GST ON BOT/DBFOT TOLL PROJECTS: RAJASTHAN HC RULING

The Hon'ble Rajasthan High Court in M/s. CG Tollway Ltd. v. Union of India & Ors. vide order dated 22.05.2026 held that the right granted by NHAI to collect toll under the DBFOT model in consideration of construction services constitutes a "works contract service" under Section 2(119) read with Schedule II, Entry 6 of the CGST Act, 2017, and qualifies as a "supply" under Section 7, as all the ingredients of a barter transaction are present.

The Court further held that the contract between the petitioner and the EPC subcontractor is distinct from the concession agreement executed with NHAI, and both transactions cannot be treated as overlapping. There was no privity of contract between NHAI and the subcontractor.

The Court also observed that construction of roads falls under Heading 9954 and not under Heading 9967. Exemption under Entry 23 of Notification No. 12/2017-CT (Rate) dated 28.06.2017 is available only for toll collection services and not where toll collection forms part of consideration for construction services. Reliance was placed upon Circular No. 150/06/2021-GST dated 17.06.2021.

It was further held that even if any ambiguity exists in exemption notifications, the same must be interpreted strictly in favour of the revenue, relying upon Commissioner of Customs v. Dilip Kumar & Co. and Commissioner (CGST) v. Safari Retreats Pvt. Ltd.

Distinguishing Larsen & Toubro Ltd. v. State of Andhra Pradesh, the Court held that VAT and GST operate under different schemes, as GST is a destination-based tax on supply of goods and services.

The Court also agreed with the view taken by the Telangana High Court in GMR Pochanpalli Expressways Ltd. v. Additional Director, DGGI that toll collection under BOT arrangements forms part of deferred annuity/payment for construction services and is not exempt from GST.

Lastly, The Court held that merely because "similar" audit objections were dropped by departmental authorities in Karnataka and Gujarat, the same would not preclude the Court from deciding the pure question of law regarding taxability involved in the present case. The Court further observed that the issues involved in those audit objections were otherwise different in nature, as the Karnataka audit objection related to disclosure of ineligible ITC in Form GSTR-9, whereas the Gujarat audit objection pertained to payment of GVAT under the composition scheme.

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Civil Writ Petition No. 15048/2025

CG Tollway Ltd, Through Its Authorised Signatory, Having Its Registered Office At Floor No. 1, Villa No. 122, Gaurav Path Barliyas Royal Farm, Bhilwara, Rajasthan - 311001.

----Petitioner

Versus

1. The Union Of India, Through The Secretary, Ministry Of Finance, Department Of Revenue, North Block, New Delhi 110 001.
2. State Of Rajasthan, Through The Secretary, Ministry Of Finance, Department Of Revenue, 1St Floor, Main Building, Gate 2, Government Secretariat, Jaipur, Rajasthan 302005.
3. The Special Commissioner, State Gst Office, Kar Bhawan, Todarmal Marg, Ajmer, Rajasthan 305001
4. The Deputy Commissioner, State Tax, Business Audit 1, Bhilwara Rajasthan, Bhilwara 311001
5. The Joint Commissioner, State Tax, Business Audit 1, Bhilwara Rajasthan, Bhilwara 311001

----Respondents

For Petitioner(s) : Mr. Bharat Raichandani
Mr. R.S. Chouhan
Mr. Jitendra Mohan Choudhary

For Respondent(s) : Mr. Mahaveer Bishnoi, AAG
Mr. Harshvardhan Singh

HON'BLE MR. JUSTICE ARUN MONGA

HON'BLE MR. JUSTICE SANDEEP SHAH

Order

1.	**Date of conclusion of arguments**	**05.05.2026**
2.	**Date on which judgment was reserved**	**05.05.2026**
3.	**Whether the full judgment or only the operative part is pronounced:**	**Full Judgment**
4.	**Date of pronouncement**	**22.05.2026**

REPORTABLE

Per: Hon'ble Shah, J:

1. By way of the present petition, the petitioner has laid a challenge to the impugnedoriginal order dated 14.12.2023 passed by the Deputy Commissioner, State Tax Business Audit-I, Bhilwara (hereinafter

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referred to as 'Deputy Commissioner) while exercising powers under Section 73 read with other provisions of Rajasthan Goods and Services Tax Act, 2017 (hereinafter referred to as 'RGST Act, 2017') and Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act, 2017')holding the petitioner liable for payment of the GST, amounting to Rs. 16,36,20,418/-, along with interest and penalty. The petitioner has also laid a challenge to the order dated 09.05.2025passed by the Appellate Authority, Commercial Tax Department, Ajmer (hereinafter to be referred as 'Appellate Authority') whereby the Appellate Authority while rejecting the appeal filed by the petitioner upheld the order dated 14.12.2023 holding it to be valid and in accordance with law. The petitioner has also laid a challenge to the subsequent intimation letter, dated 06.06.2025, directing him to deposit the amount.

Factual Matrix

2. The brief facts of the case are that the NHAI entered into a concession agreement with the petitioner for the purpose of six laning of Kishangadh Udaipur Ahmedabad Section from kilometer 90.000 (near Gulabpura) to kilometer 214.870 (end of Chittorgarh bypass) of NH-79 in the State of Rajasthan Package-2 under NHDP Phase-V on BOT (Toll) Mode on 09.12.2016. As per the agreement, the concessionaire (i.e. the petitioner) was required to design, build, finance, operate and transfer ("DBFOT") the highway in question in accordance with the terms and conditions of this concession agreement. The scope of the project clarified that it was for the purpose of construction of Project Highway at the site in question along with the provisions of Project Facilitiesas also for the operation and maintenance in accordance with the provisions of agreement. Further, the right to collect the toll post commercial operation of the project and till the date

of validity of the concession agreement was given to the concessionaire. Furthermore, as per Clause 26.1 of the agreement, the concession fee was Re. 1 (Rupee one) per annum along with the premium as specified in Clause 26.2 Clause 26.2.1 specified that the concessionaire was required to be paid to the NHAI immidiately after third (3rd) anniversary of the Commercial Operation Date (COD), a premium in the form of an additional Concession Fee equal to Rs.2,28,60,00,000/- during that year and for each subsequent year till 9th anniversary of COD, the Premium shall be paid by increasing the amount of premium by an additional 3% (three percent) as compared to the immediately preceding year.

3. The admitted fact is that the petitioner had given the work contract for the construction of the road to a sub-contractor, i.e., IRB Infrastructure Developers Limited, whereas the collection of toll was to be done by the petitioner, which is being undertaken by the petitioner as of now also.

4. During the course of an Internal Audit, Report No. 15 dated 30.07.2023 came to be prepared, emphasizing the output tax liability of the petitioner and noting that the petitioner had not paid any tax for the amount of Rs. 16,36,20,418/-. The audit report referred to various provisions of the GST Act and the Rules, as well as the terms and conditions of the concession agreement dated 09.12.2016, and therefore emphasized that the amount in question, along with tax and interest, was required to be paid.

5. In response to the audit report, the petitioner filed a reply dated 28.07.2023 before the Deputy Commissioner, Business Audit-I, Bhilwara, Rajasthan. However, since the reply of the petitioner was not found satisfactory, a show cause notice came to be issued on 29.09.2023 by the Deputy Commissioner, Commercial Tax Department, Business Audit-I,

Bhilwara, Rajasthan, setting out in detail the terms of the audit objection as well as the applicable law and quoting the relevant articles of the concession agreement. It was emphasized that in case no reply to the show cause notice was received within the time frame, appropriate proceedings would be initiated against the petitioner. The petitioner filed a detailed reply to the above-mentioned show cause notice on 07.12.2023, emphasizing that there could not be any tax liability upon the petitioner as the work was sub-contracted and the sub-contractor had already paid the GST upon the work undertaken for the construction of the highway. Various other objections were also raised by the petitioner, including the ground that in identical circumstances, the authorities of GST in Karnataka and Gujarat had found the explanation given by the petitioner therein and the same sub-contractor to be justified and had dropped the audit proceedings. An opportunity of hearing was given to the petitioner, and thereafter the Deputy Commissioner proceeded to pass a detailed order dated 14.12.2023, holding the petitioner liable for payment of GST to the tune of Rs. 16,36,20,418/- along with penalty @ 10% and interest.

6. Being aggrieved by the aforesaid order, the petitioner filed an appeal under Section 107 of the Act of 2017 before the Appellate Authority, and post granting of an opportunity of hearing, the appeal filed by the petitioner came to be dismissed vide order impugned dated 09.05.2025. Hence, the present petition.

Arguments of the counsel for the petitioner:

7. Learned counsel Mr. Bharat Raichandani, along with Mr. R.S. Chouhan and Mr. Jitendra Mohan Choudhary, appearing for the petitioner, while laying a challenge to the impugned orders passed by the Deputy Commissioner as well as the Appellate Authority,

emphasized that the authorities concerned have failed to consider that there was no service provided by the petitioner to the NHAI and thus there was no supply, and consequently, no incidence of tax was involved in the case at hand. Learned counsel Mr. Bharat Raichandani while placing reliance upon the Circular dated 17.06.2021, emphasised that the only alleged consideration received by the petitioner pursuant to the concession agreement was the right to collect toll, and the right to collect toll has been exempted under Entry 23 of Notification No. 12/2017–Central Tax (Rate) dated 28.06.2017. He asserted that the same was reiterated by way of Circular No.150/06/2021-GST dated 17.06.2021, and thus the issuance of the show cause notice and subsequent orders were not justified.

8. Learned counsel for the petitioner referred to the judgment passed by the Division Bench of the Andhra Pradesh High Court in **Larsen & Toubro Ltd. v. State of Andhra Pradesh (Writ Petition No. 12124/2006),** decided on 12.10.2006, which came to be affirmed by the Hon'ble Apex Court vide judgment dated 26.08.2008 passed in **Civil Appeal No. 5239/2008 (State of Andhra Pradesh v. Larsen and Toubro Ltd.)**. Heemphasized that by way of the said judgment, while dealing with the provisions of the Value Added Tax Act, 2005, the Hon'ble Apex Court, while affirming the judgment of the Andhra Pradesh High Court, held that there can be no incidence of double taxation and that there is no sale of goods in building work contracts where the execution of the work is undertaken by a sub-contractor. He further asserted that the Hon'ble Apex Court has clearly held that the State can either collect tax from the sub-contractor or from the main contractor.

9. Learned counsel also relied upon the findings given by the authorities of the concerned department in Gujarat and Karnataka,

wherein audit objections raised against the sub-contractor in identical circumstances were dropped, and asserted that two different stands cannot be taken by the department on the same issue of incidence of tax.

Initially, written submissions were filed by the counsel for the petitioner on 18.04.2026. However, post hearing of the matter on 05.05.2026, on the same date, another set of written submissions were filed by the counsel for the petitioner in consonance with the liberty granted to him. The brief of the written submissions filed by the counsel for the petitioner is as under:

> ***"Submissions***
>
> *4.* ***First,*** *there is no service provided to NHAI. It is an independent contract entered with the NHAI. There is no service/supply.*
>
> *5.* ***Second,*** *reliance placed on the CBIC Circular vide* ***Circular No. 150/06/2021-GST dated 17.06.2021*** *is completely incorrect. The said circular provides clarification with respect to the applicability of GST on the activity of construction of road where considerations are received in deferred payment (annuity). In the present case, the Petitioner has not received any payment from NHAI. The Petitioner has collected only toll from toll users which is exempt under Entry 23 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.*
>
> *6.* ***Third****, the reliance placed by the Respondents on the decision of the Hon'ble Telangana High Court in the case of* ***GMR Pochanpalli Expressways Limited Vs. Additional Director, DGGI and ors. - 2024 SCC Online TS 3988*** *is misconceived. At Para 20, of the said judgment, the Hon'ble Court itself recognises that the activity, which is under dispute in the present case is exempt. The relevant extract is reproduced below:*
>
> *"Therefore, it is obvious that Sl.No.23 is specifying exempting the tax for the services by way of access to a*

road or a bridge, the consideration is by way of toll charges."

7. Further, the Hon'ble Court in the above judgment held that the GST is leviable on deferred annuity payments received towards construction services. However, in the present case, the Petitioner has not received a single consideration from the NHAI. The petitioner has received only toll charges which is exempt.

8. ***Fourth****, the CBIC, vide* ***Letter dated 28.06.2021 (F. No. CBIC-190354/77/2021- TO(TRU-II)-CBEC)****, addressed to the Secretary, Ministry of Road Transport & Highways, clarified that no GST is applicable on the BOT (TOLL) transactions. The said letter is enclosed as Annexure 15 with the writ petition.*

9. ***Fifth****, the consideration received towards construction of the project already stands subjected to tax in the hands of M/s IRB Infrastructure Developers Ltd. The present demand therefore seeks to subject the very same consideration to tax once again, resulting in impermissible double taxation and a demand wholly without jurisdiction.* ***In Larsen & Toubro Ltd. vs. State of Andhra Pradesh [2006-TIOL- 327-HC-HYD-VAT), (Para 38 and Para 39)*** *the Hon'ble Andhra Pradesh High Court held that where work is executed through sub-contractors, the transfer of property in goods takes place only once, and the same cannot be taxed again in the hands of the main contractor.*

10. The said judgment has been affirmed by the Hon'ble Supreme Court in ***State of Andhra Pradesh vs. Larsen & Toubro Ltd. [2008-TIOL-158-SC-VAT, Para 17 to Para 22]****.*

11. ***Sixth****, the similar projects have been undertaken by the Petitioner, throughout the country and identical issue came up before the jurisdictional officers. The GST department for the Petitioner's sister concerns including M/s. IRB Westcoast Tollway Limited, in the States of Gujarat and Karnataka, have accepted and acted upon the aforesaid CBIC clarifications and Entry No. 23 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 and has dropped the demands. In those cases, the department has taken a consistent view and*

granted relief, confirming the non- taxability services under consideration.

12. The Petitioner, being similarly situated, is entitled to parity in treatment under Article 14 of the Constitution of India. Therefore, once this is the case, the Respondent No. 3 & 4 cannot take a contradictory stand. The GST is a central statute, there cannot be different and varying stand of the GST department. Reliance is placed upon the decision of the Hon'ble Supreme Court in the case of ***Union of India and Ors. vs. Kaumudini Narayan Dalal and Anr. - 2001 (10) SCC 231****, wherein it was held that, it is not open to the revenue to accept one judgment in the case of the assessee in the case and challenge its correctness in the case of other assessees without just cause. A copy of the said audit reports are enclosed as Annexure 17 and Annexure 18 respectively of the present writ petition.*

13. Without prejudice, even assuming that GST is applicable, the entire exercise is revenue neutral inasmuch as the construction activity has already suffered tax in theHon'ble hands of the EPC contractor. There is no loss to the revenue, and the demand is therefore unsustainable. Reliance is placed on ***CCE v. Narmada Chematur Pharmaceuticals Ltd., (2005) 179 ELT 276 (SC), M/s Technova Imgaging Systems Private Limited Vs. CCE & ST - 2019 (370) ELT 54 (Bom).***

14. Thus, the impugned order is contrary to the exemption Notification, statutory framework, CBIC's clarifications. Therefore, the present writ petition be allowed and order-in-appeal dated 09.05.2025 be quashed and set aside."

11. No other arguments, except those stated above, were made by the learned counsel for the petitioner.

12. Learned counsel for the petitioner thus prayed for allowing the writ petition and for quashing and setting aside the orders passed by the Deputy Commissioner dated 14.12.2023 (Annexure-2) as well as the Appellate Authority dated 09.05.2025 (Annexure-1), as also the Recovery Notice/Intimation Letter dated 06.06.2025 (Annexure-3).

Arguments on behalf of the State counsel

13. On the other hand, Mr. Mahaveer Bishnoi, learned Additional Advocate General, along with Mr. Harshvardhan Singh, opposed the writ petition and raised a preliminary objection with regard to the petitioner having an alternate remedy to challenge the impugned order passed by the Appellate Authority before the Appellate Tribunal, as provided under Section 112 of the CGST Act, 2017. He asserted that the order was passed while exercising powers under Section 107 of the Act of 2017, and against the same, a specific remedy of appeal has been provided under Section 112 of the Act of 2017. He submitted that, in view of availability of an alternative efficacious remedy and the matter in issue involving various disputed questions of fact, this Hon'ble Court would not like to interfere with the matter in question at this stage.

14. To fortify the above submissions, counsel for the respondents placed reliance upon the judgment passed by the Hon'ble Apex Court in **Whirlpool Corporation v. Registrar of Trade Marks (1998) 8 SCC 1**, and in **Assistant Commissioner (CT) LTU, Kakinada & Ors. v. M/s. Glaxo Smith Kline Consumer Health Care Limited, (2020) 19 SCC 681**.

15. Apart from the objection regarding availability of alternative remedy, learned counsel for the respondents, while referring to the definition of "supply" under Section 7 of the Act of 2017 as well as the definition of "consideration" under Section 2(31) of the Act of 2017, emphasized that 'supply' includes 'barter' and 'consideration' includes 'payment in money or otherwise'. Learned counsel thus emphasized that since the petitioner was granted the right to collect toll, the same amounted to consideration and the transaction was essentially 'barter', inasmuch as the petitioner constructed the road and in barter, received

the right to collect toll. He therefore emphasized that the transaction clearly falls within the definition of taxable supply.

16. Mr. Bishnoi further referred to the exemption granted under the notification dated 28.06.2017, is confined to services falling under Heading 9967, i.e., "supporting services in transport". He submitted that, thus as far as the service by way of access to a road or bridge on payment of toll is concerned, the same was exempted under Entry 23. However, the service in question is construction of road, which falls under Heading 9954, covering general construction services of highways, streets, roads, railways, airfield runways, bridges, and tunnels. He explained that consideration for construction may be paid partially upfront and partially in deferred annual payments, often termed as annuities. Entry 23A clarifies that exemption does not cover construction of road services, even if deferred payment is made by way of installments. He asserted that collection of toll was essentially deferred annuity received by the petitioner.

17. He thus referred to the clarification issued by the department pursuant to the 43rd GST Council meeting dated 28.05.2021, wherein it was clarified that services like construction of roads are not exempted. He further emphasized that the collection of toll is treated to be an annuity and therefore the impugned orders have rightly been passed by the authorities concerned. He also referred to Clause 26 of the agreement to emphasize that even premium has been paid by the concessionaire to the NHAI for the work undertaken, and that payment of revenue is part and parcel of the agreement in question. Therefore, the impugned orders have rightly been passed. Thus, while supporting the impugned orders, he prayed for dismissal of the writ petition.

Analysis & Reasoning:-

18. As far as the ground taken by the counsel for the respondent with regard to the availability of an alternative remedy is concerned, the counsel for revenue very frankly admitted that the remedy of appeal under Section 112 before the Tribunal is available, however, he also admitted that, till date, the Tribunal is not functional, thereby rendering the remedy otiose. He, however, asserted that the Tribunal shall be functional by the next month. In view of the fact that the Tribunal is not functional till date, the petitioner in question cannot be refused to be entertained on the ground of availability of an alternate and efficacious remedy. This Court thus deems it appropriate to adjudicate the matter on merits rather than leaving the petitioner remediless.

19. Before delving into the facts and law applicable to the case at hand, it would be relevant first to quote certain provisions of the Act of 2017 and the Rules framed thereunder, for the purpose of elucidating the issue.

Section 2(31) of the CGST Act, 2017

(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;

Section 2(119)

(119)"works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration 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;

Section 7

*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 consideration by a person in the course or furtherance of business;

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

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

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

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

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

(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 recommendation 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), (1A) 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.

Schedule-II Entry 6

6. *Composite supply*

The following composite supplies shall be treated as a supply of services, namely:-

(a) works contract as defined in clause (119) of section 2; and

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

Rule-27 & 28 of the CGST Rules, 2017

27.Value of supply of goods or services where the consideration is not wholly in money.- *Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall,-*

(a) be the open market value of such supply;

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

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

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

Illustration:

(1) Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the

new phone without exchange is twenty four thousand rupees, the open market value of the new phone is twenty four thousand rupees.

(2) Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupees.

28.Value of supply of goods or services or both between distinct or related persons, other than through an agent.-*The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-*

(a) be the open market value of such supply;

(b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;

(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:

Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:

Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services."

20. An in-depth analysis of the definitions quoted above reveals that 'consideration' has been defined to include any payment made or to be made, whether in money or **otherwise**, in respect of the **supply** of goods or services or both. At the same time, "works contract" has been defined to mean a contract for building, construction, erection, repair, maintenance, etc., of any immovable property, (wherein transfer of

property in goods or in some other form is involved) in the execution of such contract. It is thus clear that even if the consideration is not in money but otherwise, and payment is made or to be made in future, the same is included within the definition of 'consideration'. At the same time, for a contract to qualify as a works contract, the handing over of any immovable property in execution of such contract for construction, maintenance, etc., is a necessary indice.

21. As far as supply is concerned, all forms of supply of goods or services or both, including sale, transfer, **barter**, exchange, licence, lease, rental, etc., made or agreed to be made for a consideration, have been treated as falling within the definition of supply. Furthermore, even in cases of composite supply, the details provided under Schedule-II, which forms part of Section 7, includes works contract as defined in Clause 119(2) of the Act of 2017, as part of the supply of services.

22. As far as the levy and collection of tax is concerned, specific provision has been made under Section 9 of the Act of 2017, and for the purpose of calculation of the value of taxable supply, specific provision has been made under Section 15 of the Act of 2017. It emphasizes that the value of supply of goods and services shall be the transaction value, i.e., the price actually paid or payable for the said supply of goods or services or both. The details as to what shall be included in the value of supply have further been provided under sub-section (2) of Section 15. Furthermore, in cases where consideration is not wholly in money, for the purpose of determining the value of supply, Rule 27 of the Rules of 2017 specifies how the value is to be calculated, and Rule 28 deals with calculation of supply of goods or services between distinct or related persons other than through an agent, while emphasizing that the same is to be calculated on the basis of the open

market value of the supply, and in case of non-availability of the same, other yardsticks have been fixed.

23. For the purpose of determining the interest, rights, and liabilities of the parties, as well as the nature of the transaction, certain terms and conditions/articles of the concession agreement would be relevant and essential for deciding the present controversy.

Needless to emphasize, the concession agreement dated 09.12.2016 itself refers to the patch of the national highway, i.e., the area in question, being handed over to the petitioner on a design, build, finance, operate, and transfer (DBFOT) basis. However, the scope of the project will be relevant to be quoted for understanding the nature of the concession agreement. Clause 2.1, which pertains to the scope of the project, provides as under:

> *"2.1 Scope of the Project*
>
> *The scope of the Project (the* ***"Scope of the Project"****) shall mean and include, during the Concession Period:*
>
> *(a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;*
>
> *(b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and*
>
> *(c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement."*

25. As to what concession has been granted has been specified under Clauses 3.1.1 and 3.1.2, which provide as under:

> ***3.1.1*** *Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire, the Concession*

set forth herein including the exclusive right, license and authority to design, finance, construct, operate and maintain the Project (the "Concession") and provide Services for a period of 45 (forty-five) years, commencing from the Appointed Date, and ending on the Transfer Date (the "Concession Period"), and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein.

3.1.2 *Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to undertake the following in accordance with the provisions of Applicable Laws and Applicable Permits, during the Concession Period to:*

(a) Right of Way, access, and license to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;

(b) plan, design, develop, procure, construct, finance, upgrade, equip, operate, maintain and manage the Project as per the terms and conditions of this Agreement including Specifications and Standards, Applicable Laws, Applicable Permits and Good Industry Practice and transfer the same to the Authority or designated Government Instrumentality on the Transfer Date;

(c) manage, operate and maintain the Project and regulate the use thereof by third parties;

(d) demand and collect Fee from Users liable for payment of Fee for using the Project MMLP and / or availing any Services or any part thereof and refuse entry to any User if the Fee due is not paid;

(e) perform and fulfill all of the Concessionaire's obligations in accordance with the provisions of this Agreement;

(f) bear and pay all costs, expenses, and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement; and

(h) neither assign, transfer, or sublet or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Project nor sell, transfer, exchange, lease, sub-license, part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement."

26. Clause 10.2.1 specifies the right of the concessionaire to have access to the site, and Clause 10.2.2 further emphasizes that from the date of commencement of the work, the land, including any building, construction, immovable asset, etc., upon the site in question, shall be handed over on a leave and licence basis to the concessionaire. The relevant Article provides as under:

> *"10.2.1 The Authority hereby grants to the Concessionaire license to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and Tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.*
>
> *10.2.2 In consideration of the Concession Fee, this Agreement and the Covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and license rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the* ***"Licensed Premises"****), on an "as is where is" basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever."*

27. Articles 26.1 and 26.2 of the agreement in question make reference to the concession fee to be charged by NHAI and the additional concession fee amounting to Rs. 2,28,60,00,000/- after the third anniversary of the commercial operation of the work, with a further increment of 3% every year thereafter. It is, thus, clear that, for the work undertaken, the concessionaire is not only required to build, operate, and maintain the road but is also obligated to pay the premium to NHAI as quantified in the agreement itself. Clauses 26.1 and 26.2 provide as under:

> ***"26.1 Concession Fee***
>
> *In consideration of the grant of Concession, the Concessionaire shall pay to the Authority by way of concession fee (the "Concession Fee") a sum of Re. 1 (Rupee one) per annum and the Premium specified in Clause 26.2.*
>
> ***26.2 Additional Concession Fee***
>
> *26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees COD. a Premium in the form of an additional Concession Fee equal to Rs. to pay to the Authority, immediately after the third (3rd) anniversary year of 2.28,60,00,000/-(Rupees Two Hundred Twenty Eight Crore and Sixty Lakh only) as due to the Authority during that year, due and payable for the period remaining in that year; and for each subsequent year till the 9th anniversary of COD, the Premium shall be determined by increasing the amount of Premium in the respective year by an additional 3% (three percent) as compared to the immediately preceding year and for each subsequent year of the Concession Period, the premium shall be determined by increasing the amount of Premium in the respective year by an additional 8% (eight percent) as compared to the immediately preceding year.*
>
> *For avoidance of doubt it is clarified that the term 'Premium' as referred in para above shall be as applicable for one financial year. In accordance with and in compliance with the terms of this agreement, if payment of such'Premium' is due and payable only for part of such financial years, then*

only pro-rata payments @ 1/12th of such Premium shall be payable for each month of such part financial year for which such Premium payments is due as payable. For the purpose of assessing the amount due for payment on such payment of Premium, part of a month shall be deemed to be a fullmonth. In such circumstances the subsequent year as referred to in para above, for the purpose of annual escalation, shall fall to commence on 1st of April of the immediately succeeding financial year.

26.2.2 The Premium payable under Clause 26.2.1 shall be deemed to be part of the Concession Fee for the purposes of this Agreement."

28. Further perusal of the terms of the contract, including Clause 37, reveals that absolute right of termination has been conferred upon the NHAI, and even the project itself is to be undertaken under the complete control and supervision of the NHAI. Needless to emphasize, as far as the contract in question is concerned, the same has been entered into between the NHAI and the writ petitioner in the capacity of concessionaire, and there is no corresponding agreement between the NHAI and the sub-contractor. In other words, there is no privity of contract between the NHAI and the sub-contractor.

29. Thus, there are two distinct contracts, one executed between the NHAI and the petitioner, and the other between the petitioner and the sub-contractor, i.e., IRB Infrastructure Developers Limited.

30. An in-depth analysis of the terms and conditions of the articles of the contract clearly reveals that the argument raised by the counsel for the petitioner, with regard to no service being provided to the NHAI, is liable to be rejected, inasmuch as the scope of supply, as defined under Section 7, includes barter, transfer, licence, etc. In the present case, admittedly, premium is also being paid by the concessionaire to the NHAI, and land has been provided on leave and licence. Furthermore, even assuming for the sake of argument that no premium is being paid,

then too it would essentially amount to barter, in as much asfor the work undertaken by the concessionaire, i.e., building of road and maintenance of the same, the concessionaire has been granted the right to collect toll from the persons using the road in question during the subsistence of the agreement. Thus, the ingredients of 'barter' are made out.In barter for undertaking the construction and maintenance of the road, the concessionaire has been conferred certain exclusive rights, including leave and licence to construct and operate the road and collect the toll tax, etc. some of which have been elaborated under Article 3.1.2 of the concession agreement itself.

31. Further, Clause 27.1, which pertains to 'user fee', reveals that as far as collection of toll fees is concerned, the concessionaire has been given exclusive rights for the same. Furthermore, Article 10 also leaves no doubt that the land in question has been handed over to the concessionaire under exclusive possession of the petitioner through the leave and licence rights.

32. The definition of "works contract" as provided under Section 2(119) of the Act of 2017, and as included in Schedule II, Entry 6, would be applicable to the present case. Inasmuch as the petitioner supplies the works contract services to the NHAI and, in return, receives the right to demand and collect fees from the users, licence of the site, and right of way, thus all the ingredients of 'barter' are clearly available in the contract at hand. Moreover, the right to receive premium, as specified supra, itself shows that consideration forms part of the contract. Thus, the agreement in hand would fall within the definition of "supply" as defined under Section 7 of the Act of 2017.

33. It is further relevant to note that, as per the terms of the agreement itself, the valuation of toll collection rights undertaken by the petitioner has been assessed at around Rs. 2590 million, and as rightly

quoted by the Deputy Commissioner, the petitioner has been awarded the right to collect the toll bythe NHAI in consideration of the construction services rendered by the petitioner on a DBFOT basis. The service encompasses direct and indirect expenses related to construction of roads, bridges, infrastructure, etc. and other assets at the toll plaza. Thus, the arrangement in question falls within the definition of "works contract services" and has rightly been treated as taxable.

34. Since, as there is a promise of fulfilling the obligation on the part of the petitioner to construct and maintain the road, vis-à-vis the corresponding promise of NHAI to permit the petitioner to collect toll for the road in question during the subsistence of the contract, the transaction squarely falls within the statutory framework of 'supply' and 'consideration'.

34. As far as the argument advanced by the counsel for the petitioner with regard to double taxation is concerned, though they may appear attractive at first blush, but upon perusal of the record of the case, the same fizzles out. This is for the reason that there is no privity of contract between the NHAI and the sub-contractor. Rather, there exist two distinct contracts, one between the NHAI and the petitioner, and another between the petitioner and the sub-contractor.

35. As far as the work undertaken by the sub-contractor, i.e., the Principal Engineering, Procurement and Construction (EPC) Contractor, is concerned, the sub-contractor has provided works contract services to the petitioner and has allegedly deposited the due output tax liability. The services rendered by the sub-contractor, i.e., IRB Infrastructure Developers Limited attracted tax liability and are distinct from the contract between the petitioner and the NHAI.

36. With regard to the concession agreement in question, the petitioner, after getting the road constructed through the sub-contractor by virtue of a separate contract, handed over the same by way of transfer to the NHAI and thereafter has been collecting toll upon the same while paying the premium as agreed between the parties, in consonance with the concession agreement. Thus, both contracts are distinct and cannot be treated as overlapping. They are not part of the same transaction, nor is there any privity of contract between the NHAI and the sub-contractor.

37. As far as the arguments of the counsel for the petitioner with regard to exemption from applicability of GST to the collection of toll are concerned, it would be relevant to quote Notification No. 12/2017-CT (Rate) dated 28.06.2017, relied upon by the petitioner. The relevant portion of the same provides as under:

SL. No.	**Chapter, Section, Heading, Group or Service Code (Traiff)**	**Description of Services**	**Rate (per cent)**	**Condition**
(1)	(2)	(3)	(4)	(5)
23	Heading 9967	Service by way of access to a road or a bridge on payment of toll charges.	Nil	Nil

38. At the same time, the clarification issued by the Ministry of Finance dated 17.06.2021 would also be relevant to quote here, which provides as under:

"Circular No.150/06/2021-GST
CBIC-190354/36/2021-TRU Section-CBEC
Government of India
Ministry of Finance
Department of Revenue
*****

North Block, New Delhi,
Dated the 17th June, 2021

To,

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

Sub–Clarification regarding applicability of GST on the activity of construction of road where considerations are received in deferred payment (annuity)-reg.

Certain representations have been received requesting for a clarification regarding applicability of GST on annuities paid for construction of road where certain portion of consideration is received upfront while remaining payment is made through deferred payment (annuity) spread over years.

2. This issue has been examined by the GST Council in its 43rd meeting held on 28th May, 2021.

2.1 GST is exempt on service, falling under heading 9967 (service code), by way of access to a road or a bridge on payment of annuity [entry 23A of notification No. 12/2017-Central Tax]. Heading 9967 covers "supporting services in transport" under which code 996742 covers "operation services of National Highways, State Highways, Expressways, Roads & streets; bridges and tunnel operation services". Entry 23 of said notification exempts "service by way of access to a road or a bridge on payment of toll". Together the entries 23 and 23A exempt access to road or bridge, whether the consideration are in the form of toll or annuity [heading 9967].

2.2 Services by way of construction of road fall under heading 9954. This heading inter alia covers general construction services of highways, streets, roads railways, airfield runways, bridges and tunnels. Consideration for construction of road service may be paid partially upfront and partially in deferred annual payments (and may be called annuities). Said entry 23A does not apply to services falling under heading 9954 (it specifically covers heading 9967 only). Therefore, plain reading of entry 23A makes it clear that it does not cover construction of road services (falling under heading 9954), even if deferred payment is made by way of instalments (annuities).

3. Accordingly, as recommended by the GST Council, it is hereby clarified that Entry 23A of notification No. 12/2017-CT(R) does not exempt GST on the annuity (deferred payments) paid for construction of roads.

4. Difficulty if any, in the implementation of this circular may be brought to the notice of the Board.

Yours faithfully,

(Rajeev Ranjan)
Under Secretary, TRU
Email: rajeev.ranjan-as@gov.in
Tel: 011 2309 5558"

39. A comparative analysis of both the circular and the clarification reveals that the work undertaken for construction of roads falls under Heading 9954 and not under Heading 9967, as tried to be claimed by the learned counsel for the petitioner. Only Entry No. 9967, with regard

to collection of toll, has been exempted. However, where construction of roads is undertaken and, pursuant thereto, as a reciprocal arrangement under the agreement, the toll is being collected, there is no exemption under that heading whatsoever. This is further clarified by the Circular dated 17.06.2021 issued by the Ministry of Finance. More particularly, when the payment for construction of roads is made in deferred annual installments, it may be called annuity. In the present case, the collection of toll is essentially oneof the consideration, which is being received by the petitioner and essentially amounts to annuity. Thus, the same does not fall within the ambit of the exemption clause in this regard.

40. Even otherwise, as far as the exemption notifications are concerned, in case of any ambiguity the same are to be interpreted in favour of the revenue and not in favour of the assessee. The law in this regard is no longer res integra, in view of the judgment pronounced by the Hon'ble Apex Court in **Commr. of Customs v. Dilip Kumar & Co.; (2018) 9 SCC 1**, followed in **Commr. (CGST) v. Safari Retreats (P) Ltd.;(2025) 2 SCC 523**. The Hon'ble Supreme Court in **Dilip Kumar** (supra) has observed as under:

> *"**53**. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.*
>
> ***54.** In Govind Saran Ganga Saran v. CST [Govind Saran Ganga Saran v. CST1985 Supp SCC 205 : 1985 SCC (Tax)*

447] , this Court pointed out three components of a taxing statute, namely, subject of the tax; person liable to pay tax; and the rate at which the tax is to be levied. If there is any ambiguity in understanding any of the components, no tax can be levied till the ambiguity or defect is removed by the legislature. [See Mathuram Agrawal v. State of M.P. [Mathuram Agrawal v. State of M.P., (1999) 8 SCC 667] ; Indian Banks' Assn. v. Devkala Consultancy Service [Indian Banks' Assn. v. Devkala Consultancy Service, (2004) 11 SCC 1 : AIR 2004 SC 2615] and Consumer Online Foundation v. Union of India [Consumer Online Foundation v. Union of India, (2011) 5 SCC 360] .]

***55.** There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualising different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the Revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the*

interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the Revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.

…. …. ….

63. *In TISCO Ltd. v. State of Jharkhand [TISCO Ltd. v. State of Jharkhand, (2005) 4 SCC 272] , which is another two-Judge Bench decision, this Court laid down that eligibility clause in relation to exemption notification must be given strict meaning and in para 44, it was further held: (SCC pp. 289-290)*

"44. The principle that in the event a provision of fiscal statute is obscure such construction which favours the assessee may be adopted, would have no application to construction of an exemption notification, as in such a case it is for the assessee to show that he comes within the purview of exemption (see Novopan India Ltd. v. CCE [Novopan India Ltd. v. CCE, 1994 Supp (3) SCC 606])."

66. *To sum up, we answer the reference holding as under:*

66.1. *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

66.2. *When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.*

66.3. *The ratio in Sun Export case [Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564] is not correct and all the decisions which took similar view as in Sun Export*

case [Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564] stand overruled. "

41. The Hon'ble Supreme Court in Safari Retreats (supra) has observed as under:

*"**Rules regarding the interpretation of taxing statutes***

27. Regarding the interpretation of taxation statutes, the parties have relied on several decisions. The law laid down on this aspect is fairly well settled. The principles governing the interpretation of the taxation statutes can be summarised as follows:

***27.1.** A taxing statute must be read as it is with no additions and no subtractions on the grounds of legislative intendment or otherwise;*

***27.2.** If the language of a taxing provision is plain, the consequence of giving effect to it may lead to some absurd result is not a factor to be considered when interpreting the provisions. It is for the legislature to step in and remove the absurdity;*

***27.3.** While dealing with a taxing provision, the principle of strict interpretation should be applied;*

***27.4.** If two interpretations of a statutory provision are possible, the Court ordinarily would interpret the provision in favour of a taxpayer and against the Revenue;*

***27.5.** In interpreting a taxing statute, equitable considerations are entirely out of place;*

***27.6.** A taxing provision cannot be interpreted on any presumption or assumption;*

***27.7.** A taxing statute has to be interpreted in the light of what is clearly expressed. The Court cannot imply anything which is not expressed. Moreover, the Court cannot import provisions in the statute to supply any deficiency;*

***27.8.** There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly;*

27.9. *If literal interpretation is manifestly unjust, which produces a result not intended by the legislature, only in such a case can the Court modify the language;*

27.10*. Equity and taxation are strangers. But if construction results in equity rather than injustice, such construction should be preferred;*

27.11*. It is not a function of the Court in the fiscal arena to compel Parliament to go further and do more;*

27.12. *When a word used in a taxing statute is to be construed and has not been specifically defined, it should not be interpreted in accordance with its definition in another statute that does not deal with a cognate subject. It should be understood in its commercial sense.*

Unless defined in the statute itself, the words and expressions in a taxing statute have to be construed in the sense in which the persons dealing with them understand, that is, as per the trade understanding, commercial and technical practice and usage."

42. Apparently, there is no ambiguity. However, even assuming for the sake of argument that some ambiguity exists with regard to the exemption, then the same has to be interpreted in favour of the department, in view of the clarification circular dated 17.06.2021. Thus, the ground taken by the counsel for the petitioner with regard to the toll being collected, as exempted under Entry 23-A of the circular in question, cannot be accepted in view of the clarification issued by the department, as also considering the fact that, in the present case, the toll is being collected as a barter for the work contract undertaken by the petitioner, and further considering that apart from toll collection, there is also a payment of premium as specified under Article 26.2 of the agreement in question. Exemption is only with regard to toll collection simpliciter and not for toll being collected for barter.

43. As far as the reliance placed by the counsel for the petitioner upon the judgment passed by the Hon'ble Apex Court in State of Andhra

Pradesh v. Larsen and Toubro Ltd. (supra) is concerned, it is pertinent to note that the said case pertained to the provisions of the Value Added Tax (VAT) and not GST. As far as the VAT is concerned, the taxability arose at the time of incorporation of goods in the works contract, as per the provisions of the VAT Act, which has further been emphasized by the Hon'ble Apex Court.

However, as far as GST is concerned, it is a destination-based tax levied on the supply of goods and services. Under the VAT Act, there is no concept of taxing services, only goods are taxed. The issue before the Hon'ble Apex Court in Larsen and Toubro (supra) was with regard to VAT being imposed upon the sale of goods purchased by the sub-contractor and thereafter handed over by the contractor to the procuring authority.

45. In contrast, in the present case, the nature of tax is entirely different and is being levied upon the services provided by the contractor in terms of the concession agreement. Thus, the judgment in question, as referred to by the counsel for the petitioner has no application to the case at hand.

46. It will be relevant to mention here that recently the Division Bench of the High Court of Telangana had an occasion to deal with an identical issue concerning a BOT contract for construction of a road in **GMR Pochanpalli Expressways Limited v. Additional Director, DGGI and Ors.; 2024 SCC OnLine TS 3988.**

47. In the above-mentioned case, the validity of the Circular dated 17.06.2021 (as referred above) was under challenge, with a prayer for declaring it being in contravention of the Notification dated 28.06.2017, more particularly Entry 23 thereof.

48. The Hon'ble Court, while dealing with an identical concession agreement (with the only distinction that the toll was being collected by

the NHAI and not by the concessionaire in that particular case), held that the prolonged collection of toll in question amounted to annuity. Though it was not a hybrid annuity model, it was treated as a BoT-annuity model.

The Court, while examining both the Circular dated 17.06.2021 and the Notification dated 28.06.2017, held as under:

> *"**26.** Therefore by the contents of the circular, the Entry of 23A in the Notification that the GST is exempt on service falling under Service Code 9967, by way of access to a road or a bridge on payment of annuity has been reaffirmed. Additionally, explained that the service code covers (a) supporting services in transport (b) operation 17 PSKJ&NTRJ Wp_16266_2023 services of National Highways, State Highways, Express Highways, Roads and streets, (c) bridges and tunnel operation services, by way of access to a road or bridge on payment of toll under Entry 23 of the Notification. In substance, the services enumerated in 23 and 23A for providing access to roads or bridges are exempted, whether the consideration is in the form of tolls or annuities. On top of that, specified the services of construction of highways, streets, road railways, airfield runways, bridges and tunnels, which fall under Service Code 9954, whether the consideration may be upfront or partially in deferred annual payment/annuity is not covered under Entry 23A and not exempt from the GST.*
>
> ***27.** The resolution of the 22nd GST Council and the consequent notification Nos.32 and 33 of 2017 elucidates that payment of annuity to the developers of public infrastructure has been equated with toll which was already exempted from tax. In effect, the service of access to a road or bridge on payment of an annuity covered under Code 9967 is qualified for exemption. Therefore insertion of entries 23A and 24A is in consonance with the resolution of the 22nd GST Council.*
>
> ***28.** The clarification of the 43rd GST Council saved exemption to the service under 9967 in entry No.23A and*

held that the exemption does not cover any deferred/annuity payment for construction service. Therefore it has been announced that the construction of roads simplicitor is taxable service, though the payment is in full or annuity to the concessionaire. The council's reiteration preserved the exemption of the Service under the Code 9967 and enunciated that the taxable Service fall within the scope of heading 9954. A close reading of notification Nos. 12, 32 and 33 of 2017 in no way suggests that the entries 23 or 23A or 24A exempts the services under 9954 i.e. construction service of the highways, bridges, and so on. Thus, we are of the considered opinion that there is no intersection or overlap or contradiction of direction in the resolutions of the 22nd and the 43rd GST Council vis-à-vis Notifications Nos. 12, 32 and 33 of 2017 and the impugned circular. In this view, the circular's explanation aligns with the 43rd GST Council resolution."

50. We are in complete agreement with the reasoning given by the Division Bench of the Telangana High Court as far as the applicability of the Circular dated 17.06.2021 is concerned, and with regard to GST not being exempted for the toll being collected pursuant to the construction of roads, as well as toll, forming part of the deferred annuity payment for construction services.

51. With regard to the arguments raised by the counsel for the petitioner qua the dropping of identical objections in Karnataka and Gujarat, it is needless to emphasize that, firstly, even if identical objections (assuming they are indeed identical) were dropped, it makes no difference. The Court has been called upon to adjudicate a pure question of law, and simply because an office of the department has dropped identical objections does not preclude this Court to deliberate and decide the taxability of the petitioner. Even otherwise, there can be no concept of negative equality, as sought to be invoked by the counsel for the petitioner.

52. However, in the interest of justice and for complete adjudication, this Court finds it appropriate to deal with the argument advanced by the counsel for the petitioner in this regard. The petitioner has placed on record the audit reports and decisions thereupon pertaining to the States of Karnataka and Gujarat, wherein audit objections were initiated against M/s. IRB Westcoast Tollway Limited and M/s. IRB Ahmedabad Baroda Super Express Tollway Pvt. Ltd., respectively.

53. A perusal of the objection shows that, as far as the audit objection in the State of Karnataka is concerned, it was with regard to the assessee/auditee declaring ITC of a certain amount as ITC available but ineligible at column No. 8 of Form GSTR-9. However, no documentary evidence was produced regarding the ineligible ITC as listed in the annual statement filed in Form GSTR-9. The proceedings were dropped while considering the reply filed and the documents produced by the audit. Thus, the issue before the assessing officer in Karnataka was not whether the construction undertaken by the assessee would fall within the definition of supply or services, nor whether the subcontractor or the principal contractor would be liable for the payment of taxable liability of the principal contractor. Thus, the issue in the case of Karnataka is entirely different and has no bearing in the present case.

54. Similarly, as far as the audit objection in Gujarat is concerned, the issue there was with regard to payment of VAT, more particularly GVAT, and whether the same was paid under the composition scheme or not. Even the assignment by the NHAI of the user fee collection from the users of the road was being considered. However, the issue pertained to liability under the VAT Act and not under the GST. As held supra, the provisions of both Acts operate differently, and simply because an audit objection was dropped in Gujarat, cannot make the same applicable to the present case. Thus, the arguments raised by the counsel for the

petitioner with regard to parity with Gujarat and Telangana are without substance.

55. This Court has further examined the orders impugned, passed by the Deputy Commissioner as well as the Appellate Authority, and finds that the same are well-reasoned orders, while referring to the provisions of law as well as the terms and conditions of the concession agreement. This Court does not find any illegality in the impugned orders, and the same are thus upheld.

Conclusion

56. As an upshot of the above discussion, the writ petition filed by the petitioner is bereft of merit and is accordingly dismissed. The orders dated 14.12.2023 and 09.05.2025 passed by the Deputy Commissioner and the Appellate Authority respectively, are affirmed.

57. No order as to costs.

(SANDEEP SHAH),J **(ARUN MONGA),J**

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