IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2031 OF 2018

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

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

WITH

WRIT PETITION (L) NO.639 OF 2020

ATE Enterprises Private Limited … Petitioner
Vs.
Union of India and others … Respondents

Mr. Abhishek A. Rastogi a/w. Mr. Pratyushprava Saha for Petitioner.
Mr. Anil C. Singh, ASG along with Mr. Pradeep S. Jetly, Senior Advocate and Mr. J. B. Mishra for Respondent Nos.1, 3 and 4.
Mr. Dushyant Kumar, AGP with Mr. S. B. Gore for Respondents-State.

CORAM : UJJAL BHUYAN,
ABHAY AHUJA, JJ.

DATE: JUNE 16, 2021

P.C. :

There is difference of opinion in the Bench.

2. Matters relate to constitutionality of section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017. While as per one opinion (opinion of Justice Ujjal Bhuyan) the said provision is unconstitutional, Justice Abhay Ahuja has expressed his disagreement and has rendered his separate opinion today.

3. In view of such difference in opinion, Registry to place the matters before Hon'ble the Chief Justice on the administrative side for doing the needful.

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

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Mr. S. G. Gore, AGP for Respondent No.5-State.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.

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

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

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

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

3. Thus from the above it is evident that challenge made in this writ petition is to the constitutionality of section 13(8)(b) and section 8(2) of the Integrated Goods and Services Tax Act, 2017.

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

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

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

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

overseas customer pays commission to the petitioner against invoice issued by the petitioner. The entire payment is received by the petitioner in India in convertible foreign exchange.

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

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

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

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

case of supply of services where the location of the supplier and the place of supply of services are in the same state or same union territory, it would be treated as an intra-state supply. Therefore the export of service by the petitioner as intermediary would be treated as intra-state supply of services under section 13(8)(b) read with section 8(2) of the IGST Act rendering such transaction liable to payment of central goods and services tax (CGST) and state goods and services tax (SGST).

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

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

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

jurisdiction to levy tax on such services consumed outside India.

4. Levy of GST on an intermediary like the petitioner is violative of Article 14 of the Constitution of India.

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

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

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

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

14.1. Several representations were received seeking change in place of supply for intermediary of services, further seeking clarification on the scope of the expression ‘intermediary’. The issue was examined and with effect from

01.10.2014 place of supply for all intermediaries (goods as well as services) was made the location of the intermediary. This was because many a times the same person provided agency services for selling of goods and subsequently selling of annual maintenance contract (AMC). Therefore, making a distinction between intermediary of goods and services caused hardship. Generally value addition of the service provided by an intermediary is at the place where the intermediary is located. Thus to eliminate any ambiguity between the place of supply of intermediary services provided in relation to goods and services and to bring both at par, place of supply for both was made the location of intermediary. If place of supply was to be made the location of recipient, place of supply for all intermediaries located in taxable territory providing service to a person whose usual place of residence is outside India would be the location of the recipient i.e., outside India and thus such services would have gone outside the tax net.

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

14.3. Referring to the definition of the expression ‘export of services’ as provided in section 2(6) of the IGST Act, it is stated that the services provided by the intermediary (petitioner) are not export of services as all the five conditions mentioned in section 2(6) of the IGST Act are not satisfied.

Therefore, the contention that levy of tax on export of services is *ultra vires* Article 269A of the Constitution of India is untenable.

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

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

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

said Act applied; section 64(1) of the Finance Act, 1994 provided that Chapter V thereof extended to the whole of India except the State of Jammu and Kashmir. Therefore, any service provided outside India could not be subjected to service tax. Thus, the Finance Act, 1994 did not have extra-territorial operation. With effect from 01.07.2012 a new scheme of taxation was introduced. All services were made subject to service tax except those placed in the negative list or specifically exempt. The Place of Provision of Service Rules, 2012 was introduced with effect from 01.07.2012. This set of rules provided for determining the place of provision of the services. In other words, if the place of provision of service was India, the service would be taxable. On the other hand, if the place of provision of service was not India then the said service would not be taxable.

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

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

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

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

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

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

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

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

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

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

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

of India read with section 9 of the CGST Act and the MGST Act.

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

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

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

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

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

a. *Reliance Energy Limited Vs. MSRDC*, **(2007) 8 SCC 1**;
b. *Union of India Vs. N. S. Rathnam*, **(2015) 10 SCC 681**; and
c. *K T Moopil Nair Vs. State of Kerala*, **AIR 1961 SC 552**.

16.7. Mr. Raichandani in his next limb of argument advances the proposition that levy of tax on export of service is *ultra vires* Article 246A read with Article 269A and Article 286 of the Constitution of India. Referring to Article 246A he submits that this is a special provision with respect to GST. It provides that notwithstanding anything contained in Articles 246 and 254, Parliament and subject to clause (2) the legislature of every state have power to make laws with respect to GST imposed by the union or by such state. As per clause (2), Parliament has exclusive powers to make laws with respect to GST where the supply of goods or of services or both take place in the course of inter-state trade or commerce. Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. While clause (1) provides that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India, clause (5) provides that Parliament may by law formulate the principles of determining the place

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

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

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

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

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

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

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

of his above submission learned counsel has placed reliance on the following decisions:-

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

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

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

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

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

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

dismissed.

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

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

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

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

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

19. Both the sides have filed written submissions.

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

21. Before we proceed to deal with goods and services tax (GST) and

integrated goods and services tax (IGST), we may note what the Supreme Court had said on two of the legacy taxes i.e., value added tax (VAT) and service tax which have since been replaced and subsumed by GST. In **All India Federation of Tax Practitioners** *(supra)*, the question for consideration before the Supreme Court was the constitutional status of the levy of service tax and the legislative competence of Parliament to impose service tax under Article 246(1) read with entry 97 of List I of the seventh schedule to the Constitution. It was an appeal before the Supreme Court against the decision of the Bombay High Court upholding the legislative competence of Parliament to levy service tax *vide* Finance Act, 1994 and Finance Act, 1998. According to the Bombay High Court, service tax fell in entry 97 List I of the seventh schedule to the Constitution.

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

21.2. Finance Bill, 1998 was introduced in Parliament so as to levy tax on services rendered by a practising chartered accountant, cost accountant and architect to a client in professional capacity at a particular rate.

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

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

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

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

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

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

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

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

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

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

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

23.3. This Court held that the view of the CESTAT was in accord with the statutory provision as clarified by the Central Board of Excise and Customs in the circular relied upon, further opining that the services rendered by the respondent were fully covered by the principle laid down in the decision of the Supreme Court in **All India Federation of Tax Practitioners** (*supra*). It was

held as under:-

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

23.4. This Court held that though the reports of test and analysis were done in India, those were sent abroad because the clients of the respondent were foreign clients. They paid the respondent for such services in foreign convertible currency. It was in that sense that the Tribunal held that the benefit of the services accrued to the foreign clients outside India, terming the same as

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

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

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

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

25.1. Thus what Article 245 contemplates is that while Parliament may make laws for the whole or any part of India, the legislature of a state may make laws for the whole or any part of the state. Further, no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial

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

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

26.1. At this stage we may briefly note that power to legislate, be it by the Parliament or by the legislature of a state, is traceable to Article 246 of the Constitution. The various entries comprising the three lists of the seventh schedule to the Constitution of India are the fields of legislation.

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

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

29. By the said Constitution (101st Amendment) Act, 2016, Article 279A

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

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

31. Section 2 of the CGST Act provides for definitions of different expressions finding place in the CGST Act. Sub-section (93) defines 'recipient' of supply of goods or services or both to mean - (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration; (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available or to whom possession or use of the goods is given or made available; and (c) where no consideration is payable for the supply of a service the person to whom the service is rendered, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied. Thus what is of relevance is that where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration would be construed to be the recipient of supply of goods or services or both.

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

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

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

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

34. Similar provisions are there in the Maharashtra Goods and Services Tax Act, 2017 (already referred to as the 'MGST Act' hereinabove) which is an act to make provisions for levy and collection of tax on intra-state supply of goods or services or both in the state of Maharashtra and matters connected therewith or incidental thereto. Here also section 7 deals with scope of supply

whereas section 9 is the charging section.

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

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

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

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

37. 'Intermediary' is defined in sub-section (13) to mean a broker, an agent or any any other person by whatever name called, who arranges or facilitates the supply of goods or services or both or securities between two or more persons but does not include a person who supplies such goods or services or

both or securities on his own account.

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

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

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

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

for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the supply; and in the absence of such places the location of the usual place of residence of the supplier.

40. Section 5 of the IGST Act is the charging section. Sub-section (1) says that subject to the provisions of sub-section (2) there shall be levied a tax called the integrated goods and services tax (IGST) on all inter-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rate as may be notified by the central government on the recommendations of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Sub-section (2) deals with integrated tax on the supply of petroleum, crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel.

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

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

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

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

such person.

44. That brings us to section 13 which deals with place of supply of services where location of supplier or location of recipient is outside India. Sub-section (1) gives the intent of section 13. It says that provisions of section 13 shall apply to determine the place of supply of services where the location of the recipient of services is outside India. Sub-section (2) provides that except the services specified in sub-sections (3) to (13), the place of supply of services shall be the location of the recipient of services. However as per the proviso, where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services. Thus sub-section (2) lays down the general proposition that place of supply of services shall be the location of the recipient of services barring the exceptions carved out in sub-sections (3) to (13). In this case we are concerned with clause (b) of sub-section (8). For a proper perspective sub-section (8) is quoted hereunder:-

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

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

45. The Parliamentary Standing Committee on Commerce submitted report No.139 on *Impact of Goods and Services Tax (GST) on Exports*. The said report was presented to the *Rajya Sabha* on 19 December, 2017 and was laid on the table of *Lok Sabha* on the same day. After referring to the definition of

'export of services' as defined under section 2(6) of the IGST Act, it was noted that service providers providing services to overseas suppliers of goods earn commission in convertible foreign exchange; but IGST @ 18% is leviable on such commission because the government does not recognize their services as export of services. Section 13(8) provides that place of supply of services will be the location of the service supplier and not the location of overseas customers. Even in cases where both the supplier and the buyer are located outside India, commission earned for such transaction also attract IGST @ 18%. In view of the fact that GST is a destination based consumption tax, the Parliamentary Standing Committee made the following recommendations:-

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

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

46. It may also be mentioned that GST Council i.e., respondent No.3 in its paper on *GST - Concept and Status*, dated 01.04.2018 reiterated that GST would be applicable on supply of goods or services as against the concept of tax on manufacture of goods or on sale of goods or on provision of services. GST is a destination based consumption tax as against the principle of origin based taxation. Under destination based taxation, tax accrues to the destination place where consumption of the goods or services takes place. Import of goods or services would be treated as inter-state supplies and would be subject to IGST in addition to applicable customs duty. All exports and supplies to special economic zones and special economic zone units would be zero-rated. The fact that GST is a destination based consumption tax; it is a value added tax; it is a tax on services provided and consumed within the territory of India having no extra-territorial operation or nexus has been clarified by respondent No.2 i.e., Central Board of Indirect Taxes and Customs in its circular bearing No.20/16/04/2018-GST dated 18.02.2019 wherein it is reiterated that after introduction of GST which is a destination based consumption tax it is essential to ensure that the tax paid by a registered person accrues to the state in which the consumption of goods or services or both takes place.

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

supply.

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

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

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

read together.

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

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

respondents to file writ petitions before the High Court. The High Court after hearing the matter upheld the claim of exemption and quashed the assessment orders which thereafter led to filing of the appeals.

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

port, are coals "exported" within the meaning of the Act".

”

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

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

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

53.1. In so far question No.1 was concerned, the answer was in the affirmative i.e., Parliament being constitutionally restricted from enacting extra-territorial legislation but such restriction was made subject to certain

exigencies, such as, it should have a real connection to India which should not be illusory or fanciful. In so far the second question was concerned, the answer was an emphatic no. Supreme Court held as under:-

> "76. We now turn to answering the two questions that we set out with:
>
> > (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?
>
> 77. The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, - events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.
>
> 78. It is important for us to state and hold here that the powers of legislation of Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a

requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

> (2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

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

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

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

state supplies of goods or services except on the supply of alcoholic liquor for human consumption at such rate as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Likewise section 5 of the IGST Act which is the charging section provides for levy of IGST on all inter-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rates as may be notified by the central government on the recommendation of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Thus it is apparent that section 9 of the CGST Act cannot be invoked to levy tax on cross-border transactions i.e., export of services. Likewise from the scheme of the IGST Act it is evident that the same provides for levy of IGST on inter-state supplies. Import and export of services have been treated as inter-state supplies in terms of section 7(1) and section 7(5) of the IGST Act. On the other hand sub-section (2) of section 8 of the IGST Act provides that where location of the supplier and place of supply of service is in the same state or union territory, the said supply shall be treated as intra-state supply. However, by artificially creating a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.

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

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

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

56. With utmost respect we are unable to accept the views of the Gujarat

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PC:- (Per Abhay Ahuja, J.)

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

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

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

Nikita Gadgil

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

WRIT PETITION NO.2031 OF 2018

Dharmendra M. Jani
an Indian resident, aged 48
having his residence at
606-Park Vista, Park Darshan
CHS Ltd., Lallubhai Park,
Andheri (West), Mumbai 400 058. ...Petitioner

V/s.

1. The Union of India
Through the Secretary
Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.

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

3. Goods and Service Tax Council
Through its Additional Secretary,
5th Floor, Tower II, Jeevan Bharti Building,
Janpath Road, Connaught Place,
New Delhi-110 001.

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

5. State of Maharashtra
Through the Secretary, Law & Judiciary,
Ministry of Finance, Finance Department,
Mantralaya, Nariman Point,
Mumbai 400 032. ...Respondents

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

CORAM : UJJAL BHUYAN AND
ABHAY AHUJA, JJ.

RESERVED ON : 2ND DECEMBER, 2020.
PRONOUNCED ON : 16th JUNE, 2021.

JUDGMENT AND ORDER : (PER ABHAY AHUJA, J.)
(DISSENTING)

67. On 9th June 2021, I had passed the following order:-

> "1. Having noted the Judgment and Order dated 9th June, 2021 as pronounced by my Respected Learned Brother Shri Justice Ujjal Bhuyan, with greatest respect being unable to persuade myself to share the opinion of my Learned Brother, I would like to record my separate opinion in the matter.
>
> 2. List the matter on 16th June, 2021 for pronouncement of my opinion."

68. I have now had the privilege and advantage of perusing the erudite judgment and order in the above matter delivered by my learned respected Brother Shri Justice Ujjal Bhuyan. I am unable to share the conclusion arrived at by him holding that Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 ("IGST Act")

offends Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India and is also *ultra vires* the IGST Act besides being unconstitutional. For reasons discussed in the following paragraphs, I am of the opinion that Section 13(8)(b) cannot be considered to be unconstitutional or *ultra vires* the IGST Act. Section 13(8)(b) of the IGST Act would in my view be constitutionally valid and operative for all purposes.

69. Pursuant to this Petition under Article 226 of the Constitution of India, Petitioner seeks to declare section 13(8)(b) and section 8(2) of the IGST Act as *ultra vires* Articles 14, 19(1)(g), 245, 246, 246A, 269A, 286 of the Constitution of India and also *ultra* vires the provisions of the IGST Act and section 9 of the Central Goods and Services Tax Act, 2017 ("CGST Act") and Maharashtra Goods and Services Tax Act, 2017 ("MGST Act").

70. Although, the facts in the matter as well as the pleadings and submissions on behalf of Petitioner and Respondents have been very meticulously set out in my learned Brother's judgment, it would be in the fitness of things to briefly narrate the same.

71. Petitioner is proprietor of M/s. Dynatex International, having office in Mumbai. It is submitted that Petitioner is a registered supplier under the provisions of the Goods and Services Tax Act, 2017 and has annexed certificate of provisional registration dated 28th June, 2017 to the Petition. It is further submitted that the Petitioner provides marketing and sales promotion services to customers/principals located outside India who in turn export goods to importers in India on the basis of agreements, illustrative copy

whereof has been annexed as Exhibit "C" to the Petition. In terms of such agreements, Petitioner solicits purchase orders for its overseas customers by undertaking activities of marketing and promotion of goods of its overseas customers.

72. The Indian purchaser, i.e., importer directly places purchase order on the overseas customer of Petitioner for supply of goods, which are then shipped by the overseas customer to the Indian importer/purchaser. Such goods are cleared by the Indian purchaser from the customs by payment of applicable customs duty. The overseas customer raises invoice in the name of the Indian purchaser, who directly remits the sale proceeds to the overseas customer. Upon receipt of such payment, the overseas customer pays commission to Petitioner against invoice raised by Petitioner, upon his overseas customer, which it is submitted is received by Petitioner in India in convertible foreign exchange.

73. It is submitted that the transaction entered into by Petitioner with the foreign customer is one of export of service from India. Reference is made to Section 2(6) of the IGST Act, which defines export of service and to Section 2(13) of the IGST Act, which defines intermediary. It is submitted that Petitioner's case is an export of service by an intermediary.

74. It is submitted that Section 7 of the IGST Act deals with interstate supply, whereas, Section 8 deals with intrastate supply. Section 7 provides as to when a supply would be considered as interstate supply in India, i.e., supply between two or more States or Union Territories of India and Section 8 provides for intrastate

supply, i.e., supply within one State or within one Union Territory. Section 13 of the IGST Act deals with a situation where location of the supplier or the location of the recipient is outside India. Sub-Section (2) provides that the place of supply of services shall be the location of the recipient of services. Sub-Sections 3 to 13 provide exceptions. As per Sub-Section 8, the place of supply shall be the location of the supplier of services and which includes the intermediary services in Clause (b), which are the services rendered by Petitioner.

75. Further, it is submitted that by way of deeming fiction under Section 13(8)(b) of the IGST Act, where the location of the recipient of service is outside India, the place of supply is treated as the location of the supplier of servispecces which is in India, thereby bringing into the tax net export of services. Reference has also been made to Section 8(2) of the IGST Act, 2017, which provides that in case of services where the location of the supplier and the place of supply of services are in the same State or same Union Territory, it would be treated as an intrastate supply. With reference to these provisions, it is submitted that the export of service by Petitioner as an intermediary is being treated as intrastate supply of services, rendering such a transaction liable to payment of CGST and SGST.

76. In the above circumstances this Petition has been filed challenging the constitutional validity of Section 13(8)(b) read with Section 8(2) of the IGST Act, on various grounds, essentially covering the following points :-

i. GST is a destination based tax on consumption and section 13(8)(b) of the IGST Act is contrary to the said principle;

ii. Section 13(8)(b) read with Section 8(2) of the IGST Act is *ultra vires* Article 246A read with Article 269A, Article 286 as well as Article 245 of the Constitution of India as the section results in levy on export of services as intra-State supply;

iii. Section 13(8)(b) is *ultra vires* the charging section 5;

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

v. Section 13(8)(b) results in violation of Article 14 of the Constitution being arbitrary, unreasonable and discriminatory;

vi. Section 13(8)(b) results in violation of right to carry on business viz. Article 19(1)(g) of the Constitution;

vii. No Double Taxation is permitted.

77. Respondents have filed Reply. Petitioner has filed Rejoinder. On behalf of the Parties written submissions have also been filed for the assistance of the Court. I have also heard Learned Counsel for Petitioner, Shri Bharat Raichandani as well as Learned Additional Solicitor General, Shri Anil C. Singh for the Respondent Revenue alongwith Shri Pradeep Jetly, learned Senior Counsel and Shri J.B. Mishra, Learned Standing Counsel for Revenue and with their able assistance, we have perused the papers and proceedings in the matter. The issue that arises for consideration, is whether the provision of Section 13(8)(b) read with Section 8(2) of the IGST Act

is unconstitutional or *ultra vires* the IGST Act, Section 9 of the CGST Act/MGST Act.

78. In short the issue is that Petitioner is aggrieved that his supply of intermediary services as intermediary to his overseas customers, which according to him is export of service by virtue of section 13(8)(b) of the IGST Act read with section 8(2) of the said Act is being treated as an intra-State supply making him liable to pay CGST and MGST, which he submits cannot be permitted. Petitioner is therefore challenging Section 13 (8) (b) read with Section 8(2) of the IGST Act as being *ultra vires* Articles 14, 19 (1) (g), 245, 246A, 269A and 286 of the Constitution of India as well as the IGST Act and section 9 of the CGST and MGST Act.

79. Before commencing the examination of the aforesaid challenge, it would be helpful to set out the principles of judicial review.

80. Whether a law or a provision is unconstitutional or not, has to be decided by the Court on the touch-stone of the Constitution. It is also settled law that Courts should proceed to construe a statute with a view to uphold its constitutionality.[1]

81. In the case of ***State of Madhya Pradesh v/s. Rakesh Kohli & Another***[2] the Supreme Court had set out the following principles to be considered while examining the validity of statutes on taxability. In paragraph 32, the Supreme Court stated thus:-

[1] ITC Ltd. v. Agricultural Produce Market Committee (2002) 9 SCC 232, Asst. Director of Inspection Investigation v. A.B. Shanthi (2002) 6 SCC 259, Shri Krishna Gyanoday Sugar Ltd. v. State of Bihar, (2003) 4 SCC 378 and Welfare Association A.R.P. Maharashtra v. Ranjit P. Gohil (2003) 9 SCC 358, State of A.P. v. K. Purushottam Reddy and Others, (2003) 9 SCC 564 (SC).
[2] (2012) 6 SCC 312

> "*32:- While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:-*
> *(I)there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,*
> *ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,*
> *(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,*
> *(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and*
> *(v) in the field of taxation, the legislature enjoys greater latitude for classification..."*

82. Also the following paragraphs in the decision in the case of ***Government of Andhra Pradesh & Ors Vs. P. Laxmi Devi***[3] may be helpful:-

> *" **30.** The first decision laying down the principle that the Court has power to declare a Statute unconstitutional was the well-known decision of the US Supreme Court in **Marbury** v. **Madison** 5 U.S. (1Cranch) 137 (1803). This principle has been followed thereafter in most countries, including India.*
> *B. **How and when should the power of the Court to declare the Statute unconstitutional be exercised?***
> *Since, according to the above reasoning, the power in the Courts to declare a Statute unconstitutional has to be accepted, the question which then arises is how and when should such power be exercised.*

[3] AIR 2008 SC 1640

31. *This is a very important question because invalidating an Act of the Legislature is a grave step and should never be lightly taken. As observed by the American Jurist Alexander Bickel "judicial review is a counter majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it." (See A. Bickel's `The Least Dangerous Branch')*

32. *The Court is, therefore, faced with a grave problem. On the one hand, it is well settled since* ***Marbury*** *V.* ***Madison*** *(supra) that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of conflict, on the other hand the Court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people. The Court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.*

33. *We have observed above that while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection. This requires clarification, since, sometimes Courts are perplexed as to whether they should declare a statute to be constitutional or unconstitutional.*

34. *The solution to this problem was provided in the classic essay of Prof James Bradley Thayer, Professor of Law of Harvard University entitled* ***'The Origin and Scope of the American Doctrine of Constitutional Law'*** *which was published in the Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only*

when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of great outlines broadly drawn for an unknowable future. Often reasonable men may differ about its meaning and application. In short, a Constitution offers a wide range for legislative discretion and choice. The judicial veto is to be exercised only in cases that leave no room for reasonable doubt. This rule recognizes that, having regard to the great, complex ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is not clearly in violation of a constitutional provision is valid even if the Court thinks it unwise or undesirable. Thayer traced these views far back in American history, finding, for example, that as early as 1811 the Chief Justice of Pennsylvania had concluded: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt" vide ***Commonwealth ex. Rel. O'Hara*** *V.* ***Smith*** *4 Binn. 117 (Pg.1811).*

35. *Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is*

broad separation of powers under the Constitution, and the three organs of the State - the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

36. *Apart from the above, Thayer also warned that exercise of the power of judicial review "is always attended with a serious evil", namely, that of depriving people of "the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors" and with the tendency "to dwarf the political capacity of the people and to deaden its sense of moral responsibility".*

37. *Justices Holmes, Brandeis and Frankfurter of the United States Supreme Court were the followers of Prof. Thayer's philosophy stated above. Justice Frankfurter referred to Prof Thayer as "the great master of constitutional law", and in a lecture at the Harvard Law School observed "if I were to name one piece of writing on American Constitutional Law, I would pick Thayer's once famous essay because it is the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions". (vide H. Phillip's `Felix Frankfurter Reminisces' 299-300, 1960).*

38. ***In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt****. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be*

unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide ***Mark Netto*** *V.* ***Government of Kerala and Ors.*** *[1979]1SCR609. Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.*

39. *In a dissenting judgment in* ***Bartels*** *V.* ***Iowa*** *262 US 404 412(1923), Justice Holmes while dealing with a state statute requiring the use of English as the medium of instruction in the public schools (which the majority of the Court held to invalid) observed "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".*

The Court certainly has the power to decide about the constitutional validity of a statute. However, as observed by Justice Frankfurter in ***West Virginia*** *V.* ***Barnette*** *319 U.S. 624 (1943), since this power prevents the full play of the democratic process it is vital that it should be exercised with rigorous self restraint.*

.....
.....

46. *In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges personal preferences. The Court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in* ***State of Bihar*** *V.* ***Kameshwar Singh*** *AIR 1952, SC 252 (274); "The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence".*

In our opinion, the Court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

47. *As observed by the Constitution Bench decision of this Court in* ***M.H. Quareshi*** *V.* ***State of Bihar****: [1959]1SCR629 :*

The Court must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, common report, the history of the times, and may assume every state of facts which can be conceived existing at the time of the legislation. (See also ***Moti Das*** *V.* ***S.P. Sahi*** *MANU/SC/0021/1959 : AIR 1959SC942.*

48. *In the light of the above observations, the impugned amendment is clearly constitutional. The amendment was obviously made to plug a loophole in the Stamp Act so as to prevent evasion of stamp duty, and for quick collection of the duty. There are other statutes e.g. the Income Tax Act in which there are provisions for deduction at source, advance tax, etc. which aim at quick collection of tax, and the constitutional validity of these provisions have always been upheld".*

83. In the case of ***Hamdard Dawakhana & Another v/s. Union of India***[4]***,*** the Supreme Court has observed that another principle that is to be borne in mind while examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people, that the laws it enacts are directed to problems which are made manifest by experience, and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted.

84. In the case of ***Union of India v. Exide Industries Ltd.***[5], the Supreme Court, (in the decision authored by Hon'ble Shri Justice A.M. Khanwilkar) has reiterated that the examination of the Court begins with a presumption in favour of constitutionality. This presumption, the Supreme Court states is not just borne out of judicial discipline and prudence, but also out of the basic scheme of the Constitution wherein the power to legislate is the exclusive domain of the Legislature/ Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the legislature and, in exercise of judicial review, the Court starts with a basic presumption in favor of the proper exercise of such power. There has to be a delicate balance of powers or rather separation of powers to be preserved under the Constitution.

85. In paragraph 30 of the decision of ***Exide Industries (supra)*** the Supreme Court, while observing that the time tested

[4] (1960) Cri LJ 671
[5] (2020) 5 SCC 274

principle of checks and balances does not empower the Court to question the motives or wisdom of the legislature, except in circumstances when the same is demonstrated from enacted law, quoted the following passage from ***United States v/s. Butler et al (297 US (1936))*** in support as under:-

> *"The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of the power by the executive is subject to judicial restraint, the only check upon our own exercise of power by the executive is subject to judicial restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the process of democratic government...."*

The Court further held that in the Indian constitutional jurisprudence, the above principle has been reckoned by this Court in its early years in1954 in ***K. C. Gajapati Narayan Deo & Ors. v/s. The State of Orissa 15 (1954) SCR 1*** wherein the Court observed thus:-

> *"...If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power... If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislature entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers..."*

86. But before we proceed further, a word on the background/history of GST.

86.1. GST is goods and services tax. It is an indirect tax, levied on supply of goods or services or both. GST has been in operation in more than 160 countries after being introduced in France in 1954. Different countries follow different models of GST. Most countries do not have full GST. They have partial GST. Full GST means all indirect taxes are covered under it and calculated as Value Added Tax (VAT). Some countries have GST calculated as VAT or comprehensive VAT or just VAT. The differences reflect the diversity of situation prevailing in different countries. GST is applicable all across Europe. UK has had VAT since 1993. New Zealand introduced GST in 1986. Australia introduced VAT in 2000. Canada initiated GST in 1991. Ukraine has VAT. Singapore has GST. USA does not have GST/VAT. Malaysia introduced GST in 2015 but was dismantled in 2018.

86.2. Historically, Indian experience with GST like tax began in late 1970s. The first proposal being the Indirect Taxation Enquiry Committee Report of 1978 by L.K. Jha. The Jha Committee suggested introduction of manufacturing VAT as MANVAT. This could not be implemented due to inter linkage issues. Then came the Long Term Fiscal Policy (LTFP) report in 1985 that suggested MODVAT. Thereafter there was a Tax Reform Committee Report of 1992 with focus on requirements for opening up the economy which was initiated in 1991 under New Economic Policy (NEP). There was a proposal to tax services also. Services were brought into the indirect tax net by 1994 by imposing service tax on them as the

services sector had been expanding rapidly. In 1994 the MODVAT scheme was expanded to include capital goods and to shift to comprehensive VAT. MODVAT was replaced by CENVAT in 2000. Full-fledged CENVAT came into operation in July 2001. MODVAT on goods was also expanded by bringing in more commodities in its purview. Then came the Task Force on Indirect Taxes, which recommended moving towards comprehensive VAT on goods and services. It became necessary to bring goods and services on the same platform so that credit for inputs could be given across goods and services and not just separately for each of them. The rules of CENVAT credit were introduced along with credit on service tax. These were a precursor to introducing GST. For sales tax, VAT was introduced in the states and almost all the states added VAT by 2005. CENVAT was for the Centre and VAT was used by the states.

86.3. The sales tax regime in India was complex. Since states were free to levy sales tax on goods and services at the rate they thought fit, residents would buy necessities from States which had lower sales tax. Across various indirect taxes – sales tax, services tax, excise duty – input credit was not available so the cascading effect continued. To eliminate this, GST was proposed in the Budget for 2006 – 2007. The important change that would come with the introduction of GST in the country was that earlier the indirect taxes were imposed on the "act of" production, sales, transportation etc. but under GST it was going to be on the transaction of supply.

86.4. Though, India has had several indirect taxes, the difficulty that was faced was that input credit was not available from

one tax to another and there was cascading effect. This is sought to be taken care of under the GST regime.

86.5. In 2009 the Empowered Committee of State Finance Ministers was set up for comprehensive indirect tax reform by the introduction of GST in India.

86.6. On March 11,2011 the Constitution (115th Amendment) Bill was introduced in the Lok Sabha and the bill was referred to the standing committee on Finance for examination. The committee submitted its report on 7 August 2013. However, since the bill in the Lok Sabha had lapsed due to the dissolution of the 15th Lok Sabha on March 2014, the same could not be considered.

86.7. Thereafter, the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 to introduce the GST and confer simultaneous powers on the Centre and States was introduced in the Loksabha on December 19, 2014 by the then Finance Minister. The Statement of Objects and Reasons of the 122nd Constitutional Amendment Bill, 2014 (which became the 101st Constitutional Amendment Act, 2016), reads as under:

> *"1. The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services,*

except those which are kept out of the purview of the goods and services tax.

2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for-

(a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

(b) subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;

(c) dispensing with the concept of 'declared goods of special importance' under the Constitution;

(d) levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

(e) levy of an additional tax on supply of goods, not exceeding one per cent in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;

(f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products,

it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

(h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;

(i) creation of Goods and Services Tax Council to examine issues relating to goods and services tax and make recommendations to the Union and the States on parameters like rates, exemption list and threshold limits. The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It is further provided that every decision of the Council shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting in accordance with the following principles...."

86.8. The Bill after being passed in the Loksabha on May 6, 2015 was sent to the Rajyasabha. On 12th May 2015, the bill was sent to the Select Committee for examination. The Select Committee submitted its report on July 22, 2015. It would be relevant to quote from paragraph 1.10 of the said report under the head RATIONALE BEHIND MOVING TOWARDS GST as under:

"1.10 The introduction of GST would mark a clear departure from the scheme of distribution of fiscal powers envisaged in the Constitution. The proposed dual GST envisages taxation of the same taxable event i.e., supply of goods and services, simultaneously by both the Centre and the States."

86.9. The Bill was passed with amendments in the Rajyasabha on August 3, 2016 and in the Loksabha on 8th August 2016 and after ratification by half of the States, the Constitution (One Hundred and First Amendment) Act 2016 ("Constitution (101st) Amendment Act") received the assent of the Hon'ble President of India on 8th September 2016. The said proposed dual GST which envisages taxation of the same taxable events i.e. supply of goods and services, simultaneously and concurrently by both the Centre and the State. This has led *inter alia* to the introduction of Articles 246A, 269A, 279A, 366(12A) (defining Goods and Services Tax), 366 (26A) (defining services) and omission of Article 268A, Entry 92, Entry 92-C in the Union List to Schedule VII of the Constitution of India to make way for IGST, CGST and MGST.

86.10. The amendment to the Constitution has defined "goods and services tax" to mean any tax on supply of goods, or services, or both (except taxes on the supply of alcoholic liquor for human consumption) by including the same in sub-Clause 12A of Article 366 of the Constitution of India. The expression "supply" has been defined under the GST Law and not under the Constitution to keep the process of future amendment simple whereas the terms "goods and services" are defined under both i.e. the Constitution and the GST legislation. The expression "goods" was already defined under sub-clause (12) of Article 366 to include all the materials, commodities and articles; the expression "services" has been defined in sub-Clause 26A of Article 366 to mean anything other than goods.

86.11. At this stage it would also be appropriate to refer to the Supreme Court decision in the case of ***Union of India and another versus Mohit Minerals Private Limited and Another***[6] *where* while considering challenge to the Goods and Services Tax (Compensation to States) Act, 2017 as well as the Goods and Services Tax (Compensation) Rules, where the following observations in paragraph 7 with respect to the amendment to the Constitution.

> *"7..... The Constitution (122nd Amendment) Bill, 2014 was introduced in the Lok Sabha to seek amendment in the Constitution, inter alia, providing for subsuming of various indirect taxes and central and states' surcharges and cesses so far as they relate to supply of goods and services both on Intra State and Interstate. The Constitution 101st Amendment Act 2016 was passed to levy goods and services tax..... On 12 April 2017, Parliament enacted 3 acts namely (1) the Central Goods and Services Tax Act, 2017; (2) Integrated Goods and Services Tax Act, 2017; and (3) the Goods and Services Tax (Compensation to States) Act, 2017."*

86.12. The Supreme Court in the case of ***Mohit Minerals (supra)*** has relied upon the statement of Objects and Reasons to the Constitution 101st Amendment Act, 2016 as set out above and in paragraph 23, has observed as under:

> *"23. The Constitution (101st Amendment) Act, 2016 dated 08.09.2016 was passed to amend the Constitution of India. By Constitution (101st Amendment) Act, 2016, new Articles 246A, 269A and 279A were inserted. Amendments were also made in Articles 248, 249, 250, 268, 269, 270, 271, 286, 366 and 368. Article 268A was omitted. Amendments were also made in Seventh Schedule to the Constitution in List I and List II...."*

[6] Civil Appeal No. 10177 of 2018

86.13. Thereafter, the Supreme Court went on to quote Article 246A, Article 269A and other Articles and sections of the Constitution (101st) Amendment Act which were relevant in respect of deciding the challenge relating to the Compensation to States for loss of revenue on account of introduction of Goods and Services Tax to finally hold that that the Compensation Act as well as the Rules were not unconstitutional or *ultra vires* the Constitution of India.

86.14. Pursuant to the above referred amendments to the Constitution of India, including Articles 246A, 269A, 366(12A), 366(26A), the Parliament has enacted the Central Goods and Services Tax Act, 2017 ("CGST Act") as well as the Integrated Goods and Services Tax Act, 2017 and the State Legislature has enacted the Maharashtra Goods and Services Tax Act, 2017 ("MGST Act"). The CGST Act and the MGST Act have been enacted to make a provision for levy and collection of tax on intra-State supply of goods or services or both respectively by the Central Government and the State Government. The IGST Act has been enacted to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government.

86.15. The Statement of Objects and Reasons of the IGST Act, are quoted as under:

> *"Presently, Article 269 of the Constitution empowers the Parliament to make law on the taxes to be levied on the sale or purchase taking place in the course of inter-State trade or commerce. Accordingly, Parliament had enacted the Central Sales Tax Act, 1956 for levy of central sales tax on the sale taking place in the course of inter-State trade or commerce. The central sales tax is being collected and retained by the exporting States.*

2. The crucial aspect of central sales tax is that it is non-vatable i.e. the credit of this tax is not available as set-off for the future tax liability to be discharged by the purchaser. It directly gets added to the cost of goods purchased and becomes part of the cost of business and thereby has a direct impact on the increase in the cost of production of a particular product. Further, the fact that the rate of central sales tax is different from the value added tax being levied on the intra-State sale creates a tax arbitrage which is exploited by unscrupulous elements.

3. In view of the above, it has become necessary to have a Central legislation, namely the Integrated Goods and Services Tax Bill, 2017. The proposed Legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place in the course of inter-State trade or commerce. The proposed Legislation will remove both the lacunas of the present central sales tax. Besides being vatable, the rate of tax for the integrated goods and services tax is proposed to be more or less equal to the sum total of the central goods and services tax and state goods and services tax or Union territory goods and services tax to be levied on intra-State supplies. It is expected to reduce cost of production and inflation in the economy thereby making the Indian trade and industry more competitive, domestically as well as internationally. It is also expected that introduction of the integrated goods and services tax will foster a common or seamless Indian market and contribute significantly to the growth of the economy.

4. The Integrated Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely-

(a) to levy tax on all inter-State supplies of goods or services or both except supply of alcoholic liquor for human consumption at a rate to be notified, not exceeding forty percent as recommended by the Goods and Services Tax Council (the Council);

(b) to provide for levy of tax on goods imported into India in accordance with the provisions of the Customs Tariff

Act, 1975 read with the provisions contained in the Customs Act, 1962;

(c) to provide for levy of taxes on import of services on reverse charge basis under the proposed Legislation;

(d) to empower the Central Government to grant exemptions by notification or by special order, on the recommendation of the Council;

(e) to provide for determination of the nature of supply as to whether it is an inter-State or intra-State supply;

(f) to provide elaborate provisions for determining the place of supply in relation to goods or services or both;

(g) to provide for payment of tax of a supplier of online information and database access or retrieval services;

(h) to provide for refund of tax paid on supply of goods to tourists leaving India;

(i) to provide for apportionment of tax and settlement of funds and for transfer of input tax credit between the Central Government, State Government and Union territory;

(j) to provide for application of certain provisions of the Central Goods and Services Tax Act, 2017, inter alia, relating to definitions, time and value of supply, input tax credit, registration, returns other than late fee, payment of tax, assessment refunds, audit, inspection, search, seizure and arrest, demands and recovery, appeals and revision, offences and penalties and transitional provisions, in the proposed Legislation; and

(k) to provide for transitional transactions in relation to import of services made on or after the appointed day.....”

87. With the above prefatory observations and the back drop, let us now examine the challenge by Petitioner.

88. The approach of the Court in testing the constitutional validity of a provision is well settled. In the case of ***Exide Industries Ltd. (supra)***, the Supreme Court has observed that the fundamental

concern of the Court should be to inspect firstly the existence of enacting power and once such power is found to be present, then next is to ascertain whether the enacted provision impinges upon any right enshrined in Part-III of the Constitution. The process of examining validity of a duly enacted provision as envisaged under Article 13 of the Constitution is based on the aforesaid two steps.

89. It would therefore be appropriate to first consider the challenge with respect to Articles 246, 246A, 269A, Article 286 and Article 245 of the Constitution of India, which are quoted as under:

89.1 Article 246 is quoted as under:

> "*246. Subject matter of laws made by Parliament and by the Legislatures of States:-*
> (1) *Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)*
> *(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List)*
> *(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").*
> *(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List".*

89.2. Article 246A is quoted as under:

> "*Art. 246A:- (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and , subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
>
> *(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.*
>
> *Explanation – The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."*

89.3. Article 269A of the Constitution of India is quoted as under:

> *"Art. 269A :- (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.*
> *Explanation. - For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.*
> *(2) The amount apportioned to a State under*
> *clause (1) shall not form part of the Consolidated Fund of India.*
> *(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246A, such amount shall not form part of the Consolidated Fund of India.*

(4) Where an amount collected as tax levied by a State under Article 246A has been used for payment of the tax levied under Clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principal for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce".

89.4. Article 286 of the Constitution of India is reproduced as under:

"Article 286. Restrictions as to imposition of tax on the sale or purchase of goods.—

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

(a) outside the State; or

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

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

89.5. Article 245 of the Constitution of India is quoted as under:

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

89.6. Article 366(12A) defines "Goods and Services Tax" to mean any tax on supply of goods or services or both except taxes on the supply of the alcoholic liquor for human consumption.

89.7. Article 366 (26A) defines "services" to mean anything other than goods.

90. It is well known that taxation is recognized as an instrument of raising revenue. Under Article 336 (28), of the Constitution of India taxation is defined to include imposition of any tax, whether general or local or special. Article 265 says that no tax shall be levied or collected except by authority of law. The Constitution of India is quasi federal in nature with clear precise demarcation of legislative powers between the Center and the States.

91. As can be seen, Article 246 of the Constitution of India deals with the distribution of legislative powers as between Union and the State legislatures as contained in the VIIth Schedule of Constitution. The VIIth Schedule to the Constitution of India gives three lists. List – I is known as the Union list, list -II is the State list and list – III is the concurrent list. If an item is listed in list- I then the Union or the Parliament would have competence to legislate on such item. If the item is in list-II, then the State would have the power. If the item is in the concurrent list, then both the Union or the State can legislate. And, under Article 248 of the Constitution of India but subject to Article 246A, Parliament has exclusive (residuary) power to make any law with respect to any matter not

enumerated in the Concurrent List or State List. The power read with the Union List under Seventh Schedule implies that the Parliament has residuary powers to legislate any law with respect to any tax not mentioned in either of the Concurrent or State List.

91.1. Pursuant to the Constitution (One Hundred and First Amendment) Act, 2016, from the 16th day of September 2016, and with the operation of Article 246A through the Constitution (101st) Act, 2016, the legislative relations between the Union and the States have evolved and the said amendment has created 'special provision with respect to goods and services tax such that the Parliament and the Legislature of every State, now have power to make laws with respect to goods and services tax imposed by the Union or by that State. Entry 92 as well as 92C stand deleted by this amendment in order to facilitate the operation of this special provision.

91.2. It is seen that the power to make laws under Article 246A is a non obstante power to anything contained in Article 246 and Article 254 i.e. the general power of the Parliament and States to make laws with respect to subject-matters covered in the lists under Seventh Schedule and supremacy of central legislation in case of repugnancy between a central Act and State legislation. Therefore, Article 246A will override the general powers, even if a subject-matter of taxation is contained in the Seventh Schedule, and the Parliament and legislature of every State have simultaneous power to make laws with respect to any tax imposed on supply of goods and services other than supply of alcoholic liquor for human consumption.

91.3. Under Article 246A (2), Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods or services takes place in the course of inter State trade or commerce.

91.4. It is therefore apparent that the IGST Act has been enacted by the Parliament for levy of IGST on inter-state supply of goods or services, *inter alia*, pursuant to the exclusive power contained in Article 246A(2).

92.1. Under Article 269A, Parliament has powers to make laws (i) with respect to goods and services tax where the supply of goods or services or both takes place in the course of inter-State trade or commerce (Article 269A(1)) or (ii) on the principles determining place of supply, and when a supply of goods or services takes place in the course of inter-state trade or commerce (Article 269A(5)).

92.2. Under Article 269A of the Constitution, any law pertaining to supply of goods or services in the course of inter-State trade or commerce is to be enacted by the Parliament. Under Article 269A(5) the rules or principles for place of supply are also to be formulated by the Parliament.

92.3. The GST on supplies in the course of inter-State trade or commerce is levied and collected by the Government of India and such tax is apportioned between the Union and the State. The

manner of apportionment may be provided by the Parliament by law on the recommendations of the GST Council.

93. Pursuant to the aforesaid powers under Article 246A and Article 269A, the IGST Act has been enacted.

94. Before moving further, it would be apposite to refer to the following provisions of the IGST Act which are relevant for our discussion.

94.1. Section 2(6) defines “export of services” as under:

> *"export of services" means the supply of any service when, --*
> *(i) the supplier of service is located in India;*
> *(ii) the recipient of service is located outside India;*
> *(iii) the place of supply of service is outside India;*
> *(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; or in Indian rupees wherever permitted by the Reserve Bank of India; and*
> *(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;*

94.2. Section 2(13) defines “intermediary” as under:

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

94.3. Section 2 (21) of IGST Act defines “ supply” as under:-

> *“supply” shall have the same meaning as assigned to it in section 7 of the Central Goods and Services Tax Act;*

94.4. Section 5 of the IGST Act is the charging section and deals with the levy and collection of IGST as under:

> *"Levy and collection.*
>
> *1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:*
>
> *Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).*
>
> *(2) The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.*
>
> *(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.*
>
> *(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both,*

and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

94.5. Section 7 of the IGST Act deals with inter-State supply as under:

"Inter-State supply.

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in--

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated

to be a supply of goods in the course of inter-State trade or commerce.

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in--

(a) two different States; or

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) Supply of goods or services or both,--

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section, shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

94.6. Section 8 of the IGST Act deals with inter-State supply as under:

Intra-State supply

(1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the following supply of goods shall not be treated as intra-State supply, namely:--

(i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;

(ii) goods imported into the territory of India till they cross the customs frontiers of India; or

(iii) supplies made to a tourist referred to in section 15.

(2) Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit.

Explanation 1.--For the purposes of this Act, where a person has,

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or

(iii) an establishment in a State or Union territory and any other establishment registered within that State or Union territory,

then such establishments shall be treated as establishments of distinct persons.

Explanation 2.--A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

94.7. Section 10 of the Act deals with place of supply of goods other than supply of goods imported into, or exported from India as under:

"(1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,--

(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the

goods at the time at which the movement of goods terminates for delivery to the recipient;

(b) where the goods are delivered by the supplier to a recipient or any other person on the direction of a third person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to the goods or otherwise, it shall be deemed that the said third person has received the goods and the place of supply of such goods shall be the principal place of business of such person;

(c) where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient;

(d) where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly;

(e) where the goods are supplied on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, the place of supply shall be the location at which such goods are taken on board.

(2) Where the place of supply of goods cannot be determined, the place of supply shall be determined in such manner as may be prescribed.

94.8. Section 11 of the Act deals with place of supply of goods other than supply of goods imported into, or exported from India as under:

"Place of supply of goods imported into, or exported from India.

The place of supply of goods,--

(a) imported into India shall be the location of the importer;

(b) exported from India shall be the location outside India."

94.9. Section 12 deals with place of supply of services where location of supplier and recipient is in India.--

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

(2) The place of supply of services, except the services specified in sub-sections (3) to (14),--
(a) made to a registered person shall be the location of such person;
(b) made to any person other than a registered person shall be,-
(i) the location of the recipient where the address on record exists; and
(ii) the location of the supplier of services in other cases.

(3) The place of supply of services,--
(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or
(b) by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or
(c) by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or
(d) any services ancillary to the services referred to in clauses (a), (b) and (c),
shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:

Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.

Explanation.--Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(4) The place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed.

(5) The place of supply of services in relation to training and performance appraisal to,--

(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the location where the services are actually performed.

(6) The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located.

(7) The place of supply of services provided by way of,--
(a) organisation of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or
(b) services ancillary to organisation of any of the events or services referred to in clause (a), or assigning of sponsorship to such events,--
(i) to a registered person, shall be the location of such person;
(ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

Explanation.--Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of services by way of transportation of goods, including by mail or courier to, --
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation:

[Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods.]

(9) The place of supply of passenger transportation service to, --
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the place where the passenger embarks on the conveyance for a continuous journey:

Provided that where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined in accordance with the provisions of sub-section (2).

Explanation.--For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.

(10) The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the first scheduled point of departure of that conveyance for the journey.

(11) The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall, --
(a) in case of services by way of fixed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services;
(b) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on the record of the supplier of services;
(c) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis through a voucher or any other means,--
(i) through a selling agent or a re-seller or a distributor of subscriber identity module card or re-charge voucher, be the address of the selling agent or re-seller or distributor as per the record of the supplier at the time of supply; or
(ii) by any person to the final subscriber, be the location where such prepayment is received or such vouchers are sold;
(d) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that if such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

Explanation.--Where the leased circuit is installed in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services

separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(12) The place of supply of banking and other financial services, including stock broking services to any person shall be the location of the recipient of services on the records of the supplier of services:

Provided that if the location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.

(13) The place of supply of insurance services shall,--
(a) to a registered person, be the location of such person;
(b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services.

(14) The place of supply of advertisement services to the Central Government, a State Government, a statutory body or a local authority meant for the States or Union territories identified in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

94.10. Section 13 deals with place of supply of services where location of supplier or location of recipient is outside India.--

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

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:
Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:--
(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:
Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:
Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;
(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:--
(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;
(b) intermediary services;
(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.
Explanation.--For the purposes of this sub-section, the expression,--
(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;
(b) "banking company" shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);
(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(d) "non-banking financial company" means,--
(i) a financial institution which is a company;
(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

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

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.
Explanation.--For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following noncontradictory conditions are satisfied, namely:--
(a) the location of address presented by the recipient of services through internet is in the taxable territory;
(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;
(c) the billing address of the recipient of services is in the taxable territory;
(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;
(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;
(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

94.11. Section 16 deals with Zero rated supply.--

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:--
(a) export of goods or services or both; or
(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

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

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:--
(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or
(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

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

95. Petitioner's case is that his supply is export of services as defined in section 2(6) of the IGST Act. But because of (i) Section 13(8)(b) of the IGST Act which in the case of Intermediary services (as well as two other services), provides the place of supply to be the location of supplier (and not the location of the recipient and which according to him should have been the case) as the service recipient is outside India read with (ii) section 8(2) which provides that where the location of the supplier and the place of supply of services are in the same State, the supply is being treated as intra State supply, Petitioner's export is being deemed as intra -state supply making him liable to CGST and MGST. Petitioner has therefore questioned the *vires* of these two provisions or the competence of the Parliament to enact these provisions with reference to Articles 246A, 269A, 286 and 245 of the Constitution of India. According to Petitioner, Parliament cannot legislate to deem an export of services to be an intra -state Supply as is purportedly being done by virtue of section 13(8)(b) read with section 8(2) of the IGST Act.

96. Admittedly, Petitioner is an Intermediary (as defined in section 2(13)) above rendering Intermediary Services (as provided for in section 13(8)(b) above) to its overseas customers based on which the overseas customers export their goods to importers in India for which Petitioner receives commission.

97. From the above referred provisions it emerges that the only exception is if the intermediary has provided the service on his

own account in which case he may claim to be an exporter of the service if he otherwise falls within the definition. This would not be an export of services in as much as Intermediary Services are specifically provided in Section 13 (8)(b) under the authority of the Constitution of India provided in Article 269A read with Article 246A. Petitioner is providing intermediary service of arranging, marketing, facilitating the export of his overseas customers to Indian importers and that is the reason he receives commission. It is in respect of these intermediary services that Section 13(8)(b) refers to the place of supply of such service as the location of the supplier.

98. The legislature keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue enacts provisions. Section 13(8)(b) of the IGST Act in respect of intermediary services is one such provision. Intermediary services are specifically dealt with, where it has been specifically provided that where the supplier or the recipient is outside India, then in respect of Intermediary services, the place of supply shall be the location of the supplier. There is no quarrel with the definition of export of services contained in Section 2 (6) of the IGST Act, though it is stated in the Affidavit of the Revenue that Petitioner does not satisfy the conditions of the said Section. It is admitted position that Petitioner is an Intermediary (Section 2 (13) of IGST Act) providing Intermediary Services to service recipient located outside India. Therefore, for the purposes of place of supply Section 13(8) (b) comes into play.

99. In my view, when there is a specific provision defining Intermediary as in section 2(13) of the IGST Act and Intermediary Services are specifically dealt with in section 13(8)(b), the question of application of general provision of Section 2(6) of export of services would not arise. The following Latin phrase is apt here, *Specialia derogant generaliabus*, which means special provisions are never limited or explained by the general, i.e., special provisions derogate from general, but *generalia specibus non derogant* which means general provisions do not derogate from special provisions.

100. There would therefore be no question of deeming Petitioner's supply of intermediary services to be intra-State supply.

101. It is pursuant to the powers invested by the Constitution, that the Parliament, in Sections 7 and 8 of IGST Act has provided for determination of the nature of supply, whether inter-state or intra-State; Section 7 provides for what supply is inter-State and Section 8 provides for what is treated as intra-State.

102. It is pursuant to the power in Article 269A(5) that Chapter V of the IGST Act entitled "Place of Supply of Goods or Services or Both" containing Sections 10 to 14 has been enacted by the Parliament.

103. It is observed that the Explanation to Article 269A(1) deems supply of goods or services in the course of import into India to be supply in the course of inter-State trade or commerce. A plain reading indicates that the said Explanation clearly limits itself to clause (1) of Article 269A. Article 269A empowers the Parliament to levy and collect GST on supplies in the course of inter-state trade

or commerce. In my view, just because the import into India has been deemed to be inter-state trade or commerce, that under Article 269A, in no way would take away the power of the Parliament to stipulate any other type of supply to be a supply in the course of inter-State trade or commerce; firstly because the Explanation deeming import to be inter-state is restricted to clause (1) of Article 269A and secondly clause (5) (which not being bound by the Explanation to clause (1) of Article 269A), empowers the Parliament to legislate on principles for determining the place of supply and when the supply would be in the course of inter-state trade or commerce. A conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law on what is inter-state supply and what is not which obviously includes what is intra-state in contradistinction to what is inter-state and that power is exclusively with the Parliament. In my considered opinion, the power to enact provisions determining the nature of supplies (as inter state supply in section 7 of IGST Act or intra state supply in section 8 of IGST Act) or place of supply (as contained in sections 10 to 14 of the IGST Act including section 13(8)(b) where in the case of intermediary services, where supplier or the service recipient is located outside India, the place of supply has been stipulated to be the location of supplier) originates from these Articles. The power of the Parliament to stipulate principles on place of supply or to legislate on the same as contained in the IGST Act is empowered by the Constitution Amendment Act, 2016. Therefore, there is no doubt that the power to stipulate the place of supply as contained in Sections 13 (8)(b) of the IGST Act is pursuant to the provisions of Article 269A (5) read with Article 246A and Article 286 of the Constitution. The impugned provisions

are in my view constitutional and are not in any way *ultra vires* the Constitution. If the Parliament pursuant to powers invested in it by the Constitution has in its wisdom dealt with Intermediary Services as that rendered by Petitioner, that is a matter within the Parliament's domain.

104. In this context it will also be useful to refer to Chapter 21 of the GST flyer of CBIC (www.cbic.gov.in) where in paragraph 10.1 it has been stated that considering the intangible nature of supply of services, in respect of certain categories of services, the place of supply is determined with reference to a proxy. The said paragraph is quoted as under:

> *"10. Place of supply*
> *10.1Place of supply provisions have been framed for goods & services keeping in mind the destination/consumption principle. In other words, place of supply is based on the place of consumption of goods or services. As goods are tangible, the determination of their place of supply based on the consumption principle is not difficult. Generally the place of delivery of goods becomes the place of supply. However, the services being intangible in nature, it is not easy to determine the exact place where services are acquired, enjoyed and consumed. In respect of certain categories of services, the place of supply is determined with reference to a proxy.....*

105. Coming to Petitioner's case of Section 13(8)(b) invoking Section 8(2) to deem inter-state supply as intra-state supply, it is observed that Section 8 deals with nature of supply and Section 13 deals with place of supply. Both the provisions have different purposes. One is to determine the nature of supply whether it is intra-State and the other is to stipulate place of supply in the case where the supplier or

the recipient of the services is located outside India; Whereas Section 8(2) refers to a situation to be intra-state if location of supplier and place of supply is in the same State, Section 13(8) refers to place of supply being the location of the supplier of service in case of intermediary services whereas in the instant case the service recipient is outside India. In Section 8(2) the reference is to the same State in India, whereas in Section 13 (1) read with Section 13(8)(b) it is location of the service recipient being outside India. Besides Petitioner is admittedly an intermediary rendering intermediary services to a service recipient located outside India. Therefore, Section 13(8)(b) comes into the picture in the case of Petitioner. Once the Parliament has in its wisdom stipulated the place of supply in case of Intermediary Services be the location of the supplier of service, no fault can be found with the provision by artificially attempting to link it with another provision to demonstrate constitutional or legislative infraction.

105.1. In any event Section 8(2) in my view is not applicable to the case of Petitioner as location of supplier and place of supply is not within same State (in India) but in taxable territory viz. India.

105.2. Therefore, to say that by virtue of Section 13 (8) (b) read with Section 8(2) of the IGST Act, Parliament has sought to impose tax on export of services out of the territory of India by treating the same as local supply in violation of Articles 246A and 269 is completely fallacious and untenable and the argument deserves to be rejected in view of what has been observed. In fact Section 16 as quoted above clearly has zero rated the supply involving export of services (as defined in Section 2(6) of the IGST Act) and therefore

also the issue raised by Petitioner that the impugned provisions seek to make a levy on the same is untenable. However, as noted earlier that when there is a specific provision defining Intermediary as contained in section 2(13) of the IGST Act and Intermediary Services are specifically dealt with in section 13(8)(b), the question of application of a general provision would not arise, particularly when the constitutionality of both the above provisions has been upheld.

105.3. Therefore, there would be no question of Section 13(8)(b) or Section 8(2) being unconstitutional. Rather these provisions are clearly *intra vires* Articles 246, 246A and 269A of the Constitution.

106.1. With respect to Article 286, Petitioner submits that no State has the authority to levy local tax on export of services as that would be in violation of Article 286 (1), which states that no law of the State shall impose or authorise the imposition of tax on the supply of goods or services or both where such supply takes place outside the State. It has also been submitted that Section 13 (8) (b) read with Section 7(5) has deemed an export of service to be a local supply which is in violation of Article 286 (1) and that a central legislation cannot authorise the State to collect tax which has been prohibited by the Constitution.

106.2. Article 286 of the Constitution of India is reproduced as under:

> *"Article 286. Restrictions as to imposition of tax on the sale or purchase of goods.—*

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

(a) outside the State; or

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

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

106.3. A plain reading of Article 286 of the Constitution of India as quoted above suggests that Article 286 firstly prevents one State in India from imposing any tax on supply of goods and services within another State as that is the prerogative of individual States i.e no authority to any State to impose tax on intra state supply within another State except that other State; Secondly it does not permit any State in India to authorize imposition of tax on import into or export out of the territory of India of goods and services as that is the prerogative of the Central Government; Thirdly it states that the Parliament alone and not the State Legislatures will formulate the principles for determining when supply of goods or of services or both in any of the ways mentioned in clause (1) above i.e outside the State or import into or export out of India.

106.4. In fact it is in view of the language of newly amended Article 286 (2) pursuant to the Constitution (101st) Amendment Act, 2016 that the Parliament can formulate principles for determining when a supply of goods or services or both have taken

place either outside the State or in the course of import into or export out of the territory of India.

106.5. Even the omission of Article 286(3) pursuant to the Constitution (101st) Amendment Act, 2016 signifies that the power to legislate on any matter relating to inter-state supply is with the Parliament and not with the State.

106.6. The whole purpose of Article 286(2) is to empower the Parliament to formulate principles to determine the situs of supply. This is also stated in Article 269A(5).

106.7. It is in furtherance of the powers under Article 246A, 269A and 286 of the Constitution of India, the Parliament by legislation, in Sections 7 (inter-State supply) and 8 (Intra-State supply) of the IGST Act has provided for determination of the nature of supply and in Sections 10 to 14 for place of supply.

106.8. The impugned provision does not in any manner deem an export of service to be a local apply whereas Section 13 pertains to place of supply and Section 7 pertains to the nature of inter-state supply as enacted by the Parliament pursuant to Article 246A read with Article 269A of the Constitution. Both the Sections as discussed have different purposes.

106.9. The submission by Petitioner that in terms of Section 13(2), Petitioner's service is an export of service appears to be

misplaced as Section 13(2) clearly stipulates that except for the services specified in sub-sections (3) to (13), the place of supply to be the location of the recipient of services. And one of such exception in Section 13(8)(b) clearly stipulates that the place of supply for "intermediary services" shall be the location of the supplier of services. Therefore this submission appears to be misplaced.

106.10. The argument that a central legislation cannot authorize the State to collect tax which is prohibited by the Constitution or that the provisions are a colorable legislation is without any legs to stand in view of provisions under Articles 245, 246A, 269A of the Constitution of India.

106.11. Therefore, the argument of Petitioner that the impugned provisions are violative of Article 286(1) do not hold any water.

106.12. Petitioner's reliance on the decision in the case of ***State of Travancore, Cochin & Ors. V. The Bombay Co. Ltd***.[7] admittedly refers to the unamended Article 286, and refers to a series of integrated activities in the course of export sale of goods whereas in the case at hand, we are dealing with supply of intermediary services which are specifically covered under Section 13(8)(b) of the IGST Act and defined as such and not integrated with the supply of goods taking place and therefore the decision is clearly distinguishable. In the decision of ***The Central India Spinning & Weaving and Manufacturing Co. Ltd., The Empress Mills, Nagpur v.***

[7] AIR 1952 SC 366

The Municipal Committee, Wardha[8] the Supreme Court construed the terms export and import in terms of Article 286(1). However, as mentioned earlier, we are concerned with the supply of services of an intermediary as provided in Section 13(8)(b) read with Section 2(13) of the IGST Act and therefore these decisions would in my view be distinguishable.

106.13. It is, therefore, not relevant in the circumstances that export and import have not been defined under the Constitution or that the same would be of wide construction.

106.14. As discussed earlier, Article 246A (2) has invested exclusive power in the Parliament to make laws in respect of supply of goods or services in the course of inter-state trade or commerce. Article 269A(5) authorizes the Parliament to make law for determining place of supply and when a supply of goods or services takes place in the course of inter-state trade or commerce. Article 286(2) also authorizes Parliament to make law for determining when supply of goods or services take place outside a State in India or in the course of import of goods or services into or export of goods or services out of the territory of India. There is no conflict between Article 246A, Article 269A or Article 286 which clearly empower the Parliament to formulate laws for determining place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce or as to when supply of goods or services or both take place outside a State or in the course of import into or export out of the territory of India.

[8] AIR 1958 SC 341

107.1. On behalf of Petitioner in the written submissions, counsel has sought to canvass that the provisions of section 13 (8) (b) of the IGST Act are *ultra vires* Article 245 of the Constitution of India. According to him by stipulating place of supply in the case of intermediary services to be the location of the supplier of services is to levy tax on the overseas recipient thereby attracting the provisions of Article 245. In the written submissions a question is raised whether the Parliament is empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India. Counsel has also alluded to a hypothetical situation where the supplier of goods is in Germany and the buyer of goods is in Singapore to question whether such a transaction would be subject to GST at the hands of petitioner by virtue of the impugned section even though payment of GST in respect of such transactions is exempted under the IGST law. He has sought to rely upon paragraph 76 of the decision in the case of ***GVK Industries Ltd Vs. ITO***[9]***.***

107.2. At the outset we observe that this challenge by way of written submissions on behalf of petitioner has been taken up for the first time during the course of arguments and does not find place in the petition, either in the facts or the grounds or the prayers even though petition has been amended pursuant to leave granted earlier. Also the hypothetical situation in respect of which this new challenge seems to be taken up is not the case of petitioner. It has been clearly stated in paragraph 4.6 of the petition that Indian purchaser i.e. the importer directly places a purchase order on the overseas customer for supply of the goods and the goods are directly

[9] 2011 332 ITR 130 (SC)

shipped by the overseas customer to the Indian purchaser. There is no discussion or factual submission that Indian intermediary i.e. Petitioner is purportedly a commission agent to a supplier in Germany who is exporting goods to an importer in Singapore. In fact the agreements, illustrative copy whereof has been annexed to the petition are only in respect of counterparty from Japan. Firstly, as has been observed by the Supreme Court in the case of ***Exide Industries (supra),*** the Court, cannot venture into hypothetical spheres which are not contemplated in the enactment while adjudging the constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. Secondly, the very fact that Counsel for Petitioner is seeking to include these facts during the course of hearing it would not be necessary for us to deal with the challenge on the basis of these facts. The Supreme Court of India in the case of ***Government of National Capital Territory, Delhi Vs. Inder Pal Singh Chadha***[10], has held that constitutional issues should not be decided unless that it is necessary to do that for the purpose of giving relief in given case. It would, therefore, not be necessary for us to deal with this hypothetical situation to consider the challenge under Article 245 of the Constitution of India. Moreover, since the hypothetical situation canvassed by Petitioner with respect to levy of IGST in cases where both supplier and buyer of goods are located outside India, it is admitted position that there is already an exemption notification in that regard providing 'Nil' rate of tax and therefore I do not consider it necessary to dwell on it.

107.3. For the sake of convenience it would be appropriate to quote Article 245 of the Constitution of India as under:

[10] (2002) 9 SCC 461

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

107.4. A plain reading of Article 245, makes it clear that the impugned section in no way violates this provision as from the plain language of the said section it is clear that the same do not seek extra territorial operation nor seek to levy tax on service recipient outside India. All that Section 13(8)(b) does is to provide for place of supply in respect of intermediary services where the service recipient is outside India (as in the case of the Petitioner), to be the location of the supplier of services. Therefore, there is no question of extra territorial legislation here. In the facts of the present case, the recipient is located outside India and the intermediary services supplier is located in India and therefore section 13 (8)(b) would become applicable in that the place of supply would be the location of the supplier of services viz. in the taxable territory in India. Even if the supplier of services was located outside India in which case as per this provision the place of supply would be the location of the supplier i.e. outside India and would not be taxable in India; and there would be no question of extra territorial legislation.

107.5. It is further clear from the charging section 5 of the IGST Act that the levy of IGST is within the taxable territory i.e. India and

therefore also there would also be no case of extra-territorial legislation.

107.6. Even otherwise as can be seen, Article 245(1) begins with the language, subject to the provisions of this Constitution; which means that Article 245 is subject to the other provisions of the Constitution such as Article 246A, Article 269A, the bringing in of the new GST law as well or legislations on interstate supply of goods and services as well as on principles regarding place of supply.

107.7. We are in complete agreement with the principles laid down by the Hon'ble Supreme Court in the case of ***GVK Industries (supra)***. However, having observed that this is not a case of extra territorial legislation it would not be necessary to comment on the same.

107.8. Therefore, Section 13(8)(b) of the IGST Act cannot be said to be *ultra vires* Article 245 of the Constitution of India.

108. It is clear from the above provisions, that only the Parliament is empowered to legislate on matters pertaining to the supply of goods or services that take place in the course of inter state trade or commerce. As far as the Petitioner's supply is concerned admittedly the same is supply in the course of inter-state trade or commerce pursuant to the provisions of Section 7 of IGST Act. Also as can be seen from subsection (5) of Article 269A of the Constitution that it is only the Parliament that can formulate the principles for determining the place of supply or when a supply of goods or of services or both takes place in the course of interstate trade or

commerce. In fact the language of article 286 (2) also refers to that the Parliament can formulate principles for determining when a supply of goods or services or both have taken place either outside the State or in the course of import into or export out of the territory of India. Section 13(8)(b) and Section 8(2) operate for different purposes and as we have held that Section 13(8)(b) read with Section 8(2) is not *ultra vires* the Constitution of India.

109. Having held that the IGST law is constitutional, and the provisions pertaining to the place of supply contained in section 13(8)(b) of the IGST Act in respect of intermediary services would not be violative of Articles 246A, 269A, 286, 245 of the Constitution of India, we now move on to consider Petitioner's challenge under Articles 14 and 19(1)(g) of the Constitution of India.

110.1. Petitioner's grievance of violation of Article 14 of the Constitution of India is on two counts:

(1)One is despite having purportedly satisfied the definition of export of services as defined in Section 2(6) of the IGST Act, by virtue of Section 13(8)(b), the intermediary services provided by the Petitioner to its overseas customer are not being treated as export of service thereby discriminating against Petitioner and other exporters of service;

(2) secondly the intermediary services provided by Petitioner in India are subject to GST, whereas that is not the case with other service providers like marketing agents, management consultants, market research agents, professional advisers as such services are not subject to GST pursuant to Section 13(2) of the IGST Act.

110.2. Before we discuss Petitioner's challenge to this Article, a brief introduction to the principles on the subject.

110.3. The Constitution Bench of the Supreme Court in the case of ***R.K. Garg Vs. Union of India and Ors***.[11] has stated the principles to be borne in mind while considering the constitutional validity of a statute under Article 14 as under :-

> *"Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the Courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.*
>
> *Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil*

[11] AIR 1981 Supreme Court 2138

> *rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight - jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved..."*

110.4. In the aforementioned case of ***R.K. Garg Vs. Union of India and Ors.*** *(supra)*, the Supreme Court has once again laid down that in order to pass the test of reasonable classification, the classification must fulfill two conditions, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is a basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. This means that Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it however does not forbid classification provided such classification is not arbitrary. In other words, what is necessary in order to pass the test of permissible classification under Article 14 is

that the classification must not be arbitrary, artificial or evasive, but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.

110.5. It would also be pertinent to refer to the case of ***Shri Ram Krishna Dalmia v/s. Shri Justice S. R. Tendolkar & Others***[12], the larger bench of the Supreme Court while considering the challenge to a notification issued under the Commissions of Enquiry Act,1952 has in paragraph 11 of its decision referred to various principles based on which the constitutionality of a statute or a provision would need to be considered.

> *" .... It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (a) that the classification must be funded on an intelligible, differentia which distinguishes persons or things that are grouped together from others left out of the group and (b) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but by a law of procedure."*
>
> *(i) that a law may be constitutional even though it relates to a single individuals if, on account of some special circumstances or reasons applicable to him and not*

[12] AIR 1958 SC 538

applicable to others, that single individual may be treated as a class by himself;
(ii) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
(iii) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(iv) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
(v) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
(vi) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed,, if there is nothing on the face of the law of the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.
The above principles will have to be constantly borne in mind by the Court when it is called upon, to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

110.6. The Supreme Court, in the case of ***V.S. Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.***[13] *has stated that :-*

"This Court has repeatedly pointed out that when a citizen wants to challenge the validity of any statute on the ground that it contravenes Article 14, specific, clear and

[13] AIR 1964 Supreme Court 1781

unambiguous allegations must be made in that behalf and it must be shown that the impugned statute is based on discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the said statute".

110.7. In the case of ***G.K. Krishnan etc. Vs. State of Tamil Nadu and Anr. etc.***[14] held as under :-

"...A person who challenges a classification as unreasonable has the burden of proving it. There is always a presumption that a classification is valid, especially in a taxing statute. The ancient proposition that a person who challenges the reasonableness of a classification and therefore, the constitutionality of the law making the classification, has to prove it by relevant materials, has been reiterated by this Court recently."

110.8. The Supreme Court in the case of ***Exide Industries Ltd., (supra)***, has observed that the approach of constitutional courts ought to be different while dealing with fiscal statutes. The Supreme Court has observed that the legislature is the best forum to weigh different problems in the fiscal domain and form policies and address the same including creation of liability, constitution of liability, exemption of liability, or subject an existing provision to new regulatory measures. In the very nature of taxing statutes, legislature holds the power to frame laws to plug in specific revenue leakages. Such laws are always pin-pointed in nature and are only meant to target a specific avenue of taxability. It was further observed that no doubt, fiscal statutes must comply with the tenets of Article 14, but it is to be noted that a larger discretion is given to the legislature in taxing statutes than in other spheres.

[14] AIR 1975 Supreme Court 583

110.9. There is no discrimination between Petitioner's case and other exporter of services. The intermediary services rendered by Petitioner are specifically provided as one of the services in addition to banking services and transport hiring services where the place of supply has been provided as the location of the supplier of services as per Section 13(8)(b) of the IGST Act. Intermediary has been specifically defined and which as discussed earlier does not include a person who renders the services for himself. Here, because of the intermediary, the export of goods is taking place from the overseas customer to the Indian importer, which is the transaction of import of goods for which the intermediary services have been provided by Petitioner. Therefore, between Petitioner and others there is no discrimination. Section 13(8)(b) would not be hit by Article 14 on this ground. For the same reason the second ground of discrimination, is also not tenable in as much as the Act has specifically provided for such intermediaries. Petitioner who is providing Intermediary Service to recipient outside India is on a different footing, the objective in my view would be to prevent revenue from escaping.

110.10. In my view, therefore there is a reasonable classification founded on intelligible differntia which has a rational relation/nexus to the object sought to be achieved. The objectives could be, as stated in the Respondent's reply, to encourage the *Make in India* program and create the level playing field. It is however clarified that no view is being expressed with respect to the claims or counter-claims on the Make in India program referred to above as that is clearly a matter of the policy of the Government of India, which needless to say is the prerogative of the Government. Also in

the second ground the objective in my view would be to prevent revenue from escaping and therefore, there is reasonable classification and the same is neither arbitrary nor unreasonable and cannot be said to be discriminatory in any manner. This is also not a case of class discrimination.

110.11. Further, as far as the judgments referred to by Petitioner in support of his contention, there cannot be any disagreement on the principles laid down in those judgments. However in my considered view, they are not applicable to the case of the Petitioner in view of the above discussion.

110.12. The levy on account of Section 13(8)(b) of the IGST Act is therefore neither arbitrary nor unreasonable nor discriminatory.

110.13. Therefore the challenge under Article 14 must fail and fails.

111.1. Let us now examine Petitioner's challenge to Article 19(1) (g) of the Constitution of India.

111.2. Petitioner has submitted that by virtue of Section 13(8)(b), the service provided by Petitioner to its overseas customers has resulted in an unreasonable restriction upon the right of Petitioner to carry on trade under Article 19(1)(g) of the Constitution of India, which action could result in closure of business of Petitioner and that it would encourage the foreign service recipient to set up liaison offices in India and escape taxation.

111.3. At the outset, we are unable to appreciate as to how by virtue of Section 13(8)(b) of the IGST Act, Petitioner would be restricted to carry on its business or for that matter result in closure of business of Petitioner. As has been discussed earlier, Petitioner is a marketing/sales agent for overseas exporters of products imported by customers in India, for which he earns commission. All that Section 13(8)(b) seeks to do is to impose a levy on Petitioner by stipulating that in respect of Intermediary Services, where the recipient is outside the country, in those cases, the place of supply shall be the location of the supplier. As to how that would result in a restriction or closure of business of the Petitioner is unfathomable particularly when the submission is devoid of my details. There is no restriction imposed on the intermediary services of a person like Petitioner. It is a legitimate power of the parliament, as discussed earlier, to enact IGST Act including Section 13 (8)(b). If the submission of Petitioner was to be considered, then any tax levied by the Central or State Government would be a restriction to carry on trade under Article 19(1)(g) of the Constitution of India.

111.4. Further, whether a foreign exporter would set up a liaison office in India is a matter which is in the individual freedom of such an exporter subject of course to the other applicable laws. As to what Section 13(8)(b) of the IGST Act has to do with it or as to how that would infringe on Petitioner's right is not understood. Even otherwise, as on date there is no grievance of Petitioner that his overseas customer has set up liaison office in India.

111.5. On behalf of Petitioner, Paragraph 6 of the decision of the Supreme Court in the case of ***Bengal Immunity Company Vs. State of Bihar***[15] has been cited in support of his contentions.

111.6. A plain reading of Paragraph 6 suggests that no such restriction as set out in the said paragraph has been imposed by virtue of Section 13(8)(b) of the IGST Act. It appears that Petitioner has failed to appreciate that the Parliament has power to legislate on place of supply and on inter-state supply of goods and services pursuant to Article 269A read with Article 246A and Article 286 of the Constitution of India, by virtue of which the IGST Act and Section 13(8)(b) have been enacted.

111.7. Therefore, Section 13 (8) (b) of the IGST Act is not unconstitutional or *ultra vires* Article 19(1)(g).

112.1. On behalf of Petitioner it is submitted that levy of GST on intermediary services by Petitioner is contrary to fundamental concept of GST as a destination based consumption tax. It is asserted that for taxing a service it is not the place of performance, but the place of consumption, which is relevant; export would take place when the service is provided from India by a person in India, but is received and consumed abroad. The artificial exception carved out in Section 13(8)(b) of the IGST Act is contrary to all principles of interpretation, and, therefore, liable to be struck down as *ultra vires* to the fundamental principle of destination based consumption tax.

[15] 1955(2)SCR603

112.2. GST has three main aspects viz. it is calculated as VAT, it brings goods and services together on the same platform. Of course it is an indirect tax but it is not levied on the act of production, sale and so on. It is levied on all transactions called supply from start to the end. So primarily GST is a tax levied on supply of goods and services. The earlier excise duty, sales tax, service tax and so on, which were on the "act of" are eliminated and the tax is no more on the act of producing or on point of sales. Since GST is to be calculated as value added tax with input tax credit available from one level of supply to the next in the chain of production and distribution, the cascading effect of one tax on to the other is eliminated.

112.3. The Goods and Services Tax as envisaged pursuant to the newly introduced GST law is a tax on the supply of goods and services. This can be borne out not only from paragraph 1.10 of the Report of the Select Committee of the Rajya Sabha on the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 as quoted earlier, but also from the statement of objects and reasons thereof which became the Constitution (101st Amendment) Act, 2016 as well as from the Statement of Objects and Reasons of the IGST Act as set out earlier. Even Article 366 (12A) defines Goods and Services Tax to any tax on supply of Goods and Services or both, therefore the charging sections in GST laws, CGST as well as IGST is to levy GST on supply.

112.4. Even Section 2 (21) of IGST Act defines " supply" as under:-

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

(ii) Section 7 of the CGST Act, 2017 refers to scope of supply and reads as under:

"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;

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II...."

112.5. Therefore, the scheme of the GST law in India is taxation on supply. Concepts cannot be imposed upon clear, unambiguous Articles of the Constitution of India as well as the language in the provisions of the statute. There is no dispute that the supply under consideration is an inter-State supply of service. The inter- State levy is on supply within the taxable territory i.e. within the boundaries of India and not extra-territorial in accordance with Article 245 of the Constitution of India. Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner, the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is in breach of this principle as the place of supply has been specifically provided.

112.6. There are three methods of calculation of indirect taxes viz. specific duty, ad valorem tax and value added tax (VAT). GST uses the method of value added tax of calculation which removes the cascading effect. GST is calculated on "value added" and not the value of the goods or services; value addition is the value added to the raw materials and other things purchased by the producer which means that the cost of purchase inputs would be excluded. This method of levy of tax is intended to remove the cascading effect of tax on tax and profit on tax. Therefore the IGST Act in my view is not VAT but only calculated as VAT.

112.7. In the decision in the case of ***All India Federation of Tax Practitioners v. Union of India***[16] (which relied on the principles laid down in ***Moti Laminates Pvt. Ltd. v. Collector of Central Excise Ahmedabad***[17]) relied upon by Petitioner where the constitutional validity on the levy of service tax and the legislative competence of the Parliament to impose such tax was considered, and it was observed by the Supreme Court that the concept of VAT which is a general tax that applies in principle to all commercial activities involving production of goods and provision of services to conclude that VAT is a consumption tax borne by the consumer. The Supreme Court further want on to hold that service tax is a VAT, which in turn is a destination based consumption tax and not a charge on the business but on the consumer and it would logically be leviable only on services provided within the country. In my respectful view the said decision may be distinguishable. As described herein GST is a tax on supply and not on the sale. One of the elements of GST as

[16] 2007 (7) STR 625
[17] 1995 (76) ELT 241 (SC)

mentioned is that the calculation of GST is like VAT, which is on the value addition to reduce the cascading effect of the various taxes thereby reducing the effective rate of indirect taxes. This is one of the three methods of calculation of indirect taxes, viz., specific duty, ad valorem tax and value added tax. That was a different context and the constitutional amendments introducing special provisions of Article 246A, Article 269A and Article 279A, have brought in the new GST regime. It is also observed that the Constitutional Amendment bringing an end to the service tax regime has omitted Article 268A and Entry 92C (though the same was not notified).

112.8. As regards the decision in the case of ***Commissioner of Service Tax v. SGS India Pvt. Ltd.***[18] Petitioner therein was providing technical inspection and certification agency services and technical testing and analysing agency service on behalf of its foreign customers who imported goods from India whereas in the case at hand the Petitioner is admittedly an "intermediary" defined in the IGST Act and providing intermediary services to its foreign customers who were exporting goods into India. The Court in that case held that the services provided by SGS were fully covered by a clarification issued by the Revenue and also referred to the decision of ***All India Federation of Tax Practitioners (supra)*** . However, that was also a decision under the service tax regime and would be distinguishable in view of the amendment to the Constitution bringing in the GST law. Also it is observed that an appeal in the said matter is pending final adjudication before the Hon'ble Supreme Court.

[18] 2016 (34) STR 554 (Bom)

112.9. Therefore, as observed earlier, there does not appear to be any conflict between this principle and Section 13 (8) (b) of the IGST Act as the scheme of GST in India is a levy on supply.

113.1. I now come to the Petitioner's challenge that Section 13(8)(b) seeks to runs contrary to the scheme of the Act and deems an inter-State supply as intra-State supply and, therefore, the Section is *ultra vires* the charging section as well as the scheme of the IGST Act. Petitioner has cited Sections 1, 5, 7, 7(1), 7(2), 7(3), 7(5), 12 and 13 have been cited by learned counsel for Petitioner to submit that from the scheme, scope and object of the IGST Act, the levy of IGST is on inter-State supplies. It has also been submitted that import and export of services have been treated as inter-State supplies in terms of Sections 7(1) and 7(5).

113.2. Since the supply, being discussed here, is an inter-State supply, as has been discussed by us earlier, the following portion of the charging section may be reproduced here. Section 5 of the IGST Act, is quoted as under :-

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

accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).
....”

113.3. The above Section clearly states that all that on inter-State supplies of goods and services, there shall be levied a tax called the Integrated Goods and Service Tax, which shall be paid by the taxable person. There is no divergence of view that the scheme, scope and object of the IGST Act is a levy on inter-State supplies and the supply in this case is an inter-State supply. But what the argument of Petitioner seems to miss is that the Parliament as discussed earlier, can by law determine the place of supply, which pursuant to Article 269A(5) of the Constitution of India, it has done by enacting Chapter V containing Sections 10 to 14 on place of supply. Section 13(8)(b) as discussed earlier pertains to the case of intermediary services, where the service recipient is outside India and where the place of supply has been provided to be the location of the supplier. When the Constitution has empowered the Parliament to formulate principles determining the place of supply, in my view, Section 13(8)(b) cannot be said to be *ultra vires* the charging section as Section 13(8)(b) does not violate the levy on the supply made by the intermediary, particularly in view of Section 7, which designates such supplies to be inter-State supplies. And which power to designate inter-State supply also comes from Articles 246A, 269A(1) read with 269A(5) as discussed earlier. In my view, Section 13(8)(b) does not and cannot deem an inter-State supply to be an intra-State supply. When there is a specific provision for levy

and collection of IGST, then, in my view, referring to the charging section of another Act is not called for or rather it would be irrelevant. Section 13(8)(b) of the IGST Act has been enacted pursuant to the powers under Article 269A(5) of the Constitution of India and in accordance with the scheme of the IGST Act by which IGST is levied on all inter-State supplies of goods and services.

113.4. There cannot be any dispute as to the doctrine of pith and substance as canvassed by Petitioner while deciding on legislative competence or that under Article 265 no tax can be levied without authority of law. Having already held that Section 13(8)(b) has been enacted pursuant to the authority of law and that the said Section 13(8)(b) cannot be linked with Section 8(2) of the IGST Act to deem an inter-state supply as an intra-state supply, the said concerns are unfounded.

113.5. Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner, the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is *ultra vires* the charging section or the scheme of the Act.

114.1. Petitioner is also concerned that Section 13(8)(b) of the IGST Act is *ultra vires* the charging Section 9 of the CGST Act as well as corresponding Section 9 of the MGST Act which provides for a levy of CGST/MGST on intra-state supplies of goods and services or both since according to Petitioner in view of Section 13(8)(b) read

with Section 8(2) the subject supply would be treated as intra-state supply.

114.2. It would be useful to quote Section 9 (1)of the CGST Act as under :-

> *"**9. Levy and collection.** - (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.*

114.3. Similar is the provision under the MGST Act and is therefore not being reproduced.

114.4. Firstly there is no dispute that the supply under consideration is an inter-State supply of service. Therefore, when the place of supply in the case of intermediary services, such as that rendered by Petitioner and the place of supply of such service is provided to be the location of supplier of services, viz., Petitioner, it could not be said that Section 13(8)(b) of the IGST Act is in breach of Section 9 of the CGST Act/MGST Act as both these provisions operate in different fields. When there is a specific provision dealing with the case of Petitioner viz. Section 13 (8)(b) of the IGST Act, which has been enacted pursuant to the powers under Article 269A

(5) of the Constitution of India, then also in my view the challenge appears to be without substance.

114.5. Petitioner has also referred to Section 8(2) to submit that Section 13(8)(b) of the IGST Act by stipulating the place of supply in the case of intermediary services to be the location of supply of services would invoke Section 8(2). Both the provisions have different purposes. As stated earlier Section 8 deals with nature of supply whereas Section 13 deals with place of supply and the attempt to artificially link Section 8(2) with Section 13(8)(b) is misplaced and unfounded as discussed earlier. In my considered opinion, Section13 (8) (b) cannot be linked with Section 8 (2) of the IGST Act. Therefore, in my view, the challenge with reference to the charging sections of Acts which operate in different fields in respect of supplies of different natures appears to be unnecessary.

114.6. Hence Section 13 (8) (b) is not *ultra vires* Section 9 of the CGST Act and MGST Act.

115.1. Coming to the Petitioner's grievance on double taxation; On behalf of Petitioner it has been firstly asserted that GST is being levied twice on the same commission, once on the Petitioner and then on the Indian purchaser of goods. Secondly the same supply would be taxed in the hands of Petitioner and on the basis of the destination based principle would also be taxed in the hands of the service recipient in the importing country.

115.2. I am unable to appreciate any of these arguments. As far as the first argument is concerned, there are, in my view, two

distinctly identifiable supplies involved, i.e., (i) supply of services by the intermediary to the overseas supplier of goods and (ii) supply of goods by overseas supplier to the Indian importer. The first supply attracts Section 13 (8)(b) of the IGST Act. The second supply is liable to tax under the Customs Act, 1962 and the incidence of customs duty would be on the importer of goods and not on the intermediary service provider. Moreover, the principle is well settled that two taxes which are separate and distinct imposts on two different transactions/supplies is permissible as in law there is no overlapping.

115.3. With respect to the second assertion that the same supply would be taxed by foreign service recipient in his hands in the importing country, that in my view is also not really tenable in the eyes of law as IGST is not extra-territorial and generally speaking a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. Moreover, that would depend on the laws of that country . It is also pertinent to refer to the earlier discussion that Petitioner is providing intermediary services as an intermediary as defined in the IGST Act to the overseas customer and not as an exporter of service.

116.1. It is observed that Petitioner has placed much reliance upon the 139th Department related Parliamentary Standing Committee on Commerce in support of his contentions In support of his contention, Petitioner has extracted paragraphs 15.1 to 15.3 of the recommendations regarding amendment to section 13(8) of the

IGST Act to exclude 'intermediary' services and make it subject to the default section 13(2) so that the benefit of export of services would be available."

116.2. Without commenting on the necessity for the Parliament, GST Council/Government to take steps to implement or effectuate the above recommendations, it is pertinent to appreciate that the recommendations, do not have any binding value nor are they enforceable.

116.3. Reliance upon reports of Parliamentary Committees are external aids to construction to be used only when there is ambiguity in the statute. The law relating to reliance upon Reports of Parliamentary Standing Committees has been once again reiterated in the decision of the Constitution Bench of the Supreme Court in the case of ***Kalpana Mehta v. Union of India***[19]. Paragraph 134 in the said judgment authored by the then Chief Justice of India Justice Dipak Misra and Justice A.M. Khanwilkar as well as paragraph 257 authored by Justice Dr. D. Y. Chandrachud are apt and are quoted as under:

> *"134.....it is clear as day that the Court can take aid of the report of the parliamentary committee for the purpose of appreciating the historical background of the statutory provisions and it can also refer to committee report or the speech of the Minister on the floor of the House of the Parliament if there is* ***any kind of ambiguity or incongruity in a provision of an enactment****.*
>
> *257.....The validity of the advice which is tendered by a Parliamentary Committee in framing its recommendations for*

[19] (2018) 7 SCC 1

legislation cannot be subject to a challenge before a court of law. The advice tendered is after all what it purports to be: it is advice to the legislating body. The correctness of or the expediency or justification for the advice is a matter to be considered by the legislature and by it alone."

116.4. In any event, it is always open to Petitioner to make appropriate representation to give effect to the above recommendations and for the Respondents to consider the same.

117. Learned Additional Solicitor General, Shri Anil Singh has drawn our attention to the decision of the Gujarat High Court in the case of **Material Recycling Association of IndiaVs. Union of India and Others (R/Special Civil Application No. 13238 of 2018 with R/Special Civil Application No. 13243 of 2018) decided on 24th July, 2020,** wherein, he submits a similar challenge as in this Petition was made in respect of Section 13(8)(b) of the IGST Act and which had been rejected. It is observed that the said decision challenged the constitutional validity of Section 13(8)(b) of the IGST Act under Articles 14, 19, 265 and 286 of the Constitution of India. The Gujarat High Court after considering the submissions made by the counsel for the parties and after analysis in Paragraphs 63 to 68, has upheld the constitutional validity of Section 13(8)(b) read with Section 2(13) of the IGST Act. Though, the challenge before this Court is with respect to some more Articles of the Constitution of India, however I am in respectful agreement with the conclusion of the Gujarat High Court in the said case. True also that the decision in the case of **Material Recycling Association of India (supra)** cannot be treated as a binding precedent, however I am persuaded to rely on the following paragraphs :-

"64. The introduction of Goods and Service Tax in India in the year 2017 is with an object of providing one tax for one nation so as to harmonize the indirect tax structure in the country. For the said purpose, the Constitution is amended by the Constitution (One Hundred First Amendment) Act, 2016 to bring on to introduce Article 246A which provides for special provision with respect to Goods and Service Tax. Article 246A begins with non-obstante clause stipulating that notwithstanding anything contained in Articles 246 and 254, the parliament subject to Clause-2, Legislature of every State, have power to make laws with respect to Goods and Service Tax imposed by the Union or by such State. Clause 2 of Article 246A empowers the parliament, who has exclusive power to make laws with respect to goods and services tax where the supply of goods or of services or both takes place in the course of inter State trade or commerce. Thus, the parliament has exclusive power under Article 246A to frame laws for inter State supply of goods of services. The basic underlying change brought in by the GST regime is to shift the base of levy of tax from point of sale to the point of supply of goods or service. In that view of the matter, Section 13(8)(b) of the IGST Act,2017 which is framed by the parliament inconsonance with the Article 246(2) of the Constitution of India is required to be considered.

65. Section 8 of the IGST Act, 2017 provides for intra-State supply so as to take care for the supply of goods to or by a special economic zone and the goods imported in the territory of India till they cross the Custom in India. Section 8 is subject to provision of Section 10 of the IGST Act, 2017 where as Section 12 of the IGST provides for place of supply of services where the location of supplier and recipient is in India. Section 12(1) and 12(2) o the IGST Act,2017 reads as under :-

"12. Place of supply of services where location of supplier and recipient is in India.—(1) The provisions of this section shall apply to determine the place of supply of

services where the location of supplier of services and the location of the recipient of services is in India.

(2) The place of supply of services, except the services specified in sub-section (3) to (14),–

(a) Made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be, –

(I) the location of the recipient where the address on record exists; and

(ii) the location of the supplier of services in other cases."

The aforesaid provision of sub-section 12(2)(b) stipulates that the place of supply of service made to any person other than registered person shall be the location of the recipient where the address on record exists and location of supply of service in other cases. Sub-section 3 to 14 of Section 12 stipulates the place of supply of service in various eventualities. However, the same does not cover the case of intermediary. Section 13 of IGST Act, 2017 stipulates that the place of supply of services where the location of the supplier of services or the location of the recipient of services in outside India. Sub-section 2 of Section 13 stipulates that the place of supply of service except the services described in sub-section 3 to 13 shall be the location of the recipient of the services and if the location of recipient of service is not available in the ordinary course of business, the place of supply shall be location of supplier of service. Thus, sub-section 3 to 13 carves out an exception to the place of supply of services to be the place of recipient of services where the location of supplier or location of recipient is outside India. On perusal of provision of Section 13 of IGST Act, 2017, sub-section 3 to 13 thereof provide different eventualities to determine the place of supply of services. Sub-section 3 describes place of supply of services where the services are actually performed, Sub-section 4 refers to place of supply of services supplied directly in relation to an immovable property, Sub-section 5 refers to supply of

services supplied by way of admission to, or organization of a cultural artistic etc. and Sub-section 6 provides that when services as provided in sub-sections 3, 4 and 5 are at more than one location, the place of supply shall be location of taxable territory, Section 7 refers to the location of supply of service, if it is Union territory or State, then it would be in proportion to the value for services separately collected or determined as per the contract or agreement. Sub-section 8 of Section 13 refers to place of supply of the services shall be the location of supplier of services in case of banking company, intermediary services and services consisting of hiring of means of transport. Intermediary services is defined in Section 2(13) of IGST Act, 2017 which means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account and accordingly, when intermediary services are provided by brokers, the place of supply could be either the location of service provider or the service recipient. The petitioner has tried to submit that the services provided by a broker outside India by way of intermediary service should be considered as "export of services" but the legislature has thought it fit to consider such intermediary services; the place of supply would be the location of the supplier of the services. In that view of the matter, it would be necessary to refer to the definition of "export of services" as contained in Section 2(6) of the IGST Act, 2017 which provides that export of service means the place of service of supply outside India. Conjoint reading of Section 2(6) and 2(13), which defines export of service and intermediary service respectively, then the person who is intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both. In such circumstances, the respondent no.3 have issued Circular

No.20/2019 where exemption is granted in IGST rates from payment of IGST in respect of services provided by intermediary in case the goods are supplied in India.

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68. The contention of the petitioner that it would amount to double taxation is also not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. If the services provided by intermediary is not taxed in India, which is a location of supply of service, then, providing such service by the intermediary located in India would be without payment of any tax and such services would not be liable to tax anywhere. In such circumstances, the contentions raised on behalf of the petitioner are not tenable in view of the Notification No.20/2019 issued by the Government of India, Ministry of Finance whereby Entry no.12AA is inserted to provide Nil rate of tax granting exemption from payment of IGST for service provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory i.e. India. Therefore, the respondents have thought it fit to consider granting exemption to the intermediary services viz. service provider when the movement of goods is outside India.

69. In view of the foregoing reasons, it cannot be said that the provision of Section 13(8)(b) r.w. Section 2(13) of the IGST Act,2017 are ultra vires or unconstitutional in any manner. It would however, be open for the respondents to consider the representation made by the petitioner so as to redress its grievance in suitable manner and inconsonance with the provisions of CGST and IGST Act.

The petition is, therefore, disposed of accordingly. Rule is discharged with no order as to costs."

118. In the circumstances, a position of law, as discussed, regarding the legitimacy of Section 13(8)(b) or Section 8(2) of the IGST Act cannot be doubted. Petitioner has neither made a case of non-existence of competence nor demonstrated any constitutional infirmity in Section 13(8)(b)or Section 8(2) of the IGST Act, nor a case of applicability of Section 8(2) of the IGST Act to the case of Petitioner. Petitioner has also failed to make out a case that Section 13 (8) (b) or Section 8(2) of the IGST Act are *ultra vires* the scheme of the IGST Act. Petitioner has failed to demonstrate that Section 13(8)(b) of the IGST Act is ultra vires Section 9 of the CGST Act or the MGST Act. Therefore the challenge fails.

119. In the light of the above, I am of the view that neither Section 13(8)(b) nor Section 8 (2) of the IGST Act are unconstitutional. Also neither Section 13 (8) (b) nor Section 8 (2) of the IGST Act are *ultra vires* the IGST Act. Section 13 (8) (b) is also not ultra vires Section 9 of the CGST Act, 2017 or the MGST Act, 2017. Section 13(8)(b) as well as Section 8(2) of the IGST Act are constitutionally valid and operative for all purposes.

120. Petition is accordingly dismissed. There shall be no order as to costs.

[ABHAY AHUJA, J.] **[UJJAL BHUYAN, J.]**

Nikita Gadgil/Mugdha