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BRIEF NOTE ON JUDGEMENTS TO BE DISCUSSED IN WEBINAR BY CHAMBER OF TAX CONSULTANTS ON 28.1.2025

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1. Judgement of Hon. Gujarat High Court in the case of Gujarat Chamber of Commerce and Industry regarding leviability of GST on Assignment of Leasehold Rights

A layman's understanding of the Goods and Services Tax is derived from the nomenclature of the tax. Since GST is leviable on "goods" and "services", it is commonly understood that any immovable property can neither be goods nor services and therefore GST will not be attracted on a transaction in immovable property. However, in law, this is a much more intricate issue and therefore required elaborate discussion by Hon. Gujarat High Court in the case of **Gujarat Chamber of Commerce and Industry v/s Union of India Special Civil Application No. 11345 of 2023 decided on 3.1.2025.**

ISSUE BEFORE HON. GUJARAT HIGH COURT

Industries are set up in plots allotted by the Gujarat Industrial Development Corporation (GIDC). These allotments by GIDC are by way of grant of lease of 99 years. The grant of lease by GIDC is exempt

from tax by way of specific exemption entry. It is very common for industries to transfer the leasehold rights granted by GIDC to other entities. This may be vacant land or land with building appurtenant thereto. Issue before Hon. High Court was whether GST is leviable on assignment of long term leasehold rights by one entity to another entity.

DECISION OF HON. GUJARAT HIGH COURT

Hon. Gujarat High Court has held that the transaction of assignment of leasehold rights in GIDC land does not tantamount to taxable supply for the purpose of the GST Acts and therefore no GST is leviable on such transaction. The reasons given by Hon. High Court for arriving at such decision are as under:

- (a) Corpus Juris Secundum defines the word “property” as depending on the context with which it is used. Firstly it is applied to external things that are objects of rights or estates i.e. the things that are the object of ownership and secondly it is applied to the rights or estates that a person may acquire in or to things. In legal parlance “property” is used to designate right of ownership or aggregate of rights to possess, use, enjoy and dispose of a thing and to exclude everyone else from interfering it.
- (b) From this perspective, leasehold rights are nothing but interest in immovable property as per Section 105 read with Section 108(j) of the Transfer of Property Act, 1882. Transfer of such leasehold right extinguishes the estate of the transferor in the immovable property and all legal relationships with the lessor and the assignee becomes liable for obligation under the assignment deed.

- (c) While grant of lease by GIDC in consideration for upfront premium and periodical rent will qualify as supply of service, when such leasehold right is transferred by the assignor in favour of assignee by execution of deed of assignment, the same would constitute transfer of immovable property. Reliance placed in this regard on judgement of Hon. Supreme Court in the case of **Gopal Saran v/s Satya Narayana (1989) 3 SCC 56.**
- (d) The words “sale” and “service” are not interchangeable as held by Hon. Supreme Court in the case of **Narinder S. Chadha v/s Municipal Corporation of Greater Mumbai (2014) 15 SCC 689.**
- (e) The definition of “supply” under Section 7 of the GST Acts is an exhaustive definition. The scope of supply will not include transfer of leasehold rights as it would be transfer of immovable property being a benefit arising out of immovable property. This is particularly in light of Clause 5 of Schedule III to the GST Acts which excludes sale of land from its purview.
- (f) Statement of Objects and Reasons for introducing GST regime shows that the legislative intention was to subsume existing indirect taxes in a single tax called Goods and Services Tax at each stage of supply chain by converging any tax which was being levied on supply of goods or services. The definition of the term “services” under the Finance Act, 1944 clearly excluded transfer of title in immovable property. Further, under the Finance Act, 1994 even development rights are considered as benefits arising out of land and they were not liable to service tax. This same principle will continue to

apply under the GST regime as the object of the GST Acts is to subsume earlier indirect taxes.

- (g) Reference made to the agenda/minutes of the 5th and 7th GST Council meetings shows that while proposal was made to impose GST on sale of immovable property, the GST Council decided to defer such imposition which fortifies the intention of the council to continue the underlying object of erstwhile service tax.
- (h) Hon. High Court has held in the case of **Munjaal Manishbhai Bhatt v/s Union of India (2022) 104 GSTR 419 (Guj.)** that the intention of introduction of GST regime was not to change the basis of taxation of value added tax and service tax regime and that supply of land in every form was excluded from the purview of the GST Acts.
- (i) What is sold in many cases is not just land as allotted by GIDC but developed land along with building as constructed by the original lessee. This constitutes “profit a pendre” which is also an immovable property and therefore also it would not be subject to tax under the GST Acts. Reliance was placed in this regard on the judgement of Hon. Supreme Court in the case of **Anand Behera v/s State of Orissa AIR 1956 SC 17** as well as **State of Orissa v/s Titaghur Paper Mills Co. Ltd. (1985) Supp. SCC 285.**
- (j) Even while providing for taxing of construction services, value of land is required to be excluded as per Notification No. 11/2017 – Central Tax (Rate) dated 28.6.2017.

CONCLUSION

Since the very basis of levy of tax under the GST Acts is “supply” of “goods” and “services”, a very important judgement has been delivered by Hon. Gujarat High Court in the aforementioned case which will pave the way for further development on jurisprudence regarding the charging section of GST.

2. Judgement of Hon. Supreme Court in the case of Bharti Airtel Ltd. regarding admissibility of Cenvat credit on telecommunication towers

While we are still trying to grapple with the nuances of the judgement of Hon. Supreme Court in the case of **Chief Commissioner of Central Goods and Services Tax v/s Safari Retreats Pvt. Ltd. 2024 SCC Online SC 2691**, another important judgement of Hon. Supreme Court relating to input tax credit has been recently rendered in the case of **Bharti Airtel Ltd. v/s The Commissioner of Central Excise, Pune Civil Appeal No. 10409 – 10410 of 2014 decided on 20.11.2024**. While the judgement is in the context of the erstwhile Central Excise – Service tax regime, the same would have ramifications in the GST regime as well.

ISSUE BEFORE HON. SUPREME COURT

The issue before Hon. Supreme Court in the case of Bharti Airtel Ltd. (supra) was whether cellular service providers are entitled to claim Cenvat credit of duty paid on procurement of parts of telecommunication towers or not. While Hon. Bombay High Court had taken a view that mobile towers are immovable property and

therefore Cenvat credit was not admissible, Hon. Delhi High Court took a view that the mobile towers are moveable property exigible to Cenvat credit. Matters from both these High Courts reached the doors of Hon. Supreme Court. The primary objection of the revenue for admissibility of credit was that telecommunication towers were immovable property and therefore Cenvat credit was not admissible in respect of such towers.

DECISION OF HON. SUPREME COURT

Hon. Supreme Court has discussed the meaning of the phrase “immovable property” in detail. The definition of the phrase immovable property under the General Clauses Act, 1897 and the Transfer of Property Act, 1882 was considered. Thereafter the definition of the phrase “attached to earth” as given in Section 3 of the Transfer of Property Act, 1882 was referred to and analyzed in light of earlier judicial pronouncements. Hon. Court ultimately culled out the following 6 parameters for determining whether anything was “immovable property” or not – (1) Nature of annexation (2) Object of annexation (3) Intendment of the parties (4) Functionality test (5) Permanency test (6) Marketability test. Applying these parameters, Hon. Supreme Court came to a conclusion that mobile towers were not immovable property. It was observed that mobile towers were brought to the site in completely knocked down condition and it was possible to dismantle the towers and take them to other sites. It was further observed that while the dismantling would entail some damage at the site, the damage would only be to components such as cables and there would not be any damage to the towers per se. It was held that the mobility and marketability of the towers would be retained. Hon. Supreme Court conclude that the affixation to the earth was only to maintain stability of the tower and to keep it wobble free.

It was therefore held that Cenvat credit could not be denied to the cellular companies in respect of mobile towers by considering them to be immovable property.

APPLICABILITY TO GST LAWS

The judgement will have a direct bearing on GST laws. Clauses (c) and (d) of Section 17(5) of the GST Acts disallow input tax credit in respect of works contract services/goods and services used in the construction of immovable property except plant and/or machinery. The entire dispute before Hon. Supreme Court in the case of Safari Retreats Pvt. Ltd. (supra) was the scope of the phrases “plant and machinery” as well as “plant or machinery” appearing in clauses (c) and (d) of Section 17(5). However whether something is plant and/or machinery would be relevant provided that what is being constructed is an immovable property. In other words clauses (c) and (d) of Section 17(5) of the GST Acts would get triggered only if what comes into existence is an immovable property. If no immovable property comes into existence then there cannot be an embargo on input tax credit under clauses (c) and (d) of Section 17(5) of the GST Acts. Therefore pre-fabricated buildings, temporary sheds, etc which qualify as moveable property as per the parameters laid down by Hon. Supreme Court in the case of Bharti Airtel Ltd. (supra) and therefore they will be eligible for claim of input tax credit under the GST law. Moreover, even if a particular thing is attached to a building, if the attachment is not permanent in terms of what has been held by Hon. Supreme Court, then input tax credit in relation to such thing can be claimed. For instance, air-conditioners while being attached to buildings would not become part of immovable property since they are easily detachable and therefore input tax credit in respect of air-conditioners would be available. Of course, admissibility of tax credit

will have to be determined on case to case basis but the principles laid down by Hon. Supreme Court in the case of Bharti Airtel Ltd. (supra) will apply.

CONCLUSION

Since the GST law is a continuation of the erstwhile indirect tax laws viz. Central excise, service tax, value added tax, etc and there being conceptual similarity in the various imposts, it is important to bear in mind the implications of judgements rendered in the context of other pari materia laws as they would have a direct bearing on interpretation of provisions under the GST law.