



# Recent Trends, Amendments & Case Studies

CA Vivek Baj



# Key Statistics On Tax Litigations



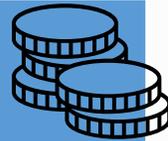
Around 25 lakhs pending Tax matters (at various forums)



Over 70-80k Tax appeals filed annually



33% of Tax disputes take 10-15 years to be disposed off

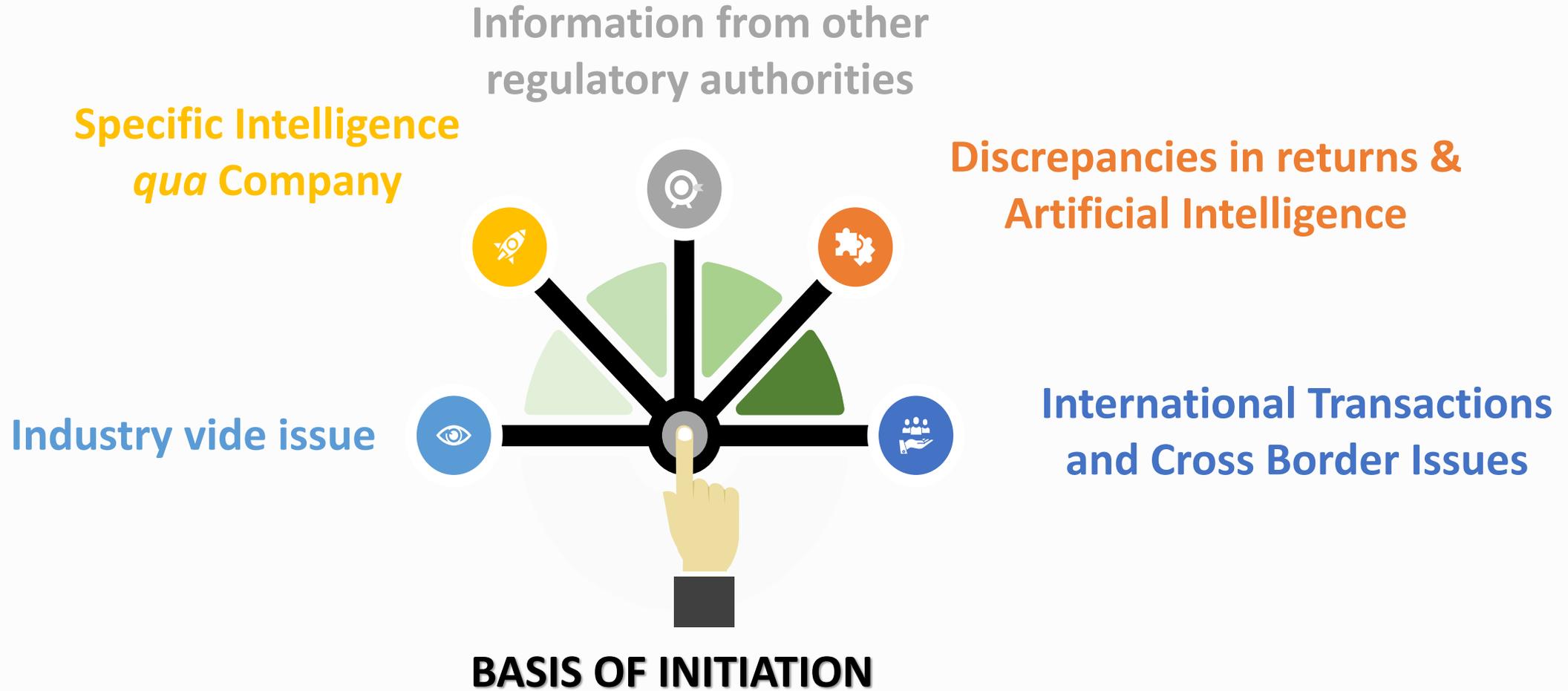


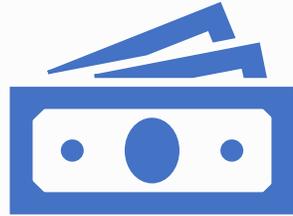
Annual litigation cost to economy ranges between USD 3-3.5 Bn



Huge sums of money blocked in litigation due to pre-deposits, mandatory or otherwise

# Recent Trends in Litigation...





## Industry wide issues

**Pharma sector under DGGI Scanner; about ₹450 crore of GST dues recovered in FY24**

 Times of India

SC overturns HCs, allows Income Tax department to reopen 90,000 cases

 Storyboard18

DGGI investigating 658 gambling companies, reports Rs 82k crore tax evasion by online 'gaming' companies

 Business Standard

GST authorities issue Rs 2,000 cr notice to 20 insurers

**GST notices to foreign airlines could hurt India's aviation potential: IATA**



## Specific intelligence *qua* Company

Excess availment of ITC in GSTR-3B vis-vis GSTR-2A

Fake invoicing in entire supply chain

- GST/ Service Tax demand on comparison with Form 26AS
- Sharing of information by other regulatory authorities (Income Tax, Customs, Sector-specific regulator, ED, etc)

Information from other authorities



- Reconciliation between GSTR-3B & GSTR-2A
- Mis-match between GSTR-1 & GSTR-3B

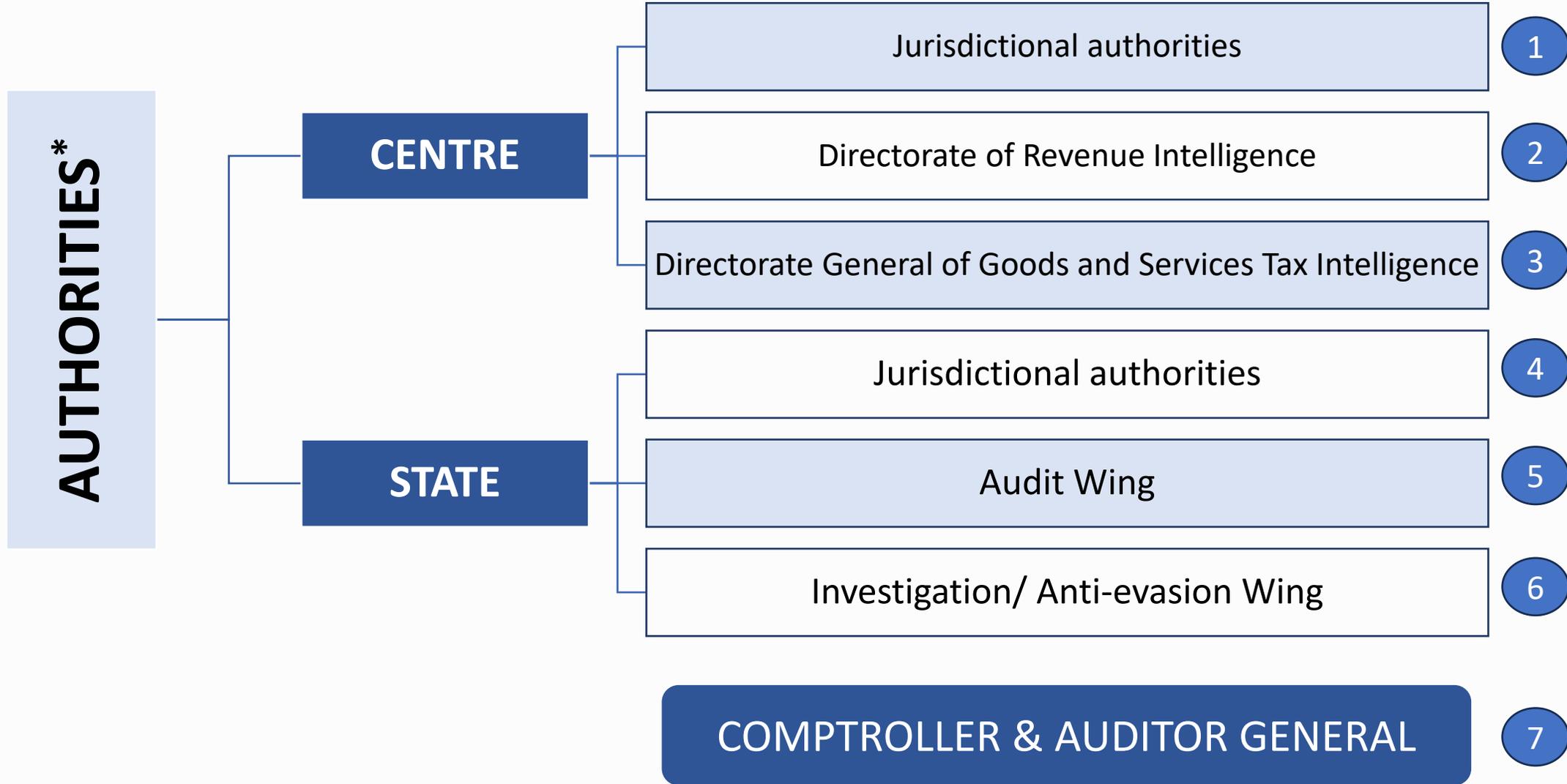
Discrepancies in returns and Artificial Intelligence



- Global press releases

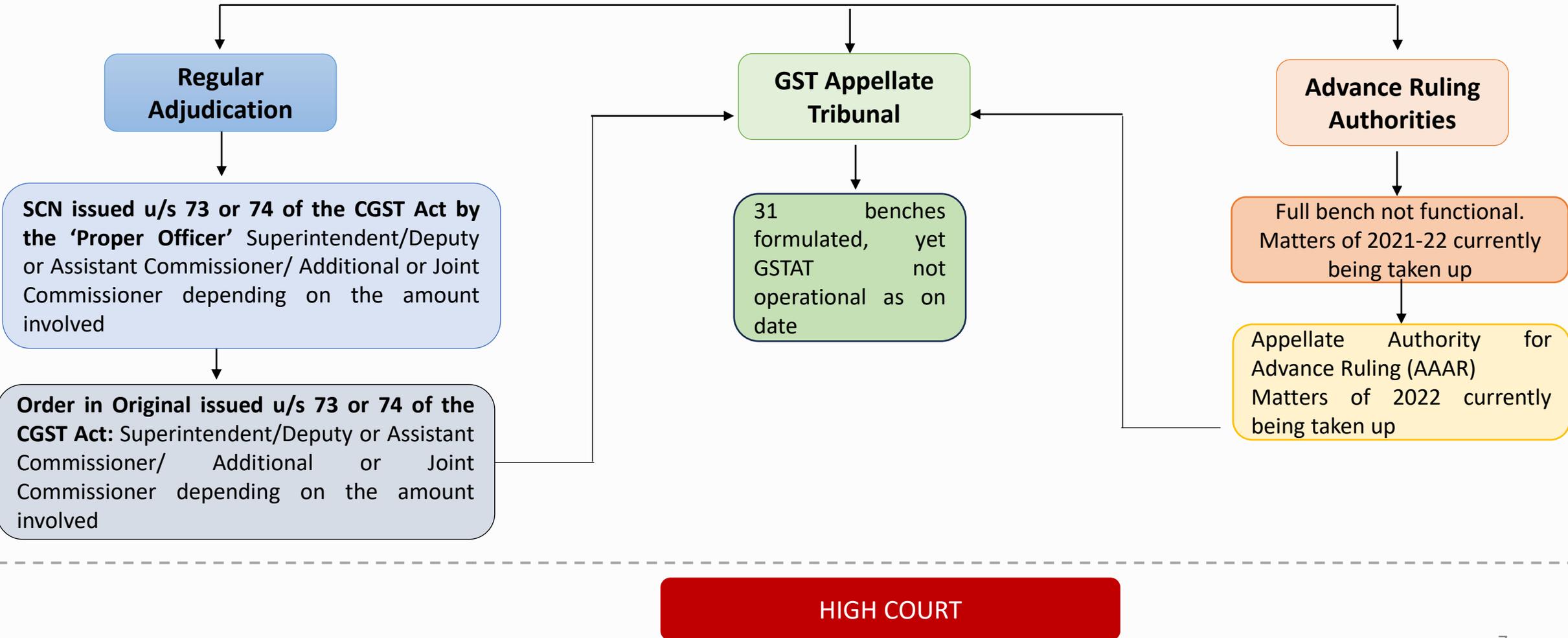
International Transactions and Cross Border Issues





\* Illustrative

# Litigating Avenues



## Recent Trends



# Transaction in Securities





Various companies have been issued notices demanding ITC reversal u/s 17(3) of the CGST Act on 'dividend income' and 'buy-back of shares' being *'transaction in securities'*

# Relevant Provisions

*“7. (1) For the purposes of this Act, the expression **“supply”** includes: all forms of **supply of goods or services** or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business”*

**Goods: Section 2(52)**  
*Goods means every kind of movable property **other than money and securities...***

**Services- Section 2(102):**  
*services means anything **other than goods, money and securities...***

**Securities Section 2(101):**  
*Securities shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956*

*Section 2(h) of Securities Contract (Regulation) Act, 1956*  
 (h) “securities” include:  
 (i) ...  
 (ii) (ia)....  
**(iii) rights or interest in securities;**

*(3) 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, **transactions in securities,** sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*

In common parlance, **“transaction”** would include both, purchase and sale

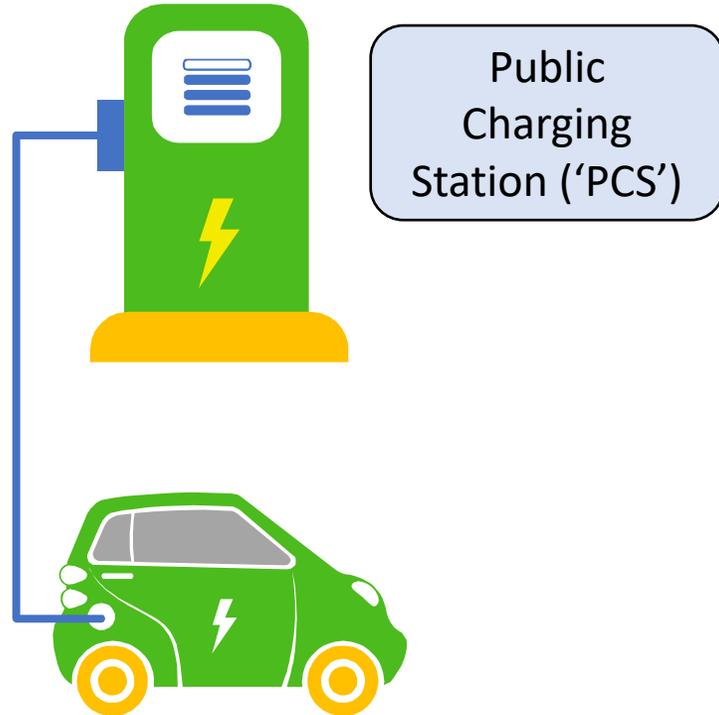
- Dividend income merely being a **return on investment** may not fall under the scope of 'transaction in securities'
- Buy back primarily involves **purchase** of shares/ securities. There *per-se* being no transfer of capital asset in exchange of a consideration, buy-back may not fall under the garb of 'transaction in securities'



# Taxability of Charging EVs

# Taxability of Charging EVs...

Karnataka AAR - M/s Chamundeshwari Electricity Supply Corporation Limited



## EV CHARGING FEES

- I. Energy Charges – number of units of energy consumed
- II. Service Charges – i.e. cost of setting up service station and operating cost

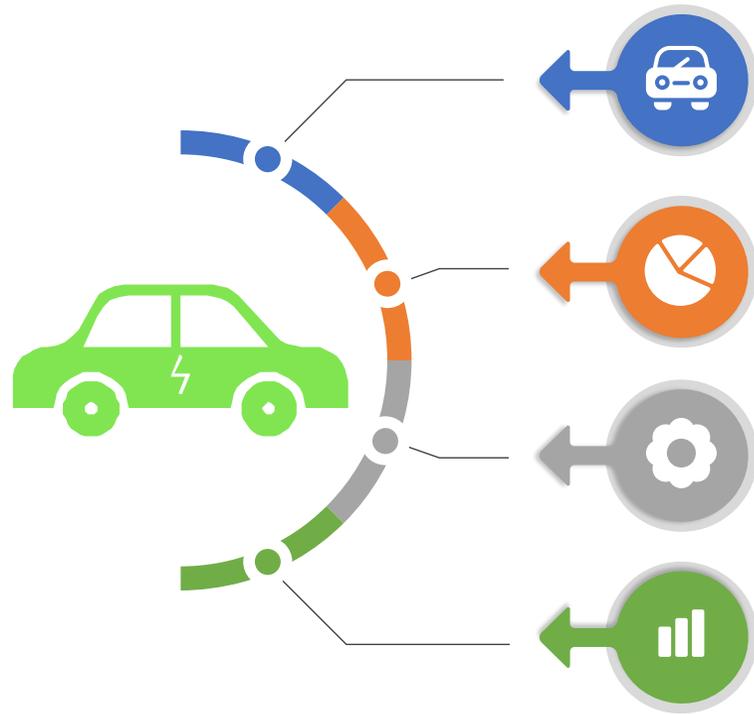
**Whether energy charges will be considered as sale of “*electrical energy*” and exempt from GST?**

# ...Taxability of Charging EVs

## Held by AAR

- Electricity is not supplied 'as such'
- It is converted into chemical energy - Consumer receives only chemical energy which is stored in the battery of EV
- **Activity of charging an EV is a supply of service @ 18%**  
*(SAC - 998714 – Maintenance and repair service of fabricated metal products, machinery and equipment)*

## Key Considerations



It is mandatory to have a **license** to supply electricity under Electricity Act, 2003 – PCS does have such license

**Guidelines by Ministry of Power** – Activity of charging EV through a charging station involves 'a service' and does not involve sale of electricity

**Divergent views** on whether electricity energy or chemical energy is transmitted to EV from charging station?

Concept of **composite/ mixed supply** not deliberated in the AAR ruling

# **Safari Retreats Private Limited**



# Statutory Provisions under GST Law

## Sec 16(1)

- Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person

## Sec 16(4)

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

## Sec 17(5)(c) & (d)

- (5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-
- (c) works contract services when supplied for construction of an immovable property (**other than plant and machinery**) except where it is an input service for further supply of works contract service;
- (d) goods or services or both received by a taxable person for construction of an immovable property (**other than plant or machinery**) on his own account including when such goods or services or both are used in the course or furtherance of business

## Explanation to Sec 17

- Explanation.- For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes,-*
- (i) land, building or any other civil structures;
  - (ii) telecommunication towers; and
  - (iii) pipelines laid outside the factory premises.

## KEY ARGUMENTS PUT FORTH BY THE PETITIONER

1

### ITC

No break in tax chain and hence the denial of ITC cannot be applied



Settled principle that interpretation should be adopted which avoids double taxation

### DOUBLE TAXATION

2

1

### ARBITRARY

Granting ITC for flats sold prior to OC while denying ITC on commercial units provided on lease (on which GST is payable) is arbitrary and discriminatory

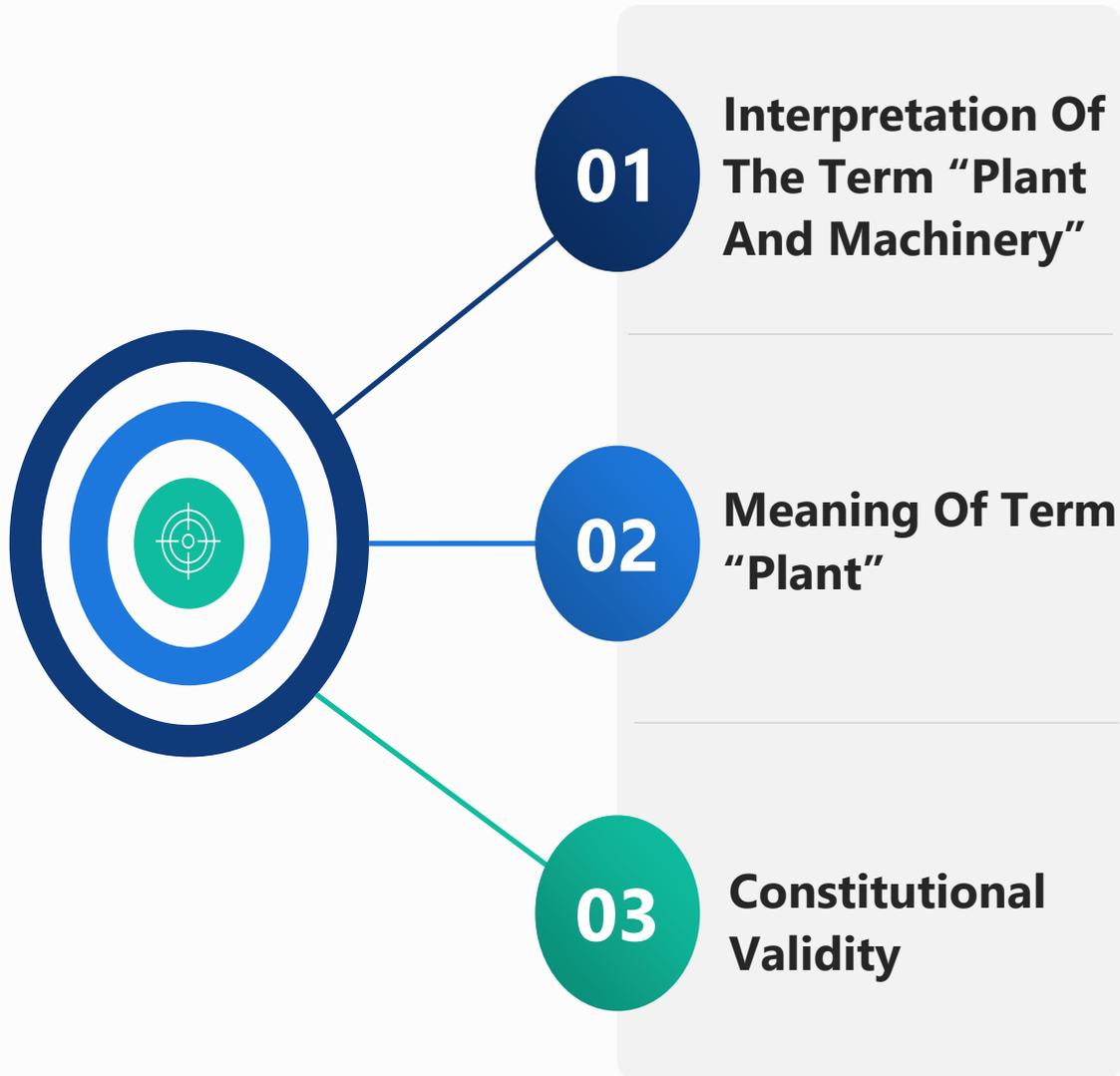


## Decision

ITC cannot be denied under Section 17(5)(d) of CGST Act, since the Petitioner is using them for construction of a building which is not used for his own purpose but for fresh stream of GST revenue in the form of rental income

**A narrow interpretation will frustrate the very intention of the GST Act which is to avoid the cascading effect of multi-stage taxation**

# Issues for Consideration before the Hon'ble Supreme Court



*Whether the definition of "plant and machinery" in the explanation appended to Section 17 of the CGST Act applies to the expression "plant or machinery" used in clause (d) of sub-section (5) of Section 17?*



*If it is held that the explanation does not apply to "plant or machinery", what is the meaning of the word "plant"?*



*Whether clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act are unconstitutional?*

## Interpretation the term Section 17(5)(d):

- Expression “plant or machinery” must be read as “plant and machinery”. It is not uncommon to read “and” as “or” or “or” as “and”
- Clauses (c) and (d) of Section 17(5) deal with the same subject matter, i.e., immovable property and therefore they cannot be treated unequally
- Explanation to Section 17(5) applies to Chapters V and VI and thus has to apply to clause (d). The use of the word “or” in clause (d) is a mistake of the legislature
- If the mall is used to render renting service for five years and then sold, no GST will be payable. If ITC allowed, ITC will be exhausted against GST payable on rental income. Thereafter, the mall would be sold without paying any tax, which would cause a substantial monetary loss

## Challenge to constitutional validity:

- The transactions lead to the creation of immovable property, which itself is the intelligible differentia based on which classification has been done. Such classification has a rational nexus since there is a break in the tax chain and therefore, the ITC is being denied
- ITC is a statutory right, and in the absence of the right under the statute, the Court cannot issue a mandamus to grant ITC

## Others:

- Construction cannot be said to be on a taxable person’s “own account” if it is intended to be sold or given on lease or license
- Functionality test will have to be applied on the facts of each case

# Conclusion of the Decision of Hon'ble Supreme Court

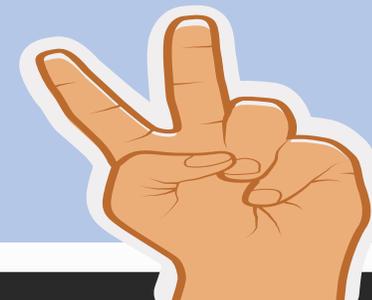
## CONSTITUTIONAL VALIDITY OF SECTION 17(5)(C) AND (D)

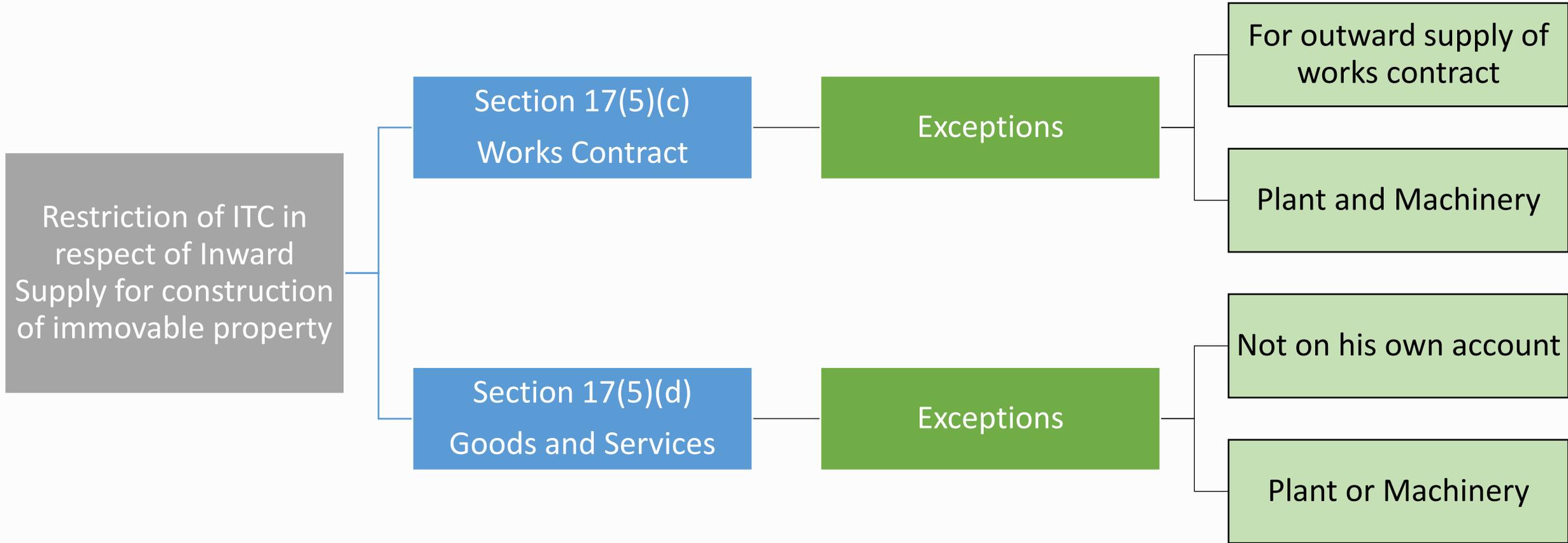
- The challenge to constitutional validity of clauses (c) and (d) of Section 17(5) rejected
- The provisions involved an intelligible classification with a rational nexus to the legislative objective, and there was no discrimination in the treatment of ITC claims related to immovable property



## ITC ELIGIBILITY

- “Plant or machinery” under Section 17(5)(d) different than “plant and machinery” (which excludes land or building). If the construction of a building was essential for carrying out the activity of supplying services, the building could be a ‘plant’
- Matter remanded back to the Hon'ble High Court of Odisha for deciding whether, based on the facts, the shopping mall qualifies as a "plant" by applying the functionality test





ITC may be allowed as warehouses may qualify as 'plant'

## Warehouses

ITC may not be available as hotels and cinema do not qualify as 'plant'

## Hotel & Cinema Halls

- Construction considered as 'on its own account' and restrictions under Section 17(5)(d) may apply except in cases of 'plant'
- Needs to be examined on a case-to-case basis

## Factory, Port, Airports

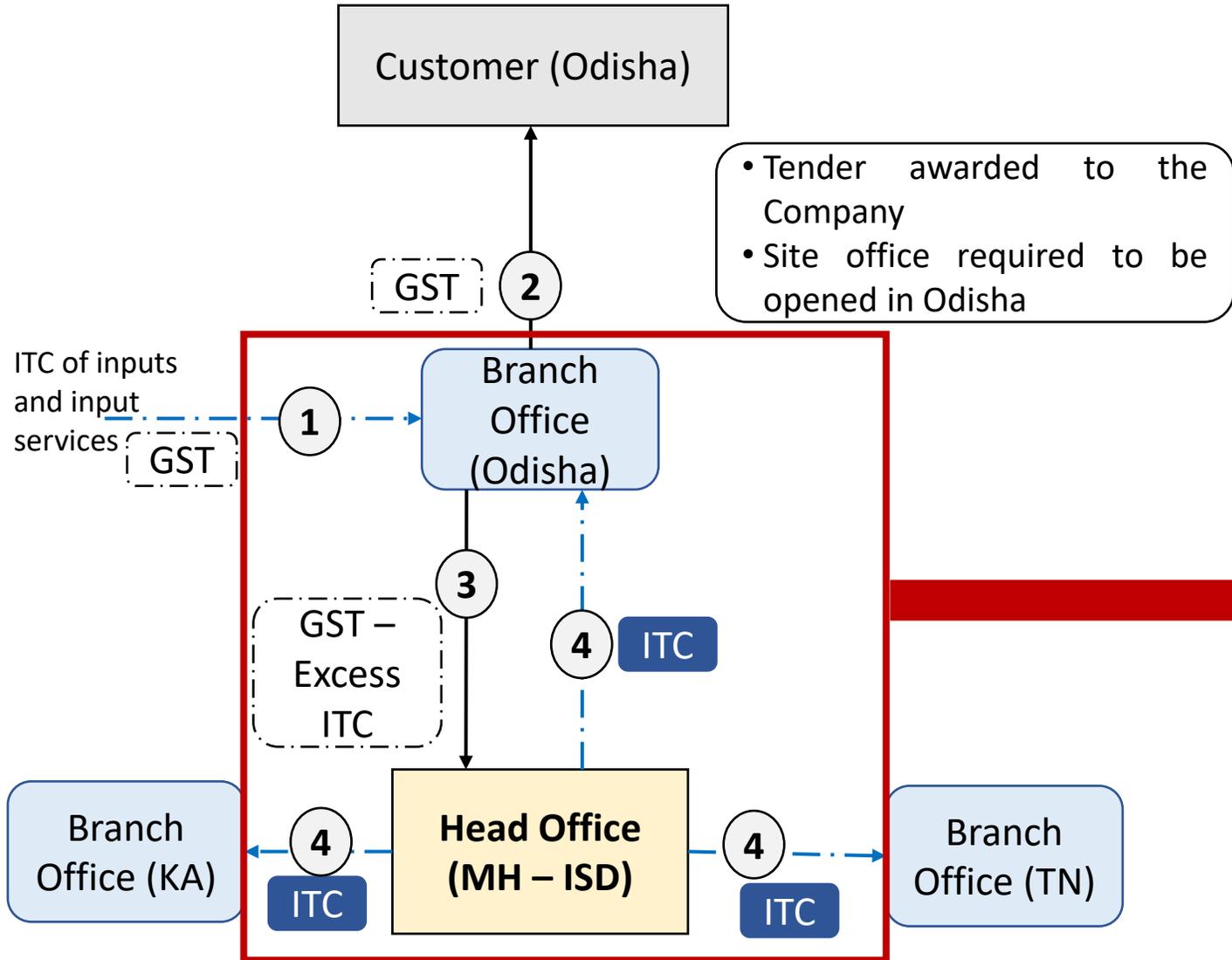
- Buildings not considered as 'on its own account' and restrictions under Section 17(5)(d) will not apply

## Malls & Commercial Offices

# Siphoning of Tax



# Siphoning of Tax...

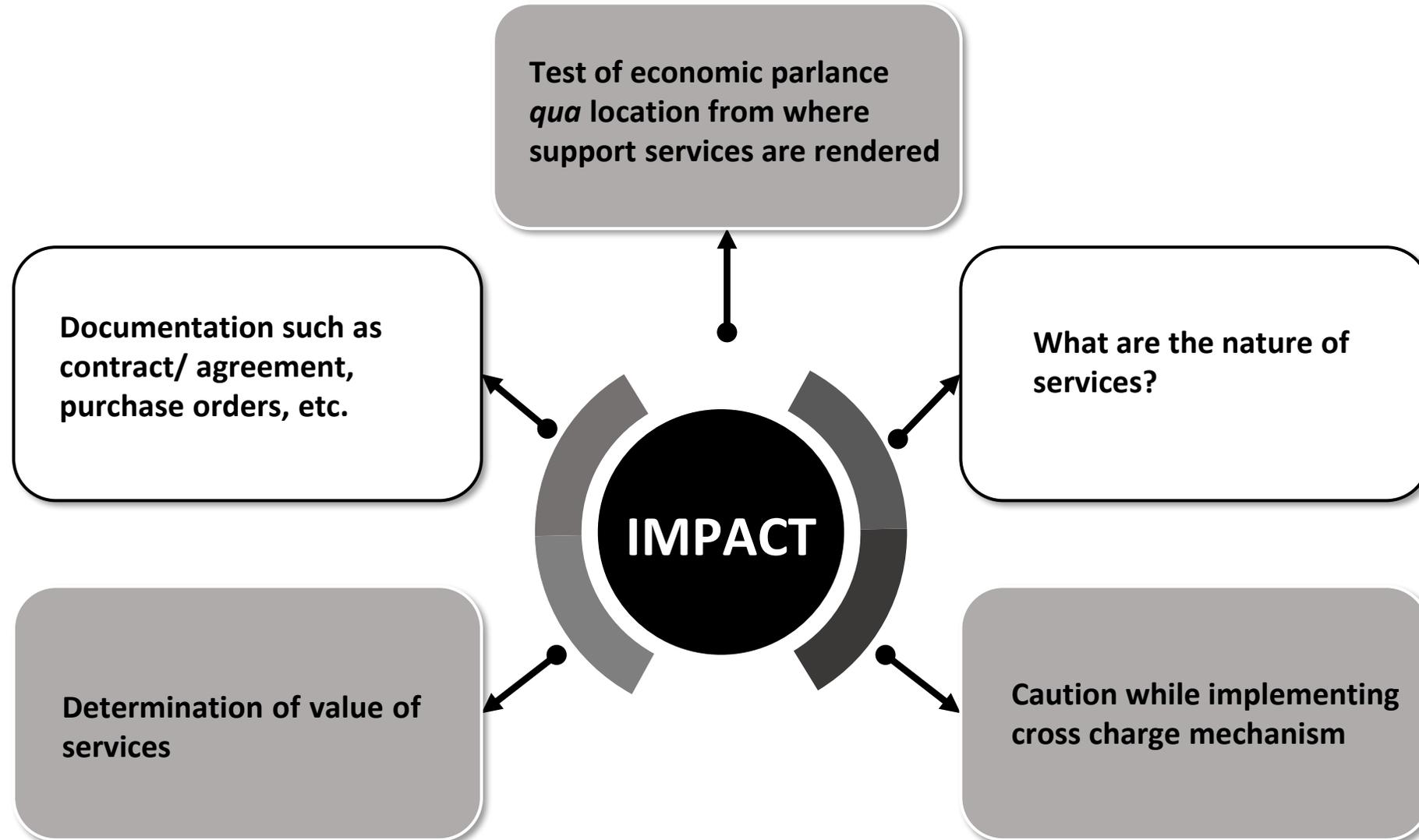


- Tender awarded to the Company
- Site office required to be opened in Odisha

**Allegation by Authorities**

*Excess ITC of Odisha State has been sought to be utilized in other Branch Offices in the garb of support service:*

- The Company's Head Office has not been awarded the contract but the Odisha location
- No support service provided by Odisha location to Head Office
- No common service utilized by other branch offices located in other parts of the country
- Wrongful conduit and mere facilitation of utilization of excess ITC at Odisha location







# E-Way Bill – Real Time Commercial Vehicle Data Tracking



Live vigilance of commercial vehicles on a real-time basis



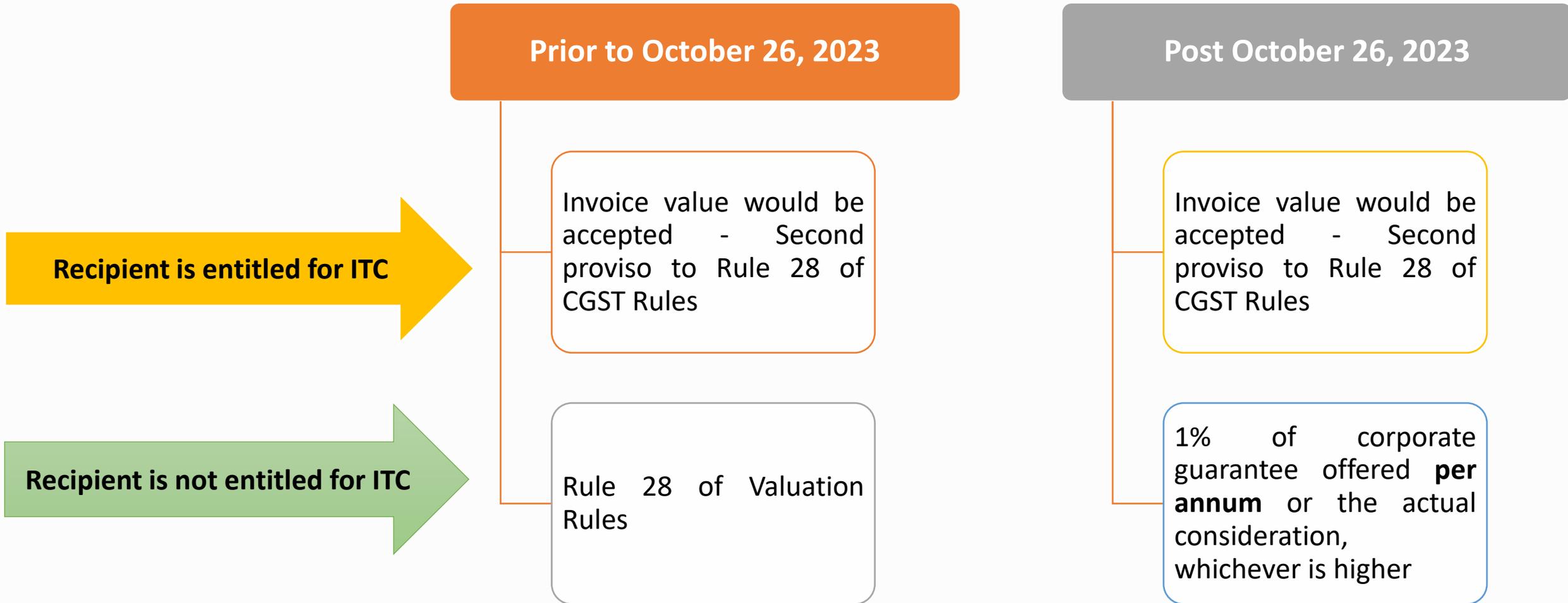
Vehicle movements from tolls are reported on daily basis to E-Way Bill System



Authorities are tracking down E-Way Bill data *vis-à-vis* conveyance crossing the tolls – recently interceptions are done upon **dodging of tolls, expiry of validity, etc.**

# GST on Corporate Guarantee





**Prior to October 26, 2023**

**Recipient is entitled for ITC**

Invoice value would be accepted - Second proviso to Rule 28 of CGST Rules

**Recipient is not entitled for ITC**

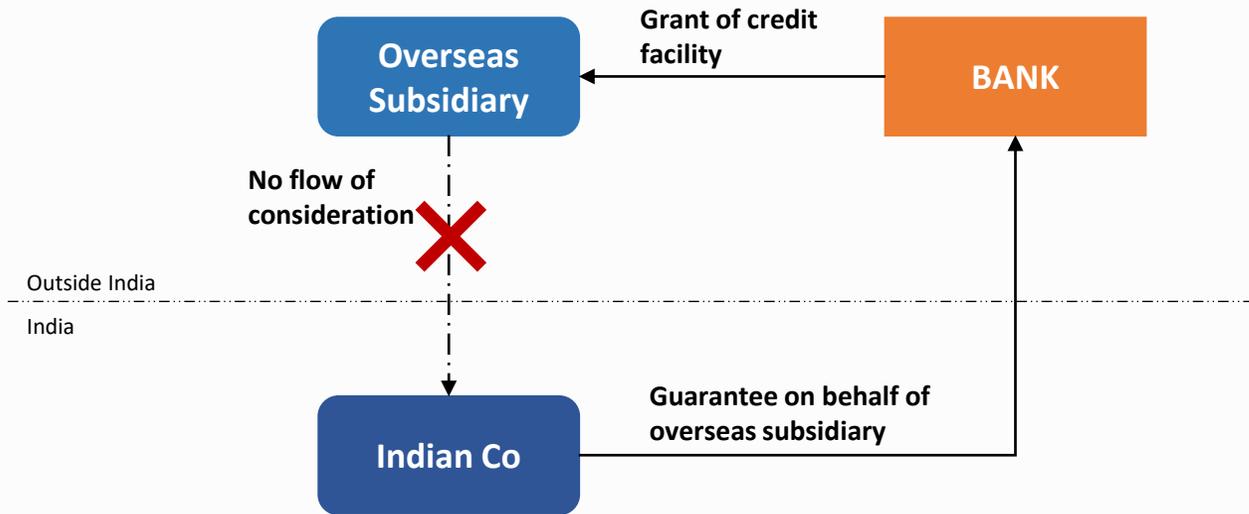
Rule 28 of Valuation Rules

**Post October 26, 2023**

Invoice value would be accepted - Second proviso to Rule 28 of CGST Rules

1% of corporate guarantee offered **per annum** or the actual consideration, whichever is higher

# ...GST on Corporate Guarantee



- **Circular No. 204/16/2023-GST dated October 27, 2023:**
  - The activity of providing corporate guarantee to banks for related party, is treated as supply of service, **even when no consideration is involved**
  - Taxable value in terms of Rule 28(2) of CGST Rules – **1% of the guarantee amount or the actual consideration, whichever is higher**

Disclosure of related party transactions in the financial statements



SCNs demanding GST on 1% of guarantee amount are issued in cases where consideration is **not** realized as well as in cases where amount realized is **less than 1%** of guarantee amount – by treating such supply as **non-export of service**

*Writ filed by M/s Sterlite Power Transmission Ltd. is accepted by the Delhi High Court challenging the levy of GST on corporate guarantee*

# Amendment in Rule 89 and 96 of the CGST Rules



## Rule 96 (10)

- **Restriction on export of goods on payment of duty** where benefit of GST deemed exports, merchant exporter, EOU/Advance license Customs duty exemption notifications has been availed on procurement

## Rule 89(4A) & 89 (4B)

- **Refund of accumulated ITC on account of exports** in cases where benefit of GST deemed exports, merchant exporter, EOU/Advance license Customs duty exemption notifications has been availed on its procurement **needs to be applied separately**

## AMENDMENTS

- Rule 96(10) and Rule 89(4A and 4B) have been omitted with effect from October 8, 2024 *vide Notification No. 20/2024- CT dated 8.10.2024*

## IMPACT

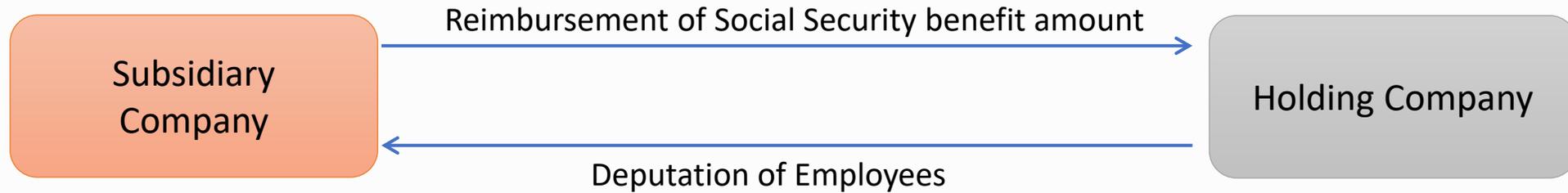
- The Exporter is free to decide the method of export (i.e. export on payment of duty or export under LuT) irrespective of benefits claimed on procurements
- No need to file separate refund applications *qua* exports where specified benefit has been claimed on procurements

# **GST on Secondment of Employees**

***[Metal One Corporation India  
Pvt. Ltd.]***



# Secondment of Employees...



- It is routine practice that Holding Company deposes their employees to its subsidiary companies. Generally, all the expenses of deputed employee including salary is being paid by the Subsidiary Company
- However, in order to maintain social security benefits of the deputed employees in its home country, social security benefit amount is being paid by subsidiary company to holding Company
- Service tax / GST Authorities are raising concern that it is a service provided by the Holding Company to its subsidiaries and accordingly, Service tax / GST is payable under RCM

# ...Secondment of Employees...

- Hon'ble Supreme court in the case of **Northern Operating Systems Private Limited ("NOS")** has held that deputation of employees for a consideration qualifies as 'service' and liable to Service tax. Relevant determinative factors and facts of NOS are tabulated below:

Relevant Determinants	Facts of NOS
<b>Nature of employment</b>	The seconded employees, during the term of secondment are the employees of their Indian entity
<b>Payroll</b>	The seconded employees are under the payrolls of their overseas employer
<b>Other benefits</b>	The bonus, social benefits, out of pocket expenses and other expenses of the secondees are borne by the overseas group company
<b>Supervision and control</b>	Supervision and control over the seconded employees rests with the Indian entity

- Instruction No. 05/2023- GST dated December 13, 2023** has been issued to clarify that the NOS judgement is not blanketly applicable in all cases of secondment and that every case shall be reviewed independently basis the key facts and the agreements between the related entities

*Metal One Corporation India Pvt. Ltd. vs. Union of India & Ors*  
[TS-697-HC(DEL)-2024-GST]



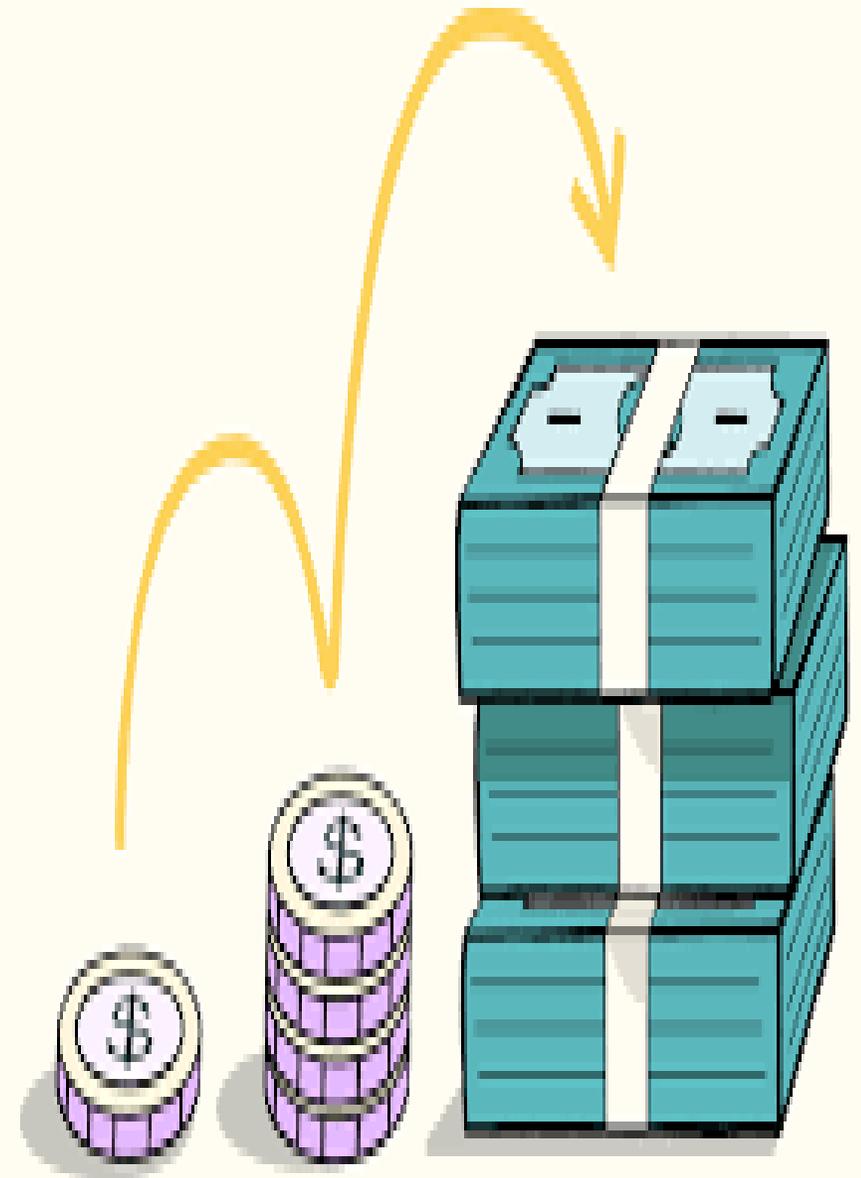
Delhi High Court set aside GST liability on secondment transaction on the basis of *Circular No. 210/4/2024-GST*



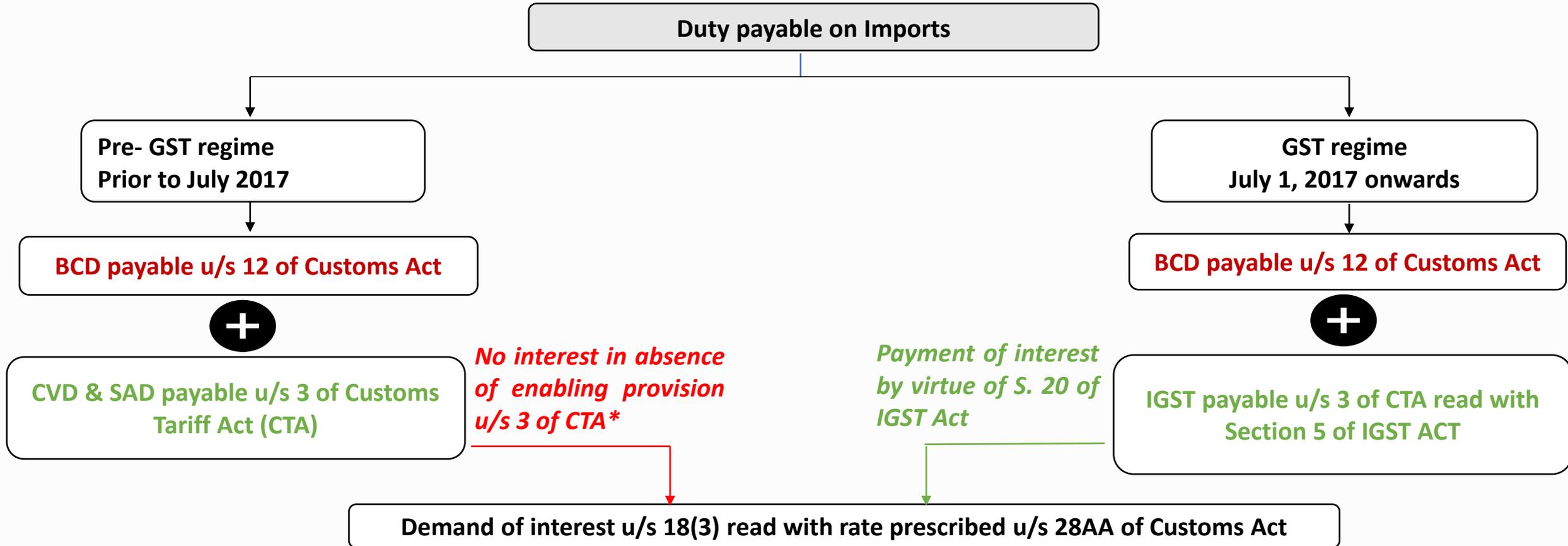
**Circular No. 210/4/2024- GST- Clarification on valuation of supply of Import of Services by a related person where recipient is eligible to full ITC**

- Clarified that - in case of any **import of service by a registered person in India from a related person located outside India** without consideration, the value of service declared in the self-invoice issued in terms of Section 31(3)(f) of CGST Act will be deemed to be the OMV if the registered person in India is eligible to full ITC in terms of second proviso to Rule 28(1) of CGST Rules
- In case where self-invoicing is not undertaken by the registered person, the value of such services may be considered as Nil - which will be deemed to be the OMV in terms of the proviso to Rule 28(1)

**Interest liability on delayed  
payment of CVD & SAD  
[Mahindra & Mahindra]**



# Interest on Delayed Payment of CVD & SAD...



\* In view of judgment passed by Hon'ble Bombay High Court in the case of **Mahindra & Mahindra**, which is also maintained by Supreme Court;  
- Section 3(12) of the CTA amended w.e.f. August 16, 2024 to include interest applicable on duties imposed under CTA

Given that there is no revenue loss to the ex-chequer to the extent of creditable taxes, it may be argued that interest should not be payable. However, there are no direct judicial precedents on the same

# ...Interest on Delayed Payment of CVD & SAD...

CVD and SAD was leviable on import of goods u/s 3 of the CTA

Interest is leviable on delayed payment of Customs duty in terms of Section 28AA of the Customs Act, 1962

Section 3(12) of the CTA refers to the Customs Act for procedural and machinery provisions and not for interest and/or penalty

Mahindra & Mahindra Ltd. V/s Union of India  
[(2023) 3 Centax 261 (Bom.)]

Hon'ble Bombay High Court held that interest cannot be levied on delayed payment of CVD and SAD as there is neither a provision under the Customs Tariff Act for levy of interest nor does it refer to Customs Act for levy of interest

# ...Interest on Delayed Payment of CVD & SAD...

Post the judgment of Mahindra & Mahindra Ltd, Section 3(12) of the CTA has been amended w.e.f. August 16, 2024 to refer interest and penalty provisions of the Customs Act

Pre-Amendment

*(12) The provisions of the Customs Act, 1962 (52 of 1962.) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act."*

*(12) The provisions of the Customs Act, 1962 (52 of 1962) and all rules and regulations made thereunder, including but not limited to those relating to the date for determination of rate of duty, assessment, **non-levy, short-levy, refunds, exemptions, interest, recovery, appeals, offences and penalties** shall, as far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to duties leviable under that Act or all rules or regulations made thereunder, as the case maybe.*

Post Amendment



Whether the amended provision would be applicable on the imports made after such amendment or prior to that?

Whether the position is clear in the GST Regime as Section 5 of the IGST Act which deals with levy & collection of IGST on imports, ultimately refers to Sec 3 of the CTA itself?

**S.20 of the IGST Act:** Subject to the provisions of this Act and the rules made thereunder, the provisions of Central Goods and Services Tax Act relating to :

(xxv) *miscellaneous provisions including the provisions relating to the imposition of interest and penalty shall, mutatis mutandis, apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under this Act...*

## Authorities denying ITC on transportation of women employees which are mandated under the State legislature

- Favourable Ruling in case of ***M/s Access Healthcare Services Pvt. Ltd (TN)*** ruled that employers could claim ITC on such services considering it is obligatory to provide transportation at night to women employees

## ITC of IGST is questioned when Customs Duty is paid through TR-6 challan

- Debonding of STPI unit(s)
- Suo moto payment of customs duty in case of bona fide default in export obligation – AA, EPCG

## Denial of ITC on account of differential IGST paid during Customs Premise Based Audit, before issuance of SCN

*[Tamil Nadu AAR in the case of M/s Mitsubishi Electric India Private Limited]*

- Differential IGST paid along with **penalty @ 15% as determined by the audit officers**
- Restriction provided under Section 17(5) where ***tax has been paid in accordance with the provisions of Sections 74, 129 and 130 of the CGST Act, 2017***



ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

# Thank you

For further details please contact us:



[elplaw.in](http://elplaw.in)



[elplaw@elp-in.com](mailto:elplaw@elp-in.com)



[Economic Laws Practice \(ELP\)](#)

**Disclaimer:** The information provided in this presentation does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This presentation is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/ quasi-judicial authorities may not take a position contrary to the views mentioned herein.

© Economic Laws Practice 2023