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

WRIT PETITION NO. 2980 OF 2019

L & T IHI Consortium, a consortium of Larsen & Toubro Ltd. and IHI Infrastructure Systems Co. Ltd., Japan ... Petitioner

Versus

1. Union of India, represented by Secretary, Department of Revenue.
2. State of Maharashtra, represented by the Secretary, Ministry of Finance
3. GST Council
4. Deputy Commissioner of State Tax ...Respondents

Mr. Arvind Datar, Senior Advocate with Mr. P. R. Renganath with Mr. M. Kannan, Mr. Roshan D'sa i/b. Purnima G. Bhatia for the petitioner.
Mr. D. P. Singh for Respondent no. 1.
Mr. V. A. Sonpal, Special Counsel with Ms. Jyoti Chavan, AGP for Respondent No.2.
Ms. P. S. Cardozo with Ms. Maya Majumdar for Respondent No. 3.

CORAM: G. S. KULKARNI &
JITENDRA JAIN, JJ.

DATE: 14 November 2024.

Judgment (Per G. S. Kulkarni, J.)

The judgment is divided into the following sections to facilitate analysis:

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

A. Introduction :-

2. The petitioner a consortium of two entities was awarded a contract by the Mumbai Metropolitan Development Authority (MMRDA) a project of public importance, namely the "**Mumbai Trans Harbour Link Project",** which involved construction of the longest bridge of 22 kms on the ocean connecting South Mumbai and Nhava-Sheva in Navi Mumbai. It is under such contract disputes have arisen on the application of the provisions of the Central Goods and Services Tax Act, 2017 (for short "**CGST Act**") as also the corresponding provisions of the Maharashtra Goods and Services Tax Act, 2017(for short "**MGST Act**") *inter alia* in regard to the petitioner's claim in regard to the input tax credit being not granted to the petitioner qua the advance amounts received by the petitioner from the MMRDA as per the terms of the contract and remitted to its constituent L&T as also denial of the refund of the tax paid.

3. In such context *inter alia* on the premise that receipt of advances under the contract would not attract levy of GST, in the present proceedings instituted under Article 226 of the Constitution of India, the petitioner assails the constitutional validity of the provisions of Sections 7, 12, 13 and 16 of the CGST Act as also the corresponding provisions of the MGST Act (collectively referred as "**GST Acts**"). The substantive reliefs sought by the petitioner are as under:-

> (i) **Section 7** of the CGST Act as also of Section 7 MGST Act, insofar as these provisions apply to supplies "agreed to be made", are ultra vires the provisions of Article 246A read with Article 366(12A) and violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;
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> (ii) declaration that the provisions of **Sections 12 and 13** of the CGST Act and MGST Act, insofar as they apply to supplies "agreed to be made" are ultravires the said provisions of the Constitution;
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> (iii) for a declaration that the provisions of **Section 16(2)(b)** of the CGST Act and the MGST Act are contrary to the provisions of **Section 13(2)** and the *Explanation* thereto under the GST Acts and accordingly the same be declared to be arbitrary, unreasonable, discriminatory and violative of the provisions of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;
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> (iv) **for a declaration that the input tax credit may be availed under section 16 of the CGST and MGST Act, on the basis of a "receipt voucher" issued under section 31(3)(d) of the CGST Act and MGST Act, notwithstanding the non-inclusion of receipt voucher under Rule 36 of the CGST Rules, 2017 and MGST Rules, 2017;**
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> (v) for a declaration that the proviso to **Section 54(3)** of the CGST and MGST Act is arbitrary, unreasonable and violative of the provisions of Article 14, 19(1)(g), 265 and 300A of the Constitution of India;
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> (vi) that respondent no. 3/GST Council be directed to refund to the petitioner together with applicable interest the

sum of Rs.32.02 crores and Rs.32.62 crores remitted by the petitioner and collected by the respondents without authority of law."

B Factual matrix :-

4. As derived from the pleadings, the factual antecedents under which the controversy arises needs to be illustrated :-

The petitioner is an unincorporated consortium of two entities, namely, Larsen and Toubro Ltd. (**L&T**) and IHI Infrastructure Systems Co. Ltd., Japan (**IHI**). On 4 January, 2017, the Mumbai Metropolitan Region Development Authority (for short **"MMRDA"**) invited tender for procurement and construction of a bridge for the "**Mumbai Trans Harbour Link (MTHL) Project**" (for short "**the project"**). The project was being funded by the Japan International Co-operative Agency. The petitioner was formed as an unincorporated consortium of L&T & IHI, "solely to bid for" and if successful, execute the project. The petitioner was a successful bidder. A letter of acceptance was issued to the petitioner by MMRDA on 17 November, 2017. A Consortium Agreement dated 22 December, 2017 was entered into between L&T and IHI. Thereafter, a Contract Agreement dated 26 December, 2017 was entered between MMRDA and petitioner.

5. The petitioner, as also the consortium members of the petitioner obtained registration under the GST laws, in compliance with the GST

provisions. For the execution of the project work, purchase orders dated 23 March, 2018, back-to-back with the Contract Agreement, were issued by the petitioner to its members, i.e., L&T and IHI. The members of the petitioner would raise bills on the petitioner for the portion of the work executed by them each month. In turn, the petitioner would raise a single consolidated invoice on the client, namely, MMRDA. Being back-to-back contracts, there was virtually no value addition by the petitioner. The payment realized by the bank was to be transferred by the petitioner to its members.

6. In regard the issues as arising in the present petition, it is the petitioner's case that under Clause 14.2 of the General Conditions of Contract (GCC), the Employer [i.e. the MMRDA] was to make an advance payment as an interest-free loan to the petitioner [the contractor], upon the petitioner furnishing a bank guarantee. Such loan was to be repaid through percentage deduction from the interim payment to be made to the contractor.

7. The first tranche of such advance payment alongwith GST amount of Rs.32.02 crores was paid by the MMRDA to the petitioner in March, 2018. The petitioner has contended that though the tender documents clearly stipulated that such amounts would be a loan which was to be repaid in the course of execution of the contract, it was inadvertently treated as an "advance consideration" under the contract and consequently, the petitioner

was constrained to remit tax even though, according to the petitioner, there was no supply of service, in view of the statutory provisions of Section 7 of the GST Acts, which stipulate that "supply" includes supply "agreed to be made". As also Section 13 of the GST Acts providing that receipt of payment shall determine "time of supply", notwithstanding that service has not been provided.

8. It is the petitioner's case that accordingly, GST (Rs.32.02 crores approximately) being CGST and MGST, was leviable on the advance amounts. The MMRDA remitted Rs.32.02 crores of GST amount to the petitioner along with the advance amount, as the first tranche. The petitioner in turn remitted the said amount in cash through the electronic cash ledger to the GST Department. The petitioner has contended that an "Advance Receipt Voucher" dated 6 March, 2018 for Rs.32.02 crores in terms of Section 31(3)(d) of CGST and MGST Act, 2017 was issued by the petitioner to MMRDA. The petitioner contends that the entire amount received by the petitioner from MMRDA as an advance/loan was to be recovered from the bills to be raised by the petitioner in the course of execution of the contract.

9. The petitioner contends that on receipt of such advance, the petitioner in turn remitted the said amounts to its constituent L&T together with GST of Rs.32.02 crores. L&T thereupon issued a "Receipt Voucher

(RV)" dated 28 March, 2018 indicating the amount received and the GST. Under the contract, such sequence was repeated for the next tranche of advance/loan granted to the petitioner by the MMRDA, this time an amount Rs.32.62 crores (approx) was disbursed to the petitioner in September 2018 and the same was transferred to the petitioner's constituent L&T. Such amount of Rs.32.62 crores was treated, accounted and remitted to the GST Department similar to the first tranche, Receipt Vouchers were issued by the petitioner to MMRDA and by L&T to the petitioner.

10. On the aforesaid backdrop, the case of the petitioner is that the petitioner was precluded from availing of the Input Tax Credit (ITC) of the GST paid to L&T (its constituent) for the reason that Section 16(2)(b) of the CGST and MGST Act provided that no ITC could be taken unless the service had been received. The petitioner contends that at such point of time, the work under the contract was in progress and/or was yet to be commenced as would be understood by the GST laws, hence, the respondent proceeded on the basis that no services had been received by the petitioner from its constituent L&T. It is contended that another reason being that the receipt voucher-RV issued under Section 31(3)(d) of the CGST/MGST Act had not been prescribed as a "tax paying document" under Section 16(2)(a) of the CGST Act read with Rule 36 of the CGST Rules.

11. It is hence the petitioner's case that the statutory scheme is *ex facie* unreasonable inasmuch as :

(i) Tax is imposed on a supply "agreed to be made", although the Constitution authorizes levy of tax only of supply;

(ii) Receipt of payment (even before providing of service) is treated as the time of supply (Section 13(2)(b);

(iii) Despite such levy of tax, input tax credit is denied on the GST charged on such payment, until the service is actually received;

(iv) Input tax credit is denied also on the ground that "receipt voucher" is not specified as a "tax paying document" under section 16(2)(a) of the CGST Act read with Rule 36 of the CGST Rules.

12. The petitioner contends that in contracts of such nature, it is a necessary condition of contract of upfront advances and loans being provided which is a common facet in large government contracts. It is stated that invariably, such contracts are also executed by unincorporated joint ventures (UJV), such as the petitioner, formed specifically for such contracts, since technical and financial collaboration is required to execute huge government projects, while the work is ultimately executed by the constituents of the UJV. The UJV itself does not effect any value addition

as the UJV is created for cohesion and as a single point of contract for the government entity involved. It is hence contended that in the petitioner's case, the statutory scheme results in the petitioner remitting tax on 110% of the contract value, which the petitioner intends to demonstrate as follows:

(a) Contract value – Rs. 1000 crores

(b) Loan = 10% of contract value, i.e., Rs.100 crores

(c) GST rate = 10%

13. The petitioner contends that, hence, the petitioner is required to pay GST on the advances/loan received from the contractee/government entity. It is also required to reimburse tax on the advances/loan extended by it, in turn to its constituents. However, the petitioner is precluded from taking credit of this tax amount reimbursed by it, as a result, it ends up with an additional cash flow of Rs.10 crores thereby resulting in the government receiving tax on 110% of the contract value of Rs. 1000 crores.

14. In such circumstances the petitioner has contended that the government thus collects Rs. 110 crores as tax, while plainly only Rs.100 crores ought to have been collectible, being GST of 10% on the contract value of Rs.1000 crores. This, according to the petitioner, is due to the said arbitrary provisions of the GST Acts.

15. The petitioner contends that what is more concerning is the refund of unutilized input tax credit of Rs.10 crores, which becomes available once project work commences and which remains unutilized even after completion of the project, being denied to the petitioner by virtue of the proviso to Section 54(3) of the CGST Act, since refund of unutilized ITC is restricted only to two situations mentioned in the proviso, i.e. (i) zero-rated supplies made without payment of tax; (ii) inverted duty structure, i.e., where the rate of tax on inputs (goods) is more than the rate of tax on output supplies. Hence, according to the petitioner, such balance of Rs. 10 crores remains unutilized, especially since the petitioner has been constituted only for the purposes of this particular government contract. This restriction on the grant of refund, even in a situation where the government collects excess tax of 10% as explained is plainly unreasonable, without authority of law which goes against the scheme of the GST, is the petitioner's case. It is contended that also grant of input tax credit is rendered illusory since the time when credit may be availed, is so restricted that it is unable to be utilized and thereafter refund of unutilized credit is denied.

16. The petitioner has contended that subsequently it has come to the knowledge of the petitioner that the advances being also a loan did not fall within the GST net at all and that no GST was payable on loan amounts.

For such reason, the petitioner filed refund applications on 28 December, 2018 on the GST Portal claiming refund of Rs.32.02 crores and Rs. 32.06 crores. On such refund applications, a show cause notice dated 8 February, 2019 was issued to the petitioner as to why the refund applications ought not to be rejected. After hearing the petitioner, the Deputy Commissioner of State Tax rejected the refund applications *inter alia* on the reasoning that the upfront payment "was an advance" and not a loan. Such order passed by the Deputy Commissioner of State Tax was challenged by the petitioner in appeal. It is in the above premise, the present petition is filed by the petitioner making the following prayers:

> "a. in the nature of a Writ of declaration, declaring the provisions of section 7 of the CGST Act and the provisions of section 7 of the MGST Act, insofar as they apply to supplies "agreed to be made", as being *ultra vires* the provisions of Article 246A read with Article 366(12A) and violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;
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> b. in the nature of a Writ of declaration, declaring the provisions of sections 12 and 13 of the CGST Act, and provisions of sections 12 and 13 of the MGST Act, insofar as they apply to supplies "agreed to be made", as being *ultra vires* the provisions of Article 246A read with Article 366(12A) and violative of Articles 14, 19(1) (g), 265 and 300A of the Constitution of India;
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> c. in the nature of a Writ of declaration, declaring the provisions of section 16(2)(b) of the CGST Act, and provisions of section 16(2)(b) of the MGST Act as being contrary to the provisions of section 13(2) and the Explanation thereto of the CGST Act and to provisions of Section 13(2) and the Explanation thereto of the MGST Act, respectively, and as being arbitrary, unreasonable, discriminatory and violative of the provisions of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;

d. in the nature of a Writ of declaration, declaring that input tax credit may be availed under section 16 of the CGST Act, and under section 16 of the MGST Act, on the basis of a receipt voucher issued under Section 31(3)(d) of the CGST Act and section 31(3)(d) of the MGST Act respectively, notwithstanding the non-inclusion of receipt voucher under Rule 36 of the CGST Rules, 2017 and under Rule 36 of the MGST Rules, 2017 respectively;

e. in the nature of a Writ of declaration, declaring the proviso to section 54(3) of the CGST Act, and the proviso to section 54(3) of the MGST Act, as being arbitrary, unreasonable and violative of the provisions of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India;

f. Writ of Mandamus or any other appropriate Writ order or direction of this Hon'ble Court, ordering and directing the Respondent No.3 to forthwith refund to the Petitioner, together with applicable interest, the sum of Rs.32.02 crores remitted by the Petitioner (under Respondent No.3 acknowledgment bearing ARN No. AA2711188460836) and collected by the Respondents without authority of law;

g. Writ of Mandamus or any other appropriate Writ or order of this Hon'ble Court, ordering and directing the Respondent No.3 to forthwith refund to the Petitioner, together with applicable interest, the sum of Rs.32.62 crores remitted by the Petitioner (under Respondent's no. 3 acknowledgment bearing ARN No. AA271218093852U) and collected by the Respondents without authority of law.

C. Respondents' pleadings :-

Reply Affidavit on behalf of Respondent Nos.1 & 3:-

17. Reply affidavit of Shri. Milind Gawai, Principal Commissioner of Central Tax, Mumbai East Commissionerate, is filed on behalf of respondent nos.1 and 3 (Union of India and the GST Council). The affidavit contends that as per Section 54(3) of the CGST Act, refund of tax is available only in two contingencies i.e. firstly, if dealer is engaged in

supply of zero rated supplies made without payment of tax; and secondly, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies i.e. Inverted Duty Structure. In such context, referring to Sections 9 and 13 of the CGST Act, it is contended that advances received on services are taxable at the time of receipt of payment/advances as per Section 13(2)(a) of the CGST Act and the same is taxable/leviable to tax as intra-state supplies of services as per provisions of section 9 of the CGST Act. The petitioner is neither an exporter nor covered by Inverted Duty Structure as enumerated in Section 54 of the CGST Act, hence, the benefit of the said provision is not available to the petitioner.

18. The reply affidavit further contends that the upfront amounts received by the petitioner from the MMRDA were advances "for mobilization" and not loan. In such context, Section 76(1) of the CGST Act has been referred which begins with a *non-obstante* clause *inter alia* providing that 'every person who has collected from any other person any amount as representing the tax under the said Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not'.

19. It is hence contended that if the amount received by the petitioner was loan as claimed by the petitioner, in that case there would be no taxable service as 'loan' is not included in definition of 'services' under clause 102 of Section 2 of the CGST Act. In such event, such activity would not qualify as "input services" for the Company. It is contended that for such reason, the petitioner would not be eligible to take Input Tax Credit on the amount of GST paid by it to L&T. It is next contended that in case, if such activity was loan as claimed by the petitioner i.e. non-taxable service, then the provisions of Sections 7, 12, 13, 16 and 54 of the CGST Act read with Rule 36 of the CGST Rules are not applicable in the present facts.

20. In dealing with the grounds as raised in the writ petition, it is contended that part of the provisions of Section 7 in so far as it relates to services '*agreed to be made*' cannot be considered as ultra vires Article 246A read with Article 366(12A) of the Constitution of India. It is contended that Article 366(12A) of the Constitution of India defines Goods and Services as "tax imposed on the supply of goods, services, or both, with the exception of taxes levied on the supply of alcoholic liquor for consumption by humans", would not restrict the meaning of the word "supply", as supply already made. The use of the words in a statute is stated to be the prerogative of the legislature on which the petitioner would not have any locus to comment upon. It is contended that the term 'supplies agreed to be

made" cannot be considered as 'unconstitutional' and violative of Sections 7 and 13 of the CGST and the MGST Act.

21. It is contended that the case of the petitioner, in fact, is misplaced as what is sought to be taxed by the respondents is the mobilization advances paid to the petitioner. It is next contended that Input Tax Credit is not a substantive right but a concession given to its subject by the government so it is the prerogative of the government to decide whether and to what extent this facility can be given to a service provider or not. It is contended that under Section 16 of the CGST Act, input can be received only after goods and services are received. Hence, any comparison between Section 13(2) and Section 16(2)(b) of the CGST Act is misplaced. In regard to Receipt Voucher, the case of these respondents, in the affidavit, is that the non-inclusion of the Receipt Voucher can in no way result in the government retaining the tax or that the non-inclusion of the Receipt Voucher is in any manner arbitrary, unreasonable or violative of Article 14, 19(1)(g) or 300A of the Constitution. It is stated that the documents to be included in the CGST Rules is an exercise undertaken by the Government and which cannot be left to the interpretation as sought to be made by the petitioner. It is hence contended that on a reading of Section 54(3) of the CGST Act, it is clear that advances received on services are taxable at the time of receipt of payment/advances as per Section 13(2)(a) and the same is

taxable/leviable to tax the intra-state supplies of services, as per the provisions of Section 9 of the CGST Act. It is contended that the petitioner is neither an exporter nor covered by inverted duty structure as enumerated in Section 54 of the CGST Act and therefore, is not entitled for refund as per law.

22. It is next contended that the amount which was claimed as refund was paid in cash against output liability on advances received and that there was no cash balance at the end of December, 2018, thus, the reasons mentioned in the refund application that the petitioner has paid GST on the advance received, on which the joint venture partner-Larson & Toubro has also paid GST, which tantamounts to excess payment of GST to the Government is not a tenable proposition. It is lastly contended that the upfront amounts received by the petitioner from the MMRDA were advance for mobilization and not loan and hence, were clearly hit by the provisions of Section 76(1) of the CGST Act. It is contended that if such activity was loan as claimed by the petitioner, then there would be no taxable service, for the reason that 'loan' is not included in definition of 'services' under clause 102 of Section 2 of the CGST Act. In such event, the activity would not qualify as "input services" for the petitioner. It is stated that for such reasons, the petitioner would not be eligible to take Input Tax Credit on the amount of GST paid by the company to M/s. Larsen &

Toubro Ltd. on the said activity. Further, in case if such activity was loan, as asserted by the company i.e. non-taxable service, then the provisions of Sections 7, 12, 13, 16 and 64 of the CGST Act are not applicable in the instant matter. It is thus submitted that the petition be dismissed.

Reply affidavit on behalf of respondent nos. 2 and 4

23. On behalf of respondent nos. 2 and 4, Dr. David Thomas Alvares, Joint Commissioner of State Tax has filed reply affidavit *inter alia* contending that the petitioner in law is not entitled to the reliefs as prayed for. It is contended that the petitioner is also not entitled to grant of Input tax credit (ITC) or refund. It is stated that ITC is not frustrated by denying refund but can be adjusted year after year for future liabilities of GST as per law and on such reason, there is no prejudice to the petitioner. It is further stated that in any event, refund as demanded by the petitioner has been rejected considering the clear provisions of Section 54(3) of the GST Acts, which provides for refund available as specified in the said provisions.

24. Insofar as the incidence of liability is concerned, the liability of the petitioner to pay tax has arisen under Section 9 on supply of goods, the scope of which is defined in Section 7 to include supply agreed to be made. It is stated that however, the incidence of tax is at the time of raising of invoice or at the time of receiving of payment. It is further stated that

merely an agreement to supply does not result in liability, hence there is no tax on agreement to supply as contended. It is further stated that the constitutional provisions of Article 246A read with Article 366(12A) empowers the Central and State to levy tax on supply of goods and services. It is stated that when there is no definition of the word "supply", there is field open to the Legislature to create a fiction of including agreement to supply being included in the scope of supply. For such reason, the word "supply" agreed to be made in Section 7 cannot be held to be unconstitutional. It is further stated that there is no bar to include in scope of supply any agreement to supply, as the tax is not being levied on the agreement of supply but on receipt of payment. It is contended that the provisions of Section 7 and Section 13 are read together to understand the net effect and to examine validity or provisions of the Act. It is contended that the combined effect of Section 7 and Section 13 is that the supply includes agreement to supply but tax is not levied on such agreement but on receipt of payment under the Contract as provided under Section 13 of the GST Act. Hence, there is no lack of authority or competence on levy of tax on receipt of payment under an agreement to supply.

25. Insofar as the petitioner's case that Clause 14.2 of the Contract Agreement uses the word "Loan", it is contended that it is essentially advance payment for adjustment against the future running bills. It is stated

that in any event it is well settled that nomenclature of transactions is not relevant and it is to be construed on the nature of transaction.

26. Insofar as the case of the petitioner on refund is concerned, it is contended that the petitioner has already availed of a remedy of making a refund application, which has been rejected and against which an appeal is filed which is pending before the Appellate Authority.

27. It is next contended that this is a case where MMRDA has paid advance money along with tax to the petitioner. Therefore, the tax element included in such advance payment amounts to collection of tax and would be required to be included in the amount of treasury, hence, the petitioner rightly deposited the tax collected in the treasury since the same could not have been retained by the petitioner as per the provisions of Section 16 of the GST Act.

Petitioner's Rejoinder Affidavit to Respondent No.3's Reply Affidavit:-

28. A rejoinder affidavit filed on behalf of the petitioner to the counter affidavit of Mr. Milind Gawai, which reiterates the case of the petitioner in contending that what was given by MMRDA to the petitioner was an advance, being an interest-free loan. It is contended that that while GST law treats supply having been effected for the purpose of levy of tax, it is the respondents' contention that since work under the contract had not started,

no service has yet been provided to the petitioner, and hence the petitioner was precluded from availing ITC as per section 16(2)(b) of the CGST Act. It is contended that considering such double standard, the statutory provisions are challenged by the petitioner being arbitrary and unreasonable. It is contended that alternatively, if the provisions are to be "read down" to mean that where supply is deemed as effected for levying tax, such deeming provision would enure to permit the availment of ITC. It is contended that the *lis* is mainly about the levy of GST when supply is not yet effected i.e. regarding impermissibility of collection of output tax. It is contended that Section 54(3) dealing with refund of input tax/ITC is hence not primarily relevant. It is relevant only to the limited extent, i.e., where levy of tax on supply yet to be effected results in accumulation of ITC and its refund denied. It is stated that this adds to the arbitrariness of the provisions. It is next contended that the case of respondent nos. 1 and 2 in the counter affidavit does not appreciate the petitioner's case in the correct perspective.

29. It is contended that the tender documents clearly stipulate the payment to be a loan. However, it was inadvertently treated as an advance with MMRDA paying the "GST" on the same and in these circumstances, the GST amount was remitted to the government. The petitioner's case however is that the payment being a loan, no GST is payable on the same,

and hence even in the unlikely case of the challenge herein to the provisions of Sections 7, 13, 16(2)(b) not succeeding, no tax would be payable on the same and refund would be due is the case before the statutory authorities, earlier in adjudication and now in appeal. It is contended that the petitioner's case in these Writ Petitions is the challenge to the above provisions, and that even if the payment were to be construed as an advance, no tax can be constitutionally collected on the same, that is, without the happening of the taxable event. In the alternative, it is contended that where the taxable event is treated as having happened by way of statutory fiction, then such fiction cannot be arbitrarily curtailed, but has to be given its full effect upon which ITC would be available immediately upon the tax being remitted on the advance, notwithstanding the non-inclusion of receipt voucher by the rule-making authority under Rule 36 of the CGST Rules. It is contended that the tax on supply cannot be imposed where the supply is yet to take place. Further it is contended that payment of mobilization advance is not the taxable event contemplated in the Constitution.

30. It is next contended that interestingly the respondents refer to taxpayers as "subjects", an monarchical anachronism in a constitutional democracy. It is contended that clearly, such outdated perception that has formed the respondents' view that input tax credit is only a concession,

when clearly it is an integral part and vested right under the GST regime. It is next contended that non-inclusion of the receipt voucher is unconstitutional. For such reasons, it is prayed that the petition would be required to be allowed

Petitioner's Rejoinder Affidavit to Respondent No.2&4's Reply Affidavit:-

31. There is a rejoinder affidavit on behalf of the petitioner to the reply affidavit of Dr. David Thomas Alvares, Joint Commissioner of State Tax on behalf of the respondent nos. 2 and 4. It is contended that the petitioner is aggrieved not only by the legality and constitutionality of the provisions, but also by the improper interpretation/application of the provisions as enacted. It is contended that as regards the case of respondent nos. 2 and 4 that ITC can be adjusted year after year for future liabilities of GST, it is submitted that the petitioner - an unincorporated joint venture has been formed only for the purposes of this particular government contract. It is contended that since large-scale infrastructure contracts of the government require unique combinations of technical expertise, machinery, experience, and financial wherewithal, it is usual practice that such joint ventures are formed only for the execution of a particular contract, and thereafter that joint venture ceases to operate/exist. It is, therefore, contended that there is no question of adjusting unutilized ITC after a project has been completed. It is next contended that the case of the respondents is in a factual vacuum,

ignoring the basic ground realities. The petitioners contend that the accumulated/ unutilised ITC would cause considerable prejudice to the petitioner and other like entities, and in the process increase the cost of government infrastructure projects.

32. It is next contended that the refund application filed by the petitioner is not under section 54 (3) of the CGST Act, since it is not the case of accumulation of ITC, rather it is a refund of output tax on the ground that it is not a taxable transaction and/or that it amounts to double taxation. Hence, the application is under the head 'any other' category. It is contended that Section 54(3) is unconstitutional as it does not take into account the issues which are itself created by the legislation. It is therefore contended that it is no answer to the challenge to the constitutionality to say that Section 54(3) caters only to two situations.

33. It is next contended that where there is no definition of "supply", the legislature is bound by the ordinary meaning of the word and cannot seek to enlarge the definition by creating a fiction. It is also contended that the Constitution enables levy of tax on "supply of services" and not on "receipt of payment". In other words, the taxable event is the supply and not receipt of payment. It is contended that it is not permissible for the legislature to alter the taxable event.

34. It is next contended that the respondent ought not to conflate between the wording of the provisions, the constitutionality of which is challenged by the petitioner and as to how the provision would be required to be interpreted. It is contended that the question whether the payment is an advance or a loan falls for consideration under the statutory proceedings and the issues as raised in this writ petition are *de hors* the 'advance versus loan' issue. It is contended that in other words, be it an advance or loan, the issues here are whether GST could be levied merely because payment has been made even though service has not in fact been rendered and in the context of what Sections 7, 12 and 13 of CGST Act would provide, and further whether on GST so paid, the corresponding ITC may however be denied until service in fact is rendered (Section 16(2)(b) versus Section 13(2)), whether ITC may be denied because the rule-making authority has omitted to specify the statutory 'receipt voucher' as a document based on which ITC may be availed (Rule 36 of CGST Rules versus Section 16 read with Section 31(3)(d) of the CGST Act). Further, whether after denying ITC which leads to cumulation of unutilised ITC, the refund of the same being also denied under Section 54(3) is stated to be the petitioner's concern. It is hence contended that the amount so received by the petitioner from the MMRDA being a loan and MMRDA being an arm of the government, which has drafted the tender documents categorically stating

that the amount to be an "interest-free loan". This is to be given effect to. It is contended that it is trite that the revenue cannot re-write the contract for the parties; the relevant clause 14.2 speaks of "repayment" of the amount; the payments schedule, for payment of the contract value by MMRDA to the Petitioner, mentions the stages of payment, and the amount payable at each stage, in all amounting to 100% of the contract value, and this payment schedule does not include the amount of the interest-free loan paid under Clause 14.2 of General Conditions of Contract, since the said amount is purportedly stated to be not the part of the consideration/contract value.

35. It is next contended that the adoption of two directly conflicting standards to determine whether supply has been made, that is one with respect to payment of GST and another with respect of availment of corresponding ITC, is the point in issue. It is contended that for purposes of payment of GST, supply is said to be made upon receipt of payment, however, for availment of ITC, supply is said to be made only upon actual rendition of supply and availment of ITC is curtailed until then (notwithstanding that payment has been made and GST thereon remitted). This is contended to be patently arbitrary and unreasonable.

36. It is next contended that the amount of loan is paid as a percentage of the contract amount and since the contract amount is inclusive of tax, the

amount received towards loan, was inclusive of tax, and therefore, the GST had to be 'back-worked'. It is contended that subsequently, when the petitioner came to understand that the loans did not fall within the GST net at all, refund applications were made. It is stated that this upfront loan, including the GST thereon, is to be recovered by MMRDA from the stage-wise payments and thus there is no question of unjust enrichment of the petitioner. It is next stated that the petitioner, by abundant caution, has also issued credit notes to MMRDA with regard to the GST portion. It is stated that in any case, the fact that GST was paid voluntarily cannot be put against the petitioner. As the issue is whether in law, the respondents are entitled to levy GST on the loan amount received by the petitioner from MMRDA.

37. It is next contended that the omission to include receipt voucher under Rule 36 of the CGST Rules as a document based on which ITC may be availed is bad in law, when Section 16(2)(b) is to be read harmoniously with Section 13(2) and the Explanation thereto, that the goods/services are deemed to have been received (to the extent of payment) for taking ITC. It is stated that the omission to include receipt voucher under rule 36 of the CGST Rules as a document based on which ITC may be availed is bad in law, since the rule-making authority has failed to effectuate the statutory provisions, thereby depriving the assessees of the benefit conferred by the

Parliament. As to how the denial of ITC amounts to retention of tax by the Revenue and how this consequently causes financial prejudice to the denial of ITC is the case of the petitioner as averred in paragraphs 10 to 16 of the writ petition, is reiterated.

38. It is next contended that the legislature is to be given a larger latitude in matters of taxes cannot be raised in every challenge to a taxing statute. If this is to be the rule, then the constitutional provisions and principles would be reduced to an empty, decorative shell. It is contended that in the instant case, there are no great complexities involved, as this is clearly a case of the statute overreaching the Constitution by seeking to tax future events and of the rule-making authority failing the statute by omitting to carry out its mandate.

Clarificatory Affidavit on behalf of the Petitioner

39. There is a clarificatory affidavit filed by the petitioner on the issue as raised on behalf of the respondents that the petition raises academic issues and has become infructuous. In such context, the petitioner has stated that the contention of the respondents that the Writ Petition is infructuous is perhaps because the ITC then precluded was later available to be taken upon actual rendering of service. In such context, it is stated that however, even in such a scenario, the precluding of the credit immediately upon

payment of tax, results in excess payment of tax by the petitioner. It is stated that the timing of allowance of credit is crucial. Illustratively it is stated that where a travel booking at the stated time is denied, but arranged at a later time, the fact that travel was in fact done at such later time cannot preclude a claim for the delay especially when such delay causes prejudice, notwithstanding the fact that ITC may have been taken at a later point in time; further such prejudice continues which forms the subject matter of challenge of Section 54 of the CGST Act. It is contended that the denial of ITC upon payment of tax results in excess payment of tax has been explained by the petitioner in its pleadings. It is contended that even if ITC was substantively available upon payment of tax, its benefit could not be taken because of a procedural roadblock in Rule 36 of the CGST Rules, i.e. ITC could be taken only based on invoice and not based on a 'receipt voucher' which is the document required to be issued for advance payments. The constitutionality of the same is challenged by the petitioner.

40. It is next contended that since ITC was denied at the relevant time, it results in accumulation of ITC. However, Section 54 precludes refund of such accumulated ITC. Hence, the constitutionality of the relevant portion of Section 54 too is challenged. In conclusion, it is contended that the Writ Petition challenges the constitutional validity of the provisions of CGST/MGST Act and Rules and seeks refund of the tax collected without

authority of law. Hence, it cannot by any means be contended that the Writ Petition or any one of the prayers have become infructuous. It is, therefore, contended that the petition necessarily requires adjudication.

Second Clarificatory Affidavit on behalf of the Petitioner

41. There is a second clarificatory affidavit on behalf of the petitioner to contend that the oral plea as taken on behalf of the respondents that the petition had become infructuous was misconceived. In such context, it is contended that respondent nos. 2 and 4 were under the misapprehension that since the work in question had begun, the service had now been received and therefore, ITC in respect of GST on the interest free loan could not be taken, and consequently the Writ Petition had become infructuous. In such context, it is petitioner's case that such plea stems from complete misappreciation of the facts of the case and of the issues as raised, inasmuch as, the constitutionality as challenged by the petitioner was *de hors* the ITC provisions. It is contended that the primary issue raised in the Writ Petition is not about taking/utilisation of ITC, but about the constitutionality of levy and collection of GST on loan/advances that is on services that have not yet been supplied (u/s. 9 read with Sections 12 and 13 of the CGST Act). It is contended that the parent constitutional provision under Article 246A read with Article 366(12-A) permits levy only on "supply of goods or service or both" and not on "supply to be made of goods or services or both". In other

words, the Constitution does not permit taxation of a future event *de hors* the fact whether ITC can be taken of such GST statutorily levied and collected on a future supply, such levy and collection would be ultra vires the Constitution. It is for such reason that the petitioner has sought for writs of declaration that the relevant portions of Sections 7, 12 and 13 be declared as ultra vires Articles 14, 19, 265 and 300A of the Constitution, and for consequential writs of mandamus directing refund of the GST of Rs 32.02 crores + Rs 32.62 crores collected without authority of law on the loan/advance given by MMRDA to the petitioner. In such context, it is submitted that since the constitutionality of the very collection of tax on the interest-free loan has been challenged, the petitioner has abstained from adjusting the GST paid on the loans against invoices raised for supplies effected thereafter. It is submitted that it can be evidenced from GSTR-1 filed by the petitioner wherein Column 11(b) adjustment has not been done till date which was verified by the department when the refund application has been filed. For such reason, there is no question of the Writ Petition becoming infructuous.

42. In regard to the issue regarding taking/utilization of ITC, without prejudice to its contentions on the constitutionality of the provisions of GST as assailed, it is the petitioner's case that the petitioner invoices and receives payments from MMRDA for the MTHL project. For the execution

of the project, the petitioner has a back-to-back agreement with its constituents (M/s L&T Ltd, India and M/s IHI Infrastructure Systems Co Ltd, Japan). Thus, whatever payment + GST the petitioner receives from MMRDA (including loans/advances) is made over to the petitioner's constituents. Therefore, whatever GST is paid as input tax to the constituents is available as ITC and matches with, and is utilisable for, the payment of the petitioner's output tax obligations. It is contended that in the matter of the loan/ advance, the petitioner could not take ITC of the input GST paid to its constituents since no work was done owing to Section 16(2)(b) of the CGST Act, 2017. Therefore, the output GST on the loan/ advance received from MMRDA had to be remitted in cash. It is further stated that the loan/advance from MMRDA and the corresponding loan/advance to the petitioner's constituents is adjusted proportionately over the period of the contract against the stage-wise invoices. It is stated that where a loan/advance (which has suffered GST) is given upfront but is recovered/adjusted over the period of the contract, the supplier issues stagewise invoices for the full amount of work done in that stage, plus GST thereon. However, while the supplier furnishes details of output supplies (GSTR-1), the supplier is permitted to remit tax only on invoice value less proportionate loan/advance adjusted (Sl. no. 11B of GSTR-1) since the loan/advance has already suffered tax. Correspondingly, the ITC of GST

that was earlier precluded to be taken by the recipient, is now permitted to be taken to the extent of GST on the portion of the loan so recovered/advance so adjusted, being the "deferred ITC". Such deferred ITC would accumulate as unutilised ITC because it was precluded from being taken and utilised when the loan/advance suffered GST, and such GST had therefore to be remitted in cash.

43. As and by way of clarification, it is contended that it is the petitioner's case that no GST is leviable on the loan (or even if it is treated as an advance) and writs of mandamus have been sought directing refund of total amount of Rs 64.64 crores, the petitioner has, by way of abundant caution, not made the stage- wise adjustments in sl. no. 11(b) of GSTR-1 to its output tax liability but has been remitting GST on the full value of the contract utilising the deferred ITC. It is thus the petitioner's case that although Rs 64.64 crores of ITC on the loan that were earlier precluded, was permitted not to be availed and was accordingly availed, contrary to what seems to be the department's/ respondents plea, however, the matter does not simplistically end there. It is contended that while ITC has been availed, since no adjustment has been made on output tax liability in Form GSTR-1 at sl. no. 11 (b), the sum of Rs 64.64 crores thus continues as receivable in the books of the petitioner and the petitioner continues to be prejudiced to that extent.

44. In conclusion, it is submitted that the fact of ITC being originally precluded on the loan/advance, though allowed to be taken proportionately at the time of each stage-wise invoice, prejudices the taxpayer for the reason that if the output tax is not so reduced, while the ITC becomes fully utilisable against such full output tax, this results in excess output tax having been paid, thus the claim of the petitioner for refund. Further, if the output tax is reduced proportionately, this leads to accumulation of unutilized ITC, for which no refund is available as per Section 54 of CGST Act. It is thus submitted that either way, the petitioner is prejudiced and thus the petition ought to be allowed by holding that the petition has not become infructuous.

D. Submissions on behalf of the Petitioner:-

45. Mr. Arvind Datar, learned Senior Counsel for the petitioner has made the following submissions in support of the reliefs prayed by the petitioner:-

46. Larsen & Toubro Ltd. and IHI Infrastructure Systems Co. Ltd., Japan (for short '**L&T/IHI**') formed a consortium and emerged as a successful bidder in the MMRDA's project to construct a Trans Harbour Link, a 22 Km 6 lane road bridge, connecting Mumbai with Navi Mumbai. The consortium had entered into a "Contract Agreement" with the MMRDA. The consortium was formed with a Japanese partner in view of the Special

Terms for Economic Partnership (STEP) of Japanese ODS Loans as per JICA Operational Rules, and for technical collaboration. The work to be done / goods to be supplied by L&T/IHI were specified in separate work orders. The work was to be carried out on back-to-back basis. The consortium was merely a pass-through entity. All payments received by it would be made over to L&T and/or IHI. As per clause 14.2 of the Contract Agreement, the MMRDA made "an advance as an interest-free loan" for mobilization. The loan was required to be repaid through percentage deductions from the interim payments by MMRDA to the consortium. The payment under Clause 14.2 was made together with the GST by MMRDA to the consortium, on the ground that Section 7 and Section 13(2) read with Section 9 required GST to be remitted on any payment even if supply (service) had not yet been effected. Accordingly, when the consortium made over this payment to L&T, it was made together with GST. The GST was thus levied even before the supply service was effected, which has lead the petitioner to the challenge the validity of Sections 7, 12 and 13 of the CGST Act.

47. It is submitted that the MTHL project work is a works contract {section 2(119)}, hence, although it includes the provision of both goods and services, it is treated as service by legal fiction under paragraph 6(a) of Schedule II to the CGST Act. The GST amount paid by the consortium to

L&T constituted input tax for the consortium, it being a payment made to its supplier i.e. L&T. In any value added tax system, this input tax would be available as tax credit to adjust against the output tax payable. However, since Section 16(2)(b) inter alia provides "*… …. … no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services, or both to him unless… … (b) he has received the goods or services or both*" precludes input tax credit until supply / service is received, the output tax is required to be remitted in cash. Such effect is sought to be explained in a table which reads thus:-

S.No	Particulars	Amount (Rs.Crores)
BEFORE PROJECT WORK COMMENCES		
1.	Payment under Cl.14.2 by MMRDA to the Consortium	100
2	GST thereon @ 12% [Consortium's OUTPUT TAX]	12
3	Amt paid by MMRDA to the Consortium	112
4	Consortium's output tax to be remitted (in cash or by ITC) by the Consortium to the Govt.	12
5	Back-to-Back payment by Consortium to L&T/IHI	100 +12 GST
6	Consortium's INPUT TAX from sl. No.5, denied as ITC until Consortium receives service from L&T/IHI	12
7	Thus, output tax under sl.no.4 is remitted in cash	12
AFTER PROJECT WORK COMMENCES		
8	Aggregate of subsequent payments by MMRDA to the Consortium (net of recovery of Cl.14.2-payments)	900+ 108 GST
9	Consortium's output tax to be remitted (in cash or by ITC) by the Consortium to the Govt.	108
10	Aggregated of subsequent back-to-back payments by the Consortium to L&T and IHI (net of recovery of cl. 14.2-payments)	900+ 108 GST

11	Consortium's INPUT Tax (sl.No.10), available as ITC	108
12	Thus, output tax under sl. no.9 is remitted thru ITC	108
NET RESULT		
13	Amount of ITC remaining un-utilisable with the Consortium = sl. no.6	12
If s. 16(2)(b) had not arbitrarily denied ITC until supply is effected (despite tax being remitted on upon receipt of the cl. 14.2-payment), the liability at sl. no.4 would have been paid out of the ITC at sl. no.6. There is thus outgo of cash twice from the consortium, and consequently receipt of cash twice by the government.		

48. It is hence submitted that after collecting GST on supply / service to be made, 'input tax credit' of the same is denied until supply is effected, constitutes the challenge to Section 16(2)(b) of the CGST Act.

49. The next submission is in regard to the procedural denial of ITC. It is submitted that even proceeding on the basis that such ITC is available, claiming the same would stand procedurally blocked since the receipt voucher, namely the document being issued by the petitioner for receipt of the advance, has not been specified as per Section 31(3)(d) read with Rule 36 of the CGST Rules as a document, based on which ITC can be claimed. It is submitted that there could not be a denial of the refund of unutilised ITC. At the stage payments of the consideration (together with GST) under the Contract Agreement were made by MMRDA to the petitioner-consortium, upon completion of proportionate work, GST being the consortium's output tax, was to be remitted by the consortium to the

Government. The stage payments (together with GST) were made over on a back-to-back basis by the consortium to its members. Such GST, being the consortium's input tax, was available as ITC for discharge of equivalent GST output tax liability. It is hence submitted that the ITC arising out of the transfer of payment under Clause 14.2 of the Contract Agreement to the consortium's members, remained in consortium books. The refund of the same was precluded since the proviso to Section 54(3) would stipulate refund only in two circumstances, i.e. zero-rated supplies and inverted duty structure. It is submitted that from the Government's standpoint this results in excess collection of GST as can be illustratively seen from the following table:-

S.No	Particulars	Amount (Rs.Crores)
1	AMOUNT TO BE RECEIVED as GST @ 12% by govt. on contract value of Rs.1,000 crores.	120
2	AMOUNT RECEIVED BY THE GOVT. AS GST: From the Consortium members=Rs.120 crores From Consortium as per sl. No.7 in the table = Rs.12 crores.	132

This being the petitioner's challenge in prayer clause (d).

50. On the petitioner's challenge to the constitutional validity of the provisions of Section 7 in prayer clause (a), it is submitted that Article 246A of the Constitution provides for levy of "goods and services tax" which is defined in Article 366(12A) of the Constitution to mean "tax on supply of

goods or services or both". It is submitted that the plain reading of Article 246A read with Article 336(12A) would show that GST can be levied only on supply of goods and not on 'future supplies', as contemplated by Sections 7, 12 and 13 of the CGST Act. The latter two provisions fix the time of supply as earlier of receipt, invoice or actual supply. It is thus submitted that Section 7 defines supply to include "supplies to be made" is ultra vires the provisions of Article 246 read with Article 366(12A) and Article 265 of the Constitution.

51. In such context, it is further submitted that the CGST Act tacitly recognizes that supply ought to have been made for GST to be levied, and hence, the legal fiction in the "Explanation" below Section 13(2) that supply is deemed to have been received to the extent of payment, would create an anomalous situation, for the reason that any legal fiction to enlarge the subject matter of taxation, can be made only by a Constitutional amendment as was done with the 46th Constitutional Amendment in the matter of sale tax by inserting Article 366(29A). In supporting the proposition, reliance is placed on the decision of the Supreme Court in **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.**[1].

52. It is next submitted that none of the taxation entries in the Constitution for example Entry 82 (taxes on income), Entry 83 (duties of

1 AIR 1958 SC 560

customs) of List I, or Entry 54 (taxes on sale) of List II contemplate taxation of an event yet to take place. In such context, reliance is placed on the decision of the Supreme Court in **K. L. Johar And Company vs Deputy Commercial Tax Officer**[2] wherein in regard to the hire purchase contracts, it was held that tax can only be levied when the option is exercised, merely because in most cases option is exercised, tax cannot be levied immediately on the making of the hire purchase agreement. Also, reliance is placed on the decision of the Supreme Court in **The Sales Tax Officer, Pilibhit vs Messrs. Budh Prakash Jai Prakash**[3] and the decision in **Veer Service Station vs. GNCT of Delhi & Ors.**[4] It is submitted that similar position can be seen concerning the provisions of the income tax from the decisions in **Commissioner Of Income Tax vs Coral Electronics (P) Ltd.**[5]; **GKW Ltd. vs. Commissioner of Income Tax, WB-IV**[6]; **Commissioner of Income Tax-X vs. Smt.Paramjeet Luthra**[7], as also under the Customs Act in relation to the customs duty, as seen from the decision in **United News of India vs. Union of India**[8]; **Garden Silk Mills Ltd. vs. Union of India**[9].

2 AIR 1965 SC 1082
3 AIR 1954 SC 459
4 2015 SCC OnLine Del 10812 (DB)
5 2003 SCC OnLine Mad 970 (DB)
6 2011 SCC OnLine Cal 2059 (DB)
7 2014 SCC OnLine Del 4767 (DB)
8 2004(168) E.L.T. 442 (Del.)
9 1999(113) E.L.T. 358 (S.C.)

53. It is next submitted that levy of GST on payments received upfront with reference to service is also discriminatory, since notification No.66 of 2017-CT dated 15 November 2017 exempts such advance receipts with respect to the goods from GST. It is submitted that there is no rational differentiation between advances for supply of goods and supply of services, as GST is levied on both. It is submitted that all the statutory provisions towards supply of goods and supply of services are treated at par throughout the Act and the Rules made thereunder. Thus, granting of exemption only for supply of goods with reference to Section 12(2)(b) and denying the same for services under Section 13(2)(b) is violative of Article 14 of the Constitution of India. It is hence submitted that as the levy of tax on "supply to be made" is unconstitutional, the petitioner is consequently entitled to refund of the amounts paid.

54. Insofar as prayer clause (c) is concerned, namely substantive denial of benefit of 'input tax credit' (ITC), it is submitted that Section 13(2)(b) read with the 'Explanation' thereto creates a legal fiction whereby supply is deemed to have been made on the date of receipt of payment. Thus, the liability to pay the tax arises simultaneously at the time of payment. It is submitted that, however, Section 16(2)(b) provides that ITC cannot be claimed unless supply is received. It is submitted that this is plainly arbitrary and creates a serious hardship because the supplier is unable to utilize the

ITC towards any output tax that he may be liable, for such reason Article 300A would stand breached in such situation. This would also go against the professed purpose of GST, as well as the formal Statement of Objects and Reasons (S.O.R.) attached to the CGST Bill which provides the object of CGST legislation to be "*to broad base the input tax credit* by making it available for taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business."

55. It is next submitted that the restriction in Section 16(2)(b) is plainly against the Statement of Objects and Reasons of the enactment which also mentions that the GST regime was intended to effect "*seamless transfer of input tax credit from one stage to another in the chain of value addition*."

56. It is submitted that in recognizing this hardship and anomaly, Notification No.66/2017-CT dt. 15 November 2017 was issued granting an exemption for the advances made 'for supply of goods' *inter alia* providing that no GST is required to be paid while making advances for the purchase of goods/ supply of goods. Such exemption was granted even though Section 12(2)(b), like Section 13(2)(b), also stipulates that the date of any advance payment is the time of supply (of goods). Hence, the lack of such exemption leading to roadblocks in the availability of input tax credit in regard to services, is discriminatory.

57. It is next submitted that the petitioner in the alternative has sought declaration to the effect that the legal fiction created by the Explanation to Section 13(2)(b) being deeming service to have been provided to the extent of advance payment, applies to Section 16(2)(b), thereby enabling the taking of ITC concurrently with the payment of tax, which would be for the following reasons:

i. Section 13 can have no standalone purpose. The legal fiction in such provision, though ostensibly restricted to that section, would consequentially extend to other provisions which command / injunct actions related to the concept as defined.

ii. The object of Section 16(2)(b) is to curtail fraudulent taking of ITC, in the absence of goods/services and not to deny ITC where payment has actually been made for a service and the tax thereon too has been remitted.

iii. It is unlikely that in the event of the challenge in prayer clause (a), if not answered in favour of the petitioner, this would mean that Section 7(1)(a) can levy GST on "supplies agreed to be made". This would, in turn, mean that tax could be levied simply upon an agreement with consideration, even without the actual receipt of such consideration. Thus, there is no necessity for a legal fiction to provide

that the supply is deemed to be made to the extent of receipt. In other words, the only purpose / aim of such a fiction would be to facilitate the taking of ITC by stipulating the fulfillment of Section 16(2)(b) through the fiction.

58. Insofar as the challenge raised in prayer clause (c) is concerned, it is submitted that there cannot be a procedural denial of ITC. In such context, the submission is that even proceeding on the basis that ITC of the GST remitted on advance payments for services is available, it is submitted that the receipt voucher which is the document required by Section 31(3)(d) in respect of an advance, has not been specified under Rule 36 of the CGST Rules as a document based on which ITC can be taken. It is submitted that Rules cannot take away what a Statute provides. It is also settled that tax credit cannot be denied because a document other than a prescribed document forms the basis of a claim so long as the claim is genuine. This proposition is supported by referring to the decision in **Commissioner of Central Excise, Goa Vs. Essel Propack Ltd.**[10]. It is for such reason and to dispel such cloud, a declaration is sought to the effect that ITC may be taken on the basis of a receipt voucher.

59. In regard to the challenge of the petitioner in prayer clause (d) about the denial of refund of unutilised ITC, it is submitted that this challenge

10 2015(39) S.T.R. 363 (Bom.)

arises only in the unlikely event of the earlier challenges, as raised by the petitioner, failing. It is submitted that after levying tax on supply agreed to be made contrary to the Constitution, and after denying ITC (even though tax is paid) until service is actually received, the denial of which leads to accumulation of unutilised ITC, the proviso to Section 54(3) excludes refund of such unutilised ITC. This results in the Government collecting tax twice over, as explained in the table as noted above, which would be violative of Article 265 of the Constitution. It is submitted that such denial of ITC would only have the effect of increase in costs, especially of such large infrastructure projects. This again runs counter to the Statement of Object and Reasons of the CGST Bill, which mentions the object of the GST regime to be "reduction in the cost of production and inflation in the economy." It is next submitted that the denial of refund of such accumulated ITC is arbitrary and unreasonable as it imposes an unreasonable restriction on the right to trade, and deprives the supplier of his property, and thus, it is violative of Article 14, 19(1)(g) and 300A of the Constitution.

E. Submissions on behalf of GST Council-Respondent No.3 :-

60. Ms. Cardozo, learned Counsel for respondent No.3 has made the following submissions:

61. It is submitted that Section 7 of the CGST Act which defines the 'scope of supply' provides that the expression "supply" includes all forms of supply. The provision is intended to plug the gaps. In the context of the submissions made on behalf of the petitioner, Ms. Cardozo has relied on the provisions of Section 13 of the CGST Act which provides for the 'time of supply of services', and more particularly to the "Explanation' thereof which provides that for the purposes of clauses (a) and (b) of sub-section (2), the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment; and the other clauses of the explanation, which according to her, would justify the tax being required to be deposited in case, when the payments were made by the MMRDA to the petitioner- consortium, however, the benefit of deposit of such tax would not be to the benefit of the petitioner, to claim ITC, considering the provisions of section 16(2)(b). In supporting such contention, reliance is placed on the reply affidavits filed on behalf of respondent No.3.

62. Ms. Cardozo would next submit that the writ petition be held to be not maintainable as the same has been filed by the petitioner without fully exhausting the alternate remedy of an appeal as availed by the petitioner which is pending adjudication. It is hence submitted that on such count the petition needs to be dismissed. Ms. Cardozo in support of her submission has placed reliance on the decision of the Supreme Court in **Union of India**

vs. V.K.C. Footsteps India Private Ltd.[11] Ms.Cardozo submits that Supreme Court in paragraph 110 of this decision has observed that refund of unutilised ITC is available only in case of inverted tax structure and in cases of zero rated supplies and there is no constitutional entitlement to refund. It is, therefore, her contention that the petitioner is not eligible for refund as per the decision of the Supreme Court.

63. Ms. Cardozo, relying on the written submissions filed on behalf of GST Council, would not dispute that the Receipt Voucher needs to be recognized as an invoice and it would be a document on which ITC can be claimed. However, she would submit that the petitioner ought not to be granted any relief on ITC for the reason that the claim of the petitioner for refund of the GST has been rejected. She would submit that in fact, such prayer in the petition ought not to be entertained and the petitioner ought to have independently applied for availing of the ITC. Ms. Cardozo in fact, has an objection in the petitioner raising a contention that the Receipt Voucher was not recognized as a tax paying document for the petitioner not being permitted to avail the ITC. According to her, this is an inappropriate and false case as pleaded by the petitioner. It is also her contention that the right to refund is not a constitutional right but subject to compliance of the statutory provision.

11 (2022) 2 SCC 603

64. It is Ms. Cardozo's submission that on the applicability of Section 13 which defines time of supply of services, it is beyond doubt that such section deems the time of receipt of payment as the time for supply of services and, therefore, levy is justified. It is submitted that on a conjoint and harmonious reading of Section 16(2), 13(2), 2(66), 31(3)(d), Rule 36 and Rule 50, when read harmoniously, would clearly demonstrate that the provisions impugned in the present proceedings are constitutional and does not suffer from arbitrariness and unjustness.

65. Ms. Cardozo submits that the receipt of the mobilization advances itself goes on to show that the work for which the payment is received has already began and, therefore, it cannot be said that the levy is on future supplies of services. It is only the time itself between the receipt of advances and services to be rendered and more so in case of execution of project work like that of the petitioner and, therefore, there cannot be a challenge to the vires on these grounds.

66. Ms.Cardozo has also made a submission on the contention of the petitioner that advance payment is treated as an interest free loan. However, the petitioner has submitted that this issue will be raised by them in the statutory appeal and, therefore, is not pressed for in the present proceedings.

F. Submissions on behalf of Respondent No.1 :-

67. Mr. D. P. Singh, learned counsel for respondent no.1 has adopted the submissions as made by Ms. Cardozo on behalf of the GST Council.

G. Submissions on behalf of Respondent No.2 :-

68. Mr. Sonpal, learned Special Counsel for respondent Nos.2 – State Authorities has made the following submissions:

69. At the outset, it is submitted that the petitioner has applied for refund of unutilized ITC which was rejected and an appeal against the rejection order is pending, however, the petitioner, in these circumstances, has challenged the vires of the provisions of the CGST Act and the Rules, which, according to the petitioner, is outside the scope of the appeals which are pending, hence, such challenge can be raised by the petitioner after the pending appeals are decided. It is contended that at the material point of time, it could be assumed that ITC was not available to be utilized for the reason that the services were not provided or received, but on a later date, when the services were provided, such ITC was available and it can be safely presumed that ITC was not available at the time of receiving payment, however, in due course of time when service was provided, ITC is utilized full against the outward supply of services.

70. Mr. Sonpal submits that the Receipt Voucher (RV) is not a document specified under Rule 36 of the CGST Rules and, therefore, the petitioner cannot claim ITC under Section 16(2)(a). Thus, the receipt voucher cannot be treated as an invoice under Section 31(2) nor it is the case of the petitioner that the same is treated as an invoice and hence the petitioner was not eligible to claim ITC. On the refund of unutilized ITC, it is submitted that under Section 54 read with Rule 89, refund of unutilised ITC can be claimed only in case of zero rated supply of export or on account of inverted duty structure and as the petitioner does not fall in any one of them, the question of granting refund to the petitioner does not arise. It is next submitted that as per Section 13(2)(a), liability to pay tax on services shall arise at the time of supply i.e. on the date of issue of invoice or on the date of receipt of payment, whichever is earlier, or the date of providing service. It is submitted that since in the instant case, "the payment is received in advance", the petitioner was liable to pay GST under Section 13. It is submitted that as and when the services are rendered by the petitioner, ITC would be available against outward supply of services.

71. It is submitted that on account of faulty accounting methods adopted by the petitioner, the petitioner is not eligible to get credit or seek refund, hence, the petitioner cannot cover up its lapses by challenging the statutory provisions.

72. It is next submitted that it was apparent that receipt of money from MMRDA by the consortium and the consequent payment to the members of the consortium namely to L&T suffers from faulty account practices, inasmuch as, it was apparent that the payment of such amounts to L&T was not recorded as outward supply by L&T and credit register would be available to enable it to avail of the unutilised ITC. In such context, a reference is made to Rule 49(4) (before amended with effect from 10 November 2020). It is submitted that the petitioner has suffered from its own short falls, as there is no clock back, hence, ITC cannot be availed after filing returns from September of next financial year. Referring to the decision in **R. K. Garg vs. Union of India**[12], it is submitted that it is settled law that in a fiscal Statute, a larger latitude is given to the Government to frame the enactment. In support of his submission, reliance is placed on the decision of the Supreme Court in **State Of M.P vs. Rakesh Kohli & Anr.**[13].

H. Rejoinder Submission on behalf of the petitioner :-

73. Section 54(3) deals with ITC whereas the petitioner is challenging the vires and refund of output tax liability and, therefore, the decision in case of ***Union of India vs. VKC Footsteps India Private Limited*** [14] is not applicable.

12 (1981) 4 SCC 675
13 AIR 2012 SC 2351
14 2021 (52) GSTL 513 (SC)

74. As merely because Article 366 (12A) excludes alcoholic liquor, it cannot be contended that the respondents can levy tax on future supplies also. Section 13(2) deems to have been rendered in case of advance receipt but the same is contrary to Article 366(12A) which speaks only on supply of goods and not on future supplies. The definition sought to be made between the goods and services by the respondents is contrary to the object of the Constitution (101st Amendment) Act which "provides for a common national market for goods and services" based on logo "One Nation One Tax". There cannot be intelligible distinction between the goods and services and why the services are not exempted when the goods are exempted qua advance receipt.

75. We have heard learned counsel for the parties and with their assistance, we have perused the record. We now proceed to discuss the issues which fall for our consideration in the present proceedings, so as to arrive at an appropriate conclusion .

I. Discussion and Conclusion:-

76. At the outset, the facts, which are not in dispute, are required to be noted. The petitioner is an unincorporated consortium of its two constituents, L&T and IHI. It participated in the bids invited by the MMRDA for the construction of the "Mumbai Trans Harbour Link Project

(MTHL)". On 17 November 2017, a letter of acceptance of its bid was issued by the MMRDA, to the petitioner. After a Consortium Agreement dated 22 December 2017 was entered between the petitioner and its constituents (L&T & EHI), a "Contract Agreement" was entered between the MMRDA and the petitioner on 26 December 2017. The petitioner also obtained reregistration as per the GST laws.

77. Under clause 14.2 of the contract agreement, the parties (the MMRDA and the petitioner) agreed for an "advance payment". Such payment as noted in the foregoing paragraphs was made by the MMRDA to the petitioner in two tranches. Thus, MMRDA remitted two tranches of advance amounts to the petitioner which also included the GST component under both the GST Acts. The parties acting under clause 14.2 of the Contract Agreement, is the genesis of the disputes on GST, which is the subject matter of the present proceedings. The question being, whether the advance amounts as received by the petitioner from the MMRDA would be reckoned towards "supply" falling within the purview of the GST laws, so as to enable the petitioner to claim the benefit of such tax paid on the advance amounts. It would thus be imperative to note Clauses 14.2 and 14.3 of the Contract Agreement, which read thus:-

"14.2 Advance Payment

The Employer shall make an advance payment as an interest-free loan for mobilization and design, when the Contractor submits a guarantee in accordance with this Sub-Clause. The total advance payment, the number and liming of installments (if more than one), and the applicable currencies and proportions, shall be as stated in the Contract Data.

Unless and until the Employer receives this guarantee, or if the total advance payment is not stated in the Contract Data, this Sub-Clause shall not apply.

The Engineer shall deliver to the Employer and to the Contractor an Interim Payment Certificate for the first installment after receiving a Statement (under Sub-Clause 14.3 [Application for Interim Payment Certificates] and after the Employer receives (i) the Performance Security in accordance with Sub-Clause 4.2 [Performance Security] (ii) a guarantee in amounts and currencies equal to the advance payment. This guarantee shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be in the form annexed to the Contract Data or in another form approved by the Employer.

The Contractor shall ensure that the guarantee is valid and enforceable until the advance payment has been repaid, but its amount may be progressively reduced by the amount repaid by the Contractor as indicated in the Payment Certificates. If the terms of the guarantee specify its expiry date, and the advance payment has not been repaid by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the guarantee until the advance payment has been repaid.

Unless stated otherwise in the Contract Data, the advance payment shall be repaid through percentage deductions from the interim payments determined by the Engineer in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates] as follows:

(a) deductions shall commence in the next Interim Payment Certificate following that in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds 30 per cent (30%) of the Accepted Contract Amount less Provisional Sums; and

(b) deductions shall be made at the amortisation rate stated in the Contract Data of the amount of each Interim Payment Certificate (excluding the advance payment and deductions for its repayments as well as deductions for retention money) in the currencies and proportions of the advance payment until such time as the advance payment has been repaid; provided that the advance payment shall be completely repaid prior to the time when 90 per cent (90%) of the Accepted Contract Amount less Provisional Sums has been certified for payment.

If the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure] (as the case may be), the whole of the balance then outstanding shall immediately become due and in case of termination under Clause 15 [Termination by Employer] and Sub-Clause 19.6 [Optional Termination, Payment and Release], payable by the Contractor to the Employer".

14.3 Application for Interim Payment Certificates.

The Contractor shall submit a Statement in six copies to the Engineer after the end of the period of payment stated in the Contract (If not slated, after the end of each month). In a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the relevant report on progress in accordance with Sub-Clause 4.21 [Progress Reports).

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:

(a) the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but excluding items described in sub-paragraphs (b) to (g) below);

(b) any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 (Adjustments for Changes in Legislation) and Sub-Clause 13.8 (Adjustments for Charges in Cost);

(c) any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Contract Data to the total of the above amounts, until the amount so

retained by the Employer reaches the limit of Retention Money (if any) stated in the Contract Data;

(d) any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [Advance Payment];

(e) any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [Plant and Materials intended for the Works]."

(emphasis supplied)

78. On a bare reading of clause 14.2 of the contract agreement (supra), it is quite clear that the parties agreed that the employer (MMRDA) shall make an advance payment which would be an interest free loan, which could be so treated by the parties, by acting in the specified manner, as clauses 14.2 and 14.3 would require. Such advance payment was to be utilized for mobilization and design, being the project works, *inter alia* on the conditions as agreed between the parties. In our opinion, a reading of Clause 14.2 of the contract agreement cannot be read to mean to be a clause simplicitor providing for loan and its mere repayment, for the reason that the clause makes an allowance, for adjustment of the advance amounts, that become payable to the petitioner under the contract, under such clause. This is quite explicit form the plain reading of these clauses. It also appears that considering such nature of the clause, the petitioner accepted advances under the said clause, as mobilization advances. Also, the parties have agreed under these clauses that the Engineer shall deliver to the employer-MMRDA, and to the petitioner an Interim Payment Certificate for the first

installment, after receiving a statement under clause 14.3 [i.e. an application for interim payment certificate].

79. Thus, clauses 14.2 (advance payment) and 14.3 (application for interim payment certificates) of the contract agreement, would *inter alia* evidence two significant aspects, firstly that the MMRDA could make an advance payment which could be treated as an interest-free loan, for mobilization and design. Secondly, such advance payment would stand adjusted /progressively reduced, by the amounts the contractor/petitioner becomes entitled to be paid by the employer (MMRDA), for the works undertaken, as indicated in the Payment Certificates to be issued by the Engineer. The advance payment would accordingly stand repaid through percentage deductions, from the interim payments determined by the Engineer in accordance with sub-clause 14.6 [Issue of Interim Payment Certificates] as provided for in sub-clauses (a) and (b) of clause 14.2. Such adjustment as agreed between the parties permitted an application for Interim Payment Certificates and a statement to that effect to be submitted by the petitioner to the MMRDA. This statement *inter alia* includes "any amounts to be added and deducted for the advance payment and repayments in accordance with sub-clause 14.2 (advance payment)".

80. Thus, although under clauses 14.2 the nature of the payment is an advance payment and in a given situation could be treated as an interest free loan for mobilization and design, however, merely because clause 14.2 labels such advance payment as interest free loan, whether in the present facts and more particularly considering the manner in which the parties acted upon under the said clause, the factual scenario whether would regard the nature and character of such payment did not attract payment of GST. Such aspect needs to be examined. This more particularly for two fold reasons, firstly that clause 14.2 read with clause 14.3 indicates that the advance payment does not simplicitor remain to be "an interest free loan" as the advance payment is permitted to be proportionately deducted, as it forms part of the contract amount which becomes payable by MMRDA (employer) to the contractor (petitioner). Also clause 14.2 does not bring about a consequence that advance payment would continue to remain as a loan to be repaid by the petitioner from whatever resources and hence such loan does not have any relation with the performance of the contract. This apart, the advance payment as specifically agreed between the parties under clause 14.2 is for the purpose of mobilization and design, hence, even on such count necessarily it is integral to the contractor (petitioner) and its constituents, discharging their obligations under the contract.

81. Having examined the nature and working of the advance payment arrangement as contemplated under the said clauses of the contract agreement, we examine as to how the parties understood and acted upon the advance payment falling under these clauses 14.2 and 14.3 of the contract agreement. It is not in dispute that for execution of the project work, purchase orders dated 23 March 2018 back-to-back with the Contract Agreement, were issued by the petitioner to its member, i.e. L & T. Reciprocally the constituent of the petitioner would raise bills on the petitioner for the portion of the work executed by it each month. In turn, the petitioner would raise a single consolidated invoice on the employer (MMRDA). On availing of these advances, the petitioner issued "advance receipt vouchers" to the MMRDA for both the first and second installment of the mobilization advance received by it. Such 'advance receipt vouchers' as issued/ executed by the petitioner in favour of the MMRDA, indicated several details *inter alia* the total amount of advance claimed before tax and the GST amounts payable on such advance and the total invoice value. On receipt of the advances the petitioner back to back remitted the amounts to its constituent L&T along with the GST, for which L & T issued to the petitioner a "Receipt Voucher" in favour of the petitioner. Illustratively, the "Advance Receipt Voucher' (page 69 of the paper-book) insofar as the first tranche is concerned, is extracted hereunder, which clearly indicates that

such advance was demanded as "mobilization advance" which can also in the nature of an interim payment. Moreover, the petitioner itself claimed remittance of the GST amounts, on such mobilization advance, as claimed by it :-

<table>
<tr><th colspan="8">Advance Receipt Voucher (In All currencies)</th></tr>
<tr><td>Reference No:</td><td colspan="2">L&T-IHI/MTHL-PKG-01/MAPC-001</td><td>Contract No:</td><td colspan="4">MMRDA/ENG1/000752 dated 26th Dec 2017</td></tr>
<tr><td>Adv. Receipt No:</td><td colspan="2">001</td><td>Project ID No:</td><td colspan="4">ID-P 255</td></tr>
<tr><td>Date:</td><td colspan="2">6/Mar/2018</td><td>IICA Concurrence No:</td><td colspan="4">A. ID-P 255/C – 002 for INR and JPY Portion
B. ID-P 255/C 006 for USD Portion
C. ID-P 255/C 005 for EURO Portion</td></tr>
<tr><td colspan="3">Detail of Employer:</td><td colspan="5">Detail of Contractor</td></tr>
<tr><td>INTERIM PAYMENT</td><td colspan="2">Mumbai Metropolitan Region Development Authority (MMRDA)</td><td>Name:</td><td colspan="4">L&T -IHI Consortium</td></tr>
<tr><td>PAN:</td><td colspan="2">AAATM7106R</td><td>PAN:</td><td colspan="4">AABAL5822F</td></tr>
<tr><td>TAN:</td><td colspan="2">MUMM16747D</td><td>TAN:</td><td colspan="4">MUML10837B</td></tr>
<tr><td>GSTIN:</td><td colspan="2">Mobilization advance Payment Certificate Top Sheet</td><td>GSTIN:</td><td colspan="4">27AABAL5822F1ZS</td></tr>
<tr><td>Address:</td><td colspan="2">2nd Floor, New Office Building, Plot No. R-05, R-06 & R-12, E – Block, Bandra Kurla Complex, Bandra (E), Bandra, Mumbai, Maharashtra, India 400051.</td><td rowspan="2">Local Address:</td><td colspan="4" rowspan="2">L&T – IHI Consortium C/o Larsen & Toubro Limited, Landmark 'A' wing 5th Floor, Suren Road, Andheri East, Mumbai:-400093</td></tr>
<tr><td colspan="2">Detail of Engineer:</td></tr>
<tr><td>Name:</td><td colspan="2">Dr. S H Robin Sham, CBE M/s. AECOM Asia Company Ltd., PADECO Co. Ltd – Al-Handasah Consultants -TY Lin International Consortium</td><td rowspan="2">Regd. Address:</td><td colspan="4" rowspan="2">L&T – IHI Consortium, Nuclear and Special Bridges Business Unit, L&T Construction, C/o Larsen & Toubro Limited, Mount Moonamalee Road, Manapakkam, P. B. N. 979, Chennai-600089, Tamil Nadu, India.</td></tr>
<tr><td>Address:</td><td colspan="2">6th Floor, 'A' Wing, MMRDA Old Building, Bandra-Kurla Complex, Bandra (E), Mumbai 400 051, India.</td></tr>
<tr><td>S. No.</td><td>Description</td><td>SAC Code</td><td>INR</td><td>USD</td><td>JPY</td><td>EURO</td></tr>
<tr><td>1</td><td>First Installment of Mobilization Advance (5% of Accepted Contract Amount) in all applicable</td><td>9954</td><td>Rs.2,237,281,644</td><td>$ 6,646,392</td><td>¥ -</td><td>£ -</td></tr>
</table>

	Currencies and proportions less GST Component					
A	Total Amount Before Tax (A)		Rs.2,237,281,644	$ 6,646,392	¥ -	£ -
(B)	Exchange Rate		Rs. 1.0000	Rs. 64.8660		
A	Total Amount Before Tax (AXB)		Rs.2,237,281,644.07	Rs.431,124,887,66		
	CGST @ 6%		Rs.134,236,899	Rs.25,867,493	¥ -	£ -
	SGST @ 6%		Rs.134,236,899	Rs.25,867,493	¥ -	£ -
	Total GST Amount		Rs.268,473,797	Rs.51,734,987	¥ -	£ -
	Total Invoice Value (in Figure)		Rs.2,505,755,441	Rs.482,859,874	¥ -	£ -
Total Invoice Value (in words)			Rupees Two Hundred Fifty Crore Fifty Seven Lakh Fifty Five Thousand Four Hundred Forty One Only	Rupees Fourty Eight Crores Twenty Eight Lakh Fifty Nine Thousand Eight Hundred and Seventy Four Only		
Signature of Authorized Representative of the Contractor Name: Dr. Na, Yung Mook Designation: Project Manager MTHL - Pkg-01						

(emphasis supplied)

82. Similar document (advance receipt voucher) was issued by the petitioner to the MMRDA qua the second tranche of advance payments. On receiving the first installment of advance payment, the petitioner remitted such advance to its constituent L&T together with the GST of Rs.32.02 Crores. L&T in turn issued to the petitioner a 'Receipt Voucher' dated 28 March 2018 certifying the receipt of the advance amounts as also detailing the CGST and MGST amounts at 6%. The "Receipt Voucher" reads thus:-

"

Receipt Voucher

ORIGINAL FOR RECIPIENT DUPLICATE FOR TRANSPORTER TRIPLICATE FOR SUPPLIER

PRINCIPAL PLACE OF BUSINESS : L&T House, Mumbai, Mumbai City, Mumbai – 400001, Maharashtra, India
SUPPLIER'S ADDRESS :, MTHL package – 1 Project office ,,, Mumbai – 400015, Maharashtra, India

INVOICE TO L&T-IHI CONSORTIUM 5 FLOOR, A WING, LANDMARK BUILDING, ANDHERI EAST, MUMBAI MUMBAI – 400093 MAHARASHTRA, INDIA		CONSIGNEE NAME & ADDRESS L&T-IHI CONSORTIUM 305 & 306 – 3rd Floor, B Wing, Nava Bharat Estate, PD Mello Road, Oppo. Sewri Railway Station, Sewri West, Mumbai-400015 Maharashtra, India		**INVOICE NO:** LEMHLE18RV000085 **DATE:** 29-Sep-2018 **CUSTOMER ORDER/LOA No :** MTHL-PKG-01/MMRDA/L&T/001 **CUSTOMER ORDER/LOA DATE:** 22-Dec-2017	
PLACE OF SUPPLY : Maharashtra / 27 Maharashtra		**PLACE OF DELIVERY :** Maharashtra / 27		IC REFERENCE	Doc Ref No
		GST Reg No.	27AABAL5822F1ZS	Heavy Civil Infrastructure IC	00/AM/000003
GST Reg No.	CLIENT CODE	SOURCE STATE	JOB CODE	JOB ORDR NO./DATE	
27AABAL5822F1ZS	LO01245	Maharashtra	LE171107 – Nuclear & Special Bridges	LE171107/00001/22-dEC-2017	
HNS/SAC	BOQ	UMO	Quantity	Rate	Amount
	AM – Progress	LS	1.0000	2237281644.0000	2237281644.00
Total Basic Amount					2237281644.00
Total Taxable Amount					2237281644.00
CGST – 6.00% - Maharashtra				13,42,36,898.64	
SGST – 6.00% - Maharashtra				13,42,36,898.64	268473797.28
Grant Total					2505755441.28
Less: Deductions					
00012548-PROGRESS BILLS-RETENTION DUE				0.00	
IT-INCOME TAX				0.00	
Total Deduction					
Net Amount Payable					0.00
					2505755441.28
(Indian rupee Two Hundred and Fifty Crore, Fifty-Seven Lakh, Fifty - Five Thousand, Fourt Hundred and Forty-One and Twenty-Eight Paise Only)					
We Hereby Certify That our Registration Certificate Under The GST Act Is In Force On The Date On Which The Supply Of The Goods / Service Specified In this tax Invoice Is Made By Us And That The Transaction of supply Covered by this Bill Has been effecgted by us In The Regular Course of Our Business, and appropriate GST Will Be Remitted by us to the exchaquar **If Any Exemption/Reducgtion Of Tax Under The GST Act Is Claimed By You. Valid Declaration Must Be Received By Us Within 15 Days, Falling Which No Adjustment Will Be Possible. If The Above Sale Is Assessed To Tax At A Higher Rate, The Extra Amount Is Payable By You.**				Interest @ 2% P.a. Over And Above SBI Prime Lending Rate is Applicable For Delayed * I – Inclusive Of Contract Value	
Our GST Reg. No. : 27AAACL0140P5ZF		Intra State CGST 6.00%		E. & O. E For Larsen & Toubro	

			SGST 6.00%		Limited, Construction Authorised Signatory

(emphasis supplied)

83. Subsequently, in September 2018, the second tranche of the advance together with the levy of GST of Rs.32.62 Crores, was received from the MMRDA. The GST amount was accounted and remitted to the GST Department by the petitioner. On receipt of the second advance payment, the amounts, back to back were remitted by the petitioner to its constituent L&T, who issued a Receipt voucher to the petitioner similar to the one as noted hereinabove.

84. From the reading of the 'advance receipt voucher' dated 06 March 2018 (supra) as also a similar advance receipt voucher from the second tranche issued by the petitioner, it is clear that what was sought by the petitioner from the MMRDA under clause 14.2, was a mobilization advance which necessarily formed part of the contract consideration. For this reason, merely because clause 14.2 *inter alia* refers to such amount, to be an interest free loan, it appears that the petitioner neither demanded the advance as an interest free loan nor treated the same to be an interest free loan, when it remitted the amounts along with the GST, to its constituent and having clearly availed such amounts as a mobilization advance to be adjusted in the

payments which were to become due and payable to the petitioner, as the contractual work would progress.

85. Accordingly, the petitioner having received the GST amounts from the MMRDA qua both the advances that too voluntarily, and having deposited the GST amounts with the Government, in our opinion, the petitioner has now intended to take a different position that both these advances be treated purely as a loan. Necessarily, considering the mandatory provisions of Section 76 of the GST Acts, the petitioner could not have "not" deposited the GST amounts received by it from the MMRDA, with the government.

86. On the aforesaid conspectus, as to how the provisions of the GST laws would consider such amounts being paid to the petitioner by the MMRDA under the contract, qua the petitioner's liability to pay the GST amounts, needs to be considered. In examining this issue, some of the provisions of the GST Act are required to be noted, which read thus:-

> **2. Definitions. - In this Act, unless the context otherwise requires, -**
>
> (31) **"consideration"** in relation to the supply of goods or services or both includes-
>
> (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

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

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

(59) **"input"** means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

(60) "**input service**" means any service used or intended to be used by a supplier in the course or furtherance of business;

(62) "**input tax in relation to a registered person**," means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy;

(63) "**input tax credit**" means the credit of input tax;

(66) "**invoice or tax invoice**" means the tax invoice referred to in section 31;

(82) "**output tax**" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;

(83) "**outward supply**" in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;

(84) "**person**" includes--

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a firm;

(e) a Limited Liability Partnership;

(f) **an association of persons or a body of individuals, whether incorporated or not, in India or outside India**;

(g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);

(h) any body corporate incorporated by or under the laws of a country outside India;

(i) a co-operative society registered under any law relating to co-operative societies;

(j) a local authority;

(k) Central Government or a State Government;

(l) society as defined under the Societies Registration Act, 1860 (21 of 1860);

(m) trust; and

(n) every artificial juridical person, not falling within any of the above;

(90) "**principal supply**" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

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

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

(b) where no consideration is payable for the supply of

goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

(102) "**services**" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

[*Explanation.* For the removal of doubts, it is hereby clarified that the expression services includes facilitating or arranging transactions in securities;]

[(102A) "**specified actionable claim**" means the actionable claim involved in or by way of—

(i) betting;

(ii) casinos;

(iii) gambling;

(iv) horse racing;

(v) lottery; or

(vi) online money gaming;]

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

[Provided that a person who organises or arranges, directly or indirectly, supply of specified actionable claims, including a person who owns, operates or manages digital or electronic platform for such supply, shall be deemed to be a supplier of such actionable claims, whether such actionable claims are supplied by him or through him and whether consideration in money or money's worth, including virtual digital assets, for supply of such actionable claims is paid or conveyed to him or through him or placed at his disposal in any manner, and all the provisions of this Act shall apply to such supplier of specified actionable claims, as if he is the supplier liable to pay the tax in relation to the supply of such actionable claims;]

> (108) "**taxable supply**" means a supply of goods or services or both which is leviable to tax under this Act;
>
> (118) "**voucher**" means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;
>
> (119) "**works contract**" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;"

87. Having noted the relevant definitions, we may observe that the definition of '*consideration*' which is in relation to the supply of goods or services or both, *inter alia* includes "*any payment made*" or "*to be made*", whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both and such payment shall not include any subsidy given by the Central Government or a State Government. Applying the definition of consideration to the advances as received by the petitioner, the payment received as an advance would partake the character of a 'consideration' in relation to the supply of services. This also bearing in mind that the advance payments as received by the petitioner, is in relation to a works contract as defined under section 2(119) of the CGST Act.

88. Further, the advance payment contractually received by the petitioner, having merged at a later point of time to form payment to be received by the petitioner-Consortium, is not in dispute. A technical plea, however, is sought to be raised on behalf of the petitioner, which is to the effect that on the first tranche of the advance payment being received by the petitioner from the MMRDA, the petitioner had discharged its obligation by remitting the output tax (in cash or ITC) to the government, however, at the relevant time, as there was no supply of services from its constituent, according to the petitioner, has resulted in a situation that although the petitioner deposited the GST with the government, Input Tax Credit (ITC) of such GST paid by the petitioner was not available to the petitioner, as actual service had not taken place. Alternatively, it is contended that as there was no supply being received, there was no question of "any tax" being levied/deposited on a deferred supply. It is hence urged that although the petitioner had deposited GST with the department, the petitioner had become entitled firstly for a refund on the ground that there was no supply and secondly, if not a refund, the petitioner was entitled for Input Tax Credit (ITC). The petitioner being denied the refund as also the ITC, it is the petitioner's case that the provisions of Sections 7, 12, 13, 16(2)(b) are ultra vires the Constitutional provisions and/or provisions of CGST / MGST Act, noted by us hereinabove.

89. We may observe that at the first blush, some of the petitioner's contentions on the vires of the assailed provisions, although sounded attractive, however, on a deeper scrutiny, the challenge to the vires of the provisions in the context in hand, apart from being misconceived, needs to fail. The following discussion would aid our conclusion.

90. Before we delve on the question of the challenge to the validity of these provisions, we refer to the principles of law which have guided the Courts in dealing with the questions when validity of the statutory provisions is in question. In **R. K. Garg Vs. Union of India & Ors.** (supra) the Supreme Court in the context of challenge to the legality of an economic legislation namely the validity of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981, has held that laws relating to economic activities need to be viewed with greater latitude and that the court should feel more inclined to give judicial deference to legislature's judgment in the field of economic regulation than in other areas where fundamental human rights are involved also referring to the observations of Frankfurter, J. in **Morey v. Dond** 354 US 457. In our opinion, such principles as applicable to economic legislation also would be relevant insofar as the tax legislation is concerned, wherein the wisdom of the legislature, in its anticipation, working and the implications brought out by the tax provision, is also required to be of paramount consideration, in

testing the constitutional validity of such legislation when tested on the well settled principles of law in that regard, which primarily are legislative competence, and the law being ultra vires the constitutional provisions or falling under the category of a legislation which is manifestly arbitrary.

91. The following observations of the Supreme Court in **R. K. Garg Vs. Union of India & Ors**. (supra), in our opinion, are apt in the context of the present proceedings:-

> "8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil 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 doctrine 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. Nowhere has this admonition been more felicitously expressed than in Morey v. Dond 354 US 457 where Frankfurter, J. said in his inimitable style:
>
> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.
>
> The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not

> relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

92. In **State of M. P. Vs. Rakesh Kohli & Anr.** (supra), the Court was considering the challenge whether the High Court was justified in declaring Clause (d) of Article 45 of Schedule 1-A of the Indian Stamp Act, 1899 which was brought in by the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 as unconstitutional being violative of Article 14 of the Constitution of India. In such context, the Supreme Court, not agreeing with the view taken by the High Court, held that the well defined limitation in the constitutional validity of the statute enacted by the Parliament or the

State Legislature has not been kept in mind by the High Court. In such context, the Supreme Court made the following observations:

> "13. In our opinion, the High Court was clearly in error in declaring Clause (d), Article 45 of Schedule 1-A of the 1899 Act which as brought in by the M.P. 2002 Act as violative of Article 14 of the Constitution of India. It is very difficult to approve the reasoning of the High Court that the provision may pass the test of classification but it would not pass the requirement of the second limb of Article 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality. The High Court failed to keep in mind the well defined limitations in consideration of the constitutional validity of a statute enacted by Parliament or a State Legislature. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.
>
> 14. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take away or abridge any of the fundamental rights enumerated in Part - Ill of the Constitution or any other constitutional provisions.
>
> 15. In Mcdowell and Co. while dealing with the challenge to an enactment based on Article 14, this Court stated in paragraph 43 (at pg. 737) of the Report as follows :
>
> > " ..... A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) C violation of any of the fundamental rights guaranteed in Part Ill of the Constitution or of any other constitutional provision. There is no third ground .... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is E found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional

infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom ..... "

(Emphasis supplied)

Then dealing with the decision of this Court in State of T.N. and others v. Ananthi Ammal and others (1995) 1 SCC 519, a three-Judge Bench in Mcdowell and Co. observed in paragraphs 43 and 44 [at pg. {39) of the Report as under :

" ..... Now, coming to the decision in Ananthi Ammal, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Articles 14, 19 and 300-A of the Constitution. On a review of the provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as Section 11 of the Act provided for payment of compensation in instalments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p. 526, para 7)

"7. When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions· have been held to be reasonable or have stood the test of lil'fle, only for the purpose of indicating what may be said to be reasonable in the context. We proceed to examine the_ provisions of the said Act upon this basis."

44. It is this paragraph which is strongly relied upon by Shri Nariman. We are, however, of the opinion that the observations in the said paragraph must be understood in the totality of the decision. The use of the word 'arbitrary' in para 7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provisions of the Land Acquisition Act and ultimately it was found that Section 11 H insofar as it provided for payment

> of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression 'arbitrary' was used in para 7." ·

20. ..... While dealing with the aspect as to how and when the power of the court to declare the statute unconstitutional can be exercised, this Court referred to the earlier decision of this Court in Rt. Rev. Msgr. Mark Netto v. State of Kerala and others (1979) 1 SCC 23 and held in para 46 (at pg. 740) of the Report as under:

> "46. 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 G different ways e.g. if a State Legislature makes a law which only 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 Rt. Rev. Msgr. Mark Netto v. State of Kerala SCC para 6: AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise."

Then in paras 56 and 57 (at pg. 744), the Court stated as follows:

> "56. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation 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 p. 274, para 52)
>
> > "52 .... The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence ....

> " 57. 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."

24. In Hamdard Dawakhana and another v. The Union of India and others, AIR 1960 SC 554, inter alia, while referring to the earlier two decisions, namely, Bengal Immunity Company Ltd. and Mahant Moti Das, AIR 1959 SC 942, it was observed in paragraph 8 (at pg. 559) of the Report as follows:

> "8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the C articles in Part Ill of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the D factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy."

27. A well-known principle that in the field of taxation, the Legislature enjoys a greater latitude for classification, has been noted by this Court in long line of cases. Some of these decisions are : M/s. Steelworth Limited v. State of Assam, 1961 Supp(2) SCR 589; Gopal Narain v. State of Uttar Pradesh and another., AIR 1964 SC 370; Ganga Sugar Corporation Limited v. State of Uttar Pradesh and others, (1980) 1 SCC 223; R.K. Garg v. Union of India and others, (1981) 4 SCC 675 and State of WB. and another v. E.I.TA. India Limited and others, (2003) 5 SCC 239.

28. In R.K. Garg, the Constitution Bench of this Court stated that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc.

29. 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 the 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."

93. Having considered the contours of law, the Courts would apply in testing the validity of the statutory provisions, we now refer to the relevant provisions of the GST Acts. Chapter III provides for "Levy and Collection of tax", Chapter IV, which pertains to "Time and Value of Supply". These are the relevant Chapters under which the provisions, as assailed by the petitioner, would fall. It is the petitioner's contention that on receipt of such advance payment, no liability had arisen to pay tax. Such contention needs to be considered by examining the relevant provisions in relation to "Scope of Supply" (Section 7), Levy and Collection (Section 9) as contained in Chapter III, and in relation to "Time of Supply of Services"- (Section 13), as contained in Chapter IV. These provisions are required to be noted which read thus:-

"CHAPTER III
LEVY AND COLLECTION OF TAX

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

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

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

Explanation – For the purpose of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the

time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions *inter se* shall be deemed to take place from one such person to another;]

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

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

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

(2) Notwithstanding anything contained in sub-section (1),--

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

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

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

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

This clause provides the scope of supply. This clause provides for activities to be treated as supply. This clause further provides that certain activities, specified in Schedule I of the proposed Act, even made or agreed to be made without a consideration shall be treated as supply. This clause also provides activities which are neither supply of goods nor supply of services. (*Notes on Clause*)."

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

(2) . .. … …. ….. …… …….

…..

…….

(emphasis supplied)

"CHAPTER IV

TIME AND VALUE OF SUPPLY

Section 12. Time of supply of goods. - (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance

with the provisions of this section.

(2) The time of supply of goods shall be the earlier of the following dates, namely:--

(a) the date of issue of invoice by the supplier or the last date on which he is required, under [* * *] section 31, to issue the invoice with respect to the supply; or

(b) the date on which the supplier receives the payment with respect to the supply:

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

Explanation 1.--For the purposes of clauses (a) and (b), "supply" shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2.--For the purposes of clause (b), "the date on which the supplier receives the payment" shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.

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

(a) the date of the receipt of goods; or

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

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

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

(4) In case of supply of vouchers by a supplier, the time of supply shall be--

(a) the date of issue of voucher, if the supply is identifiable at that point; or

(b) the date of redemption of voucher, in all other cases.

(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall--

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

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

(6) The time of supply to the extent it relates to an addition in the

value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

This clause provides for time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

Section 13. Time of supply of services. -

(1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of services shall be the earliest of the following dates, namely:--

(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(b) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation.--For the purposes of clauses (a) and (b)--

(i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(ii) "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

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

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

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

Provided that where it is not possible to determine the time

of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:

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

(4) In case of supply of vouchers by a supplier, the time of supply shall be--

(a) the date of issue of voucher, if the supply is identifiable at that point; or

(b) the date of redemption of voucher, in all other cases.

(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall--

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

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

(6) The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

This clause provides for time of supply of services. This clause extensively elaborates time of supply in normal situations, in reverse charge situations, in situations of supply of voucher and remainder situations. *(Notes on Clauses)*."

(emphasis supplied)

94. As noted above, the challenge of the petitioner is *inter alia* to the provisions of Section 7 of the GST Acts insofar as they apply to supplies "agreed to be made", being asserted to be ultra vires the provisions of Article 246A read with Article 366(12A) as also of Article 14, 19(1)(g), 265 and 300A of the Constitution of India. We extract the provisions of Articles 246A and Article 366(12A) of the Constitution hereunder:-

> "246A. Special provision with respect to goods and services tax
>
> (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
>
> *Explanation.*—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.
>
> 366. Definitions.
>
> In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—
>
> (12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption".

95. On a plain reading of Section 7, the expression "supply" includes *"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 (as defined under Section 2(31)) by a person in the course or furtherance of business. It is well settled that every word as contained in the provision as used by the legislature, is required to be given its due meaning, so as to gather the object and intention behind the provision as intended by the legislature. In the context of Section 7(1)(a), it is apparent that it *inter alia* includes "all forms of supply of goods or services or both", of the nature

as specified therein which are "made" or "agreed to be made" for a *"consideration"* by a person in the course or furtherance of business. In our opinion and quite significantly, the phrase "in the course or furtherance of business" in section 7(1)(a) would be required to be given its due and desired meaning. Also, relevance is required to be attributed to the difficult incidents of the transactions, the provision includes namely of "*sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration"*, so as to mean and constitute a supply under Section 7(1)(a) is necessarily required to be in the course or furtherance of business. Once the test in such form is satisfied in relation to the supply of goods or services, the levy of collection of tax under Chapter III and more particularly, Section 9 (charging section) would stand attracted. As to how the expression "*in the course or furtherance of business"* is legally understood and interpreted by the Courts can be discussed.

96. In **Commissioner of Gift Tax, Kerala Vs. P. Gheevarghese, Travancore Timbers and Products, Kottayam**[15] the Supreme Court dealing with the issue under the Gift Tax Act was considering the interpretation of the words "in the course of carrying on a business". The Court observed that the words "in the course of" were considered by the Court in **State of Travancore Cochin V. Shanmugha Vilas Cashew Nut Factory**[16] in the

15 AIR 1972 SC 23

16 AIR 1953 SC 333

context of the language employed in Article 286 of the Constitution, when the Court pointed out that the word "course" etymologically denotes movement from one point to another. It was held that the expression "in the course of" not only implies a period of time during which the movement is in progress but also postulates a connected relation. It was observed that the expression "in the course of carrying on of business etc." meant that the gift should have "some relationship" with the carrying on of the business to bring the gift within that provision and that it must further be established that there was some "integral connection" or relation between the making of the gift and the carrying on of the business. The relevant observations of the Supreme Court are required to be noted which read thus:

> "6. The words "in the course of" were considered by this Court in State of Travancore Cochin Vs. Shanmugha Vilas Cashew Nut Factory, 1954 SCR 53 (AIR 1953 SC 333) in connection with the language employed in Article 286 of the Constitution. It was pointed out that the word "course" etymologically denotes movement from one point to another and the expression "in the course of" not only implies a period of time during which the movement is in progress but also postulates a connected relation. There Clause 1 (b) of the Article was under consideration and what was exempted under the clause was the sale or purchase of the goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. The only assistance which can be derived in the present case is the emphasis on there being connected relation between the activities for which these words are used. Thus the expression "in the course of carrying on of business etc." means that the gift should have some relationship with the carrying on of the business. If a donor makes a gift only while he is running the business that may not be sufficient to bring the gift within the first part of Clause

> (xiv) of Section 5 (1) of the Act. It must further be established, to bring the gift within that provision, that there was some integral connection or relation between the making of the gift and the carrying on of the business."

97. In **Mod. Serajuddin etc. V. The State of Orissa**[17], the Supreme Court held that the expression "in the course" implies not only a period of time during which the movement is in progress but postulates a connected relation. It was held that the sale in the course of export out of the territory of India, means sale taking place not only during the activities directed to the end of exportation of the goods out of the country, but also, as part of or connected with such activities.

98. In **Mahadeo Ram Bali Ram vs The State Of Bihar**[18]**,** the Patna High Court considered the expression "in the course of" as used in Article 286(1)(b) of the Constitution, when it held that the expression postulates that the transaction of sale must be an integral part of the activity of exporting the goods out of the country.

99. Adverting to the above interpretation of the expression "in the course of business" and in the present context, an expression added to it namely of the words "in furtherance of business", as used in Section 7(1)(a) would necessarily mean that the supply is connected to or in relation to the activities in question or is the integral part of such activity. By applying

17 AIR 1975 SC 1564

18 AIR 1959 PATNA 30

such interpretation, it cannot be denied that once an advance was received by the petitioner in the course of or in furtherance of the contract in question, it would necessarily amount to a supply attracting payment of GST. We may observe that such intention can also be gathered from the insertion of sub-section (1A) in Section 7, which was incorporated by the CGST Amendment Act, 2018 with retrospective effect from 1 July 2017, providing that where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II, which includes 'works contract' as defined in Section 2(119), finding place in item 6 of Schedule II defining a 'composite supply'. Thus, the legislative intention behind Section 7 is quite clear that such composite contract would fall within the definition of supply as envisaged by Section 7(1)(a).

100. This apart, such meaning of the word "supply" as Section 7(1)(a) would postulate, can also be gathered from the reading of Section 7(1)(aa), which was inserted by the Finance Act No.13 of 2021, with effect from 1 January 2022, which *inter alia* provides for the activities or transactions, by a person other than an individual, to its members or constituents or *vice versa*, for cash, deferred payment or other valuable consideration. The *'Explanation"* below section 7(1)(aa) also provides that the person and its members or constituents shall be deemed to be two separate persons and the

supply of activities or transactions *inter se* shall be deemed to take place from one such person to another.

101. We find that the common thread running through the provisions of sub-section (1A) and sub-section (1)(aa) of Section 7 discerns that the word "supply" cannot be given a meaning *de hors* from what has attributed by the Parliament, even applying the constitutional intent as contained in Article 366(12A) which 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, which is a general provision.

102. It would also not be correct for the petitioner to contend that the scope of supply as defined under Section 7 would not be applicable for any deferred supply and / or for that matter would not include the supply to cover the advance payment considering the nature of the contract.

103. In our opinion, thus, the contentions as urged on behalf of the petitioner cannot be accepted, for the reason that the petitioner's reading of Section 7 would not amount to a correct reading of the provision. We may also observe that Section 7 is required to be holistically read. As noted above merely for the reason that Section 7(1)(a) uses the word "or agreed to be made for a consideration", so as to define "supply", would not render nugatory the contents of the earlier part of sub-clause (a) of sub-section (1)

which categorically provides that supply includes all forms of supply of goods or services or both. The petitioner is not denying that, in the facts of the present case, considering the purport of Clause 14.2 read with Clause 14.3 of the contract agreement, advance payment would also form part of the consideration in relation to the contract in question. If this be so, the legislature in its wisdom has not only in terms of Section 7(1)(a), but further by insertion of clause (aa) in sub-section (1) of Section 7, included such "supply of goods or services agreed to be made for consideration or a deferred payment for other valuable consideration", so as to fall within the ambit of expression 'supply'.

104. We hence find it difficult to accept the petitioner's contention that Section 7 would nonetheless be required to be held to be ultra vires the provisions of Article 246A, 366(12A) of the Constitution, as also other constitutional provisions of Section 14, 19(1)(g) and 300A as it takes within its ambit supply of goods or services agreed to be made. In any event Section 7 cannot be read *de hors* several other provisions of the GST Acts. It needs to be read under the legislative scheme as envisaged under the Act and not otherwise. In fact, the foregoing discussion would show that no valid ground can be gathered, for such provision to be held ultra vires the said constitutional provisions, for this reason, the petitioner's challenge to the vires of Section 7 on the ground that it applies to supplies agreed to be

made is not well founded.

105. We may observe that Section 9 of the CGST Act providing for "Levy and Collection" ordains that 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. Section 9 is the charging section. Hence, going by Section 9, for all supplies of goods or services, i.e., 'services' as defined under Section 2(102), tax under the CGST shall be payable. The advance amount as received by the petitioner and forming subject matter of the present proceedings, certainly relates to the activities requiring the use of money or its conversion by cash or by any other mode integral to the contract in question. It is also not in dispute that the contract in question is a contract involving intra-State supply of goods or services or both. Thus, by implication of these provisions of the GST Acts and more particularly on a cumulative reading of Sections 7 and 9, advance payment as received by the petitioner from the MMRDA would be subject to the levy of GST. It would be difficult to gather any contrary reading of the provisions, as applicable to the transaction in question, under which the petitioner has received advance payment from MMRDA and in turn has remitted the amount to its constituent and thereafter back to back having paid such amounts to its constituent L&T alongwith the GST credit.

106. We now move to the next challenge of the petitioner, that is to the provisions of Section 12 and 13 of the CGST Act which are also asserted to be ultra vires the provisions of Article 246A read with Article 366(12A) and violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India, in so far as they apply to "supplies agreed to be made". As noted above, Sections 12 and 13 fall under Chapter IV of the CGST & MGST Act. Section 12 pertains to "time of supply of goods", which stipulate that the liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the said provision. Sub-section (2)(a) provides that the time of supply of goods shall be the earlier of the dates namely the date of issue of invoice by the supplier or the last date on which he is required under Section 31(1), to issue the invoice with respect to the supply; or in terms of sub-section 2(b) the date on which the supplier receives the payment with respect to the supply. Similarly, Section 13 provides for "time of supply of services" which ordains that the liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of the section. Sub-section (2) provides that the time of supply of services shall be the earliest of the following dates as specified in sub-clause (a), (b) and (c) read with the '*Explanation*' thereunder. Sub-clause (a) provides that the time of supply of services shall be the earliest of the dates namely the date of issue of invoice by the

supplier, if the invoice is issued within the period prescribed under section 31 or the date of receipt of payment, whichever is earlier; or under clause (b) the date of provision of service, if the invoice is not issued within the period prescribed under Section 31 or the date of receipt of payment, whichever is earlier. '*Explanation'* for the purposes of clauses (a) and (b) provides that the supply shall be deemed to have been made, to the extent it is covered by the invoice or, as the case may be, the payment; and further that the date of receipt of payment shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier. Sub-section (5) of Section 13 provides that where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall be as provided in clauses (a) and (b) thereunder, that is in case where a periodical return has to be filed, be the date on which such return is to be filed; or in any other case, to be the date on which tax is paid.

107. The petitioner's case challenging the vires of Section 12 and 13, is to the effect that these provisions are invalid and ultra vires as they apply to 'supply agreed to be made', for the reason that Article 246A applies only in respect of the 'supply of goods or services' and not in relation to supply "agreed to be made". It is also the petitioner's contention that Article 246A

necessarily derives its meaning and takes within its ambit the provisions of Article 366(12A) which 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. The petitioner has asserted that tax on supply of goods and services would not mean a tax on supply agreed to be made, which by virtue of Article 366(12A) necessarily has to be a tax on actual supply of goods or services or both. It is hence the petitioner's case that once the actual supply itself is not made, there is no warrant for the levy in question either by virtue of the applicability of Section 7 read with Section 9 and Sections 12 and 13.

108. We are of the opinion that for reasons similar as discussed by us in considering Section 7 of the CGST/MGST Act, Sections 12 and 13 also cannot be held to be ultra vires the constitutional provisions, on which even Section 7 was assailed by the petitioner. Once it is established that advance payment was received by the petitioner as per the terms and conditions of the 'contract agreement' which was received as the 'mobilization advance', as specifically claimed and accepted by the petitioner, such payment/receipt from the MMRDA would necessarily pertain to supply as defined under Section 7, read with the provisions of Section 2(31) which defines consideration. Hence, the liability to pay tax in terms of Sections 12 and 13(2) had arisen on the date of receipt of payment by the petitioner from

the MMRDA. Such amount of advance was thereafter remitted by the petitioner to its constituent L&T along with the outward tax as deposited with the government, however, the petitioner was not issued an invoice by L&T and was issued a 'Receipt Voucher' as noted by us hereinabove. According to the petitioner, an invoice could not be issued as at the relevant time in Phase I, i.e. when the first tranche was received by the petitioner, as there was no supply of goods or services or both.

109. We may observe that under Sections 12 and 13, the issuance of an invoice is not sacrosanct or the only necessary incident under Sections 12 and 13, for the reason that these provisions explicitly provide for alternatives, that is apart from the issuance of an invoice by the supplier, the date of receipt of payment, as also the date of provision of service, if the invoice is not issued within the prescribed period under Section 31 or the date of receipt of payment, whichever is earlier are included, to reckon the time of supply. Hence, if the parties agreeing to the nature of the supply, as the agreement between the parties in the present case postulate, and such supply if falls within the parameters of Section 7 (1) and in pursuance thereto a deposit of the GST is made, then necessarily such voluntary action on the part of the parties, is within the purview of section 7. In such event, necessarily, qua the time of supply of services, such supply would stand governed by sections 12 and 13. Thus, having regard to our reasons in

repelling the challenge to the vires of Section 7, Sections 12 and 13 also cannot be held to be illegal or unconstitutional, when tested on the anvil of the provisions of Article 246A, 366(12A) and much less on the touchstone of Article 14, 19(1)(g) and 300A of the Constitution. We, hence, do not find that the petitioner is correct in its contention that the advances received by the petitioner from MMRDA would fall outside the purview of Section 9 read with Sections 7, 12 and 13 of GST Acts.

110. Having reached the aforesaid conclusion, we are of the clear opinion that the decisions as relied on behalf of the petitioner on the principles in relation to the challenge of the vires of the statutory provisions would also not be applicable. We now discuss the decisions as relied on behalf of the petitioner. The decision of the Supreme Court in **Govind Saran Ganga Saran vs. Commissioner of Sales Tax & Ors.**[19] is relied upon to contend that there is vagueness in the impugned provisions and if this be so, it is held by the Supreme Court that any uncertainty or vagueness in the legislative scheme defining any of these components of the levy will be fatal to its validity. There can be dispute on such proposition which had arisen before the Supreme Court involving the interpretation of Sections 14 and 15 of the Central Sales Tax Act. The issue was whether the turnover of the goods was subject to tax under the sales tax law of a State, considering that Section 15

19 1985 (Supp) Supreme Court Cases 205

prescribed the maximum rate at which such tax may be imposed requiring that such tax shall not be levied at more than one point. Two conditions were imposed in order to ensure that inter-State trade or commerce in such goods is not hampered by heavy taxation within the State occasioned by an excessive rate of tax or by multi point taxation. It is in such context, the Supreme Court held that Section 15 enacts restrictions and conditions which are essential to the validity of an impost by the State on such goods and if either of the two conditions are not satisfied, the impost would be invalid. It was observed that in order that the tax should not be levied at more than one stage, it was imperative that the sales tax law of the State should specify either expressly or by necessary implication the single point at which the tax may be levied. It was observed that alternatively, it may empower a statutory authority to prescribe such single point for the purpose. It was also observed that the single point at which the tax may be imposed must be a definite ascertainable point, so that both the dealer and the sales tax authorities may know clearly the point at which the tax is to be levied. It is in such context, the Supreme Court made the following observations:-

> "6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If

> those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

In our opinion, considering our discussion on the interpretation of the provisions as also the context in hand, the aforesaid observations of the Supreme Court would not assist the petitioner.

111. The next decision of the Supreme Court on which reliance is placed is in the case of **Garden Silk Mills Ltd. Vs. Union of India** (supra) to canvass a proposition that once Article 246A read with Article 366(12A) of the Constitution prescribed that the tax needs to be levied on supply of goods and services, it would not be permissible for the legislature to deviate from the constitutional mandate defining the taxable event. The proposition is also that the legislature in making the provisions under Sections 7, 12, 13 and 16 could not have prescribed different parameters on taxability. In the said decision, the question which fall for consideration of the Court, was whether while assessing customs duty payable in respect of imported goods, the customs authorities could add/include landing charges in arriving at the value of those goods. Disputes had arisen in relation to the goods of the appellant which were imported from abroad. The transactions for sale and purchase between the foreign supplier and the appellant company were in the nature of CIF contracts i.e. price included costs, insurance and freight

charges. Hence the price which was paid included not only the cost of the goods but also the insurance and freight charges. The customs authorities, however, in determining the value of the goods for the purpose of ascertaining the amount of duty payable, added to the CIF price the landing charges which were paid to the Port Trust Authorities. On the payment of the customs duty, the goods were cleared and used by the appellants. Such action of the custom authorities was challenged by the appellant by approaching the High Court *inter alia* contending that the landing charges which were paid at the rate ¾% of the CIF value of goods had been wrongly added while arriving at the assessable value of the goods and, therefore, the High Court should direct refund which was the amount of duty relatable to the landing charges. The High Court rejected the appellant's contention. It is in these circumstances, the proceedings reached the Supreme Court. In deciding such issue, the Supreme Court, referring to its decision in **Union of India vs. Apar Industries Limited**[20], held that the import of goods into India would commence when the goods cross the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reached the customs barriers and the bill of entry for home consumption is filed. On such observations, the Supreme Court dismissed the appeal confirming the decision of the High Court. In our opinion, the principles

20 1999 (5) J. T. 160

of law and the legal position as discussed by the Supreme Court may not be applicable in the facts of the present case and more particularly applying the principles of the Constitution Bench of the Supreme Court as laid down in **State of Madras v. Gannon Dunkerley & Co.** (supra). In this decision, entry 48 in List 2 of Schedule 7 of the Constitution fell for interpretation, when the Supreme Court held that the same is required to be interpreted not in a strict sense but in a broad sense. It was also held that such constitutional provisions cannot be construed in its popular sense, but must be interpreted in its legal sense. In our opinion, the petitioner merely referring to the provisions of Article 246A read with Article 366(12A) of the Constitution which provide that the Parliament as also the State Legislature would be empowered to make laws in respect of goods and services tax to be imposed by the Union or a State, would be required to be interpreted in a broad sense. Thus, the Parliament as also the State Legislature were within their constitutional authority, to not only enact the provisions which are assailed by the petitioner, but also to prescribe / stipulate the manner and the method under which the scheme of the GST laws ought to work, in regard to the applicability of such provisions, was also the domain of the respective legislatures. We may observe that these constitutional provisions define and/or lay down the broad contours of the subject matter of the legislation, the Parliament and the State Legislature can frame and not the actual

framework and nitty gritties of how the GST legislation would work post legislation. It is thus too weak a proposition that Article 246A read with Article 366(12A) would negate the validity of Sections 7, 12 and 13 of the GST Acts.

112. Now we deal with the next contention of the petitioner, namely the challenge to the vires of Section 16 of the CGST Act, which provides for "Eligibility and conditions for taking input tax credit". The case of the petitioner is that in the event, GST as paid by the petitioner on the advance amounts as received from the MMRDA is considered to be valid and the challenge as raised by the petitioner to the provisions of Sections 7, 12 and 13 fails, in such event it be held that the petitioner had become entitled to avail of the Input Tax Credit (ITC) as per the provisions of Section 16 of the CGST Act. The petitioner however contends that the purport of Section 16(2)(b) does not permit the petitioner to utilize the Input Tax Credit, inasmuch as the conditions as incorporated under sub-section (2)(b) makes it mandatory that the petitioner has received goods or services or both. It is, therefore, the petitioner's contention that when clearly GST was deposited by the petitioner and at such point of time, the petitioner having not received the supply of goods or services from L & T, by virtue of Section 16(2)(b) for want of supply of goods and services and an invoice from L&T, the petitioner was precluded to avail of the input tax credit (ITC).

According to the petitioner, insertion of Section 16(2)(b) is thus directly inconsistent, contrary or ultra vires the provisions of Section 13(2), which recognizes that GST is liable to be paid on incidents enumerated in sub-section (2), the relevant incident in the present case being the advance payment received by the petitioner from the MMRDA along with GST being remitted to L&T, along with the output tax, in discharge of the petitioner's statutory obligation. It is, therefore, the petitioner's contention that Section 16(2)(b) takes away and/or negates the consequences which are brought about by Section 13(2)(b), hence, on account of such inconsistency, necessarily Section 16(2)(b) be held to be ultra vires the provisions of Section 13(2)(b) of the CGST Act.

113. To examine such contentions of the petitioner, we need to note Section 16 providing for "Eligibility and conditions for taking input tax credit", which falls under Chapter V "Input Tax Credit". Section 16 reads thus:

> **Section 16. Eligibility and conditions for taking input tax credit.**
>
> (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.
>
> (2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed

[21](aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37.

(b) he has received the goods or services or both.

[22]*Explanation*--For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services --

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person];

[23](ba) the details of input tax credit in respect of the said supply communicated to such registered person under Section 38 has not been restricted;

(c) subject to the provisions of [24][section 41] [25][xxx], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the

21 Inserted by Finance Act 2021, w.e.f.1-1-2022 vide Noti. No. 39/2021-Central Tax, dt. 21-12-2021

22 Substituted by CGST (Amdt.) Act 2018 (31 of 2018) dt.30-8-2018 w.e.f. 1-2-2019

23 Inserted by Finance Act, 2022 (6 of 2022)w.e.f. 1-10-2022 vide SO 4569(E) dt.28-9-2022

24 Substituted for "Section 41", CGST (Amdt.) Act, 2018 (31 of 2018) dt. 30-8-2018

25 Words "of section 43A" omitted by Finance Act, 2022 (6 of 2022) w.e.f. 1-10-2022 vide SO 4569(E) dt.28-9-2022

supplier, an amount equal to the input tax credit availed by the recipient shall be [26][paid by him along with interest payable under section 50], in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him to the supplier of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961(43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]

(emphasis supplied)

114. On a plain reading of sub-section (1) of Section 16, it is seen that it provides that every registered person shall, subject to such conditions and restrictions, as may be prescribed and in the manner specified in Section 49 (Payment of tax, interest, penalty and other amounts), be entitled to take credit of input tax charged on any supply of goods or services or both to him, which are used or "intended to be used" in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Sub-section (2) begins with non-obstante clause,

26 Substituted for "added to his output tax liability, along with interest thereon" by Finance Act, 2023 dt. 31.3.2023 w.e.f. 1-10-2023

which provides that "Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless the requirements of clauses (a), (aa), (b), (ba) read with explanation, (c) and (d) are fulfilled.

115. It is the petitioner's case that the petitioner's eligibility under Section 16 to avail of the Input Tax Credit is being taken away for two fold reasons. Firstly, that the petitioner is not in a position to comply with sub-section (2) (a), which provides that the petitioner should be in possession of a tax invoice or debit note issued by a supplier registered under the Act or such other tax paying documents as may be prescribed. The petitioner reads sub-section (2)(a) in the context of Section 31(3)(d) providing that a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment. Secondly, it is contended that the petitioner although having deposited GST would not be in a position to comply with the requirements of clause (b) of sub-section (2), which provides that the petitioner has received the goods or services or both at the time of receiving of the advance payment of which tax has been deposited. This apart, it is also the petitioner's case that the requirement of sub-section (2)(b) of Section 16 is contrary to the provision of Section 13, which imposes a liability to pay tax

on services at the time of supply in accordance with the provisions of sub-section (2)(a) and (2)(b), i.e. on the date of receipt of payment (as no invoice was received in the present facts).

116. We find that there is substance in the contention as urged on behalf of the petitioner insofar as the petitioner's entitlement to avail of the ITC is concerned. In the context, peculiar to the facts in hand, we are of the clear opinion that applying the jurisprudential principles governing the goods and service tax and even on first principles, it cannot be a situation that in the circumstances, as in the present case, the petitioner could be denied the credit of ITC. This merely for the reason that, in the situation in hand, the petitioner although was complying with the other requirements, as the petitioner purportedly was unable to achieve compliances of Section 16(2)(b) i.e. to receive an invoice, on the ground that the petitioner had not received the goods or services or both. This could not have been accepted to be the correct legal position against the petitioner. The reason being that the petitioner, a registered person as defined under section 2(94) which had deposited the tax with the government and having discharged its output tax obligation towards its constituent, was in a situation that under the contract and in the course of its robust certainty of its performance, the petitioner was in the process of generating supply of goods or services or both and/ or was in the process or at the stage that the actual supply of goods or services

was being achieved/fructified. Hence, these circumstances and fact situation could not have been held against the petitioner to blanketly disentitle the petitioner (registered person) from availing the ITC, when except for the invoice qua the supply of goods and services, was not being furnished by the petitioner, when other documents evidencing the discharge of the GST liability and as recognised under section 31 were available with the petitioner. It is, therefore, necessary that the revenue officials carefully apply their mind to the nature of the transaction more particularly when the transaction is peculiar, as in the present case as entered with a government body (MMRDA), and get satisfied as to how the transaction is to take effect with the registered person who would be receiving the goods or services.

117. The revenue officials in the present case could not have been oblivious that the contract agreement between MMRDA and the petitioner was a peculiar contract and/or one of its kind involving the petitioner-Consortium, which is a combination of technical and financial entities, coming together and accepting the contract to construct a bridge of 22kms over the sea. It is in such context, the petitioner dealing with the wing of the State Government, namely, the MMRDA accepted the advance payment as the mobilization advance and paid GST thereon, with an express covenant that the advance is permitted to be adjusted in the supply of goods and services being provided to the benefit of MMRDA. It is with such pivotal

consideration, the transaction ought to have been viewed and approached by the department, in the context of applicability of provisions of Section 16(2)(b) read with the provisions of Section 13(2).

118. In the aforesaid context, we may also observe that sub-section (1) of Section 16 *inter alia* makes a person entitled to take credit of input tax charged on any supply of goods or services or both to him, which "are used" or "intended to be used" in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Thus, the entitlement to take credit of input tax charged on any supply of goods or services is in regard to such components "used" or "intended to be used in the course" or "furtherance of his business", is the basic requirement for the amount to be credited to the electronic credit ledger of such person. Although sub-section (1) is conditional upon the fulfillment of the requirements as contained in sub-section (2), in our opinion, the incorporation as contained in sub-section (2)(b) being one of the conditions, namely that the person has received the goods or services or both would also be required to be read, to further the intention as to what is provided for in sub-section (1) of Section 16, namely credit to be made available for supply of goods or services or both to the person when the goods and services were "intended to be used" in the course or furtherance of his business. The words "intended to be used in the course" or

"furtherance of his business" would mean / include the deferred receipt of goods or services or both. Also, the word "intended" as used in sub-section (1) of Section 16 is required to be given its due meaning in applying the provisions of sub-section (2) (b) of Section 16, when it prescribes that the credit of any input tax would *inter alia* be available when the registered person has received the goods or services or both. If we do not read that the provision in such manner or we do not attribute such meaning in conjointly reading the provisions of sub-section (1) and sub-section (2)(b) of section 16, it is likely to create an anomalous situation or even an absurdity, which is instantly seen from the facts of this case.

119. We say so for the reason that on one hand in the present case, tax has been deposited by the petitioner on the intended supply of goods or services or both entitling itself for its credit into electronic credit ledger as permissible under Section 16(1), however, on the other hand, merely on an interpretation that the goods or services are in the process of being received and which are certainly to be received under the contract, the benefit of the input tax credit is being denied. If such denial of supply is to be accepted, a converse situation emanates namely that by virtue of Section 12 or 13, the Government becomes recipient of the tax, despite there being no supply, however, at the same time, under the GST provisions having received the tax, at the threshold, the credit of such tax is being taken away or denied to

the registered person. Certainly such consequence is not postulated from the very scheme of the GST legislation. We may thus observe that if we do not read and interpret the provisions of Section 16(2)(b) in the manner as discussed hereinabove, it is also likely to create an anomalous effect on the operation of Section 13(2), namely that the liability to pay tax on services would be required to be reckoned, not on what has been provided under sub-section (2) of Section 13, but only on the deferred date, when the goods or services are actually received, to be reckoned as an incident, at which point of time, the liability to pay tax on services would arise, and not in respect of specific incidents as provided for under sub-section (2). This would create a complete dichotomy, disturbance or friction in the interplay between Section 13(2) and Section 16 of the CGST Act. In our opinion, this can never be the intention of the legislature. Thus, there needs to be a harmonious interpretation of provisions of Section 13 read with the provisions of Section 16. The intention underlying sub-section (1) of Section 16 is not only required to be effected but safeguarded by a meaningful and purposive reading of the provisions of Section 13(2), so as to apply the provisions of sub-section (2)(b) of Section 16, as it stands and intended by the legislature. Any interpretation otherwise in our opinion would cause deleterious effect and a disharmony in the working of these GST provisions. For these reasons, the petitioner was entitled to the input

tax credit under the provisions of Section 16 as in the present peculiar facts, merely referring to the provisions of Section 16(2)(b), it could not have been denied to the petitioner.

120. Another hurdle as canvassed before us in denying the input tax credit, is on the ground of applicability of Section 16(2)(a) which provides that for the entitlement to the credit of input tax, a registered person needs to be in possession of a tax invoice or debit note issued by a supplier registered under the Act or such other tax paying documents as may be prescribed as noted above. It is submitted that the meaning to the words 'Tax Paying Documents' is required to be gathered from the provisions of Section 31 which provides as to what a 'tax invoice' should be in the context and applicability of the CGST Act. Section 31 falls under Chapter VII which pertains to "tax invoice credit" and "debit notes". In the present context a reference is made to Section 31 sub-section 3(d). We note the said provision which reads thus:

> "**31. Tax invoice.**-
>
> (1) …… …..
>
> (2) …… …..
>
> (3) Notwithstanding anything contained in sub-section (1) and (2)-
>
> ….
>
> **(d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such**

payment;

(e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;

(f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;

(g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier."

(emphasis supplied)

121. Section 31 would be required to be read with Rule 36 of the Central Goods and Service Tax Rule 2017 which falls under chapter V – Input Tax Credit. Rule 36 reads thus:

"36. **Documentary requirements and conditions for claiming input tax credit.-**

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34;

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of

sub-rule (1) of rule 54.

(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document [* * *]

[Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.]

(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

[(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under sub-section (1) of section 37 unless,-

(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in Form GSTR-1 or using the invoice furnishing facility; and

(b) the details of [input tax credit in respect of] such invoices or debit notes have been communicated to the registered person in Form GSTR-2B under sub-rule (7) of rule 60.]"

(emphasis supplied)

122. In the present case as contended on behalf of the petitioner, the provisions of Section 31 read with Rule 36 are being applied by the Revenue to deny the input tax credit to the petitioner on the ground that on account of lack of supply, no invoice was available or issued so as to entitle the petitioner to claim the input tax credit. We may however observe that the respondent No.3 namely the GST Council and respondent No.4-Deputy Commissioner of Income of State Tax on such issue have argued before us in different voices. In these circumstances, certainly, the position

as taken by the GST Council is required to be accepted when Ms. Patricia Cardoza appearing for the GST Council has fairly submitted that the "Receipt Voucher" is a tax paying document as also submitted at page 5 of her written submissions.

123. We may observe that in the facts and circumstances of the case, there was no doubt either with the petitioner or with any of the respondents and more particularly in the context of the peculiar contract agreement, under which the parties have acted and under which the "Advance Receipt Voucher (ARV)" of the nature issued by the petitioner to the MMRDA, as also the "Receipt Voucher" issued by L&T to the petitioner, satisfied the requirements of Section 31 read with Rule 39 as tax was deposited with the Government under the ARV and the same was remitted as an output tax to L&T by the petitioner.

124. In any event the purpose of a tax invoice is to confer and attribute certainty in relation to the supply of services as envisaged and in the context as understood under the GST laws. However, what cannot be overlooked is the provisions of sub-section (3)(d) of Section 31 of the CGST Act as noted by us hereinbefore, specifically include within the ambit of the tax invoice, as defined under Section 31, to provide that a registered person shall on receipt of advance payment with respect to any supply of goods or services

or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment. Sub-section (3) of Section 31 begins with a *non-obstante* clause when it provides that the contents of sub-section (3) are notwithstanding anything contained in sub-sections (1) and (2). Thus the rigour and the mandate of sub-section (1) and (2) of Section 31 is not applicable to the operation of sub-section (3) which stands on its independent legs, when it recognises the tax paying documents as referred thereunder. In any event sub-section (3) of Section 31 is also required to be read in the context of the companion provisions namely sub-section (4), (5), (6) and (7). These provisions contemplate a variety of situations, even when at a belated stage, an invoice can be issued and which can be a situation of advance payment being received in relation to the transactions between the parties. Thus, Section 31 is required to be holistically read so as to make the provision meaningful and more particularly in the context in hand. For such reason, when the petitioner satisfied the requirements of Section 31(3)(d) as also accepted by the revenue to be a tax paying document, it would not be correct in law that the petitioner is denied input tax credit, merely because the petitioner has not complied with the part of the provisions, namely sub-section (1) of Section 31 read with Rule 36. In any event, Rule 36 cannot control the operation of Section 31 being the substantive statutory provision. In the aforesaid

circumstances, we are of the clear opinion that the petitioner was entitled to the benefit of input tax credit and denying the petitioner such credit was arbitrary and illegal and contrary to the provisions of Section 16 of the CGST / MGST Act.

125. Insofar as the petitioner's contention in regard to the entitlement of the petitioner to the refund of the ITC and/or any excess tax as paid is concerned, we do not delve on such issue as fairly submitted, as the same is subject matter of consideration in the appeal filed by the petitioner against rejection of the petitioners refund application including on the application of principles as laid down by the Supreme Court in the case of **Union of India & Ors. vs. VKC Footsteps India Pvt. Ltd.** (supra) as also the interpretation on clauses 14.2 and 14.3 and other clauses of the contract agreement as entered between the parties. We keep open all contentions of the parties to agitate such issues in the said proceedings.

126. Before parting we may observe that at the Bar there are several decisions cited by the parties which we have noted in the foregoing paragraphs. The principles of law laid down in such decisions are well settled, however, to avoid prolix we deem it appropriate not to discuss these decisions, suffice it to observe that we have discussed only those decisions, the context of which necessitated.

127. In the light of the above discussion, we dispose of this petition in terms of the following order:

ORDER

(i) The prayers of the petitioner challenging the constitutional validity and legality of Sections 7, 12, 13 and 16(2)(b) of the CGST/MGST Act are rejected.

(ii) It is declared that in the peculiar facts of the case on the basis of Receipt Voucher issued by L&T in favour of the petitioner, the petitioner was entitled to avail the Input Tax Credit under section 16 of the CGST/MGST Act.

(iii) All contentions of the parties in relation to the utilization by the petitioner to the input tax credit as may be statutorily recognized under the provisions of the CGST and MGST Act are expressly kept open.

(iv) The prayers of the petitioner challenging the validity of Section 54(3) of the CGST/MGST Act are kept open in view of the pending statutory appeal. All contentions of the parties in that regard subject to the decision in the pending appeals are expressly kept open.

(v) As a consequence of (iii) and (iv) above, the prayers of the petitioner for refund of tax are not been adjudicated leaving it open to the parties to assert their respective contentions in the pending appeal.

(vi) Rule is made absolute in the aforesaid terms.

(vii) Parties to bear their own costs.

(JITENDRA JAIN, J.) (G. S. KULKARNI , J.)