IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani … Petitioner
Vs.
Union of India and others … Respondents

Mr. Bharat Raichandani a/w. Ms. Pragya Koolwal i/b. UBR Legal for Petitioner.
Mr. Anil C. Singh, ASG a/w. Mr. Pradeep S. Jetly, Senior Advocate and Mr. J. B. Mishra for Respondent Nos.1 to 4.
Mr. S. G. Gore, AGP for Respondent No.5-State.

CORAM : UJJAL BHUYAN & ABHAY AHUJA, JJ.

Reserved on : DECEMBER 02, 2020
Pronounced on: JUNE 9, 2021

Judgment and Order : (*Per Ujjal Bhuyan, J.*)

Heard Mr. Bharat Raichandani, learned counsel for the petitioner ; Mr. Anil C. Singh, learned Additional Solicitor General of India alongwith Mr. Pradeep S. Jetly, learned senior counsel and Mr. J. B. Mishra, learned counsel for respondent Nos.1 to 4; also heard Mr. S. G. Gore, learned AGP for respondent No.5.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has prayed for a declaration that section 13(8)(b) and section 8(2) of the Integrated Goods and Services Tax Act, 2017 are *ultra vires* articles 14, 19, 245, 246, 246A, 269A and 286 of the Constitution of India and also *ultra vires* the provisions of the Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and Maharashtra Goods and Services Tax Act, 2017.

3. Thus from the above it is evident that challenge made in this writ petition is to the constitutionality of section 13(8)(b) and section 8(2) of

the Integrated Goods and Services Tax Act, 2017.

4. Case of the petitioner is that he is a proprietor of a proprietorship firm M/s. Dynatex International having its registered office at Andheri (West), Mumbai which is engaged in providing marketing and promotion services to customers located outside India. It is registered as a supplier under the provisions of the Central Goods and Services Tax Act, 2017 (briefly "the CGST Act" hereinafter).

5. Petitioner has explained in the writ petition the nature of the services rendered by it and the transactions involved. According to the petitioner, it is a service provider. It provides service to customers located outside India. These overseas customers are engaged in manufacture and / or sale of goods. Such overseas customers may or may not have establishments in India. However, petitioner provides services only to the principal located outside India and in lieu thereof receives consideration in convertible foreign currency from the principal located outside India. For providing such services, ordinarily an agreement is entered into with the overseas customers.

6. In terms of such agreement petitioner solicits purchase orders for its foreign customers. As a matter of fact petitioner undertakes activities of marketing and promotion of goods sold by its overseas customers in India.

7. The Indian purchaser i.e., the importer directly places a purchase order on the overseas customer of the petitioner for supply of the goods which are then shipped by the overseas customer to the Indian purchaser. Such goods are cleared by the Indian purchaser from the customs. The overseas customer raises sale invoice in the name of the Indian purchaser who directly remits the sale proceeds to the overseas customer. Upon receipt of such payment, the overseas customer pays commission to the petitioner against invoice issued by the petitioner. The

entire payment is received by the petitioner in India in convertible foreign exchange.

8. Essentially the transaction entered into by the petitioner with the foreign customers is one of export of service from India earning valuable convertible foreign exchange for the country. It is an "export of service" within the meaning of section 2(6) of the Integrated Goods and Services Tax Act, 2017 (briefly "the IGST Act" hereinafter). Petitioner is also an "intermediary" within the meaning of section 2(13) of the IGST Act. So it is an export of service by an intermediary.

9. While section 7 of the IGST Act deals with inter-state supply, section 8 thereof deals with intra-state supply. The above provisions lay down when a supply will be considered as inter-state supply in India i.e., supply between two or more states or union territories of India and intra-state supply i.e., supply within one state or within one union territory.

10. Section 13 of the IGST Act deals with situations where the location of the supplier or the location of the recipient is outside India. While sub-section (2) generally provides that the place of supply of services shall be the location of the recipient of services, exceptions are carved out in sub-sections (3) to (13). As per sub-section (8), the place of supply of the services mentioned therein shall be the location of the supplier of services which is intermediary services in terms of clause (b).

11. Thus, by way of a deeming fiction, in the case of intermediary services where the location of the recipient is outside India, the place of supply shall be the location of the supplier of services which is in India, thus bringing into the tax net what is basically export of services. In this connection reference may be made to sub-section (2) of section 8 of the IGST Act which says that in case of supply of services where the location of the supplier and the place of supply of services are in the same state or same union territory, it would be treated as an intra-state

supply. Therefore the export of service by the petitioner as intermediary would be treated as intra-state supply of services under section 13(8)(b) read with section 8(2) of the IGST Act rendering such transaction liable to payment of central goods and services tax (CGST) and state goods and services tax (SGST).

12. Petitioner has stated that it has paid CGST and SGST under protest from out of its own pocket without collecting the same from its foreign customers. Since the year 2015-16 petitioner is bearing net tax burden of about 40% of the total revenue leading to significant drop in net revenue of the petitioner. According to the petitioner, its tax burden has gone up from 28% in the year 2012 to 43.81% in the year 2017. The tax burden has increased post implementation of goods and services tax (GST) and is impacting the whole revenue earning of the petitioner.

13. It is in such circumstances that the present writ petition has been filed assailing the constitutional validity of section 13(8)(b) of the IGST Act read with section 8(2) of the said Act on the various grounds urged in the writ petition which can be broadly summed up as under:-

1. Levy of tax on export of service is *ultra vires* Article 269A of the Constitution of India.
2. Section 8(2) and section 13(8)(b) of the IGST Act are *ultra vires* section 9 of the CGST Act which is the charging section.
3. GST is a destination based tax on consumption. Therefore, services provided by a service provider in India to a service receiver located outside India which is treated as export of service cannot be taxed; for taxing a service it is not the place of performance but the place of consumption which is relevant. Once the services are consumed outside India, Parliament has no jurisdiction to levy tax on such services consumed outside India.
4. Levy of GST on an intermediary like the petitioner is

violative of Article 14 of the Constitution of India.

5. Levy of CGST and SGST on the export of service by the petitioner to its overseas customers constitute an unreasonable restriction upon the right of the petitioner to carry on trade and business under Article 19(1)(g) of the Constitution of India.

6. GST is an indirect tax. The cardinal rule of indirect taxation is that it must be capable of being passed on to the end receiver of the service. Therefore, it is trite that an agent cannot be burdened with GST.

7. Levy of GST on an intermediary like the petitioner providing services to an overseas customer would lead to double taxation on the same service.

14. Respondent Nos.1 to 4 have filed a common affidavit-in-reply through Dr. K. N. Raghavan, Principal Commissioner of Central Goods and Services Tax, Mumbai Central Commissionerate. In so far contention of the petitioner that levy of tax on export of service is *ultra vires* Article 269A of the Constitution of India is concerned, it is submitted that there are several intermediaries who provide services to overseas customers. However, such services do not qualify as “export of service” even when consideration is received in foreign exchange. In this connection it is stated that till 2014 place of supply for intermediary services was governed by the Place of Provision of Service Rules, 2012. As per the said rules, for intermediary of services place of supply was location of service provider and for intermediary of goods place of supply was location of service recipient.

14.1. Several representations were received seeking change in place of supply for intermediary of services, further seeking clarification on the scope of the expression ‘intermediary’. The issue was examined and with effect from 01.10.2014 place of supply for all intermediaries (goods as well as services) was made the location of the intermediary. This was

because many a times the same person provided agency services for selling of goods and subsequently selling of annual maintenance contract (AMC). Therefore, making a distinction between intermediary of goods and services caused hardship. Generally value addition of the service provided by an intermediary is at the place where the intermediary is located. Thus to eliminate any ambiguity between the place of supply of intermediary services provided in relation to goods and services and to bring both at par, place of supply for both was made the location of intermediary. If place of supply was to be made the location of recipient, place of supply for all intermediaries located in taxable territory providing service to a person whose usual place of residence is outside India would be the location of the recipient i.e., outside India and thus such services would have gone outside the tax net.

14.2. It is further stated that the issue of place of supply of intermediaries was discussed during the stage of drafting of GST laws and the above reasoning was adopted by the GST Council. In addition, it was found that with respect to intermediary services in relation to goods and services including stocks, transportation of goods etc., the services are actually performed and enjoyed at the place where the underlying arranged supply is made. Taxing such services provided by Indian service providers to foreign companies incentivises the foreign company to start manufacturing in India to offset the liability against the tax on goods cleared domestically or get refund of taxes on goods exported from India. Therefore, taxing such services in India is in consonance with the *Make in India* program.

14.3. Referring to the definition of the expression ‘export of services’ as provided in section 2(6) of the IGST Act, it is stated that the services provided by the intermediary (petitioner) are not export of services as all the five conditions mentioned in section 2(6) of the IGST Act are not satisfied. Therefore, the contention that levy of tax on export of services is *ultra vires* Article 269A of the Constitution of India is untenable.

14.4. Contention of the petitioner that section 13(8)(b) read with section 8(2) of the IGST Act would lead to double taxation has been denied. In case of intermediary services in relation to import of goods in India, there are two distinctly identifiable supplies involved, *viz*, (a) supply of goods by the overseas supplier to the Indian importer of goods; and (b) supply of services by the intermediary to the overseas supplier of goods. The above two mentioned distinct supplies are liable to tax under two different statutes i.e., Customs Act, 1962 and the IGST Act operating under two different fields of taxation. Thus the argument that there is double taxation on the services rendered by the petitioner is untenable. Elaborating further it is stated that in the first transaction as the title of the imported goods does not lie with the intermediary service provider, the incidence of custom duty is on the importer of goods. In so far the second transaction is concerned, the commission is paid by the overseas supplier to the Indian intermediary for the services provided by the latter and IGST on the same is levied in India on the intermediary as the place of supply is the location of the intermediary as per section 13(8)(b) of the IGST Act.

14.5. In the circumstances, respondents seek dismissal of the writ petition.

15. Petitioner has filed a longish rejoinder affidavit. In so far place of supply in terms of Place of Provision of Service Rules, 2012 is concerned it is contended that challenge made in the present writ petition is to section 13(8)(b) of the IGST Act read with section 8(2) of the said Act after introduction of the GST regime with effect from 01.07.2017. Therefore, reference to the 2012 Rules is wholly irrelevant and completely out of context. Referring to impost of service tax it is contended that taxable territory was defined under section 65B(52) of the Finance Act, 1994 as the territory to which provisions of the said Act applied; section 64(1) of the Finance Act, 1994 provided that Chapter V

thereof extended to the whole of India except the State of Jammu and Kashmir. Therefore, any service provided outside India could not be subjected to service tax. Thus, the Finance Act, 1994 did not have extra-territorial operation. With effect from 01.07.2012 a new scheme of taxation was introduced. All services were made subject to service tax except those placed in the negative list or specifically exempt. The Place of Provision of Service Rules, 2012 was introduced with effect from 01.07.2012. This set of rules provided for determining the place of provision of the services. In other words, if the place of provision of service was India, the service would be taxable. On the other hand, if the place of provision of service was not India then the said service would not be taxable.

15.1. Petitioner has meticulously referred to the various individual rules of the aforesaid 2012 Rules whereafter it is submitted that while Rule 3 was the general rule which provided that the place of provision of a service would be the location of the recipient of service, this being based on the universally accepted principle that tax on services is a destination based consumption tax; it was a tax on the consumer and levied in the country of consumption of the service. Rules 4 to 12 were exceptions to the general rule which were based on actual consumption of the service. The exceptions were carved out keeping in mind that the said services were related to physical performance of the service and service related to immovable property situated in India. Such exceptions did not have any remote connection with the services provided by the petitioner which had no nexus to immovable property situated in India.

15.2. Reiterating his contentions made in the writ petition, petitioner asserts that all services when provided to overseas customer and consumed abroad are treated as export of service and not taxed in India; the same treatment should be offered to intermediary services as well. Similarly placed services provided by market research agencies, marketing agents, advertising consultants, professional services provided

by lawyers, accountants etc. are all treated as export of service. Therefore, there can be no justifiable reason for singling out the petitioner as intermediary and by creating a legal fiction deny export of service by treating it to be service rendered in India and taxed accordingly.

15.3. In so far claim of the respondents that section 13(8)(b) would in fact boost the *Make in India* program the same has not only been denied but has been termed as unreal and illusory.

15.4. Petitioner has also referred to the 139th Parliamentary Committee Report, annexed to the writ petition as Exhibit-1, and submits therefrom that levy of GST on intermediary services is contrary to the basic fundamental concept of GST as a destination based consumption tax. On such basis petitioner asserts that for taxing a service it is not the place of performance but the place of consumption which is relevant; export would take place when the service is provided from India by a person in India but is received and consumed abroad. The artificial exception carved out in section 13(8)(b) of the IGST Act is contrary to all principles of interpretation besides being unconstitutional and *ultra vires* the IGST Act itself. Therefore the aforesaid provision is liable to be struck down as *ultra vires* to the fundamental principle of destination based consumption tax.

15.5. By giving various illustrations, petitioner has stated that levy of GST on export of services has created an exodus of such intermediaries from India. While it will not have any impact on import of goods into India, it would only lead to extinguishment of intermediaries from India.

15.6. Asserting that GST would be levied twice on the same commission, once by the petitioner on the commission and then by the importer (Indian purchaser of the goods) on the said commission, which is a clear case of double taxation.

15.7. Finally petitioner asserts that the world over intermediary services are treated as export of services and are accordingly not subject to VAT / GST. In the circumstances petitioner seeks and prays that the writ petition be allowed in full.

16. Opening his arguments Mr. Raichandani, learned counsel for the petitioner submits that the factual position in this case is undisputed. Petitioner is engaged in providing marketing and promotional services to customers located outside India. The Indian purchaser (importer) directly places purchase order on the overseas customer for supply of goods which are shipped by the overseas customer to the Indian purchaser who gets the goods cleared from the port / customs. The overseas customer raises sale invoice in the name of the Indian purchaser who directly remits the sale proceeds to the overseas customer. Upon receipt of the payment from the Indian purchaser the overseas customer pays commission to the petitioner. Petitioner has no privity of contract with the Indian purchaser.

16.1. By virtue of section 13(8)(b) read with section 8(2) of the IGST Act the place of supply has been declared to be the location of the service provider i.e., the petitioner making the said transaction liable to payment of CGST and MGST as intra-state supply of services. Petitioner has paid such taxes from out of his pocket 'under protest' without collecting the same from the foreign customers.

16.2. In the above circumstances, petitioner has challenged the legality and validity of section 13(8)(b) of the IGST Act to the extent that it seeks to levy GST on services provided to, used and consumed by recipients located outside India and treating the same as intra-state supply leviable to CGST and MGST which is not only illegal, void, arbitrary and unreasonable but also *ultra vires* Articles 14, 19(1)(g), 21, 286, 246A, 265, 269A and 300A of the Constitution of India read with

section 9 of the CGST Act and the MGST Act.

16.3. Mr. Raichandani submits that admittedly the service rendered by the petitioner is an export of service to foreign customer located outside India. The said service is used and consumed outside India. That being the position it is an 'export of service' as defined under section 2(6) of the IGST Act. In fact it is so in terms of section 13(2) of the IGST Act as well. However, 'intermediary' which is defined under section 2(13) of the IGST Act has been placed under section 13(8)(b) of the IGST Act by virtue of which the place of supply of the service is the location of the supplier (petitioner). Consequently, the said supply is deemed to be an intra-state supply within the state of Maharashtra and taxed accordingly.

16.4. Further submission is that GST is a destination based consumption tax. It is a value added tax; a tax on services provided and consumed within the territory of India. Therefore it cannot have any extra-territorial operation or nexus. In this connection learned counsel has referred to the decision of the Supreme Court in *All India Federation of Tax Practitioners Vs. Union of India*, **2007 (7) STR 625**. He has also extensively referred to the 139th Parliamentary Committee Report with regard to place of supply of services. On the strength of the above, Mr. Raichandani contends that section 13(8)(b) of the IGST Act is evidently contrary to the fundamental principle of destination based consumption tax.

16.5. Another limb of argument of learned counsel for the petitioner is that levy of CGST and MGST on export of service by intermediary is arbitrary, unreasonable and discriminatory. He submits that petitioner has been denied a level playing field *vis-a-vis* other exporters of services. Besides it incentivises the foreign customer to set up liaison office in India at the cost of an intermediary like the petitioner. Though all service providers like the petitioner should be treated in the same manner, this is not so. Service providers like marketing agents,

marketing consultants, management consultants, market research agents, professional advisers etc. provide similar services. However, such services would not be subject to GST in terms of section 13(2) of the Act. But by virtue of the exception carved out under section 13(8)(b) of the IGST Act, the service rendered by the petitioner despite satisfying all the conditions of section 13(2) read with section 2(6) of the IGST Act would be subject to GST. Therefore, he contends that the levy is most unreasonable and arbitrary, thus violative of Article 14 of the Constitution of India.

16.6. On the proposition that a provision can be struck down if it is violative of Article 14, learned counsel for the petitioner had placed reliance on the following decisions:-

a. *Reliance Energy Limited Vs. MSRDC*, **(2007) 8 SCC 1**;

b. *Union of India Vs. N. S. Rathnam*, **(2015) 10 SCC 681**; and

c. *K T Moopil Nair Vs. State of Kerala*, **AIR 1961 SC 552**.

16.7. Mr. Raichandani in his next limb of argument advances the proposition that levy of tax on export of service is *ultra vires* Article 246A read with Article 269A and Article 286 of the Constitution of India. Referring to Article 246A he submits that this is a special provision with respect to GST. It provides that 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 GST imposed by the union or by such state. As per clause (2), Parliament has exclusive powers to make laws with respect to GST where the supply of goods or of services or both take place in the course of inter-state trade or commerce. Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. While clause (1) provides that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India, clause (5) provides that Parliament may by law formulate the principles of determining the place of supply and when a supply of goods or of

services or both takes place in the course of inter-state trade or commerce. On the above basis Mr. Raichandani submits that the Constitution only grants power to the Parliament to frame laws for inter-state trade and commerce i.e., for determining inter-state trade or commerce. It does not permit imposition of tax on export of services out of the territory of India by treating the same as a local supply. Hence, section 13(8)(b) of the IGST Act is *ultra vires* Articles 246A and 269A of the Constitution.

16.8. Referring to Article 286, learned counsel for the petitioner submits that clause (1) is very clear in as much as it provides that no law of a state shall impose or authorize the imposition of a tax on the supply of goods or services or both where such supply takes place outside the state or in the course of import of the goods or services or both into the territory of India or export of goods or services out of the territory of India. He submits that this is a prohibitive bar and is couched in negative language. In so far clause (2) is concerned, Parliament may by law formulate principles for determining a supply of goods or of services or both in any of the ways mentioned in clause (1). Thus no state has authority to levy local tax on export of services. Section 13(8)(b) of the IGST Act has deemed an export to be a local supply. This is violation of Article 286(1). In support of the above submission, Mr. Raichandani has placed reliance on the following decisions:-

a. *State of Travancore - Cochin Vs. Bombay Company Limited*, **AIR 1952 SC 366**;
b. *Central India Spinning and Weaving and Manufacturing Company Limited Vs. Municipal Committee, Wardha*, **AIR 1958 SC 341**; and
c. *GVK Industries Limited Vs. ITO*, **(2011) 332 ITR 130**.

16.9. Mr. Raichandani has argued that section 13(8)(b) of the IGST Act is not only *ultra vires* the charging section of the said Act i.e., section 5, but is also *ultra vires* the charging section of the CGST Act as well as

the MGST Act i.e., section 9. He submits that IGST Act is an Act providing for levy and collection of tax on inter-state supply of goods and services. While section 1 provides that it shall extend to the whole of India except the State of Jammu and Kashmir, section 5 which is the charging section provides that there shall be levied IGST on all inter-state supplies of goods or services or both. Section 7 explains what is inter-state supply. Section 8(2) clarifies that supply of services where the location of the supplier and the place of supply are within the same state or union territory, shall be treated as an intra-state supply. Thus he submits that from an analysis of the scheme, scope and object of the IGST Act, it is evident that the same provides for levy of IGST on inter-state supplies. However, section 13(8)(b) runs contrary to the overall scheme of the IGST Act because it deems a supply out of India as an intra-state supply. Viewed in that context the said provision is also contrary to section 9 of the CGST Act as well as the MGST Act in as much as section 9 provides for levy of CGST on all intra-state supplies of goods or services or both. The said levy cannot be extended to cross border transactions i.e., export of services.

16.10. Learned counsel for the petitioner has also argued that respondents by levying CGST and MGST on the service provided by the petitioner to its overseas customers have imposed an unreasonable restriction upon the right of the petitioner to carry on trade under Article 19(1)(g) of the Constitution. He submits that such action on the part of the respondents would result in closure of business of the petitioner besides encouraging foreign service recipient to set up liaison offices in India and thereby escape taxation.

16.11. Last submission of Mr. Raichandani is that section 13(8)(b) of the IGST Act leads to double taxation and more. The same supply would be taxed at the hands of the petitioner and following the destination based principle it would be an import of service from India for the foreign service recipient and would be taxed at his hands in the

importing country. In support of his above submission learned counsel has placed reliance on the following decisions:-

a. *BSNL Vs. Union of India*, **2006 (2) STR 161**;
b. *Adani Power Ltd. Vs. Union of India*, **2015 (330) ELT 883** (*Guj.*); and
c. *Union of India Vs. Adani Power Ltd.*, **2016 (331) ELT 129**.

17. Leading the arguments on behalf of the respondents, Mr. Anil C. Singh, learned Additional Solicitor General submits that there is always a presumption in favour of constitutionality of a statute. Burden lies heavily on the person who challenges the validity of a statute. It is a settled proposition that for declaring a statute as unconstitutional, Court has to see whether there is legislative competence to enact the statute or not and whether the impugned provision is violative of any of the fundamental rights enshrined in Part III of the Constitution or not. According to Mr. Singh, the impugned provision cannot be assailed or struck down on the above two tests. Elaborating further he submits that no statute can be struck down as arbitrary unless it is unconstitutional. Greater latitude vests with the Parliament in taxing statutes and motive is not a relevant factor. In support of the above submissions, learned Additional Solicitor General has placed reliance on the following decisions:-

a. *Union of India Vs. Exide Industries Ltd.*,
(2020) 425 ITR (SC) 1;
b. *Shri Ram Krishna Dalmia Vs. Shri S. R. Tendolkar*,
AIR 1958 SC 538;
c. *R. K. Garg Vs. Union of India*, **AIR 1981 SC 2138**;
d. *Government of Andhra Pradesh Vs. P. Lakshmi Devi*,
AIR 2008 SC 1640;
e. *Laya Binykumar Panday Vs. Medical Council of India*,
2006 (6) Mh.L.J. 438; and
f. *Amrit Banaspati Company Vs. Union of India*,
(1995) 3 SCC 335

17.1. Next submission of Mr. Singh is that even under the erstwhile service tax regime, the Place of Provision of Service Rules, 2012 contained a similar provision with effect from 01.10.2014. In compliance thereto petitioner had been paying service tax on the service rendered to overseas customer and therefore it is not open to the petitioner to make the impugned challenge now. Reverting back to the aforesaid rules Mr. Singh, learned Additional Solicitor General submits that central government considered several representations and after examining the issue in detail declared that with effect from 01.10.2014 the place of supply for all intermediaries (goods and services) would be the location of the intermediary. This in turn would encourage the *Make in India* program by encouraging the overseas customers to set up units in India thereby leading to foreign investments giving a boost to *Make in India* program. This will also bring about a level playing field in India.

17.2. Learned Additional Solicitor General has placed strong reliance on the judgment of the Gujarat High Court in *Material Recycling Association of India Vs. Union of India* decided on **24.07.2020**, wherein identical challenge made to section 13(8)(b) of the IGST Act has been repelled by the Gujarat High Court. Mr. Singh firstly submits that the decision of the Gujarat High Court is correct in all respects and therefore, there is no reason as to why a different view should be taken by this Court. Secondly, relying on a decision of the Supreme Court in *Kusum Ingots & Alloys Vs. Union of India*, **(2004) 6 SCC 254** followed by the Gauhati High Court in *Rehena Begum Vs. State of Assam*, **Writ Petition (C) No.6968 of 2013** decided on **21.07.2015**, he submits that in the case of an all India statute a view taken by a High Court as to its constitutionality or otherwise would be applicable throughout the territory of India and therefore, should be followed.

17.3. In such circumstances learned Additional Solicitor General submits that there is no merit in the writ petition and therefore, the writ petition should be dismissed.

18. Replying to the general submissions made by the learned Additional Solicitor General on constitutionality of a statute Mr. Raichandani submits that there can be no doubt or dispute about the said propositions canvassed by Mr. Singh. However, each challenge has to be decided having regard to the facts and circumstances of each case and there can be no straight jacket formula. In this connection learned counsel for the petitioner has placed reliance on *State of UP Vs. Deepak Fertilizers & Petrochemical Corporation Ltd.*, **(2007) 10 SCC 342**.

18.1. Mr. Raichandani submits that substance of the impugned provision has to be looked into to determine as to whether in pith and substance it is within a particular entry. He has placed reliance on a number of decisions in this regard. Continuing with his submissions Mr. Raichandani asserts that apart from passing the test of legislative competence, the impugned provision must be otherwise legally valid and would also have to pass the test of constitutionality in the sense that it cannot be in violation of the provisions of the Constitution nor can it operate extra-territorially.

18.2. In so far reliance placed on the Place of Provision of Service Rules, 2012 by the respondents, Mr. Raichandani submits that there cannot be waiver or estoppel against raising an issue of constitutionality. Challenge made is to section 13(8)(b) of the IGST Act which has come into effect from 01.07.2007. Therefore, reference to the Finance Act, 1994 and to the Place of Provision of Service Rules, 2012 is wholly irrelevant and completely out of context. The present challenge as to levy of GST on export of services by intermediary treating the same as intra-state supplies cannot be judged or adjudicated on the touchstone of service tax law which in any case did not have extra-territorial operation.

18.3. Regarding the submission that the impugned provision would boost the *Make in India* program, Mr. Raichandani submits that such a

submission is without any evidence and needs to be rejected outright. As a matter of fact levy of GST on export of services by intermediary has created an exodus of intermediaries to places like Singapore, Dubai, Hong Kong etc. thereby depriving the central government not just GST but also income tax, valuable foreign exchange and employment to thousands of people. Such levy of GST is rather against the *Make in India* program as well as against the age old policy of the Government of India to encourage export of goods and services.

18.4. In so far the Gujarat High Court judgment in **Material Recycling Association of India** *(supra)* is concerned, the submission is that decision of the Gujarat High Court cannot be treated as a binding precedent. It is a settled legal position that decision of one High Court is not binding on another High Court. If what the learned Additional Solicitor General submits is accepted then no High Court would be in a position to examine the validity of a provision which has been upheld by one High Court. Assailing the Gujarat High Court judgment Mr. Raichandani submits that it has been rendered *sub silentio*. The challenge to section 13(8)(b) of the IGST Act that it is *ultra vires* Article 286 read with Article 246A and Article 269A of the Constitution was neither canvassed before nor considered by the Gujarat High Court. There is no discussion on Articles 14 and 19(1)(g) as well. He therefore submits that this Court may take a view different from and independent of the Gujarat High Court.

19. Both the sides have filed written submissions.

20. Submissions made by learned counsel for the parties have received the due consideration of the Court.

21. Before we proceed to deal with goods and services tax (GST) and integrated goods and services tax (IGST), we may note what the Supreme Court had said on two of the legacy taxes i.e., value added tax

(VAT) and service tax which have since been replaced and subsumed by GST. In **All India Federation of Tax Practitioners** *(supra),* the question for consideration before the Supreme Court was the constitutional status of the levy of service tax and the legislative competence of Parliament to impose service tax under Article 246(1) read with entry 97 of List I of the seventh schedule to the Constitution. It was an appeal before the Supreme Court against the decision of the Bombay High Court upholding the legislative competence of Parliament to levy service tax *vide* Finance Act, 1994 and Finance Act, 1998. According to the Bombay High Court, service tax fell in entry 97 List I of the seventh schedule to the Constitution.

21.1. The issue was examined by the Supreme Court from the point of view of competence of Parliament to levy service tax on practising chartered accountants having regard to entry 60 of List II of the seventh schedule to the Constitution and Article 276 of the Constitution. Referring to the service tax background it was noticed that Government of India in the late 1970s had initiated an exercise to explore alternative revenue sources due to resource constraints. Though customs and excise duty constituted two major sources of indirect taxes in India, however by 1994 Government of India found revenue receipts from customs and excise on the decline due to various reasons. Therefore, in the year 1994-95 the then Union Finance Minister introduced the new concept of service tax by imposing tax on services of telephones, non-life insurance and stock brokers. That list increased since then, as knowledge economy had made 'services' an important revenue earner. Service tax was an indirect tax levied on certain services provided by certain categories of persons. Service tax was premised on the economic viewpoint that there is no distinction between consumption of goods and consumption of services as both satisfy the human needs.

21.2. Finance Bill, 1998 was introduced in Parliament so as to levy tax on services rendered by a practising chartered accountant, cost

accountant and architect to a client in professional capacity at a particular rate.

21.3. It was in that background that Supreme Court referred to the concept of VAT which is a general tax that applies in principle to all commercial activities involving production of goods and provision of services whereafter it was concluded that VAT is a consumption tax as it is borne by the consumer. It was held that service tax is a VAT which in turn is a destination based consumption tax in the sense that it is on commercial activities. It is not a charge on the business but on the consumer and it would logically be leviable only on services provided ***within the country*** (emphasis is ours); service tax is a value added tax. It was held as under:-

> "6. At this stage, we may refer to the concept of Value Added Tax (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.
>
> 7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.
>
> 8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly services fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc."

21.4. After re-stating that the economic concept of there being no distinction between consumption of goods and consumption of services

was translated into a legal principle of taxation by the Finance Acts of 1994 and 1998, it was noted that Government of India had introduced Article 268A in the Constitution in the year 2003 by providing that taxes on services shall be charged by the Union of India and shall be appropriated by Union of India and the States. A new entry 92C was also introduced in the Union List for the levy of taxes on services.

21.5. On analysing the scheme of the Finance Act, 1994, Finance Act, 1998, relevant provisions of the Constitution of India and the decision of the Supreme Court in *Moti Laminates Pvt. Ltd. Vs. Collector of Central Excise, Ahmedabad*, **1995 (76) ELT 241 (SC)**, Supreme Court recorded the finding that source of the concept of service tax was traceable to economics. It is an economic concept. It has evolved on account of the service industry becoming a major contributor to the Gross Domestic Product (GDP) of an economy particularly knowledge based economy. Supreme Court held that service tax is a value added tax which in turn is a general tax applying to all commercial activities involving production of goods and provision of services, besides VAT being a consumption tax as it is borne by the client. It was held as under:-

> "20. On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country."

22. Thus what is clearly discernible is that the emphasis in the above paragraph was on tax leviable on services provided within the country.

23. In *Commissioner of Service Tax Vs. SGS India Pvt. Ltd.*, **2014 (34) STR 554 (Bom.)**, this Court was considering an appeal by the Revenue under section 35G of the Central Excise Act, 1994 read with section 83 of the Finance Act, 1994. In that case respondent was providing technical inspection and certification agency service as well as technical testing and analysis agency service at different places in India in respect of goods imported by their customers located abroad. For

providing such services respondent received consideration in convertible foreign exchange. A show cause notice was issued to the respondent by the Directorate General of Central Excise Intelligence, Mumbai Zonal Unit alleging that the services provided by the respondent were performed in India though test reports thereof were sent outside India. Since the services were performed in India, there was no export of services. Respondent was therefore called upon to pay service tax. This demand was disputed by the respondent. However, the adjudicating authority passed the order in original confirming the demand and imposing penalty.

23.1. It is this order of the adjudicating authority which was challenged by the respondent in appeal before the Central Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT). CESTAT by the order impugned allowed the appeal. As a result the demand was dropped, so also the penalty.

23.2. This decision of CESTAT was challenged in appeal before the High Court by the adjudicating authority. This Court noted that CESTAT had found as a finding of fact that the clients of the respondent were located abroad. The test reports might have been prepared in India; the test might have been conducted in India. However, the certificates had been forwarded to the clients of the respondent abroad. From this the High Court deduced that the respondent had exported the services by way of testing and analysis in India and transmitting the test report / analysis report to the foreign clients. The service was complete when the report was delivered to the foreign client. Since the delivery of the report to the foreign client was considered to be an essential part of the service, the demand of service tax was set aside.

23.3. This Court held that the view of the CESTAT was in accord with the statutory provision as clarified by the Central Board of Excise and Customs in the circular relied upon, further opining that the services

rendered by the respondent were fully covered by the principle laid down in the decision of the Supreme Court in **All India Federation of Tax Practitioners** (*supra*). It was held as under:-

> "24. In the present case, the Tribunal has found that the assessee like the respondent rendered services, but they were consumed abroad. The clients of the respondents used the services of the respondent in inspection/test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were foreign clients, paid the respondent for such services rendered, in foreign convertible currency. It is in that sense that the Tribunal holds that the benefit of the services accrued to the foreign clients outside India. This is termed as 'export of service'. In these circumstances, the Tribunal takes a view that if services were rendered to such foreign clients located abroad, then, the act can be termed as 'export of service'. Such an act does not invite a Service Tax liability. The Tribunal relied upon the circulars issued and prior thereto the view taken by it in the case of *KSH International Pvt. Ltd. v. Commissioner and B.A. Research India Ltd*. The case of the present respondent was said to be covered by orders in these two cases. To our mind, once the Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non-commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. It is this finding and conclusion of the Hon'ble Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case.
>
> 25. The view taken by the Tribunal therefore, cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. If the emphasis is on consumption of service then, the order passed by the Tribunal does not raise any substantial question of law."

23.4. This Court held that though the reports of test and analysis were done in India, those were sent abroad because the clients of the respondent were foreign clients. They paid the respondent for such

services in foreign convertible currency. It was in that sense that the Tribunal held that the benefit of the services accrued to the foreign clients outside India, terming the same as ‘export of services’. High Court upheld the view of CESTAT that if services were rendered to such foreign clients located abroad then such an act can be termed as 'export of service' which act does not invite a service tax liability. This Court referred to the Supreme Court judgment as alluded to hereinabove that service tax is a value added tax which in turn is a destination based consumption tax in the sense that it is not a charge on the business but on the consumer, then it is leviable only on services provided ***within the country***. Thus the view taken by the CESTAT was upheld.

23.5. During the hearing Mr. Singh pointed out that against the aforesaid decision of this Court, Commissioner of Service Tax has filed SLP before the Supreme Court wherein Supreme Court has condoned the delay and has issued notice.

24. Having noticed the views taken by the Supreme Court as well as by this Court on VAT and service tax, we may now look at those constitutional provisions dealing with GST.

25. Part XI of the Constitution of India deals with relations between the Union and the States. Article 245 which is included in Chapter I of the said part lays down the extent of laws made by Parliament and by the legislatures of the states. Clause (1) says that subject to provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a state may make laws for the whole or any part of the state. As per clause (2), no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

25.1. Thus what Article 245 contemplates is that while Parliament may make laws for the whole or any part of India, the legislature of a state

may make laws for the whole or any part of the state. Further, no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. This apparent dichotomy manifest through clause (2) of Article 245 has been explained by the Supreme Court in **GVK Industries Limited** (*supra*) and in *Sondur Gopal Vs. Sondur Rajini*, **AIR 2013 SC 2678**. It has been held that laws made by one state cannot have operation in another state. A law which has extra-territorial operation cannot directly be enforced in another state but such a law is not invalid and is saved by Article 245(2) of the Constitution. But clause (2) does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. Unless such contingency exists, Parliament shall be incompetent to make law having extra-territorial operation.

26. Article 246 deals with subject matter of laws made by Parliament and by the legislatures of states. Clause (1) says that notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of the seventh schedule to the Constitution. As per clause (2), notwithstanding anything in clause (3), Parliament and subject to clause (1) the legislature of any state also have power to make laws with respect to any of the matters enumerated in List III of the seventh schedule to the Constitution. In terms of clause (3), legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in List II of the seventh schedule to the Constitution which is however subject to clauses (1) and (2). As a clarification, clause (4) makes it clear that Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a state notwithstanding that such matter is a matter enumerated in the State List.

26.1. At this stage we may briefly note that power to legislate, be it by the Parliament or by the legislature of a state, is traceable to Article 246

of the Constitution. The various entries comprising the three lists of the seventh schedule to the Constitution of India are the fields of legislation.

27. By way of Constitution (101st Amendment) Act, 2016, Article 246A was inserted in the Constitution of India. It lays down special provision with respect to goods and services tax (GST). Clause (1) says that 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 GST imposed by the union or by such state. Before proceeding to clause (2) we may note that clause (1) has overriding power over Articles 246 and 254. While we have already discussed Article 246, we may mention that Article 254 deals with inconsistency between laws made by Parliament and laws made by the legislatures of states leading to repugnancy. Be that as it may, clause (2) says that Parliament has exclusive power to make laws with respect to GST where the supply of goods or of services or both takes place in the course of inter-state trade or commerce.

28. Article 269A was inserted in Chapter I of Part XII of the Constitution by way of the Constitution (101st Amendment) Act, 2016 providing for levy and collection of GST in the course of inter-state trade or commerce. Clause (1) says that GST 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 i.e., GST Council. As per the explanation to clause (1), supply of goods or of services or both in the course of import into the territory of India shall be deemed to be supply of goods or of services or both in the course of inter-state trade or commerce. Clause (5) clarifies that Parliament may by law formulate the principles for determining the place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce.

29. By the said Constitution (101st Amendment) Act, 2016, Article 279A was inserted in the Constitution of India providing for Goods and Services Tax Council i.e., GST Council which is headed by the Union Finance Minister as the chairperson. Clause (4) provides that GST Council shall make recommendations to the union and to the states on various aspects including on model GST laws, principles of levy, apportionment of GST levied on supplies in the course of inter-state trade or commerce under Article 269A and the principles that govern the place of supply [Article 279A(4)(c)].

30. Parliament enacted the Central Goods and Services Tax Act, 2017 (already referred to as "the CGST Act" hereinabove) to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the central government and for matters connected therewith or incidental thereto. As per section 1(2), the CGST Act extends to the whole of India except the State of Jammu and Kashmir.

31. Section 2 of the CGST Act provides for definitions of different expressions finding place in the CGST Act. Sub-section (93) defines 'recipient' of supply of goods or services or both to mean - (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. Thus what is of relevance is that where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration would be

construed to be the recipient of supply of goods or services or both.

31.1. As per sub-section (102) of section 2, 'services' means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.

31.2. 'Taxable supply' means supply of goods or services or both which is leviable to tax under the CGST Act and 'taxable territory' means the territory to which the provisions of the CGST Act apply.

32. Scope of supply is dealt with in section 7 of the CGST Act. Sub-section (1) says that for the purpose of the CGST Act, the expression 'supply' would include - (a) all forms of supply of goods or services or both, such as, sale, transfer, exchange, license, rental, lease etc. made or agreed to be made for a consideration by a person in the course or furtherance of business; (b) import of services for a consideration whether or not in the course or furtherance of business etc.

33. Section 9 is the charging section. It provides for levy and collection of a tax called the central goods and services tax (CGST) on all intra-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rate as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and paid by the taxable person.

34. Similar provisions are there in the Maharashtra Goods and Services Tax Act, 2017 (already referred to as the 'MGST Act' hereinabove) which is an act to make provisions for levy and collection of tax on intra-state supply of goods or services or both in the state of

Maharashtra and matters connected therewith or incidental thereto. Here also section 7 deals with scope of supply whereas section 9 is the charging section.

35. That brings us to the Integrated Goods and Services Tax Act, 2017 (already referred to as the 'IGST Act' hereinabove). The IGST Act has been enacted to make provision for levy and collection of tax on inter-state supply of goods or services or both by the central government and for matters connected therewith or incidental thereto. As per section 1(2), the IGST Act shall extend to the whole of India except the State of Jammu and Kashmir.

36. Section 2 provides for definitions of various expressions used in the IGST Act. Sub-section (6) is relevant. It defines ‘export of services’. Since this definition is relevant it is extracted as under:-

> “2(6) ‘export of services’ means the supply of any service when,-
>
> (i) the supplier of service is located in India;
> (ii) the recipient of service is located outside India;
> (iii) the place of supply of service is outside India;
> (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
> (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;”

36.1. Thus from the above it is seen that ‘export of services’ means the supply of any service when the supplier of service is located in India; the recipient of service is located outside India; the place of supply of service is outside India; payment for such service has been received by the supplier of service in convertible foreign exchange; and the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

37. 'Intermediary' is defined in sub-section (13) to mean a broker, an agent or any any other person by whatever name called, who arranges or

facilitates the supply of goods or services or both or securities between two or more persons but does not include a person who supplies such goods or services or both or securities on his own account.

38. 'Location of the recipient of services' has been defined in sub-section (14) of section 2. Since this definition is also relevant, the same is quoted hereunder:-

> "2(14) 'location of the recipient of services' means,-
>
> (a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;
>
> (b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;
>
> (c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and
>
> (d) in absence of such places, the location of the usual place of residence of the recipient;"

38.1. From the above what is deducible is that location of the recipient of services would mean where a supply is received at a place of business for which registration has been obtained, the location of such place of business; where a supply is received at a place other than the place of business for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; 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 in the absence of such places, the location of the usual place of residence of the recipient.

39. Sub-section (15) of section 2 defines the expression 'location of the supplier of services' to mean where a supply is made from a place of business for which registration has been obtained, the location of such place of business; where a supply is made from a place other than the

place of business for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; 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 supply; and in the absence of such places the location of the usual place of residence of the supplier.

40. Section 5 of the IGST Act is the charging section. Sub-section (1) says that subject to the provisions of sub-section (2) there shall be levied a tax called the integrated goods and services tax (IGST) 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 CGST Act and at such rate as may be notified by the central government on the recommendations of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Sub-section (2) deals with integrated tax on the supply of petroleum, crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel.

41. Inter-state supply is dealt with in section 7. As per sub-section (3), subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply are in two different states; two different union territories; or in a state and in an union territory, shall be treated as a supply of services in the course of inter-state trade or commerce. Sub-section (4) says 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. Sub-section (5) says that supply of goods or services or both - (a) when the supplier is located in India and the place of supply is outside India; (b) to or by a special economic zone developer or a special economic zone unit; or (c) in the taxable territory not being an intra-state supply and not covered elsewhere in section 7, shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce. Thus the

takeaway from this sub-section particularly from clause (a) is that in the case of supply of goods or services or both when the supplier is located in India and the place of supply is outside India that shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce; as distinguishable from intra-state supply.

42. Section 8 deals with intra-state supply. As per sub-section (2), subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same state or in the same union territory shall be treated as intra-state supply. As per the proviso, intra-state supply of services shall not include supply of services to or by a special economic zone developer or a special economic zone unit. Explanation 1 clarifies that where a person has an establishment in India and any other establishment outside India; an establishment in a state or union territory and any other establishment outside that state or union territory; or an establishment in a state or union territory and any other establishment in a state or union territory and any other establishment being a business vertical registered within that state or union territory then such establishment shall be treated as establishments of distinct persons. As per Explanation 2, a person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

43. While section 10 deals with place of supply of goods other than supply of goods imported into or exported from India, section 12 on the other hand deals with place of supply of services where location of supplier and recipient is in India. Sub-section (1) says that provisions of section 12 shall apply to determine the place of services where the location of supplier of services and the location of the recipient of services is in India. Clause (a) of sub-section (2) clarifies that except the services specified in sub-sections (3) to (14), the place of supply of services made to a registered person shall be the location of such person.

44. That brings us to section 13 which deals with place of supply of services where location of supplier or location of recipient is outside India. Sub-section (1) gives the intent of section 13. It says that provisions of section 13 shall apply to determine the place of supply of services where the location of the recipient of services is outside India. Sub-section (2) provides that except the services specified in sub-sections (3) to (13), the place of supply of services shall be the location of the recipient of services. However as per the proviso, 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. Thus sub-section (2) lays down the general proposition that place of supply of services shall be the location of the recipient of services barring the exceptions carved out in sub-sections (3) to (13). In this case we are concerned with clause (b) of sub-section (8). For a proper perspective sub-section (8) is quoted hereunder:-

> "13(8) The place of supply of the following services shall be the location of the supplier of services, namely:-
>
> (a) * * * *
>
> (b) intermediary services;
>
> (c) * * * * ."

44.1. Thus what sub-section (8)(b) says is that in case of supply of services by intermediary the place of supply shall be the location of the supplier of services i.e., the intermediary which is an exception to the general rule as expressed in sub-section (2) of section 13 and this is what is impugned in the present proceeding.

45. The Parliamentary Standing Committee on Commerce submitted report No.139 on *Impact of Goods and Services Tax (GST) on Exports*. The said report was presented to the *Rajya Sabha* on 19 December, 2017 and was laid on the table of *Lok Sabha* on the same day. After referring to the definition of 'export of services' as defined under section 2(6) of the IGST Act, it was noted that service providers providing services to

overseas suppliers of goods earn commission in convertible foreign exchange; but IGST @ 18% is leviable on such commission because the government does not recognize their services as export of services. Section 13(8) provides that place of supply of services will be the location of the service supplier and not the location of overseas customers. Even in cases where both the supplier and the buyer are located outside India, commission earned for such transaction also attract IGST @ 18%. In view of the fact that GST is a destination based consumption tax, the Parliamentary Standing Committee made the following recommendations:-

> "• Provide that place of supply of Indian intermediaries of goods will be the location of service recipient i.e., customers located abroad (and not the location of such intermediaries as is currently provided), so that intermediary services will be treated as exports; or
>
> • Providing an exemption to Indian intermediaries of goods from levy of IGST, exercising the powers vested under section 6(1) of the IGST Act; or
>
> • Notify such services under section 13(13) of the IGST Act to prevent double taxation (tax in India as well as in the importing country) by treating place of effective use (foreign country) as place of supply."

45.1. The Committee further recommended that the government may also cause amendment to section 13(8) of the IGST Act to exclude intermediary services and make it subject to the default section 13(2) so that the benefit of export of services would be available. Noting that it is the long standing policy of the Government of India to export services without exporting taxes and duties, the Committee hoped that government would leave no stone unturned to place in an efficacious taxation regime for a robust export framework.

46. It may also be mentioned that GST Council i.e., respondent No.3

in its paper on *GST - Concept and Status*, dated 01.04.2018 reiterated that GST would be applicable on supply of goods or services as against the concept of tax on manufacture of goods or on sale of goods or on provision of services. GST is a destination based consumption tax as against the principle of origin based taxation. Under destination based taxation, tax accrues to the destination place where consumption of the goods or services takes place. Import of goods or services would be treated as inter-state supplies and would be subject to IGST in addition to applicable customs duty. All exports and supplies to special economic zones and special economic zone units would be zero-rated. The fact that GST is a destination based consumption tax; it is a value added tax; it is a tax on services provided and consumed within the territory of India having no extra-territorial operation or nexus has been clarified by respondent No.2 i.e., Central Board of Indirect Taxes and Customs in its circular bearing No.20/16/04/2018-GST dated 18.02.2019 wherein it is reiterated that after introduction of GST which is a destination based consumption tax it is essential to ensure that the tax paid by a registered person accrues to the state in which the consumption of goods or services or both takes place.

47. We have already referred to and analysed Articles 246A and 269A of the Constitution of India. Both were inserted into the Constitution by way of the Constitution (101st Amendment) Act, 2016. While Article 246A deals with special provision with respect to GST, Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. From a careful and conjoint reading of the two Articles it is quite evident that the Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce, besides laying down principles for determining place of supply and when such supply of goods or services or both takes place in the course of inter-state trade or commerce. Thus the Constitution does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply.

48. At this stage we may refer to Article 286 of the Constitution of India. Article 286 lays down restrictions as to imposition of tax on the sale or purchase of goods. Article 286 being relevant is extracted as under:-

> "286. Restrictions as to imposition of tax on the sale or purchase of goods -
>
> (1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or services or both, where such supply takes place -
>
> (a) outside the State; or
>
> (b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India
>
> (2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1).

48.1. Clause (1) says that no law of a state shall impose or authorize the imposition of a tax on the supply of goods or of services or both where such supply takes place - (a) outside the state; or (b) in the course of the import of the goods or services or both into or export of the goods or services or both out of the territory of India. Clause (2) provides that Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1). Though the expressions "import" and "export" have not been defined in the Constitution which would mean that we would have to fall back upon usage of the said expressions in the ordinary common parlance, nonetheless there is an express bar under clause (1) of Article 286 that no law of a state shall impose or authorize imposition of a tax on the supply of goods or services or both where such supply takes place in the course of import into or export out of the territory of India. While clause (2) empowers the Parliament to make laws formulating principles for determining supply of goods or of services or both certainly the same cannot be used to foil or thwart the scheme of clause (1). Both have to be read together.

49. In so far the present case is concerned, it is certainly a supply of service from India to outside India by an intermediary. Petitioner fulfills the requirement of an intermediary as defined in section 2(13) of the IGST Act. That apart, all the conditions stipulated in sub-section (6) of section 2 for a supply of service to be construed as export of service are complied with. The overseas foreign customer of the petitioner falls within the definition of 'recipient of supply' in terms of section 2(93) of the CGST Act read with section 2(14) of the IGST Act. Therefore, it is an 'export of service' as defined under section 2(6) of the IGST Act read with section 13(2) thereof. It would also be an export of service in terms of the expression 'export' as is understood in ordinary common parlance. Evidently and there is no dispute that the supply takes place outside the State of Maharashtra and outside India in the course of export. However, what we notice is that section 13(8)(b) of the IGST Act read with section 8(2) of the said Act has created a fiction deeming export of service by an intermediary to be a local supply i.e., an inter-state supply. This is definitely an artificial device created to overcome a constitutional embargo. Question for consideration is whether creation of such a deeming provision is permissible or should receive the imprimatur of a constitutional court?

50. In **State of Travancore - Cochin** (*supra*), the state was in appeal before the Supreme Court against the decision of the High Court quashing the assessments under the United State of Travancore and Cochin Sales Tax Act. The respondents in each case claimed exemption from assessment in respect of the sales effected by them on the ground *inter alia* that such sales took place in the course of export of the goods out of the territory of India. Sales tax authorities rejected the contention as in their view the sales were completed before the goods were shipped and could not therefore be considered to have taken place in the course of the export. This led the respondents to file writ petitions before the High Court. The High Court after hearing the matter upheld the claim of

exemption and quashed the assessment orders which thereafter led to filing of the appeals.

50.1. Constitution Bench of the Supreme Court referred to clause (1) of Article 286 on which the respondents based their claim to exemption. Supreme Court referred to the views expressed by the learned judges of the High Court on the scope and meaning of sub-clause (b) of clause (1) of Article 286 which is extracted as under:-

> "7. * * * *
>
> The words 'in the course of ' make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions, the sale has taken place, such a sale is exempted from the levy of sales tax. The sale may have taken place within the boundaries of the State. Even then sales tax cannot be levied if the sale had taken place while the goods were in the course of import into India or in the course of export out of India. We are stressing this point because both parties in what we may describe as the cashew nut cases entered into a lengthy discussion as to the exact point of time when the sale became completed and as to the exact place where the goods were when the sale became a completed transaction."

50.2. It was found that on this interpretation local purchases made for the purpose of export were held by the learned judges to be integral part of the process of exporting. Approving such interpretation, Supreme Court held as under:-

> “11. We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under article 286(1)(b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an

> export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under article 286(1)(b). That clause, indeed, assumes that the sale had taken place within the limits of the State and exempts it if it took place in the course of the export of the goods concerned."

50.3. Accordingly it was held that whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India would come within the exemption. Agreeing with the conclusion of the High Court, the appeals were dismissed.

51. Interpretation of the expressions 'export' and 'import' in the context of the Constitution of India came up before the Supreme Court in **Central India Spinning and Weaving and Manufacturing Company Limited** *(supra).* Supreme Court held thus:-

> "7. The High Court was of the opinion that "The words 'export' and 'import' have no special meaning. They bear the ordinary dictionary meaning, which has been the foundation for the decisions to which I have referred in the opening portion of my opinion. These words mean only 'taking out of and bringing into'."
>
> 8. The appellant's contention is that the words 'imported into or exported from' do not merely mean 'to bring into' or to carry out of or away from but also have reference to and imply the termination or the commencement of the journey of the goods sought to be taxed and therefore goods in transit which are transported across the limits of a Municipal Committee are neither imported into the municipal limits nor exported therefrom. It is also contended that even if the words 'imported into or exported from' are used merely to mean "to bring into" or "to carry out of or away from" the qualifying of the tax by the adjective "terminal" is indicative of the terminus ad quern or terminus a qua of the journey of the goods and excludes the goods in transit. The respondent on the other hand submits that the tax is leviable merely on the entry of the goods into the municipal limits or on their exit there from and the word "terminal" has reference to the termini of the jurisdictional

limits of the municipality and not to the journey of the goods. The efficacy of the relative contentions of the parties therefore requires the determination of the construction to be placed on the really important words of which are "terminal tax", "imported into or exported from" and " the limits of the Municipality". In construing these words of the statute if there are two possible interpretations then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him.

9. 'Import' is derived from the Latin word importare which means 'to bring in' and 'export' from the Latin word exportare which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico-logically they do not have any reference to goods in 'transit' a word derived from transire bearing a meaning similar to transport, i.e., to go across. The dictionary meaning of the words 'import' and 'export' is not restricted to their derivative meaning but bear other connotations also. According to Webster's International Dictionary the word "import" means to bring in from a foreign or external source; to introduce from without; especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export. Similarly "export" according to Webster's International Dictionary means "to carry away; to remove; to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import". The Oxford Dictionary gives a similar meaning to both these words.

* * * * *

20. The respondent also relied on Muller v. Baldwin (1874) 9 Q.B. 457 where it was held that "coals exported from the Port" must be taken to have been used in its ordinary meaning of "carried out of the Port" and therefore included coals taken out of the port in a steamer as "bunker coals" that is, coals taken on board for the purpose of consumption on the voyage. The argument that the term "exported" must receive a qualified interpretation and that it means taken for the purpose of trade only was rejected. Lush J. said at p. 461:-

> "There is nothing in the language of the Act to show that the word "exported" was used in any other than its ordinary sense..... Construing the words of the Act upon this principle, we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure-boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of

> being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the Act".
>
> ”

52. Reverting back to Article 245 of the Constitution of India, we have already discussed that clause (1) empowers the Parliament to make laws for the whole or any part of the territory of India which power is however subject to the provisions of the Constitution. We have also noted that as per clause (2), no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. As we have noted earlier there appears to be an apparent dichotomy of what clause (1) says and what clause (2) saves. While clause (1) says that Parliament may make laws for the whole or any part of the territory of India which is however subject to the provisions of the Constitution, clause (2) however says that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

53. In **GVK Industries Limited** *(supra)*, Supreme Court formulated two questions for its consideration, viz.,

1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspect or causes that do not have nor expected to have any direct or indirect, tangible or intangible impact on or effect in or consequences for (a) the territory of India or any part of India or (b) the interest of, welfare of, well being of or security of the inhabitants of India and Indians?
2) Does the Parliament have the powers to legislate 'for' any territory other than the territory of India or any part of it?

53.1. In so far question No.1 was concerned, the answer was in the affirmative i.e., Parliament being constitutionally restricted from enacting extra-territorial legislation but such restriction was made subject to certain exigencies, such as, it should have a real connection to India which should not be illusory or fanciful. In so far the second

question was concerned, the answer was an emphatic no. Supreme Court held as under:-

> "76. We now turn to answering the two questions that we set out with:
>
> > (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) 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?
>
> 77. The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial 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 extra-territorial 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.
>
> 78. 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 pre-determined 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. 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 the 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.

> (2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?
>
> 79. The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question No.1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra- territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question No.1 above, and would be laws made "for" a foreign territory."

53.2. In **Sondur Gopal** *(supra)* reiterating the above position Supreme Court clarified that clause (2) of Article 245 does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. Unless such contingency exists, Parliament shall be incompetent to make laws having extra-territorial operation. Referring to an earlier decision of the Supreme Court in *M/s. Electronics Corporation of India Limited Vs. Commissioner of Income Tax*, **AIR 1989 SC 1707**, it was held that unless a nexus with something in India exists, Parliament would have no competence to make the law. Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India.

54. Reverting back to section 9 of the CGST Act which is the charging section we find that it provides for levy and collection of CGST

on all intra-state supplies of goods or services except on the supply of alcoholic liquor for human consumption at such rate as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Likewise section 5 of the IGST Act which is the charging section provides for levy of IGST 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 CGST Act and at such rates as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Thus it is apparent that section 9 of the CGST Act cannot be invoked to levy tax on cross-border transactions i.e., export of services. Likewise from the scheme of the IGST Act it is evident that the same provides for levy of IGST on inter-state supplies. Import and export of services have been treated as inter-state supplies in terms of section 7(1) and section 7(5) of the IGST Act. On the other hand sub-section (2) of section 8 of the IGST Act provides that where location of the supplier and place of supply of service is in the same state or union territory, the said supply shall be treated as intra-state supply. However, by artificially creating a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.

55. Coming to the judgment of the Gujarat High Court in **Material Recycling Association of India** (*supra*), we find that Gujarat High Court while holding that section 13(8)(b) of the IGST Act cannot be said to be *ultra vires* or unconstitutional in any manner, however kept it open for the respondents to consider the representation made by the petitioner so as to redress its grievance in a suitable manner and in consonance

with the CGST Act and the IGST Act. This is how Gujarat High Court dealt with the challenge:-

> 65. ….. The petitioner has tried to submit that the services provided by a broker outside India by way of intermediary service should be considered as "export of services" but the legislature has thought it fit to consider such intermediary services; the place of supply would be the location of the supplier of the services. In that view of the matter, it would be necessary to refer to the definition of "export of services" as contained in section 2(6) of the IGST Act, 2017 which provides that export of service means the place of service of supply outside India. Conjoint reading of section 2(6) and 2(13), which defines export of service and intermediary service respectively, then the person who is intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both. In such circumstances, the respondent No.3 have issued Circular No.20/2019 where exemption is granted in IGST rates from payment of IGST in respect of services provided by intermediary in case the goods are supplied in India.
>
> 66. It therefore, appears that the basic logic or inception of section 13(8)(b) of the IGST Act, 2017 considering the place of supply in case of intermediary to be the location of supply of service is in order to levy CGST and SGST and such intermediary service therefore, would be out of the purview of IGST. There is no distinction between the intermediary services provided by a person in India or outside India. Only because, the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has though it fit to consider the place of supply of services as place of person who provides such service in India.
>
> 67. Therefore, there is no deeming provision as tried to be canvassed by the petitioner, but there is stipulation by the Act legislated by the parliament to consider the location of the service provider of intermediary to be place of supply. Similar situation was also existing in service tax regime w.e.f. 1st October 2014 and as such same situation is continued in GST regime also. Therefore, this being a consistent stand of the respondents to tax the service provided by intermediary in India, the same cannot be treated as "exporter of services" under the IGST Act, 2017 and therefore, rightly included in Section 13(8)(b) of the IGST Act to consider the location of supplier of service as place of supply so as to attract CGST and SGST."

56. With utmost respect we are unable to accept the views of the Gujarat High Court as extracted above. Having regard to the discussions made in the preceding paragraphs it is evident that section 13(8)(b) of the IGST Act not only falls foul of the overall scheme of the CGST Act and the IGST Act but also offends Articles 245, 246A, 269A and 286(1)(b) of the Constitution. The extra-territorial effect given by way of section 13(8)(b) of the IGST Act has no real connection or nexus with the taxing regime in India introduced by the GST system; rather it runs completely counter to the very fundamental principle on which GST is based i.e., it is a destination based consumption tax as against the principle of origin based taxation.

57. Mr. Singh, learned Additional Solicitor General had argued that the decision of the Gujarat High Court should be followed by this Court and for this purpose had relied upon the decision of the Supreme Court in **Kusum Ingots & Alloys** *(supra)* as well as of the Gauhati High Court in **Rehena Begum** *(supra).* In **Kusum Ingots & Alloys** *(supra)* the question before the Supreme Court was whether the seat of the Parliament or the legislature of a state would be a relevant factor for determining the territorial jurisdiction of a High Court to entertain a writ petition under Article 226 of the Constitution of India. In the context of the issue involved Supreme Court examined the expression 'cause of action', clause (2) of Article 226 of the Constitution of India and section 20(c) of the Civil Procedure Code whereafter it was held that even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have territorial jurisdiction in the matter. A writ petition questioning the constitutionality of a Parliamentary legislation can be filed in any High Court of the country. Of course it can be done only when a cause of action arises which will confer territorial jurisdiction. It was in that context Supreme Court held that an order passed on a writ petition questioning the constitutionality of a Parliamentary act whether interim or final will have effect throughout the territory of India subject of course to applicability of such act.

58. In **Rehena Begum** (*supra*), a Single Bench of the Gauhati High Court found that section 17A of the Industrial Disputes Act, 1947 was held to be unconstitutional by the Andhra Pradesh High Court which decision was followed by the Madras High Court. Gauhati High Court agreed with the views expressed by the Madras High Court as well as by the Andhra Pradesh High Court that unconstitutionality of the provision of section 17A would have effect throughout the territory of India.

59. It is a settled legal proposition that decision of one High Court is not binding on another High Court though it deserves due consideration and certainly has a high persuasive value. This position has been clarified by the Supreme Court in *Valliamma Champaka Pillai Vs. Sivathanu Pillai*, **(1980) 1 SCR 354** and by this Court in *CIT Vs. Thane Electricity Supply Limited*, **(1994) 206 ITR 727**. In **Valliamma Champaka Pillai** (*supra*), Supreme Court declared that the erroneous decisions rendered by the erstwhile Travancore High Court could not be made binding on the Madras High Court. Such decisions could at best have a persuasive effect. There is nothing in the States Re-organisation Act, 1956 or any other law which exalts the ratio of those decisions to the status of a binding law nor could the *ratio decidendi* of those decisions be perpetuated by invoking the doctrine of *stare decisis*. Expanding on this, this Court in **Thane Electricity Supply Limited** (*supra)* held that the decision of one High Court is neither a binding precedent for another High Court nor for courts or tribunals outside its own territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the states or territories over which the Court has jurisdiction. In other states or outside the territorial jurisdiction of that High Court it may at best have only persuasive effect. By no amount of stretching of the doctrine of *stare decisis*, can judgments of one High Court be given the status of a binding precedent so far other High Courts or courts or tribunals outside the territorial jurisdiction of that High Court are concerned.

60. That apart, from a practical and pragmatic point of view if what the learned Additional Solicitor General argued is accepted then decision of one High Court declaring constitutionality of an all India statute would foreclose adjudication by other High Courts which would neither be in the interest of administration of justice nor in the public interest. Furthermore, there is a fundamental difference in the present case in as much as unlike in **Rehena Begum** *(supra)*, here the Gujarat High Court has held the particular provision as intra *vires* and constitutional.

61. In so far the general submissions made by Mr. Singh as to presumption in favour of constitutionality of a statute and that burden lies on the person who challenges constitutionality, there can be no dispute to such propositions. As a matter of fact these are well settled principles which are to be borne in mind while examining constitutionality of a statute. Moreover greater latitude has to be given to the Parliament or to the legislature while framing taxing statutes and that exercise of power to tax may normally be presumed to be in the public interest. But as has been held by the Supreme Court, each case would have to be decided on the facts of that case. There can be no straight-jacket formula in applying the above principles. It is also a settled proposition that a statute must pass the test of legislative competence; it must also pass the test of constitutionality in the sense that it cannot violate any provisions of the Constitution.

62. Reliance placed by the learned Additional Solicitor General on the Place of Provision of Service Rules, 2012 to highlight the fact that similar provision as contained in section 13(8)(b) was there unchallenged which would preclude the petitioner from instituting the challenge now appears to be misplaced. Because there was no challenge to the Place of Provision of Service Rules, 2012 can be no valid ground for non-suiting the petitioner from instituting the present challenge. Section 13(8)(b) of the IGST Act read with section 8(2) of the said Act

have been challenged on the ground that those provisions violate the CGST Act and the IGST Act besides being violative of Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India. The challenge has to be met on the touchstone of the above provisions and not by falling back upon a non-existent Place of Provision of Service Rules, 2012.

63. The other submissions made by Mr. Singh that levy of IGST on supply of services by intermediaries to foreign customers would strengthen the *Make in India* program by encouraging foreign investment can be no answer to challenge to constitutionality of a parliamentary statute. Besides such a statement has been made *de-hors* any supporting statistics and analysis. Therefore, the same cannot be of any assistance to the respondents.

64. In view of what we have discussed and the conclusion that is being reached, it may not be necessary to deal with the other grounds raised by the petitioner in support of the challenge.

65. Thus having regard to the discussions made above and upon thorough consideration, we have no hesitation in holding that section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is *ultra vires* the said Act besides being unconstitutional.

66. Writ petition is accordingly allowed to the above extent. However, there shall be no order as to cost.

(ABHAY AHUJA, J.) **(UJJAL BHUYAN, J.)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani ... Petitioner
V/s.
The Union of India and Ors. ... Respondents

Mr. Bharat Raichandani alongwith Ms. Pragya Koolwal i/by UBR Legal for Petitioner.
Mr. Anil C. Singh, ASG alongwith Mr. Pradeep S. Jetly, Senior Advocate and Mr.J.B. Mishra for Respondent Nos.1 to 4.
Mr.S.G. Gore with Ms. Jyoti Chavan, AGP for Respondent No.5-State.

CORAM : UJJAL BHUYAN AND
ABHAY AHUJA, JJ.
DATE : 9TH JUNE, 2021

PC:- (Per Abhay Ahuja, J.)

1. Having noted the Judgment and Order dated 9th June, 2021 as pronounced by my Respected Learned Brother Shri Justice Ujjal Bhuyan, with greatest respect being unable to persuade myself to share the opinion of my Learned Brother, I would like to record my separate opinion in the matter.

2. List the matter on 16th June, 2021 for pronouncement of my opinion.

(ABHAY AHUJA, J.) **(UJJAL BHUYAN, J)**

Nikita Gadgil
50/50