where the source of such power exists.** (See *Dr Ram Manohar Lohia* v. *State of Bihar* [AIR 1966 SC 740 : (1966) 1 SCR 709, 721 : 1966 Cri LJ 608] and *Municipal Corporation of the City of Ahmedabad* v. *Ben Hiraben Manilal* [(1983) 2 SCC 422 : (1983) 2 SCR 676, 681] .) The omission to mention in the impugned orders the relevant clause of the second proviso or the relevant service rule will not, therefore, have the effect of invalidating the orders and the orders must be read as having been made under the

[91] 1985 3 SCC 398

applicable clause of the second proviso to Article 311(2) read with the relevant service rule. It may be mentioned that in none of the matters before us has it been contended that the disciplinary authority which passed the impugned order was not competent to do so."

(emphasis supplied)

128 Similarly, in **Titagarh Paper Mills** v. **Orissa State Electricity Board**[92], a three-judge Bench of this Court, in the context of the Electricity Supply Act 1948, held that a mislabelling of the source of power would not vitiate its exercise:

"9. …..But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power — a mere wrong label — cannot invalidate the action of an authority, if it is otherwise within its power.."

Thus, as long as a source of power to legislate or issue a notification is available, the lack of a mention, an incorrect reference or mistake does not vitiate the exercise of such power.

129 The impugned notifications were issued with the intention of creating a level playing field between the Indian and foreign shipping lines. In the Eighteenth GST Council meeting held on 31 June 2017, the agenda of taxing importers on a reverse charge basis was discussed:

""Para 6.7.1: Agenda Item 3(v)- Value for the purpose of levy of GST on transportation of goods by a vessel from a place outside India up to the customs station in India

6.7.1. In the existing Service Tax Law, with a view to provide level playing field to the Indian shipping companies, it has been provided that in cases where the goods are imported by an importer in India on CIF (Cost, Insurance and Freight) basis and the service of transportation of goods by a vessel from a place outside India up to the customs station in India is provided by a person located in non-taxable territory (a foreign shipping line) to a person located in non-taxable territory (overseas supplier/ exporter of goods), the importer in India shall be liable to pay Service Tax on freight. In view of the representations that where the importer purchases goods on CIF basis, he may not have the invoice issued by the shipping line for freight and may not know the amount of freight charged by the foreign shipping line from the foreign supplier; it was stipulated in the Service Tax Rules that in such cases the importer shall have the option to pay an amount calculated at the rate of 1.4% of the CIF value of imported goods. This provision was stipulated on the basis that freight roughly constitutes 10% of the CJF value of goods on an average. Under GST too, it was decided that the liability to pay GST on such transportation service provided by a foreign shipping line to a foreign supplier shall be of the importer in India and the notifications are being issued accordingly. It is proposed that the similar provision deeming value of such service at 10% of the CIF value may be

[92] 1975 2 SCC 436

incorporated in the IGST notification. Considering the nature of the service, this provision is not required in the CGST, SGST or UTGST notifications. The Council approved the proposal.

[….]

8(v)…..in respect of agenda item 3 the Council approved to incorporate a provision in the IGST notification that in cases where the goods are imported by an importer in India on CIF basis and the service of transportation of goods by a vessel from a place outside India up to the customs station in India is provided by a person located in non-taxable territory (a foreign shipping line) to a person located in non-taxable territory (overseas supplier/exporter of goods) and in case the importer did not know the amount of freight charged by the foreign shipping line from the foreign supplier the deemed value of such service shall be 10% of the CIF value."

130 The impugned notifications were issued after the GST Council took note of the fact that since transport of imported goods by Indian shipping lines to India is not treated as export of service, the Indian shipping lines pay IGST on the same on a forward charge basis. On the other hand, on the same transportation service, the foreign shipping lines are not required to pay tax as they are not taxable persons in India. Therefore, to provide a level playing field to Indian shipping lines, the importer in India has been made liable to pay IGST on transportation of goods by foreign shipping lines on a reverse charge basis. If Indian shipping lines continue to be taxed and not their competitors, namely, the foreign shipping lines, the margins arising out of taxation from GST would not create a level playing field and drive the Indian shipping lines out of business.

131 It was contended by the respondents that instead of course correcting the input tax mechanism, the Union Government has chosen to tax the Indian importer on reverse charge. However, this Court is not in a position to adjudicate the desirability of a taxation scheme, as long as it is legally issued. Commenting on the efficacy of the tax intervention with the desired goals would be delving into the arena of policy.

D.6 Composite Supply and Issues of Double Taxation

132 Having examined whether the impugned levy is permissible under Section 5 of the IGST Act, we shall now advert to the arguments raised by the respondents regarding the impugned notifications amounting to double taxation. The respondents have submitted before this Court that the transaction between the foreign exporter and the respondents is already subject to IGST under Sections 5 of the IGST Act read with Sections 3(7) and 3(8) of the Customs Tariff Act as "supply of goods". An additional levy of IGST on imported goods, that is on the supply of transportation service, by designating the importer as the recipient would amount to double taxation.

133 The transaction at hand involves three parties- the foreign exporter, the Indian importer and the shipping line. The first leg of the transaction involves a CIF contract, wherein the foreign exporter sells the goods to the Indian importer and the cost of insurance and freight are the responsibility of the foreign exporter. In other words, the foreign exporter is liable to ensure that the goods reach their place of destination and the Indian importer pays the transaction value to the exporter. The second leg of the

transaction involves an agreement between the foreign exporter and the shipping line (whether foreign or Indian) for providing services for transport of goods to the destination, i.e., in the territory of India.

134 On the first leg of the transaction, between the foreign exporter and the Indian importer, the latter is liable to pay IGST on the transaction value of goods under Section 5(1) of the IGST Act read with Section 3(7) and 3(8) of the Customs Tariff Act. Although this transaction involves the provision of services such as insurance and freight it falls under the ambit of 'composite supply'. We note from the written submissions of the Union that the ASG has fairly submitted that this transaction would include value elements of freight and insurance, and yet the IGST is levied as a tax on supply of goods only. Such transactions are termed as "composite supply" under the CGST Act.

135 Section 2(30) of the CGST Act defines "composite supply" as

"(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Illustration.— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;"

136 Section 2(30) of the CGST Act clearly provides that a transaction may have two or more taxable supplies, where one of them is a principal supply. The illustration to Section 2(30) further clarifies that a transaction such as the CIF contract for supply of goods reflects a composite supply under the CGST Act, where the principal supply is the supply of goods.

137 The tax liability on composite supply is provided under Section 8 of the CGST Act.

"8. Tax liability on composite and mixed supplies.— The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:—

(a) **a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply**; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax."

(**emphasis supplied**)

Section 8 of the CGST Act provides that the tax liability on a composite supply which comprises of two or more supplies, will only be levied on the 'principal supply'. In a CIF transaction, the principal supply, according to Section 2(30), is supply of goods. Thus, the tax would be levied as if the transaction was one of supply of goods.

138 Section 20 of the IGST Act provides that the provisions relating to 'composite supply' under the CGST Act would apply *mutatis mutandis* under the IGST Act. By extension, the IGST in a transaction of composite supply would be levied on the principal supply of goods.

139 The respondents have urged before this Court that the impugned levy which seeks to impose IGST on the 'service' aspect of the transaction would be in violation of the principle of 'composite supply' incorporated under Section 2(30) read with Section 8 of the CGST Act, which applies equally to the imposition of IGST under Section 20 of the IGST Act. In contrast, the Union Government has submitted that the impugned levy is on the second leg of the transaction, which is a standalone contract between the foreign exporter and the foreign shipping line. Thus, the Union has urged that the contract between the foreign exporter and the foreign shipping line- of which the Indian importer is not a party- cannot be deemed to be a part of 'composite supply'. While the first leg of the transaction, between the foreign exporter and Indian importer, is (according to the submission) a composite supply, the second leg is an independent transaction. In this regard, the Union has relied on the decision of this Court in **McDowell** (supra) to contend that a single element can constitute a levy and a part of the value for another transaction. Further the Union Government has urged that the levy is on different aspects of the transaction.

140 We are unable to agree with the Union Government on this count. The aspect theory that the Union Government has relied on finds its place in various decisions of this Court, such as in **Federation of Hotels & Restaurant Association of India** v. **Union of India**[93] and **BSNL** (supra).

141 In **Federation of Hotels & Restaurants Association of India** (supra), a challenge was raised regarding the imposition of an expenditure tax by the Union Government. In discussing the various aspects of a transaction, this Court, speaking through Justice MN Venkatachaliah (as the learned Chief Justice then was), observed that

"31. **Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.** Lord Simonds in *Governor General-in-Council* v. *Province of Madras* [AIR 1945 PC 98 : 1945 FCR 179, 193] in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

"... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....""

(**emphasis supplied**)

There is no doubt that different aspects of a transaction can be taxed through separate provisions. However, this Court in **BSNL** (supra) observed that the aspect theory does not allow the value of goods to be included in services and vice versa. In **BSNL** (supra),

[93] (1989) 3 SCC 634

this Court dealt with the question of whether provision of telephone services involved a transfer of goods which would be amenable to sales tax. In this context, the Court observed:

"88**.** No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax."

142 In the present case, the question is whether the imposition of IGST on supply of services can be sustained when there is a concomitant imposition of IGST on supply of goods. However, we must first analyse the context in which the IGST is levied on the import of goods in this case.

143 The provisions of composite supply in the CGST Act (and the IGST Act) play a specific role in the levy of GST. The idea of introducing 'composite supply' was to ensure that various elements of a transaction are not dissected and the levy is imposed on the bundle of supplies altogether. This finds specific mention in the illustration provided under Section 2(30) of CGST Act, where the principal supply is that of goods. Thus, the intent of the Parliament was that a transaction which includes different aspects of supply of goods or services and which are naturally bundled together, must be taxed as a composite supply.

144 It is true that in this case, the first leg of the transaction between the foreign exporter and the Indian importer is a composite supply, while the second leg, between the foreign exporter and the shipping line may, from a perspective, be regarded as a standalone transaction. Both of them are independent transactions and ordinarily, the IGST could be levied on both sets of transactions- one as supply of goods (under the ambit of composite supply) and the other as supply of services. However, the impugned notifications seek to tax the importer as the deemed recipient of the supply of service. The ASG has advanced an interpretation of Sections 5(3) and 5(4) of the IGST Act, read with Section 2(93) of the CGST Act to contend that the importer can be classified as the 'recipient' of the services. On this interpretation, we have upheld the validity of the impugned notifications under Sections 5(3) and 5(4) of the IGST Act in Section D.2-D.5 of this judgment. The respondents as a matter of fact urged that (i) the Indian importer is not privy to the contract between the foreign exporter and the foreign shipping line; (ii) the Indian importer does not pay consideration to the foreign shipping line; and (iii) the Indian importer does not receive any services from the foreign shipping line since the transportation services are provided by the foreign shipping line to the foreign exporter. The ASG, while advancing arguments on behalf of the Union Government, has opposed these submissions. The Union Government has urged that this Court must look beyond the text of the contract between the foreign shipping line and the foreign exporter to identify the Indian importer as the recipient of the services. This Court has upheld the validity of the impugned notifications on this ground. The Union Government is

contradicting the main plank of its submission now by contending that the two legs of the transaction are separate standalone agreements. That would imply, that while on the one hand the Union Government seeks to levy tax on the Indian importer by going beyond the text of the contract between the foreign shipping line and foreign exporter (for the purpose of identifying the Indian importer as the recipient of services), on the other hand, as far as the submissions on composite supply are concerned, the Union Government urges that the contracts must be viewed as separate transactions, operating in silos. We are unable to subscribe to this view. The Union of India cannot be heard to urge arguments of convenience – treating the two legs of the transaction as connected when it seeks to identify the Indian importer as a recipient of services while on the other hand, treating the two legs of the transaction as independent when it seeks to tide over the statutory provisions governing composite supply.

145 This Court is bound by the confines of the IGST and CGST Act to determine if this is a composite supply. It would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. In a CIF contract, the supply of goods is accompanied by the supply of services of transportation and insurance, the responsibility for which lies on the seller (the foreign exporter in this case). The supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is payable under Section 5(1) of the IGST Act read with Section 20 of the IGST Act, Section 8 and Section 2(30) of the CGST Act. To levy the IGST on the supply of the service component of the transaction would contradict the principle enshrined in Section 8 and be in violation of the scheme of the GST legislation. Based on this reason, we are of the opinion that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation. As noted earlier, under Section 7(3) of the CGST Act, the Central Government has the power to notify an import of goods as an import of services and vice-versa:

"7. Scope of supply—

[…]

(3) Subject to the provisions of [sub-sections (1), (1A) and (2)]16, the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

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

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

No such power can be noticed with respect to interpreting a composite supply of goods and services as two segregable supply of goods and supply of services.

146 The High Court in the impugned judgment has observed that:

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

132. The GST is implemented by subsuming various indirect taxes. **The difficulty which is being experienced today in proper implementation of the GST is because**

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

133. It appears that despite having levied and collected the integrated tax under the IGST Act, 2017, on import of goods on the entire value which includes the Ocean Freight through the impugned notifications, once again the integrated tax is being levied under an erroneous misconception of law that separate tax can be levied on the services components (freight), which is otherwise impermissible under the scheme of the GST legislation made under the CA Act, 2016.

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

[…]

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

(**emphasis supplied**)

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

E Conclusion

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

(i) The recommendations of the GST Council are not binding on the Union and States for the following reasons:

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

(b) Neither does Article 279A begin with a non-obstante clause nor does Article 246A state that it is subject to the provisions of Article 279A. The Parliament and the State legislatures possess simultaneous power to legislate on GST. Article 246A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The 'recommendations' of the GST Council are the product of a collaborative dialogue involving the Union and States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST. It is not imperative that one of the federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation; and

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

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

(iii) The IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. The specification of the recipient – in this case the importer – by Notification 10/2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge;

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

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

149 For the reasons stated above, the appeals are accordingly dismissed.

150 Pending application(s) if any, stand disposed of.