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

WRIT PETITION NO.1687 OF 2024

M/s. Eagle Security & Personnel Services through Veena Chittersen Sharma (proprietor) (Eagle for short), situated at Shop No.12, Nirmala Co-op. Housing Society Ltd., JP Road, Andheri (West) Mumbai – 400 058 ...Petitioner

Versus

1. Union of India, through the Secretary, Ministry of Finance (Department of Revenue), No.137, North Block, New Delhi – 110 001

2. State of Maharashtra through the Secretary, Finance Department Mantralaya, Madam Cama Road, Hutatma Rajguru Chowk, Nariman Point, Mumbai – 400 032

3. The GST Council, through the Secretary, 5th Floor, Tower II, Jeevan Bharti Building, Janpath Road, Connaught Place, New Delhi – 110 001

4. The Central Board of Indirect Taxes and Customs, through the Chairman, North Block, New Delhi – 110 001 ...Respondents

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Mr. Shreyas Shrivastava (through VC) a/w Mr. Saurabh R. Mashelkar for the Petitioner.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.
RESERVED ON : 5 August 2025
PRONOUNCED ON : 18 August 2025

JUDGMENT:- *(Per Jitendra Jain, J.)*

1. Rule. By consent of the party, same is taken for final hearing at the stage of admission itself.

2. This petition under Article 226 of the Constitution of India is filed seeking the following reliefs:-

> *"(a) That this Hon'ble Court be pleased to issue a writ of Mandamus or Certiorari, or any other writ, order or direction by reading down Section 17(3) of the CGST Act and MGST Act in so far the same treats the taxable supplies under RCM as exempt supplies without there being any reasonable basis for such classification.*
>
> *(b) that this Hon'ble Court be pleased to issue a writ of Mandamus or Certiorari, or any other writ, order or direction quashing and setting aside sub-section 17(2) of the CGST Act and MGST Act introduced vide the Impugned Notifications to the extent it denies the benefit of ITC claim to the Petitioner for being ultra vires of the CGST Act, MGST Act and Rules made thereunder and the Constitution."*

3. The Petitioner is a sole proprietor registered under the CGST Act with effect from 1 July 2019.

Grievance of the Petitioner:-

4. Prior to 1 January 2019, GST on security services was taxable on forward charge basis, meaning the person rendering service was liable to pay tax, under the head "Investigation and Security Services". Post 1 January 2019, the said services have been brought under Reverse Charge Mechanism (RCM), meaning thereby that the person receiving services must pay tax, based on Notification No.29 of 2018 dated 31 December 2018 which in turn amends Notification No.13 of 2017 dated 28 June 2017. As per the above Notifications, a registered person

located in a taxable territory receiving security services is liable to pay tax if the supplier of service is **any person other than a body corporate**.

5. The Petitioner, being a proprietor, is aggrieved by RCM because input tax paid on goods and services procured by her for rendering security services now cannot be set-off against output tax liability because these services under RCM are treated as exempt services in the hands of the Petitioner, and consequently there is no output tax liability against which Input Tax Credit (ITC) can be set-off, thereby resulting in higher cost of rendering services. For example, if Petitioner has paid Rs.10 as GST while procuring some goods/services for rendering security services then Rs.10 will not be allowed to be set-off because under RCM, she is not liable to pay GST on security services but the person receiving services is liable to pay tax and such recipient can claim credit.

Submissions of the Petitioner:-

6. Mr. Shrivastava, learned counsel for the Petitioner submits that in the Notification a body corporate is excluded from the phrase "supplier of service" and, therefore, all other entities are discriminated and consequently equals have been treated unequally, thereby violating Article 14 of the Constitution of India. He further submitted that on account of the impugned provisions and the Notification issued, the Petitioner is unable to compete since the Petitioner is now not entitled to avail ITC, thereby resulting in increased cost of rendering service. Therefore, the Petitioner's right to carry on business under Article 19(1)(g) of the Constitution of India is violated. He further submits that the objective of the GST Act is to avoid cascading effect and seamless transfer of tax credit and the impugned provisions denying the benefit of ITC run contrary to the objective of the GST Act. He submitted that

ITC on account of inverted duty structure is refunded to avoid cascading effect. However, no such provision exists in respect of tax paid under RCM. For all the aforesaid reasons, Mr. Shrivastava, learned counsel for the Petitioner submits that the impugned provision to the extent it treats taxable supplies under RCM as exempt and consequently denies the benefit of ITC to the Petitioner is *ultra vires* the Constitution of India or at least the provisions of Section 17(2) and (3) should be read down to exclude the proprietorship form of entity. Although the learned counsel refers to some decision of the Supreme Court, neither the citation nor copy of the same was handed over at the time of hearing or towards the end of day.

7. We have heard learned counsel for the Petitioner.

Analysis & Conclusion:-

A. Scheme of the Central Goods and Services (CGST) Act, 2017:-

8. The GST regime of indirect taxation came into effect from 1 July 2017. The relevant provisions for the purpose of this petition are as under:

9. Section 16(1) of the CGST Act reads as under: -

> *"16. Eligibility and condition for claiming input tax credit:-*
> *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of the input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."*

10. Section 17(2) and (3) of the CGST Act reads as under:-

> *"17. Apportionment of credit and blocked credits:-*
> *(1) … … …*

> *(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.*
> *(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and and shall shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.*
> *Explanation.-For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule."*

11. Section 49(2) and (4) of the CGST Act reads as follows:-

> *"**49. Payment of tax, interest, penalty and other amounts**.-*
> *(1) … … …*
> *(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.*
> *(3) … … …*
> *(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and restrictions and within such time as may be prescribed."*

12. Section 2(82) of the CGST Act defines "output tax" in relation to a taxable person to mean the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but **excludes tax payable by him on reverse charge basis**. Section 2(62) defines "input tax" in relation to a registered person to mean the central tax, state tax, integrated tax or union territory tax charged on any supply of goods or services or both made to him and includes items specified therein and more particularly clause (b) refers to the tax payable under the provisions of sub-sections (3) and (4) of Section 9.

13. Section 9(3) of the CGST Act provides that the Government may, on the recommendations of the Council, by notification specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

14. Section 16 provides for eligibility, conditions and restrictions for taking ITC. As per Section 16(2), benefits of ITC can be claimed only on fulfillment of the conditions specified therein. The restriction are provided in Section 17 of the CGST Act.

15. Section 17 provides for apportionment of credit and blocked credits. This section restricts the quantum of ITC.

16. Section 17(1) provides that where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the ITC as is attributable to the purposes of his business.

17. Section 17(2) provides that where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies and partly for effecting **exempt** supplies, the amount of credit shall be restricted to so much of the input tax as is attributable to the taxable supplies including zero-rated supplies. Thereby it implies that proportionate **ITC attributable to exempt supplies will not be allowed to be taken as credit**. Section 17(3) provides that the value of exempt supply under sub-section (2) shall be such as may be prescribed, and **shall include supplies on which the recipient is liable to pay tax on reverse charge basis, etc**. It implies that

in case of services on which tax is payable on reverse charge basis, same will be treated as exempt and consequently as per Section 17(2) ITC would not be available to the supplier of the service.

18. Section 49(2) provides that ITC shall be credited to electronic credit ledger and Section 49(4) provides that said credit may be used for making payment towards output tax subject to conditions and restrictions.

19. Therefore, on a conjoint reading of Sections 2, 9, 16, 17 and 49, the person whose services are chargeable to tax under RCM is not liable to pay any tax and such services are treated as exempt under Section 17, and further there being no output tax liability on such person, the credit of input tax is not permitted. It is important to note that the power to issue impugned notifications by virtue of Section 9(3) of the CGST Act has not been challenged and, in our view, rightly so.

B. Scope of Judicial Interference on Challenge to Vires of Fiscal Laws:-

20. Judicial intervention when faced with constitutional challenge to fiscal statutes has been the subject matter before the Supreme Court since the birth of the Constitution of India and by now dust is fairly settled. The Courts have delineated the Laxman Rekha in this context which we propose to discuss in the next few paragraphs.

21. There is minimal scope for challenge to constitutional validity. The fulcrum of constitutional challenge is the question of legislative competence. Every fiscal legislation is an experiment in achieving certain desired ends, and the trial-and-error method is inherent in every such experiment. The law is very clear that Legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of a solution through any doctrine or straitjacket formula and this is particularly true in the case of legislation

dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. Every legislation, particularly in economic matters, cannot provide for all possible situations or anticipate all possible abuses.

22. As held in ***R. K. Garg vs. Union of India***[1]*,* every legislation particularly in economic matters is essentially empiric and it is based on experimentation. There may be crudities, inequities and even possibilities of abuse but on that account alone it cannot be struck down as invalid. These can always be set right by the Legislature by passing amendments. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions. Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. Moreover, there is always a presumption in favour of the constitutionality of a statute and the burden is upon he who attacks it to show that there has been a clear transgression of the constitutional principles. The Legislature understands and correctly appreciates the needs of its own people; its laws are directed to problems made manifest by experience and its discrimination is based on adequate grounds.

23. In adjudging constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. The Court must, while examining the constitutional validity of a legislation in economic matters, "be resilient, not rigid, forward looking, not static, liberal, not verbal". It must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless

1 (1982) 133 ITR 239 (SC)

the exercise of legislative judgment appears to be palpably arbitrary. The trial-and-error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilised for tax evasion or avoidance not intended by the Legislature, the Act can always be amended and the abuse terminated.

24. It is also relevant to note the views of Justice Frankfurter in the case of ***Morey vs. Doud***[2] which is reproduced hereunder:-

> *"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."*

25. Firstly, it must be kept at the forefront that while considering a challenge to the constitutionality of legislation, the Court must presume its constitutionality, and the burden lies heavily on those who challenge the constitutional validity. The basic principles governing legislative power in the context of the present case can be culled out from the dicta of the Supreme Court in ***Hoechst Pharmaceuticals Ltd. vs. State of Bihar***[3] and in the decision of the Constitution Bench in ***State of West Bengal vs. Kesoram Industries Limited***[4].

26. In matters of taxation, the Court must defer to legislative judgment and policy. Where a statute empowers the Government to grant exemption from tax to any specified class, in public interest, the Court would not question the policy of the Government in exercising

2 354 US 457 (1957)
3 (1983) 4 SCC 45
4 (2004) 10 SCC 201

this power or interfere merely because the exemption granted has been confined to new units and not extended to all units doing the same business. Mere excessiveness of tax or the absence of corrective machinery would not render the tax as an unreasonable burden and thereby violative of Article 19(1)(g).

27. A taxing statute is not *per se* regarded as a restriction on freedom under Article 19(1)(g) even if it imposes some hardships in individual cases. The mere excessiveness of tax or even the circumstances that its imposition might tend towards the diminution of earnings or profits of the persons of incidence does not, *per se,* and without more, constitute violation of rights under Article 19(1)(g). Courts do not usually interfere with attacks on the ground of it being excessive or it imposes a heavy burden on trade and commerce or that the profits of business are greatly reduced thereby.

28. Taxation law is not open to attack on the ground of inequality, even though the result of taxation may be that the total burden on different persons may be unequal. Courts in view of the inherent complexity of fiscal adjustment of diverse elements permit a larger discretion to the Legislature in matter of classification. The power of Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. When the power to tax exists the extent of burden is a matter for discretion of the law-makers. It is not the function of the Court to consider the propriety or justness of the tax or enter upon the realm of legislative policy.

29. In taxation matters, the State has a wide discretion in selecting persons or objects it will tax, and a statute is not open to attack on the ground that it taxes some persons or objects and not

others. The classification is within the limits up to which the Legislature is given freehand for making classification in a taxing statue. The tests of this vice of discrimination in tax laws are thus less vigorous. Courts are extremely circumspect in questioning the reasonability of classification except where there is writ on the statute perversity or madness or gross disparity. No precise formula or precise scientific principles of exclusion or inclusion can be applied in taxation laws. Perfect uniformity and perfect equality of taxation in all aspects in which the human mind can view is a baseless dream insofar as taxation is concerned. Taxation based on classification between individual agriculturalist and companies doing agriculturalist business was held to be constitutional.

30. Article 14 of the Constitution permits reasonable classification for the purpose of legislation and prohibits class legislation. Legislation intended to apply or benefit a well-defined class is not open to challenge by reference to Article 14 of the Constitution on the ground that same does not extend a similar benefit of protection to other persons. It is difficult to expect the Legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. Still, the Court would respect the classification dictated by the wisdom of legislature and shall interfere only on being convinced that the classification would result into palpable arbitrariness on the touchstone of Article 14 of the Constitution of India. Article 14 prohibits class legislation, but not reasonable classification or sub-classification.

31. The Supreme Court has time and again reiterated that Courts do not sit in appeal over the decisions of the Government to do merit review of the subjective decision and that Government decisions concerning public revenue have an intricate economic value attached to

them and to elevate the standard of review on the basis of subjective understanding of the subject matter being extraordinary would be *dehors* the review jurisdiction. The Courts will not transgress into the field of policy decision and strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical. The State is entitled to pick and choose the subject matter of tax and the benefits to be granted and the persons to whom the benefit is to be granted.

32. The input tax credit is in the nature of a benefit or concession extended to a person under the statutory scheme. Even if it is held to be an entitlement it is always subject to the restrictions under the statue. It is not an absolute right but is subject to conditions and restrictions specified in Sections 16, 17 and 49 of the CGST Act and the Rules made thereunder.

C. Article 14 Submissions:-

33. The first contention raised by the learned counsel for the Petitioner is that if the supplier is a body corporate, then the provisions of RCM would not be applicable but same will be applicable to all other entities. According to the learned counsel for the Petitioner, there is no reason why other types of entities like proprietorship, etc. are covered by RCM and a body corporate is not covered. For example, if a proprietary concern or a partnership firm provides security services to a registered person then RCM would be applicable, but if the same services are provided by a private limited company then the private limited company will pay tax on forward charge and would claim the credit.

34. It is settled position that body corporate is a separate class than non-corporates. In income-tax laws, different rates of taxation are

applied to body corporates and non-body corporates. Similarly, certain incentives/benefits are given to corporates which are not available to non-corporates and vice versa. A body corporate cannot be compared to a non-body corporate and put in one group. Therefore, merely because the RCM is not made applicable to a supplier of service who is a body corporate, whereas it is made applicable to any other person, cannot be a ground to contend that equals have been treated unequally by invoking Article 14 of the Constitution of India. The classification is based on an intelligible differentia, and the same has a reasonable nexus with the object that the law seeks to achieve.

35. Besides, all proprietorship entities rendering security services are identically and equally treated by this notification and therefore there is compliance of Article 14 of the Constitution of India.

36. In the case of ***Uber India Systems Private Limited & Ors. vs. Union of India & Ors.***[5] an issue arose before the Delhi High Court on withdrawal of exemption from GST in respect of bookings made by the consumer through electronic platform or electronic commerce operator for an auto rickshaw ride or bus ride or non-air-conditioned stage carriage which prior to the said withdrawal was available to fare paid to individual auto rickshaw drivers, bus operators etc. irrespective of the mode of booking availed of by the consumer. The challenge was posed on the basis of Articles 14 and 19(1)(g) to the withdrawal of exemption which was rejected, and when dealing with Article 14 of the Constitution of India the Delhi High Court observed that the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. The Court further observed that it would mean that the State has the power to classify persons for legitimate purposes and

5 (2023) 112 GSTR 280 (Delhi)

the Legislature is competent to exercise its discretion and make classification, thereby every classification is in some degree likely to produce some inequality, but mere production of inequality is not enough to make the provision unconstitutional.

37. The Bombay High Court in the case of ***Dharmendra Jani vs. Union of India & Ors.***[6] rejected the contention based on Article 14 by holding that intermediary services provided by the Petitioner to its overseas customers are subjected to GST whereas in the case of service providers like marketing agents, management consultants and professional advisors, the services are not subjected to GST pursuant to Section 13(2) of the IGST Act. The Bombay High Court held that the classification is based on intelligible differentiation.

38. Whether a particular class of persons is required to be covered by RCM or not is broadly a policy matter left to the wisdom of the Legislature and generally, this Court does not easily interfere with such matters unless a case of manifest or patent violation of Article 14 or 19 is made out. Besides, only on the grounds of its notion of expediency, the Courts neither strike down nor rewrite or read down statutory provision in the exercise of powers under Article 226 of the Constitution. In fiscal matters, Legislature is given wide latitude to decide the subject matter of tax, the incidence of tax, the persons entitled to exemption, etc. These are policy matters which cannot be gone into by this Court under its extraordinary jurisdiction when challenge is to the vires. In our view, the classification between a body corporate and non-body corporate does not violate the guarantee of equality or the equal protection of law under Article 14 of the Constitution of India.

6 (2023) 113 GSTR 281 (Bom)

39. It has been laid down in many decisions of the Supreme Court that taxation statutes, for the reasons of functional expediency and even otherwise, can pick and choose the person on whom tax is to be levied. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judiciary cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of situations, in which some of the taxpayers find themselves, is not hit by Article 14 of the Constitution of India if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assesses are accidental and inevitable and are inherent in every taxing statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line.

40. The prescription of different rates of tax leviable to different categories of companies is held not to be violative of Article 14 of the Constitution by the Hon'ble Supreme Court in the case of ***Amalgamated Tea Estates Co. Ltd. vs. State of Kerala***[7].

41. In the case of ***All India Haj Umrah Tour Organizer Association Mumbai vs. Union of India & Ors.***[8] the Supreme Court was posed with the submission on Article 14 of the Constitution of India since exemption was given to the Haj Committee for organising Haj pilgrimage but not to private tour operator. The Supreme Court rejected the submission by the private tour operator by observing that Haj Committee is a separate class and private tour operator is a separate class and therefore exemption given from GST to Haj pilgrimage tour

7 AIR 1974 SC 849
8 (2022) 103 GSTR 434 (SC)

organized by the Haj Committee and not to private tour operator was held to be based on reasonable classification and not violative of Article 14 of the Constitution of India.

42. In ***Amarendra Kumar Mohapatra & Ors. vs. State of Orissa & Ors***[9], where the Constitution Bench dealt with the question of classification that was under-inclusive held that having regard to the real difficulties under which the Legislature operates, the Courts have refused to strike down legislation on the ground that they are under-inclusive.

43. In ***Shashikant Laxman Kale & Anr. vs. Union of India & Anr.***[10], the Supreme Court approved of classification based on private sector and public sector undertaking to be treated differently since both fall in different classes and hence the Supreme Court approved of granting exemption to payment received by an employee of a public sector company at the time of his voluntary retirement and exclusion of such benefit to private sector employees was held to be permissible.

44. Therefore, in our view, this contention based on Article 14 challenge to the vires of Section 17 (2) and (3) and notifications is liable to be rejected. Furthermore, no case is made out for reading down the said provisions to either save them from the challenge of constitutionality or any other reason.

D. <u>Article 19 (1)(g) Submissions</u>:-

45. The next submission made by the Petitioner is that he is put to unfair disadvantage on account of denial of ITC thereby resulting in higher cost and consequently same is affecting his competitiveness in the market.

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9 (2014) 4 SCC 583
10 AIR 1990 SC 2114

46. Firstly, the Petitioner is registered with GST Authorities from 1 July 2019 and the scheme of RCM, which is the subject matter of the present petition, was introduced from 1 January 2019. Therefore, at the time of seeking registration under GST, the Petitioner was aware about the scheme of RCM applicable to her entity and activities and non-entitlement of ITC by virtue of Section 17 of the CGST Act. The Petitioner with open eyes applied for GST registration with full knowledge of the above and, therefore, cannot now be heard to say that the impugned provisions are unconstitutional and *ultra vires* or should be read down. However, since it is possible to argue that there could be no waiver of fundamental rights, we do not propose to non-suit the Petitioner on this ground.

47. Secondly, whether a particular business model based on a particular type of entity is competitive or uncompetitive is a business decision which the Petitioner must take and such business model, after adopting a particular type of entity, if found to be non-competitive cannot be a ground for challenging the vires of the impugned provisions. The challenge to the vires of any particular provision cannot be sustained on the ground of competitiveness. The issue of business competitiveness is within the field of an assessee and the business environment and has no relation whatsoever to the constitutional framework of law. A provision of law cannot be struck down or read down to make a business competitive for a particular type of entity. The provisions of law are to be tested on the touchstone of the Constitution of India and not on the touchstone of competitiveness in the business environment. Article 19(1)(g) guarantees freedom to carry on business or profession and not the competitiveness of a business entity in the market. Admittedly, it is not the case of the Petitioner that by virtue of the impugned notification/provision there is a bar on him to carry on

his business. Therefore, even on this count, we do not see any reason for reading down or quashing the impugned provisions challenged in the writ petition or it being violative of Article 19(1)(g) of the Constitution of India.

48. The Hon'ble Supreme Court in the case of ***M/s. S. Kodar vs. State of Kerala***[11] observed that it is not necessary that a dealer should be enabled to pass on the incidence of tax on sale to the purchaser in order that it might be a tax on sale of goods. The Court further observed that it cannot be said that because the dealer is disabled from passing on the incidence of tax to the purchaser the provisions of the Act impose an unreasonable restriction upon the fundamental rights of the dealer under Article 19(1)(g) of the Constitution.

49. In the case of ***State of Karnataka vs. M. K. Agro Tech (P) Ltd***[12] it has been held by the Supreme Court that it is the domain of Legislature as to how tax credit is to be given and under what circumstances.

50. In ***Federation of Hotel & Restaurant Association of India vs. Union of India & Ors.***[13] in paragraph 24, the Supreme Court observed as under:-

> *"24. A taxing statute is not, per-se, a restriction of the freedom under Article 19(l)(g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable, so long as law represents a process of abstraction from the generality of cases and reflects the highest common-factor. Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax or even the circumstances that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per-se, and without more, constitute violation of the rights under Article 19(l)(g). Fazal Ali J., though in*

11 AIR 1974 SC 2272
12 (2017) 16 SCC 210
13 AIR 1990 SC 1637

> *a different context, in Sonia Bhatia v. State of U.P. and Ors. observed:*
> *...The Act seems to implement one of the most important constitutional directives contained in Part IV of the Constitution of India. If in this process a few individuals suffer severe hardship that cannot be helped, for individual interests must yield to the larger interests of the community or the country as indeed every noble cause claims its martyr."*

51. The views expressed by the above decision were reiterated by the Hon'ble Supreme Court in the case of ***Easland Combines Coimbatoire vs. Collector of Central Excise Coimbatore***[14] in para 18 which reads as under:-

> *"18. In our view, it would be difficult to accept the aforesaid contention. It is well-settled law that merely because a law causes hardship, it cannot be interpreted in a manner so as to defeat its object. It is also to be remembered that the courts are not concerned with the legislative policy or with the result, whether injurious or otherwise, by giving effect to the language used nor is it the function of the court where the meaning is clear not to give effect to it merely because it would lead to some hardship. It is the duty imposed on the courts in interpreting a particular provision of law to ascertain the meaning and intendment of the legislature and in doing so, they should presume that the provision was designed to effectuate a particular object or to meet a particular requirement. (Re: Firm Amar Nath Basheshar Dass v. Tek Chand.)"*

52. The benefit of credit of ITC is available only if there is output tax liability. In RCM there is no output tax liability because it is treated as exempt and, therefore, in tune with the objective of GST, credit of ITC cannot be claimed in the absence of liability but same can be claimed by the recipient of service.

E. **Submissions on Inverted Duty**:-

53. The comparison by the Petitioner with the provisions relating to inverted duty structure is misconceived. In that case there is actual

14 (2003) 3 SCC 410

payment of output tax, rate of which is less compared to input tax and therefore is entitled to refund under Section 54 of the CGST Act. In the instant case, there is no output tax liability and there is no provision of refund in case of cases covered by RCM. The Court, cannot, direct the legislature to enact similar provision as that of Section 54 of the CGST Act or to amend Section 54.

F. Objective of GST Submissions:-

54. Insofar as the submission with respect to cascading effect and seamless transfer of credit is concerned, once the Legislature is competent to enact the provisions of law, cascading effect cannot be a ground to challenge the provision as *ultra vires*. The provisions of the enactment can be challenged only if it is beyond the competence of the State enacting the law as per the Constitution of India or violates any of the fundamental rights of a person guaranteed under the Constitution. It is not the case of the Petitioner that the impugned provisions are beyond the competence of the State to enact. Insofar as whether the impugned provisions are violative of any of the fundamental rights guaranteed under the Constitution, we see no reasons nor is any case made out for the same by the Petitioner. The submission made by the Petitioner on competitiveness and equality has been considered by us in the above paragraphs and we have concluded that the same does not violate any of the fundamental rights guaranteed by the Constitution of India.

55. The objective of GST may be to eliminate cascading effect or seamless transfer of credit but merely because the Legislature puts a condition whereby a particular person is not entitled to avail ITC thereby increasing the cost of service cannot be a ground for striking down or reading down the provisions. In case of RCM, the person

receiving the services, i.e. the recipient pays the tax and can claim credit of the same. The provider of service is exempt from paying tax. Therefore, when looked at the chain of supply there is seamless of transfer of credit of tax serving the objective of GST. Merely because persons covered by RCM cannot claim credit of ITC cannot be seen in a microscopic way to hold the notification and the provision as *ultra vires*.

56. The reasons for taxing a particular service under RCM can be many. For example, if an individual is rendering services to a company then in order to lessen the burden of compliance by the individual, the said services may be covered under RCM or if it is difficult to trace administratively the person rendering the services then the Legislature may tax such services rendered by that person under RCM and shift the liability to the person receiving the services.

57. There could be varied reasons administratively, economically, convenience, etc. which goes into the decision-making process before such services are brought under the purview of RCM. The objective of bringing certain goods and / or services within the ambit RCM is to safeguard, administrative convenience, additional source of revenue, recovery from persons outside jurisdiction, difficulty in collection of tax, economy in collecting tax from few assessees compared large number of assessee, supply of services from unregistered person to registered person etc.

58. Therefore, the GST Council, which is an expert body, after deliberation recommends the Central Government, the services, persons / goods etc on which tax can be collected on RCM basis. This exercise cannot be faulted on constitutional grounds and certainly not by this Court under Article 226 of the Constitution of India. The said exercise and decision-making process is best left to the framers of law and the

administrators and experts who are well versed with ground realities before any notification is issued under Section 9(3) of the CGST Act.

G. Decisions upholding vires of Section 17 of GST:-

59. The constitutional challenge to the provisions of Section 17(2) and (3) of the CGST Act came up for consideration before the Delhi High Court in the case of ***Pace Setters Business Solutions Pvt. Ltd. vs. Union of India & Ors.***[15]. The challenge before the Delhi High Court was on the same basis as what is canvassed before us today. The Delhi High Court after analyzing the scheme of the Act rejected the challenge laid by the Petitioner therein to the notifications and the provisions of Section 17(3) of the CGST Act. The Delhi High Court after referring to the provisions of Section 9(3) in paragraph 31 rejected the challenge to the notification being without authority of law. In paragraph 32, the Delhi High Court observed that there is no inherent right of an assessee to claim credit for input tax paid on the services availed. The matter relating to whether any such credit is available and to what extent it is available is a matter of statutory prescription. The right to avail input tax credit is a statutory right and is available only if the statute provides for the same and that too, to the extent the statute permits. In paragraphs 33 and 38, the Delhi High Court rejected the challenge on the ground of Article 14 and observed that same is not discriminative. The submission on cascading effect was also rejected by the Delhi High Court.

60. In our view, the impugned challenge made before us is no more *res integra* considering the decision of the Delhi High Court. The notifications are issued under Section 9(3) on the recommendation by the GST Council which is a collective body of the Centre and States. No

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gross case is made out and none of the grounds urged warrant any different approach or view in the matter.

61. The Hon'ble Supreme Court in the case of ***Chief Commissioner of Central Goods and Service Tax & Ors. vs. Safari Retreats Private Limited & Ors.***[16]rejected the challenge to the constitutional validity of Sections 17(5)(c) and 17(5)(d) of the CGST Act, 2017 by holding that the provision meets the test of reasonable classification which is a part of Article 14 of the Constitution of India. The Supreme Court affirmed the contention of the Union of India that immovable property and immovable goods for the purpose of GST constitutes a class by themselves and clauses (c) and (d) of Section 17(5) of the CGST Act apply only to this class of cases. It was further held that the right of ITC is conferred only by the statute and unless there is a statutory provision ITC cannot be enforced. It is a creation of statute and thus no one can claim ITC as a matter of right, unless it is expressly provided in the statute. The Supreme Court also observed that the Legislature can always carve out exceptions to the entitlement of ITC under Section 16 of the CGST Act. The Court further observed that they will have to go into complex questions involving fiscal adjustments of diverse elements to decide why transactions covered by clauses (c) and (d) are separately classified and the Court has no experience or expertise to embark upon the said exercise. Therefore, the Court rejected the contention that clauses (c) and (d) of Section 17(5) of CGST are discriminatory.

62. In paragraph 79 of the above judgment, the Supreme Court further observed that while dealing with a taxing statute it can always be said that ideally, a particular provision ought not to have been incorporated or ought to have been incorporated with a modification. Even if this can be said, *per se*, the particular provision does not become

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unconstitutional. The Court cannot impose its views on the Legislature. The Supreme Court upheld the constitutional validity of clauses (c) and (d) of Section 17(5) and refused to read down the provision. In our view, the ratio of the decision in the case of ***Safari Retreats Private Limited (supra)*** would squarely apply to the challenge posed by the Petitioner before us on Section 17(2) and 17(3) of the CGST Act and, therefore, such a challenge cannot succeed.

H. Reading Down Submissions:-

63. The doctrine of reading down, while construing a statute has been lucidly laid down in the case of ***Delhi Transport Corporation vs. D.T.C. Mazdoor Congress***[17]***,*** in paragraph 255 which reads as under:-

> *"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible-one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the Legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the Legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the Legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."*

17 (1991) Supp (1) SCC 600

64. In the background of the above elucidation by the Supreme Court and since we have rejected the challenge to the vires of the impugned Section and the notification, the contention raised by the Petitioner to read down the provision/notification to include a proprietor along with a body corporate is rejected.

65. In view of above, the petition is dismissed by rejecting the challenge to Notification No.29 of 2018 amending Notification No.13 of 2017 and Section 17(2) and 17(3) of the CGST Act as prayed for and reproduced in paragraph 2 above.

66. There shall be no order for costs.

(Jitendra Jain, J.) (M. S. Sonak, J.)