HC-KAR

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF JUNE, 2026

BEFORE

THE HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

R

WRIT PETITION NO. 10234 OF 2020 (T-RES)
C/W
WRIT PETITION NO. 10363 OF 2020 (T-RES)
C/W
WRIT PETITION NO. 11574 OF 2020 (T-RES)
C/W
WRIT PETITION NO. 2173 OF 2021 (T-RES)

IN WP No. 10234/2020

BETWEEN:

CANARA BANK
(FORMERLY SYNDICATE BANK)
J.C. ROAD BENGALURU-560002
REPRESENTED HEREIN BY ITS
CHIEF GENERAL MANAGER
MR V. RAMACHANDRA.

...PETITIONER

(BY SRI. G.SHIVADASS, SENIOR COUNSE APPEARING FOR
SMT. MANASA ANANTHAN AND
SMT. TANMAYEE RAJKUMAR ADVOCATES)

AND:

1. THE UNION OF INDIA
REPRESENTED HEREIN BY THE SECRETARY
DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NORTH BLOCK
NEW DELHI-110 001.

2. THE CENTRAL BOARD OF
INDIRECT TAXES AND CUSTOMS
NORTH BLOCK,

DEPARTMENT OF REVENUE
MINISTRY OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NEW DELHI-110 001.

3. THE PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF
GOODS AND SERVICE TAX INTELLIGENCE
BELAGAVI ZONAL UNIT
SHREE LAKSHMI COMPLEX. NO.4855/83
2ND , 3RD AND 5TH FLOOR, 1ST CROSS
SADASHIV NAGAR, APMC YARD
BELAGAVI-590 001.

4. THE COMMISSIONER OF
CENTRAL GST AND CENTRAL TAX
MANGALURU GST COMMISSIONERATE
7TH FLOOR, TRADE CENTER,
BUNTS HOSTEL ROAD,
MANGALURU-575 003.

…RESPONDENTS

(BY SRI. ARAVIND KAMATH, ASGI ALONG WITH
SRI. JEEVAN.J, NEERALGI, ADVOCATE)

THIS W.P. FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE VARIOUS FACILITIES PROVIDED BY THE PETITIONER TO CUSTOMERS, WHO MAINTAINED MAB AND FROM WHOM NO CONSIDERATION WAS RECEIVED BY THE PETITIONER, ARE NOT LIABLE TO SERVICE TAX AND ETC.

IN WP NO. 10363/2020

BETWEEN:

BANK OF BARODA
(FORMERLY VIJAYA BANK)
41/2 M G ROAD
BANGALORE
REPRESENTED HEREIN BY ITS
GENERAL MANAGER
MR G RAMESH.

...PETITIONER

(BY SRI. G. SHIVADASS, SENIOR COUNSEL APPEARING FOR
SMT. TANJMAYEE RAJKUMAR, AND
SMT. MANASA ANANTHAN, ADVOCATES)

AND:

1. THE UNION OF INDIA
REPRESENTED HEREIN BY THE SECRETARY
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NORTH BLOCK
NEW DELHI-110 001.

2. THE CENTRAL BOARD OF
INDIRECT TAXES AND CUSTOMS
NORTH BLOCK
DEPARTMENT OF FINANCE
GOVERNMENT OF INDIA
NEW DELHI-110 001.

3. THE PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF
GOODS AND SERVICE TAX INTELLIGENCE
BANGALORE ZONAL UNIT
NO.112 SP ENCLAVE ADJACENT
TO KARNATAKA BANK, KH ROAD
BANGALORE-560 027.

4. THE PRINICPAL COMMISSIONER OF CENTRAL TAX
BENGALURU NORTH GST COMMISSIONERATE
C R BUILDING, QUEENS ROAD
BENGALURU - 560 001.

...RESPONDENTS

(BY SRI. ARAVIND KAMATH, ASGI ALONG WITH
SRI. JEEVAN.J.NEERALGI, ADVOCATE)

THIS W.P IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO-DECLARE THAT THE VARIOUS FACILITIES PROVIDED BY THE PETITIONER TO CUSTOMERS, WHO MAINTAINED MAB AND FROM WHOM NO CONSIDERATION WAS RECEIVED BY THE PETITIONER, ARE NOT LIABLE TO SERVICE TAX AND ETC.

IN WP NO. 11574/2020

BETWEEN:

CANARA BANK
NO. 51, BGSE TOWERS,
ST CROSS, J C ROAD,
WILSON GARDEN

BANGALORE 560027
REPRESENTED HEREIN BY ITS
CHIEF GENERAL MANAGER
MR. V. RAMACHANDRA

...PETITIONER

(BY SRI. G. SHIVADASS, SENIOR COUNSEL APPEARING FOR
SMT. TANMAYEE RAJKUMAR, AND
SMT. MANASA ANANTHAN, ADVOCATES)

AND:

1. THE UNION OF INDIA
REPRESENTED HEREIN BY THE SECRETARY
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NORTH BLOCK
NEW DELHI 110 001.

2. THE CENTRAL BOARD OF
INDIRECT TAXES AND CUSTOMS
NORTH BLOCK,
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF FINANCE
GOVERNMENT OF INDIA,
NEW DELHI 110 001.

3. THE PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF
GOODS AND SERVICE TAX INTELLIGENCE
BANGALORE ZONE UNIT,
NO.112, SP ENCLAVE,
ADJACENT TO KARNATAKA BANK,
K.H. ROAD,
BENGALURU 560 027.

4. THE COMMISSIONER OF CENTRAL TAX
BENGALURU SOUTH GST COMMISSIONERATE
C R BUILDING, QUEENS ROAD,
BENGALURU 560 001.

...RESPONDENTS

(BY SRI. ARAVIND KAMATH, ASGI ALONG WITH
SRI. JEEVAN.J.NEERALGI, ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE VARIOUS FACILITIES PROVIDED BY THE PETITIONER TO CUSTOMERS, WHO MAINTAINED MAB AND FROM WHOM NO CONSIDERATION WAS RECEIVED BY THE PETITIONER ARE NOT LIABLE TO SERVICE TAX AND ETC.

IN WP NO. 2173/2021

BETWEEN:

THE KARNATAKA BANK LTD
NO.599, MAHAVEERA CIRCLE
KANKANADY, MANGALURU-575002
REPRESENTED HEREIN BY ITS
GENERAL MANAGER AND
CHIEF FINANCIAL OFFICER
MR. MURALIDHAR KRISHNA RAO

...PETITIONER

(BY SRI. G.SHIVADASS, SENIOR COUNSEL APPEARING FOR
SMT. TANMAYEE RAJKUMAR, AND
SMT. MANASA ANANTHAN, ADVOCATE)

AND:

1. THE UNION OF INDIA
REPRESENTED HEREIN BY THE SECRETARY,
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NORTH BLOCK, NEW DELHI-110 001.

2. THE CENTRAL BOARD OF
INDIRECT TAXES AND CUSTOMS
NORTH BLOCK
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
NEW DELHI-110 001.

3. THE PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF GOODS AND SERVICE
TAX INTELLIGENCE, BELAGAVI ZONAL UNIT
SHREE LAXMI COMPLEX
NO.4855/83, 2ND & 3RD AND 5TH FLOOR,
1ST CROSS, SADASHIV NAGAR, APMC YARD
BELAGAV I- 590 001.

4. THE ADDITIONAL DIRECTORGENERAL (ADJ)
DIRECTORATE GENERAL OF GST INTELLIGENCE
3RD FLOOR, NTC HOUSE
15, N M ROAD,
BALLARD ESTATE
MUMBAI-400 001.

...RESPONDENTS

(BY SRI. ARAVIND KAMATH, ASGI ALONG WITH
SRI. JEEVAN.J. NEERALGI, ADVOCATE)

THIS W.P IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO-DECLARE THAT THE VARIOUS FACILITIES PROVIDED BY THE PETITIONER TO CUSTOMERS, WHO MAINTAINED MAB AND FROM WHOM NO CONSIDERATION WAS RECEIVED BY THE PETITIONER, ARE NOT LIABLE TO SERVICE TAX AND ETC.

THESE PETITIONS ARE BEING HEARD AND RESERVED ON 05.03.2026 COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

CAV ORDER

This batch of writ petitions take exception to the impugned show cause notices (SCNs) issued by the respondents to the petitioners – Banks calling upon them to show cause as to why service tax not paid by the Banks for various periods upto 30.06.2017 (pre-GST regime) should not be demanded and recovered from the petitioners – Banks together with interest and

penalty as demanded in the impugned SCNs issued by the respondents.

2. Briefly stated, the factual conspectus giving rise to the present batch of writ petitions may be adverted to thus:-

The petitioners in these writ petitions are Public Sector Banks engaged in the rendition of banking and financial services, encompassing savings bank accounts, current accounts and a bouquet of other facilities and privileges made available to customers in the course of their banking relationship. It is contended by the petitioners that the customers are given a choice to open and operate different types of accounts, in relation to which different services comprising of a bouquet / basket of services are provided by the Banks to its customers. The respondents issued the impugned show cause notices *interalia* contending that by virtue of the provisions contained in Sections 66B, 65B(44) and (51), 66E(e) and Section 67 of the Finance Act, 2012 and the definition of “consideration” under Section 2(d) of the Indian Contract Act, 1872, the petitioners – Banks are the petitioner Banks had incurred liability towards service tax in respect of the services rendered by them to their customers and such services being

undergirded non-monetary consideration in the nature of the customer's commitment to the petitioners – Banks to maintain the stipulated Minimum Average Balance (MAB), by ascribing a notional / deemed value equivalent and in terms of the penalty charged by the Banks to the customers, in the event they do not maintain MAB in their chosen accounts and that accordingly, the petitioners – Banks are liable to pay service tax. The impugned SCNs further alleged that the nature and extent of services extended by the petitioner Banks to their customers were contingent upon the MAB undertaken to be maintained by them and that, upon failure to maintain the stipulated MAB, the rendition of such services was not curtailed but continued, albeit subject to the levy of the prescribed penalty. It is further contended in the impugned SCNs that the services provided by the petitioners – Banks are nothing but "declared services" within the meaning of Section 66E(e) of the Finance Act, whereby the petitioners - Banks had "agreed to an obligation to do an act" of rendering services and in return, the act of the customers in keeping the MAB in their accounts, constitutes the "consideration" for the said obligation undertaken by the Banks and as such, the respondents have

issued the impugned SCNs invoking the aforesaid provisions of the Finance Act demanding service tax, interest and penalty from the petitioners – Banks who are before this Court by way of the present petitions.

3. Heard learned Senior counsel for the petitioners and learned ASG for the respondents and perused the material on record.

4. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioners submitted that the petitioners – Banks had not charged any consideration for the services provided by them to the customers, who maintained MAB which was merely one of the conditions of the contract entered into between the Banks and the customers and only in the event, the customers committed breach / default in complying with the said condition of maintaining MAB, the services would still be provided subject to payment of penalty and in the absence of any consideration being charged by the Banks to the customers for providing the said services without charging penalty and upon maintaining MAB, the

respondents did not have any jurisdiction or authority of law to demand service tax from the petitioners who are not liable to pay service tax as demanded by the respondents in the impugned SCNs, which deserve to be quashed. It is submitted that since the impugned SCNs are contrary to the Circular No.178/10/2022- GST dated 03.08.2022, Circular No.214/1/2023 – Service Tax dated 28.02.2023 and CBEC Circular No.62/11/2003-ST dated 21.08.2003 as well as the provisions contained in Sections 66B, 65B(44) and (51), 66E(e) and Section 67 of the Finance Act, thereby rendering the impugned SCNs arbitrary, illegal and without jurisdiction or authority of law and since there are no questions / disputed questions of fact involved in the present petitions, which relate to pure questions of law, mere existence of an alternative remedy in favour of the petitioners would not come in the way of this Court entertaining and adjudicating upon the present petitions, which deserve to be allowed by quashing the impugned SCNs issued by the respondents. In support of his submissions, learned Senior counsel for the petitioners placed reliance upon the following judgments:-

(i) Commissioner vs. Larsen and Toubro Limited – 2016 (44) STR 391 (Guj);

(ii) Commissioner of Service Tax vs. Bhayana Builders (P) Ltd., - 2018 (10) GSTL 118 (SC);

(iii) Commissioner of Service Tax, Chennai vs. REPCO Home Finance Limited – 2020 (42) GSTL 104 (TRI-LB);

(iv) Magadh Sugar and Energy vs. State of Bihar – 2021 SCC OnLine SC 801;

(v)Engineers India Limited vs. State of A.P. & others – W.P.No.32971/2016 Dated 31.12.2018;

(vi) Philips India Limited vs. Collector of Central Excise – 1997(91) ELT 540 (SC);

(vii) Commissioner of Customs (Import), Mumbai vs. Dilip Kumar and Company – 2018 (361) ELT 577 (SC);

(viii) Commissioner of Central Excise, Pondicherry vs. Acer India Limited – 2004 (172) ELT 289(SC);

(ix) The South Gujarath Roofing Tiles Manufacturers Association vs. State of Gujarath – AIR 1977 SC 90;

(x) The Commissioner of Customs, New Delhi vs. Caryaire Equipment India Private Limited – 2012 (278) ELT 30 (SC);

(xi) Balarampur Chini Mills Limited vs. Union of India & others - 2019 (368) ELT 279 (All.);

(xii) Hitachi Home and Life Solutions Limited vs. State – 2018 (8) GSTL 370 (J & K);

(xiii) Commissioner of CGST & Central Excise vs. Edelweiss Financial Services Limited – (2023) 5 CENTAX 58 (SC);

(xiv) Asha R. vs. ACCT – (2025) 29 CENTAX 391 (KAR);

(xv) Commissioner of Central Excise & Service Tax, Rohtak vs. Merino Panel Product Limited – 2022 SCC Online SC 1677;

(xvi) Union of India vs. Intercontinental Consultants & Techno Crafts – (2018) 4 SCC 669.

5. Per contra, learned ASG would reiterate the various contentions urged in the statement of objections and submits that the petitions are premature, since it is always open for the petitioners to submit their replies to the impugned SCNs which would be considered by the respondents in accordance with law. It was submitted that the very fact that penal charges are collected when MAB is not maintained indicates that petitioners – Banks are providing additional services for the customers who maintain MAB and therefore, this very maintenance of MAB by the customers constitutes non-monetary consideration which is valued and quantified in terms of Section 67 of the Finance Act and the Rules made thereunder, thereby making the petitioners liable to pay service tax towards the said services rendered by the petitioners-Banks, whose contentions and claims in the present petitions are devoid of merit and the same are liable to be dismissed.

6. I have accorded my anxious consideration to the rival submissions and perused the material on record.

7. Before proceeding to consider the rival contentions on merits, it is apposite and germane to extract the relevant provisions of the Finance Act, 2012 which are as under:-

> ***" 65B. Interpretations :***
>
> *In this Chapter, unless the context otherwise requires,–*
>
> *(1) "actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882;*
>
> *(2) "advertisement" means any form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include any presentation made in person;*
>
> *(3) "agriculture" means the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products;*
>
> *(4) "agricultural extension" means application of scientific research and knowledge to agricultural practices through farmer education or training;*
>
> *(5) "agricultural produce" means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market;*
>
> *(6) "Agricultural Produce Marketing Committee or Board" means any committee or board constituted under a*

State law for the time being in force for the purpose of regulating the marketing of agricultural produce;

(7) "aircraft" has the meaning assigned to it in clause (1) of section 2 of the Aircraft Act, 1934;

(8) "airport" has the meaning assigned to it in clause (b) of section 2 of the Airports Authority of India Act, 1994;

3 [xxx]

(10) "Appellate Tribunal" means the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962;

(37) "person" includes,—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a society,

(v) a limited liability partnership,

(vi) a firm,

(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

(38) "port" has the meaning assigned to it in clause (q) of section 2 of the Major Port Trusts Act, 1963 or in clause (4) of section 3 of the Indian Ports Act,
1908;

(39) "prescribed" means prescribed by rules made under this Chapter;

[(39a) " Print media" means

(i) " book" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867(25 to 1867),

but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes;

(ii) " newspaper" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867(25 of 1867);]

(40) " process amounting to manufacture or production of goods" means a process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 or 1[or the Medicinal and Toilet preparation (Excise Duties) Act , 1955 (16 of 1955)] any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force;

(41) "renting" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property;

(42) "Reserve Bank of India" means the bank established under section 3 of the Reserve Bank of India Act, 1934;

(43) "securities" has the meaning assigned to it in clause (h) of section 2 of the Securities Contract (Regulation) Act, 1956;

***(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service**, but shall not include—*

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1. — For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.– For the purposes of this clause, the expression " transaction in money or actionable claim" shall not include

(i) any activity relating to 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;

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out

(a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the predictions of the Lottories (Regulation) Act, 1998]

(b) by a foreman of chit fund for conducting or organising a chit in any manner]

Explanation 3: For the purpose of this chapter-

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4.— A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;

(45) "Special Economic Zone" has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005;

(46) "stage carriage" shall have the meaning assigned to it in clause (40) of section 2 of the Motor Vehicles Act, 1988;

(47) "State Electricity Board" means the Board constituted under section 5 of the Electricity (Supply) Act, 1948;

(48) "State Transmission Utility" shall have the meaning assigned to it in clause (67) of section 2 of the Electricity Act, 2003;

(49) "support services" means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis;

(50) "tax" means service tax leviable under the provisions of this Chapter;

(51) "taxable service" means any service on which service tax is leviable under section 66B;

(52) "taxable territory" means the territory to which the provisions of this Chapter apply;

53) "vessel" has the meaning assigned to it in clause (z) of section 2 of the Major Port Trusts Act, 1963;

(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the

purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, improvement, repair, renovation, alteration of any building or structure on land or for carrying out any other similar activity or a part thereof in relation to any building or structure on land;

(55) words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 or the rules made thereunder, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise."

66B. Charge of Service Tax on and after Finance Act, 2012.

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

***66E. Declared Services**.-*

The following shall constitute declared services, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation. — For the purposes of this clause,—

(I) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

67. Valuation of taxable services for charging Service tax –

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

(a) "consideration" includes

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any or, as the case may be the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.]

(b) " money includes any currency cheque, promissory note, letter of credit, drat, pay order, travellers cheque, money order, postal remittance and other similar instrument but does not include currency that is held for its numismatic value]

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and 2 [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

Circular No.178/10/2022- GST dated 03.08.2022, reads as under:-

Circular No. 178/10/2022-GST
F. No. 190354/176/2022-TRU
Government of India
Ministry of Finance
Department of Revenue (Tax Research Unit)

****

Room No. 146G, North Block,
New Delhi, the 3rd August, 2022.

To,

The Principal Chief Commissioners/

Chief Commissioners/ Principal Commissioners/ Commissioner of Central Tax (All) / The Principal Director Generals/ Director Generals (All)

Madam/Sir,

Subject: GST applicability on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law – reg.

In certain cases/instances, questions have been raised regarding taxability of an activity or transaction as the supply of service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act. Applicability of GST on payments in the nature of liquidated damage, compensation, penalty, cancellation charges, late payment surcharge etc. arising out of breach of contract or otherwise and scope of the entry at para 5 (e) of Schedule II of Central Goods and Services Tax Act, 2017 (hereinafter referred to as, "CGST Act") in this context has been examined in the following paragraphs.

2. "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5 (e) of Schedule II of CGST Act if the same constitutes a "supply" within the meaning of the Act. The said expression has following three limbs: -

a. Agreeing to the obligation to refrain from an act-

Example of activities that would be covered by this part of the expression would include non-compete agreements, where one party agrees not to compete with the other party in a product, service or geographical area against a consideration paid by the other party.

Another example of such activities would be a builder refraining from constructing more than a certain number of floors, even though permitted to do so by the municipal authorities, against a compensation paid by the neighbouring housing project, which wants to protect its sunlight, or an industrial unit refraining from manufacturing activity during certain hours against an agreed compensation paid by a neighbouring school, which wants to avoid noise during those hours.

b. Agreeing to the obligation to tolerate an act or a situation- This would include activities such a shopkeeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker, or an RWA tolerating the use of loud speakers for early morning prayers by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation.

c. Agreeing to the obligation to do an act- This would include the case where an industrial unit agrees to install equipment for zero emission/discharge at the behest of the RWA of a neighbouring residential complex against a

consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so.

3. The description "agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" was intended to cover services such as described above. However, over the years doubts have persisted regarding various transactions being classified under the said description.

3.1. Some of the important examples of such cases are Service Tax/GST demands on –

i. Liquidated damages paid for breach of contract;

ii. Compensation given to previous allottees of coal blocks for cancellation of their licenses pursuant to Supreme Court Order;

iii. Cheque dishonour fine/penalty charged by a power distribution company from the customers;

iv. Penalty paid by a mining company to State Government for unaccounted stock of river bed material;

v. Bond amount recovered from an employee leaving the employment before the agreed period;

vi. Late payment charges collected by any service provider for late payment of bills;

vii. Fixed charges collected by a power generating company from State Electricity Boards

(SEBs) or by SEBs/DISCOMs from individual customer for supply of electricity;

viii. Cancellation charges recovered by railways for cancellation of tickets, etc.

In some of these cases, tax authorities have initiated investigation and in some advance ruling authorities have upheld taxability.

4. In Service Tax law, 'Service' was defined as any activity carried out by a person for another for consideration. As discussed in service tax education guide, the concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration'. The element of contractual relationship, where one supplies goods or services at the desire or another, is an essential element of supply.

5. The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act in para 5 (e) of Schedule II of CGST Act is strikingly similar to the definition of contract in the Contract Act, 1872. The Contract Act defines 'Contract' as a set of promises, forming consideration for each other. 'Promise' has been defined as willingness of the 'promisor' to do or to

abstain from doing anything. 'Consideration' has been defined in the Contract Act as what the 'promisee' does or abstains from doing for the promises made to him.

6. This goes to show that the service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

6.1 A perusal of the entry at serial 5(e) of Schedule II would reveal that it comprises the aforementioned three different sets of activities viz. (a) the obligation to refrain from an act, (b) obligation to tolerate an act or a situation and (c) obligation to do an act. All the three activities must be under an "agreement" or a "contract" (whether express or implied) to fall within the ambit of the said entry. In other words, one of the parties to such agreement/contract (the first party) must be under a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a situation or (c) to do an act. Further some "consideration" must

flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraining or (b) tolerating or (c) doing. Such contractual arrangement must be an independent arrangement in its own right. Such arrangement or agreement can take the form of an independent stand- alone contract or may form part of another contract. Thus, a person (the first person) can be said to be making a supply by way of refraining from doing something or tolerating some act or situation to another person (the second person) if the first person was under an obligation to do so and then performed accordingly.

Agreement to do or refrain from an act should not be presumed to exist

7. There has to be an express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach

of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or non-performance and are thus mere 'events' in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, , such payments will not constitute 'consideration' and hence such activities will not constitute "supply" within the meaning of the Act. Taxability of these transactions is discussed in greater detail in the following paragraphs.

Liquidated Damages

7.1 Breach or non-performance of contract by one party results in loss and damages to the other

party. Therefore, the law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.

7.1.1 It is common for the parties entering into a contract, to specify in the contract itself, the compensation that would be payable in the event of the breach of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or parties of the contract is referred to as liquidated damages. Black's Law Dictionary defines 'Liquidated Damages' as cash compensation agreed to by a signed, written contract for breach of contract, payable to the aggrieved party.

7.1.2 Section 74 of the Contract Act, 1972 provides that when a contract is broken, if a sum has been named or a penalty stipulated in the contract as the amount or penalty to be paid in case of breach, the aggrieved party shall be entitled to receive reasonable compensation not exceeding the amount so named or the penalty so stipulated.

7.1.3 It is argued that performance is the essence of a contract. Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of

contract. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance. Liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract. They do not act as a remedy for the breach of contract. They do not restitute the aggrieved person. It is further argued that a contract is entered into for execution and not for its breach. The liquidated damages or penalty are not the desired outcome of the contract. By accepting the liquidated damages, the party aggrieved by breach of contract cannot be said to have permitted or tolerated the deviation or non-fulfilment of the promise by the other party.

7.1.4 In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

7.1.5 Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

7.1.6 If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what

name it is called; it must be remembered that a "consideration" cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of prepayment of loan and of making arrangements for the

intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt.

Compensation for cancellation of coal blocks

7.2 In the year 2014, coal block/mine allocations were cancelled by the Hon'ble Supreme Court vide order dated 24.09.2014. Subsequently, Coal Mines (Special Provisions) Act, 2015 was enacted to provide for allocation of coal mines and vesting of rights, title and interest in and over the land and mines infrastructure together with mining leases to successful bidders and allottees. In accordance with section 16 of the said Act, prior (old) allottee of mines were given compensation in the year 2016 towards the transfer of their rights/ titles in the land, mine infrastructure, geological reports, consents, approvals etc. to the new entity (successful bidder) as per the directions of Hon'ble Supreme Court.

7.2.1 There was no agreement between the prior allottees of coal blocks and the Government that the previous allottees shall agree to or tolerate cancellation of the coal blocks allocated to them if the

Government pays compensation to them. No such promise or offer was made by the prior allottees to the Government. The allottees had no option but to accept the cancellation. The compensation was given to them for such cancellation, not under a contract between the allottees and the Government, but under the provisions of the statute and in pursuance of the Supreme Court Order. Therefore, it would be incorrect to say that the prior allottees of the coal blocks supplied a service to the Government by way of agreeing to tolerate the cancellation of the allocations made to them by the Government or that the compensation paid by the Government for such cancellation in pursuance to the order of the Supreme Court was a consideration for such service. Therefore, the compensation paid for cancellation of coal blocks pursuant to the order of the Supreme Court in the above case was not taxable.

Cheque dishonor fine/ penalty

7.3 No supplier wants a cheque given to him to be dishonoured. It entails extra administrative cost to him and disruption of his routine activities and cash flow. The promise made by any supplier of goods or services is to make supply against payment within an agreed time (including the agreed permissible time with late payment) through a valid instrument. There is never an implied or express offer or willingness on part of the supplier that he would tolerate deposit of an invalid, fake or unworthy instrument of payment against consideration in the form of cheque dishonour fine or penalty. The fine or penalty that the supplier or a banker imposes, for dishonour of a cheque, is a penalty

imposed not for tolerating the act or situation but a fine, or penalty imposed for not tolerating, penalizing and thereby deterring and discouraging such an act or situation. Therefore, cheque dishonor fine or penalty is not a consideration for any service and not taxable.

Penalty imposed for violation of laws

7.4 Penalty imposed for violation of laws such as traffic violations, or for violation of pollution norms or other laws are also not consideration for any supply received and are not taxable, which are also not taxable. Same is the case with fines, penalties imposed by the mining Department of a Central or State Government or a local authority on discovering mining of excess mineral beyond the permissible limit or of mining activities in violation of the mining permit. Such penalties imposed for violation of laws cannot be regarded as consideration charged by Government or a Local Authority for tolerating violation of laws. Laws are not framed for tolerating their violation. They stipulate penalty not for tolerating violation but for not tolerating, penalizing and deterring such violations. There is no agreement between the Government and the violator specifying that violation would be allowed or permitted against payment of fine or penalty. There cannot be such an agreement as violation of law is never a lawful object or consideration. The service tax education guide issued in 2012 on advent of negative list regime of services explained that fines and penalties paid for violation of provisions of law are not considerations as no service is received in lieu of payment of such fines and penalties.

7.4.1 It was also clarified vide Circular No. 192/02/2016-Service Tax, dated 13.04.2016 that fines and penalty chargeable by Government or a local authority imposed for violation of a statute, bye-laws, rules or regulations are not leviable to Service Tax. The same holds true for GST also.

Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period

7.5 An employer carries out an elaborate selection process and incurs expenditure in recruiting an employee, invests in his training and makes him a part of the organization, privy to its processes and business secrets in the expectation that the recruited employee would work for the organization for a certain minimum period. Premature leaving of the employment results in disruption of work and an undesirable situation. The provisions for forfeiture of salary or recovery of bond amount in the event of the employee leaving the employment before the minimum agreed period are incorporated in the employment contract to discourage non-serious candidates from taking up employment. The said amounts are recovered by the employer not as a consideration for tolerating the act of such premature quitting of employment but as penalties for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation. Further, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the

employer are not taxable as consideration for the service of agreeing to tolerate an act or a situation.

Compensation for not collecting toll charges

8. In the wake of demonetization, NHAI directed the concessionaires (toll operators) to allow free access of toll roads to the users from 8.11.2016 to 1.12.2016 for which the loss of toll charge was paid as compensation by NHAI as per the instructions of Ministry of Road Transportation and Highways. The toll reimbursements were calculated based on the average monthly collection of toll. A question arose whether the compensation paid to the concessionaire by project authorities (NHAI) in lieu of suspension of toll collection during the demonetization period (from 8.11.2016 to 1.12.2016) was taxable as a service by way of agreeing to refrain from collection of toll from users.

8.1 It has been clarified vide Circular No. 212/2/2019-ST dated 21.05.2019 that the service that is provided by toll operators is that of access to a road or bridge, toll charges being merely a consideration for that service. During the period from 8.11.2016 to 1.12.2016, the service of access to a road or bridge continued to be provided without collection of toll from users. Consideration came from the project authority. The fact that for this period, for the same service, consideration came from a person other than the actual user of service does not mean that the service has changed.

Late payment surcharge or fee

9. The facility of accepting late payments with interest or late payment fee, fine or penalty is a facility granted by supplier naturally bundled with the main supply. It is not uncommon or unnatural for customers to sometimes miss the last date of payment of electricity, water, telecommunication services etc. Almost all service providers across the world provide the facility of accepting late payments with late fine or penalty. Even if this service is described as a service of tolerating the act of late payment, it is an ancillary supply naturally bundled and supplied in conjunction with the principal supply, and therefore should be assessed as the principal supply. Since it is ancillary to and naturally bundled with the principal supply such as of electricity, water, telecommunication, cooking gas, insurance etc. it should be assessed at the same rate as the principal supply. However, the same cannot be said of cheque dishonor fine or penalty as discussed in the preceding paragraphs.

Fixed Capacity charges for Power

10. The price charged for electricity by the power generating companies from the State Electricity Boards (SEBs)/DISCOMS or by SEBs/DISCOMs from individual customers has two components, namely, a minimum fixed charge (or capacity charge) and variable per unit charge. The minimum fixed charges have to be paid by the SEBs/DISCOMS/individual customers irrespective of the quantity of electricity scheduled or purchased by them during a month. They take care of

the fixed cost of generating/ supplying electricity. The variable charges are charged per unit of electricity purchased and increase or decrease every month depending on the quantity of electricity consumed.

10.1 The fact that the minimum fixed charges remain the same whether electricity is consumed or not or it is scheduled/consumed below the contracted or available capacity or a minimum threshold, does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not scheduling or consuming the minimum the contracted or available capacity or a minimum threshold.

10.2 Both the components of the price, the minimum fixed charges/capacity charges and the variable/energy charges are charged for sale of electricity and are thus not taxable as electricity is exempt from GST. Power purchase agreements may have provisions that the power producer shall not supply electricity to a third party without approval of buyer. Such agreements which ensure assured supply of power to State Electricity Boards/DISCOMS are ancillary arrangements; the contract is essentially for supply of electricity.

Cancellation charges

11. A supply contracted for, such as booking of hotel accommodation, an entertainment event or a journey, may be cancelled by a customer or may not proceed as intended due to his failure to show up for availing the same at the designated place and time. The supplier may allow cancelation of supply by the

customer within a certain specified time period on payment of cancellation fee as per commercial terms of the contract. In case the customer does not show up for availing the service, the supplier may retain or forfeit part of the consideration or security deposit or earnest money paid by the customer for the intended supply.

11.1 It is a common business practice for suppliers of services such as hotel accommodation, tour and travel, transportation etc. to provide the facility of cancellation of the intended supplies within a certain time period on payment of cancellation fee. Cancellation fee can be considered as the charges for the costs involved in making arrangements for the intended supply and the costs involved in cancellation of the supply, such as in cancellation of reserved tickets by the Indian Railways.

11.2 Services such as transportation travel and tour constitute a bundle of services. The transportation service, for instance, starts with booking of the ticket for travel and lasts at least till exit of the passenger from the destination terminal. All services such as making available an online portal or convenient booking counters with basic facilities at the transportation terminal or in the city, to reserve the seats and issue tickets for reserved seats much in advance of the travel, giving preferred seats with or without extra cost, lounge and waiting room facilities at airports, railway stations and bus terminals, provision of basic necessities such as soap and other toiletries in the wash rooms, clean drinking water in the waiting area etc. form part and parcel of the transportation service;

they constitute the various elements of passenger transportation service, a composite supply.. The facilitation service of allowing cancellation against payment of cancellation charges is also a natural part of this bundle. It is invariably supplied by all suppliers of passenger transportation service as naturally bundled and in conjunction with the principal supply of transportation in the ordinary course of business.

11.3 Therefore, facilitation supply of allowing cancellation of an intended supply against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply. For example, cancellation charges of railway tickets for a class would attract GST at the same rate as applicable to the class Circular No. 178/10/2022-GST of travel (i.e., 5% GST on first class or air-conditioned coach ticket and nil for other classes such as second sleeper class). Same is the case for air travel.

11.4 Accordingly, the amount forfeited in the case of non-refundable ticket for air travel or security deposit or earnest money forfeited in case of the customer failing to avail the travel, tour operator or hotel accommodation service or such other intended supplies should be assessed at the same rate as applicable to the service contract, say air transport or tour operator service, or other such services.

11.5 However, as discussed above, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer

or such forfeiture by Government or local authority in the event of a successful bidder failing to act after winning the bid for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable.

12. Field formations are advised that while the taxability in each case shall depend on facts of that case, the above guidelines may be followed in determining whether tax on an activity or transaction needs to be paid treating the same as service by way of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act.

13. Any difficulty in implementation of the circular may be brought to the notice of the Board.

Yours faithfully,

(Smita Roy) Technical
Officer, TRU

Circular No.214/1/2023 – Service Tax dated 28.02.2023, reads as under:

Circular No. 214/1/2023-Service Tax

F.NO. CBIC-110267/14/2023-CX-VIII SECTION-CBEC

Government of India
Ministry of Finance
Department of Revenue Central Board of Indirect Tax & Customs
(CX & ST Wing)

New Delhi, dated: 28th February, 2023

To,

1. The Principal Chief Commissioner / Chief Commissioner, CGST & CX (All)

2. The Principal Director General/ Director General (All)

3. The Principal Commissioner / Commissioner, CGST & CX (All)

4. Webmaster.cbic@icegate.gov.in for uploading the Circular on CBIC's website Madam/Sir,

Subject: *Leviability of Service Tax on the declared service "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" under clause (e) of section 66E of the Finance Act, 1994 - reg.*

An issue has arisen on the levy of service tax on liquidated damages arising out of breach of contract, forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period and similar other issues arising out of clause (e) of section 66E of the Finance Act, 1994. Reference has also been invited to Circular No. 178/10/2022-GST dated 3rd August, 2022 regarding applicability of GST on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law, and its applicability to service tax related issues.

2. It may be seen that "Agreeing to the obligation to refrain from an a or to tolerate an act or a situation, or to do an act" is a Declared Service as per clause (e) of section 66E of the Finance Act, 1994. A service conceived in an agreement where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act, would be a 'declared service' under section 66E(e) read with section 65B(44) and would be leviable to service tax.

3. The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is similar in GST. "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5 (e) of Schedule II of the CGST Act, 2017.

4. As can be seen, the said expression has three limbs: - i) Agreeing to the obligation to refrain from an act, ii) Agreeing to the obligation to tolerate an act or a situation, iii) Agreeing to the obligation to do an act. Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to

pay consideration to the first party for doing or abstaining from such an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

5. The issue also came up in the CESTAT in Appeal No. ST/ 50080 of 2019 in the case of M/s Dy. GM (Finance) Bharat Heavy Electricals Ltd in which the hon'ble Tribunal relied on the judgment of divisional bench in case of M/s South Eastern Coal Fields Ltd Vs. CCE Raipur {2021(55) G.S.T.L 549(Tri-Del)}. Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB] dated 20.09.2022 in this case and also against Order A/85713/2022 dated 12.8.2022 in case of M/s Western Coalfields Ltd. Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s South Eastern Coalfields Ltd. supra (CA No. 2372/2021), M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) on this ground.

6. In view of above, it is clarified that the activities contemplated under section 66E(e), i.e. when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are the activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity. Field formations are advised that while taxability in each case

shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST dated 3rd August, 2022, may also be referred to in this regard.

7. Difficulty experienced, if any, in implementing the circular should be brought to the notice of the Board. Hindi version will follow.

CBEC Circular No.62/11/2003-ST dated 21.08.2003, reads as under:-

Circular: 62/11/2003-S.T.dated: 21-Aug-2003

Service Tax- Commissioning or installation services, IT services, maintenance or repair and Foreign exchange broking services- Clarifications.

Circular No.62/11/2003-S.T, dated: 21-8-2003
F.No.B3/7/2003-TRU

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Miscellaneous issues relating to the service on which service tax has been imposed with effect from 1-7-2003.

1. Commissioning or installation:

1.1 Commissioning or installation of plant, equipment or machinery by a commissioning or installation agency, is chargeable to service tax. A doubt has been raised as to whether the services like a plumber putting up a water tank, fitting pipes and tubing, an electrician putting up electric wire and fittings, installation of booster motors, air conditioners, water filters, hand-pumps, water heaters etc. will be chargeable to service tax.

1.2 .2 As commonly understood, the activity of installation means the act of putting an equipment, machinery or plant into its place and making it ready for use. The activity of installation will start after erection which would refer to putting up civil structures. Commissioning of a plant would mean operationalising an installed plant/equipment/machinery. In this backdrop it is clarified that putting up a water tank, piping, electric wiring, in a residential premises etc. would not be covered in the definition of taxable service and thus would not be taxable. However, installing a booster pump, air-conditioner, water filter, water heater etc. would be covered in the definition and be taxable, as all these things are machinery or equipment.

1.3 Notification No.18/2003-Service Tax dated 21-8-03 has been issued which exempts commission or installation services provided by a commissioning or installation agency other than a commercial concern. Accordingly the commissioning or installation services provided by an individual will be exempt from service tax.

1.4 Notification No. 19/2003-Service Tax dated 21-8-03 has been issued which provides that in case of a contract which involves the commissioning or installation service along

with supply of plant, machinery or equipment, service tax will be payable only on 33% of the gross amount charged for commissioning or installation and supply of plant, machinery or equipment. It is optional for the assessee to avail of this notification. It is emphasized under this notification that the gross amount (33% of which is chargeable to service tax) shall include the value of the plant, machinery, equipment, parts and any other material sold by the service provider alongwith the commission or installation service. The benefit of this notification can be availed for a contract only if the exemption under notification 12/2003-Service Tax dated 20-6-2003 is not availed for that contract.

1.5 Corrigendum to Circular No. 59/8/2003: In Service Tax Circular No. 59/8/2003, dated 20th June 2003, in paragraph 2.6,-

(i) in the first sentence the words "commercial coaching and training" may be read as "commissioning or installation" ;

(ii) in the first bullet the sentence "It is submitted that it has been provided in law that service tax is leviable on erection and commissioning charges only and not on the material and goods supplied." may be read as "It is clarified that it has been provided in law that service tax is leviable on commissioning or installation charges only and not on the material and goods supplied."

2. Scope of IT service under Business Auxiliary Service;

2.1 The definition of Business Auxiliary Service in the law excludes the Information Technology (IT) services. As per the definition IT service means any service in relation to

designing, developing or maintaining of computer software or computerized data processing or system networking or any other service primarily in relation to operation of computer systems. It was clarified in Circular No. 59/8/2003, dated 20th June 2003 that only if the output service provided by a service provider is in the nature of the above operations, such exclusion would operate. The mere fact that a personal computer or a laptop has been used for providing the service does not, ipso facto, make the service an information technology service. Similarly, the fact that any of the IT services has been used by the service provider as an input service does not automatically make the output service an IT service.

2.2 A doubt has been raised that the clarification in the said circular dated 20-6-03, is at odds with the letter F.No.334/1/2003-TRU dated 28-2-2003 which states, "However computer enabled services, namely, data processing, networking, back office processing, computer facility management shall not be subjected to Service Tax." It is claimed that back office processing may include accounts outsourcing or payroll-processing activities etc. and such service may not be primarily in relation to computer system.

2.3 It is clarified that there is no contradiction between the clarifications dt.28-2-03 and dt.20-6-2003. The scope of IT services is explained in the definition of Business Auxiliary Service in the Act itself as any service in relation to designing, developing or maintaining of computer software or computerized data processing or system networking or any other service primarily in relation to operation of computer systems. The last words "primarily in relation to operation of computer systems" make the intention abundantly clear. The

words "back office processing" used in the clarification dated 28-2-2003 have to be read in conjunction with the other terms used therein viz. data processing, networking, computer facility management. Thus any service of back office processing primarily in relation to operation of computer system will be covered as IT services and not taxable. Payroll-processing, accounts management etc. even by using computer programs, can not be termed as activities primarily in relation to computer systems. The use of computer in these services is secondary and the primary activity is that of business-related work. Thus these services will be taxable as Business Auxiliary Services. This is exactly the position that has been clarified in the circular dated 20-6-2003.

3. Maintenance or repair service:

3.1 Maintenance or repair services rendered under contracts entered into prior to 1-7-2003 are exempted from service tax if the bills are raised, and payment also made, prior to 1-7-2003 (notification No.11/2003-ST dated 20-6-03). In this context a doubt has been raised as to whether service tax would still be chargeable in cases where though the bills are raised, or payment made, after 1-7-2003, but the service was rendered prior to 1-7-2003.

3.2 It is a basic principle that no tax can be charged except under authority of law. Thus, if the levy of service tax on a particular service comes into force on a given date, that service will not be taxable if rendered before that date. The levy of service tax on "Maintenance or repair service" has come into force on 1-7-2003. Accordingly any maintenance or repair service rendered prior to 1-7-2003 will not be taxable, irrespective of when the bills are raised or payment made. This

will apply to other services as well which were rendered prior to the imposition of service tax on them.

3.3 Notification No. 20/2003-Service Tax dated 21-8-03 has been issued which exempts services in relation to maintenance or repair of computers, computer systems and computer peripherals.

4. Foreign exchange broking:

4.1 With regard to services provided by money changers, a doubt has been raised whether all trading in foreign exchange will be chargeable to service tax.

4.2 Prior to 1-7-2003 the service of "securities and foreign exchange (forex) broking", when provided by banking company/financial institution/body corporate was liable to service tax. Through Finance Act, 2003 "foreign exchange broking" when provided by foreign exchange brokers, other than banking company/financial institution/body corporate, were also brought under the tax net w.e.f 1-7-2003. As per the definition in law foreign exchange brokers include authorized dealers of foreign exchange. Authorised dealer of foreign exchange has been assigned the meaning of "authorized person" under the FEMA, 1999. Accordingly authorized dealers/money changer etc. which are authorized to deal in foreign exchange are covered in the definition of "foreign exchange brokers" under service tax provisions. However, as explained above only the service of "foreign exchange broking" when provided by foreign exchange brokers (other than banking company/financial institution/body corporate which are already covered) has been brought under the tax net.

5. Service rendered free of charge:

5.1 In the context of certain services, a doubt has been raised as to whether service tax will be payable if the service is provided free of charge. 5.2 As per charging section viz. section 66 of the Act, service tax is chargeable at the rate of 8% of the value of taxable service. Thus if the value is zero the tax will also be zero even though the service is taxable. Receipt of this letter may please be acknowledged."

8. It is not in cavil and stands borne out from the record that, under the Finance Act, with effect from 01.07.2012 onwards, a negative list regime was introduced and the term "service" was specifically defined under Section 65B(44) as being an activity carried out by one person for another for a consideration; the expression "taxable service" in Section 65B(51) has been defined as a service on which service tax is leviable under Section 66B which is the charging section, where there is a levy of tax on the value of all services except those in the negative list; Section 65B(22) defines "declared service" as an activity carried for consideration and declared as such under Section 66E; in this context, Section 66E (e) of the Finance Act covers the activity of "agreeing to the obligation to refrain from an Act or to tolerate an

act or situation or to do an act" as a declared service. It is this very clause which the impugned SCNs seek to press into service for the purpose of fastening service tax liability upon the petitioners, with specific reliance being placed upon the latter limb of the expression "agreeing to the obligation to do an act" as adverted to in the impugned SCNs issued by the respondents.

9. A perusal of the material on record including the transactions / contracts / agreements entered into between the petitioners – Banks and its customers clearly indicate that several customers may keep differing balances and if the MAB is kept according to the norms of the Banks, customers would be entitled to facilities, and in the event there was failure to keep MAB, the Banks would charge penalty / fee towards the default and service tax was undisputedly being discharged by the Banks towards the said amounts collected by them. The requirement of maintaining MAB by the customers who would be entitled to continue to receive services from the petitioners – Banks without payment of any penalty / fee is clearly one of the conditions of the contract entered into between the petitioners – Banks and its customers and the services provided to a customer, who maintained MAB and to

customers who do not maintain MAB (subject to payment of penalty/fee) is merely and essentially a condition of the contract and the said services are not provided towards non-monetary consideration of a deemed or notional value as sought to be contended by the respondents in the impugned SCNs issued by them; to put it differently, if a customer does not keep his part of the bargain under the contract, a fee / penalty is charged to him, on which service tax is paid and therefore, keeping of the MAB is merely a condition of the contract simpliciter which cannot be construed / treated / called as "consideration" charged in terms of the Finance Act and the Rules made thereunder; nor can it be said that the contract contemplates charging of service cost to the customers on a *post facto* basis and the contract only envisages recovery of penalty *post facto* which is the consideration for non-maintenance of such MAB and no other consideration is charged or is in contemplation of the contract.

10. As stated supra, in the event of a failure to maintain the stipulated MAB, the contractual framework governing the relationship between the petitioner Banks and their customers contains no covenant providing for recovery of the cost of services

from the customers, which unmistakably demonstrates that the rendition of services continues notwithstanding such default and that adherence to the MAB stipulation is susceptible of verification only *post facto*; in other words, the Banks does not charge any consideration nor is there any intention to charge the costs of services to the customers as can be discerned from the apparent tenor of the contract and the only charge is for non-maintenance of MAB which the Banks may impute as a recovery for the costs in servicing such customers; it follows therefrom that so long as the petitioners – Banks are paying service tax on such penalty, it would be incongruous to charge them again on the imputed value of services being rendered, which would result in double taxation / double levy of tax which is neither contemplated nor permissible in law.

11. It is well settled that Circulars issued by the Board are binding upon the respondents / Department as held in various judgments including the judgment of the Apex court in the case of ***Merino Panel Product's case supra*****,** wherein it is held as under:-

> ***" C. Analysis***
>
> ***C.1. Binding nature of circulars issued by the Department***

17. *On first blush, it appears that the arguments from the appellant Revenue and respondent assessee are on two separate footings. While the former assails the specific reasoning given by CESTAT for setting aside the show-cause notice in terms of invocation of an incorrect part of the CEVR, the latter is more concerned with the binding nature of the CBEC Circular issued by the Revenue itself.*

18. *It is clear that the latter question goes to the heart of the matter, rather than the issue of whether the show-cause notice becomes legally untenable for failure to expressly mention that the valuation of the goods is to be done under Rule 11 read with Rule 9 of the CEVR. On the legal proposition advanced by learned ASG, we readily affirm that citation of an incorrect source of power does not vitiate the exercise of the power itself provided the power vests in the authority to begin with.*

19. *However, what needs to be additionally ascertained is whether the appellant acted in contravention of its own circular. The reason for this is that while citation of an incorrect provision may not, by itself, lead to an invalidation of the show-cause notice, but contravention of a binding circular that mandates a particular methodology to be followed might. The power under the CEA for issuance of such administrative/executive directions is contained in Section 37-B. ["**37-B. Instructions to Central Excise Officers**.—The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act,*

1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods or for the implementation of any other provision of this Act, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board: Provided that no such orders, instructions or directions shall be issued—(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or(b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions."] The binding nature of such circulars has long been acknowledged by this Court.

20. *In Paper Products Ltd. v. CCE [Paper Products Ltd. v. CCE, (1999) 7 SCC 84] the settled position on this point of law was noted in the following passage : (SCC p. 87, para 4)*

"4. The question for our consideration in these appeals is : what is the true nature and effect of the circulars issued by the Board in exercise of its power under Section 37-B of the Central Excise Act, 1944? This question is no more res integra in view of the various judgments of this Court. This Court in a catena of decisions has held that the circulars issued

under Section 37-B of the said Act are binding on the Department and the Department cannot be permitted to take a stand contrary to the instructions issued by the Board. These judgments have also held that the position may be different with regard to an assessee who can contest the validity or legality of such instructions but so far as the Department is concerned, such right is not available."

21. *The rationale behind the requirement for the Revenue to abide by its own administrative directions and interpretation of different parts of the CEA and CEVR, was commented upon in Ranadey Micronutrients v. CCE [Ranadey Micronutrients v. CCE, (1996) 10 SCC 387] : (SCC p. 392, paras 15-16)*

"15. There can be no doubt whatsoever, in the circumstances, that the earlier and later circulars were issued by the Board under the provisions of Section 37-B, and the fact that they do not so recite does not mean that they do not bind Central Excise officers or become advisory in character. There can be no doubt whatsoever that after 21-11-1994, excise duty could be levied upon micronutrients only under the provisions of Heading 31.05 as "other fertilisers". If the later circular is contrary to the terms of the statute, it must be withdrawn. While the later circular remains in operation the Revenue is bound by it and cannot be allowed to plead that it is not valid.

16. We reject the submission to the contrary made by the learned counsel for the Revenue and in the

affidavit by M.K. Gupta, working as Director in the Department of Revenue, Ministry of Finance. One should have thought that an officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the aegis of the Ministry of Finance, for it is the Board which is, by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings."

22. *Thus, the starting point of our analysis on this question is that the CBEC Circular of 1-7-2002 is binding on the Revenue. If the show-cause notice issued by the Revenue is found to be contrary to the Circular, it would prima facie result in abrogation of the uniformity and consistency which is strongly emphasised upon in Ranadey Micronutrients [Ranadey Micronutrients v. CCE, (1996) 10 SCC 387] . It goes without saying that the Revenue's stance against its own circular can potentially lead to a chaotic situation where, with one hand, the Revenue would lay down instructions on how to interpret the relevant statutes and rules, and*

with the other hand, it would promptly disobey those very directions. Maintaining predictability in taxation law is of utmost importance and, for this reason, the Court should not accept an argument by the Revenue that waters down its own Circular as this would fall squarely within the contours of the prohibition outlined in Paper Products [Paper Products Ltd. v. CCE, (1999) 7 SCC 84].

12. In ***Asha's case supra*****,** this Court held as under:-

9. Since both the issues are interlinked, they are taken up together for consideration. In my considered opinion, compensation paid in favour of the petitioners by the KIADB under the Head "Solatium" is not exigible / amenable to levy of GST under the provisions of CGST / KGST Act and the impugned notices, orders etc., issued / passed by the respondents are illegal, arbitrary and without jurisdiction or authority of law and the same deserve to be quashed for the following reasons:-

(i) The material on record discloses that the BMRCL offered package compensation to the petitioners which was accepted by them, pursuant to which, agreements under Section 29(2) of the KIAD Act were entered into between the petitioners and KIADB resulting in disbursement of compensation in favour of the petitioners. In this context, it is significant to note that neither the agreements nor other documents entered into between the petitioners and KIADB indicate that the petitioners have been paid solatium towards compensation received by them from the KIADB. In fact, it is only in the package compensation offered by the BMRCL

that it chose to split up the compensation offered to the petitioners under various heads by designating solatium under one head amongst several heads of compensation; merely because the package compensation offered by the BMRCL is split into various heads, the compensation offered by the BMRCL under the designated head "Solatium" cannot be construed or treated or understood as solatium in the real sense of the term / expression "solatium" either under the L.A. Act or under RFCTLARR Act; in other words, the package compensation offered by the BMRCL by categorising / describing various amounts out of the total package offered under various heads including solatium was for the limited / restricted purpose of offering package compensation and in reality / substance, the said amount cannot be treated as solatium in true / strict / real sense as wrongly contended by the respondents whose contention cannot be accepted on this ground also.

(ii) It is an undisputed fact borne out from the material on record that pursuant to the package compensation offered by the BMRCL which was accepted by the petitioners, various documents including agreement, affidavit, indemnity bond, receipt etc., were executed by the petitioners in favour of the KIADB whereby the petitioners transferred, relinquished / abandoned and gave up their claim, right, title, interest, possession etc., in the lands in favour of KIADB for consideration offered by the BMRCL; it follows there from that though the BMRCL categorised a particular component of the consideration offered by them to the petitioners as solatium, in reality, the transaction essentially entered into

between petitioners and KIADB under Section 29(2) of the KIAD Act was in the nature of a sale / transfer of all rights in land of the petitioners which was directly and squarely exempted from levy of GST under Entry 5 of the Schedule – III of the CGST / KGST Act, since compulsory acquisitions of land where the owners lose their entire right on the property is akin to sale and ought to be treated as such and on this score also, the impugned orders, notices etc., deserve to be quashed.

(iii) There is no gainsaying the fact that ordinarily, when compensation is awarded by the State / acquiring authority in favour of the land losers under any enactment, one of the components of compensation would necessarily be solatium paid by the State / acquiring authority; a land loser who is not satisfied with any component of compensation including the quantum of solatium awarded / granted in his favour would be entitled to challenge the same in accordance with law; however, in the instant cases, petitioners having entered into various documents with the KIADB agreeing to an undertaking that they would not seek enhancement of compensation under any of the heads designated / described / categorised in the package compensation offered by the BMRCL and would not be entitled to challenge the quantum of solatium which is yet another circumstance to indicate that though the BMRCL described / designated / categorised a particular portion of the amount offered by them as solatium, the said amount was not solatium in its real / true / strict sense of the term so as to make it exigible / amenable to levy of GST and as

such, the contentions urged by the respondents cannot be accepted.

(iv) It is pertinent to note that as stated supra, the primary / main ground for levying GST on solatium by the respondents is by contending that the act of the petitioners in receiving the solatium component tantamounts to agreeing to an obligation to tolerate the act of acquisition within the meaning of Entry 5(e) of the CGST / KGST Act; in this regard, it is relevant to state that the entire compensation including the solatium component having been received by the petitioners pursuant to various documents executed by them in favour of the KIADB would clearly not amount to agreeing to an obligation to tolerate acquisition; in fact, rather than tolerating acquisition of their lands, petitioners have undisputedly executed various documents in favour of KIADB relinquishing / transferring / selling their right over the lands after receiving monetary compensation and neither these transactions nor any act, deed or thing done by the petitioners in this regard would amount to agreeing to the obligation to tolerate an act by the petitioners so as to attract Entry 5(e) of Schedule – II and consequently, on this ground also, the contention of the respondents cannot be accepted.

(v) Section 11(2) of the L.A.Act contemplated passing of a consent award pursuant to an agreement entered into between the land losers and the Government / acquiring authority; it is well settled that compensation paid under a consent award in terms of Section 11(2) of the L.A.Act was / is not amenable to levy of service tax / GST in respect of any of the various components of compensation including

solatium. Similarly, certain States viz., Gurajat, Andhra Pradesh, Maharastra etc., amended Section 23 by inserting / incorporating Section 23-A of the RFCTLARR Act, thereby providing for passing of consent award pursuant to agreement entered into between the land losers and the Government / acquiring authority. In the instant cases, a perusal of the package compensation offered by the BMRCL as well as subsequent documents executed between the petitioners and KIADB will indicate that the compensation is paid with the consent of the petitioners, thereby indicating that no portion of the compensation including solatium would be exigible / amenable as wrongly contented by the respondents and viewed from this angle also, the contention of the respondents cannot be accepted.

(vi) Even assuming that the component / head described / designated / categorised as solatium in the package compensation offered by the BMRCL is to be treated or construed or understood as solatium, the said amount paid to the petitioners towards acquisition of their lands cannot be said to be exigible/amenable to GST for more than one reason; in this context, it is relevant to refer to the relevant statutory provisions of the CGST/KGST Act.

Section 7 of the CGST Act, reads as under:

Scope of supply.

7. *(1) For the purposes of this Act, the expression "supply" includes—*

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

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

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

(d) [*****].

[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

***Entry 5(e) of Schedule II** - Activities [or transactions] to be treated as supply of goods or supply of services, reads as under;*

5. Supply of services.
The following shall be treated as supply of services, namely:-
(a) xxx
(b) xxx
(c) xxx
(d) xxx
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

***Entry 5(b)** of the aforesaid Schedule II, reads as under:-*

***5. Supply of services**.*

The following shall be treated as supply of services, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in

case of non-requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972;or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

Entry 5 of Schedule III *(Activities or transactions which shall be treated neither as a supply of goods nor a supply of services) reads as under:*

5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

(vii) Section 7(1) of the CGST/KGST Act provides for the scope of supply; it includes all forms of supply of goods and services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

(viii) Clause (d) of sub-section (1) of Section 7 states that the activities referred to in Schedule II shall be treated as "supply of goods" or "supply of services". This clause was omitted vide CGST Amendment Act, 2018 w.e.f. 01.07.2017.

(ix) Simultaneously, Section 7(1A) was inserted vide CGST Amendment Act, 2018 w.e.f. 1.07.2017. It postulates that only when activities or transactions constitute a supply in accordance with Section 7(1), then they shall be treated as

supply of goods or services as referred to in Schedule II. The effect of this would be that Schedule II will be merely a classification schedule and will not automatically lead to being considered a supply of goods or services or both.

(x) Entry No. 5(e) of Schedule II treats agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act as supply of service.

(xi) Section 7(2)(a) postulates that notwithstanding anything contained in Section 7(1), activities or transactions specified in Schedule III shall neither be treated as supply of goods nor supply of services.

(xii) Entry 5 of the III Schedule treats sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building as neither supply of goods nor as supply of services.

(xiii) The nature of GST and its brief history was dealt with by this Court in the case of ***Tonbo Imaging India Pvt.Ltd vs. Union of India - (2023) 4 Centax 443,*** *wherein it was held as under:*

7. *Before adverting to the rival contentions and the relevant statutory provisions, a brief overview of the GST scheme is required ; in this context, it is relevant to state that the entire scheme of indirect taxes in India has undergone transformation upon introduction of GST with effect from July 1, 2017. This tax is being levied with concurrent jurisdiction of the Centre and the States on the supply of goods or services. For this purpose, the Constitution of India has been amended vide Constitution (101st Amendment) Act, 2016 with effect from September 16, 2016. The Constitutional Amendment Bill specifically mentions that the objective of introducing GST is to avoid cascading effect of taxes.*

8. *The Central Government enacted the CGST Act to provide for levy and collection of tax on supply of goods or services or both where the supply is intra-State supply ; so*

also, the CGST Rules were also framed including the impugned rule 89(4)(C).

9. *The Central Government enacted the IGST Act for the purpose of levy and collection of GST on the supply of goods or services or both where the supply is inter-State supply.*

10. *The State of Karnataka enacted the KGST Act to levy and collect tax on intra-State supply of goods or services or both within the state of Karnataka.*

11. *GST is a multi-stage tax, as each point in a supply chain is taxed (unless specifically exempted by law) till the goods and services reach the final consumer. This can be demonstrated by the following :*

• A manufacturer procures "input goods" and "input services" to manufacturer his goods and would make "outward supply" to a wholesale supplier. Here, the levy of GST would be on the manufacturer/seller. However, the incidence of GST would be on the wholesale supplier.

• For the wholesale supplier, the goods procured from the manufacturer/seller becomes "input goods". The wholesale supplier would make value additions thereon and make an "outward supply" of the same to the retailer. In doing so, GST is levied on the wholesale supplier, but the incidence of GST, which was earlier on the wholesale supplier, is further passed on to the retailer.

• The goods procured from the wholesale supplier becomes "input goods" for the retail seller. The retail seller would make value additions thereon and make an "outward supply" of the same to the final consumer. In doing the same, GST is levied on the retail seller, but the incidence of GST, which was earlier on the retail seller, is further passed on to the final consumer.

• The supply chain having been terminated, the final consumer will not be able to pass the incidence of tax any further and thus bears the final burden of tax.

• GST is therefore a destination-based tax on consumption of goods and services. It is levied at all stages right from manufacture up to final consumption with "credit" of

taxes paid at previous stages of supply chain available as set-off. In a nutshell, only value addition will be taxed, and burden of tax is to be borne by the final consumer.

12. *In the case of All India Federation of Tax Practitioners v. Union of India [2007] 9 VST 126 (SC) ; (2007) 7 SCC 527, the apex court held as under (page 153 in 9 VST) :*

> *"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. The service tax is a value added tax."*

13. *In the case of Union of India v. VKC Footsteps India Pvt. Ltd. [2021] 93GSTR 160 (SC) ; (2022) 2 SCC 603, the apex court held as under (para 23, page 202 in 93 GSTR) :*

> *"44. The idea which permeates GST legislation globally is to impose a multi-stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfils the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. In a sense therefore, the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. The fundamental object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain."*

Section 16 of the IGST Act, 2017 reads as under :

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

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

(b) supply of goods or services or both to a special economic zone developer or a special economic zone unit.

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

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

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

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services tax Act or the rules made there under."

Section 54(3) of the CGST Act, 2017 reads as under :

54. Refund of tax.—(1) Any person claiming refund of any tax. ..

(2). ..

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input-tax credit at the end of any tax period:

Provided that no refund of unutilised input-tax credit shall be allowed in cases other than—

(i) zero rated supplies made without payment of tax ;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council :

Provided further that no refund of unutilised input-tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty :

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of Central tax or claims refund of the integrated tax paid on such supplies.

(4). ..

Rule 89(4) of the CGST Rules, 2017 reads as under :

"89. Application for refund of tax, interest, penalty, fees or any other amount.—(1) - (3). ..

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-

section (3) of section 16 of the Integrated Goods and Services tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula- Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷· Adjusted Total Turnover Where,—

(A) 'Refund amount' means the maximum refund that is admissible ;

(B) 'Net ITC' means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both ;

(C) 'Turnover of zero-rated supply of goods' means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both

(D) 'Turnover of zero-rated supply of services' means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely :

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which

payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period ;"

(xiv) It would be relevant to note that the levy of GST is on goods or services or both and the same is defined in the CGST/KGST Act under Section 2(52) and Section 2(102) as under:

***2. Definitions**.- In this Act, unless the context otherwise requires,*

(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply; It is quite clear from the above that since goods is defined as movable property, it obviously does not include immovable property. It is also seen that though the definition of services is wide enough to cover anything other than goods, money and securities, it will have to be read in its context and cannot be given such a wide meaning as to include immovable property.

(102) "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;

*(xv) In **VKC Footsteps case supra**, the Apex Court held that stamp duties and taxes on alcohol for human consumption provide a significant part of revenues of the states and that hence, the Parliament has consciously excluded them from the scope of GST so as to protect the revenues of States i.e., collecting stamp duties on land acquisition or sale or transfer as under:*

"The jurisprudential basis furnishes a depiction of an ideal State of existence of GST legislation within the purview of a modern economy, as a destination-based tax. But there can be no gain saying the fact that fiscal legislation around the world, India being no exception, makes complex balances founded upon socio-economic complexities and diversities which permeate each society. The form which a GST legislation in a unitary State may take will vary considerably from its avatar in a nation such as India where a dual system of GST law operates within the context of a federal structure. The ideal of a GST framework which Article 279A(6) embodies has to be progressively realized. The doctrines which have been emphasized by Counsel during the course of the arguments furnish the underlying rationale for the enactment of the law but cannot furnish either a valid basis for judicial review of the legislation or make out a ground for invalidating a validly enacted law unless it infringes constitutional parameters. While adopting the constitutional framework of a GST regime, ***Parliament in the exercise of its constituent power has had to make and draw balances to accommodate the interests of the States. Taxes on alcohol for human consumption and stamp duties provide a significant part of the revenues of the States.*** *Complex balances have had to be drawn so as to accommodate the concerns of the States before bringing them within the umbrella of GST. These aspects must be borne in mind while assessing the jurisprudential vision and the economic rationale for GST legislation. But abstract doctrine cannot be a ground for the Court to undertake the task of redrawing the text or context of a statutory provision. This is clearly an area of law where judicial interpretation cannot be ahead of policy making. Fiscal policy ought not be dictated through the judgments of the High Courts or this Court. For it is not the function of the Court in the fiscal arena to compel Parliament to go further and to do more by, for instance, expanding the coverage of the legislation (to liquor, stamp duty and petroleum) or to bring in uniformity of rates. This would constitute an impermissible judicial encroachment on legislative power. Likewise, when the first proviso to Section 54(3) has provided for a restriction on the entitlement to refund it would be impermissible for the Court to redraw the boundaries or to expand the provision for refund beyond*

what the legislature has provided. If the legislature has intended that the equivalence between goods and services should be progressively realized and that for the purpose of determining whether refund should be provided, a restriction of the kind which has been imposed in clause (ii) of the proviso should be enacted, it lies within the realm of policy."

(xvi) As held by the Apex Court in the aforesaid judgment, though stamp duty transactions are on the instrument, given the fact that it is a major source of revenue, the GST Council deliberated on subsuming the same under GST so that real estate transactions of sale, acquisition, etc., could also be taxed under the GST regime; however, since the same could not be agreed upon, the GST regime was introduced without subsuming the said transactions and the same was left to the domain of the States.

(xvii) The Agenda Item 2A to the GST council minutes before the legislation was introduced would be of some relevance to our discussion;

Agenda Item 2A - GST TREATMENT OF LAND & BUILDING (REAL ESTATE)

1.1 Presently, under service tax law, the following services relating to real estate (land and building) are subjected to service tax: -

(1) Any lease, tenancy, easement, license to occupy land;

(2) Any lease or letting out of the building including a commercial, industrial, or residential complex for business or commerce.

Both are covered under renting of immovable property, which has been declared a service under the Finance Act, 1994.

1.2 Further, construction of a complex, building, civil structure or a part thereof, including a complex or building

intended for sale to a buyer, wholly or partly except where the entire consideration has been received after issuance of completion certificate, is chargeable to service tax.

It is proposed to treat the aforesaid activities under GST as supply of service (Model GST Law).

2.1 Under the Service Tax law, an activity which constitutes merely transfer of title in goods or immovable property is excluded from the definition of service [section 65B (44) of Finance Act].

2.2 Under the GST regime, it is proposed to subject supply of goods or services to GST. Goods have been defined under the Constitution to include "all materials, commodities and articles". Likewise, services have been defined under the Constitution "as anything other than goods". Goods and services tax have been defined in the Constitution to mean "any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption". Supply has been defined in the model GST law in the broadest possible sense and includes sale.

2.3 What is presently being taxed under service tax law is provision of service in relation to land and buildings. Under the proposed GST, the taxable event is supply of goods or services [Articles 246A & 286 of the Constitution]. However, immovable property has not been included in the definition of goods in the model GST law. As mentioned in paras 1.1 and 1.2, only supply of services in relation to land and building has been proposed to be subjected to GST.

2.4 Thus, supply of immovable property (land and buildings) has been kept outside the purview of GST. It is felt, that this would distort the GST particularly when there is no constitutional or legal impediment to levy GST on supply of land and building to GST due to the following reasons: -

(i) Stamp duty, which is levied under Article 268, is with reference to documents and is collected by the Centre on documents listed in Entry 91 of the Union List while by the States on documents listed in Entry 63 of the State List. Therefore, the argument that because legal conveyance of title of land and buildings attracts stamp duty, they cannot be subjected to GST is facile because stamp duty is levied on documents while GST would be levied on the supply of land

and buildings, whether as goods or services ("aspect theory" upheld by the Supreme Court in a host of judgements). Renting/leasing are subjected to service tax presently. Documents pertaining to such renting/leasing are subjected to stamp duty.

(ii) Entry 49 of the State List reads thus: -

"Taxes on lands and buildings"

It is felt that this entry is not an impediment to levy of GST on supply of lands and buildings because of the "aspect theory" upheld by the Supreme Court: while the stock of lands and buildings is subjected to tax by the States on the aspect of possessing land and buildings, the supply aspect can be subjected to GST.

(iii) Most international jurisdictions subject supply of land and building to GST/VAT (Australia, Canada, New Zealand, Malaysia, Singapore, South Africa, EU & UK).

(iv) Presently, because both VAT and service tax are leviable on under construction property and not on flats sold after completion of construction, buying an under construction flat is more taxing for a buyer.

(v) Further, though service tax and VAT are charged generally @ 4.5% and 1% of the value of the flat (which includes the value of the undivided share of land) respectively, there are embedded taxes in the flat. The total tax incidence in respect of flats in non metros is more than that in metros. In fact, where the value of land is less, the incidence of service tax and VAT is more (embedded taxes). GST on supply of land and building will equalize the tax incidence in respect of houses in metros and non-metros.

(vi) Without levying GST on supply of land and building, it would be very difficult to complete the input tax credit chain (ITC) and allow ITC in respect of construction services and construction material used in creation of immovable property which is further used for carrying out taxable activities. This is highly distortionary. While at the behest of business and industry, the ITC chain would get liberalized, the tax administration would forever be saddled with non-completion of ITC chain thereby resulting in disincentives to obtain

taxable invoices for availing input tax credit. Non inclusion of land and building in GST results in cascading of taxes.

(vii) Gains from GST arising out of a comprehensive tax base, would be negated owing to a large hole in the tax base [As per MOSPI data, construction sector constitutes almost 9% of the total gross value added (GVA) in the country]. This is for the reason that levy of GST on supply of land and buildings would be an impediment to the generation, flow and parking of black money.

(viii) Land and building are not on the same footing as alcoholic liquor for human consumption as the latter is constitutionally outside the definition of goods and services tax (para 2.2 above).

3. In view of the discussion in the forgoing paras, it is imperative that supply of land and building is subjected to GST. However, certain categories of such supplies may be exempted in public interest. These are listed below: -

(I) Supply of vacant land for the purposes of agriculture.

(II) Supply of land for construction of, -

(a) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana;

(b) a civil structure or any other original works pertaining to the 'In –situ rehabilitation of existing slum dwellers using land as a resource through private participation' under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana, only for existing slum dwellers;

(c) a civil structure or any other original works pertaining to the Beneficiary-led individual house construction /enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;

(d) a structure meant for funeral, burial or cremation of deceased;

(e) a single residential unit, on land admeasuring not more than 100 square metres;

(f) low-cost houses up to carpet area of 60 square meters per house in a housing project approved by competent

authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

(g) low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under:

1) the "Affordable Housing in Partnership" component of the Housing for all (Urban) Mission/ Pradhan Mantri Awas Yojana;

2) any housing scheme of a State Government.

(h) Post-harvest storage infrastructure for agriculture produce including cold storage for such purposes.

(III) Sale of:

a) houses constructed under Rajiv Awas Yojana;

b) houses constructed under 'In –situ rehabilitation of existing slum dwellers using land as a resource through private participation' under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana, only for existing slum dwellers.

c) low-cost houses up to carpet area of 60 square meters per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

d) low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under:

i. the "Affordable Housing in Partnership" component of the Housing for all (Urban) Mission/ Pradhan Mantri Awas Yojana;

ii. any housing scheme of a State Government.

(IV) Sale of residential premises other than <u>new</u> residential premises.

Note: - 1) A residential premise is new when any of the following apply:

1. it has not previously been sold as residential premises

2. a new building replaces a demolished building on the same land.

4.1 We may prescribe a different rate of GST for supply of land vis-à-vis supply of buildings, with full ITC of both.

4.2 Further, the amount of stamp duty paid on land or buildings, may be allowed to be excluded from the value of land or buildings, for levy of GST on their respective supply.

4.3 Alternatively, the amount of GST payable may be reduced by the amount of stamp duty paid on the land or buildings, subject to the condition that no refund of ITC would be availed under the duty inversion clause of GST law.

(xviii) As rightly contended by the learned Senior counsel for the petitioners, this Agenda Item to tax immovable property transactions was not agreed upon and at the GST council meeting held on 22nd and 23rd of December 2016, which is broadly set out hereunder:

Agenda Item 2A - CST Treatment of Land and Building (Real Estate)

10. The Secretary to the Council introduced this agenda and explained that in Section2(49), the definition of 'goods' included only movable property. He pointed out that under the Constitution, States had power to charge stamp duty on transactions in land and building and that the rate of this duty ranged between 5% and 6%. He emphasized that under this agenda item, no change in the scheme of stamp duty was proposed as entry 63 of the State List of Schedule 7 of the Constitution empowering States to charge stamp duty remained intact. He pointed out that today, there existed a dichotomy in rates of Service Tax on property depending upon the fact whether it was bought as an under construction property (which attracted Service Tax) or as a ready-built property after obtaining completion certificate (which did not attract Service Tax). He explained that this created a cost arbitrage of about 6% in favour of buying ready-built property. He stated that, in addition, there were embedded taxes as no ITC was available on inputs like steel, cement, floor tiles, sanitary fittings, etc. used in the construction of the property. Shri Arvind Subramanian, Chief

Economic Advisor to the Government of India stated that the cost arbitrage between ready-built and under-construction property could range between 6% to18% due to embedded taxes. In view of this, the Secretary to the Council proposed that GST could be imposed on supply of land and building and the rate could be 12% or 18% with a provision to block refund if there was an incidence of duty inversion between input tax and the output tax on the final supply. He stated that such a measure would take care of the present anomaly of taxation between constructed and under-construction property.

Starting the discussion on this agenda item, the Hon'ble Minister from Uttar Pradesh raised the question as to what percentage of sale of property was fully-constructed vis-à-vis those under construction. The Secretary to the Council stated that such data was not readily available. The Hon'ble Minister from Uttar Pradesh observed that most property sales would be of under-construction property as it would be difficult for developers to fully fund by themselves the development of a property. The Hon'ble Minister from Uttarakhand stated that the hill States should have special exemption. The Hon'ble Chairperson observed that this would be decided once the main issue was settled. The Hon'ble Minister from Punjab observed that if a developer constructed the property on his own, then the completed project's cost would be higher as the developer would also recover the cost of capital investment. The Hon'ble Deputy Chief Minister of Gujarat did not support the proposal under this agenda item. He observed that in almost 90% cases, an under-construction flat was booked by customers and money was paid by them for construction. He stated that stamp duty was on value addition and the proposal made now would lead to double taxation. The Secretary to the Council stated that another important consideration for introducing this agenda item was that if sale of property was considered as a supply and tax was charged at the rate of 18%, it would complete the ITC chain and there would be greater incentive to buy tax paid inputs like cement, steel, sanitary fittings,tiles, etc. The Hon'ble Deputy Chief Minister of Gujarat stated that levying GST on Land and Building would put additional duty burden on the small house-owners. The Hon'ble Minister from Telangana observed that after demonetization, the real estate business had suffered and introduction of GST on it would further worsen the situation. The Hon'ble Minister from Bihar suggested to form a small committee to further examine this proposal.

The Commissioner (GST) CBEC stated that if tax was imposed on re-sale of property, say, a hotel, this would help in claiming ITC and lowering the cost of business for the buyer of

the hotel. He also stated that charging GST on re-sale of property would also capture the value addition over a period of time. The Hon'ble Deputy Chief Minister of Gujarat pointed out that there was stamp duty on re-sale. The Hon'ble Minister from West Bengal stated that he supported the views expressed by the Hon'ble Deputy Chief Minister of Gujarat and the Hon'ble Ministers from Uttar Pradesh and Telangana. He observed that all fittings and raw materials used in buildings would largely be tax-paid and this was presently an additional tax gain for the State as no ITC was available on them. He expressed that the proportion of evaded inputs like steel, cement, etc. might not be very high. He further stated that there were much larger transactions in smaller and medium houses and these should not be taxed in addition to the levy of stamp duty. He cautioned that this would also be a bad political message. The Chief Economic Advisor observed that low-cost housing could remain exempt from GST. He further observed that the final, effective rate of tax on the consumer would not change but there would be greater flow of ITC and a self-policing mechanism would come into play. The Hon'ble Minister from Punjab stated that for residential property, ITC could not be availed. The Hon'ble Minister from Kerala stated that he did not support the proposal under this agenda item. He observed that the Transfer of Property Act gave power to States to levy stamp duty on the transfer of property after completing the paper work. He informed that in Kerala, rebate of stamp duty was given against payment of VAT. He further stated that cement, etc. were not obtained from the grey market as this could risk collapse of the building. He emphasised that stamp duty was a source of revenue for the State government and that it should be left with the States. The Hon'ble Minister from Tamil Nadu stated that the proposal under this agenda item appeared to be unconstitutional as stamp duty was constitutionally retained. He also added that the definition of goods in the Constitution did not include land and building. The Hon'ble Chairperson summed up the two broad view points namely that incidence of tax was likely to go up and the other that the tax amount would remain the same due to availability of ITC on inputs used as construction material.

The Hon'ble Minister from Punjab observed that if GST was imposed on land and building, the cost for the customer would go up. The Chief Economic Advisor stated that if GST was extended to land and building, it would be a transformational GST and would also have a strong anti-corruption, anti-black money signalling. He reminded the House that internationally, GST was charged on supply of property. The Hon'ble Chairperson observed that this idea was transformational but instead of

introducing it at this stage, this suggestion could be revisited after a year or so of the GST implementation.

The Hon'ble Deputy Chief Minister of Delhi suggested that instead of closing the issue at this stage, it could be further examined by a group of officers or Ministers constituted for this purpose. However, taking into view the general sense of the House, the Council agreed that this issue could be revisited after a year or so of the implementation of GST.

11. In view of the discussion above for agenda item 2A, the Council decided not to introduce GST on land and building at this stage and agreed that this issue could be revisited after a year or so of the implementation of GST.

*(xix) Having regard to the judgment of the Apex Court in **VKC Footsteps case supra** and the discussion of the GST Council, it can be concluded that transactions such as, acquisition and transfer of immovable property were not sought to be subsumed under the GST regime.*

(xx) At this stage, it would be relevant to understand that immovable property in its traditional sense always meant the tangible property but as there were developments and changes in the practices of society, it came to be recognized as a bundle of rights in immovable property. As rightly contended by the learned Senior counsel, rights in immovable property is different from the usage to which it could be put and the latter may or may not amount to services depending on the statute but the former would certainly not be a service in the light of the discussions held above.

(xxi) It is relevant to note that a perusal of the definition of 'immovable property' in various statutory enactments including General Clauses Act, Transfer of Property Act, Registration Act etc., would clearly show that

not only the physical property but also the rights and benefits arising out of such property are recognised as immovable property.

(xxii) The Apex Court in the case of ***Jilubhai Nanbhai Khachar and others v. State of Gujarat and another - 1995 Supp (10) SCC 596,*** *analysed the definition of 'land' given in Black's Law dictionary and Law Lexicon as under:*

"11. In Black's Law Dictionary (Sixth Edition) at page 877, land is defined to mean-"in the most general sense, comprehends any ground, soil or earth whatsoever, including.....rocks. "Land" may include any estate or interest in lands, either legal or equitable, as well as easements and incorporeal hereditaments. Technically, land signifies everything comprehending all things of a permanent nature, and even of an unsubstantial provided they be permanent. Ordinarily, the term is used as descriptive of the subject of ownership and not the ownership. Land is the material of the earth, whatever may be the ingredients of which it is composed, weather, soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted by law.

12. According to the Law Lexicon (Reprint edn. 1987) by Ramanatha Iyer p. 701, the word 'land" in the ordinary legal sense comprehends everything of a fixed or permanent nature and, therefore, growing trees, land includes the benefit arise out of the land and things attached to the earth or permanently means everything attached to the earth and also the share in or charges on, the revenue or rent of villages or other defined portions of territory. Land includes the bed of the sea below high water mark. Land shall extend to messuages, and all other hereditaments, whether corporal or incorporeal and whether freehold or of any other tenure and to money to be paid out in the purchase of land. Land in its widest signification would therefore include not only the surface of the ground, cultivable, uncultivable or waste lands but also everything on or under it. In Jagannath Singh v. State of U.P., AIR (1960) SC 1563 p. 1568, this Court held that the word "land" is wide enough to include all lands whether agricultural or non-agricultural land. In State of U.P. v. Sarju Devi, [1978] 1 SCF 18, this court held that the definition of the land in Section 3 (14) shows that it is not necessary for the

land to fall within its purview that it must be actually under cultivation or occupied for purposes connected with agriculture. The requirement is amply satisfied even if the land is either held or occupied for the purposes connected with agriculture. The word "held" only means possession of legal title and does not require actual connected occupation. In State of Gujarat v. Kamla Ben Jivan Bhai, [1979] Supp. 2 SCC 440, this Court held that actual cultivation is not necessary to constitute an estate and the right to collect grass is a right annexed to land which was held to be an estate and abolition of the right to pay annual amount was an agrarian reform. In Sri Ram Ram Narain Medhi v. State of Bombay, [1959] Supp. 1 SCR 489, this Court held that the Code is a law relating to land tenures. The right in relation to an estate used in Article 31A has been noted in a very com-prehensive sense. In Digvijay Singh Hamirsinhji v. Manji Savda, [1969] 1 SCR 405, this Court interpreting Section 18 of Saurashtra Land Re-forms Act, 1951 held that the Girasdar to whom the ruler made the grant was bound by the provisions of that Act and that he was not entitled to have his tenant evicted except in accordance with the provisions of the Act."

(xxiii) As rightly contended by learned Senior Counsel for the petitioners, compulsory acquisition of land would fall under Entry 5 of Schedule III r/w Section 7(2) of the CGST/KGST Act and that this Entry is only by way of 'ex abundanti cautela' to show the Legislative intent not to tax sale of land and completed building, i.e., excess of caution does no harm; in the case of ***Gokaraju Rangaraju vs. State of Andhra Pradesh -1981 (3) SCC 132,*** *the Apex Court held as under:*

18. *We do not agree with the submission of the learned Counsel that the de facto doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The de facto doctrine saves such acts. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the legislatures of the States. Article 71(2) of the Constitution provides that acts done by*

the President or Vice-President of India in the exercise and performance of the powers and duties of his office shall not be invalidated by reason of the election of a person as President or Vice-President being declared void. So also Section 107(2) of the Representation of the People Act, 1951 (43 of 1951) provides that acts and proceedings in which a person has participated as a member of Parliament or a member of the legislature of a State shall not be invalidated by reason of the election of such person being declared to be void. There are innumerable other Parliamentary and State legislative enactments which are replete with such provisions. The twentieth amendment of the Constitution is an instance where the de facto doctrine was applied by the constituent body to remove any suspicion or taint of illegality or invalidity that may be argued to have attached itself to judgments, decrees, sentences or orders passed or made by certain District Judges appointed before 1966, otherwise than in accordance with the provision of Article 233 and Article 235 of the Constitution. The twentieth amendment was the consequence of the decision of the Supreme Court in Chandra Mohan v. State of U.P. [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] that appointments of District Judges made otherwise than in accordance with the provisions of Articles 233 and 235 were invalid. As such appointments had been made in many States, in order to pre-empt mushroom litigation springing up all over the country, it was apparently thought desirable that the precise position should be stated by the constituent body by amending the Constitution. Shri Phadke, learned Counsel for the appellants, argued that the constituent body could not be imputed with the intention of making superfluous amendments to the Constitution. Shri Phadke invited us to say that it was a necessary inference from the twentieth amendment of the Constitution that, but for the amendment, the judgments, decrees etc. of the District Judges appointed otherwise than in accordance with the provisions of Article 233 would be void. We do not think that the inference suggested by Shri Phadke is a necessary inference. It is true that as a general rule the Parliament may be presumed not to make superfluous legislation. The presumption is not a strong presumption and statutes are full of provisions introduced because abundans cautela non nocet (there is no harm in being cautious). When judicial pronouncements have already declared the law on the subject, the statutory reiteration of the law with reference to particular case does not lead to the necessary inference that the law declared by the judicial pronouncements was not thought to apply to the particular cases but may also lead to the inference that the statute-making body was mindful of the real state of the law but was acting under the influence of excessive caution and so to silence the voices of doubting Thomases by declaring the law

declared by judicial pronouncements to be applicable also to the particular cases. In Chandra Mohan case [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] this Court had held that appointments of District Judges made otherwise than in accordance with Article 233 of the Constitution were invalid. Such appointments had been made in Uttar Pradesh and a few other States. Doubts had been cast upon the validity of the judgments, decrees etc. pronounced by those District Judges and large litigation had cropped up. It was to clear those doubts and not to alter the law that the twentieth amendment of the Constitution was made. This is clear from the Statement of Objects and Reasons appended to the Bill which was passed as Constitution (20th Amendment) Act, 1966. The statement said:

"Appointments of District Judges in Uttar Pradesh and a few other States have been rendered invalid and illegal by a recent judgment of the Supreme Court on the ground that such appointments were not made in accordance with the provisions of Article 233 of the Constitution.... As a result of these judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgments, decrees, orders and sentences passed or made by these District Judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the District Courts in Uttar Pradesh has practically come to a standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders, and sentences passed or made heretofore by all such District Judges in those States...."

(xxiv) In the case of ***Chotanagpur Banking Association Ltd vs. Govt. of India - 1957 SCC Online Patna 81***, the Patna High Court held as under:

46. *The use of the word "absolutely" in Sections 16 and 17 of the Land Acquisition Act, and the absence of this word in R. 75A(3) will not make any difference, in that, the word "absolutely" only makes the intention of the Legislature more emphatic, and nothing more. It has been used only as abundans cautela as an abundant caution, in that Abundans Cautela Non Nocet, that is, excess of caution does no harm. The words "the property shall vest in Government free from any mortgage, pledge, lien, or other similar encumbrance" alone are clear manifestations of the intention of the Legislature that the vesting of the property is not for any limited purpose or limited duration.*

(xxv) It is therefore clear that even if Entry 5 of Schedule III were not there, sale of land and building cannot be brought under GST as they are covered under the State List II and there is no intention to tax sale/ acquisition immovable property per se under the GST legislations. It is also significant to note that this position is clarified by the aforesaid Circular No. 177/09/2022-TRU dated 03.08.2022 which clearly states that Sale of land either as it is or after some development is covered by Entry No.5 of Schedule III of the CGST/KGST Act and accordingly, does not attract GST; in other words, even if the said entries were not present in the said schedule, there was still no intention to tax stamp duty transactions of the nature which could be subsumed under the GST and consequently, not only sale of land or completed building, even compulsory acquisitions of such land cannot be the subject matter of a GST levy.

(xxvi) Learned Senior Counsel is also right in contending that after the retrospective amendment in Section 7 to exclude 7(1)(d) and include Section 7(1A), Schedule II is merely a classification schedule; Entry 5(e) of Schedule treats "agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" as a supply of service and would only be a classification entry and the need to prove that an activity or transaction is a supply stems from Section 7(1).

(xxvii) Circular No. 178/10/2022-GST dated 03.08.2022 issued by the respondents explains the three expressions as under (para 2):

(i) ***Agreeing to the obligation to refrain from an act*** *- Example of activities that would be covered by this part of the expression would include non-compete agreements, where one party agrees not to compete with the other party in a product, service or geographical area against a consideration paid by the other party. Another example of such activities would be a builder refraining from constructing more than a certain number of floors, even though permitted to do so by the municipal authorities, against a compensation paid by the neighbouring housing project, which wants to protect its sunlight, or an industrial unit refraining from manufacturing activity during certain hours against an agreed compensation paid by a neighbouring school, which wants to avoid noise during those hours.*

(ii) ***Agreeing to the obligation to tolerate an act or a situation*** *- This would include activities such a shopkeeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker, or an RWA tolerating the use of loudspeakers for early morning prayers by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation*

(iii) ***Agreeing to the obligation to do an act*** *- This would include the case where an industrial unit agrees to install equipment for zero emission/discharge at the behest of the RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so.*

13. In ***Intercontinental Consultant's case supra*****,** the Apex Court held as under:-

24. *Section 66 of the Act is the charging section which reads as under:*

*"**66. Charge of service tax**.— (1) There shall be levied a tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses … of Section 65 and collected in such manner as may be prescribed."*

25. *Obviously, this Section refers to service tax i.e. in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the "value of taxable services". Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*

26. *In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended i.e. prior to 1-5-2006) or after its amendment, with effect from 1-5-2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that the High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

27. *This position did not change even in the amended Section 67 which was inserted on 1-5-2006. Sub-section (4) of Section 67 empowers the rule-making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above viz. the service tax is to be paid only on the services actually provided by the service provider.*

28. *It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad [Babaji Kondaji Garad v. Nasik Merchants Coop. Bank Ltd., (1984) 2 SCC 50] , this rule was enunciated in the following manner: (SCC p. 63, para 15)*

"15. … Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

29. *The aforesaid principle is reiterated in S. Chenniappa Mudaliar [CIT v. S. Chenniappa Mudaliar, (1969) 1 SCC 591 : (1969) 74 ITR 41] holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.*

30. *It is also well-established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel [CIT v. Taj Mahal Hotel, (1971) 3 SCC 550 : (1971) 82 ITR 44] : (SCC p. 554, para 11)*

> *"11. … the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

14. As noticed hereinabove, even the Circulars emanating from the respondents unequivocally postulate that a "declared service" must be supported by "consideration" and must, in addition, partake the character of an independent service rendered under a contract for separate consideration; the arrangement between the parties should be an independent arrangement to do an act, for which, consideration should flow. In the instant case, maintenance of the stipulated MAB constitutes merely one of the contractual stipulations governing the relationship between the petitioner Banks and their customers and, in the event of a breach or default thereof, the only consequence that ensues is the levy of a penalty. Such penal charges can by no stretch of imagination be construed, characterised, categorised or treated as "consideration" flowing to the Banks, particularly when no monetary accrual or pecuniary benefit enure to the petitioners - Banks merely by reason of the maintenance of such MAB. Significantly, a customer remains at liberty to withdraw the entire amount standing to the credit of the account, which inexorably leads to the conclusion that the MAB, or

the maintenance thereof, cannot be regarded as "consideration" for the services rendered by the Banks. Further, it is not the case of the respondents that they are entitled to appropriate the entire MAB as their consideration for providing services and / or that the same was recognised as such in their books; under these circumstances, in the light of the principles laid down in the aforesaid judgments, the Circulars issued by the Board and the contract entered into between the petitioners – Banks and their customers, I am of the considered opinion that the impugned SCNs proceed on a fundamentally erroneous premise by conflating a contractual condition with "consideration", a patent infirmity which vitiates the very foundation of the impugned proceedings and warrants their quashing.

15. A perusal of the material on record would reveal that the genesis of the transaction under consideration lies in the opening of a bank account by the customer, whereupon all customers, without any distinction or discrimination, become entitled to avail themselves of the bouquet of services offered by the respective petitioner Banks. Though customers may be classified into different categories such as rural, urban and the like, a uniform set of

facilities and services is extended to all customers falling within a particular category. All features, facilities and services appurtenant to the chosen category of account are made available to the customer, who retains absolute autonomy in selecting the account offering best suited to his requirements, without any interference on the part of the petitioner Banks. It is the customer who introduces funds into the account by way of deposits and, insofar as the impugned transactions are concerned, the quantum, frequency and manner of deposit or withdrawal remain entirely within the customer's unfettered discretion.

16. The stipulated MAB constitutes merely one of the terms and conditions governing the account opening arrangement pursuant to which the account is opened and funds are deposited. These contractual stipulations remain uniform and are made applicable to all customers falling within the same category of accounts, with the attendant features, facilities and services being equally available to every such customer. The discretion to avail or not avail a particular account offering rests entirely with the customer and the petitioner Banks do not foist or thrust any MAB stipulation upon a customer so as to derive any corresponding

benefit or "consideration" therefrom. It therefore follows that the availability of the features, facilities and services is category based, while the decision to opt for a particular account and maintain the stipulated MAB lies exclusively within the domain of the depositor. The petitioner Banks neither influence nor dictate such choice and do not, in any manner, compel or insist upon maintenance of the MAB by their customers.

17. A customer who opts for an account category carrying a stipulated MAB is required to maintain such minimum balance and, in the event of a failure to adhere thereto, becomes liable to the penal consequences envisaged under the very contract governing the account relationship. Thus, non maintenance of the MAB merely attracts a penalty. The maintenance of an MAB is, in essence, nothing more than the maintenance of a deposit in a bank account and such deposit entitles the customer to the interest accruing thereon, whereas any breach of the MAB stipulation is visited with a penalty. Put differently, for agreeing to maintain a deposit, the account holder receives interest, while any infraction of that obligation attracts a penal charge. The amount recovered by the Bank on account of such breach unmistakably partakes the

character of a penalty and not "consideration". To the extent such penal charges are recovered by the Banks, the corresponding tax consequences are attracted and the same are not in dispute. Equally, the stipulation relating to maintenance of MAB is uniformly applicable to all customers falling within the concerned category and those customers who maintain the requisite deposit are compensated by the petitioner Banks through payment of interest, which, admittedly, is not exigible to Service Tax.

18. It is of considerable significance to note that the petitioner Banks neither foist nor compel any customer to maintain the stipulated MAB, the choice in this regard is being left entirely to the customer. Irrespective of whether a customer maintains the prescribed MAB, deposits falling within the concerned category continue to earn the same rate of interest. Non maintenance of the MAB merely results in an amount becoming payable by the customer to the petitioner Banks by way of penalty. It therefore becomes manifest that even in cases of breach or default of the MAB requirement, the customer continues to earn interest on the deposits maintained with the petitioner Banks. The Banks do not suspend or discontinue payment of interest on the account balance

merely on account of such default; the breach is visited only with a penalty, on which the applicable Service Tax has already been discharged. In essence, the transaction comprises the maintenance of a deposit in a bank account and the levy of a penalty in the event of a breach, upon which the requisite Service Tax stands duly discharged. Consequently, the transaction does not give rise to any further taxable element or facet warranting examination through the prism of Service Tax.

19. The impugned SCNs proceed on the fundamentally erroneous assumption that the stipulated MAB confers certainty and assurance of liquidity upon the petitioner Banks by virtue of the deposits maintained by customers. This premise is wholly fallacious, since there exists no restriction, limitation or fetter either on the withdrawal of funds or on the maintenance of deposits in excess of the prescribed MAB. Consequently, it cannot be presumed that the declared MAB represents liquidity invariably available to the Banks at any given point in time. This is particularly so when banking institutions cater to thousands, if not millions, of customers simultaneously and every account holder remains at liberty to breach the MAB stipulation, continue availing the

attendant services and merely incur the prescribed penalty for such default. The notion of assured liquidity, therefore, is a complete misnomer, since the mere existence of a stipulated MAB does not, by itself, translate into assured liquidity available to the petitioner Banks.. The stipulated MAB is, in essence, nothing but a form of deposit and, like all deposits, the funds remain fungible in character. Every such deposit earns interest at the same applicable rate and no intrinsic, tangible or discernible benefit accrues either to the customer or to the petitioner Banks solely by reason of the maintenance of MAB. There is neither any enhanced interest enuring to the benefit of the depositor nor any corresponding diminution of interest operating to the advantage of the Bank. Equally, the Bank does not assume custody of the funds in a manner that denudes the customer of the unfettered right of withdrawal, nor does a breach of the MAB stipulation result in the customer being disentitled to the attendant features, facilities or services associated with the account. If the MAB deposit were to be construed as "consideration", it is elementary that such consideration must accrue to and vest in the petitioner Banks, a proposition wholly divorced from commercial reality. For the MAB to

qualify as "consideration", the funds would necessarily have to be irretrievably parted with by the customer and irrevocably appropriated by the petitioner Banks. Stated differently, if the MAB were indeed "consideration", the depositor could not retain the unfettered right to withdraw such funds at will. However, the petitioner Banks function merely as custodians of the deposits, which are reflected as liabilities repayable to the customers, and the decision regarding the quantum and duration of deposits remains entirely within the dominion and control of the customer. Furthermore, customers, irrespective of whether they maintain the stipulated MAB, continue to receive consideration from the petitioner Banks in the form of interest at identical rates applicable to similarly situated account holders. Viewed thus, the very foundation upon which the impugned SCNs proceed stands substantially eroded, rendering them liable to be quashed on this ground as well.

20. A perusal of the provisions contained in Section 67 of the Finance Act, will indicate that it is absolutely essential that consideration should be charged and the transaction should contemplate charging or existence of a consideration that can be

quantified in monitoring terms which is a positive act which should be done for making the subject transaction amenable / exigible to payment of service tax; in ***Bhayana Builder's case supra*****,** the Apex Court negatived the contention of the Revenue / Department that free supply done by a service recipient could be included as consideration under a contract for construction and held as under:

> ***11.*** *As already pointed out in the beginning, all these assessees are covered by Section 65(25-b) of the Act as they are rendering "construction or industrial construction service", which is a taxable service as per the provisions of Section 65(105)(zzq) of the Act. The entire dispute relates to the valuation that has to be arrived at in respect of taxable services rendered by the assessees. More precisely, the issue is as to whether the value of goods/materials supplied or provided free of cost by a service recipient and used for providing the taxable service of construction or industrial complex, is to be included in computation of gross amount charged by the service provider, for valuation of taxable service. For valuation of taxable service, provision is made in Section 67 of the Act which enumerates that it would be "the gross amount charged by the service provider for such service provided or to be provided by him". Whether the value of materials/goods supplied free of cost by the service recipient to the service provider/assessee is to be included to arrive at the "gross amount", or not is the poser. On this aspect, there is no difference in amended Section 67 from*

unamended Section 67 of the Act and the parties were at ad idem to this extent.

12. *On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients:*

(a) Service tax is payable on the gross amount charged — the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

(b) The amount charged should be for "for such service provided" — Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any

amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined.

13. *A plain meaning of the expression "the gross amount charged by the service provider for such service provided or to be provided by him" would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the "gross amount" simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words "for such service provided or to be provided" by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient,*

naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14. *We may note at this stage that Explanation (c) to sub-section (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation hereinbelow in order to understand the contention:*

*"(c) "**gross amount charged**" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."*

(emphasis supplied)

15. *It was argued that payment received in "any form" and "any amount credited or debited, as the case may be…" is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid*

argument. A plain reading of Explanation (c) which makes the "gross amount charges" inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account, etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words "in any form of payment" are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, "any amount credited or debited, as the case may be", to any account whether called "suspense account or by any other name, in the books of accounts of a person liable to pay service tax" would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16. *In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to*

ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.

17. *Faced with the aforesaid situation, the argument of the learned counsel for the Revenue was that in case the assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of Notification dated 10-9-2004 read with Notification dated 1-3-2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67% : 33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted*

that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessees to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.

18. *In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says "33% of the gross amount "charged" from any person by such commercial concern for providing the said taxable service". According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount*

is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of "taxable service". Thirdly, even when the explanation was added vide Notification dated 1-3-2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at "gross amount charged".

19. *Matter can be looked into from another angle as well. In CCE v. Larsen & Toubro Ltd. [CCE v. Larsen & Toubro Ltd., (2016) 1 SCC 170] this Court was concerned with exemption notifications which were issued in respect of "taxable services" covered by sub-clause (zzq) of clause (105) read with clause (25-b) and sub-clause (zzzh) of clause (105) read with clauses (30-a) and (91-a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five "taxable services" [viz. Sections 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under: (SCC p. 195, para 23)*

"23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided".

(emphasis in original)

Further, while referring to exemption notifications, it observed: (SCC p. 206, para 42)

"42. … Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."

It is clear from the above that the service tax is to be levied in respect of "taxable services" and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the legislature, that cannot be added.

***20.** It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any "taxable service" defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.*

21. So also, in ***Edelweiss Financial Services case supra***, the Apex Court held as under:-

> *2. Heard Mr. Tathagat Sharma, learned counsel for the petitioner.*
>
> *3. The challenge here is to the concurrent finding in favour of the assessee recorded by the Principal Commissioner GST which was upheld by the CEST Tribunal, through the impugned order on 16.02.2022. The learned counsel would submit that this case is similar to Civil Appeal No. 428/2020 @ Diary No.42703/2019 (Commissioner of 12:57:51 IST Reason: Service Tax Audit II Delhi IV Vs. M/S DLF Cyber City Developers Ltd.). and therefore the matter should be admitted and tagged with the pending case.*
>
> *4. Responding to the above, Mr. Bharat Rai Chandani, learned counsel for the assessee on caveat would read Section 65 (12) of the Finance Act, 1994 to point out that issuance of corporate guarantee to a group company without consideration would not fall within banking and other financial services and is therefore not taxable service. He would also read Section 65B (44) of the Finance Act 1994 to point out that the definition of service would indicate that it relates to only such service which is rendered for valuable consideration.*
>
> *5. The counsel would next advert to paragraph 3.1.12 of the Commissioner's order where the following was recorded:-*
>
> *"further, the consideration can be of two types viz., monetary consideration and non monetary consideration. In the present case, the Assessee has argued that they have*

not received any consideration. In such case it's for the department to prove that the Assessee's claim is wrong. It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or non- monetary consideration in any form. It is not alleged or proved in the Show Cause Notice as to how the Assessee got any benefit from their subsidiaries in monetary or non-monetary terms for the Corporate Guarantees issued. Missing this vital point, valuation of the consideration using provisions of Section 67(1) of the Finance Act, 1994 become a futile exercise."

6. Mr. Rai Chandani then read paragraphs 8 and 9 of the judgment of the Tribunal, which are extracted below;

"8. The criticality of 'consideration' for determination of service, as defined in section 65B(44) of Finance Act, 1994, for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under Section 66B of Finance Act, 1994 will not arise. It is clear that there is no consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned.

9. The reliance placed by Learned Authorised Representative on the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B(44) of Finance Act, 1994. 'Consideration' is the recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is a determination for computing the measure of the levy and the latter must follow the former."

7. The above would suggest that this was a case where the assessee had not received any consideration while providing corporate guarantee to its group companies.

No effort was made on behalf of the Revenue to assail the above finding or to demonstrate that issuance of corporate guarantee to group companies without consideration would be a taxable service. In these circumstances, in view of such conclusive finding of both forums, we see no reason to admit this case basing upon the pending Civil Appeal No. 428 @ Diary No.42703/2019, particularly when it has not been demonstrated that the factual matrix of the pending case is identical to the present one.

8. In consequence, the Civil Appeal stands dismissed.

9. Pending application(s), if any, stand closed.

22. In the instant case, it is an undisputed fact and a matter of record that the petitioners – Banks have not charged any consideration for rendering the facilities in question and as such, in the absence of the legal mandate contained in Section 67 of the Finance Act and the judgments of the Apex Court referred to supra, I am of the view that the act of the customers in maintaining MAB cannot be construed, treated, categorized or described as 'consideration' towards the services provided by the petitioners-Banks leading to the sole / unmistakable conclusion that the demand for payment of service tax on the erroneous premise that maintaining MAB in the accounts of the customers amounts to consideration as sought to be contended in the impugned SCNs is

clearly contrary to law and facts and the impugned SCNs deserve to be quashed on this ground also.

23. The impugned SCNs seek to invoke the definition of ‘consideration’ as defined under Section 2(d) of the Indian Contract Act for the purpose of making the impugned demand; in this context, it is apposite to observe that for the alleged promise made by the customers to be construed as "consideration", such promise must necessarily fructify into a benefit or consideration accruing to and receivable by the petitioners-Banks. It is only upon satisfaction of this foundational requirement that a monetary value can be ascribed to such "consideration" for the purposes of levy of Service Tax. In the absence of these indispensable prerequisites being satisfied, it would be wholly untenable to contend that the maintenance of the stipulated MAB by the customers constitutes the "consideration" for the services rendered by the petitioners - Banks.; in fact, this aspect has been explained by the respondents themselves in paragraphs 4, 5, 6 and 7 of their aforesaid Circular dated 03.08.2022, wherein the expression “contract” and “consideration” in the Contract Act are referred by the Board itself by specifically clarifying that the 2nd party must pay consideration to

the 1st party doing an act and that there must necessarily be sufficient nexus between the agreement to do an act and the consideration so received failing which, the services provided by the petitioners – Banks would not be exigible / amenable to service tax and as such, even this contention urged by the respondents cannot be accepted.

24. A perusal of the material on record will also indicate that during the pendency of the present petitions, the respondents who had initiated identical / similar proceedings against the South Indian Bank Ltd., issued show cause notice dated 28.09.2023 to the said Bank demanding payment of GST. The said Bank submitted a reply dated 15.11.2023 putting forth identical / similar contentions as urged in the present petitions and requested the respondents to drop the proceedings. The respondents considered the said reply and noticed that the definition of consideration, supply etc., under the GST regime was identical to the definitions under the pre-GST service tax regime and placed reliance upon the judgment of the Apex Court in ***Bhayana Builder's case supra*** and other judgments relied upon by the petitioners herein and passed an order dated 30.12.2023 dropping the proceedings which was subsequently

accepted by the respondents on merits on 08.06.2024 as can be seen from the information provided by the respondents themselves under the RTI Act. The said order dated 30.12.2023 passed by the respondents is as under:-

> *" 29. At the outset the taxpayer has explained the various facilities and services provided by them to the customers, which are detailed below:*
>
> *a) The taxpayer is a banking company having registered office at Thrissur and branches/ offices located in 30 States/ Union Territories in India. The principal place of business registered in GST for the State of Kerala is "The South Indian Bank Ltd, SIB House, TB Road, Mission Quarters, Thrissur - 680 001 ", and the Bank is regularly paying GST on the value of taxable supply of goods and services made by them.*
>
> *b) Their major business income consists of income from banking operations viz: acceptance of deposits in various forms such as fixed deposits, recurring deposits, savings bank deposits, current deposits etc. and provide various lending activities in the form of term loans, overdraft, cash credit, housing loans, gold loans, consumer loans etc. income from money transfer business and purchase or sale of foreign currency etc. and allied activities permitted by the RBI such as safe deposit vaults, marketing of insurance products, mutual funds etc.*
>
> *c) For the purpose of discharging the applicable GST, the Bank is registered under the provisions of Central Goods and Services Tax Act, 201 7 (hereinafter referred to as 'CGST Act') and Kerala Goods and Services Tax Act, 2017 (hereinafter referred to as 'KGST Act') vide GSTIN 32AABCT0022F2Z6.*

d) The taxpayer provides to its customer various variant of bank accounts as explained above. Based on the type of account, the Customer opts for the Bank to provide certain features/facilities/service (like debit card/ Internet banking/SMS banking etc.,). It is imperative for the Bank to provide the facility of withdrawing the money deposited by the customers with the Bank. Further, in the case of operative accounts such as saving bank or current account, the Bank should provide for withdrawing the money in a frequent manner as and when required by the customer.

e) The Bank provides cheque books, demand drafts, ATM cards, internet banking facilities etc. to enable the customers to withdraw the money deposited by him. The Bank does not charge any fee for certain basic facilities.

f) The Bank also provides additional value added services to account holders in lieu of the customers maintaining/ maintenance of a Minimum Average Balance (monthly/ quarterly) in their accounts. The services offered are over and above normal services and it vanes in each account requiring minimum balance.

g) The consent or commitment for maintaining average minimum balance with the customer is obtained by the Bank in the form of "Declaration by Applicants" as "Request/ Agreement/Undertaking" in the account opening form. In the event of non-maintenance of the average minimum balance, the Bank imposes a non-maintenance charge, as may be determined and fixed by the Bank for each account type according to policies of the Bank and rules framed from time to time in accordance with RBI guidelines.

h) As a Bank they typically provide a catena of banking services to its customers. In relation to the Current Account and Savings Account services which are relatable to the impugned notice, the services can be broadly classified into taxable and exempt, which have been tabulated as under:

Taxable service (where charges and fees are recovered)	*Non-taxable services*
Operation of Current Accounts and Savings Accounts Deposit and Withdrawal of Funds Cheque book issuance Debit Cards Issuances of demand drafts pay orders Cheque collection Outward NEFT/RTGS/IMPS/Travellers cheque encashment Home Banking facility Stop payment requests standing instructions Cheque bounce charges, Charges for card/ATM transactions Foreign currency conversion.	*Extending of Deposits, Loans or Advances, in so far as the consideration is represented by way of interest discount.*

i) On the services which are taxable, the Bank is discharging applicable GST by filing periodical returns.

j) Since the Bank offers a variety of bank accounts, the Bank first explains the different varieties of bank accounts and also informs the Customer about the features/ facilities/ services that are offered by the Bank as a part of each kind of bank account. Further, the Bank also explains the different terms and conditions that are attached with each kind of bank account. This is done so as to enable the Customers to choose the bank account that satisfies their requirements.

k) Once the Customers finalize the kind of bank account which the Customers wish to open with the Bank, the Bank provides an account opening form. The account opening form is required to be

filled by the customers selecting the type of bank account which he desires to open. Pursuant to which, the customers agree to the terms and conditions laid down under each type of bank account.

30. *The taxpayer further submitted their para-wise reply to the contentions raised in the SCN, which is as given below:*

a) There is no consideration charged by the bank and consequently there is no supply of goods or services by the bank.

i) The taxpayer has submitted that under the GST laws, the taxable event prescribed is 'Supply'. The term 'supply' is defined under Section 7 of CGST Act, 201 7 which is reproduced below:

"7. for the purposes of this Act, the expression "supply" includes-(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business:"

ii) They further submitted that as per the above, a transaction will be construed to be a 'supply' if the following requisites are satisfied

• It must be in the nature of sale, barter, exchange, rent or such other similar activity;

• It must be in respect of goods or services;

• It must be undertaken for a consideration;

• It is must be undertaken in the course or furtherance of business.

iii) Further the term 'consideration' has been defined under Section 2 (31) of CGST Act, 201 7 which is reproduced below:

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

a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or

by any other person but shall not include any subsidy given by the Central Government or a State Government;

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

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

iv) They added that the definition of 'consideration' under Section 2(31) includes any payment made or to be made, in respect of supply of goods or services or both by the recipient or by any other person. It also includes the monetary value of any act or forbearance, in respect of, in response to; or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person.

v) They further submitted that for the purpose of understanding the scope of the term 'Consideration', a reference is required to be made to the understanding as provided under the Indian Contract Act, 1872 ('Contract Act'); that the concept of consideration has been derived from the Latin phrase "quid pro quo" which means "something for something"; that in line with the above, consideration means anything, monetary or otherwise, that is paid or made towards an activity of service undertaken.

vi) Furthermore, the taxpayer referred to the definitions for the 'consideration' given as per various dictionaries as follows:

Black Law Dictionary;

"Consideration means something which is of value in the eye of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant.

Webster's Dictionary:

"Something of value given or done in exchange for something of value given or done by another, in order to make binding contract; inducement for a contract."

vii) The taxpayer further stated that the aforesaid definitions clearly indicate that consideration would mean 'something for something in return' and it signifies the benefit which must be bargained for between the parties and is an essential reason for a party entering into a contract; that any consideration, monetary or otherwise, should flow from the recipient of service to the supplier of service and accrue to the benefit of the latter; therefore, not all money flow from the service recipient to the service provider can constitute 'consideration'; it shall be some benefit which would ultimately accrue to the service provider in exchange for rendering an activity to the benefit of the service recipient.

viii) The taxpayer added that there have been multiple instances, when the same concept under the Finance Act, 1994, the erstwhile law governing taxation of services, had come up for consideration before the Courts.

a. They have placed reliance on the case of Bhayana Builders (P) Ltd vs CST, Delhi reported in 201342.STR-49-Tri- LB, where the Larger Bench of the Hon'ble CESTAT determined the scope of definition of 'consideration'. Though the issue related to inclusion of cost of material supplied by the service recipient in the value of the output service, the following observations with reference to the expression 'consideration' in Section 67 may be referred;

"(iv) The expression "consideration" occurring in the U.P. Imposition of Ceiling on Land Holdings Act, 1961 fell for consideration in Ku. Sonia Bhatia v. State of U.P. and Others - AIR 1981 SC 1274 the Court explained that since the expression 'consideration" was not defined in the U.P. Act, its meaning as derived from the definition of the expression in Section 2(d) of the Contract Act, 1872 could be considered. After considering the definition of the expression in the Contract Act and referring to Black's Law Dictionary; other dictionaries, English judgments and Corpus Juris Secundum, the Supreme Court held that: the inescapable conclusion that follows is that consideration means a

reasonable equivalent for other valuable benefit passed on by the promisor to the promisee or by the transfer of to the transferee.

(v) Clearly, Section 67 of the Act deals with valuation of taxable services and intends to define what constitutes the value received by the service provider as "consideration" from the service recipient for the service provided. Implicit in this legislative architecture is the concept that any consideration whether monetary or otherwise should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the later"

b. They have further submitted that the Apex Court while affirming the aforesaid view of the Larger Bench in the case of Commissioner of Service Tax vs Bhayana Builders (P) Ltd reported at 2018 (10) GSTL 118 (SC) further held that the value on which service tax is payable has to satisfy the following ingredients:

Service tax is payable on the gross amount charged: - the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

The amount charged should be for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words 'for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"

c. Further they have referred to the case of Commissioner v. Larsen & Toubro Ltd (2016) reported at 44 STR 391 (Guj) where the court held that that there must be services provided for value to be amenable to charge under service tax Act.

"The question of charging service tax however, needs to be looked from a slightly different angle. Section 66 of the Finance Act, 1994, as noted, provides for levy of taxes at the rate of prescribed percentage of the value of taxable services referred to in various sub-clauses of clause (105) of Section 65. For applicability of this charging Section, therefore, what is needed is to ascertain the value of taxable service. In other words, service tax can be levied only if the service is provided, even if it is otherwise, a taxable service, carries a certain value. If the value of service provided is nil, there would be no occasion for charging the service tax. In essence, thus, Section 66 aims at collecting service tax when a certain service is provided for a value. To put it conversely, when the service is provided but no value thereof is charged, there would be no question of collecting service tax. No provision has been brought to our notice in the Finance Act, 1994 under which though the service provider has not charged any value for service, service tax thereon still can be levied on its deemed value, be it market value or fair value. It is a different matter altogether if the departmental authority disbelieves that though service was provided but no charge was collected and in such a case, the authority would have ample power to inquire into the matter and come to appropriate conclusion on the basis of available materials on record However, if the department proceeds on the premise that a certain service though otherwise a taxable service, the service provider did not collect any charge for the same from the service recipient, in our opinion, it would simply not be possible for the authority to collect any service tax on such service.

Thus, the term taxable service has a direct relation to the consideration either paid in cash or by way of deferred payment or by mentioning of any other valuable consideration. This would reinforce our belief that when no charge was collected for providing the service, there would be not question of applying a rate of tax on the value of such service.

In this context we may recall, according to the assessee, providing of service-by its SEZ unit to its DTA unit was merely for the purpose of convenience and SEZ unit had not collected any charge for such service from its DTA unit. Though the Assessing Officer in his order has made a brief reference to the SEZ unit receiving consideration for such service, we do not find any basis for such a conclusion. In fact, the case of assessee all along has been that invoices were raised for such services merely for the purpose of convenience and in fact, since promotional programmes were being organised, which would benefit the entire company and its different units, there was no question of charging a particular unit by SEZ unit

for such service and that raising of invoices was merely for the purpose of convenience. If that be so, in our opinion, no service tax could be levied not on the Principle of Mutuality but, as noted, on the ground that service provided carried no actual value.

d. The taxpayer further submitted that in the case of Philips India Ltd v. Collector of Central Excise (1997) 91 ELT 540(SC) the court held that Legitimate business considerations to be kept in mind while determining the assessable value.

As to the after sales service that the dealer was required under the agreement to provide, it did of course enhance in the eyes of intending purchasers the value of the appellant's product, but such enhancement of value enured not only for the benefit of the appellant; it also enured for the benefit of the dealer for, by reason thereof, the dealer got to sell more and earn a larger profit. The guarantee attached to the appellant's products specified that they could be repaired during the guarantee period by the appellant's dealers anywhere in the country. Thus, though one dealer might have to repair goods sold by another dealer and incur costs in that regard, he also had the benefit of having the goods he sold reparable throughout the country. The Provision as to after sales service, therefore, benefited not only the appellant; it was as provision of mutual benefit to the appellant and the dealer. We think that in adjudicating matters such as this, the Excise, authorities would do well to keep in mind legitimate business considerations.

e. The taxpayer added that the Hon'ble Supreme Court Commissioner of CGST an Central Excise vs Edelweiss Financial Services Ltd reported in (2023) 5 Centex 58 (SC) has confirmed the view of the Tribunal that no Service Tax can be levied on corporate guarantee, in the absence of consideration collected by the provider of such guarantee.

ix) The taxpayer further submitted that from a perusal of the aforesaid decisions, it is essential for a consideration to be there in order to make a transaction subject to GST and in the present case there is no consideration received by them in respect of the account holders maintaining MAB, accordingly, the same is not subject to GST and no demand can be confirmed pursuant to the impugned Notice.

x) The taxpayer also submitted that it is an admitted position that where MAB is not maintained by the customers, the Bank

charges a fee, on which GST is discharged; that a mere promise of providing a service will not make it a consideration. Further, they added that there is nothing in the terms and conditions agreed to between the Bank and the customers that establish the nexus between the facilities provided by the Bank and maintenance of MAB by the customers; that with each account variant, the Bank offers several facilities which are either free of cost i.e., without consideration or partially free in which case, on the consideration received, GST is paid. It is also stated that the charges collected by bank for non maintaining of MAB is a condition of contract and the same cannot be constructed as construed as consideration of contract.

xi) In this regard, the taxpayer made reference to the decision of the larger bench of the Hon'ble Tribunal in the case of Commissioner of Service Tax, Channel v Repco Home Finance Ltd 2020 (42) G.S.T.L. 104 (Tri. - LB) wherein the aspect of conditions of contract vis a vis consideration of contract came for discussion. In this regard, it was held as follows:

"32. What needs to be noted from the aforesaid definition of consideration under Section 2(d) of the Contract Act is that consideration should flow at the desire of the promisor. Thus, if the consideration is not at the desire of the promisor, it ceases to be a consideration. The banks and non-banking financial companies are promisors and the promisees are the borrowers. The contractual relationship between the banks and non-banking financial companies and the customers is repayment of the loan amount over an agreed period. The banks and non-banking financial companies would not desire premature termination of the loan advanced by them as it is in their interest that the loan runs the entire agreed tenure for the banks thrive on interest earned from lending activities. As premature termination of a loan results in loss of future interest income, the banks charge an amount for foreclosure of loan to compensate for the loss in interest income. It is the customer who has taken the loan, who moves for foreclosure of the loan by making the payment of the loan amount before the stipulated period and thereby breaching the promise to service the loan for the agreed period of time. This results in a unilateral act of the borrower in repudiating the contract and consequently breach of one of the essential terms of the loan agreement. A breach of contract may give rise to a claim for damages."

xii) They also submitted that neither the Customer nor the Bank recognize the agreement to maintain MAB as consideration for the commitment to provide services; that the treatment of the customers agreement to maintain MAB as consideration for an agreement to provide the facilities is therefore without any basis and based on conjectures and surmises.

xiii) Further the taxpayer has pointed out that it is a settled position that taxability is to be determined on the basis of the actual transaction between the parties and not on the basis of presumptions; that the FAQs on Banking, Insurance and Stockbrokers Sector issued by the CBIC at Q.31 is unequivocal that services supplied by an unrelated party without consideration would not be liable to GST. This FAQ was specifically relied by them in their submissions when the present investigation was being undertaken, however, the same has not been considered while issuing the impugned notice.

xiv) They further alleged that the consideration has been presumed in the Show Cause Notice, the fact of which can be ascertained from the invocation of Rule 27(b) in order to arrive at the value of the consideration; that the law does not provide for assumption of consideration; that the consideration should be actual though it can be either in monetary terms or non-monetary terms; that a mere promise which cannot be considered to be a nonmonetary consideration, is not a consideration and it is only an assumption of consideration which is not permissible under the GST Act.

xv) Based on the above, the taxpayer has submitted that there is no taxable service which is being provided by the Bank to its customer by way of providing features / facilities / services linked to the deposit accounts maintained by the Customers and hence no demand can be confirmed pursuant to the impugned notice.

b) There is no service in the nature of entry SE of Schedule II

i) As per entry S(e) of the Schedule II of the CGST Act, agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act shall also be treated as supply of services. In this regard the taxpayer has submitted that Schedule II is subjected to Section 7(1) (a) of the CGST Act and since Section 7(1) (a) is not satisfied in the present case the impugned notice cannot legally invoke entry to Schedule II.

ii) The taxpayer further submitted that for the purpose of understanding the scope of Entry S(e) of Schedule II of the CGST Act, the Bank places reliance on Circular No.178/ 10/2022 dated 03.08.2022 provides in para 2 wherein instances which would be covered by the various expressions provided by the said entry; that sub para (c) specifically explains what would be covered by 'agreeing to an obligation to do an act'. The relevant extract of the Circular is produced below:

"2. Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in pare S(e) of Schedule II of CGST Act if the same constitutes a "supply" within the meaning of the Act. The said expression has following three -limbs, the third one being: -

……

(c) Agreeing to the obligation to do an act This would include the case where an industrial unit agrees to install equipment for zero emission/ discharge at the behest of the RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/ discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so."

iii) The taxpayer added that on a perusal of the aforesaid para, it can be observed that an activity where there is an obligation to do a thing on receipt of a consideration would be covered even if there was no legal obligation for doing such an act. Applying the above principles to the facts of the present case, they have submitted that there is no obligation to provide any service to the customer who

maintains MAB, unless the customer specifically requests for a specified service; that once such a request is made, then the service is either provided free of charge or at a concessional rate and if such a charge is collected, GST is paid.

iv) Further , they stated that the promise of a customer to maintain MAB is not adhered to always by the customer; that the very fact that penal charges are collected evidence that such commitments are also not adhered to.

v) The taxpayer further contended that in Para. 6.1 and 7 of the Circular, supra, it is specifically indicated that the intention of a positive or negative act in lieu of consideration must be expressly indicated in the agreement by the parties. The relevant portion of the Circular reads as under:

"61. A perusal of the entry at serial S(e) of Schedule II would reveal that it comprises the aforementioned three different sets of activities viz. (a) the obligation to refrain from an act, (b) obligation to tolerate an act or a situation and (c) obligation to do an act. All the three activities must be under an "agreement or a "contract" (whether express or implied) to fall within the ambit of the said entry. In other words one of the parties to such agreement/contract (the first party/ must be under a contractual obligation to either (a) refrain from an act. or {b l to tolerate an act or a situation or {c) to do an act. Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first Party for such (a) refraining or (b) tolerating or (c) doing. Such contractual arrangement must be an independent arrangement in its own right Such arrangement or agreement can take the Jami of an independent stand-alone contract or may form part of another contract. Thus, a person (the first person) can be said to be making a supply by way of refraining from doing something or tolerating some act or situation to another person (the second person) if the first person was under an obligation to do so and then performed accordingly.

Agreement to do or refrain from an act should not be presumed to exist.

7. There has to be an express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined 01· presumed to exist just because there is a flow of money from one

party to another Unless there is an express or implied promise by the redolent of money to agree to do or abstain from doing something in retun1 for the money paid to him it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or non-performance and are thus mere 'events' in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, , such payments will not constitute 'consideration' and hence such activities will not constitute "supply" within the meaning of the Act. Taxability of these transactions is discussed in greater detail in the following paragraphs. "

vi) They have submitted that the aforesaid portion of the Circular squarely applies to the facts of the present case and the proposal to demand tax on the premise that the promise to maintain MAB in itself is a consideration for a Service in the nature of Entry S(e) of Schedule II of the CGST Act is without any basis, as such an obligation is neither agreed in any agreement nor forthcoming from the act of the parties.

vii) They added that it is a settled law that Department authorities are bound by the Circulars issued by the Board and the present proposal to demand tax is in contravention to the Circular, which cannot be sustained in law. They have also referred to a few of the judgments in this regard are as follows:

a. It is submitted that the binding nature of the circular has recently been reiterated by the Supreme Court in the case Commissioner of Central Excise and Service Tax, Rohtak v. Merino Panel Product Ltd2022-TIOL-103-SC-CX , it has been clearly held

that in this case that maintaining predictability in taxation law is of the utmost importance and that circulars issued within the framework of the law would be binding on the department.

b. In case of Suchitra Components Ltd v Commissioner of C. Ex., Guntur, 2008 (11) S.T.R. 430 (S.C.) the Hon'ble Supreme Court held that beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. Thus, when the circular is against, the assessee, they have right to claim enforcement of the same prospectively.

viii) The taxpayer further submitted that the position of law in terms of Entry S(e) of Schedule II of the Act is similar to that of Section 66E (e) of the Finance Act, 1994 and the said entry under Finance Act, 1994 came up for consideration before the Courts under the erstwhile regime and the position of law as enunciated in the aforesaid Circular was applied while deciding the said matters; few of the judgments are as follows:

• Linde Engineering India Pvt Ltd. V. Commissioner of Central Excise and Service Tx, Vadodara- (2023) 7 Centex 66 (Tri. - Ahmd),

• Northern Coalfields Ltd. v. Commissioner CGST, CE and Customs, Jabalpur- (2023) 3 Centax 211 (Tri. - Del)

• Cholamandalam Investment & Finance Company Ltd. v. Commissioner Of GST & Central Excise- (2023) 11 Centax 86 (Tri. - Mad).

ix) In the light of the aforesaid submissions, the taxpayer has stated that in the facts of the present case, there is no service in the nature of those mentioned in Entry S(e) of Schedule 11 undertaken by them and consequently the demand proposed in the impugned notice is liable to be dropped.

c) Notwithstanding the above, the valuation adopted is without any basis

i) In this regard the taxpayer has submitted that they provide host of services to their customers and not every customer uses all the services rendered by the Bank. Each customer uses the services provided by the Bank basis their requirements. All the services are made available to all the customers falling under the respective categories and the customer is given the option of to avail such services at his discretion and the Bank does not interfere in any manner.

ii) They added that the Bank does not thrust on MAB proposal on any customer so as to assume any derivative benefits or consideration; as per Section 15 of the CGST Act, 2017, transaction value is the price actually paid or payable by recipient for the supply of goods and or/ services to him by the supplier, where supplier and recipient of supplier are not related and price is the sole consideration for the supply.

iii) They further submitted that customer and Bank are unrelated parties and hence Section 15(1) will be applicable to the facts of the present case and it would be the transaction value which will be subjected to tax. However, since there is no consideration charged by the Bank, there is no value available for payment of GST.

iv) The taxpayer also mentioned that notice has invoked Rule 27 of the CGST Rules to contend that there is a non-monetary consideration received from the customer by the Bank, which is the commitment to maintain the minimum balance in the account. In this regard they have submitted that the aforesaid contention is based on a presumption which is both factually and legally incorrect; that there is no direct benefit derived by the Bank from the customer who promises to maintain MAB, infact, there can be account holders who maintain different levels of balances, which can vary from time to time but the services provided by the Bank remain the same and hence, an analogy that there is a non-monetary consideration received by the Bank is clearly erroneous.

v) Further with regard to invoking Rule 27 of the CGST Rules, the taxpayer has submitted that, the same deals with value of supply of goods or services where the consideration is not wholly in money. It provides that in such cases, the value shall be the following:

a) be the open market value of such supply;

b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;

c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both ·of like kind and quality;

d) if the value Is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order

vi) It is further submitted that the phrase 'open market value' and 'goods or services or both of like kind and quality' have been specifically defined after Rule 35 of the CGST Rules as under-

"Explanation - For the purposes of the provisions of this Chapter, the expressions-

(a) "open market value" of a supply of goods or services or both means the full value in money, excluding the Integrated tax, Central tax, State tax, Union Territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;

(b) "supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or

closely or substantially resembles, that supply of goods or services or both.'~ vii) They added that on a perusal of the above definitions, it can be observed that both the definitions indicate that the value would be such amount charged from unrelated person to provide similar service.

viii) It is also mentioned that in the notice, the highest penalty levied for non-maintenance of MAB is construed to be the value determined in terms of Rule 27 of the CGST Rules; however, this assumption is dehors the principle laid down under said Rule, as the penalty charged for non maintenance of MAB cannot be the value of the services provided by the Bank to the customers. Further they added that on a perusal of the maximum amount of penalty prescribed for different accounts, it can be observed that though varied services are provided for different kind of accounts, the amount charged is uniform, viz. Rs.100 or Rs.200 or Rs.500, as the case may, which also establishes that such amount is only in the nature of penal charges and cannot be equated to transaction value of services provided to customer maintaining MAB.

ix) It is also submitted that when the value of the services cannot be ascertained by applying the provisions of law, then the levy itself fails. They have placed reliance on the following decisions in this regard.

a. Suresh Kumar Bansal Union Of India- 2016 (43) S.T.R. 3 (Del.)

b. Commissioner of Central Excise v. Larsen & Toubro Ltd. - 2015 (39) S.T.R. 913 (S. C).

x) Based on the above, the taxpayer has submitted that the application of penal charges as value of services to allege short payment of tax is clearly without any basis and on this account also, no demand can be confirmed as alleged in the impugned Show Cause Notice.

d. <u>No interest under Section 50 of the CGST Act and Section 14 of the Kerala Finance Act, 2017 ,2019 and no penalty under</u>

Section 73 of the CGST Act,201 7 and Rule 9 of the Kerala Finance Act, 2017 can be imposed.

i) The taxpayer has submitted that the notice has proposed to levy interest on the Bank for failure to pay tax on free banking services provided to the customers; Section 50 of the Act seeks to recover interest from a taxpayer in case there is a failure on part of the taxpayer to pay tax to the government.

ii) In this regard, the taxpayer has stated that, Section 50 of the Act is only applicable when a person who is liable to pay tax as per the abovementioned provisions, fails to do so and then as a consequence has to pay interest at the prescribed rate; that as per the factual matrix as well as their submissions made above, it is significantly clear that the Bank was never liable to pay tax on the free banking services provided by the Bank to its customer and therefore, the question of paying interest does not arise.

iii) In this regard, the taxpayer has placed their reliance on J .K. Synthetics Ltd. v Commercial Taxes Officers [(1994) 4 SCC 276], wherein it was held by the Hon'ble Supreme Court that no interest can be levied on an amount which is not admitted as tax. The relevant extract from the judgment is as follows

"14 . ... Therefore, the expression 'tax payable' under the said two sub Sections is the full amount of tax due and 'tax due' is that amount which becomes due ex-hypothesi on the turnover and taxable turnover 'shown in or based on the return'. The word 'payable' is a descriptive word, which ordinarily means 'that which must be paid or is due, or may be paid' but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2A) and 1 lB of the Act leaves no room for doubt that the expression 'tax payable' in Section 1 lB can only mean the full amount of tax which becomes due under Sub-Sections (2) and (2A), of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to

visit him with the liability to pay interest under Clause (a) of Section 1 lB. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the Section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

iv) In view of the above, the taxpayer has submitted that no interest can be levied ·on the instant transaction as there is no requirement to pay tax at the first instance.

v) With regard to the proposal of penalty under Section 73(9) of the CGST Act, the taxpayer has submitted that they are not liable to pay any tax in the first instance, therefore, the question of paying any interest or penalty on non-payment of the said tax amount does not arise.

vi) The taxpayer further submitted that where there has been no contravention of any law, as has been submitted previously, there can be no imposition of any penalty on the claim of a contravention and therefore, Section 73(9) of the CGST Act will not be applicable in the present case and consequently, the Bank is not liable to pay any penalty under the aforementioned Section.

vii) Further the taxpayer has reiterated that the free banking services provided by the Bank to its customers cannot be considered to be a supply of service and the MAB maintained by the customers cannot be considered to be consideration. For this reason also, no penalty can be levied on the aforesaid transaction.

viii) In this regard, they have placed reliance on the case of Hindustan Steel Ltd. v State of Orissa, [AIR 1970 SC 253], wherein it was held by the Supreme Court that penalty can only be imposed when a party deliberately acts in defiance of law. The relevant extract from the judgment is as follows

7 . ... But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed

unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.,,

ix) Further, the taxpayer has also placed reliance on the case of, EID Parry v ACCT [2000 AIR SCW 86], wherein it was held by the Supreme Court that, where the Appellants had not included planting and transport subsidies in the taxable turnover, it was done under a bona fide belief and the Order of the Authority that imposed and upheld levy of penalty, was set aside.

x) In view of the aforesaid submissions and case laws cited, that taxpayer has submitted that no penalty can be levied under Section 73(9) of the CGST Act and no interest under Section 50 of the CGST Act can be levied as there has been no contravention of law by the Bank.

xi) They also added that, where GST is not applicable on the free banking services as alleged in the Show Cause Notice there is no scope to levy Kerala flood cess.

xii) The taxpayer further requested an opportunity of personal hearing before the disposal of the Show Cause Notice, and submitted to urge further grounds at the time of hearing of the case.

31. The authorised representative of the taxpayer had appeared for a personal hearing on 11.12.2023, and produced a written submission and explained the contents.

Discussion and findings

32. In this order, reference to any provision of Central Goods & Services Tax Act 2017, Central Goods & Services Tax Rules, 2017

and any Notification issued under Central Goods & Services Tax Act, 2017 (hereinafter also referred to as "CGST Act") and Central Goods and Services Tax Rules, 201 7 (hereinafter also referred to as "CGST Rules") shall also be Page 1 of 38 GEXCOM/ADJN/GST/ADC/328/2023-ADJN-O/o Pr COMMRCGST-KOCHI 1/ 1443642/2023 construed as a reference to the corresponding provision in the Integrated Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Rules, 2017 and any Notification issued under Integrated Goods and Services Tax Act, 201 7, in the Kerala State Goods & Services Tax Act, 2017 (hereinafter also referred to as "SGST Act"), Kerala State Goods & Services Tax Rules 201 7 (hereinafter also referred to as "SGST Rules") and Notifications issued under Kerala State Goods & Services Tax Act, 2017, As per Section 6 of Kerala State Goods and Services Tax Act, 2017 (No. 10017 /Leg.A2/2017 /Law) the Officers appointed under the Central Goods and Services Tax Act, 2017 (Central Act 12 of 2017) are authorized to be the proper Officers under SGST Act.

33. I have carefully gone through the records of the case, submissions made by the tax payer in their reply to the notice and during the personal hearing and relevant provisions of law and now make the following findings. In order to determine whether the tax demand in SCN 11 is sustainable it is absolutely essential to examine whether the alleged activities of the taxpayer qualify as "supply" as defined in Section 7(1) of the CGST Act, 2017.

34. Now let me examine the contentions by the Department in this regard. As per Section 7 (1) of the CGST Act 2017 the expression supply includes

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

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

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

34.1. As per Section 7(1A) of the CGST Act 2017, where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

34.2. According to clause S(e) of the schedule II of the CGST Act, 2017, agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act, shall be treated as supply of service.

34.3. As per Section 2 (31) of the CGST Act 2017, consideration m relation to the supply of goods or services or both includes-

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

(b) the monetary value of any act or forbearance, in respect of, in response t, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government: Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply

35. The Department contends that

► *From the time of account opening, the Bank commits to provide specified service/facilities in lieu of the AMB/AQB maintained by the account holder;*

► *Bank's obligation to provide certain services to their customers free of cost on the condition that the customers maintain the stipulated minimum balance in their accounts, satisfies the nature of activity as narrated under clause S(e) of schedule II read with Section 2(31)(b) of the CGST Act;*

► *The activity of the Bank by way of agreeing to the obligation to do an act, i.e., provision of certain free services to their customers, is a supply as defined under section 7(1) of CGST Act, 2017;*

► *The customers' act of agreeing to the terms and conditions put forth by the Bank. Viz., maintenance of the Minimum Account Balance, which may in turn result in monetary benefit to the Bank, is the consideration for the or receiving such services from the bank.*

In this regard, Para 5 and 6 of the CBIC Circular 178/10/2022 GST dated 03.08.2022 (reproduced below) were extracted in the SCN.

" 5 The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act in para 5 (e) of Schedule II of CGST Act is strikingly similar to the definition of contract in the Contract Act, 1872.

*The Contract Act defines '**contract' as a set of promises, forming consideration for each other.** 'Promise' has been defined as willingness of the 'promisor' to do or to abstain from doing anything. 'Consideration' has been defined in the Contract Act as **what the promisee' does or abstains from doing for the promises made to him.***

6. This goes to show that the service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. ***There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.***

36. From the forgoing, the following facts could be deduced:

• In order to open a Bank account a customer has to agree to the specified 'terms and conditions' put forth by the Bank, including maintenance of specified minimum balance in the account.

• The minimum balance requirements, privileges and charges vary across different types of accounts (product variants).

• The Bank does not charge any fee for certain basic facilities. • Special privileges are offered for the accounts where higher AMB /AQB is maintained and certain free services are offered to account holders who have to maintain high AMB/AQB, vis-à-vis account holders who are required to maintain only lesser AMB/AQB. The services offered are over and above normal services.

• Irrespective of whether AMB / AQB was maintained or not, the bank would provide the agreed upon services to the account holder.

• Where MAB is not maintained by the customers, the bank charges a fee, for which GST is charged.

• Stipulations regarding the maintenance of AMB / AQB and the penal charges for not maintaining the AMB / AQB are available on the bank's website and the brochures and the bank takes a

declaration from the customer stating that all the rules and conditions applicable to the product variant have been understood by them.

• The balance amount in the account is payable by the bank to the customer on demand at any time subject to the specified charges for non-maintenance of the specified minimum balance (AMB/ AQB).

Taxpayer's submissions in the reply to the SCN

37. The bank has made the following submissions in their reply to SCN:

► *There is no consideration charged by the bank and consequently there is no supply;*

► *For the purpose of understanding the 'consideration', a reference is required scope to be understanding as provided in the Indian Contracts Act; of the term made to the*

► *The concept of consideration has been derived from the Latin phrase "quid pro quo" which means something for something;*

► *Based on the definitions including in Black's law dictionary and Websters dictionary, consideration signifies the benefit which must be bargained for between the parties and is an essential reason for a party entering into a contract;*

► *There is nothing in the terms and conditions agreed between the bank and the customers that establishes a nexus between the facilities provided by the bank and maintenance of MAB by the customers;*

► *Where MAB is not maintained by the customers, the bank charges a fee, in which GST is charged;*

► *The charges collected by the bank for non-maintenance of MAB is a condition of contract and the same cannot be construed as consideration of contract;*

► *Neither the customer nor the bank recognizes the agreement to maintain MAB as a consideration for the commitment to provide services, and the treatment of customers; agreement to maintain MAB as consideration for an agreement to provide facilities is based on conjectures and surmises;*

► *FAQs on Banking, Insurance and Stockbrokers Sector issued by the CBIC is unequivocal that services supplied by an unrelated party without consideration would not be liable for GST;*

► *The promise to maintain MAB, in itself, is a consideration for a service in the nature of Entry S(e) of Schedule II of the CGST Act is without any basis, as such an obligation is neither agreed in any agreement nor forthcoming from the act of the parties.*

The bank has cited case laws, including the decisions of the Hon 'ble Supreme Court in the cases of Bhayana Builders (P) Ltd., Philips India Ltd. and Edelweiss Financial Services Ltd, under the erstwhile laws governing taxation of services and goods, and Para 2, 6.1 and 7 of CBIC Circular 178/10/2022 GST dated 03.08.2022, in support of their contentions.

38. Since the services provided by banks to their customers are not in the nature of activities specified in Schedule I, it is clear from ***Sub-Sections (1) and (IA) of the CGST Act 2017,*** *that the activities specified in* ***schedule II*** *of the CGST Act, 2017, including agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act vide clause S(e), would* ***qualify as a supply only if the same is for a consideration****. Hence the moot point is whether the alleged services provided to the account holders maintaining the specified minimum balance (AMB / AQB) were for any non-monetary consideration (as receipt of monetary consideration is not alleged in the SCN). After a careful consideration of the facts on record, legal provisions and rival submissions, described above, I find that*

39. The principal allegation in the SCN is that the activity of the bank by way of ***agreeing to the obligation to provide certain free services to their customers,*** *is a 'supply of services' under section 7(1) of CGST Act, 2017 read with* ***clause 5(e) of the schedule II of the CGST Act, 2017,*** *and the customers' act of agreeing to the terms and conditions put forth by the Bank. Viz., maintenance of the Minimum Account Balance, which may in turn result in monetary benefit to the Bank, is the* ***consideration for such 'supply of services' by the bank.***

39.1. As per Clause (b) of Section 2 (31) of the CGST Act 2017 (which relates to non-monetary consideration), consideration in relation to the supply of goods or services or both includes the ***monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person*** *but shall not include any subsidy given by the Central Government or a State Government:*

Here, the existence of the act of agreeing to provide free services to account holders maintaining specified minimum balance, on the part of the bank, and the act of the act of agreeing to maintain the specified minimum balance, on the part of the customer, is not in dispute. Therefore, the issue boils down to the question ***whether the obligation undertaken by the customers is in respect of, in response to, or for the inducement of the obligation undertaken by the bank.*** *In other words, the question is whether there is sufficient nexus between the obligations undertaken by the customer and the bank that meets the requirement of Clause (b) of Section 2 (31).*

39.2. In this regard, The Department as well as the bank have cited CBIC Circular 178/ 10/2022 GST dated 03.08.2022, to support of their respective contentions (The department has cited Para 5 and 6 and the bank has cited Para 2, 6.1 and 7). The last

sentence of Para 6 of the Circular cited by the Department is reproduced below:

"There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

The relevant portions of Para 6.1 and 7, cited by the bank is reproduced below:

"6.1. A perusal of the entry at serial S(e) of Schedule II would reveal that it comprises the aforementioned three different sets of activities viz. (a) the obligation to refrain from an act, (b) obligation to tolerate an act or a situation and (c) obligation to do an act. All the three activities must be under an "agreement" or a "contract" (whether express or implied) to fall within the ambit of the said entry. In other words, one of the parties to such agreement/ contract (the first party) must be under a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a situation or (c) ***to do an act****. Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraning to (b) tolerating or (c) doing. Such contractual arrangement must be an independent arrangement in its own right"*

"7. . . . . .. Unless there is an ***express or implied promise by the recipient of money to agree to do*** *or abstain from doing something* ***in return for the money paid to him, it cannot be assumed that such payment was for doing an act*** *or for refraining from an act or for tolerating an act or situation." Since the alleged consideration for obligation (to provide certain services free of cost) undertaken by the bank is not money but the commitment / obligation undertaken by the customer (to maintain the specified minimum balance), the above sentence needs to be adapted by substituting the word s 'money' / 'money paid' by 'commitment' / 'commitment made', in order to apply the same in the context of the instant case. Once that is done, the sentence becomes symmetric (as both parties are dealing in commitments).*

39.3. When Clause (b) of Section 2 (31) of the CGST Act 2017 is analysed in the light of the contents of CBI Circular dated 03-08-2022, described in the above para, it is clear that the existence of mutual obligations in a contract does not necessarily imply that the obligation of one party is in consideration of obligations undertaken by the other party. ***In the absence of an express or implied promise establishing a necessary and sufficient nexus between the mutual obligations / commitments in a contract, the same can only be treated as mere conditions of contract.***

39.4. The SCN has failed to cite any concrete evidence to show that the obligation / commitment undertaken by the customers to maintain minimum balance was towards the obligations undertaken by the bank (to provide certain services free of cost to account holders maintaining the specified minimum balance. On the contrary, the facts on record indicate that they are mere conditions of contract, as descried below:

39.5. It is an undisputed fact that where minimum balance (MAB / QAB) is not maintained by the customers, the bank charges a fee and penalise the customer for his lapse. Moreover, the balance amount in the account is payable by the bank to the customer on demand at any time subject to the specified charges for non-maintenance of the specified minimum balance (AMB/AQB). One method that can be used to test the nexus between the mutual obligations in a contract is to apply the inversion test. That is to analyse / observe the effect of an instance of one party failing to meet the obligation, on the obligations of the other party in the contract. In the instant case, there is no provision in the account opening form, which represents the contract between the bank and the customer, to increase the charges in respect of a customer who failed to maintain the specified minimum balance, and the charges applicable to the concerned product variant (as per the Schedule of Charges in the website of the bank) continue to be applicable. The bank offers different types of account (product variants) carrying different combinations of obligations and privileges for the customers to choose from. The customers make an informed choice of the product variant, keeping in mind his requirements and other relevant factors. There is no indication in the SCN or the relied upon documents that he would cease to receive getting the contracted services at the contracted rate, or lose his right to receive free services or other privileges associated with the particular product variant chosen by him, if he fails to maintain the minimum balance associated with the variant in a month or a quarter. The only consequence, he may have to face, as per the SCN, is that he has to

pay the fee or penal charges for his lapse. The above facts reinforce that maintenance of minimum balance is merely one of the conditions of contract, and not a consideration for the commitment to provide the free services associated with the product chosen.

39.6. *The taxpayer has cited some case laws in their reply to SCN 11, including the decisions of the Honourable Supreme Court in the cases of Bhayana Builders (P) Ltd., Philips India Ltd. and Edelweiss Financial Services Ltd., which are mentioned in the preceding paragraphs. Though the decisions in these case laws relate to the erstwhile laws including the Finance Act, 1994, I find them relevant to the case at hand. Those decisions were made interpreting the definition of "consideration" in the Indian Contracts Act, to make them relevant to the Finance Act, 1994 since the term was not defined in the Finance Act, 1994. I have gone through these case laws and find that they are of help to the taxpayer and seriously undermine the allegations of SCN 11 in this case.*

39.7. *Having gone through the submissions made by the bank in reply to the SCN, in the light of facts / documents on record and legal provisions, I find considerable force in the bank's submissions and am inclined to accept their contention that there is nothing in the terms and conditions agreed between the bank and the customers that establishes a nexus between the facilities provided by the bank and maintenance of MAB by the customers. I am also inclined to accept that the treatment of customers' commitment to maintain MAB as consideration for the obligation to provide facilities (provision of certain services frees of cist / at concessional rate) in the SCN is based on conjectures and surmises, as the SCN has failed to establish the necessary "quid pro quo".*

40. *In view of the analysis of relevant facts and legal provisions described in the foregoing paragraphs, I hold that commitment to maintain minimum balance by the customers cannot be treated as consideration for the commitment by the bank, to provide certain services free of cost / concessional rate, and*

accordingly the latter does not qualify as a supply under Section 7 of the CGST Act, 2017. I find that the crucial factor that there must be a ***necessary and sufficient nexus*** *between the supply (i.e. agreement to do or to abstain from doing something) and the consideration cannot be established . In the light of the above discussion, I find that the demand for GST and other proposals in the SCN can be dropped. Consequently, I give up the exercise of valuation.*

41. *Since no CGST, SGST or Kerala Flood Cess is liable to be paid by the taxpayer, as discussed above, I find that no interest on such taxes is payable.*

42. *Also, since no CGST, SGST or Kerala Flood Cess is in default, penalty under Section 73(9) of the CGST Act, 2017 and under Rule 9 of Kerala Flood Cess Rules, 2019 read with Section 14(4) of the Kerala Finance Act, 2019 is NOT to be imposed on the taxpayer.*

43. *In view of the foregoing discussions, I pass the following order and dispose of Show Cause Notice No. 11/2023-24/GST [ADC] dated 28/09/2023."*

25. The information provided by the respondents under the RTI Act to the aforesaid South Indian Bank specifically / categorically stating that the aforesaid order dated 30.12.2023 passed by the respondents dropping the proceedings against the said Bank by accepting its contentions is as hereunder:-

F.No.GEXCOM/RTI/APP/1636/2024-ADT Date:28.11.2024
RTI/URGENT

To

Smt.Rose Mary Thomas
South Indian Bank,

SIB Building,
A2, Infopark Exp,
Rajagiri Valley,
Chittethukara,
Kakkanad-682039

Sir,

Sub: Information sought under RIT Act, 2005-Reg.

Please refer to your RTI application Registration No.CCECH/R/E/24/00043 dated 20.11.2024 received in this office.

The response to the information sought is provided here; The Order in Original No.41/2023-24/GST(ADC) dated 30.12.2024 was accepted on Merits on 08.06.2024.

In case you are not satisfied with this reply, you may prefer an appeal to ***Shri.Kommisetty Muralidhar, Joint Commissioner & First Appellate Authority (RTI), Office of the Commissioner of Central Tax & Central Excise, C.R.Building, I.S.Press Road, Kochi-8*** *within 30 days of receipt of this letter.*

Yours faithfully,

Sd/-
(Raja Tomy)
(Assistant Commissioner/CPIO)

26. The aforesaid undisputed facts and circumstances coupled with the fact that there is no change whatsoever insofar as demand for payment of service tax or GST in the pre-GST / post-

GST regime is concerned, is sufficient to come to the conclusion that the respondents having accepted the aforesaid order dated 30.12.2023 by accepting very same / identical / similar contentions urged by South Indian Bank on 08.06.2024 as noticed supra, the impugned SCNs issued by the respondents containing the very same allegations deserve to be quashed on this ground also.

27. Insofar as the objection canvassed on behalf of the respondents regarding the maintainability of the present petitions in view of the availability of an equally efficacious alternative remedy is concerned, it is pertinent to note that, prior to instituting the present proceedings, the petitioner Banks, several other banking institutions and the Indian Banks' Association had submitted representations to the respondents raising objections to the proposed levy of Service Tax on account of non-maintenance of MAB by bank customers. Despite such representations, no remedial or corrective measures were forthcoming from the respondents and, on the contrary, the impugned SCNs came to be issued not only to the petitioner Banks but also to several other banking institutions similarly situated.

28. In ***Magadh Sugar's case supra*****,** the Apex Court held as under:-

> ***20.*** *While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternative remedy is available, the existence of an alternative remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallised by this Court in Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1] and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107] Recently, in Radha Krishan Industries v. State of H.P. [Radha Krishan Industries v. State of H.P., (2021) 6 SCC 771] a two-Judge Bench of this Court of which one of us was a part of (D.Y. Chandrachud, J.) has summarised the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternative remedy. This Court has observed : (Radha Krishan Industries case [Radha Krishan Industries v. State of H.P., (2021) 6 SCC 771] , SCC p. 795, para 27)*
>
> *27. The principles of law which emerge are that:*
>
> *27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*
>
> *27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.*

27.3. Exceptions to the rule of alternative remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternative remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(emphasis supplied)

21. *The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Commr. of State Tax v. Commercial Steel Ltd. [Commr. of State Tax v. Commercial Steel Ltd., (2022) 16 SCC 447] In State of H.P. v. Gujarat Ambuja Cement Ltd. [State of H.P. v. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499] this Court has held that a writ petition is maintainable before the High Court if the Taxing Authorities have acted beyond the scope of their jurisdiction. This Court observed : (Gujarat Ambuja Cement case [State of H.P. v. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499] , SCC pp. 517-18, para 23)*

"23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the Taxing Authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. CIT [L. Hirday Narain v. CIT, (1970) 2 SCC 355] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

22. *The above principle was reiterated by a three-Judge Bench of this Court in Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill [Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, (2012) 2 SCC 108] . In that case, a show-cause notice/provisional assessment order was issued to the assessee on the ground of an unauthorised use of electricity under Section 126(1) of the Electricity Act, 2003 and a demand for payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the Taxing Authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgment [Sri Seetarama Rice Mill v. Jeypore Electrical Division, 2010 SCC OnLine Ori 467] of the High Court was appealed before this Court, it held that the High Court did*

not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the Revenue Authorities. This Court made the following observations : (Sri Seetaram Rice Mill [Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, (2012) 2 SCC 108] , SCC p. 140, paras 81 & 82)

"81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.
…
82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, lex nil frustra facit, nor to enforce one which would be frivolous—lex neminem cogit ad vana seu inutilia—the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail."

(emphasis supplied)

23. *In Union of India v. State of Haryana [Union of India v. State of Haryana, (2000) 10 SCC 482] the assessing authorities imposed sales tax on the rentals charged for supply of telephones. Writ petitions were filed in the High Court challenging the levy. The writ petitions were dismissed on the ground that an alternative remedy of a statutory appeal was available. An appeal against these orders was filed before this Court. The appeal was allowed and the matter was remanded back to the High Court for determination since it involved a question of law on whether the supply of telephones amounted to sale.*

24. *It is not the case of the appellant that the respondents have miscalculated the duty and penalty imposed on it. The appellant contends that the State Government does not have the power to levy tax on its sale of electricity to BSEB. Thus, the plea strikes at the exercise of jurisdiction by the Government. In view of the law discussed above on the rule of alternative remedy, the High Court can exercise its writ jurisdiction if the order of the authority is challenged for want of authority and jurisdiction, which is a pure question of law.*

25. *The appellant is admittedly a sugar mill producing electricity from bagasse (a byproduct of sugar production). The electricity that is produced is used for running the Mill and the excess is sold to BSEB. There is no dispute about the nature of the transaction between the appellant and BSEB. The petition before the High Court was initially tagged with the petition filed by NTPC since it involved similar issues. However, it was subsequently de-tagged and*

heard separately on the ground that the appellant in this case is a sugar mill that also produces electricity, while NTPC is a power generation company. The writ petition filed by the appellant was dismissed by the impugned judgment [New Swadeshi Sugar Mills v. State of Bihar, 2017 SCC OnLine Pat 3688] . Both the petitions — filed by the appellant and NTPC before the High Court challenged the power of the State Government to levy tax on sale of electricity to Electricity Boards. A three-Judge Bench of this Court in Sree Meenakshi Mills Ltd. v. CIT [Sree Meenakshi Mills Ltd. v. CIT, 1956 SCC OnLine SC 42 : (1957) 31 ITR 28 : AIR 1957 SC 49] succinctly explained the tests for the identification of questions of fact, questions of law and mixed questions of law and facts. T. L. Venkatarama Aiyar, J. writing for the Bench observed that:

"9. … To take an illustration, let us suppose that in a suit on a promissory note the defence taken is one of denial of execution. The court finds that the disputed signature is unlike the admitted signatures of the defendant. It also finds that the attesting witnesses who speak to execution were not, in fact, present at the time of the alleged execution. On a consideration of these facts, the court comes to the conclusion that the promissory note is not genuine, Here, there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact. …

10. In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has

acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession the court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law."

The test that is to be applied for the determination of a question of law is whether the rights of the parties before the court can be determined without reference to the factual scenario. In this case, the High Court was entrusted with the determination of the meaning of the phrases used in Section 3 of the Act to determine if the supply of electricity by the appellant would fall within its ambit. Unlike a dispute on the execution of a promissory note or a plea of adverse possession, there is no adjudication on facts required here. There is also no dispute on the nature of the transaction involved.

26. *The issues raised by the appellant are questions of law which require, upon a comprehensive reading of the Bihar Electricity Act, a determination of whether tax can be levied on the supply of electricity by a power generator (which also manufactures sugar) supplying electricity to a distributor; and whether the first respondent has the legislative competence to levy duty on the sale of electricity*

> *to an intermediary distributor in view of the decision of this Court in State of A.P. [State of A.P. v. NTPC Ltd., (2002) 5 SCC 203] The question of whether the appellant is liable to file returns under Sections 6-B(1) and 5-A of the Act is directly related to the issue of whether the sale of electricity by the appellant to BSEB falls under the charging provisions of Section 3(1). The questions raised by the appellant can be adjudicated without delving into any factual dispute. Thus, the present matter is amenable to the writ jurisdiction of the High Court.*

29. A perusal of the impugned SCNs would indicate that the respondents have already pre-determined and concluded that the petitioner Banks are liable to pay Service Tax in respect of the services rendered to customers qua the maintenance of MAB, thereby clearly suggesting that the impugned proceedings are premeditated in nature; moreover, the stand adopted by the respondents in their statement of objections leaves little room for doubt that they have wholeheartedly endorsed the proposal contained in the impugned SCNs. In such circumstances, relegating the petitioners to pursue alternative remedies would amount to a mere ritualistic exercise, devoid of any real efficacy,; as stated supra, it is the specific contention of the petitioners that the relevant / requisite / necessary jurisdictional facts which confer

authority upon the respondents and form the basis to issue the SCNs are missing, conspicuously absent and are not contained in the impugned SCNs which are patently illegal and contrary to the very basic tenets of service law and in the light of the findings recorded by me hereinbefore in favour of the petitioners – banks that the impugned SCNs are without jurisdiction or authority of law coupled with the fact that the question / issue which arises for consideration in the present petitions is a pure question of law without there being any disputed questions of fact, it cannot be said that the petitioners are to be relegated to avail alternative remedies in the present petitions, especially having regard to the findings above that the action of the authorities is ex-facie illegal and without jurisdiction or authority of law and also considering the ramifications, the impugned SCNs have on the banking industry and consequently, even this contention urged by the respondents cannot be accepted.

30. In light of the foregoing discussion and for the reasons recorded hereinabove, I am of the considered opinion that the impugned SCNs are manifestly unsustainable in law, being arbitrary, without jurisdiction and bereft of statutory sanction. The

same are ex facie contrary to the aforesaid Circulars as well as the scheme and mandate of the provisions of the Finance Act. Consequently, the impugned SCNs, together with all proceedings emanating therefrom and consequential thereto, are liable to be and accordingly stand quashed.

31. In the result, I pass the following:-

ORDER

(i) W.P.No.10234/2020 is hereby allowed.

(ii) The impugned show cause notice at Annexure-A dated 08.01.2020 issued by the respondents and all further proceedings pursuant thereto are hereby quashed.

(iii) W.P.No.10363/2020 is hereby allowed.

(iv) The impugned show cause notice at Annexure-A dated 20.01.2020 issued by the respondents and all further proceedings pursuant thereto are hereby quashed.

(v) W.P.No.11574/2020 is hereby allowed.

(vi) The impugned show cause notice at Annexure-A dated 13.01.2020 issued by the respondents and all further proceedings pursuant thereto are hereby quashed.

(vii) W.P.No.2173/2021 is hereby allowed.

(vii) The impugned show cause notice at Annexure-A dated 11.06.2020 issued by the respondents and all further proceedings pursuant thereto are hereby quashed.

Sd/-
(S.R.KRISHNA KUMAR)
JUDGE

Srl.
List No.: 19 Sl No.: 2