Reserved On : 15/07/2026
Pronounced On : 14/08/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12175 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12179 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 12492 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 13176 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 14252 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 14454 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 15076 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 15082 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 15084 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 6085 of 2025
With
R/SPECIAL CIVIL APPLICATION NO. 9622 of 2025
With
R/SPECIAL CIVIL APPLICATION NO. 11560 of 2025
With
R/SPECIAL CIVIL APPLICATION NO. 764 of 2026

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI Sd/-

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Approved for Reporting	Yes	No
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TORRENT POWER LTD
Versus
UNION OF INDIA & ORS.

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APPEARANCE FOR THE PETITIONER(S)
SCA Nos.12175 & 12179 of 2024
MR S N SOPARKAR, SENIOR ADVOCATE WITH MR UCHIT N SHETH

SCA Nos.12492 & 13176 of 2024
MR VIKRAM NANKANI, SENIOR ADVOCATE WITH MR PARITOSH GUPTA & MR MAHIR DANI

SCA No.14252 of 2024
MR VIVEK SARIN WITH MR AAKASH GUPTA & MR PRATHAM P JOSHI

SCA No.14454 of 2024
MR TUSHAR HEMANI, SENIOR ADVOCATE WITH MS VAIBHAVI PARIKH

SCA Nos.15076, 15082 & 15084 of 2024
MR SUJIT GHOSH, SENIOR ADVOCATE WITH MS MANNAT WARAICH, MS ANSHIKA AGARWAL, MS VIDHI CHABBRA, MR ADITYA PANDYA & MR PARITOSH GUPTA

SCA No.11560 of 2024
MR BHARAT RAICHANDANI WITH MR MAHESH RAICHANDANI, MS JASMINE DIXIT & MR RITHIK JAIN

SCA No.6085 of 2025 - MR ADITYA PANDYA

SCA No.9622 of 2025 - MR DHAVAL SHAH

SCA No.764 of 2026 - MR DHINAL SHAH

APPEARANCE FOR THE RESPONDENT(S)

MR N VENKATRAMAN, ADDITIONAL SOLICITOR GENERAL WITH MR ANKIT SHAH, MR UTKARSH R SHARMA, MR TIRTH NAYAK, MR SHASHVAT SHUKLA, MS HETAL PATEL, MS HETVI SANCHETI AND MR DEEPAK KHANCHANDANI, SENIOR STANDING COUNSELs MR RAJ TANNA, MS TANUSHREE SHRIMAL, MS NIMISHA PAREKH AND MR PARTH PATEL, AGPs
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CORAM: **HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

COMMON CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. In the present group of writ petitions, the petitioners, who have furnished corporate guarantees have challenged the *vires* of Rule 28(2) of Central Goods and Service Tax Rules, 2017 (for

short, "CGST Rules") and Central Goods and Service Tax Act, 2017 (for short, "the CGST Act"). A declaration is sought from this Court to declare the provisions of Rule 28(2) of the CGST Rules and Section 15(4) of the Act, as *ultra vires* to Articles 14, 19(1)(g) and 265 of the Constitution of India. The petitioners have also challenged the validity of the Circulars dated 27.10.2023 and 11.07.2024 issued by Central Board of Indirect Taxes and Customs (CBIC) issued by the Central Board of Indirect Taxes and Customs(CBIC). It is the case of the petitioners that GST levied under Rule 28(2) of the CGST Rules on corporate guarantees is illegal, and arbitrary since it does not attract tax liability.

SUBMISSIONS ADVANCED ON BEHALF OF THE PETITIONERS:

2. Learned Senior advocates and advocates appearing for the respective petitioners have made extensive and prolonged submissions, which were repetitive also. All the learned advocates appearing for the respective parties have referred to the decision dated 06.05.2026 of Bombay High Court in the case of M/s.D.P.Jain & Co. Infrastructure Private Limited Vs. Union of India & Ors (Writ Petition No.2087 of 2025). We have fused the submissions as under:

2.1 Following submissions are made in order to substantiate that a corporate guarantee will not constitute "supply" under the GST Acts:

a) Reference is made to Section 7 of the CGST Act and it is submitted that it mentions the supply of goods or services or both, and the transaction of such services or goods must independently constitute a "supply" under Section 7 of the CGST Act, which is an inclusive definition. It must constitute an identifiable supply of services in the course of or furtherance of business. The corporate guarantee furnished by the petitioners will not constitute a taxable supply of service since as per the provision of Section 7 of the CGST Act, to constitute a taxable supply of service, there has to be, (a) supply; (b) services; (c) to related party; and (d) in course or furtherance of business.

b) It is submitted that none of the four conditions are satisfied in the case of corporate guarantees, and hence the levy must fail. Reliance in this context is placed on the judgment of this Court in the case of <u>Gujarat Chamber of Commerce and Industry Vs. Union of India</u>, (2025) 139 GSTR 390.

c) The levy under Section 9 of the CGST Act attaches only to a 'supply' of goods or services. A corporate guarantees furnished without any fee or commission involves no activity carried out for another with consideration, no cost incurred by the guarantor, and nothing is 'provided' unless and until the guarantee is invoked, and it is a contingent contract (Section 31 of Indian Contract Act, 1872), not in the course or furtherance of business. Hence not service at all.

d) It is further submitted that if the Legislature intended to treat corporate guarantees as supplies, then it was required to enact an express provision to that effect. This is demonstrated by Section 7(1)(aa) of the CGST Act, introduced vide Finance Act, 2021 (with retrospective effect from 01.07.2017) where the Legislature, in order to overcome the principle of mutuality and treat transactions between a person and its members or constituents as taxable supplies, introduced an express deeming fiction under Section 7(1)(aa) of the CGST Act. In the absence of any analogous provision in relation to corporate guarantees, it is clear that such transactions cannot be treated as supplies merely by implication.

e) Within the definition of the term Supply, Section 7(1)(c) of the CGST Act defines supply to mean “the activities specified in Schedule I, made or agreed to be made without a consideration”. Thus, this suggests that Schedule I lists various activities, which even when made without a consideration would be treated as a supply. On the contrary, Entry 2 of Schedule I covers “Supply of goods or services or both between related persons or between distinct persons, as specified in Section 25 of the CGST Act, when made in the course or furtherance of business.” At this stage, the pertinent difference lies in the term ‘activity’ as used in Section 7(1)(c) of the CGST Act and ‘supply’ as used in Entry 2 of Schedule I. A combined reading of the two provisions makes it clear that every activity between related persons and distinct person does not qualify as a “supply” merely because it is undertaken without consideration. Rather, the activity must satisfy the essential ingredients i.e. a supply in the course or furtherance of business, for it to be treated as a supply. In other words, while every supply is an activity, every activity is not a supply.

f) The aforesaid principle also finds support in the judgment of the Supreme Court in The Member, Board of Revenue Vs. Arthur Paul Benthall, AIR 1956 SC 35, wherein it was held that where the legislature uses different expressions, the difference in language must be presumed to be deliberate and the expressions must accordingly be assigned their respective meanings.

g) It is contended that "supply" means an act of supply i.e. giving and taking. When the corporate guarantee is given, nothing is supplied and a mere promise to pay at a future date, which is purely on a contingent basis, which contingency may or may not arise, cannot result in a supply in the current date. Thus, it is submitted that the reliance placed by the Revenue on Schedule I to the CGST Act is misconceived, whereas Entry 1 of the said Schedule does not require actual supply, Entry 2 of the said Schedule requires supply to be present for invoking the said Schedule. Hence, the deeming fiction created by Section 7(1)(c) read with Entry 2 of Schedule I to the CGST Act does not dispense with actual supply and this Schedule cannot be read to mean that irrespective of supply, GST is payable. The mere fact that an act or activity finds reference in Schedule I to the CGST Act it does not, therefore, dispense with the requirement that it must possess the essential character of a supply of goods or services. Accordingly, the mere act of furnishing a corporate guarantee between related persons cannot, by itself, be presumed to constitute a supply merely by invoking Section 7(1)(c) read with Entry 2 of Schedule I to the CGST Act. The Revenue must first establish that there exists an identifiable supply of goods or services or both between the Holding Company and its Subsidiary and that such supply is made in the course or furtherance of business, as specifically required by Entry 2 of Schedule I to the CGST Act.

h) The definition must be read with the charging architecture: there must be a 'supply'; an activity carried out for another and, per the decision of the Apex Court in the case of <u>Directorate General of Goods and Services Tax Intelligence (HQS) Vs. Gameskraft Technologies (P.) Ltd.,</u> [2026] 186 taxmann.com 1232 (SC), the consideration must ordinarily exist.

i) Schedule I to the CGST Act does not deem 'consideration' into existence; it deems certain supplies of goods or services made without consideration to be supplies whereby it presupposes (i) an existing subject-matter of supply (goods or services) and (ii) that the supply is 'made in the course or furtherance of business'. Both premises fail: (i) the subject-matter is an actionable claim excluded by Schedule III para 6 read with Section Section 7(2) and Section 7(2) of the CGST Act opens with a non-obstante ('Notwithstanding anything contained in sub-section (1)'), so it is anterior to and prevails over Section 7(1)(c) of the CGST Act; (ii) furnishing a gratuitous guarantee for a wholly-owned subsidiary is shareholder/investment activity and not the core or main business activity of the petitioners.

j) Moreover, architecture of Section 7 of the CGST Act also makes the position very clear. Section 7(1)(a) of the CGST Act starts with ‘all forms or supply of goods or services or both’ having the widest sweep has two conditions, (i) consideration and (ii) in the course or furtherance of business. Section 7(1)(aa) of the CGST Act also has consideration as pre-condition. Section 7(1)(b) of the CGST Act deals with import of services for a consideration but waives the criteria of ‘in the course or furtherance of business’.

k) It is contended that Schedule II is formulated under Section 7 of the CGST Act. While referring to the provision of Section 7(1A) of the CGST Act, it is contended that the same is subservient to Section 7(1) of the CGST Act and therefore, unless the case falls under the expression "supply" found under Section 7(1) of the CGST Act, no recourse to Section 7(1A) read with Schedule II of the CGST Act is permissible.

l) That Section 7(1A) read with Schedule II to the CGST Act operates only where certain activities or transactions constitute a supply in accordance with the provision of sub-section (1), and as per the decision of the Supreme Court in case of ***Gameskraft (supra),*** Schedule II to the CGST Act cannot create a supply; it only classifies the one that already exists.

m) It is submitted that, in fact, prior to 2017, under clause (d) of Section 7(1) of the CGST Act, the activities to be treated as a supply of goods or supply of services as referred to in Schedule II to the CGST Act were included below sub-section (1) to Section 7 of the CGST Act. However, the same has been omitted with effect from 01.07.2017, which would indicate that the provisions of sub-section (1A) of Section 7 of the CGST Act are subservient to Section 7(1) of the CGST Act and hence, unless the activities satisfy the expression "supply" of Section 7(1) of the CGST Act, the Revenue cannot invoke the provisions of Entry 5(e) of Schedule II to the CGST Act. In any case, Entry 5(e) is part of Schedule II to the CGST Act, reaches only via Section 7(1)/(1A) of the CGST Act; with no supply and no consideration, it never comes into play.

n) While referring to Article 2 of Schedule I, it is submitted that the expression "related persons" will not get attracted in the cases of corporate guarantees. It is submitted that in the cases of corporate guarantees, there is no such transaction i.e. the transaction of the guarantee is given by the Holding Companies to the lender banks and services, if at all, are being rendered to them and not to the subsidiaries. In this context, reference is made to Clause 93 of Section 2 of the CGST

Act, which defines "recipient" of supply of goods or services or both, which indicates that it is the lender which is the recipient of services and not the subsidiary companies.

2.2 It is submitted that the valuation and the taxability depend on the time of supply of services under Section 13 of the CGST Act, and in cases of corporate guarantees, which are contingent in nature, the time of supply of services cannot be determined under the provision of Section 13 of the CGST Act.

2.3 In the context of Entry 5 of Schedule II of the CGST Act, reliance is placed on the decision of the Bombay High Court in the case of Tata Sons Private Limited Vs. Union of India & Ors. 2026 : BHC-OS:11242-DB. It is contended that the Bombay High Court emphasized that the expression "agreeing to the obligation" contemplates an independent arrangement under which the parties bind themselves in the normal course of business and for consideration to undertake such an obligation and hence, the mere existence of an act or an economic consequence cannot, without the necessary legal and commercial attributes of a service transaction, be charged as a taxable supply of service. Therefore, neither the residuary formulation of services under Section 2(102) of the CGST Act nor the expansive interpretation of supply under Section 7 of the CGST Act permits every act, which is not goods to be automatically characterized as a taxable supply of service.

2.4 The word “service” must therefore be understood as an integral part of the composite expression “supply of services”.

Applying the principle of *noscitur a sociis*, the meaning of an expression takes colour from the words and expressions with which it is associated. Thus, Section 2(102) of the CGST Act cannot be read in isolation from Section 7 of the CGST Act, which contemplates a supply of goods or services, ordinarily for consideration and in the course or furtherance of business. These expressions, read holistically, presuppose an identifiable commercial or economic transaction having the character of a supply and cannot be reduced to a mere determination as to whether the subject matter falls outside the definition of “goods”.

2.5 While referring to the provisions of Section 2(102) of the CGST Act, which defines "services" in a residuary manner as "anything other than goods, money and securities", it is contended that the same does not meet the test of determining the true nature of a service. It would be a dangerous proposition to suggest that something that is not "goods" would *ipso facto* constitute a service and, consequently, a taxable supply under the GST laws. Such an interpretation would enable the residuary definition of services to travel beyond the constitutional field of GST and trench upon matters specifically preserved outside its ambit, including taxes on lands and buildings under Entry 49 of List II of the Seventh Schedule to the Constitution of India.

2.6 The expansive interpretation of "supply" recognized in the case of ***Gameskraft (supra)*** cannot be understood as dispensing with the requirement of first identifying a legally recognized economic supply. Rather, the expression "supply" remains wide enough to accommodate evolving commercial transactions once their character as an economic supply of goods or services is established.

2.7 In order to examine whether a corporate guarantee falls within the ambit of an economic supply of service, following submissions are made:

a) The GST law does not explain what constitutes an "economic supply," nor does it prescribe an independent test for determining whether an activity undertaken between related corporate entities constitutes, in its commercial sense, an intra-group service. In the absence of specific statutory guidance under the GST law, it becomes necessary to examine international commercial and taxation jurisprudence, particularly the perspective of organizations specializing in fiscal and economic issues, namely the OECD (Organisation for Economic Co-operation and Development). Reference is made to the OECD Transfer Pricing Guidelines, specifically Chapter VII, which deals with consideration for intra-group services.

b) It is contended that the Revenue has placed reliance on the OECD guidelines and the principles emanating from the international transfer pricing framework to arrive at the valuation of 1%. This aspect formed part of the agenda for the 52nd GST Council Meeting, which refers to Rule 10TD of the Income Tax Rules, 1962 pertaining to safe harbor, prescribing a minimum acceptable commission of 1% for corporate guarantees.

c) It is contended that the Revenue has based its valuation rule by fixing 1% under Rule 28(2) of the CGST Rules upon the transfer pricing principles of the OECD. It is therefore not open for the Revenue to contend that while reliance can be placed on these guidelines on one hand to determine valuation, they cannot be used to understand the commercial and economic character of the underlying transaction between one group entity in relation to another.

d) Reliance is placed on the Bombay High Court judgment in the case of Coca Cola India Private Limited Vs. Commissioner of Central Excise, Pune-III, 2009 (242) ELT 168. For valid acceptance of international jurisprudence in the absence of decisive domestic legislative or judicial guidance and reliance is also placed on the decision of the Tribunal in the case of Micro Ink Limited Vs. Assistant Commissioner of Income Tax, 2016 (176) TTJ 8 (Ahmedabad).

2.8 The following submissions are advanced on behalf of the petitioners in context of expression “in the course or furtherance of business” found in Section 7 of the CGST Act.

a) In this regard, reliance is placed upon the judgment of Delhi High Court in the case of Central Electricity Regulatory Commission Vs. The Additional Director Directorate General of GST Intelligence & Anr. - W.P.(C) No.10680/2024, wherein the Delhi High Court rejected the proposition that the residuary definition of “services” as “anything other than goods” was, by itself, sufficient to establish a taxable supply. The High Court in the said decision emphasised that Section 7 of the CGST Act independently requires the alleged supply to be in the course or furtherance of “business” as understood under Section 2(17) of the CGST Act. Thus, even assuming the existence of a service, the transaction would not constitute a taxable supply unless this independent statutory requirement is satisfied.

b) In this context, reliance is also placed upon the meanings ascribed to the expressions “business” and “course of business” in Advanced Law Lexicon and Black’s Law Dictionary. The expression “business” denotes the ordinary commercial business carried on by the person concerned, whereas “course of business” contemplates the usual, normal or regular course in which such business is carried on. An activity does not therefore become part of the business of a person merely because it produces an incidental economic benefit for an entity in which such person has an ownership interest. The relevant definitions on which reliance has been placed are reproduced hereinbelow:

i. P. Ramanatha Aiyar’s Advanced Law Lexicon - “course of business: The usual custom in business or a particular line of business.”

ii. Black’s Law Dictionary: - “course of business: The normal routine in managing a trade or business. Also termed ordinary course of business; regular course of business; ordinary course; regular course.”

iii. The meaning of the expression “ordinary course of business” was also examined by the Supreme Court in the case of Anuj Jain Vs. Axis Bank Ltd., (2020) 114 taxmann.com 656 (SC).

c) While placing reliance on the provisions of Sections 186(2) and 186(3) of the Companies Act, 2013 and Section 186(11)(a) of the Companies Act, 2013, it is submitted that the same regulates the giving of loans, guarantees, and securities to other bodies corporate or persons, and also prescribes monetary limits, which must be followed by a resolution sanctioning the guarantee at a meeting of the Board with the consent of all directors present.

d) Section 186(11)(a) of the Companies Act, 2013 expressly excludes a guarantee given by a banking company, insurance company, or housing finance company "in the ordinary course of business". The aforesaid distinction is relevant inasmuch as, in the case of entities whose very business encompasses the furnishing of guarantees or securities in the ordinary course, the restrictions otherwise imposed by Section 186 of the Companies Act, 2013 are expressly excluded.

e) In light of the above, the mere fact that a Holding Company furnishes a corporate guarantee for its subsidiary does not establish that furnishing such guarantees constitutes its “business” within the meaning of Section 2(17) of the CGST Act. The Revenue cannot presume that such an activity forms part of the ordinary commercial business of the Holding Company merely because Section 2(17) of the CGST Act employs an inclusive definition of “business”.

f) Further, it is contended that the petitioners are not in the business of lending money and the definition of the term "business" in Section 2(17) of the CGST Act cannot cover such transactions. In this regard, reliance is placed on the Bombay High Court judgment in the case of Aerocom Cushions Private Limited Vs. Assistant Commissioner (Anti Evasion), 2026 : BHC-NAG-348-DB, against which the SLP has been dismissed. Reliance is also placed on the decision of Apex Court in the case of State of Tamil Nadu & Anr. Vs. Board of Trustees of the Port of Madras, 1999 (4) SCC 630.

g) This also exposes an inherent contradiction in the Revenue’s case. If the corporate guarantee furnished by the Holding Company is to further the business of its Subsidiary and Revenue contends that the preservation of the Subsidiary’s business is itself the preservation of the Holding Company’s business by reason of their common economic interest, it effectively collapses the separate identities of the two entities for this purpose. Such commonality of identity is fundamentally inconsistent with the simultaneous assertion that there is a supplier of a service and a recipient of service. The Revenue cannot, for establishing “furtherance of business”, treat the Holding Company and its Subsidiary as one economic unit, while treating them as an independent service provider and service recipient for establishing a taxable supply.

2.9 It is contended that Shareholder / investment activity does not satisfy the expression 'in the course or furtherance of business'. Reliance is placed on the CBIC's Circular 196/08/2023-GST, GST dated 17.07.2023 specifying that the securities held by the Holding Company in the subsidiary company are neither goods nor services. Further, purchase or sale of shares or securities, in itself is neither a supply of goods nor a supply of services. For a transaction/activity to be treated as supply of services, there must be a supply as defined under Section 7 of CGST Act. Therefore, the activity of holding of shares of subsidiary company by the Holding Company *per se* cannot be treated as a supply of services by a Holding Company to the said subsidiary company and cannot be taxed under GST.

2.10 The gratuitous guarantee is an incident and protection of that conceded non-taxable shareholding, given solely to safeguard and enhance the value of the investment. The incident cannot be taxed when the principal activity is admittedly not taxable. This material serves two grounds at once: (a) no 'service'/activity at all; and (b) even if a supply, it is not 'in the course or furtherance of business', so Schedule I Sr.2 fails on its own terms, which is also the complete answer to ***Gameskraft (supra)*** para 53's Schedule I exception.

2.11 It is contended that the furnishing of a corporate guarantee by a Holding Company is not an activity that the subsidiary could ordinarily procure from an independent enterprise, nor is it one that arises inherently from the shareholder relationship. As such, this activity would never qualify as an intra-group service, a position borne out by Chapter VII of the OECD Transfer Pricing Guidelines.

2.12 Reliance is also placed on paragraph No.7.9 of the OECD Transfer Pricing Guidelines, which recognizes the concept of "shareholder activity." This is defined as an activity undertaken by a parent or Holding Company solely by virtue of its ownership interest in another group entity, which does not constitute an intra-group service even if the investee company derives an incidental benefit therefrom.

2.13 Reliance is also placed on the decision of the United States Court of Appeals for the Seventh Circuit dated December 17, 1990, in the case of <u>Centel Communications Co. Vs. Commissioner of Internal Revenue</u>, 920 F.2d 1335 (7th Cir. 1990). It is contended that the aid lent to the company by the shareholder was not a service and instead, it was an additional financial risk assumed by the Shareholders.

2.14 The corporate guarantee does not fall within the precepts of supply, but is based on the provisions of Section 126 of the Indian Contract Act, 1872, which grants legal recognition to the contract of guarantee. The corporate guarantee is a single, integrated transaction, it cannot be artificially bifurcated for the purposes of taxing one purported independent supply of service.

2.15 Reference is made to Section 126 of the Indian Contract Act, 1872. Reliance is placed on the decision of the Supreme Court in the case of Punjab National Bank Limited Vs. Shri Vikram Cotton Mills and Another (1970) 1 SCC 60, which holds that the contract of guarantee is a concurrent transaction requiring the concurrence of three persons, and the surety undertakes his obligation at the express or implied request of the principal debtor.

2.16 It is submitted that the request made by the subsidiary to the Holding Company for furnishing a corporate guarantee is an integral part of a single, indivisible transaction between both entities and the bank lender, under which the surety undertakes an obligation at the express or implied request of the subsidiary.

2.17 Hence, there is no distinct offer and acceptance or consensus *ad idem* between the Holding Company and the subsidiary for it to constitute a separate contract under the terms of the Contract Act.

2.18 The petitioners have invoked the doctrine of *Ejusdem generis / noscitur a sociis* and it is contended that Para 5(e) of Schedule II to the CGST Act 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' is the GST successor of the declared-service entry in Section 66E(e) of the Finance Act, 1994, and takes colour from its genus: reciprocal, bargained-for obligations of forbearance or toleration of the non-compete type, where the obligation itself is the thing purchased. It is contended that a guarantee is not an 'agreeing to the obligation to do an act' bargained for by the subsidiary: the guarantor's undertaking runs to the bank, is contingent (Section 31 of the Indian Contract Act, 1872), and is bought by no one; no consideration moves for the 'obligation'. To read Para 5(e) of Schedule II to the CGST Act as covering every contractual undertaking would make every contract a 'service' and render the rest of the GST definitions otiose.

2.19 It has submitted that in the case of the petitioners, the respondents have levied 1% tax under Rule 28(2) of the CGST Rules on the pledge agreement by which the petitioners' Holding Company has pledged shares to its subsidiary along with the corporate guarantee, which is beyond the scope of Rule 28(2) of the CGST Rules and also the impugned circulars dated 27.10.2023 and 11.07.2024

2.20 By placing reliance on the judgments of the Supreme Court in the case of Phoenix ARC Private Limited Vs. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799 and in the case of Maitreya Doshi Vs. Anand Rathi Global Finance Limited, (2023) 17 SCC 606, it is contended that the Supreme Court, after examination of the provisions of Section 127 of the Indian Contract Act, 1872, has held that the pledge agreement cannot be treated as a guarantee under Section 126 of the Indian Contract Act, 1872 and 1% flat levy of tax is compelling and requires to be quashed and set aside.

2.21 It is submitted that the actual pledging of the shares is neither goods nor services, but they would be termed as "securities" as defined under Section 2(101) of the CGST Act having the same meaning as under Section 2(h) of the Securities Contracts (Regulation) Act, 1956.

2.22 Thus, it is contended that the shares are clearly included in the definition of "securities" and thereby stand excluded from the purview of goods as well as services, and hence the question of imposition of tax on pledging of shares does not arise.

2.23 It is contended that the submissions of the Revenue, treating the consensus as a "consideration" that is not otherwise ascertainable and assigning it a deemed valuation, must be rejected. Reliance is placed on the Australian GST ruling (GSTR 2006/1), which holds that even if a subsidiary were to make payments to the Holding Company in respect of a guarantee issued by the Holding Company, such payment would not represent consideration for an independent service between the Holding Company and the subsidiary. Instead, it would be treated as additional consideration for the underlying supply made by the Holding Company to the lender.

2.24 Reliance is also placed upon the judgment of the Court of Justice of the European Communities (First Chamber) in the case of Levob Verzekeringen BV and Another Vs. Staatssecretaris Van Financien (Case C-41/04), wherein it was held that a transaction constituting a single supply from an economic point of view cannot be artificially split.

2.25 The mere fact that the subsidiary obtains better credit terms, access to financing, or some other commercial advantage by reason of the financial standing of its Holding Company does not, without more, establish that the Holding Company has rendered any service to it.

2.26 It is submitted that Entry 5(e) under Schedule II to the CGST Act also does not get attracted to the corporate guarantees given by the Holding Company to its subsidiary. In this regard, reliance is placed on the minutes of the meeting of the 28th GST Council. Reliance is placed on the decision of this Court in the case of Ambuja Cements Limited Vs. Chief Controlling Revenue Authority (Stamp Reference Nos.7 of 2020) wherein it is reiterated that, in construing a taxing statute, there is no room for intendment, presumption or implication and that the Court must look fairly at the language actually employed by the Legislature. If the Legislature intended that the mere furnishing of a corporate guarantee by a Holding Company for its Subsidiary should, notwithstanding its recognised legal and commercial character, constitute an independent taxable supply of service by one to the other, such liability was required to be emerged clearly from the statutory framework.

2.27 Following submissions are advanced for considering the corporate guarantees as actionable claim:

a) The petitioners have also claimed the execution of corporate guarantee as an actionable claim, hence non-taxable. It is contended that the claim of the revenue which is premised on various components, viz: corporate is neither 'goods' (Section 2(52)), nor 'money' (Section

2(75)); nor 'securities' (Section 2(101) of the CGST Act); hence a 'service' by residue (Section 2(102) of the CGST Act; Article 366(26A) of the Constitution of India); which is issued 'in the course or furtherance of business' (Section 2(17)); between related persons, and is deemed supply gets obliterated at the first instance, on being shown that corporate guarnatee is an actionable claim, by definition, 'goods' and Schedule III para 6 read with Section 7(2) of the CGST Act then takes it outside 'supply' altogether.

b) For bringing the corporate guarantee within the ambit of ‘actionable claim”; the petitioners have tried to establish a chain, in three links. It is contended that Article 366(8) of the Indian Constitution defines 'debt' which includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and 'debt charges' shall be construed accordingly. The very Constitution which authorises GST (Articles 246A, 366(12A)) declares that liability under a guarantee is 'debt'; Articles 292 & 293 of the Constitution of India likewise place the giving of guarantees within the borrowing/debt architecture of the State. Parliament has said the same statutorily, and under the Insolvency and Bankruptcy Code, 2016 (for short, “IBC”), 'debt' means 'a liability or obligation in respect of a claim which is due from any person' and 'claim' includes a right to payment 'whether or not … fixed, disputed … secured or unsecured' (Section 3(6) of

IBC); and 'financial debt' includes 'the amount of any liability in respect of any of the guarantee or indemnity' for the enumerated items (Section 5(8)(i) of IBC). The other link canvassed is that a claim to a debt, even contingent, is an 'actionable claim'. In this regard reference is made to Section 2(1) of the CGST Act adopts Section 3 of the Transfer of Property Act, 1882, which defines 'actionable claim'. It is thus submitted that in Section 3, contingency is thus expressly stipulated within the definition. The guarantor's liability crystallizes only on default and demand.

c) Further in continuation of the aforesaid submission, it is contended that actionable claims are outside the purview of 'supply' Section (2) read with Schedule III, Article 6 of the CGST Act, which states that actionable claims, other than the 'specified actionable claims' (the notified lottery/betting/gambling claims, Section 2(102A) of the CGST Act), 'shall be treated neither as a supply of goods nor a supply of services'. Section 7(2) of the CGST Act opens with a non-obstinate clause and therefore prevails over Section 7(1)(c)/Schedule I to the CGST Act. There being no supply, Section 9, Schedule I, Schedule II para 5(e) of the CGST Act, Rule 28(2) of the CGST Rules and the Circulars have nothing to operate upon.

d) It is submitted that the contentions of the respondent are wholly misplaced inasmuch as the Article 366(8) of the Constitution of India defines debt to include “any liability under any guarantee”. Thus, the Grundnorm itself recognizes that liabilities assumed under guarantees partake the character of debt notwithstanding that the liability becomes enforceable only upon the principal debtor's default.

e) The petitioners further stress upon the fact that the reliance as placed upon Article 366(8) of the Constitution of India or the Insolvency and Bankruptcy Code is certainly not for the purposes of redefining the expression “actionable claim”. Instead, the necessity to refer to the enactments arises on account of the fact that the term “debt” has not been defined under the Transfer of Property Act, where Parliament adopts a statutory definition employing an undefined legal expression, it is a well-settled principle of interpretation that the Court may legitimately ascertain its accepted legal meaning by referring to statutes in *pari materia* and other cognate commercial legislation dealing with the same legal relationship. Reliance, in this regard, is placed upon the judgments in the case of Hotel & Restaurant Association Vs. Star India Pvt. Ltd., 2006 (11) TMI 540 (Supreme Court) and Ahmedabad Pvt. Primary Teachers’ Assn. Vs. Administrative Officer and Ors., (2004) 1 SCC 755.

2.28 Challenge to impugned Circulars is premised on the following submissions:

a) The power to issue Circular is conferred on the CBIC i.e. the respondent No.3 under Section 168 of the CGST Act, as per which, it can issue Order, Instructions or Directions for the purposes of uniformity in the interpretation of the CGST Act. However, the said Section does not admit of conferring any power on the Board to either effect administrative legislation or pre-determine adjudicatory facts. To the contrary, what the Impugned Circular seeks to do is nothing but pre-determine adjudicatory facts of whether or not a given transaction is taxable, and thereafter the valuation to be adopted.

b) Reliance in this regard is placed upon the decision of the Supreme Court in the case of Union of India & Ors. Vs. Karvy Stock Broking Ltd., (2019) 11 SCC 631 wherein a circular was issued clarifying regarding the liability to pay service tax on the Commission received by distributors on mutual fund distribution. The Supreme Court upheld the judgment of the High Court, which set aside the Circular on the ground that it amounts to foreclosing discretion or judgment that may be exercised by the quasi-judicial authority while deciding a particular *lis* under particular circumstances.

c) It is submitted that by declaring, as a matter of course, that the furnishing of a corporate guarantee by a Holding Company for its Subsidiary constitutes a taxable supply of service under Schedule I, the Impugned Circulars have travelled beyond the permissible scope of Section 168 of the CGST Act and, in effect, usurped the legislative function of Parliament. In the absence of a clear statutory provision declaring such an activity to constitute a taxable supply of service, the respondent No.3 could not, through executive Circulars, create or expand the scope of the taxable event under Section 7 of the CGST Act. Reliance is further placed upon the judgment of the Delhi High Court in the case of Faridabad Iron & Steel Traders Association Vs. Union of India, 2004 (178) E.L.T. 1099 (Del.).

d) In light of the above, it is submitted that the Impugned Circulars dated 27.10.2023 and 11.07.2024 are liable to be set aside, as they do not merely seek to ensure uniformity in implementation; they conclusively determine the matters which lie exclusively within the legislative domain.

e) The invidious discrimination between two similarly placed guarantees is evident from a conjoint reading of Serial Nos.1 and 2 of the said Circular, where a personal guarantee furnished by a Director to a Bank, which is also a related party transaction is not subjected to tax. This is based on the regulatory prohibition imposed by the RBI on charging any commission or consideration for such transactions. Thus, the transaction does not have an open market value and consequently assigns a 'Nil' taxable value and resultant no tax is payable on such supply of services by a Director to the Company. On the other hand, a corporate guarantee furnished by a Holding Company is subjected to a deemed valuation under Rule 28(2) of the CGST Rules.

f) Further, it is submitted that the Circulars dated 27.10.2023 and 11.07.2024, in so far as they seek to levy

GST even in relation to past and future years if the guarantee is more than one year, are also required to be struck down as they are contrary to Section 13 of the CGST Act read with Section 31 read with Section 2(33) of the CGST Act. It is submitted that such explanation tendered by the Circulars goes beyond the ambit of Rule 28(2) of the CGST Rules. It is contended that the circulars are expressly arbitrary in as much as in every case where the corporate guarantee is given in relation to a term loan, such amount gets reduced year after year on repayment of borrowing by the borrower, and the obligation under the guarantee would also to that extent be reduced. It is submitted that in a large number of cases, it may happen that the guarantee may not continue for its prescribed life on account of the happening of one or more contingent events, such as liquidation process, prepayment of loan etc. Thus, when the services depend upon a contingent event, the alleged deemed consideration for the period during which the service is not provided cannot be levied, and such levy is arbitrary and requires to be struck down. In this regard, reliance is placed on the judgment of this Court in the case of Commissioner of Income Tax Vs. Winner Business Link (P) Ltd. (2015) 55 taxmann.com 468 (Gujarat).

g) On behalf of the writ petitioners of Special Civil Application No.14454 of 2024, with regard to levy of GST on the recipient, who is a foreign entity, it is submitted that Rule 28(2) of the CGST Rules, as retrospectively substituted by Notification 12/2024 w.e.f. 26.10.2023, applies only where the recipient is 'located in India', and since both beneficiaries are foreign subsidiaries, their case is directly covered by Circular No.225/19/2024-GST dated 11/07/2024 answer to Issue No.8. It is also contended that the demand period pre-dates the rule. The demand covers July 2017–March 2020, wholly before insertion of Rule 28(2) of the CGST Rules on 26.10.2023; Circular 225/19/2024 itself says pre-insertion guarantees are valued under Rule 28(1) of the CGST Rules, which is not competent to value such a transaction.

2.29 Without prejudice to the petitioner’s principal submission that furnishing of a corporate guarantee does not constitute a taxable supply under Section 7 of the CGST Act, even assuming such taxability, Rule 28(2) of the CGST Rules is independently liable to be struck down as being *ultra vires* the parent statute and violative of Articles 14, 19(1)(g) and 265 of the Constitution of India in as much as the said Rule impermissibly creates the levy under the guise of valuation. The following submissions are advanced in this regard:

a) It is next contended that by the inclusion of corporate guarantees and levy of tax at 1% under Rule 28(2) of the CGST Rules, it snatches away the rights of the petitioners of valuation of supplies of the services, even if the corporate guarantee is considered as a service, under Rule 30 and Rule 31 of the CGST Rules.

b) As alluded to hereinabove, Rule 28 of the CGST Rules is a machinery provision framed under Section 15 of the CGST Act solely for determining the value of an existing taxable supply. It cannot be employed to create the existence of the taxable event itself. Rule 28(2) of the CGST Rules, however, proceeds upon the legislative assumption that every corporate guarantee furnished between related persons necessarily constitutes a taxable supply of service and simultaneously prescribes the taxable value thereof. In substance, therefore, the Rule does not merely value an existing levy but supplies an essential ingredient of the levy itself, which lies exclusively within the domain of the charging provisions under Sections 7 and 9 of the CGST Act.

c) While questioning the constitutional validity of Rule 28(2) of the CGST Rules, it is contended that the value of service, which is determined and fixed at 1% of the amount of guarantee offered, where there is no actual consideration, is expressly illegal and needs to be struck down or read down.

d) The Department concedes that Rule 28(2) of the CGST Rules, ‘does not create the charge'. Precisely so: if the charge fails (no supply; Schedule III exclusion; no business course), there is nothing to value and on the Department's own machinery the demand is incompetent: the recipients are foreign (outside Rule 28(2)), the demand period pre-dates the rule, and Circular dated 11.07.2024 confines 1% deeming prospectively. Separately, 1% p.a. deeming is manifestly arbitrary; a director's personal guarantee is valued at ‘Nil’ while the Holding Company's CG is deemed at 1% of the guaranteed sum for every year of its currency, divorced from cost (Nil).

e) In this regard, it is submitted that in order for a levy of tax to be operative and valid, four essential components must be provided in the enacting statute creating the tax/impost i.e. (a) the taxable event attracting the levy, (b) the person on whom the levy is imposed i.e. who is obliged to pay the tax, (c) the rate at which the tax is imposed and (d) the measure or value to which the rate will be applied for computing the tax liability. The absence of any of the afore-stated components will render the levy as invalid. In this regard, reliance is placed upon the decision of the Supreme Court in the case of Govind Saran Ganga Saran Vs. Commissioner of Sales Taxand Ors., AIR 1985 SC 1041.

f) The 1% valuation has no legislative or commercial foundation under the CGST Act and is confiscatory.

g) Without prejudice to the aforesaid, it is submitted that the very basis upon which Rule 28(2) of the CGST Rules prescribes the deemed valuation of one per cent per annum is itself arbitrary and the valuation of 1% per annum of the amount guaranteed is wholly confiscatory in nature.

h) Reference is made to the minutes of 52nd GST Council Meeting held on 07.10.2023 and has submitted that the GST Council, while recommending insertion of Rule 28(2) of the CGST Rules, did not undertake any independent exercise to ascertain the value of Corporate Guarantees under the GST regime. Instead, the prescribed benchmark was borrowed from the Safe Harbour Rules framed under Rule 10TD of the Income-tax Rules, 1962 and also sought to be justified with reference to commission ordinarily charged by banks for issuing Bank Guarantees. The Council had taken note that the banks charge different commissions at different rates ranging from 0.5% to 3%. It is submitted that in some of the cases, the banks may not be charging any commission whatsoever and the assessee can give a corporate guarantee without incurring any cost and in such cases, the levy of 1% tax is unjustified. Neither of these benchmarks bears any legal or commercial nexus with a corporate guarantee furnished by a Holding Company in favour of its Subsidiary and hence, the action of the Revenue by giving a deeming fiction of 1% levy is not only arbitrary but is also violative of Article 19(1)(g) of the Constitution of India, and is required to be struck down or read down. In this regard, reliance is placed on the decision of the Supreme Court in the case of Wipro Limited Vs. Assistant Collector of Customs, (2015) 14 SCC 161, and the decision of this Court in the case of Munjaal Manishbhai Bhatt Vs. Union of India, 2022 (5) TMI 397.

i) In light of the above, it is evident that the impugned Rule 28(2) of the CGST Rules transplants this optional administrative mechanism into the GST regime as a compulsory statutory valuation. In doing so, it deprives the taxable person of any opportunity to demonstrate the actual value of the alleged supply or establish that the benchmark is inapplicable having regard to the facts of the transaction.

2.30 The action of retroactive effect of Rule 28(2) of the CGST Rules is assailed on the following submissions:

a) The retrospective amendment to Rule 28(2) of the CGST Rules seeks to retrospectively alter the statutory machinery for valuation of the very same alleged supply. The petitioners have accordingly mounted a challenge to Section 164(3) of the CGST Act to the limited extent that it authorises retrospective rule making resulting in the creation of substantive fiscal liabilities carrying civil and evil consequences and therefore it is submitted that the said provision be read down in such cases. In this regard, reliance is placed upon the decision of the Supreme Court in State of Uttar Pradesh and Ors. Vs. Deepak Fertilizers & Petrochemical Corporation Ltd., (2007) 10 SCC 342.

b) Reliance is placed on the Notification No.14/2018 dated 26.07.2018, and it is contended that the levy of GST on the guaranteeing loans, by the Central Government, State Government, Union Territory to their undertakings or PSU's has been made exempt, hence the petitioners cannot be extended a discriminatory treatment, and are also entitled to exemption from tax.

c) Finally, with reference to the impugned notices issued by the respondents under Section 74 of the CGST

Act, it is submitted that the provision of Section 74 of the CGST Act is not attracted in the present case, as the corporate guarantee was executed by the petitioners' Holding Company and, therefore, it cannot be said to be a case involving fraud, willful misstatement, suppression of facts, or any intention to evade tax. More particularly, the tax is sought to be levied for a period prior to the insertion of Rule 28(2) of the CGST Rules. Thus, it is submitted that the impugned notices deserve to be quashed and set aside, as the petitioners cannot be said to have committed any fraud or misrepresentation by executing the corporate guarantee in favour of their subsidiaries.

SUBMISSIONS ON BEHALF OF THE REVENUE :

3. Learned ASG, N.Venkatraman in his usual flair, has responded to the foregoing submissions. While opposing the writ petitions, and to maintain the *intra vires* of Rule 28(2) of the CGST Rules, following submissions are made:

3.1 All corporate guarantees in the present batch of matters have been extended by the respective Holding Companies, without receiving any consideration. This is an undisputed fact. Prior to GST, several indirect taxes were levied and collected through various Legislation. Among others, Sales Tax, Service Tax, Customs Duty and Central Excise Duty were the four main indirect tax levies in the country. The first two i.e. the Sales Tax and Service Tax mandated the passing of consideration from one party to another before the charge could trigger. Without such a consideration, despite the conclusion of a transaction in sale or service, no tax can be levied.

3.2 The service tax regime was a consideration-based law and not a contract-based law. It required four elements to be present. A provider of service, a recipient of the service, rendition of service by the provider to the recipient and payment of consideration for the service. It is contended that corporate guarantee in the erstwhile regime and the present GST regime is a “service”, and falls within the definition of Section 2(102) of the CGST Act.

3.3 The taxable event in the GST regime is the supply of goods or service of both, defined under Section 7 of the CGST Act. If there is a taxable supply, then the same would be subjected to the tax levied under Section 9 of the CGST Act. GST is levied on corporate guarantee transactions as a supply of service.

3.4 For explaining the supply of services by the corporate guarantor-Holding Company to the Subsidiary through corporate guarantee, learned ASG has made the following submissions :

a) Reference is made to Section 7(1) of the CGST Act, and it is contended that, under sub-clause (a), the element of consideration is *sine-quo-non* for the supply to be taxed. However, under sub-clause (c), the activities specified in Schedule I of the CGST Act can be subjected to the levy, even without a consideration. For these activities, the element of consideration has been dispensed with and is not a *sine-quo-non* requirement for it to be taxed. Consequently, the mandate of Parliament is that Section 7 of the CGST Act includes supplies made with or without consideration.

b) A supply between a Holding Company and a subsidiary company would be deemed to be a supply between related persons under Explanation (a) to Section 15 of the CGST Act. Consequently, such a supply would fall within Item 2 of Schedule I to the CGST Act and would be liable to tax even if made without a consideration.

c) The law mandates taxing transactions between related parties under Schedule I due to the lack of arm's length, realistic consideration in such dealings. By invoking Section 7(1)(c) of the CGST Act and Item 2 of Schedule I to the CGST Act, the statute treats these, often non-commercial, arrangements as taxable supplies, with Rule 28(2) of the CGST Rules setting the value for corporate guarantees at 1% of the amount or the actual consideration, whichever is higher.

d) That Section 7(1A) of the CGST Act does not independently define what a supply is *de hors* Section 7(1) of the CGST Act. To the contrary, Section 7(1A) operates harmoniously with Section 7(1) of the CGST Act. Once a transaction qualifies as a supply under Section 7(1) of the CGST Act, with the aid of Section 7(1A) of the CGST Act, for the purpose of classifying the supply as either a supply of goods or supply or services, recourse must be taken to Schedule II to the CGST Act.

e) That not all transactions which qualify as a supply under Section 7(1) of the CGST Act would find their place in Schedule II. In other words, it is not *sine-qua-non* for all taxable supplies to have a prescribed classification in Schedule II to qualify as a taxable supply under Section 7(1) of the CGST Act. Section 7(1A) read with Schedule II to the CGST Act merely operate as an inner circle in prescribing the classification for a set of transactions. Only those transactions figuring in Schedule II to the CGST Act would rely on Schedule I to the CGST Act for the purpose of its classification.

f) Reference is made to Item 5 of Schedule II to the CGST Act, and it is contended that it identifies certain supplies which would qualify as supply as services. Among them, under Entry 5(e) of Schedule II to the CGST Act, "agreeing to do an act" is specified as a supply service. It is reiterated that corporate guarantee is extended by the Holding Companies and is nothing but an agreement to pay the defaulted amount, in the event their subsidiary fails to repay the loan, which will constitute "agreeing to do an act" and consequently, would be classified as a supply of service under Section 7(1)(c) read with Item 2 of Schedule II and Section 7(1A) read with Entry 5(e) of Schedule II to the CGST Act.

g) It is contended that the Revenue entirely agrees with the submission of the petitioner that to the extent that Section 7(1A) of the CGST Act is subservient to Section 7(1) of the CGST Act, and unless a case falls under Section 7(1), the Revenue cannot take recourse to Section 7(1A) read with Schedule II to the CGST Act. The Revenue is not directly taking recourse to Item 5(e) of Schedule II read with Section 7(1A) of the CGST Act to establish a taxable supply. It is submitted that Section 7(1) includes Section 7(1)(c) of the CGST Act, which treats activities specified in Schedule I made or agreed to be made without a consideration, as a taxable supply. Item 2 of Schedule I to the CGST Act mandates the supply of goods or services or both between related persons when made in the course or furtherance of business to be treated as a taxable supply, and since a Holding Company and its subsidiary company are related persons, as per the Explanation to Section 15 of the CGST Act, the Holding Company providing corporate guarantee for the benefit of its subsidiary is treated as a taxable supply under Section 7(1)(c) read with Item 2 of Schedule I. Only after the supply is traceable to Section 7(1), does the Revenue take recourse to Section 7(1A) read with Item 5(e) of Schedule II of the CGST Act, merely for the purpose of classifying the supply as a supply of service since providing a corporate guarantee is nothing but agreeing to do an act.

4. Responding to the submissions regarding subsidiary company falling outside the scope Section 2(93) of the CGST Act, which defines ‘recipient’, following submissions are made:

4.1 It is contended that since the service is rendered to the subsidiary company, they would qualify as service recipients under Section 2(93) of the CGST Act. Under Section 145 of the Indian Contract Act, 1872, it is expressly stated that in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. Even though the subsidiary company is not a party to the contract of guarantee, by virtue of Section 145, there is an implied contract between the Holding Company and the subsidiary company. In addition, since the ultimate beneficiary of the contract of guarantee is the subsidiary company to whom the service is rendered, they would constitute “recipients” under Section 2(93) of the CGST Act. Moreover, it is submitted that the subsidiary company approaches the Holding Company and requests for the guarantee. The rendition of service gets triggered only by the subsidiary company. Consequently, for this reason too, they would qualify as a recipient, and in addition to the three categories of persons conceived under Section 2(93) of the CGST Act, any reference to a person to whom a supply is made, should be construed as a reference to the recipient of the supply. Under Item 2 of Schedule I, a reference to a supply between related persons is made. Consequently, the subsidiary company would automatically qualify as a recipient under Section 2(93) of the CGST Act.

5. For encompassing the corporate guarantee within the ambit of Section 2(17) of the CGST Act, which defines the expression "business", learned ASG has advanced the following submissions:

5.1 That the definition of business manifest that providing corporate guarantee is business. That even if the corporate guarantee is not provided as a main business activity of the holding companies, it is undoubtedly an incidental and ancillary transaction to their main trade and commerce, even if its bereft of any consideration. The definition of business is transaction or activity centric and does not consider the purpose, quantity and frequency of such a transaction or activity. Even one-time activities would constitute business under Section 2(17) of the CGST Act. As a sequel, it is submitted that extending corporate guarantee constitutes business and would squarely fall within the scope of supply under Section 7(1)(c) read with Section 7(1A) read with Item 5(e) of Schedule II to the CGST Act.

6. In response to the submissions of the petitioners, claiming corporate guarantee as an actionable claim under Section 2(1) of the CGST Act, following submissions are advanced:

6.1 As regards the argument under Article 366(8) of the Constitution of India, it must be borne in mind that Article 366 of the Constitution of India employs the expression "in this Constitution, unless the context otherwise requires". Therefore, the definition of "debt" under Article 366(8) must be restricted to interpret the expression “debt” employed elsewhere in the Constitution. It cannot be automatically quoted to interpret the Transfer of Property Act, 1882.

6.2 Other relevant Articles in the Constitution which employs the expression “debt” also support this proposition. Article 112 of the Constitution of India deals with annual financial statement to be prepared by the Government of India and Article 202 of the Constitution of India deals with annual financial statements to be prepared by the States. Article 112(3) prescribes certain expenditures which shall be charged on the Consolidation Fund of India and Article 112(3)(c) prescribes “debt charges” for which the Government of India is liable. Article 202(3)(c) is a mirror provision for the States. These amounts have to be reflected in the annual financial statements prepared under Articles 112(2) and 202(2).

6.3 Therefore, whenever the Government of India or any State Government issues a guarantee, the charges surrounding that must be reflected in the annual financial statement prepared. It is for this purpose that “debt” includes any guarantee under Article 366(8) for the purpose of construing the expression “debt charges”.

6.4 Consequently, the definition of “debt” in the Constitution cannot be automatically imported for interpreting the expression “actionable claim” under the Transfer of Property Act, 1882.

6.5 Section 3 of the Transfer of Property Act, 1882; stipulates an actionable claim to either a debt or beneficial interest in movable property, subject to the conditions attached to these two claims, whereas providing a corporate guarantee can by no stretch of imagination be construed as a beneficial interest in movable property. Corporate guarantee is a promise by the Holding Company to repay the creditor to the extent of default by the subsidiary company. The transaction between the creditor and the subsidiary, who is the borrower, may give rise to a debt. However, the corporate guarantor, who merely extends a promise to repay the debt incurred by the subsidiary in the event of default, would not qualify as a debtor.

6.6 That while framing the GST laws, the parliament did not intend to borrow the concept of debt as provisions of the IBC, but chose Transfer of Property Act, 1882. Reference is made to Sections 3 and 5 of the IBC Code and it contended that it is apparent that under Section 3 read with Section 5 of the IBC, a corporate guarantor is treated separately to a debtor and is not equated to the status of a debtor.

6.7 While referring to the provisions of Sections 126, 127 and 128 of the Indian Contract Act, 1872 it is contended that under the Indian Contract Act, 1872, the role of the guarantor or the surety is to discharge the liability of a third person in case of default. The attempt of the petitioners to treat the guarantors as debtors, renders Section 128 otiose. In nutshell it is submitted that, the principal and primary liability is always that of the debtor and the debt is always vis-à-vis the debtor. There is no claim to a debt in the hands of the guarantor. The Guarantor discharges the liability incurred by the debtor in the event of a default. The liability is always of a third person.

Since the relationship with the guarantor is not a claim to any debt, the definition of actionable claim does not trigger. Consequently, Schedule III read with Section 7(2)(a) of the CGST Act has no relevance to the present case.

7. In response to the contention raised with valuation of supply, following submissions are advanced by learned ASG:

7.1 Reference is made to Section 15 of the CGST Act which deals with the value of taxable supply. It is submitted that the provisions of Section 15(1) of the CGST Act stipulate is that that transaction value shall be the value of supply and the price actually paid or payable for the supply constitutes the transaction value. However, Section 15(1) of the CGST Act removes from its ambit where the supply is between related parties. In other words, in related party transactions, the transaction value cannot be considered as the value of taxable supply. Reference is made to the expression 'prescribed' as defined under Section 2(87) of the CGST Act and it is contended that it means the rules framed under the Act on the recommendation of the Council. On a combined reading of Section 15(4) and Section 15(5) of the CGST Act, it is contended that recourse must be made to the rules prescribed under the Act as per the mandate of Section 15(4) to value the supply since related party supplies is outside the scope of Section 15(1) and Section 15(5) of the CGST Act empowers the Government to notify specific supplies and dictate their exact valuation methods in the rules, bypassing both general transaction value and standard fallback rules.

7.2 That in this context, Rule 28 of the CGST Act which is relevant for the present case, have to be taken note of. Rule 28(2) Rules deals particularly with supply between related persons and furnishing corporate guarantee. It has been introduced by exercise of power under Section 164 of the CGST Act. It has identified the supply i.e. supply of service by a supplier to a recipient by way of corporate guarantee to any banking company or financial institution on behalf of the recipient. It has also prescribed a value for that supply to be one percent of the amount of such guarantee offered per annum, or the actual consideration, whichever is higher. It therefore passes the twin-test under Section 15(5) of the CGST Act.

7.3 That the originating point of exercise of power under Section 15(5) or Section 164 of the CGST Act, is the recommendations of the GST Council. Therefore, it is immaterial under which provision the Central Government exercises its power. In this case it has done so under Section 164 of the CGST Act. However, it also passes muster and the mandate of Section 15(5) of the CGST Act by identifying the supply and prescribing the value for the same. In this context reliance is placed on the decision of Supreme Court in case of ***Gameskraft (supra***).

8. With regard to fixation of value of the supply at 1% in Rule 28(2) of the CGST Rules, following submissions are made:

8.1 That its genesis lies in 52nd GST Council Meeting. Agenda items 3(ii) and 20 dealt with taxability of corporate guarantee provided for related persons including corporate guarantee provided by Holding Company to its subsidiary company. The agenda clearly explained the difficulties being faced by the field formations due to non-availability of open market values due to peculiar nature of the relationship between a holding and subsidiary company, it adopted the minimum acceptable commission/fee under the Income Tax Rules for such transactions, as value of supply of services in the GST regime. In the minutes 22 of 52nd GST Council meeting held on 07.10.2023, vide Paras 4.16 to 4.18, 23, the GST Council agreed with the recommendations of the Law Committee along with the circular. Therefore, Rule 28(2) of the CGST Rules had the recommendations of the GST Council and the Rule was inserted by exercising power under Section 164 of the CGST Act. The deliberations of the GST Council also reflected why the value was fixed at 1%.

9. In response to the argument of the petitioners while referring to Section 31 of the CGST Act, that even the GST Council accepts that banks charge different rates from 0.5% to 3% and in some cases there may be no commission at all, and in absence of any cost, the deeming fiction under Rule 28(2) of the CGST Rules, cannot assume fixed consideration of 1% irrespective of the actual facts, it is contended as under:

9.1 That Section 31 of the CGST Act deals with tax invoices and prescribes when registered persons would have to issue the invoices, depending on the type of supply. Section 13(2)(a) and Section 13(2)(b) of the CGST Act prescribe the time of supply vis-à-vis the date of issue of invoice prescribed under

Section 31 of the CGST Act. In the present batch of matters, Section 31 of the CGST Act does not render any assistance. Consequently, Sections 13(2)(a) and 13(2)(b) of the CGST Act do not apply. However, Section 13(2)(c) of the CGST Act does not take recourse to Section 31 of the CGST Act in any manner and operates independently. Section 13(2)(c) of the CGST Act operates when Sections 13(2)(a) and 13(2)(b) of the CGST Act do not apply and prescribes the date on which the recipient shows the receipt of services in his books of accounts, as the time of supply of services.

9.2 Therefore, when the subsidiary company reflects the guarantee extended by the Holding Company in its books of accounts, that date will constitute the time of supply of services.

9.3 To overcome this submission, it was argued by the petitioners that the subsidiary company never reflects the guarantee in its books and therefore Section 13(2)(c) of the CGST Act does not trigger. This submission goes contrary to the mandate of the law.

9.4 The Indian Accounting Standards 24 (IndAS 24) governs related party transactions, and Clause 18(b)(ii) of IndAS 24 leaves no discretion. The subsidiary company is mandated to disclose particulars of every guarantee given or received. The petitioners’ submission that the guarantee is never reflected in the subsidiary's books therefore cannot be sustained. The obligation to record and disclose the guarantee is a statutory accounting mandate binding on the subsidiary, and does not turn on whether the petitioners chose to comply with it.

9.5 Clause 18(b) of IndAS 24 extends further, mandating disclosure of the outstanding balance of every commitment, including guarantees, in every reporting period for as long as the underlying liability subsists. The subsidiary company is therefore obligated, year on year, not merely to disclose the existence of the guarantee but to record the liability it secures and its outstanding balance in each financial statement prepared during the currency of the guarantee. This is a continuing, recurring accounting obligation, not a one-time disclosure.

9.6 Therefore, time of supply is available to be determined in each year since the disclosure would be made by the subsidiary company in each year.

9.7 In this context, if Rule 28(2) of the CGST Rules is appreciated, the language employed in Rule 28(2) of the CGST Rules, which deems the value of the supply as “1% of the amount of such guarantee offered per annum”. Since under Section 13(2)(c) of the CGST Act, a taxable supply triggers every year, Rule 28(2) of the CGST Rules can be judicially interpreted to mean that the expression “amount of such guarantee” will only mean the amount subsisting in each year. Rule 28(2) of the CGST Rules in its natural import permits such a construction.

9.8 For example, if a corporate guarantee is issued for 100 crores for a duration of ten years, instead of valuing the supply at 10% of 100 crores (1% of the amount of such guarantee offered per annum), the supply will be valued at 1% of the subsisting guarantee amount each year after setting off the amount repaid by the subsidiary in each year. If in the first year, the guarantee amount is 100 crores and 10 crores stand repaid, the subsidiary will only record 90 crores as the subsisting liability secured by a guarantee in its books of accounts in the second year. Consequently, Rule 28(2) of the CGST Rules will value the supply at 1% of 90 crores as against 100 crores.

9.9 As a natural corollary, if the subsidiary precloses the liability, in the seventh year, there will be no liability for the remaining three years and consequently, no guarantee amount for those three remaining years. Therefore, Rule 28(2) of the CGST Rules will value the supply only during the period the liability exists and is secured by a corporate guarantee.

9.10 In view of the aforesaid proposition, reliance placed on the decisions in the cases of Wipro Limited Vs. Assistant Collector of Customs, (2015) 14 SCC 161, and the decision of this Court in the case of Munjaal Manishbhai Bhatt Vs. Union of India, 2022 (5) TMI 397 will be of no consequence..

10. It is submitted that Rule 28(2) of the CGST Rules was amended on 10.07.2024 w.e.f. 26.10.2023, the date of its original insertion. Two crucial amendments were carried out. The value of supply which was fixed at 1% was deemed to be 1% of the amount of guarantee offered per annum. It is either 1% of the guarantee per annum or the actual consideration, whichever is higher. If an agreement is entered into for a higher consideration for providing the guarantee, then such a

transaction would be valued at the higher consideration and not at 1%.

11. While dealing with the submissions of the petitioners, to the extent that the corporate guarantee cannot be said to be a 'Continuous Supply of Services' under Section 2(33) of the CGST Act, it is contended as under:

a. On a literal interpretation, a corporate guarantee transaction spanning over multiple years will not constitute a continuous supply of services as defined under Section 2(33) of the CGST Act since the element of "periodic payment obligations" remains absent in a related party transaction without consideration (Schedule I transaction), as in the present batch. However, the other elements of the definition stands satisfied.

b. All Schedule I transactions under the CGST Act are to be treated as taxable supplies even without the element of consideration. Since continuous supply of services mandate periodic payment obligations, it cannot be held that deemed supplies listed in Schedule can never amount to continuous supply of services. Therefore, Section 2(33) of the CGST Act and Schedule I will have to be harmoniously construed to ensure that both the provisions work in tandem.

c. Since the value deemed under Rule 28(2) of the CGST Rules is also treated as the deemed consideration for the corporate guarantee transaction, the aspect of periodic payment obligations, a *sine-qua-non* for continuous supply of services under Section 2(33) of the CGST Act, gets established. This interpretation would also allow Schedule I transactions to fall within the scope of Section 2(33) of the CGST Act, which defines continuous supply of services.

d. Therefore, as held by the Supreme Court in the case of Ashok Leyland Ltd., Vs State of Tamil Nadu and Anr., 2004 (3) SCC 1, a deeming fiction has to be taken to its logical end and the same proposition must be extended and applied to Rule 28(2) of the CGST Rules. Rule 28(2) of the CGST Rules which deems the value in a related party transaction, must also be deemed to be the consideration for that transaction to permit such a transaction to fall within the scope and ambit of Section 2(33) of the CGST Act.

e. Once the transaction qualifies as a continuous supply of services, then the supply triggers every year automatically and the time of supply is traceable to either Section 13(2)(c) of the CGST Act or Section 13(5) of the CGST Act, as stated above.

12. Responding to the contention of non-levy of GST on pledging of shares since securities are excluded from the definition of “services” under Section 2(102) of the CGST Act, following submissions are made:

a) Section 126 of the Indian Contract Act, 1872. The Contract Act does not mandate an existence of a pledge as a condition precedent for a contract of guarantee to exist. To the contrary, it is an independent legal concept defined under Section 172 of the Indian Contract Act, 1872. The taxable event under GST is supply of goods or services or both, which in this case, triggers upon execution of the contract of guarantee. Merely because performance under the contract of guarantee is secured by way of a pledge in the same contract of guarantee, it cannot by any stretch of imagination be sandwiched or dovetailed with the taxable supply. The pledging activity remains independent and unconnected with the 'taxable event'. It remains an independent and separate transaction, which has no consequence on the validity of the levy.

b) The deed of corporate guarantee in Writ Petition being Special Civil Application No.12175 of 2024, itself shows that it is a contract of guarantee under Section 126 of the Indian Contract Act, 1872. Though, pledge agreement dated 20.03.2019 is titled agreement for pledge of shares, the underlying clauses in that share pledge agreement will reflect that it is nothing but a contract of guarantee. The recitals of the pledge agreement will clarify that the borrower becomes eligible for the amount is conditioned on the petitioners pledging the shares held by them in the subsidiary company. The pledge secures the obligations of the borrower. In the event of a default, the shares can be appropriated. This satisfies the conditions of both Sections 126 and 172 of the Indian Contract Act, 1872. By agreeing to stand as the guarantor, a taxable supply is triggered. The performance under the guarantee is secured by executing a pledge. As stated earlier, the GST law is not concerned with how the promise is secured. Once the guarantee is extended, the liability to tax arises.

c) The petitioners sought to bring out a distinction between a security and a guarantee and sought to rely on the decisions of the Apex Court in the cases of ***Phoenix ARC and Maitreya Doshi (supra),*** does not bear any relevance to the present batch at hand.

13. It was argued that the Revenue is adopting a selective approach to OECD Commentary. It was suggested by the petitioners that under the OECD Commentary, corporate guarantee transactions are not taxable. This submission deserves to be rejected for the simple reason that CGST Act does not define the scope of “supply” in the context of OECD Commentaries. The CGST Act is a standalone statute enacted by Parliament. If the supply remains taxable under the provisions of the statute, it will remain uninfluenced by any conflicting material including OECD Commentaries.

14. While asserting the validity and legality of the impugned Circulars, it is contended that the Circulars merely reflect the

position of law and is not contrary to the law, and they are issued in sync with the provisions of the Statute and merely aid the field formation in carrying out the provisions of the statute without any uncertainty and ambiguity. It neither travels beyond the statute nor is contrary to the statute. Consequently, it is urged that the challenge to the Circulars must also fail. The Circulars were drafted as collateral measures to the implementation of Rule 28(2) of the CGST Rules and its subsequent amendments, hence it is contended that as a consequence, all case laws cited by the petitioners on the binding nature of circulars or that a circular cannot create a levy or that a circular cannot travel beyond the statute, pale into insignificance and do not bear any relevance to the present case.

15. Only supplies made to recipients located in India were sought to be taxed, thereby removing the transactions exported, outside the ken of Rule 28(2) of the CGST Rules. The agenda that preceded these amendments traces its original to 53rd GST Council Meeting 24, vide paras 3-5, 25, 8 issues were considered and comments were offered for the consideration of the GST Council, along with a draft circular clarifying the issues.

16. Reference is made to the minutes 26 of 53rd GST Council meeting held on 22.06.2024, vide Paras 4.138 – 4.141, 27, the recommendations of the law committee along with the draft circular was approved by the GST Council. Hence, the insertion the subsequent amendments were carried out to Rule 28(2) of

the CGST Rules and the issuance of Circulars dated 27.10.2023 and 11.07.2024 were pursuant to the recommendations of the GST Council.

17. That the reliance by the petitioners on the decision of the United States Court of Appeals, Seventh Circuit in the case of ***Centel Communications Company (supra)*** is entirely misconceived. It does not deal with a corporate guarantee transaction in any manner and pertains to taxability of ESOPs provided by an employer to an employee. For this very reason, the United States decision is distinguishable. Similarly, it is contended that reliance by the petitioners on the public ruling issued by the Australian GST authorities is equally misconceived. That sovereign nation has taken a policy call to not tax corporate guarantee transactions by terming it as not a service. That by itself would not mean that the GST Act does not treat it as supply of services.

18. Finally, while referring to the Bombay High Court decision in the case of ***D P Jain and Co.(supra)***, it is submitted that it does not lay down the correct law and it is urged that the views expressed therein do not warrant acceptance.

19. Responding to the challenge to the action taken under Section 74, it is contended that the petitioners can avail the alternative remedy of filing the appeals.

ANALYSIS AND OPINION :

20. Learned Senior Advocates and learned advocates appearing for the respective parties have made extensive submissions and cited abundant case laws, some of them are

repetitive. In order to avoid prolixity, we have confined our opinion to relevant pleadings.

21. At the outset, we may clarify that legislative intent behind promulgation of GST laws along with the scope of power of GST Council and its recommendations has been threadbare examined by the Supreme Court in case of Union of India and Another Vs. Mohit Minerals Pvt.Ltd.Through Director, 2022 (10) SCC 70, and recent decision in case of ***Gameskraft (supra)***. We may not reiterate the same.

22. The petitioners, are Holding Companies, have assailed the action of levying tax at the rate of 1% under Rule 28(2) of the CGST Rules on corporate guarantees executed by them in favour of their subsidiaries. The corporate guarantees furnished without consideration are standard, non-commercial interventions within corporate groups. A Holding Company issues such guarantees in favour of financial institutions as collateral security to facilitate the smooth financial functioning of, and support the credit requirements of, its subsidiaries. Such arrangements in favour of financial institutions are often unsecured, meaning that they are backed by the general creditworthiness of the parent Holding Company rather than being tied to any specific corporate asset.

23. Under the erstwhile service tax regime, an activity could be taxed as a taxable service only if it satisfied two statutory elements, i.e. an activity and corresponding consideration. Unlike the GST laws, the erstwhile regime contained no deeming fiction to tax transactions between related parties in

the absence of consideration. In the context of corporate guarantees, the Supreme Court, in the case of Commissioner of CGST & Central Excise Vs. Edelweiss Financial Services Limited, (MANU/SC/0648/3023), has affirmed this position by holding that service tax is not leviable on corporate guarantees in the absence of consideration.

24. Before we embark on the journey of exploring the taxability of corporate guarantee under GST regime, we may clarify that in the pre-GST regime, the corporate guarantee was governed by the Section 65B(44) of Finance Act, 1994 which required an “activity” for consideration, hence the Supreme Court in the case of ***Edelweiss Financial Services(supra)*** held that a guarantee given without consideration escaped the levy entirely, since there was no related-party deeming mechanism in service tax law. In GST regime, as per the case of Revenue, the lacuna in service tax regime has been removed by insertion of Section 7(1)(c) read with Schedule I read with Schedule II of the CGST Act, and valuation prescribed under Rule 28(2) of the CGST Rules.

ASPECT OF CORPORATE GUARANTEE & ITS SCOPE OF SUPPLY UNDER SECTION 7(1)(C) OF THE CGST ACT:

25. For determining the taxability of a corporate guarantee, the true nature and import of the corporate guarantee and its execution require close examination. Structurally, a corporate guarantee is a tripartite arrangement involving the principal debtor, the creditor bank, and the surety i.e. the Holding Company. Such an arrangement effectively encompasses three distinct yet interlocking contracts:

A. **Principal contract**: a primary contract between the subsidiary company(principal debtor) and the creditor bank.

B. **Secondary contract**: A collateral agreement between the creditor bank and the surety Holding Company, which forms the primary basis of the corporate guarantee.

C. **Implied contract**: An implied agreement between the surety Holding Company and the subsidiary company, legally obligating the subsidiary to indemnify the surety if the surety is forced to perform or pay the debt.

26. It is asserted by the petitioners that corporate guarantee executed by the petitioners are without consideration, hence will not fall within the definition of "service" as defined under Section 2(102) of the CGST Act. The definition of service stems out of definition of "service" as defined under Article 366(26A) of the Constitution of India, which means anything other than goods. "Goods" as defined under Article 366(12) of the Constitution of India includes all materials, commodities, and articles. In this context, the provision of Section 7 of the CGST Act along with Schedules require threadbare examination.

27. It is the case of the petitioners that they have furnished the corporate guarantees in favour of their subsidiaries without any consideration. It would, therefore, be necessary to refer to the scope of "supply" as provided under Section 7 of the CGST Act, which reads as under:

"Section 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 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; [and]
(c) the activities specified in Schedule I, made or agreed to be made without a consideration; [****]
(d) [****].
[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]
(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), (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."

27.1 Section 7(1)(c) of the CGST Act mentions the activities specified in Schedule I. The Schedule I is incorporated as under:

"***SCHEDULE I***
[See Section 7 of the CGST Act]

Activities to be treated as Supply even if made without consideration

1) Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2) Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:

Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

3) Supply of goods—
(a) by a principal to his agent where the agent undertakes to supply such goodson behalf of the principal; or
(b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.
4) Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business."

27.2 Section 7(1)(c) of the CGST Act read with Article 2 of Schedule I to the CGST Act, specifies "activities" which are to be considered as the supply of services between related persons or distinct persons, when made in the course or furtherance of business, is leviable to GST even in the absence of consideration.

28. At this stage we may refer to the observations of the Supreme Court in case of ***Gameskraft (supra***). The Apex court in context of Section 7 of the CGST Act has held thus:

"51.8 . This position stands authoritatively affirmed in ***Union of India v. Mohit Minerals Pvt. Ltd . [109]*** *, wherein this Court observed that Section 7 defines "supply" "with a broad brush" and adopts an inclusive and expansive framework. The court further recognised that GST regime marks a decisive departure from the earlier sale-centric taxation model and instead adopts a supply-centric and destination based structure. The emphasis under GST is therefore upon taxing economic supplies rather*

than rigidly compartmentalising transactions into conventional categories of goods and services. The following paragraphs are pertinent:

> "*114. Section 7 of the CGST Act defines the term "supply" with a broad brush and provides for an inclusive definition. Section 7(1)(b) of the CGST Act considers import of services for a consideration to constitute "supply". Section 7(1)(c) of the CGST Act captures any and all activities in Schedule 1 of the CGST Act, irrespective of whether they are made for a consideration. Additionally, Section 7(3) confers the power on the Central Government to specify which transactions are to be treated as a supply of goods and not a supply of services, and vice versa. Section 7(4) of the IGST Act states that supply of services imported into India would be considered as a supply of services in the course of "inter-State trade or commerce". Thus, an Indian importer could also be considered as an importer of the service of shipping which is liable to IGST on inter-State supply, if the activity falls within the definition of "import of service" for the IGST Act and the CGST Act.*"
>
> "*141. GST laws mark a departure from the previous policy of taxing sale/consignments and focuses on the taxing of supplies. The concept of a supplycentric and destination-based tax runs through the scheme of the statutory provisions and the proposals issued by the GST Council. Thus, an amendment to the Constitution was introduced in the form of Article 366(12-A) to create a tax on the supply of goods, or services, or both. In the commercial reality of the times, the conceptual lines between goods and services wear thin. Hence, the focus is on the taxation of supply, as opposed to the creation of neat compartments between goods and services. Section 7(1)(c) of the CGST Act specifically characterises import of services for a consideration to constitute "supply". The only question that falls for determination is whether the imports of goods on a CIF basis would also constitute import of shipping services, by way of deeming fiction.*"

51.9 . The GST regime therefore taxes supplies and not merely traditional transfers of title or conventional sale transactions. Consequently, once actionable claims are expressly included within the definition of "goods", the expression "supply" under Section 7 must necessarily receive a purposive and expansive interpretation consistent with the constitutional and statutory architecture of GST. Any other restrictive construction would defeat the very architecture of

> *GST and render the levy incapable of addressing modern commercial transactions which do not conform to traditional forms of transfer."*

29. While reiterating law enunciated in the case of ***Mohit Minerals (supra)***, the Supreme Court has asserted that the GST regime marks a decisive departure from the earlier sale-centric taxation model and instead adopts a supply-centric and destination-based structure. In context of Section 7 of the CGST Act it is reiterated that it defines the term "supply" with a broad brush and provides for an inclusive definition, and Section 7(1)(c) of the CGST Act captures any and all activities in Schedule 1 of the CGST Act, irrespective of whether they are made for a consideration. The GST regime therefore taxes supplies and not merely traditional transfers of title or conventional sale transactions, and the expression "supply" under Section 7 of the CGST Act must necessarily receive a purposive and expansive interpretation consistent with the constitutional and statutory architecture of GST. Any other restrictive construction would defeat the very architecture of GST and render the levy incapable of addressing modern commercial transactions which do not conform to traditional forms of transfer. The word 'activity' is not defined in GST regime. The "activity" is subsumed in the expression "supply" which is inclusive and encompasses activities as enumerated in Section 7 of the CGST Act.

30. At this stage, we may refer to the provisions of Section 126 of the Contract Act to understand the nature and operation of a corporate guarantee. The same reads as under:

“Section 126. "Contract of guarantee", "surety", "principal debtor" and "creditor".

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.”

We may set an example as under:

Under Section 126 of the Indian Contract Act, the promisee -Y Bank provides consideration to the principal debtor -Z in the form of the loan, in exchange, the promisor-X assumes the responsibility to fulfill that promise if the principal debtor defaults. This arraignment makes X and Z. as related parties, and the activity of securing loan to Y will be an activity during the course of business. Thus, within the core contract of guarantee, the subsidiary company technically acts as a third party, as the primary transaction occurs directly between the surety-Holding Company and the creditor bank, for the benefit of the subsidiary company. This structure aligns with the statutory definitions and rights under the Indian Contract Act, 1872.

31. In order to further understand the requirements arising from the corporate guarantee furnished by the Holding Company, we may refer to Section 140 and 145 of the Indian Contract Act, 1872 which reads as under:

“Section 140 Rights of surety on payment or performance.

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.”

SECTION 145 : Implied promise to indemnify surety:

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully."

32. Section 140 of the Indian Contract Act, 1872, referred to hereinabove, confers the right of subrogation, whereas Section 145 of the Indian Contract Act, 1872 contains implied promise to indemnify surety, and prerogative of surety recover the sum from the principal debtor. Once the guarantor Holding Company settles the debt of the defaulting subsidiary, it steps into the shoes of the creditor bank. By operation of law, the surety Holding Company is then vested with all the rights that the creditor bank originally held against the principal debtor, namely, the subsidiary. This constitutes the connecting link for treating the arrangement as a 'supply of service' by the Holding Company to its subsidiary and, consequently, brings it within the scope of "supply" under Section 7(1)(c) of the CGST Act read with Article 2 of Schedule I to the CGST Act.

33. Article 2 of Schedule I contains two expressions: "related persons" and "made in the course or furtherance of business". These expressions are linked to Section 7(1)(c) of the CGST act, which refers to activities made or agreed to be made without consideration. In order to first ascertain the element of consideration in the context of a corporate guarantee, it would be apposite to refer to the provisions of Section 127 of the Indian Contract Act, 1872, which reads as under:

"SECTION 127: Consideration for guarantee

Anything done, or any promise made, for the benefit of the

> *principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*"

34. This section starts with the expression “Anything done”, means any act done, or promise made, for the benefit of the principal debtor serves as sufficient consideration to the surety for executing the guarantee. Thus, the word “consideration” found in Section 2(102) of the CGST Act defining service gets satisfied from the Section 127 of the Indian Contract Act, 1872. A combined reading of the provisions of Sections 126 and 127 of the Indian Contract Act, 1872 explicates that when a creditor-bank provides a loan facility to a subsidiary (principal debtor), that specific act constitutes the legal consideration transcending to the Holding Company (surety). Section 127 of the Indian Contract Act, 1872 establishes that the consideration for the guarantee flows directly from the creditor bank (promisor) to the subsidiary (promisee) by way of advancing the credit facility. The Holding Company provides the guarantee in exchange for this benefit being conferred upon its subsidiary, which might otherwise be ineligible for the loan.

35. Thus, an interweaving statutory intention of Section 126, 127, 140 and 145 of the Indian Contract Act, 1872, and on examination of the nature of corporate guarantee, it can be safely held that the petitioners – Holding Companies are "related persons" as per Explanation under Section 15 of the CGST Act, to their subsidiaries, and their execution of corporate guarantee without consideration will satisfy the expression “supply of services" in the course of business" as envisaged in Section 7(1)(a) of the CGST Act read with

Schedule I, Article 2 of the CGST Act. We will be separately dealing with the expression “during the course of business”.

<u>WHETHER HOLDING COMPANY AND ITS SUBSIDIARY ARE RELATED PERSONS, AS PER ARTICLE 2 OF SCHEDULE-I</u> :

36. The word ‘activity’ is not defined in GST regime. The “activity” is subsumed in the expression “supply” which is inclusive and encompasses activities as enumerated in Section 7 of the CGST Act. As far as the expression “related persons” contained in Article 2 of Schedule I is concerned, the provisions of Section 15(4)(5) of the CGST Act assume importance. The relevant is set out hereunder:

> ***“SECTION 15 : Value of taxable supply***
>
> *(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply*.
>
> xxxxxxxxxxxxxx
>
> *“(4) where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*
>
> *(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.*
>
> *Explanation. - For the purposes of this Act,-*
>
> *(a) persons shall be deemed to be "related persons" if-*
>
> > *(i) such persons are officers or directors of one another's businesses;*
> >
> > *(ii) such persons are legally recognised partners in business;*
> >
> > *(iii) such persons are employer and employee;*
> >
> > *(iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;*

> *(v) one of them directly or indirectly controls the other;*
> *(vi) both of them are directly or indirectly controlled by a third person;*
> *(vii) together they directly or indirectly control a third person; or*
> *(viii) they are members of the same family;*
>
> *(b) the term "person" also includes legal persons;*
> *(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related."*

Explanation to sub-section 5(a)(i) to (v) of the CGST Act would encompass a Holding Company and its subsidiary company, which provides that persons shall be deemed to be "related persons" if one of them directly or indirectly controls the other. Thus, the nature of the corporate guarantee and the manner and method of its execution would satisfy the ingredients of Section 7(1)(c) of the CGST Act, read with Article 2 to Schedule I, Section 15, and Explanation 5(a)(i) to (v) of the CGST Act.

FACET OF CORE OR MAIN BUSINESS OF HOLDING COMPANIES :

37. The petitioners have also asserted that since lending of money or loan is not their core or main business, the expression "in course or furtherance of business under Article 2 of Schedule, and definition of "business" will not get attracted. Before we examine the issue in context of definition of business as defined under Section 2(17), we may refer to the judgment of Apex Court in the case of ***Board of Trustees of the Port of Madras(supra)***, the Supreme Court while dealing with the *pari materia* definition of word "business" as

defined in Section 2(d) of the Tamil Nadu Sales Tax Act, 1959, has held thus:

> *"15. Now the definition of "business" in Sec. 2(d) and in most of the sales tax statutes is an inclusive definition and includes 'trade or business or manufacture etc.' This itself shows that the legislature has recognised that the word 'business' is wider than the words 'trade, commerce or manufacture etc.'. The word 'business' though extensively used is a word of indefinite import. In taxing statutes, it is normally used in the sense of an occupation, a profession - which occupies time, attention and labour of a person, normally with a profit motive and there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure [State of A. P. V/s. H. Abdul Bakhi & Bros., AIR 1965 SC 531]. Even if such profit motive is statutorily excluded from the definition of 'business' yet the person could be doing 'business".*
>
> *xxx xxx xxx*
>
> *18. We would categorise the rulings cited before us by learned Senior Counsel on both sides into two basic and distinctive categories, the first one where the main activity of the person amounted to "carrying on business" and the second where it did not. In the first category where the main activity was business, there could be sales relating to certain transactions 'connected with', 'incidental' or 'ancillary' to the main business though without profit motive, and the question would arise as to whether these sales were liable to sales tax or not. The second category would be one where the main activity did not admittedly amount to "carrying on business". Even so, in regard to sales which were connected or incidental or ancillary to such main activity, question would arise whether such sales were exigible to sales tax. The contention of the Port Trust before us is that its case falls under the second category and not under the first category. The State contends contra.*
>
> *xxx xxx xxx*
>
> *24. The words 'incidental' in Sec. 2(d)(ii) came up for consideration in State of Tamil Nadu V/s. Binny Ltd., Madras, 1980 Suppl SCC 686 , cited for the respondent-Port Trust. The company was having business of manufacture and sale of textiles. It was also running a store in the premises of the factory to enable the workmen to buy provisions which were assessed to tax. The sales to workmen were on no profit basis. The company contended that it was only running a facility for its workmen and its main business was certainly not that of*

selling provisions. The issue related to 1967-68 after amendment of Sec. 2(d) of the Madras Act. The argument that there should be a "direct" connection between the main business and these sales of provisions was rejected by this Court and it was held that these sales were 'incidental' to the main business and covered by the amended definition of 'business' in Sec. 2(d). Bhagwati, J. (as he then was) adverted to the observations of Krishna Iyer, J. in Royal Talkies, Hyderabad Vs Employees State Insurance Corporation, 1978 4 SCC 204 : 1978 GLHEL_SC 24363 , Hyderabad V/s. Employees State Insurance Corporation, (1978) 4 SCC 204 , a decision under the ESI Act to the following effect :

"a thing is incidental to another, if it merely pertain to something else as primary, surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either."

It was pointed out that in the case relating to Royal Talkies, Hyderabad Vs Employees State Insurance Corporation, 1978 4 SCC 204 : 1978 GLHEL_SC 24363 , it was held that it was impossible to hold that a canteen or cycle stand or cinema magazine booth was not incidental to the purpose of the theatre. The cinema goers ordinarily find the above to be facilities, amenities and sometimes even a necessity. All that the statute required was that the work should not be irrelevant to the purpose of the establishment. Adverting to the facts in the case before them (i.e. Binny Case), this Court held that if a canteen maintained by a cinema -owner for the benefit of cine-goers could be regarded as 'incidental' to the purpose of the Cinema theatre, namely, the business of exhibiting films in the theatre, it was difficult to see how a store run by the owner of a Textile undertaking for sale of provisions to workmen employed in the factory could be said to be not 'incidental' to the business of manufacture of textiles. [This case stands in contrast with State of Tamil Nadu V/s. Thirumagel Mills Ltd., (1972) 29 STC 290 , where, before amendment of definition of 'business' in the T. N. Act, sales made during the running of a fair price shop by a spinning mill for benefit of employees without profit motive were held not liable to sales tax]. On the same parity of reasoning, it was held in State of Tamil Nadu V/s. Shakti Estates, (1989) 1 SCC 636 , that where a reserve-forest was purchased or taken on lease by a firm for raising coffee and cardamom plantation thereon and a portion of the forest produce was cleared by felling trees and then the cut trees and natural growth were sold in various forms like firewood, timber/sleepers/charcoal, -

then these sales were 'incidental or ancillary' to the business. It was immaterial that in these sales there was no profit motive. In the context, it was to be noted that a 'casual dealer' was also included in the definition of 'dealer' and even sales effected before the plantation had started yielding results would be covered. In Indian Express (P) Ltd. V/s. State of Tamil Nadu, (1987) 67 STC 474 (SC), it was held that the sales of old and unsold copies of newspapers by a newspaper publisher as waste paper regularly with profit motive, were 'incidental' to the main business of printing and publishing newspapers and were liable to sales tax. This case was followed in The Hindu V/s. State of Tamil Nadu, (1987) 67 STC 477 (SC), which related to sales of glazed newsprint by a newspaper publisher (during the period when the publication was stopped) and also sales of old newspapers, print waste and cut waste and these sales were treated as 'incidental or ancillary' to the main business of printing and publishing of newspaper and liable to sales tax. These cases would be of help to the appellant, State of Tamil Nadu, if the main activity of the Port Trust amounted to 'business'."

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28. It will thus be noticed that in all these cases the main activity of the person or body was undoubtedly 'business' even though the motive of profit was excluded by statute and even though the connected, incidental or ancillary sales were statutorily included in the definition of business. The question in issue before us is whether the Port Trust was established by statute to 'carry on business'.

29. We now come to the second category of cases cited for the respondent, Port Trust where the main activity of the person or body does not amount to 'carrying on business'. If that be the case the activities will stand far removed from any business. Let us assume that such "non-business" activities might result (say) in some scrap or unwanted material which should be cleared so that accommodation could be saved. If the sales were then made with an intention to reduce the congestion and not with the intention of running an independent business in the scrap or unwanted material, then would they be liable to sales tax- If in such situations, the activities of sale of the scrap or unwanted material were only a very infinitesimal part of the activities when compared with the main "non-business" activity, could they be brought under the tax net-

30. In our view, if the main activity was not 'business', then the connected, incidental (or) ancillary activities of sales *would not normally amount to 'business' unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not 'business' and the onus of proof of an independent intention to do 'business' in these connected, incidental and ancillary sales will rest on the Department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier*

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36. We agree with the above observations subject to the following clarification or modification. If the main activities are 'business' then the sales in connection with or incidental or ancillary thereto need not have been intended as a business or commercial activity. Their mere connection with or being incidental or ancillary to something else which was 'business' was sufficient to include such sales in the main business. The second part of the last extract starting with the words 'But the converse is not true', are to be modified to mean that if the main activity falling under sub-clause (i) did not amount to business, normally these sales made in connection with or were incidental or ancillary to the main activity would not be 'business' but there could still be an exception where the sales so connected or incidental or ancillary to the main "non-business" activity were proved to have been made with an independent intention to do business and the burden of proof to prove the exception would fall on the revenue. In our view, the Andhra Pradesh High Court did not, in the above passage, imply that even where the main activities were not business, the assessee must prove want of an intention to carry on business in the connected, incidental or ancillary activity which involved sales. It is possible, in exceptional cases that such latter sales could per se be business having been proved by the revenue to have been carried in with such an explicit intention. The burden, as already stated, would here lie on the revenue.

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44. From the above provisions, in our opinion, it is clear that the Port Trust is not involved in any activity of 'carrying on *business' as has been clearly held in Aminchand Pyarelal's case (AIR 1975 SC 1935) (supra) and that unclaimed and unserviceable goods are sold in discharge of various statutory charges, items etc. and the sales of these items are also an infinitesimal part of the Port Trust's main activities or services. No doubt, the sales of goods are in connection with, or incidental or ancillary to the main "non-business" activities, but they cannot be treated as 'business' without any plea by the State of Tamil Nadu that the Port Trust had an independent intention to carry on business in the sale of unserviceable/unclaimed goods. That is not the case of the Department in the show cause notice. Further from the counter-affidavits filed in the High Court it is clear that it is not the case of the State that there is any separate intention on the part of the Port-Trust, to carry on business in the unserviceable and unclaimed goods. Its contention has been that the main activities of the Port Trust amounted to 'carrying on business' and that these sales, even if they were incidental, fell within the meaning of the word 'business'. The argument fails in view of our finding that the main activity is not one amounting to 'carrying on business'."*

38. The Supreme Court has examined the definition of "business" in context of sales tax by dividing into two activities, a) the main activity of the person amounted to "carrying on business" though without profit motive, and the question would arise as to whether these sales were liable to sales tax or not and b) where it did not, and the sales which were connected or incidental or ancillary to such main activity, whether such sales were exigible to sales tax. The Apex Court has referred to its decision in the case of Royal Talkies, Hyderabad Vs. Employees State Insurance Corporation, (1978) 4 SCC 204 and has opined that "*18....a thing is incidental to another, if it merely pertain to something else as primary, surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either.*" After considering array of judgments, it is held that the

primary activity of the person or body was undoubtedly ‘business’, and this holds true even though a profit motive was excluded by statute, and despite the fact that connected, incidental, or ancillary sales were statutorily included within the definition of “business”. It is also held that *“if the main activities are 'business' then the sales in connection with or incidental or ancillary thereto need not have been intended as a business or commercial activity. However, their mere connection with or being incidental or ancillary to something else which was 'business' was sufficient to include such sales in the main business*”. The Apex Court has expressed that, if the main activity was not 'business', then the connected, incidental (or) ancillary activities of sales would not normally amount to 'business' unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the revenue, and it will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities, and the onus of proof of an independent intention to do 'business' in these connected, incidental and ancillary sales will rest on the Department. Ultimately, the Supreme court in the aforesaid case, on examination of the nature of activity carried out the Port Trust in discharge of its statutory duty in light of the decision of Supreme Court in the case of <u>Trustees of the Port of Madras Vs. M/s. Aminchand Pyarelal & Ors</u>. (AIR 1975 SC 1935 has held that it is not established for carrying on business and hence cannot be said to be involved in any activity of 'carrying on business.

ANALYSIS OF CORPORATE GUARANTEE IN CONTEXT OF MAIN BUSINESS UNDER SECTION 2(17) :

39. Keeping in mind the foregoing observations, made by the Supreme Court in context of definition of business supplied in Sales Tax Act, relating to activity of sales of goods, the definition of "business" as provided in GST Acts in light of "supply of service" needs to be examined. In continuation of the foregoing discussion, we may examine the definition of "business" as defined under Section 2(17) of the CGST Act. The relevant portion thereof is extracted below:

> *"2(17) "business" includes -*
>
> *(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;*
> *(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);*
> *(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction"*

40. The pleadings of the petitioners in context of business are required to be examined in light of the sub-clauses (a), (b) and (c). It is contended that giving corporate guarantee is not the main business of the petitioners-Company, hence, the levy is illegal. The word business as defined has a very wide import and goes beyond the inclusive definition. The expression "similar activity" in clause (a), and expression "in connection with or incidental or ancillary" are to be read in conjunction with trade, commerce, manufacture, profession, vocation, adventure, wager". In the Black law dictionary 7th Edition, "incidental" is defined as "*subordinate to something of greater importance; having a minor role*", *whereas* "*ancillary*" *means*

"*supplementary; subordinate*". This activity will encompass actions connected to the core business of the Holding Company, and will also include the action supporting the main business activity, which is connected to its subsidiary. Adopting the foregoing reasons of the Apex Court, the execution of the corporate guarantee by Holding Company is an integral part of safeguarding the financial interest of its subsidiary. The main activity of Holding Company may not be business of lending money, however, extending the guarantee is “business” even though the motive of profit is excluded, is an extension of its business interest. Its mere connection with or being incidental or ancillary in facilitating the loan to its subsidiary is sufficient to include the supply of service within the ambit of “business”. Thus, the activity of the Holding Company in giving the corporate guarantee to its subsidiary, which enables it to secure loan for its commercial activities will be an activity incidental to "similar activity" to trade, commerce etc., and hence qualifies "business". Such activity may be an activity without pecuniary (monetary) benefit. The frequency of activity is also irrelevant. There is no compulsion of volume, continuity, or frequency, and even single or isolated transactions still count as business. As held by us, corporate guarantee is a “supply of service” by the Holding Company to its subsidiary which is a beneficiary. The fate of business activity of the subsidiary hinges on the guarantee extended to it by the Holding Company making it eligible for loan, and reciprocally, the Holding Company is benefited by business expansion/activity. This activity will satisfy the ingredients of expression “during the course of business” of Article 2 of

Schedule I, and definition of "business" under Section 2(17) of the CGST Act.

SCOPE OF SUPPLY UNDER ARTICLE 5(e) of SCHEDULE-II OF THE CGST ACT :

41. It is contended by the petitioners that the corporate guarantee extended by the Holding Company to its subsidiary would not fall within the scope of clause (e) of Article 5 of Schedule II to the CGST Act, since the expression "to do an act" cannot be read in isolation and must be read in conjunction with the expression "agreeing to the obligation". It is further contended that neither the Holding Company nor the subsidiary company agrees to any obligation and, therefore, the execution of a corporate guarantee cannot be considered a supply of services. *Albeit*, we agree with the submission, nevertheless, the execution of corporate guarantee will fall within the scope of Article 5(e) of Schedule II of the CGST Act, as discussed below.

42. Having established that the execution of a corporate guarantee in favour of a subsidiary falls within the scope of "supply" as envisaged under Section 7(1)(c) of the CGST Act, read with Article 2 of Schedule I, we may now deliberate whether the activity of executing a corporate guarantee falls within the ambit of Section 7(1)(a) of the CGST Act.

43. Section 7(1)(a) of the CGST Act stipulates that where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as a supply of goods or a supply of services, as

referred to in Schedule II of the CGST Act. The relevant extract of Article 5(e) of Schedule II, on which reliance has been placed by the respective parties, is set out below:

***"SCHEDULE II** .*
[See section 7]

ACTIVITIES [1] [OR TRANSACTIONS] TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES
Xxxxxx

5. Supply of services

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

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

Article 5(e) stipulates that agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act, shall be treated as a supply of services. Albeit, the reading 5(e) will give an impression that there five apparatuses of 5(e), but in fact they are four. The same are bifurcated as under:

i) Agreeing to the obligation to
ii) refrain from an act, or
iii) To tolerate an act or a situation, or
iv) To do an act"

44. The expression (i) "to tolerate an act or situation", though it contains word "or" cannot be read in disjunction, but are part of one expression, and are supplementary to each other. The three expressions (ii to iv) are prefixed by expression "agreeing to the obligation to", and all of them commence with word "to" and are divided by "or". Thus, in literal sense Article 5(e) would mean, supply of services

“agreeing to the obligation to refrain from an act”, “agreeing to an obligation to tolerate an act or a situation” and “agreeing to an obligation to do an act”. Thus, the word “obligation” assumes importance in deciding the issue whether the corporate guarantee will fall within Article 5(e) or not.

45. Black law dictionary 7th edition: defines Obligation as under:

> *obligation, n. 1. A legal or moral duty to do or not do something. 2. A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons. - Also termed legal obligation*
>
> *An obligation in law is a binding legal tie (vinculum juris) that compels one party to perform an act, make a payment, or refrain from doing something for another party. It creates an enforceable relationship where one person has a legal duty and another has the corresponding right to demand its fulfilment.*

46. The relationship of the Holding Company with the subsidiary is statutory and finds its place under section 2(87) of the Companies Act, 2013, and thus is *vinculum juris,* a legal tie. The Holding Company is thus bound by legal duty to do or not to do something for its subsidiary. It is bound by agreement or acknowledges a liability to do certain thing for its subsidiary, and owes an enforceable relationship and corresponding right to demand the fulfillment. Thus, a corporate guarantee as sought by the subsidiary from the Holding Company and acknowledged by the Holding Company for fulfillment of its financial security will fall within the expression “agreeing to do an obligation to do an act”. Hence,

as a sequel will be considered as "supply of services" under Article 5(e) of II Schedule of the CGST Act.

WHETHER SUBSIDIARY BECOMES RECIPIENT UNDER SECTION 2(93) OF THE CGST ACT :

47. Having established that the transaction constitutes a supply of services, the next issue for consideration is whether the subsidiary can be said to be a "recipient" within the meaning of Section 2(93) of the CGST Act. Section 2(93) of the CGST Act reads as under:

> *"2(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;"*

48. As discussed hereinbefore, Section 140 of the Act, which confers a right of indemnification, serves as the connecting link in establishing the supply of services by the Holding Company to its subsidiary. Section 145 of the Act expressly provides that, in every contract of guarantee, there is an implied

promise by the principal debtor to indemnify the surety, and that the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. These provisions, read with Section 140 of the Contract Act, establish that, even though the subsidiary company may not be a party to the contract of corporate guarantee, the supply of services ultimately accrues to and is rendered for the benefit of the subsidiary company. Accordingly, the subsidiary company would be a “recipient” of the services under the corporate guarantee, thereby satisfying the requirements of Section 2(93) of the CGST Act.

49. The identity and purpose of the corporate guarantee are intrinsically connected with the subsidiary company, which approaches the creditor bank for financial assistance. The rendition of the service is triggered by the subsidiary's requirement for such financial assistance, resulting in the execution of the corporate guarantee by the Holding Company, particularly where the subsidiary is otherwise unable to secure the requisite financial assistance on its own. Thus, the supply of services through the corporate guarantee furnished by the Holding Company ultimately accrues to and terminates with the subsidiary company. As the ultimate beneficiary and recipient of the service, the subsidiary company qualifies as a “recipient” within the meaning of Section 2(93) of the CGST Act.

WHETHER CORPORATE GUARANTEE IS AN ACTIONABLE CLAIM :

50. The petitioners have also raised an issue as to whether the issuance of a corporate guarantee constitutes an

"actionable claim" and, consequently, falls outside the scope of "supply" under Schedule III of the CGST Act. The argument of the petitioners is premised on the nature and operation of corporate guarantee, which is subjected to a contingent event of paying the debt by the subsidiary company at any time. The petitioners have attempted to link corporate guarantee via Article 366 of the Constitution read with provisions of section 3 and 5 of IBC code.

51. Actionable Claim as defined under Section 2(1) of the CGST Act, has the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882. Section 3 of the Transfer of Property Act, 1882 defines actionable claim to mean:

> *"claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."*

52. Schedule-III of the CGST Act specifies certain activities and transactions that are treated as neither a supply of goods nor a supply of services and are therefore not liable to GST. One such excluded category is actionable claims, except those specifically brought within the tax net. The Supreme Court in the case of ***Gameskraft (supra****)* has an occasion to deal with "actionable claim" linked with gaming activities. The relevant observations are extracted below:

> *"50.23. As already mentioned, Article 246A introduced a comprehensive and sui generis constitutional framework enabling Parliament and the State Legislatures to enact laws with*

respect to goods and services tax. The GST regime is centered around the broad concept of "supply" as the taxable event and is not confined to traditional notions governing sale of goods under earlier commercial statutes.

50.24. The submission of the assessees proceeds upon an incorrect assumption that Articles 366(12) and 366(26A) create rigid compartments freezing every juristic category into either goods or services according to historical commercial law classifications. Neither Article 366(12) nor Article 366(26A) mandates such inflexible compartmentalisation. Article 366(26A), which defines "services" as "anything other than goods", cannot also be construed as constitutionalising pre-existing commercial law distinctions so as to denude Parliament of legislative flexibility within the GST framework enacted pursuant to Article 246A.

50.25. Even otherwise, actionable claims possess several attributes traditionally associated with movable proprietary interests capable of forming the subject matter of trade and commerce. Actionable claims are expressly recognised under the Transfer of Property Act, 1882 as transferable and assignable interests in movable property. Section 130 of the Transfer of Property Act itself contemplates assignment of actionable claims for value. Such interests are capable of transfer, assignment, valuation and commercial dealing and therefore possess characteristics traditionally associated with proprietary interests in goods. The inclusion of actionable claims within the ambit of "goods" under the GST framework therefore cannot be said to be constitutionally or conceptually alien.

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> *52.2. Notably, the definition also recognises that the beneficial interest may be "existing, accruing, conditional or contingent". Consequently, an actionable claim arises once a beneficial interest in movable property recognised by law comes into existence, whether existing, accruing, conditional or contingent. In betting and gambling transactions, once a participant stakes money upon an uncertain event, a contingent beneficial interest capable of maturing into an enforceable claim comes into existence. Such an interest squarely falls within the statutory definition of an actionable claim.*
>
> *xxx xxx xxx*
>
> *52.11. It must also be noted that Schedule II merely classifies certain supplies as supply of goods or supply of services. It is*

not an exhaustive catalogue of taxable supplies. The levy of GST arises upon the occurrence of "supply" under Section 7 and not merely upon classification under Schedule II. Consequently, merely because the manner in which actionable-claim interests arise and operate within betting and gambling transactions is not specifically enumerated in Schedule II does not exclude such transactions from the ambit of taxable supply under the CGST Act. In betting and gambling arrangements, where the organised commercial structure operated by the platform gives rise to contingent actionable-claim interests upon participation by players, such arrangements fall within the broad ambit of taxable supply contemplated under Section 7 read with Schedule III."

53. The observations of the Apex Court in relation of actionable claim stem out of the provisions of Rule 31A of the CGST Rules, read with Schedule-III of the CGST Act, relating to gaming activities read with the Section 130 of Transfer of Property Act, 1882, which contemplates assignment of actionable claims for value. It is settled legal precedent that actionable claim recognises that the beneficial interest may be "existing, accruing, conditional or contingent.

54. We shall now test the reasoning of the petitioners in context of definition of 'debt' and bringing corporate guarantee under actionable claim. The definition of "debt" can be traced to Article 366(8) of the Constitution. The same reads as under:

"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-

8. "debt" includes any liability in respect of any obligation to repay capital sums by way of annuity and any liability under any guarantee, and "debt charges" shall be construed accordingly;"

55. Article 366 begins with "In this Constitution, unless the context other wise requires". Thus, the definitions enumerated under Article 366 relates to understanding of the provisions of Constitution of India containing such words to which the meaning has been assigned. In GST Acts, the meaning of 'debt' which finds place in "actionable claim" is to understood from the Transfer of Property Act, and hence is to be interpreted and understood in the context of TP Act, 1882 keeping in mind the intention of GST laws, and not the IBC Code as claimed by the petitioners. The role of Holding Company (surety), its subsidiary (principal debtor) and the financial institution (lender) and the nature and purport of corporate guarantee under GST laws is required to be examined exclusively by resorting to the provisions of TP Act, 1882 and Indian Contract Act, 1872. In the case of a corporate guarantee, the guarantor undertakes an obligation to discharge the debt or fulfill the liability of another person upon the occurrence of a default. Albeit, such guarantee creates a contingent obligation that may become enforceable in the future, it does not, by itself, amount to an actionable claim within the meaning of law. The Holding Company is not the debtor, until the subsidiary defaults. It has beneficial financial interest in its subsidiary. The impact of default by subsidiary results into claim by the lender-bank from Holding Company. It is evident from a combined reading of the provisions of Sections 126, 127 and 128 of Indian Contract Act, 1872 that when a creditor-bank provides a loan facility to a subsidiary (principal debtor), that specific act constitutes the legal consideration moving to the holding-company (surety), and the consideration for the

guarantee flows directly from the creditor bank (promisor) to the subsidiary (promisee) by way of advancing the credit facility. Section 128 of Indian Contract Act, 1872 strengthens the role and liability of Holding Company(surety), which is co-extensive with that of principal-debtor(subsidiary). Thus, a default by a subsidiary will trigger the action by the Bank-lender to enforce the corporate guarantee from the Holding Company. The payment of debt is exclusively on the subsidiary unless it defaults. An actionable claim represents a direct, primary right to claim a payment or debt, which cannot be compared to corporate guarantee which stems out of secondary, contingent liability that triggers on default of the principal debtor emanating from a *tri-partite* agreement. As the definition under Section 3 expounds that actionable claim relates to a claim to an unsecured debt which is monetary obligations that qualify as actionable claim, which can be transferred by resorting to the provisions of section 130 of TP Act, 1882 whereas a corporate guarantee cannot be casually traded; since it is a specific, non-transferable financial assurance provided to a lender. Thus, albeit a corporate guarantee is contingent in nature, it does not *stricto sensu* falls under actionable claim as defined under section 3 of the TP Act, 1882. A corporate guarantee cannot be dragged into an actionable claim, through definition of ‘debt’ under Article 366(8) read with IBC code, but its legal entity in context of GST laws is established through the provisions of TP Act and Contract Act. Thus, corporate guarantee will remain outside the reach of Schedule III read with Section 7(2)(a) of CGST Act.

WHETHER CORPORATE GUARANTEE IS A SHAREHOLDER ACTIVITY OR NOT:

56. In order to substantiate that the corporate guarantee is a share holding activity, the petitioners have placed reliance on the judgment of the Income Tax Appellate Tribunal (ITAT), ***Micro Ink Ltd (supra)***, wherein the Tribunal while examining the scope of CG under Income tax Act has held that corporate guarantees provided by a parent entity are *prima facie* in the nature of a "shareholder activity", since the action of giving CG is taken by the Holding Company to protect corporate investments and to compensate subsidiary's lack of independent credit strength to raise finance. The Tribunal clarified that "provision of service" and "shareholder activity" are mutually exclusive concepts. However, in our opinion, the doctrine of shareholder activity cannot be applied *stricto senso* to the GST regime, and it depends on the nature of execution of CG. There may be cases like the petitioner of SCA No.12175 and 12179 of 2019, where there is pledging of shares along. The activity relating to money and security has been excluded from the definition of “goods” under Section 2(52) and “service” under Section 2(102) of the CGST Act. We may at this stage refer to the full bench decision of the Supreme Court in the case of ***Phoenix Arc Pvt.Ltd. (supra)***. The Apex Court while examining the provisions of Section 124, 126 and 172 of Contract Act has distinguished the guarantee and pledge, and has held thus:

> *“24 Chapter VIII of the Indian Contract Act, 1872 deals with "Of Indemnity and Guarantee". Section 124 defines "Contract of indemnity" and Section 126 defines "Contract of guarantee". Section 126 which is relevant for the present case is as follows:*

> *"Section 126. "Contract of guarantee", "surety", "principal debtor" and "creditor".-A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*

25 As clear from the definition a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The Pledge Agreement is limited to pledge 40,160 shares as security. The corporate debtor has never promised to discharge the liability of borrower. The Facility Agreement under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the Facility Agreement. A contract of guarantee contains a guarantee "to perform the promise or discharge the liability of third person in case of his default". Thus, key words in Section 126 are contract "to perform the promise", or "discharge the liability", of a third person. Both the expressions "perform the promise" or "discharge the liability" relate to "a third person".

26. The Pledge Agreement dated 10.01.2012 does not contain any contract that the promise which was made by the borrower in the Facility Agreement dated 12.05.2011 to discharge the liability of debt of Rs.40 crores is undertaken by the corporate debtor. It was the borrower who had promised to repay the loan of Rs.40 crores in Facility Agreement dated 12.05.2011 and it was borrower who had undertaken to discharge the liability towards lender. The Pledge Agreement dated 10.01.2012 does not contain any contract that corporate debtor has contracted to perform the promise, or discharge the liability of the third person. The Pledge Agreement is limited to pledge of 40,160 shares of GEL only.

27. We have noticed above that in the Facility Agreement there is a Security Creation by way of Schedule IV in which 100% equity shares of GEL were pledged by the borrower and second pari-passu charge on all current assets of the GEL was also created as security for loan. It transpires that since some *shares of GEL were also with the corporate debtor who is subsidiary Company of Doshion Ltd. the same was also pledged with the lender as additional security by a subsequent agreement dated 10.01.2012.*

28. The Pledge Agreement and undertaking given, entered between Assignor and corporate debtor cannot be termed as contract of guarantee within the meaning of Section 126.

29. The expression "pledge" is separately dealt with in the Indian Contact Act, 1872. Section 172 defines 'pledge' in the following words:

> *"Section 172. "Pledge", "pawnor", and "pawnee" defined.-The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called "pawnee".:"*

30. The word 'guarantee' and 'indemnity' as occurring in Section 5(8)(i) has not been defined in the Code. Section 3 sub-section (37) of the Code provides that words and expressions used but not defined in the Code but defined in the Indian Contract Act, 1872 shall have the meanings respectively assigned to them."

57. The aforesaid view is reiterated in the decision rendered in the case of Maitreya Doshi Vs. Anand Rathi Global Finance Ltd., 2023 (17) SCC 606. The Apex Court has held thus:

"34. It is true, as argued by Mr. Vishwanathan that contract of indemnity, contract of guarantee and pledge are not one and the same. The contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In a contract of indemnity, a promisee acting within the scope of his authority is entitled to recover from the promisor all damages and all costs which he may incur. A contract of guarantee, on the other hand, is a promise whereby the promisor promises to discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety. The person in respect of whose default, the guarantee is given is the principal debtor

> *and the person to whom the guarantee is given is the creditor. Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. On the other hand, the bailment of goods as security for payment of a debt or performance of a promise is a pledge".*

58. The foregoing observations of the Supreme Court in context of pledge under Section 170 of the Indian Contract Act, 1872 and guarantee under Section 126 of the Indian Contract Act, 1872 manifest that Supreme court has distinguished the same on the facet of discharge of liability emerging from the respective agreements. In light of the nature of agreement/contract between the parties in the aforesaid case, wherein the corporate debtor "has not" entered into a contract to perform the promise, or discharge the liability of borrower in case of his default, it is observed that the definition a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default, whereas by pledging the shares the corporate debtor vide Pledge Agreement dated 10.01.2012 has never promised to discharge the liability of the third person. It is held that the key words in Section 126 of the Indian Contract Act, 1872 are contract "to perform the promise", or "discharge the liability", of a third person and both the expressions "perform the promise" or "discharge the liability" relate to "a third person". Similarly, in case of ***Maitreya Joshi (supra),*** the borrower had pledged the shares as security for repayment of his own debt. In order to bring the contract/agreement within the contours of corporate guarantee, it is essential to examine its true nature and purport. In this regard, we shall refer to the judgment of the Supreme Court in the case of Infrastructure

Leasing And Financial Services Ltd. vs Hdfc Bank Ltd. & Anr., AIR 2023 SC 5239. The Supreme Court has elucidated the principle of contract interpretation. The relevant observations is as under:

> *"26. The effect of these documents is what the court is concerned with. It is a known principle of contract interpretation, that the substance of a document, is discernible from its terms, rather than the label or its nomenclature. In Yellapu Uma Maheswari and Ors. vs. Buddha Jagadheeswararao & Ors., 2015 (11) SCR 849 , the court held:*
>
> > "*It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question.*"
> >
> > *In Assam Small Scale Ind. Dev. Corp. Ltd. & Ors. v. J.D. Pharmaceuticals & Anr., 2005 (4) Suppl. SCR 232 the court stated as follows:*
> >
> > > "*The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor* '*labels*' *may not be of much relevance.*"
> >
> > *This was also stated in V. Lakshmanan v. B.R. Mangalagiri & Ors., 1994 Supp (6) SCR 561 (that the* "*nomenclature or label given in the agreement as advance is not either decisive or immutable.*"*). This principle of substance, over the form, was followed in Super Poly Fabriks Ltd. vs. Commissioner of Central Excise, Punjab, 2008 (6) SCR 1076.*
>
> *27. That one document is styled or described in a certain manner, or that it uses a certain expression, or term is not conclusive; it is the effect of all the terms, of the documents, which bring out the true purport and intention of the parties. Likewise, another allied principle of contract interpretation, is*

> *that where the transaction is not the subject of one document, but several, which refer to each other, or a reading of all, describe the entire contract, then, it is open to the court to consider all of them together. This principle was stated in S. Chattanatha Karayalar v The Central Bank of India & Ors., 1965 (3) SCR 318 wherein this court held that:*
>
>> "*The principle is well-established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley, [1912] 1 Ch. 735 Moulton, L.J. stated :*
>>
>> "*Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole.*"

59. The Supreme court has held that the substance of a document, is discernible from its terms, rather than the label or its nomenclature, and where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. It is held that that if one document is styled or described in a certain manner, or that it uses a certain expression, or term is not conclusive; it is the effect of all the terms, of the documents, which bring out the true purport and intention of the parties. Likewise, another allied principle of contract interpretation, is that where the transaction is not the subject of one document, but several, which refer to each other, or a reading of all, describe the entire contract, then, it is open to the court to consider all of them together.

60. Applying the foregoing observations in the case of writ petitioners of Special Civil Application Nos.12175 and 12179 of 2019 - (Torrent Power), the petitioners have furnished corporate guarantee and also an agreement of pledging of shares dated 20.03.2019. The recitals of the agreement, more particularly para 2.5.1 clarifies, that the after an Event of default occurs, the Security Trustee shall have the right, in its discretion to exercise all the rights, powers and remedies vested in it for the protection and enforcement of its rights in respect of the Collateral, and it shall be entitled to exercise the right and powers and remedies, without limitation, which the Pledgor hereby agrees to be commercially reasonable "a) to receive all amounts payable in respect of the Collateral or otherwise payable under Section/paragraph 2.4, to vote on all or any part of the Pledged shares, to sell the non-cash Collateral, and exercise such other rights, powers and remedies as the Security Trustee may deem fit, etc.

61. The overall reading of the clauses of the pledge agreement reveals the intention the holding-company-petitioner. It is manifest from the pledge agreement that the intention of the Torrent Power Ltd (Pledgor) is to secure the obligations and allows share appropriation upon default by its subsidiary (Jodhpur Wind Farms Pvt.Ltd) to satisfy the debt from the lender-bank-IDBI. This arraignment/obligation in the pledge agreement satisfies the ingredients of Sections 126 and 172 of the Contract Act. Since GST law is unconcerned with how a promise is secured, tax liability arises immediately upon extending the guarantee. Thus, the execution of the recitals of

the agreement of pledging of shares along with the corporate guarantee is a supply of services attracting levy of 1% of valuation under Rule 28(2) of the CGST Rules.

TIME OF SUPPLY AND TAXABLE EVENT :

62. As we have previously held that the execution of corporate guarantee is a service. We shall now make an endevour to determine the time of supply of services and point of taxable event, which is premised on Section 13 of the CGST Act, which reads as under:

> *"Section 13 of the CGST Act governs the time of supply of services. The same is as under:*
> ***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 [1][****] 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 [1][****] 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 [2][by the supplier, in cases where invoice is required to be issued by the supplier; or]:

[3][(c) the date of issue of invoice by the recipient, in cases where invoice is to be issued by the recipient:]

***Provided** that where it is not possible to determine the time of supply under clause (a) or clause (b) [3][or clause (c)], 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) [4][****]

(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.

**Enforced w.e.f. 1st July, 2017.*

63. Section 13 of the CGST Act determines the time of supply of services, which is linked to invoice date or payment date, which would not be linked to the actually ending of service. Generally, in GST laws, a service ends when the service agreed under a contract has been completely performed and the contractual obligations are discharged. The corporate

guarantee is treated as a service provided by the guarantor (promisor) to the principal debtor/creditor. This service officially begins and fulfills its "time of supply" on the exact date the contract is signed (executed), not over time. The moment the contract is signed, the creditor gains the immediate right to demand payment if a default occurs. Because this legal right materializes instantly on day one, tax levy gets attracted on the execution date. If the borrower defaults down the road and the guarantor actually have to pay the bank, that payment is merely a fulfillment of their pre-existing contract. It does not create a new taxable event or service. Hence, instead to leaving the determination of taxable event in state of flux under Rule 13(5) in case of corporate guarantee, the taxable event and the time of supply has to be fixed on crystallized dates of execution of the corporate guarantee and its invocation.

64. In the instant cases of execution of corporate guarantee, the provisions of Section 13(2)(a) and 13(2)(b) of the CGST Act will not apply, but the time of supply has to be determined by resorting to Section 13(2)(c) of the CGST Act which stipulates the date on which the recipient shows the receipt of services in his books of accounts, as the time of supply of services. Consequently, when the subsidiary company reflects the guarantee extended by the Holding Company in its books of accounts, that date will constitute the time of supply of services, and the date has direct bearing on the outstanding balance for each financial year. This is a continuing, recurring accounting obligation, not a one-time disclosure. Therefore,

time of supply is available to be determined in each year since the disclosure would be made by the subsidiary company in each year, establishing direct nexus with Rule 28(2) of the CGST Rules which deems the value of the supply as “1% of the amount of such guarantee offered “per annum”. The outstanding amount of debt as reflected in the books of accounts by the subsidiary for each financial year will be supply of service triggering the valuation mechanism under Rule 28(2) of the CGST Rules. Where there is no actual consideration involved, once the corporate guarantee deed is executed by the guarantor, the activity of provision of guarantee is crystallized. It is only the operation of the guarantee that is continuous over a period. Thus, the benefit of the guarantee accrues to the principal debtor at the time of execution of the contract of guarantee by the surety with the creditor.

WHETHER CORPORATE GUARANTEE IS CONTINUOUS SUPPLY UNDER SECTION 2(33) OF THE CGST ACT :

65. Section 2(33) of the CGST Act defines “continuous supply”. The same reads as under:

> ***“Section 2(33)*** **"***continuous supply of services*" *means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;*

66. Does corporate guarantee satisfy the ingredients of continuous supply needs to be deliberated. The break of provisions of Section 2(33) of the CGST Act expose four facets.

> *a) the supply of service is provided continuously or on a recurrent basis,*
> *b) Under a Contract,*
> *c) the contract extends for more than three months and*
> *d) there are periodic payment obligations."*

67. In a corporate guarantee, the Holding Company undertakes a continuous obligation to support the subsidiary until the guarantee is invoked, revoked, expires or is discharged. The protection under the umbrella of promise or obligation or protection continuous throughout the validity of guarantee till the guarantee is revoked or invoked. However, the obligation of periodic payment by the Holding Company to subsidiary is absent, since the guarantor-Holding Company does not render supply of service continuously or on recurrent basis with periodic payment obligations, more particularly, when the corporate guarantee is without consideration. Corporate guarantee is one time undertaking, with continuing obligation, the quintessential feature of periodic payment is absent. Albeit, the revenue has attempted to bring corporate guarantee within the ambit of Section 2(33) of the CGST Act by invoking rule of harmonious construction, we are not impressed. The impression, intention and purpose of corporate guarantee do not bring it within the scope of the definition of continuous supply under Section 2(33) of the CGST Act.

DETERMINATION OF VALUE OF CORPORATE GUARANTEE UNDER RULE 28(2) OF THE CGST RULES READ WITH SECTION 15 OF THE CGST ACT, AND ITS VALIDITY :

68. The petitioner in captioned writ petitions being special civil application nos.15082 and 15084 of 2024 have also

challenged the *vires* of section 15(4) of the CGST act. In order to test its validity together with the power of determination of valuation of corporate guarantee, the provisions of Section 2(87) of the CGST Act, Section 15(5) of the CGST Act and Rule 28 of the CGST Rules are to be read harmoniously. The read as under:

> *"Section 2(87) of the CGST Act "prescribed" means prescribed by rules made under this Act on the recommendations of the Council.*
>
> ***SECTION 15 : Value of taxable supply***
> *(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*
> xxxx xxxxx
> *(4) where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*
>
> *(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.*
>
> *Rule 28. Value of supply of goods or services or both between distinct or related persons, other than through an agent. -*
> *[(1)] 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.*

[(2) Notwithstanding anything contained in sub-rule (1), the value of supply of services by a supplier to a recipient who is a related person [2][located in India], by way of providing corporate guarantee to any banking company or financial institution on behalf of the said recipient, shall be deemed to be one per cent of the amount of such guarantee offered [2][per annum], or the actual consideration, whichever is higher.]
***[Provided** that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the value of said supply of services.]*
1. Inserted vide Notification No. 52/2021 - CT dated 26.10.2023.
2. Inserted vide Notification No. 12/2024 - CT dated 10.07.2024 w.e.f. 26.10.2023."

69. Rule 28(2) of the CGST Rules was inserted in the statute vide Notification No.52/2023 dated 26.10.2023 w.e.f 26.10.2023. The prescription of "per annum" was inserted w.e.f from even date, i.e. 26.10.2023 vide Notification No.12/2024 dated 10.07.2024. Prior to the introduction of Rule 28(2) of the CGST Rules on October 26, 2023, the GST framework lacked any specific machinery provision to value non-monetary corporate guarantees.

70. Rule 28 of the CGST Rules governs the valuation of supplies of goods and services between distinct or related persons. Rule 28(1)(a) of the CGST Rules stipulates the "open market value" as the principal yardstick. It is defined as the full value in money (excluding taxes) payable to obtain an identical supply at the same time, provided the transaction is between unrelated persons and price is the sole consideration.

71. At this stage, we may again borrow the observation of the Apex Court in case of ***Gameskraft (supra***) :

> *"53. For a transaction to constitute a taxable supply under the GST regime, consideration must ordinarily exist except in cases specifically covered under Schedule I to the CGST Act. The statutory measure for valuation under the GST framework is governed by Section 15 of the CGST Act, which provides that the value of supply shall ordinarily be the "transaction value", namely, the price actually paid or payable for the supply where the supplier and recipient are not related and the price is the sole consideration for the supply. Equally significant is the definition of "consideration" contained in Section 2(31), which adopts language of the widest amplitude.........*
>
> *xxx xxx xxx*
>
> *58. The next challenge to Rule 31A is on the ground that it is not traceable to any provision of the parent enactment and consequently constitutes excessive delegation. The said challenge must therefore be examined in the backdrop of the statutory framework governing delegated legislation and valuation under the CGST Act. The relevant provisions read as under:*
>
> *Section 15(4)*
> *"Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*
> *Section 15(5)*
> *"Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.*
> *Section 2(87)*
> *"prescribed" means prescribed by rules made under this Act on the recommendations of the GST Council.*
> *Section 164. Power of Government to make rules.-*
> *(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.*
> *(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be,*

prescribed or in respect of which provisions are to be or may be made by rules.
(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.
(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.
58.1 . Section 15(4) authorises prescription of valuation methodology where value cannot be determined under Section 15(1). Section 15(5) further empowers the Government, upon recommendations of the GST Council, to prescribe valuation methodology for notified supplies notwithstanding Section 15(1). Section 2(87) defines the expression "prescribed" to mean prescribed by rules made under the Act on the recommendations of the GST Council. Section 164 confers general rule-making power for carrying out the provisions of the Act, even with retrospective effect or from any other date, after the Act has come into force.
58.2 . A conjoint reading of Sections 15(4), 15(5), 164 and Section 2(87) reveals a common statutory thread, namely the requirement of recommendation of the GST Council. Consequently, whether Rule 31A traces its source to Section 15(4), Section 15(5), or the general rule-making power under Section 164, the foundational statutory requirement remains identical and intact. Once it is established that Rule 31A was introduced pursuant to recommendations of the GST Council, the controversy regarding the precise source of delegated authority loses much of its significance.

xxx xxx xxx

Scope and Ambit of Section 15(4)

60. The statutory framework under Section 15 contemplates both ordinary transaction-value principles as well as specially prescribed valuation methodologies operating through delegated legislation. Section 15(5), in particular, reflects legislative recognition that certain classes of supplies may require specialised valuation methodologies having regard to their peculiar commercial structure and practical difficulties in assessment. The provision operates independently of the ordinary transaction-value framework contemplated under Section 15(1) and enables prescription of special valuation mechanisms in respect of notified supplies on the *recommendations of the GST Council. Such specially prescribed valuation methodologies prevail in respect of the notified class of supplies and do not operate in conflict with Sections 15(1) or 15(4), both of which continue to operate within their respective fields. Such valuation mechanisms constitute matters of legislative and fiscal policy and the legislature necessarily possesses considerable latitude in devising standards and methodologies for quantification of tax so long as a reasonable nexus exists with the underlying taxable event. The provisions of Sections 15(1), 15(4) and 15(5) must therefore be construed harmoniously so as to give full effect to the statutory valuation framework contemplated under the GST regime…………..”*

72. Before the Supreme court, the vires of Section 15(5) and Rule 31A of the CGST Act was also raised by the tax payers. The supreme court has upheld the validity of the provisions of Rule 31A and Section 15(5) of the CGST Act. It is held that the GST valuation framework under Section 15 of the CGST Act operates through a harmonious combination of ordinary transaction-value principles under Section 15(1) of the CGST Act and specialized valuation methodologies prescribed under Sections 15(4) and 15(5) of the CGST Act for unique or complex commercial supplies. It further held that a conjoint reading of Sections 15(4), 15(5), 164, and 2(87) of the CGST Act reveals that the foundational statutory requirement for enacting any such valuation rule is the mandatory recommendation of the GST Council. Because the legislature holds wide fiscal latitude to prescribe these independent mechanisms, any controversy regarding the exact source of delegated authority for Rule 31A of the CGST Rules loses its legal significance once it is established that the rule was introduced pursuant to the GST Council's explicit recommendation. Thus, the foregoing observations of the

Supreme court also apply to the challenge of vires to Rule 28(2) and Section 15(4). A shared reading of the provisions of Section 2(87), Section 15(5) of the CGST Act manifest that valuation of supply of corporate guarantee culminates in Rule 28(2) of the CGST Rules between related persons like Holding Company and the subsidiary. In view of the observations of the Apex Court, we uphold the validity of Rule 28(2) and Section 15(4) of the CGST Act.

SOURCE OF POWER AND AUTHOIRITY TO DETERMINE THE VALUE OF CORPORATE GUARANTEE UNDER RULE 28(2) OF THE CGST RULES:

73. The petitioners have questioned the determination of 1% of deemed value on the recommendation of the GST Council under Section 164 of the CGST Act and also its wide scope of operation. They have also challenged the validity of Rule 28(2) of the CGST Act on the ground of absence of notification as required under Section 15(5) of the CGST Act. Section 9 of the CGST Act, which is the charging section prescribes levy of collection of goods and service tax on the value determined under Section 15 of the CGST Act. Thus, charging Section 9 of the CGST Act which enables determination of value of supplies of goods and services. The answer to the challenge lies in the decision of the Supreme Court in case of ***Gameskraft(supra)***. The relevant observations read thus:

> ***"Independent Rule making power under Section 164***
> *62. Even independently of Section 15(4), Rule 31A is sustainable under Section 164. Section 164(1) empowers the Government to make rules for carrying out the provisions of the Act, while Section 164(2) specifically authorises framing of rules in respect of matters which are required to be or may be*

prescribed. Since Rule 31A merely effectuates and operationalises the valuation mechanism contemplated under Section 15, the Rule squarely falls within the ambit of Section 164. Therefore, even assuming arguendo that Section 15(4) were inapplicable, Rule 31A would nevertheless remain sustainable as a valid exercise of delegated legislation under Section 164.

62.1. It is equally well settled that where the parent enactment confers rulemaking authority together with power to bring such rules into force from a specified earlier date, delegated legislation may validly operate retrospectively. Section 164 of the CGST Act not only empowers the Government to frame rules for carrying out the provisions of the Act but also expressly authorises retrospective operation of such rules within the limits prescribed therein. Consequently, Rule 31A cannot be assailed merely on the ground that the valuation mechanism operates retrospectively. In this regard, reference may be made to the three-Judge Bench decision of this Court in ***State of Madhya Pradesh v. Tikamdas [113]*** *, wherein it was held as follows:*

"5. Let us examine the rival contentions and test the soundness of each briefly. First of all, we have to ascertain the scope and area of the rule making powers, the limitations thereon and the retro-active operation of such rules. There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf. Our attention has been drawn to Sections 62(g) and (h) and 63 in this connection, by counsel for the State. The State Government may make rules for the purpose of carrying out the provisions of the Act (Section 62). Such rules may regulate the amount of fee, the terms and conditions of licences and the scale of fees and the manner of fixing the fees payable in respect of such licences [62(g) and (h)]. This provision, by itself, does not expressly grant power to make retrospective rules. But Section 63 specifically states that 'all rules made and notifications issued under this Act shall be published in the Official Gazette, and shall have effect from the date of such publication or from such other date as may be specified in that behalf.' Clearly the Legislature has empowered its delegate, the State Government, not merely to make the rules but to give effect to them from such date as may be specified by the delegate. This provision regarding subordinate legislation does contemplate not merely the power to make rules but to bring them into force from any previous date. Therefore antedating the effect of the

amendment of Rule IV is not obnoxious to the scheme nor ultra vires Section 62."

[113] *(1975) 2 SCC 100*

Effect of Absence of notification under Section 15(5)

63. Section 15(5) commences with a non-obstante clause and as mentioned enables the Government, on the recommendations of the Council, to prescribe special valuation mechanisms in respect of notified supplies. The provision operates independently of the ordinary transaction-value framework contemplated under Section 15(1) and reflects legislative recognition that certain classes of supplies may require specialised valuation methodologies having regard to their peculiar commercial structure and practical difficulties in assessment. It is in the aforesaid statutory context that the objection raised by the assessees regarding absence of a prior notification identifying the relevant supply under Section 15(5) before introduction of the Rule is required to be examined.

63.1. The contention of the assessees cannot survive once Rule 31A is found independently traceable to Sections 15(4) and 164. In any event, the Rule is demonstrably founded upon recommendations of the GST Council and therefore satisfies the foundational statutory requirement common to Sections 15(4), 15(5) and 164 alike. Once substantive statutory requirements stand fulfilled and the Rule is otherwise traceable to statutory rule-making power, the precise statutory channel through which delegated authority was exercised cannot by itself invalidate the Rule."

74. As held by the Supreme Court the source of power of determination of valuation of supply of service of corporate guarantee is embedded in the statutory provisions of Section 15(5) read with definition of prescribed under Section 2(87) read with Section 164 of the CGST Act. The genesis of fixation of valuation of supply at 1% lies in 52nd GST Council meeting. The Apex Court has held that Section 15(5) of the CGST Act commences with a non-obstante clause enables the Government, on the recommendations of the Council, to prescribe special valuation mechanisms in respect of notified supplies. It is held that the provision operates independently of

the ordinary transaction-value framework contemplated under Section 15(1) of the CGST Act and reflects legislative recognition that certain classes of supplies may require specialised valuation methodologies having regard to their peculiar commercial structure and practical difficulties in assessment. The objection raised by the assesees in the case of ***Gameskraft(supra)*** relating to absence of notification is negatived by the Apex court by holding that once Rule 31A of the CGST Rules is demonstrably founded upon recommendations of the GST Council and therefore satisfies the foundational statutory requirement common to Sections 15(4), 15(5) and 164 of the CGST Act alike. It is also asserted that once substantive statutory requirements stand fulfilled and the Rule is otherwise traceable to statutory rule-making power, the precise statutory channel through which delegated authority was exercised cannot by itself invalidate the Rule. The Apex Court has reiterated the legal precedent that where the parent enactment confers rulemaking authority together with power to bring such rules into force from a specified earlier date, delegated legislation may validly operate retrospectively, and has confirmed the powers of the GST Council that Section 164 of the CGST Act not only empowers the Government to frame rules for carrying out the provisions of the Act but also expressly authorises retrospective operation of such rules within the limits prescribed therein. Thus, the aforementioned observation of the Supreme Court does not leave any room of doubt on the exercise of powers of adopting the recommendations of the GST council, and incorporating them the in the statute even in absence of notification.

<u>DISCUSSION ON CASE LAW CITED</u> :

75. Plethora of decisions were cited before us by the learned advocates appearing for the respective parties. We have chosen to deal with the relevant case laws, for avoiding prolixity. We may begin with the decision which has been relied upon and cited by the learned senior advocates appearing for the petitioners.

76. The petitioners have expansively premised their case on the decision of Bombay High Court in case of ***D P Jain & Co. (supra).*** We respectfully disagree with the view taken to the extent of applying the decision of the Apex Court rendered in case of ***Edelweiss Financial Services (supra),*** since the decision in the said case has been rendered under the erstwhile service tax regime where consideration was mandatory. Under Section 65B(44) of the Finance Act, 1994, the element of consideration was intrinsically ingrained into the definition of "service," meaning a corporate guarantee extended without consideration could not be taxed—a strict statutory context that does not apply to the current framework. Unlike the Finance Act, 1994, the CGST Act, which contains Section 7(1)(c) read with Schedule I to the CGST Act, a specific deeming fiction that taxes certain supplies between related persons even in the absence of consideration.

77. There can be no cavil on the proposition of law, as enunciated by the Supreme Court in the case of ***Arthur Paul Benthall (supra)***, whereby the Supreme Court has clarified the contextual construction of the meaning of two words in two

consecutive provisions. However, such interpretation cannot be adopted in the statutory provisions of Section 7, since no such exigency arises.

78. In the case of ***Shri Vikram Cotton Mills and Another (supra)***, the Supreme Court, while examining the provisions of Section 126 of the Contract Act with the scheme of composition between the company and creditors under Section 391 of the Companies Act, 2013 has clarified the difference between a contract of indemnity under Section 124 and Section 126 of the Indian Contract Act, 1872, which defines a contract of guarantee. Hence, it will not apply to GST regime.

79. In the case of ***Gujarat Chamber of Commerce and Industry and Others (supra)***, the Division Bench of this Court has examined the scope of the concept of supply under Schedule II and Schedule III of Section 7 of the CGST Act. The Division Bench has elucidated the law in the context of the acquisition of land by the GIDC by executing a lease deed for a period of 99 years in favor of the allottee / lessee, and the action of the GST authorities to levy 18% tax on such transaction, and has held that the assignment by sale and transfer of leasehold rights of the plot of land allotted by GIDC to the lessee in favor of a third-party assignee for a consideration shall be an assignment, sale, or transfer of benefits arising out of immovable property by the lessee/assignor in favor of a third-party assignee who would become the lessee of GIDC in place of the original allottee/lessee. In such circumstances, the provisions of Section 7(1)(a) of the CGST Act stipulating the scope of supply,

read with Clause 5(b) of Schedule II and clause 5 of Schedule III, would not be applicable to such transaction of assignment of leasehold rights of land and building, and the same would not be subject to the levy of GST as provided under Section 9 of the CGST Act. The proposition of law, as enunciated by the Division Bench of this Court, cannot come to the rescue of the present petitioners in light of the provisions of Sections 124, 126, and 140 of the Indian Contract Act, 1872 read with Rule 128(2) of the CGST Rules, read with the provisions of Section 7 of the CGST Act, read with Schedules I and II of the CGST Act. The nature and the working of corporate guarantees and the execution of the same cannot be compared to the assignment, sale, or transfer of benefits arising out of immovable property by the lessee or assignor in favor of a third-party assignee, which was the subject matter of consideration before the Division Bench.

80. Reliance placed on the judgment of the Bombay High Court in the case of ***Tata Sons Private Limited (supra)*** will also not come to the rescue of the petitioners, as the Bombay High Court has examined the issue and the order/show-cause notice issued under Section 74(1) of the CGST Act, read with Rule 142(1) of the CGST Rules. While examining the dispute between the respective parties, which related to an adverse arbitral award and enforcement actions initiated against Tata Sons, and which ultimately ended in a settlement with Docomo, the Revenue sought to tax the same as an import of services by Tata Sons since Docomo agreed to tolerate the breach of contract by Tata Sons and agreed to do an act by

withdrawing all enforcement actions. The Bombay High Court, while placing reliance on the Circular dated 03.08.2022 has clarified the taxability under Entry 5(e) of Section 7 of the CGST Act, examined the issue. The Bombay High Court has held that DOCOMO has rendered the supply vide its act of tolerance of the contractual defaults by TSPL, along with agreeing to the obligation to refrain from initiating any proceedings, and the same appears to squarely fall within the ambit of the definition of 'supply' as envisaged under section 7(1A) of the CGST Act, 2017, and the damages referred to hereinabove are the 'consideration' paid by TSPL to DOCOMO in the course and furtherance of its business. Thus, the said 'supply' by DOCOMO to TSPL would fall within the ambit of Entry No.(e) of Sr. No. 5 of Schedule II to section 7 ibid as "supply of services, viz. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act."

81. The Bombay High Court has held that the factors mentioned in Entry 5(e) cannot be read beyond the purview and/or the context of the principal provision, namely, Section 7 of the CGST Act, as noted by us hereinabove. Reading Entry 5(e) *de hors* the provision would amount to an erroneous reading of this provision, which is sought to be applied by the Revenue.

82. It is held that when Section 7 of the CGST Act itself is not attracted, there would be no question of the provisions of Entry 5(e) of Schedule II of the CGST Act and the corresponding provisions of the IGST Act. There cannot be any cavil on the

proposition of law as declared by the Bombay High Court in the instant case. As discussed hereinabove, the execution of a corporate guarantee would satisfy the ingredients of Entry 5(e) of Schedule II under Section 7[6] of the CGST Act, read with the provisions of Sections 126, 127, and 128 of the Contract Act.

83. So far as the decision of the Bombay High Court, Nagpur Bench, in the case of ***Aerocom Cushions Private Limited (supra)*** is concerned, the facts suggest that the Bombay High Court had examined the show-cause notice issued under Section 74(1) of the CGST Act, read in the context of Section 7 and Clause 2(b) of Schedule II of the CGST Act relating to leasehold rights, and by placing reliance on the decision of this Court in the case of ***Gujarat Chamber of Commerce and Industry (supra)***, the said judgment was delivered.

84. Reliance placed on the decision of ***Anuj Jain (supra)*** cannot come to the rescue of the petitioners, as the same deals with the provisions of the IBC and the definition of debt provided under Section 3(10) of the IBC, whereas, in the present case, as discussed previously, the definition of debt cannot be borrowed from the provisions of the IBC but is required to be confined to the provisions of the Transfer of Property Act read with the provisions of the Contract Act.

85. In the case of ***Central Electricity Regulatory Commission (supra)***, the Delhi High Court, while examining the issue of the fee received by the Central Electricity Regulatory Commission under the Electricity Act, 2003 and the

levy of tax under the GST Acts, after considering the provisions of Section 7, Schedule II, and Schedule III, as well as the definitions of "business" and "consideration" under Sections 2(17) and 2(31) of the CGST Act, has held that a power of regulation which stands statutorily vested in a commission cannot fall within the ambit of any of the activities enumerated in Section 2(17)(a) of the CGST Act.

86. The Delhi High Court has also considered the provisions of Section 2(17)(i) of the CGST Act, which encompass activities or transactions undertaken by the Central or State Governments or a local authority, and has concluded that the said clause would not have any application since a commission is constituted under the Electricity Act and cannot be equated with the Central or State Governments.

87. The Delhi High Court has also considered the definition of consideration and has held that the same speaks of payment made in response to or for the inducement of the supply of goods. In the cases before us, the corporate guarantees are executed without any consideration, and hence the same falls within the provisions of Section 7(1)(c) read with Schedule I, Article 2 of the CGST Act, which was not the case before the Delhi High Court.

88. In the case of ***Star India Private Limited (supra)***, the law enunciated by the Supreme Court will not remotely apply to the facts of the present case to the GST regime. The Supreme Court, in the case of ***Ahmedabad Private Primary Teachers' Association (supra)***, has applied the doctrine of *pari materia* with reference to other statutes dealing with the

same object or forming part of the same system. There cannot be any cavil on the law enunciated by the Supreme Court in the said judgment, but the same will not apply in the present case.

89. So far as the decision of the Division Bench of this Court in the case of R/Stamp Reference No.1 of 2020 in the case of ***Ambuja Cements Limited (supra)*** is concerned, this Court has, after considering an array of judgments on the principles of interpretation of taxing statutes, reiterated that the fundamental rule of construction for fiscal or other statutes is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein, rather than from any notions which may be entertained by the Court as to what is just or expedient. We have examined the operation of the statutory provisions of the GST regime, interweaving the same with the provisions of the Contract Act as well as the Transfer of Property Act. Hence, the observations of the Division Bench, which are confined to the single statute of the Stamp Act, will not *stricto sensu* apply. We have borrowed this principle by applying the same to the statutory provisions of the GST Act read with the Transfer of Property Act and the Contract Act.

90. In the case of ***Coca Cola India Private Limited (supra),*** the Bombay High Court, while examining the provisions relating to Cenvat credit of service tax and input services in the context of "business" defined under Rule 2(l) of the Cenvat Credit Rules, 2004 (for short, “the Rules, 2004”),

has examined the controversy between the respective parties on the issue as to whether the services of advertising and marketing procured by Coca Cola India Private Limited in respect of advertisements for aerated waters are covered by the definition of the words "input services" as defined in Rule 2(l) of the Rules, 2004 (for short, “the Rules, 2004). The Bombay High Court has considered the guidelines issued by the OECD *apropos* VAT and has observed that though India is not a signatory to the OECD model, it adopts the same model of destination-based consumption tax, which is in line with international norms, and hence the OECD guidelines can be safely considered. We agree with the observations made by the Bombay High Court relating to the OECD guidelines; however, though the guidelines can be safely considered, the Revenue cannot be compelled to adopt the wisdom of the OECD guidelines, which would be against its interest and also would not apply to the taxing fabric of India.

91. In the case of ***Karvy Stock Broking Ltd. (supra),*** the Supreme Court, with regard to the Notifications, Circulars, Guidelines, and orders which are issued under sub-section (2) of Section 66 of the Finance Act, will not remotely apply to the case of the present writ petitioners. While assailing the authority and competence of the GST Council in issuing the circular, reliance is placed on the decision of the Delhi High Court in the case of ***Faridabad Iron and Steel Traders Association (supra)***. We have already dealt with such powers and authority while placing reliance on the recent decision in the case of ***Gameskraft (supra).*** It is held that the circulars

cannot take away the adjudicatory powers of the Assessing Authority as well as the Appellate Authority by clarifying provisions in the nature of adjudication. In the case of ***Faridabad Iron and Steel Traders Association (supra),*** the Delhi High Court has held that the circulars or instructions issued by the Board are binding on the departmental officers only when they act in their administrative capacity and that such circulars cannot control the quasi-judicial functions of the officers or the Appellate Authority under the Act. In the case of ***Gameskraft (supra),*** the Supreme Court, while examining the taxability of actionable claims, has held that the procedural and substantive formalities under the general law, including the Transfer of Property Act, are irrelevant for the purpose of GST, since GST is a tax on supply and not on transfer in the strict property law sense. This judgment of Delhi High Court would also not apply to the present case, as the issue involved here is whether the corporate guarantee provided without consideration is a supply, and the same cannot be equated with the actionable claims arising from betting and gambling, which were the subject matter in ***Gameskraft(supra).***

92. The petitioners have heavily placed reliance on the decision of the ITAT Ahmedabad, in the case of ***Micro Ink Limited (supra).*** The said decision also refers to the adoption of the OECD Guidelines, an issue which we have already dealt with previously. The Tribunal, while considering the OECD Guidelines, has held that the corporate guarantees issued by the assessee were in the nature of quasi-capital or shareholder activity and, for the said reason, the issuance of such

guarantees was to be excluded from the scope of services and, consequently, from the scope of international transactions under Section 92(B) of the Income Tax Act, 1961. We have previously discussed the OECD Guidelines and the adoption of the arm's length price by the GST Council in determining the valuation of corporate guarantees. The execution and operation of a corporate guarantee in the context of the provisions of the Income Tax Act cannot restrict the expression "supply of services" as envisaged under the provisions of Section 7 of the CGST Act, and the said decision will not apply to corporate guarantees, which are made taxable under the GST regime.

93. The petitioners have also placed reliance on the decision of the Supreme Court in the case of ***Govind Saran Ganga Saran (supra).*** The Supreme Court has laid down the four essential components of a taxing statute: first, the taxable event; second, the person on whom the tax is levied; third, the measure of tax; and fourth, the rate of tax. These components must be clear and unambiguous in the statute itself, and any vagueness in the measure or the rate would make the levy unconstitutional and invalid. This principle has been consistently followed by the Supreme Court and other High Courts, and the same straightjacket formula applies to the present case, wherein the corporate guarantee without consideration is being taxed under the impugned circular and the rules, which are *ultra vires* the provisions of the CGST Act itself. We find that the observations of the Supreme Court will squarely apply to the tax liability and taxability of corporate

guarantees, which have been subjected to a threadbare examination of the various provisions of the statutes, as mentioned hereinabove.

94. So far as the reliance placed on the decision of ***Winner Business Link Private Limited (supra)***, is concerned, wherein the Court has adopted the matching principle as enunciated by the Apex Court in case of Rakesh Shantilal Mardia vs. Dy. CIT, [2012] 26 taxmann.com 253 is concerned, same will not apply to the corporate guarantees.

95. The judgment of the European Court of Justice (First Chamber) in the case of ***Levob Verzekeringen BV and another (supra)*** deals with composite supply and was delivered with reference to Article 6(1) of the Sixth Directive (Common System of Value Added Tax - uniform basis of assessment) in respect of the supply of a standard software package. The proposition of law, as enunciated therein, would not apply to the GST regime, more particularly, to the working of the corporate guarantee.

96. The Court of Justice of the European Communities (First Chamber) formed its opinion and delivered the judgment by considering the nature and character of individual supplies in light of the composite supply as mentioned in the Sixth Directive, which is not found in the scheme of the GST regime.

97. The decision of the United States Court of Appeals, Seventh Circuit, in the case of ***Centel Communication Company (supra)***, and the law discussed therein, will not apply to the working of corporate guarantees, as the issue

which has been examined by the US Court of Appeals pertains to the ESOP. The interpretation of Section 83 of the Internal Revenue Code of 1954 relates to the transfer of warrants and the expression used therein in connection with the performance of services, wherein the three stockholders received taxable income upon the exercise of the warrants, and Central claimed entitlement to a corresponding deduction in the same year. The US Court of Appeals, while examining the provisions of Section 83(2), regarding any amount paid in connection with the performance of services, whereby property shall be included in the gross income of the person who performed such services, has opined about the guarantees given by the three stockholders, and accordingly, it was observed that they were making an additional contribution to capital by giving such guarantees. The decision of the US Court of Appeals would not remotely connect to the provisions of the GST regime.

98. The petitioners have also placed reliance on the United Court of Appeal and also Australian GST Rulings. It is a settled principle of law that while foreign judgments can guide courts and aid in resolving constitutional or statutory impasses, their *ratio decidendi* cannot be adopted if it overshadows the fundamental principles enshrined in the Indian Constitution. The practice of judicial borrowing demands careful scrutiny to ensure that foreign legal doctrines align seamlessly with domestic principles and India's diverse social fabric. We agree with the submissions advanced by learned ASG in this regard. The decision of the United States Court of Appeals, Seventh

Circuit in the case of Centel Communications Company will not apply to the statutory scheme of GST Regime more particularly the corporate guarantees, but pertains to pertains to taxability of employees stock ownership plan provided by an employer to an employee.

99. Similarly, the ruling issued by the Australian GST authorities cannot come to the rescue of the petitioners, since the GST Regime promulgated and adopted by India operates in different realm, and it encompasses various services including corporate guarantee within taxably reach. Hence a taxing policy adopted by Australia will have no bearing on the GST regime.

VALIDITY OF 1% VALUATION ON CORPORATE GUARANTEE :

100. After the foregoing extensive analysis of statutory provisions and the case law cited before us, we shall now endeavour to examine the core issue raised before us, i.e the constitutional validity of Rule 28(2) of the CGST Rules fixing the uniform valuation of 1%.

101. The 52^{nd} minutes of the GST council demonstrates that the Council after deliberation on the commission charged by different banks for bank guarantee ranging from 0.5% to 3%, and in absence of such charge, by adopting the Safe Harbour rule under Rule 10TD under Income Tax Rules, 1962, the minimum acceptable commission/ fee is one per cent of the amount guaranteed was suggested, which was subsequently approved, and is incorporated in Rule 28(2) of the CGST Rules.

The petitioners have also challenged the fixation of 1% of valuation in Rule 28(2) of the CGST Rules by alleging that the same cannot be determined by applying deeming fiction.

102. For supplying deeming fiction of 1% , we shall now refer to the full bench of the Supreme Court in the case of Ashok Leyland Ltd. Vs. State of T.N., (2004) 3 SCC 1. The Apex Court while considering the issue whether inter-state tax transaction amounted to inter-state sale due to legal fiction created under Section 6A(2) of the Central Tax Act, 1956, has held thus:

> *“Legal fiction*
>
> *65. The question that arises is whether a legal fiction can be applied to determine whether a particular inter-State transaction amounted to an inter-State sale or a mere transfer of stock. Legal fictions have been applied in a number of cases.*
>
> *66. In Gannon Dunkerley and Co. v. State of Rajasthan [(1993) 1 SCC 364] (SCC at pp. 388-90, paras 35, 36 & 38) it was held that:*
>
> *Since Sections 3, 4 and 5 (of the Central Sales Tax Act) were applicable to such contracts containing two separate agreements, these provisions would apply to a contract which, though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services. Sections 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract. The absence of any amendment in the definition of sale contained in Section 2(g) of the Central Sales Tax Act, 1956 so as to include transfer of property in goods involved in execution of a works contract, therefore, does not in any way*

affect the applicability of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act to such transfers.

67. In State of Bombay v. Pandurang Vinayak [(1953) 1 SCC 425 : AIR 1953 SC 244 : 1953 Cri LJ 1094] at para 5 it was held: (AIR p. 246)

"5. When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

68. A legal fiction can be utilised in several ways wherein the word "deemed" is used. However, the mere use of the word "deemed" is not in itself sufficient to set up a legal fiction as was held in Consolidated Coffee Ltd. v. Coffee Board [(1980) 3 SCC 358 : 1980 SCC (Tax) 279] (SCC at pp. 371-72, para 11), stating that:

"[T]he word 'deemed' is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision."

69. The Court went further to quote the position taken in St. Aubyn v. Attorney General [(1951) 2 All ER 473 : 1952 AC 15 (HL)] wherein Lord Radcliffe observed thus: (All ER p. 498 F-G)
"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

70. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd. [(2003) 2 SCC 111] (SCC 111 at p. 123) it was stated that the purpose and object of creating a legal fiction in the statute is well known. But when a legal fiction is created it must be *given its full effect. It was held in East End Dwellings Co. Ltd. v. Finsbury Borough Council [(1951) 2 All ER 587 : 1952 AC 109 (HL)] : (All ER p. 599 B-C)*

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

(See also ITW Signode India Ltd. v. CCE [(2004) 3 SCC 48 : (2003) 9 Scale 720] Scale : SCC para 58.)
71. These decisions, therefore, show that whenever a legal fiction is created by a statute, the same shall be given full effect."

103. The noteworthy observation to be applied, is that "A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case, it would be a question as to with what object the legislature has made such a deeming provision", and that "whenever a legal fiction is created by a statute, the same shall be given full effect. Thus, the quintessential feature for applying or supplying a deeming fiction in statute is the element of uncertainty involved in effective working of the statute. The underlying object behind supplying the deeming fiction of 1% is required to be examined keeping in mind the factum of un-ascertainable value of corporate guarantee.

104. As previously held by us the valuation under Rule 28(2) of the CGST Rules of corporate guarantee emanates from the provisions of Section 15(5) read with definition of prescribed under Section 2(87) of the CGST Act, and it prescribes a) open market value, b) value of like kind and quality, and c) cost plus 10%. Whereas Rule 28(2) of the CGST Rules is premised on legal fiction. However, the proviso to Rule 28(2) of the CGST Rules makes the valuation more interesting. The proviso to Rule 28(2) of the CGST Rules again prescribes deeming fiction of value declared in invoice deemed to be value of supply of services, in cases where the recipient is eligible for full ITC. Rule 28(1)(b) specifies valuation based on the supply of services of "like kind and quality." To qualify, a comparable service must closely resemble the transaction in terms of characteristics, functionality, risk profiles, and commercial reputation. However, since corporate guarantees are highly exclusive, tailor-made instruments driven strictly by entity-specific risk attributes, identifying an identical or closely matching proxy in practical corporate scenarios is generally impossible. Consequently, valuation under Rule 28(1)(b) of the CGST Rules would fail. Upon the non-determination of the comparative methods, Rule 28(1)(c) of the CGST Rules which is a residuary method, directs that the value be determined by applying Rule 30 (cost-based valuation) or Rule 31 (residuary method) in sequential order. Rule 31 of the CGST Rules explicitly provides that in the case of a supply of services, the supplier may completely bypass the cost-based mechanisms of Rule 30 and directly opt for Rule 31 of the CGST Rules. Under this method, the value must be determined using "reasonable

means" that remain entirely consistent with the statutory principles of Section 15 of the CGST Act and the general provisions of Chapter V of the CGST Rules. Where standard market benchmarks fail due to the highly specific nature of corporate guarantee, an adaptation of legally sound valuation methodologies is permissible to be construed as "reasonable means". The Council has adopted the Safe Harbor Rule where the recipient subsidiary is entitled to a full Input Tax Credit (ITC), valuation is non-contentious as the value declared in the invoice shall be deemed to be the open market value of the goods or services. Under the second proviso to Rule 28(1) of the CGST Rules, any value declared on the invoice including a nominal or Nil value is legally deemed to be the Open Market Value, rendering the transaction revenue-neutral, which is akin to proviso to Rule 28(2) of the CGST Rules.

105. However, Rule 28(2) of the CGST Rules, which begins with non-obstante clause completely bypasses this flexibility of stipulated under Rule 28(1) of the CGST Rules, and the taxable value for a corporate guarantee is mandated to be deemed at 1% of the total guarantee amount offered, or the actual consideration, whichever is higher. This flat 1% GST valuation of corporate guarantee stands in stark contrast to Rule 10TD of the Safe Harbour provisions of Income Tax Rules, 1962, which albeit, mandates a minimum 1% commission on the guaranteed amount for eligible international corporate guarantees, but is completely optional for taxpayers, since they serve as a simplification mechanism designed to provide tax certainty and avoid Transfer Pricing (TP) litigation. To the

contrary, the same mechanism or option does not exist under Rule 28(2) of the CGST Rules.

106. The GST Council in its meeting has acknowledged that an arm's-length corporate guarantee fee ranges between '***0.5% and 3%'***. Rule 28 contains the sentence "*shall be deemed to be one per cent of the amount of such guarantee offered* [2]*[per annum], or the actual consideration, whichever is higher".* We may at this stage reiterate the law articulated by the Supreme Court in case of ***Wipro Limited (supra)***, [2015] 14 SCC 161. While examining the provisions of Rule 9(2)(b) read with Rule 9(2) Proviso 2 (ii) of the CGST Rules, imposing a uniform charge of 1% free on board (FOB) value of goods even if actual value/transaction value is ascertainable, the Supreme Court has held the same violates fundamental principle of valuation under Customs Act and Rules and is arbitrary, irrational, violates Article 14 of the Constitution of India. However, it was further clarified by the Supreme Court that if the actual values are not ascertainable, a uniform charge of 1% of FOB can be applied. The said observations are made in context with Section 14 of the Customs Act, which introduces the concept of transaction value. Thus, the Supreme Court has read down the provisions of Rule 9(2) of the CGST Rules by observing thus :-

> *"26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or*

actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

xxxx xxx

31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

32) We find that the High Court, instead of examining the matter from the aforesaid angle, has simply gone by the powers of the rule making authority to make Rules. No doubt, rule making authority has the power to make Rules but such power has to be exercised by making the rules which are consistent with the scheme of the Act and not repugnant to the main provisions of the statute itself. Such a provision would be valid and 1% F.O.B. value in determining handling charges etc. could be justified only in those cases where

> *actual cost is not ascertainable. The High Court missed the point that Garden Silk Mills Ltd. case was decided by this Court in the scenario where actual cost was not ascertainable. That is why we remark that first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated vide notification dated 19.12.1989 would meet be justified. However, the impugned provision clearly fails the test.*
>
> *36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."*

107. The Coordinate bench of this Court in the case of ***Munjaal Manishbhai Bhatt (supra)***, has followed the principal of law of ***Wipro Limited (supra)***, wherein the Division Bench has examined the provisions of Section 7(2) read with Entry No.5 of Schedule III to CGST and Section 9(1) and Section 15 of the CGST Act, in context of an agreement with the builders for construction of a bungalow on the plot of land. The agreement mentioned the liability to pay taxes, including the GST. Such agreement of payment of liability of tax was made with a *bona fide* belief that the assessee would be liable to pay tax under GST on the consideration payable for construction of bungalow, as it would constitute supply of construction service under the GST Acts. The issue, which arose before the Coordinate Bench was related to an objection taken by the GST authorities to pay the tax on the consideration payable for land as well as on construction of bungalow. The Coordinate Bench, while examining the validity of the Notification No.11/2017 dated 28.06.2017, prescribing such liability by providing standard rate of deduction, has held

that the deeming fiction ordered the Paragraph No.2 of Notification dated 28.06.2017 and the parallel State Tax Notification to be read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature, and it will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable. The directions issued by the Division Bench are premised on the following observations.

> *"109 Thus, the prescription under Section 15(5) of the CGST Act has to be by rules and not by notification. Be that as it may, wherever a delegated legislation is challenged as being ultra-vires the provisions of the CGST Act as well as violating Article 14 of the Constitution of India, the same cannot be defended merely on the ground that the Government had competence to issue such delegated piece of legislation. Even if it is presumed that the Government had the competence to fix a deemed value for supplies, if the deeming fiction is found to be arbitrary and contrary to the scheme of the statute, then it can be definitely held to be ultra-vires. We are fortified in our view by the judgement of the Apex Court in the case of Wipro Ltd. (supra) wherein it was observed as under:*
>
>> *"34. We find that the High Court, instead of examining the matter from the aforesaid angle, has simply gone by the powers of the rule-making authority to make rules. No doubt, rule-making authority has the power to make rules but such power has to be exercised by making the rules which are consistent with the scheme of the Act and not repugnant to the main provisions of the statute itself. Such a provision would be valid and 1% FOB value in determining handling charges, etc. could be justified only in those cases where actual cost is not ascertainable. The High Court missed the point that Garden Silk Mills Ltd. case [Garden Silk Mills Ltd. v. Union of India, (1999) 8 SCC 744 : AIR 2000 SC 33] was decided by this Court in the scenario where actual cost was not ascertainable. That is why we remark that the first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated vide Notification dated 19-12-1989 might be justified. However, the impugned*

> *provision clearly fails the test."*
> *xxxx xxxxx*

112. Even otherwise, the possibility of obtaining indirect consideration cannot be ruled out for any supply transaction. If in a given case it is found that the value of construction service which is declared by the supplier is not the correct value in as much as other consideration has been indirectly received, then Section 15(4) of the CGST Act will apply which reads thus:

> *"15(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed."*

113. Therefore, even in a case where the value of supply of goods or services or both cannot be determined under sub-section (1), then the same can be determined in the prescribed manner. The valuation rules framed pursuant to Section 15(4) are contained in the Rules 27 to 31 of the CGST Rules. Rule 27 deals with instances where consideration is not wholly in the form of money. Rule 28 deals with cases where the transaction is with a related person. Rule 29 is with regard to goods supplied or received through an agent. These rules are not relevant for the present writ applications. However Rule 30 and 31 resply of the GST Rules are relevant and read as under:

> *"30. Value of supply of goods or services or both based on cost.-Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*
>
> *31.Residual method for determination of value of supply of goods or services or both.-*
> *Where the value of supply of goods or services or both cannot be determined under rules 27 to 30, the same shall be determined using reasonable means consistent with the principles and the general provisions of section 15 and the provisions of this Chapter:*

Provided that in the case of supply of services, the supplier may opt for this rule, ignoring rule 30."

xxx xxx

115. Thus, the revenue is not remediless even in a case where it doubts the correctness of the value assigned in the contract towards construction. If it is established that such value was not the sole consideration for the service, then resort can be had to the valuation rules and value can be derived by applying the cost plus profit method or a reasonable value consistent with the principles and provisions of the Statute.

116. When such detailed statutory mechanism for determination of value is available then the impugned deeming fiction cannot be justified on the basis that it is meant to curb avoidance of tax when in fact such fiction is leading to arbitrary consequences.

xxxx xxxx

122. In the result, the impugned Paragpragh 2 of the Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017 and identical notification under the Gujarat Goods and Services Tax Act, 2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.

123 While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

124 The impugned paragraph 2 of Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 and the parallel State tax Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable."

108. Applying the foregoing principle of law enunciated by the Supreme Court in case of ***Wipro Limited (supra)*** and ***Munjaal Manishbhai Bhatt (supra),*** in context of fixation of 1% flat rate of valuation, it is not denied, that 1% valuation is fixed by considering the fee range between ‘***0.5% and 3%’***. As acknowledged by the GST Council meeting in its 52nd meeting, held on 07th October, 2023, that the Field formations as well as the taxpayers are finding it difficult to arrive at the open market value for supply of services of corporate guarantees, and in order to arrive at fixed rate of 1%, the range of commission/charge between 0.5% to 3% is considered by adopting safe harbour rule. The GST has also taken into account that there may be cases, where due to long standing relationship of the banks/financial institutions with the company, there would be absence of any charge. Thus, the GST council was conscious of the facts about the uncertain/absence of nature/rate of charges on guarantee, and accordingly has fixed the minimum acceptable commission/fee at 1%, which has been introduced in Rule 28(2) of the CGST Rules. In the provision of Rule 28(2) of the CGST Rules, after deeming fiction of one per cent per annum, expression “actual consideration” is separated by word “or”, and followed by “whichever is higher”. The fixation of benchmark of value of corporate guarantee at 1 per cent, even if the “actual consideration” may be lower than 1 per cent appears to be unreasonable and arbitrary. The Supreme Court in the case of ***Wipro Limited (supra),*** has clarified that if the actual values are not ascertainable, a uniform charge can be applied. This will apply, where there is absence of any charge/commission,

and there is supply of service of "corporate guarantee". In the instant writ petitions it is established that the charge/commission on corporate guarantees ranges from 0.25% to 0.3%. The determination of 1 % flat and higher in such circumstances will also clash with Rule 30 and 31 of the CGST Rules. The petitioners are compelled to pay GST at value at 1%, albeit, the commission/charge is less than 1%. An attempt is also made by the revenue to justify the flat 1% valuation on the ground that such benchmark determination will avoid litigation due to fluctuating charge/commission ranging from 0.5% and 3%. We do not subscribe to the view expressed before us. Merely, because the revenue apprehends that the payment of GST on the valuation declared on the corporate guarantees will result in to litigation, the prescription in the statutory provisions on such indeterminate happenings cannot be adopted. The analogy put forward before us will also apply to the values which are higher than 1%. On fixing of 1% , there will also be scenarios wherein different charges/commissions charged by Banks/financial institutions can also be higher than 1% as recognised by the GST council. This may also lead to litigation. The Supreme Court in case of Coal India Limited Vs. Saroj Kumar Mishra, 2007 (9) SCC 625 has held that "*Only because, there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away.".* Hence, we find that the expression used in Rule 28(2) of the CGST Rules to the extent "whichever is higher" after fixing 1% flat value along with "actual consideration" is arbitrary and is hit by Article 14 and 19(1)(g) of the Constitution of India, and is ultra vires. The petitioners are entitled to have the valuation fixed/determined as per actual charge/commission paid on corporate guarantees, and they cannot be left without any option which is available to tax payers under the provisions of Rule 10TD of Income Tax rules which has influenced the GST council in determining the valuation of 1 per cent. The supplying of value by deeming fiction at 1% on a corporate guarantee becomes more onerous by passage of time on the tax payer, since the guarantee may span for several years, culminating into tax liability for each year.

109. Since we have held that the expression “whichever is higher” is arbitrary and hit by Article 14 and 19(1)(g), the issue which falls for further deliberation is as to whether the entire Rule 28(2) of the CGST Rules or “valuation of 1%” or expression “whichever is higher needs to be struck down or read down. In this context, reference to the decision of the Supreme Court full bench decision in case of Authorised Officer, Central Bank Of India Versus Shanmugavelu 2024 (6) SCC 641, is necessitated:

> *“93. The principle of "reading down" a provision refers to a legal interpretation approach where a court, while examining the validity of a statute, attempts to give a narrowed or restricted meaning to a particular provision in order to uphold its constitutionality. This principle is rooted in the idea that courts should make every effort to preserve the validity of legislation and should only declare a law invalid as a last resort.*
>
> *94. When a court encounters a provision that, if interpreted according to its plain and literal meaning, might lead to constitutional or legal issues, the court may opt to read down the provision. Reading down involves construing the language of the provision in a manner that limits its scope or application, making it consistent with constitutional or legal principles.*

95. The rationale behind the principle of reading down is to avoid striking down an entire legislation. Courts generally prefer to preserve the intent of the legislature and the overall validity of a law by adopting an interpretation that addresses the specific constitutional concerns without invalidating the entire statute.

96. It is a judicial tool used to salvage the constitutionality of a statute by giving a provision a narrowed or limited interpretation, thereby mitigating potential conflicts with constitutional or legal principles.

97. In ***B.R. Enterprises v. State of U.P. & Ors. reported in (1999) 9 SCC 700*** *, this Court observed that the principles such as "Reading Down" emerge from the concern of the courts towards salvaging a legislation to ensure that its intended objectives are achieved. The relevant observations read as under: -*

"81. ...It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wildfrom the crop, of course, without infringing the Constitution. For doing this, the

courts have taken help from the Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated. ..."

(Emphasis supplied)

98. A similar view was reiterated by this Court in its decision in ***Calcutta Gujarati Education Society & Anr. v. Calcutta Municipal Corpn. & Ors. reported in (2003) 10 SCC 533*** *, wherein this Court observed that the rule of "Reading Down" is only for the limited purpose of making a provision workable so as to fulfil the purpose and object of the statute. The relevant observations read as under: -*

"35. The rule of "reading down " a provision of law is now well recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. In the garb of "reading down", however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfil its purposes. ..." (Emphasis supplied)

99. Thus, the principle of Reading Down" a provision emanates from a very well settled canon of law, that is, the courts while examining the validity of a particular statute should always endeavour towards upholding its validity, and striking down a legislation should always be the last resort. "Reading Down" a provision is one of the many methods, the court may turn to when it finds that a particular provision if for its plain meaning cannot be saved from invalidation and so by restricting or reading it down, the court makes it workable so as to salvage and save the provision from invalidation. Rule of "Reading Down" is only for the limited purpose of making a provision workable and its objective achievable".

110. The law governing the application " Rule of Reading Down", while examining the constitutional validity of the statute is well crystalized. The court may apply it when it finds that a particular provision if for its plain meaning cannot be

saved from invalidation and so by restricting or reading it down, the court makes it workable so as to salvage and save the provision from invalidation. The entire Rule 28(2) of the CGST Rules cannot be declared ultra vires, neither the fixing of value at 1% since the levy of GST on corporate guarantees without consideration is held to valid by us. It is trite that the statute should be read in such a manner so as to advance justice. Hence, the provision of Rule 28(2) can be saved if the expression *"whichever is higher"* is read down, since the option of determination of value is still available on actual consideration or 1%. Thus, while upholding the constitutional validity of Rule 28(2) of the CGST Rules, we also direct that the expression "whichever is higher" shall be read down, since the expression "whichever is higher" is arbitrary as it does not confer any option to the corporate guarantor to pay GST on the actual commission/charge, since actual consideration is the indispensable factor which makes the levy and Rule workable.

RETROACTIVE EFFECT OF RULE 28(2) OF THE CGST RULES:

111. In the present batch of petitions, it is noticed by us that the corporate guarantees are executed ranging from the year 2012 to 2023, thus before the GST regime. Rule 28(2) of the CGST Rules was introduced on 26.10.2023 vide Notification No.52/2023 dated 26.10.2023, whereas the word "per annum" was introduced vide Notification dated 10.07.2024 w.e.f. 26.10.2023. The revenue has also imposed the levy by adopting the valuation of 1% retroactively on the corporate guarantees which were executed prior to GST regime, and also

prior to 26.10.2023. In order to test the effect of prescription of 1%, is retrospective or retroactive, we may refer to the decision of full bench of the Supreme Court in case of M/s.Newtech Promoters And Developers Pvt. Ltd. Vs. State of Uttar Pradesh and Ors., 2021 (18) SCC 1, wherein the Apex Court has elucidated the distinction of retrospective and retroactive nature of a statute.

> *“48 The distinction between retrospective and retroactive has been explained by this Court in Jay Mahakali Rolling Mills Vs. Union of India and Others, 2007(12) SCC 198 which reads as under:-*
>
> "*8. "Retrospective" means looking backward, contemplating what is past, having reference to a statute or things existing before the statute in question. Retrospective law means a law which looks backward or contemplates the past; one, which is made to affect acts or facts occurring, or rights occurring, before it comes into force. Retroactive statute means a statute, which creates a new obligation on transactions or considerations or destroys or impairs vested rights.*"
>
> *49 Further, this Court in Shanti Conductors Private Limited and Another Vs. Assam State Electricity Board and Others, 2019(19) SCC 529 held as under:-*
>
> "*67. Retroactivity in the context of the statute consists of application of new rule of law to an act or transaction which has been completed before the rule was promulgated.*
>
> *68. In the present case, the liability of buyer to make payment and day from which payment and interest become payable under Sections 3 and 4 does not relate to any event which took place prior to the 1993 Act, it is not even necessary for us to say that the 1993 Act is retroactive in operation. The 1993 Act is clearly prospective in operation and it is not necessary to term it as retroactive in operation. We, thus, do not subscribe to the opinion dated 31-8-2016 [Shanti Conductors (P) Ltd. v. Assam SEB, (2016) 15 SCC 13] of one of the Hon'ble Judges holding that the 1993 Act is retroactive.*"
>
> *50 In the recent judgment of this Court rendered in the case of Vineeta Sharma Vs. Rakesh Sharma and Others, 2020(9) SCC*

> *1 wherein, this Court has interpreted the scope of Section 6(1) of the Hindu Succession Act, 1956, the law of retroactive statute held as under:-*
>
> "*61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act.*"
>
> *51 Thus, it is clear that the statute is not retrospective merely because it affects existing rights or its retrospection because a part of the requisites for its action is drawn from a time antecedent to its passing, at the same time, retroactive statute means a statute which creates a new obligation on transactions or considerations already passed or destroys or impairs vested rights.”*

112. Thus, as per the decision of the Apex Court the introduction of Rule 28(2) of the CGST Rules w.e.f 26.10.2023 is retroactive, as it applies to those corporate guarantees which are executed prior to its introduction. "*Nova constitutio futuris formam imponere debet, non praeteritis*", which means a new law should be prospective, regulating future conduct rather than altering past transactions. It is a foundational principle of statutory interpretation and jurisprudence that laws should apply prospectively rather than retroactively, ensuring fairness and legal predictability so that citizens can plan actions securely, trusting that the law today governs today. However, the retroactive and retrospective framing a law though occasionally becomes indispensable. The

Constitution Bench of Supreme Court in the case of Jawaharlal Vs. State of Rajasthan and Ors., AIR 1966 SC 764 has held thus:

> "25. ....*We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively, and tax laws are no exception to this rule. So, it would be idle to contend that merely because a taxing statute purports to operate retrospectively, the retrospective operation per se involves contravention of the fundamental right of the citizen taxed under Art. 19(1)(f) or (g). It is true that cases may conceivably occur where the court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right ; and in dealing with such a question, the court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation."*

113. In continuation, we further rely on the constitution bench decision of Supreme Court in the case of State of Gujarat & Anr. Vs. Ramanlal Keshavlal Soni and Ors., 1983 GLH 668:

> ***"52*** *. The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today.......".*

114. It is settled legal precedent that the statute cannot be set aside merely because it is retroactive or retrospective. However, the legal precedents impose checks and balances on its operation. The legislature in its wisdom, has an absolute right to impair the vested rights of the tax payers, however

this power remains strictly subordinate to the fundamental rights enshrined in the Constitution, and the laws must conform to the constitutional mandates, whether they are prospective or retrospective. Accordingly, where the excessive retrospective application of a taxing statute is challenged as a violation of fundamental rights, the court is duty-bound to examine the issue by taking into account the entire matrix of surrounding facts, circumstances, and the specific context of the tax levy. Rule 28(2) imposes a retrospective levy of a new tax for the period during which no levy existed as per the law. The taxable event as previously discussed resulting into in levy travels back to pre-GST era. The retroactive effect impinges the fundamental rights under Article 14 and 19(1)(g), since the levy is unduly harsh and unfair, as taxpayers arrange their financial affairs based on the prevailing law. It imposes an unexpected financial burden without any fault on the assessee, disrupts settled legal and financial implication, more particularly when the corporate guarantee, may stretch for long period of time. Thus, the imposition of levy of GST on 1% valuation per annum to the corporate guarantee prior to the introduction of Rule 28(2) of the CGST Rules w.e.f 26.10.2023 is harsh and unfair to the tax payers. The collection of tax for the period prior to introduction of Rule 28(2), will also be hit by the doctrine of unjust enrichment, since the revenue had no legal basis or authority to levy GST on corporate guarantee, which were executed prior to the date of introduction. However, the levy is permissible, if the period crosses the date of introduction of Rule 28(2), as the taxable event occurs every years as previously discussed.

115. In the captioned writ petition, being Special Civil Application No.14454 of 2025, the show cause notice in FORM GST DRC-01 dated 01.08.2024 has been issued for the corporate guarantees furnished for F.Y,2010-2011 for USD 1,50,00,000) and FY 2011-12(USD 1,00,00,000) to the subsidiaries located outside India raising demand of IGST of Rs.96,46,650 on deemed value of Rs.5,35,92,500/- for the period July 2017 to March 2020. Hence, the case of the petitioner of this writ petition gets squarely covers by the Circular No.225/19/2024-GST dated 11.07.2024, hence the deemed valuation of 1% per annum under Rule 28(2) of the CGST Rules will not apply to the guaranteed amount. Hence, it is ordered accordingly. The impugned show cause notice, is also set aside.

VALIDITY OF CIRCULARS DATED 27.10.2023 & 11.07.2024

116. The petitioners have challenged the validity of the Circulars dated 27.10.2023 and 11.07.2024 on the ground that they are adjudicatory in nature and are contrary to the statute. Reliance placed on the Supreme Court judgment in case of ***Ratan Melting & Wire Industries (supra)*** by the Revenue is misconceived as the same does not encompass the issue raised by the petitioners. The said judgment only refers to the issue of binding nature to the revenue, and supremacy of the judgment of supreme court and high court over it. The Circulars merely explain the operation of Rule 28(2) of the CGST Rules. In the Supreme Court in decision rendered in case of ***Gameskraft (supra***) has also touched upon this issue. It is held thus:

> *"55.6. At the same time, it is clarified that the various circulars relied upon only constitute contemporaneous administrative exposition of the statutory scheme. They do not create the levy independently. The source of levy continues to remain traceable to Sections 2(1), 2(52), 7, and 9(1) of the CGST Act, Entry 6 of Schedule III read with the relevant rate notifications issued under Section 9(1). The notifications and circulars merely operationalise and clarify the statutory framework. Furthermore, the FAQ is only a guide to understand the provisions and would not confer any independent right contrary to the enactment. The challenge to the same is misconceived."*

117. As explicated by us, the source of levy is imbued in the statutory provisions, and as held by the Apex Court the Circulars merely operationalise and clarify the statutory framework, and FAQ incorporated there is only a guide to understand the provisions and would not confer any independent right contrary to the enactment. Since, we have explained the working of the statutory provisions, by adopting the rule of harmonious constructions, and have read down the expression " whichever is higher", the same would alter the FAQs of the Circulars.

CHALLENGE ON DISCRIMINATION IN REFERENCE TO CIRCULARS :

118. The petitioners have also attempted to carve out a case of discrimination *apropos* exemption granted to services supplied by Central Government, State Government, Union Territory to their undertakings or PSU's by way of guaranteeing loans taken by such undertakings vide Notification No.14/2018 dated 26.07.2018. Section 11 of the CGST Act, empowers the government to grant exemption from tax. This power is applied

to the ensure that public sector financing remains cost-effective. The law recognizes permissible differentiation and grants special exemptions to itself and the statutory bodies so that they can fulfill public duties which the private enterprises may not be willing to share due cost effectiveness. The Courts can certainly interfere if it is found that the exemption is oppressive or completely irrational affecting the legal rights of private entities. The legislature exempts government-backed loan guarantees provided to public sector undertakings to prevent artificial tax inflation on sovereign-supported public infrastructure and welfare financing. Taxing these internal state-backed arrangements would increase borrowing costs for public entities, defeating the public interest goals of governance. Hence, Rule 28(2) of the CGST Rules to declared *ultra vires* on the ground of discrimination. The clarification contained in the Circular No. 204/16/2023 dated 27.10.2023 declaring the value of supply as Nil on the providing personal guarantee by the Director of a company to Bank/financial institution for sanctioning/securing of credit in context of Explanation (a) to Section 15 of the CGST Act, viz, related person read with clause(e) of Section 7(1) of the CGST Act, is precise, and falls in line with the RBI guidelines. However, it is further clarified that in rare cases, as mentioned therein, the Director, who has provided guarantee, the taxable value of such supply of service shall be the remuneration/consideration provided to such person/guarantor by the company directly or indirectly. Thus, no case of discrimination gets established on this count also.

INVOCATION OF SECTION 74 OF GST ON THE CORPORATE GUARANTEE :

119. The petitioner of writ petition being Special Civil Application No.6085 of 2025 has also challenged the order passed under Section 74 of the CGST Act and also imposing penalty under Section 122 of the Act for the period from 1st July, 2017 to 31st March, 2023 to the tune of Rs.17,33,40,000/- relating to corporate guarantees ranging from 15.09.2017, 22.12.2017, 22.02.2017 and 27.03.2018. The penalty has been levied by recording that the petitioner has not furnished correct value of the corporate guarantees in the monthly GSTR1/3B , and thus supressed the facts, and evaded the tax liability. In other writ petitions, the petitioners have assailed the show cause notices issued under Section 74, along with the vires of Rule and Circular. The relevant part of Section 74 of the Act is extracted as under:

> *"SECTION 74 : Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts*
>
> *(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*
>
> Xxxx xxxx
>
> Explanation 2.-For the purposes of this Act, the expression

> "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

120. A reading of the aforenoted provisions manifests that the for invocation of Section 74 of the Act requires a strict showing of *malafide* intent, such as fraud, willful misstatement, or suppression. It was the specific case of the petitioner, that it did not pay GST since there was no consideration involved in the execution of the corporate guarantees. The petitioner had referred to the provision of the Act and Rules in his defence, whereas after considering the provisions of Act and Rules, the authority opined the GST was leviable on corporate guarantees. Thus, the petitioners as well the GST authorities have contested the working of statutory provisions. The Supreme Court in the case of M/s.Uniworth Textiles Limited vs. Commissioner Of Central Excise, Raipur, 2013(9) SCC 753**,** while examining the similar expressions of "willfull misstatement or suppression of facts found in Section 28 of the Customs Act, 1962 has held thus:

> *"15 In Anand Nishikawa Co. Ltd. V/s. Commissioner of Central Excise, Meerut, (2005) 7 SCC 749, while again referring to the observations made in Pushpam Pharmaceuticals Company (supra), this Court clarified the requirements of the proviso to Section 11- A, as follows:-*
>
>> *"26...This Court in the case of Pushpam Pharmaceuticals Company V/s. Collector of Central Excise, Bombay (supra), while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and willful to evade payment of duty. The*

Court, further, held :-

'*In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.*'

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. V/s. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11A of the Act".

16 In Collector of Central Excise V/s. H.M.M. Ltd., 1995 Supp(3)SCC 322, this Court held that mere non- disclosure of certain items assessable to duty does not tantamount to the mala fides elucidated in the proviso to Section 11A(1) of the Central Excise Act, 1944. It enunciated the principle in the following way: -

"The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bonafide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this

contention.

Therefore, if non- disclosure of certain items assessable to duty does not invite the wrath of the proviso, we fail to understand how the non-payment of duty on disclosed items, after inquiry from the concerned department meets, with that fate."

121. Thus, the impugned order, as well as the show cause notice under Section 74 of the CGST Act, is premised on the expression "suppression of facts" and demands interference by this Court in light of the foregoing observations. In the instant writ petitions, there is a disputed interpretation about the operation of Rule 28(2) of the CGST Rules read with the enabling provisions of the GST Acts along with the provisions of the Transfer of Property Act. In such a scenario, the observations of the Supreme Court, "When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression," may come to the aid of the petitioners. It further held that mere failure to declare does not amount to willful suppression. Albeit, Explanation 2 defines 'suppression'; its ingredients will only get satisfied by some positive act of the assessee which establishes willful suppression by withholding vital information for evading tax. We do not find that there was any intention to evade payment of tax or that the assessee was guilty of fraud, collusion, misconduct or suppression of facts. Albeit, it is true that a taxpayer cannot claim immunity from tax liability by taking shelter under the complexities of the law, its intricate operational mechanics, or the pendency of judicial clarification before a court of law, thereby utilizing legal ambiguity as an excuse for non-

payment. However, at the same time, when evaluating the breach of law, the critical facet of 'willful suppression' executed with a specific intent to evade tax must be rigorously examined. In one of the captioned writ petitions, the revenue has invoked the provisions of Section 74 of the CGST Act by issuing a show cause notice dated 01.08.2024 to the corporate guarantor, in respect of a corporate guarantee which was executed pre-GST regime on 12.02.2012. Hence, the action of the revenue in resorting to the provisions of Section 74 of the CGST Act is arbitrary and is tainted with non-application of mind. In such circumstances, the petitioners cannot be relegated to availing the alternative remedy of filing an appeal. Consequently, the order as well as the show cause notices are quashed.

CONCLUSION

122. On the substratum of a threadbare analysis of the statutory provisions and the legal precedents, we issue the following directions:

A) The provision of Rule 28(2) of the GST Rules, 2017, is held to be intra vires CGST Act and Article 14, 19(1)(g) and 265 of the Constitution of India, except to the extent that the expression “whichever is higher” shall be read down.

B) The levy of GST on the corporate guarantee furnished prior 26th October, 2023 under Rule 28(2) is declared violative of Article 14 and 19(1)(g) of the Constitution of India, however, levy gets attracted from this date in case the guarantees continue.

C) Section 15(4) of the GST Acts is held to be *intra vires.*

D) The impugned action of the Reveune against the petitioners taken under Section 74 of the GST Acts is quashed and set aside.

E) The excess amount, if any, of the GST deposited shall be refunded to the petitioners. However, we clarify that it will also be open for the respective parties to adjust the amount of the GST if they so desire.

F) The clarification issued vide impugned Circulars dated 27.10.2023 and 11.07.2023 is set aside to the extent it runs contrary to the observations and directions issued by this Court. Accordingly, it will be open for the Revenue to issue fresh Circulars / Administrative Instructions falling in line with the present decision.

G) The present directions shall be implemented within a period of three months.

H) The writ petitions are ***allowed in part***.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(VAIBHAVI D. NANAVATI,J)

MAHESH/01 & 02