2022 INSC 749

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 755 OF 2020

ALL INDIA HAJ UMRAH TOUR ORGANIZER ASSOCIATION MUMBAI ... PETITIONERS

v.

UNION OF INDIA & ORS. ... RESPONDENTS

WITH

WRIT PETITION (C) NO.781 OF 2020
WRIT PETITION (C) NO.907 OF 2020
WRIT PETITION (C) NO.772 OF 2020
WRIT PETITION (C) NO.882 OF 2020
WRIT PETITION (C) NO.809 OF 2020
WRIT PETITION (C) NO.940 OF 2020
WRIT PETITION (C) NO.855 OF 2020
WRIT PETITION (C) NO.977 OF 2020
WRIT PETITION (C) NO.856 OF 2020
WRIT PETITION (C) NO.860 OF 2020
WRIT PETITION (C) NO.896 OF 2020
WRIT PETITION (C) NO.989 OF 2020
WRIT PETITION (C) NO.1034 OF 2020
WRIT PETITION (C) NO.1014 OF 2020
WRIT PETITION (C) NO.1329 OF 2020
WRIT PETITION (C) NO.1431 OF 2020

J U D G M E N T

ABHAY S. OKA, J.

1. The broad question involved in this group of writ petitions is about the liability of Haj Group Organizers (HGOs) or Private Tour Operators (PTOs) to pay service tax on the service rendered by them to Haj pilgrims for the Haj pilgrimage.

FACTUAL ASPECTS

2. The Haj pilgrimage is undertaken by thousands of pilgrims from India, either through the Haj Committee of India (for short, 'the Haj Committee') or HGOs. There is a bilateral treaty between India and the Kingdom of Saudi Arabia. As per the said bilateral arrangement, the Haj pilgrimage can be undertaken from India only through the Haj Committee or HGOs.

3. The service tax regime was introduced in India in the year 1994 under the provisions of the Finance Act, 1994 (for short 'the Finance Act'). Initially, very few services were made subject to payment of service tax. However, by subsequent Finance Acts, a large number of services were added to the list from time to time. The total number of services subjected to service tax exceeded 100. A negative list regime was introduced by Act No.23 of 2012 with effect from 1st July 2012. By Act No.23 of 2012,

Sections 66-B and 66-C were added. Section 66-B is the charging Section which provided that there shall be a levy of service tax at the rate of 12% on the value of all services other than those specified in the negative list. By amending Section 66-B, the percentage of service tax was enhanced to 14%. Section 66-C confers power on the Central Government to frame rules for determining the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. Accordingly, the Place of Provision of Services Rules, 2012 (for short, 'the 2012 Rules') were framed which came into force with effect from 1st July 2012. On 20th June 2012, Mega Exemption Notification no.25 of 2012–ST (for short, 'the Mega Exemption Notification') was issued containing several exemptions. Paragraph 5(b) of the Mega Exemption Notification provided for the exemption on services by a person by way of conduct of any religious ceremony. Paragraph 5A of the Mega Exemption Notification provided for the exemption to services by specified organisations in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement. The Mega Exemption Notification defines specified organisations

as Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking and the Committee or State Committee as defined in Section 2 of the Haj Committee Act, 2002 (for short, 'the 2002 Act'). With effect from 1st July 2017, under the provisions of the Integrated Goods and Services Tax Act, 2017 (for short, 'the IGST Act'), the same service tax regime was continued. Identical exemption notification dated 28th June 2017 (for short, 'the IGST Exemption Notification') was issued by exercising the powers under the IGST Act. Identical Exemption Notification was also issued on the same date (for short, 'the GST Exemption Notification') under the Central Goods and Services Tax Act, 2017 (for short, 'the GST Act').

4. Some of the HGOs and PTOs filed petitions in this Court to challenge the levy of service tax on the service regarding the Haj pilgrimage. By the order dated 11th December 2019 passed in Writ Petition (C) No.977 of 2014, this Court directed the petitioners to make a representation to the Government of India for grant of exemption from service tax. Accordingly, a detailed representation was made by some of the petitioners on 19th December 2019. The GST Council by the order dated 14th March 2020, rejected the representation on the basis of the

recommendation of the Fitment Committee. The said decision was communicated by the Government of India by a letter dated 5th May 2020.

5. Most of the writ petitions in the current batch of petitions have been filed by various organisations representing HGOs/PTOs. Only one petition, i.e. Writ Petition (C) No.1329 of 2020, has been filed by an individual petitioner who desires to undertake the Haj pilgrimage. Most of the petitions challenge the aforesaid orders rejecting representations. In some of the petitions, a declaration has been claimed that the provisions of the laws relating to service tax are not applicable to services rendered by HGOs and PTOs to Hajis for performing the religious activity of Haj/Umrah. In some of the petitions, there is a challenge to the validity of Rules 8 and 14 of the 2012 Rules. However, submissions have not been canvassed on the issue of validity.

6. Counter Affidavits have been filed in Writ Petition (C) Nos.755, 856 and 896 of 2020, which have been treated as common affidavits in this group of petitions.

7. At this stage, we may note here that in this batch of petitions, we are not dealing with the issue of extra-territorial

operation of the service tax regime, as the said issue is pending for adjudication before another Bench.

SUBMISSIONS OF THE PETITIONER

8. Shri Arvind P. Datar, the learned senior counsel, has made detailed submissions in support of the writ petitions. His first submission is based on the Mega Exemption Notification. He pointed out that paragraph 5(b) of the said notification grants exemption to the services provided by persons by way of conduct of any religious ceremony. Secondly, he pointed out that under paragraph 5A, an exemption has been granted to the services rendered by specified organisations in respect of a religious pilgrimage, facilitated by the Ministry of External Affairs of the Government of India under bilateral arrangement. He pointed out that paragraphs 14 and 63 of the IGST Exemption Notification use similar language. He also pointed out that two pilgrimages covered under the existing bilateral arrangements are Kailash Manasarovar Yatra and the Haj Pilgrimage. He also pointed out the definitions of specified organisations in both the notifications, which in relation to Haj pilgrimage means the Committee or State Committees as defined under Section 2 of the 2002 Act. He pointed out that service tax is an indirect tax,

the burden of which is ultimately borne by the Haj pilgrims. He also pointed out that the said Act of 2002 defines a 'pilgrim'. It means a muslim proceeding to, or returning from, Haj. He also pointed out the details of the journey undertaken by a Haj pilgrim right from his arrival in Mecca and the duties of Haj pilgrims. He submitted that under paragraph 5(b) of the Exemption Notifications, service by persons by way of conduct of any religious ceremony is exempted. He pointed out that there is no dispute that the religious ceremony in paragraph 5(b) will include the Haj ceremony. He submitted that a wrong interpretation is sought to be given to paragraph 5(b) by the Revenue by contending that it applies only to the service provider who himself performs the religious ceremony and, therefore, the exemption will not apply to HGOs/PTOs, as they themselves do not perform Haj ceremony. He submitted that the burden of service tax passes on to Haj pilgrims; therefore, the object of granting exemption under the service tax or IGST is to reduce the financial burden on the Haj pilgrims.

9. The learned senior counsel pointed out that earlier, the object of helping poor Muslims to perform the Haj ceremony was sought to be achieved by granting Haj subsidy. However, this

Court, in the case of ***Union of India & Ors. v. Rafique Shiekh Bhikan and Anr.***[1] held that grant of such a subsidy is contrary to the tenets of Islam as the tenets of Islam require the Haj pilgrims to perform the Haj ceremony with their own funds after discharging their debts and after making a provision for the benefit of their families. The learned senior counsel also relied upon a decision of this Court dated 4th February 2019 in Writ Petition (C) No.4 of 2019 (Federation Haj PTOs of India v. Union of India). He pointed out that the role played by the HGOs and PTOs is unique, which is recognized in both the above decisions. He pointed out that the said decisions note that HGOs/PTOs act as tour operators for pilgrims, provide a complete package right from the start of the journey from various places in India to Saudi Arabia, their arrangements for stay in Saudi Arabia, the performance of Haj Ceremony and safe return to India. He pointed out that the majority of Haj pilgrims are taken care of by the Haj Committee, and only a limited number of pilgrims can undertake Haj pilgrimage through HGOs/PTOs. He pointed out that the cost of the package provided by HGOs/PTOs consists of airfare from India to Saudi Arabia. He also pointed out the

[1] 2012 (6) SCC 265

importance of the Haj and the details of the pilgrimage. He pointed out that the pilgrimage performed after Ramzan is called Haj, and the pilgrimage performed at different times is called Umrah. Relying upon the decision of this Court in the case of ***Rafique Shiekh Bhikan***[1], he pointed out that the five-day program of the Haj ceremony is extremely a rigid procedure which is to be scrupulously followed in a rigid manner and as per a time-bound schedule. He pointed out that the pilgrim loses Haj if the strict procedure and time schedule are not followed.

10. The learned senior counsel pointed out that many persons/agencies are involved in the Haj religious ceremony, such as the Ministry of Haj Affairs of the Kingdom of Saudi Arabia, the Ministry of Minority Affairs of the Government of India, Tawafa Establishments, Maollims, approved HGOs and lastly Haj pilgrims themselves. He would, therefore, submit that the service by a person by way of religious ceremony mentioned in the Exemption Notification has to be properly interpreted to mean that the word 'person' will also include persons enumerated above, including Haj pilgrims. He pointed out that all Haj pilgrims are required to register themselves with Tawafa Establishments. He pointed out that HGOs arrange for the

aeroplane booking and money exchanges on which service tax/ GST is duly paid. Though HGOs arrange for the stay of Haj pilgrims in Saudi Arabia, as soon as they land in Saudi Arabia, their entire movement is controlled by Tawafa Establishments. Maollims, who are the agents of the Tawafa Establishments, control their movement. He submitted that the Exemption Notification would apply for the conduct of the Haj ceremony except for air travel and foreign exchange services. His submission is that the residual amount is a consideration for the services for conduct of the Haj ceremony and therefore, the said amount is exempted from payment of service tax / IGST. That is how, under paragraph 5(b) of the Mega Exemption Notification and corresponding paragraph 14A of the IGST Exemption Notification, the HGOs are entitled to exemption on the aforesaid residual amount.

11. He submitted that the beneficial object of the Exemption Notification must be given full effect. He submitted that beneficial exemptions differ from exemptions generally granted in tax statutes. On this aspect, he relied upon this Court's

decision in the case of ***Government of Kerala & Anr. v. Mother Superior Adoration Convent***[2].

12. His next limb of argument is based on a violation of Article 14 of the Constitution of India. He pointed out that under paragraph 5A of the Mega Exemption Notification and paragraph 63 of IGST Exemption Notification, the services rendered by specified organisations such as Haj Committees for Haj pilgrimage are wholly exempted. He submitted that the provision of granting exemption from service tax/GST only to Haj pilgrimage organised by the Haj Committees will not stand the test of Article 14 of the Constitution of India. He pointed out that usually, a bilateral agreement between the Government of India and the Kingdom of Saudi Arabia is executed every year. A specific quota of Haj pilgrims is assigned by the Kingdom of Saudi Arabia under the bilateral agreement. Out of the said quota, normally 70% is allotted to Haj Committee, and 30% is allotted to approved HGOs. The selection through Haj Committee is done through a lottery system. He pointed out that there is no difference between the service provided by the Haj Committees and the service provided by HGOs to Haj pilgrims. He pointed

[2] 2021 (5) SCC 602

out that the exemption granted under paragraph 5A is not applied to airfare and foreign exchange conversion services. He submitted that when the Haj ceremony is identical, the act of granting exemption to those Haj pilgrims who perform Haj ceremony through the Haj Committee but denying the exemption to Haj pilgrims who perform Haj ceremony through HGOs, is discriminatory.

13. The learned senior counsel also pointed out that both the categories of Haj pilgrims, on reaching the Kingdom of Saudi Arabia, are monitored by Tawafa Establishments. He submitted that the Revenue cannot rely upon Section 9 of the 2002 Act for supporting the illegal classification made as aforesaid, as the obligation cast upon the Haj Committees by certain clauses of Section 9 are also obligations of recognised HGOs. He submitted that no distinction could be made between the Haj Committee and HGOs on the ground that the Haj Committee is an agency and instrumentality of the State. The reason is that the Government retains some control of HGOs.

14. He submitted that the provisions of the 2012 Rules are not in conformity with the statutory provisions. He invited our attention to Rules 2 and 3 of the 2012 Rules. He submitted that

for the Haj pilgrimage, the location of the service recipient will always be the Kingdom of Saudi Arabia, as the physical presence of the pilgrim is required for the conduct of the religious ceremony. He submitted that the emphasis is on the service provider's location and the service recipient's location. He submitted that the location of the service recipient will have to be the place where the service is rendered. He submitted that the Revenue is erroneously trying to equate the residence of both the service provider and the service recipient as their respective locations in India. He also invited our attention to Rule 8 of the 2012 Rules. He submitted that the location of the service recipient in case of Haj pilgrimage is and will always be the Kingdom of Saudi Arabia as per Rule 2 of the 2012 Rules. The learned senior counsel relied on this Court's decision in the case of ***All–India Federation of Tax Practitioners & Ors. v. Union of India & Ors***[3]. By relying upon the said decision, he submitted that service tax is not a charge on the business and, therefore, it is leviable only on services provided within the country.

15. He relied upon a decision of CESTAT in the case of ***Cox & Kings India Ltd. v. Commissioner of Service Tax, New***

[3] 2007 (7) SCC 527

Delhi*[4]*. He submitted that CESTAT has held that the outbound tours abroad are not liable to levy of service tax. He pointed out that the same view is taken by CESTAT in the case of ***Atlas Tours and Travels Pvt. Ltd. v. Commissioner of Service Tax, Mumbai*[5]**. He pointed out that this Court upheld the said decision.

16. The learned senior counsel submitted that even if it is assumed that Haj is not a religious ceremony but is an event, Rule 6 of the 2012 Rules will apply, which deals with the place of provision of services relating to events. He urged that if the location of the service recipient is outside the taxable territory, service tax cannot be levied. He also invited our attention to provisions of the GST Act and IGST Act, particularly Sections 12 and 13 of the IGST Act. He urged that the said provisions of the IGST Act are *pari materia* with the 2012 Rules. Relying upon Article 286(1)(b) of the Constitution of India, he submitted that the said provision prohibits the State from imposing GST on the import of goods and services outside the territory of India; therefore, the IGST Act/GST Act will not apply to Haj pilgrimage.

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[4] 2014 (35) S.T.R. 817
[5] 2015-TIOL-306-CESTAT-MUM

He would, therefore, submit that the decision made on the representation of some of the HGOs is erroneous.

17. Shri Gopal Sankarnarayanan, the learned senior counsel appearing for some of the petitioners, pointed out that the Haj pilgrimage undertaken by thousands of the Haj pilgrims either through Haj Committees or through HGOs, is identical, and there is no difference between them. The reason is that the 2002 Act defines 'pilgrim' under Section 2(f) as a Muslim proceeding to, or returning from, Haj. He submitted that no Indian pilgrim can undertake Haj pilgrimage without following the mandate set out under the bilateral arrangement between the two countries. Therefore, such pilgrimage will be only through either the Haj Committee or HGOs. He submitted that the Revenue has accepted that the Haj Committee, as well as HGOs, render the same services to the Haj pilgrims. He relied upon a chart appended to the written submissions, which shows that the services offered along with the prices charged by the Haj Committee and HGOs are virtually the same. The difference in the prices is because the Haj Committee offers accommodation without the facility of catering at a place far away from Kabah,

whereas, HGOs offer accommodation with catering for five to ten days at a location near Kabah.

18. In support of his submissions based on the violation of Article 14 of the Constitution of India, he urged that the Haj Committee cannot constitute a class by itself only because it is recognised as a specified organisation under various provisions and Exemption Notifications. He submitted that HGOs are identically placed as Haj Committees in all respects. The learned senior counsel relied upon a decision of this Court in the case of ***S. K. Dutta, Income Tax Officer v. Lawrence Singh Ingty***[6]**.** He pointed out that this Court dealt with a case where certain exemptions under the Income Tax Act, 1922 were denied to government servants belonging to Scheduled Tribe. He submitted that this Court rejected the contention of the government that the distinction sought to be made between the government servants belonging to Scheduled Tribes and others belonging to the Scheduled Tribes is not imaginary and has been made on rational basis. He pointed out that this Court held that when tax law operates unequally and which cannot be justified

[6] 1968 (2) SCR 165

on the basis of any reasonable classification, the law would violate Article 14 of the Constitution.

19. He submitted that the Revenue cannot make such discrimination on the pretext that HGOs operate with a profit motive. He submitted that the said contention has already been negatived by this Court in paragraph 11 and 12 in the case of ***Rafique Sheikh Bhikan***[1].

20. The learned senior counsel, further, submitted that only those who are not selected in the lottery drawn by the Haj Committee, have to go to HGOs. Therefore, the act of imposing service tax on those who are compelled to go through HGOs, is highly discriminatory.

21. He invited our attention to the recommendation of the Fitment Committee placed before the GST Council meeting held on 14th March 2020. The first reason set out therein is that if the exemption is allowed for religious pilgrimage, many other domestic and international tours can be considered as religious pilgrimages. Secondly, all religious pilgrimage tours are made taxable except for those which are organized by the Government of India as per the bilateral arrangement. He submitted that this distinction drawn by the Fitment Committee is completely

erroneous. He submitted that in a case like this, it is not enough for the State to justify the object of the State Act but also the effect of the law. He placed reliance on a decision of this Court in the case of ***Rustom Cavasjee Cooper v. Union of India***[7]**.** He relied upon various decisions of the Apex Court i.e. ***In Re the Special Courts Bill 1978***[8]***, Kunnathat Thatehunni Moopil Nair, etc. v. State of Kerala & Anr.***[9]***, East India Tobacco Company, etc. v. State of Andhra Pradesh & Anr.***[10]***, Vivian Joseph Ferriera & Anr. v. Municipal Corporation of Greater Bombay & Ors.***[11] and ***Jaipur Hosiery Mills (P) Ltd., Jaipur v. State of Rajasthan & Ors***[12]**.** He submitted that the onus which was required to be discharged by the Revenue has not been discharged in the present case.

22. The learned senior counsel appearing for the petitioner in Writ Petition (C) No.1329 of 2020 pointed out that the petitioner is a prospective pilgrim for Haj. He submitted that apart from violation of Article 14 of the Constitution of India, the action of the Government of India to charge service tax and GST on HGOs,

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[7] 1970 (1) SCC 248
[8] 1979 (1) SCC 380
[9] 1961 (3) SCR 77
[10] 1963 (1) SCR 404
[11] 1972 (1) SCC 70
[12] 1970 (2) SCC 26

amounts to a violation of rights guaranteed under Article 25 of the Constitution of India. His submissions made on the issue of discrimination are the same as made by the learned senior counsel appearing for the petitioners in other petitions.

23. The learned counsel for the petitioner in Writ Petition (C) No. 772 of 2020 pointed out that the service provided by the HGOs is far better than those provided in by the Haj Committees. Apart from relying upon the decision of this Court in the case of ***All–India Federation of Tax Practitioners & Ors.***[3], he relied upon the decisions of High Courts/Tribunals in support of the proposition that as the service rendered by the HGOs to Haj pilgrims being outside taxable territory, the same is not taxable for service tax.

SUBMISSIONS OF THE REVENUE

24. At the outset, Shri N. Venkatraman, the learned Additional Solicitor General of India pointed out that the issue of extra-territorial application of service tax laws raised by the petitioners cannot be gone into as it is the subject matter of challenge in other cases pending before another Bench.

25. The learned ASG pointed out the nature of the regime governing service tax prior to 1st July 2012. Thereafter, he invited

our attention to the law as applicable for the period between 1st July 2012 and 30th June 2017. He pointed out the relevant provisions of the 2012 Rules. He invited our attention to Rule 2(h) and submitted that as far as HGOs/PTOs are concerned, they are located within India. Relying upon the definition of 'location of service recipient' in Rule 2(i), he submitted that by virtue of sub-clause (iv) of clause (b) thereof, in the case of the service recipient who is an individual Haj pilgrim, his location will be in India. He pointed out that the decisions of CESTAT relied upon by the petitioners, are for the period prior to 1st July 2012, when earlier service tax regime was in existence. He submitted that as service rendered to Haj pilgrims is not a part of the negative list under Section 66-B of the Finance Act, 1994, it is taxable from 1st July 2012.

26. For the period from 1st July 2017 onwards, he relied upon Section 12(2) of the IGST, which defines 'the place of supply of services' and Section 12(9), which defines 'the place of supply of passenger transportation service'. He submitted that if both the service provider and service recipient are within India, the transaction becomes taxable. He submitted that the contract of service in these cases is entered into in India and the

consideration is paid to HGOs/PTOs in Indian currency. He submitted that various services consumed by Haj pilgrims as a part of their pilgrimage outside India, are all a bundle of services contracted with HGOs/PTOs in India and the consideration is paid for the services in India. HGOs/PTOs may, thereafter, be entering into separate engagements with the service providers outside India, from whom Haj pilgrims get services. The contracts entered into by HGOs/PTOs with service providers outside India, are not the contracts with the Haj pilgrims. He submitted that in this group of petitions, none of the statutory provisions has been challenged.

27. He urged that conducting tours for Haj pilgrims is a commercial activity undertaken by HGOs/PTOs and the said activity is not a religious ceremony, for which exemption has been provided in the exemption notification. The learned ASG submitted that tour operators who conduct religious pilgrimages of various religions, both within and outside India, are taxed under the IGST Act. He gave examples of Char Dham Yatra, Visits to Buddhist Temples in Nepal and Japan, etc.

28. Dealing with the arguments based on paragraph 5(b) of the Mega Exemption Notification, he submitted that the said

provision will apply when the service is rendered by a person by way of conduct of any religious ceremony. He submitted that HGOs/PTOs arrange for travel, accommodation and other facilities in Saudi Arabia to enable Haj pilgrims to undertake the pilgrimage. They do not conduct any religious ceremony. The learned ASG also pointed out paragraph 5A, under which an exemption has been granted not to service by way of a religious ceremony, but to services by specified organizations in respect of a religious pilgrimage facilitated by the Ministry of External Affairs under the bilateral arrangement. He pointed out the use of the expression 'religious ceremony' in contrast to the choice of the expression 'in respect of religious pilgrimage'. He submitted that in the present case, the exemption claimed is to services by a person by way of conduct of any religious ceremony. There is no exemption granted to services rendered by HGOs of arranging travel, accommodation and other facilities to enable Haj pilgrims to undertake the Haj pilgrimage. The exemption is to the services rendered only by specified organisations for facilitating religious pilgrimage.

29. While dealing with the argument of violation of Article 14 of the Constitution of India, he submitted that the classification of

pilgrims undertaking Haj pilgrimage through the Haj Committee under the bilateral arrangement and those undertaking tours through PTOs is based on an intelligible differentia having rational nexus to the object sought to be achieved by the Statute. He pointed out that service tax exemption granted to the services provided by the specified organisations in respect of religious pilgrimage facilitated by the Government of India under the bilateral arrangement is not discriminatory. He submitted that Haj Committee constitutes a class by itself, which cannot be treated on the same footing as HGOs/PTOs, though services rendered by all of them may be similar. He pointed out that Haj Committee was constituted under Section 3 of the Act of 2002 and State Haj Committees were constituted under Section 17. In view of sub-Section (2) of Section 3, the Haj Committee is a body corporate having perpetual succession and a common seal. Various statutory duties are imposed on Haj Committee by Section 9. There is an obligation to take approval to the budget estimates from the Central Government. He submitted that different classes of persons doing the same activity could be treated differently and not alike. He relied upon decisions of this Court in the cases of ***M. Jhangir Bhatusha & Ors. v. Union of***

India & Ors.[13]***, Bharat Surfactants (Private) Ltd. & Anr. v. Union of India & Anr.***[14]***, P.M. Ashwathanarayana Setty & Ors. v. State of Karnataka & Ors.***[15]***, Sanghvi Jeevraj Ghewar Chand & Ors. v. Secretary, Madras Chillies Grains & Kirana Merchants Workers Union & Anr.***[16] and ***Bangalore Water Supply & Sewerage Board v. Workmen of Bangalore Water Supply & Sewerage Board & Ors***[17]***.***

30. He also submitted that service tax is an indirect tax; therefore, the said tax can be passed on by the service provider to the service recipient. He pointed out that being a tax on service, it is not a direct tax on the service provider, but is a value added tax in the nature of consumption tax on the activity done by way of service. He relied on this Court's decision in the case of ***Union of India & Ors. v. Bengal Shrachi Housing Development Ltd. and Anr.***[18] and ***R.C. Jall v. Union of India***[19]***.*** He submitted that the classification test has to be applied with reference to service providers, namely Haj Committee and HGOs/PTOs, and not with reference to the

[13] 1989 Suppl. (2) SCC 201
[14] 1989 (4) SCC 21
[15] 1989 Suppl. (1) SCC 696
[16] AIR 1969 SC 530
[17] 1994 (2) LLN 1239
[18] 2018 (1) SCC 311
[19] 1962 Suppl. (3) SCR 436

recipients of the service. In short, he submitted that Haj Committee and HGOs/PTOs belong to different classes.

31. Reverting to the 2012 Rules, he submitted that if two competing rules appear to cover the transaction, then the tie-breaker provided in Rule 14 comes into the picture, which lays down that the determination must be in accordance with the Rule that occurs later among the rules that merit consideration. He would, therefore, submit that Rule 8 will apply, which makes the service taxable. As regards IGST Act, he submitted that when Section 12 is applicable, the applicability of Section 13 stands completely excluded and therefore, clause (b) of sub-Section (3) of Section 13 will have no application.

REJOINDER BY THE PETITIONERS

32. In rejoinder, Shri Arvind P. Datar, Senior Advocate submitted that in the present case, Rule 8 will have no application at all. The learned senior counsel submitted that the test of purposive interpretation laid down by this Court in the case of ***Government of Kerala & Anr. v. Mother Superior Adoration Convent***[2] will have to be applied. While interpreting the exemption provision, he submitted that the decisions relied upon by the Revenue in the case of ***M. Jhangir Bhatusha &***

Ors.[13], will not apply to the facts of the case. He pointed out that this was a case where this Court upheld different treatment given to the State Trading Corporation and private importers. He submitted that the differential exemptions were granted after the Government was satisfied that it was necessary in the public interest to pass a special exemption order considering the exceptional circumstances set out therein.

CONSIDERATION OF SUBMISSIONS

33. The service tax was introduced by way of the Finance Act. The Finance Act incorporated various services which were made subject to payment of service tax. The services were enumerated in clause 105 of Section 65 of the Finance Act.

34. Service tax is an indirect tax which is leviable on the service provider who is the taxable person. The service tax is a tax on service rendered. It is not a direct tax on service provider but a value-added tax on the activity by way of service. The service provider can pass on the burden of payment of service tax to the service recipient. In this group of petitions, we are concerned with the negative service tax regime, which was introduced with effect from 1st of July 2012 by incorporation of Sections 66B and 66C by the Finance Act, 2012. When this regime was introduced

with effect from 1st July 2012, more than 100 specific services were incorporated in Clause 105 of Section 65 of the Finance Act. Section 66B introduced a negative service tax regime by providing that tax shall be levied on the value of all services other than those specified in the negative list. Section 66B is the charging Section. For the sake of convenience, we are reproducing Section 66B which reads thus:

> "**SECTION 66B. Charge of service tax on and after Finance Act, 2012**.— There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent **on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another** and collected in such manner as may be prescribed."
>
> (emphasis added)

35. Thus, the service tax is payable on all services other than those specified in the negative list provided or agreed to be provided in the taxable territory by one person to another. The taxable territory is defined in Clause 52 of Section 65B of the Finance Act to mean the territory to which the provisions of the relevant Chapter 'SERVICE TAX – STATUTORY PROVISIONS' containing Sections 64 to 114 of the Finance Act apply. Sub-section (1) of Section 64 of the Finance Act provides that the relevant Chapter extends to the whole of India except the State

of Jammu and Kashmir. Under the negative list regime which operated till 30th June, 2017, service tax was payable on services provided or agreed to be provided in the taxable territory which is the whole of India except Jammu and Kashmir. Section 66C confers rule-making power on the Central Government for determination of the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. By exercising the power under Section 66C of the Finance Act, the 2012 Rules were enacted and were brought into force with effect from 1st July 2012.

36. In these petitions, we are concerned with HGOs or PTOs. It is, therefore, necessary to understand the nature of services provided by HGOs/ PTOs. Haj pilgrimage is a five-day religious pilgrimage to Mecca and nearby Holy places in Saudi Arabia. As per the Holy Quran, all Muslims who are physically and financially sound must perform the Haj pilgrimage at least once in their lives. As provided in Holy Quran, the Haj pilgrimage is one of the five pillars or duties of Islam. Haj takes place only once a year in the twelfth and final month of Islamic lunar calendar. Pilgrimage undertaken to Mecca at other times is

known as Umrah. During the five days of Haj, the pilgrims are required to perform a series of rituals, the details of which are not relevant for deciding the issues involved in these petitions.

37. To enable Haj pilgrims of India to undertake Haj pilgrimage, there is a bilateral agreement executed every year between the Kingdom of Saudi Arabia and the Government of India. As per the bilateral agreement, a quota of number of pilgrims is assigned to India. Out of the said quota, normally only 30% is allocated to HGOs. The rest of the quota is made available to the Haj Committee.

38. HGOs render services to Haj pilgrims by purchasing flight tickets, arranging and making payments for accommodation in Saudi Arabia, arranging and making available food during their stay in Saudi Arabia, arranging and making payments for transportation in Saudi Arabia and providing foreign exchange in the form of Saudi Riyals. As stated in the written submissions filed by Shri Arvind P. Datar, the learned senior counsel, all Muslim devotees who wish to undertake the Haj pilgrimage have to register themselves with Tawafa establishment in Saudi Arabia. As soon as Haj pilgrims land in Kingdom of Saudi Arabia, their entire movement is controlled by Tawafa

establishment and its agents known as Maollims. Similar kinds of services are provided by Haj Committee to those pilgrims who undertake Haj pilgrimage through Haj Committee. As pointed out by Shri Gopal Sankaranarayanan, the learned senior counsel, HGOs provide better accommodation at a place near Kabah and also arrange for food. However, the Haj Committee provides accommodation at far away places without the facility of catering. The 2012 Rules have a direct connection with liability to pay service tax as the said Rules decide the place of provision of a service. Apart from the definitions of 'location of the service provider' and 'location of the service receiver' under Clauses (h) and (i) of Rule 2, Rules 3, 4, 7, 8 and Rule 9 of the said Rules of 2012 are also relevant. Clauses (h) and (i) of Rule 2, Rules 3, 4, 7, 8 and Rule 9 read thus:

> **"2(h)"location of the service provider"** means- (a) where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;
> (b) where the service provider is not covered under sub-clause (a):
> (i) the location of his business establishment; or
> (ii) where the services are provided from a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or
> (iii) where services are provided from more than one establishment, whether business or fixed,

the establishment most directly concerned with the provision of the service; and
(iv) in the absence of such places, the usual place of residence of the service provider.

(i) "location of the service receiver" means:-
(a). where the recipient of service has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;
(b). where the recipient of service is not covered under sub-clause (a):
(i) the location of his business establishment; or
(ii) where services are used at a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or
(iii) where services are used at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service; and
(iv) in the absence of such places, the usual place of residence of the recipient of service.
Explanation:- For the purposes of clauses (h) and (i), "usual place of residence" in case of a body corporate means the place where it is incorporated or otherwise legally constituted.
Explanation 2:- For the purpose of clause (i), in the case of telecommunication service, the usual place of residence shall be the billing address.

"3. Place of provision generally - The place of provision of a service shall be the location of the recipient of service:
Provided that in case "of services other than online information and database access or retrieval services" (Inserted vide Notification 46/2012- Service Tax) where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

4.Place of provision of performance based services.- The place of provision of following services shall be the location where the services are actually performed, namely:-

(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:

Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair;

(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.

7. Place of provision of services provided at more than one location.-Where any service referred to in rules 4, 5 or 6 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided.

8. Place of provision of services where provider and recipient are located in taxable territory.- Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable

territory, shall be the location of the recipient of service.

9. Place of provision of specified services.- The place of provision of following services shall be the location of the service provider:-
(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;
(b)[x x x]
(c) Intermediary services;
(d) Service consisting of hiring of all means of transport other than, -
(i) aircrafts, and
(ii) vessels except yachts
upto a period of one month.**"**

(emphasis added)

We may note here the relevant provisions of IGST Act. Sub-Sections (14) and (15) of Section 2 are as under:

"(14) location of the recipient of services means,—
(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;
(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;
(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and
(d) in absence of such places, the location of the usual place of residence of the recipient;

(15) location of the supplier of services means,—

(a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;
(b) where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;
(c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply; and
(d) in absence of such places, the location of the usual place of residence of the supplier;**"**

Sections 12 and 13 of the IGST Act read thus:

Section 12. Place of supply of services where location of supplier and recipient is in India–
(1) The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.
(2) The place of supply of services, except the services specified in sub-sections (3) to (14),––
(a) made to a registered person shall be the location of such person;
(b) made to any person other than a registered person shall be,—
(i) the location of the recipient where the address on record exists; and
(ii) the location of the supplier of services in other cases.
(3) The place of supply of services,—
(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use

immovable property or for carrying out or co-ordination of construction work; or
(b) by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or
(c) by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or
(d) any services ancillary to the services referred to in clauses (a), (b) and (c), shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:
Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.
Explanation.—Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.
(4) The place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed.
(5) The place of supply of services in relation to training and performance appraisal to,—
(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the location where the services are actually performed.

(6) The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located.

(7) The place of supply of services provided by way of,—

(a) organisation of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or

(b) services ancillary to organisation of any of the events or services referred to in clause (a), or assigning of sponsorship to such events,—

(i) to a registered person, shall be the location of such person;

(ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

Explanation.—Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of services by way of transportation of goods, including by mail or courier to,—

(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation.
[Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods.]
(9) The place of supply of passenger transportation service to,—
(a) a registered person, shall be the location of such person;
(b) a person other than a registered person, shall be the place where the passenger embarks on the conveyance for a continuous journey:
Provided that where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined in accordance with the provisions of sub-section (2).
Explanation.—For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.
(10) The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the first scheduled point of departure of that conveyance for the journey.
(11) The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall,—
(a) in case of services by way of fixed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line,

leased circuit or cable connection or dish antenna is installed for receipt of services;

(b) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on the record of the supplier of services;

(c) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis through a voucher or any other means,—

(i) through a selling agent or a re-seller or a distributor of subscriber identity module card or re-charge voucher, be the address of the selling agent or re-seller or distributor as per the record of the supplier at the time of supply; or

(ii) by any person to the final subscriber, be the location where such prepayment is received or such vouchers are sold;

(d) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that if such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

Explanation.—Where the leased circuit is installed in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for

services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(12) The place of supply of banking and other financial services, including stock broking services to any person shall be the location of the recipient of services on the records of the supplier of services:

Provided that if the location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.

(13) The place of supply of insurance services shall,—

(a) to a registered person, be the location of such person;

(b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services.

(14) The place of supply of advertisement services to the Central Government, a State Government, a statutory body or a local authority meant for the States or Union territories identified in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

Section 13. Place of supply of services where location of supplier or location of recipient is outside India – (1) The provisions of this section shall apply to determine the place of supply of

services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely :—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs and are exported after repairs without being put to any other use in India, than that which is required for such repairs or treatment or process;

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of

accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation.—For the purposes of this sub-section, the expression,—

(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(b) "banking company" shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);

(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(d) "non-banking financial company" means,—

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially

consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following noncontradictory conditions are satisfied, namely:—

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.**"**

(emphasis added)

39. The provisions of the 2012 Rules and the relevant provisions of IGST Act are to a great extent *pari materia*. As far as the location of service provider in this case (HGOs) is concerned, there is no dispute that all of them have to be registered under Rule 4 of the Service Tax Rules, 1994 and therefore, as per sub-clause (a) of clause (h) of Rule 2, the location of HGO will be the premises for which registration has been granted to HGO. Such premises are necessarily in India. Even assuming that any other sub-clauses of clause (h) are applicable, the location of the service provider, in this case, will be in India. As far as the location of service receiver under clause (i) of Rule 2 is concerned, in this case, the service receiver is the Haj pilgrim who is obviously not registered. Therefore, sub-clause (a) of clause (i) will have no application. There are four categories listed in sub-clause (b) of clause (i) of Rule 2. The first category is of business establishments. The second category is of services which are used at a place other than the business establishment. The third category is where services are used at more than one establishment. On the face of it, the cases of Haj pilgrims undertaking the Haj pilgrimage through HGOs will not be covered by these three categories. What is applicable to them

is the fourth category which is the usual place of residence of the recipient of service. It is not the place where the service recipient receives service or is rendered service. It is the place of ordinary residence of the service recipient which, in this case, will be in taxable territory. As provided in Rule 3, the place of provision of service is the location of the recipient of service. In this case, the recipients of service from HGOs are Indian residents and accordingly, their place of residence in India will be the place of provision of service. Rule 8 provides that where the location of the provider of service as well as that of the recipient of service is in the taxable territory, the place of provision of service is the location of the recipient of service. Hence, in this case, the place of provision of service is the location of the service receiver in accordance with clause (i) of Rule 2 which will be in taxable territory.

40. However, reliance was sought to be placed by the petitioners on Rule 4, in particular Clause (b) thereof. Rule 4 is applicable to performance based service which provides that the place of provision of two services set out in the said Rule shall be the location where services are actually performed. Clause (a) of Rule 4 is applicable to services provided in respect of goods

which obviously will not apply in the present case. The petitioners are relying upon clause (b) of Rule 4. The title of Rule 4 suggests that it is applicable to performance based services. HGOs do not render performance based services looking to the nature of the services they render, which we have discussed above in detail. Therefore, Clause (b) of Rule 4 will not apply to HGOs. What will apply is Rule 3 which will mean that the place of provision of the service shall be the location of the recipient of service in accordance with Rule 2(i)(b)(iv). Thus, service is rendered by HGOs to the Haj pilgrims within taxable territory. That is how the charging section will apply.

41. There was an attempt made to argue that Haj pilgrimage will be an event covered by Rule 6, which reads thus:

> **"Rule 6. Place of provision of services relating to events.–** The Place of provision of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place where the event is actually held."

Religious ceremonies and religious functions are not covered by Rule 6. The words 'similar events' will have to be construed *ejusdem generis.* Hence, the Haj pilgrimage cannot be an event.

42. Even if we assume that the service rendered by HGOs to Haj pilgrims is transportation service, by virtue of Rule 9 of the 2012 Rules, the place of provision of service will be the location of service provider. In view of sub-Section (10) of Section 12 of the IGST Act, the place of supply of service will be the place where the passenger embarks.

43. As per Item (iv) of sub-clause (b) of Clause (i) of Rule 2 of the said Rules of 2012, the location of the service receiver will be the usual place of residence of the Haj pilgrim in India. Therefore, the service rendered by the HGOs to Haj Pilgrims is taxable for service tax as the service to Haj pilgrims is provided or agreed to be provided in taxable territory. The service is rendered by providing or agreeing to provide Haj pilgrimage tour package.

44. We may reiterate here that as prayed by the parties during arguments, we are not going into the issue of extra-territorial operations of the laws relating to service tax and the said issue is left open. Even the issue of the validity of the 2012 Rules has not been seriously canvassed at the time of oral submissions. In one of the writ petitions, the ground of violation of Article 25

of the Constitution of India has been taken without making even an attempt to substantiate the same.

45. The petitioners have relied upon the decision of this Court in the case of ***All–India Federation of Tax Practitioners & Ors.***[3] and certain decisions of High Courts and CESTAT. The said decisions apply to the fact situation before 1st July, 2012 when negative tax regime was not in force. We are concerned in these cases with the negative service tax regime which commenced from 1st July 2012. Therefore, the same will not apply to these cases.

APPLICABILITY OF EXEMPTION NOTIFICATION

46. The question is whether the exemption granted under the Mega Exemption Notification will apply in this case. As mentioned earlier, the Exemption Notifications under the IGST and the GST Acts so far as the Haj pilgrimage is concerned, are *pari materia* with the Mega Exemption Notification. It is, therefore, necessary to advert to the Mega Exemption Notification. The Mega Exemption Notification contains a list of services which are exempted from service tax leviable under Section 66B. In this case, Clauses 5 and 5A are pressed into service by the petitioners which read thus:

"**5. Services by a person by way of-**
(a) renting of precincts of a religious place meant for general public, owned or managed by an entity registered as a charitable or religious trust under section 12AA of the Income-tax Act, 1961(hereinafter referred to as the Income-tax Act), or a trust or an institution registered under sub clause (v) of clause (23C) of section 10 of the Income-tax Act or a body or an authority covered under clause (23BBA) of section 10 of the Income-tax Act;" substituted vide Notification 40/2016- Service Tax; or

(b) conduct of any religious ceremony;

5A. Services by a specified organisation in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement;"

(emphasis added)

47. Ex facie, Clause 5A will have no application as it is applicable to services by specified organisations in respect of a religious pilgrimage facilitated by the Ministry of External affairs of the Government of India under bilateral arrangement. The specified organisations have been defined in paragraph 1(1)(a)(zfa) of the Mega Exemption Notification. Specified organisations, as stated therein, are only two categories of organisations. The first one is Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking and Haj

Committee or State Committee under the said Act of 2002. The Haj Committee renders services in relation to the Haj pilgrimage which is facilitated by the Ministry of External Affairs of the Government of India under the bilateral arrangement with the Kingdom of Saudi Arabia.

48. In support of the contention that the Clause 5(b) of the Mega Exemption Notification is applicable, Shri Arvind P. Datar, the learned senior counsel with all fairness pointed out that in the case of ***Commissioner of Customs (Import) Mumbai v. Dilip Kumar and Company and Ors***.[20], a Constitution Bench of this Court held that an exemption notification should be interpreted strictly and in case of any ambiguity in the exemption notification, the same must be interpreted in favour of the revenue. In paragraph 66 and in particular 66.1 to 66.3 in the case of ***Dilip Kumar and Company***[20] it was held thus:

> **"66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.**
>
> **66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity**

[20] 2018 (9) SCC 1

> **cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.**
>
> **66.3.** The ratio in *Sun Export case* [*Sun Export Corpn.* v. *Collector of Customs*, (1997) 6 SCC 564] is not correct and all the decisions which took similar view as in *Sun Export case* [*Sun Export Corpn.* v. *Collector of Customs*, (1997) 6 SCC 564] stand overruled."
>
> (emphasis added)

49. But Shri Datar urged that when the exemption is for beneficial purposes, a different rule will apply. In the case of ***Government of Kerala & Anr. v. Mother Superior Adoration Convent***[2] relied upon by Shri Datar, this Court referred to its decision in the case of ***Commissioner of Customs (Preventive) Mumbai v. M. Ambalal and Company***[21] and held that the law laid down in the case of ***M. Ambalal and Company***[21] has not been disturbed by the Constitution Bench in the case of ***Dilip Kumar and Company***[20]**.** In paragraph 23, this Court in the case of ***Mother Superior Adoration Convent***[2] held thus:

> **"23.** Likewise, even under the Customs Act, this Court in *Commr. of Customs* v. *M. Ambalal & Co.* [*Commr. of Customs* v. *M. Ambalal & Co.*, (2011) 2 SCC 74] made a clear distinction between exemptions which are to be strictly interpreted as opposed to beneficial exemptions having as their purpose—encouragement or promotion of certain activities. This case

[21] 2011 (2) SCC 74

felicitously put the law thus follows : (SCC p. 80, para 16)

"16. It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification**. The rule regarding exemptions is that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of judgments emphasise that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal statutes are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgments at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they relate to two different sets of circumstances.**"

(emphasis added)

Thereafter, in paragraph 25, this Court referred to and quoted the relevant portion of the Constitution Bench decision in the case of ***Dilip Kumar and Company***[20]. In paragraphs 26 and 27, this Court proceeded to hold thus:

"26. It may be noticed that the five-Judge Bench judgment [*Commr. of Customs* v. *Dilip Kumar & Co.*, (2018) 9 SCC 1] did not refer to

the line of authority which made a distinction between exemption provisions generally and exemption provisions which have a beneficial purpose. We cannot agree with Shri Gupta's contention that sub silentio the line of judgments qua beneficial exemptions has been done away with by this five-Judge Bench. It is well settled that a decision is only an authority for what it decides and not what may logically follow from it (see *Quinn* v. *Leathem* [*Quinn* v. *Leathem*, 1901 AC 495 (HL)] as followed in *State of Orissa* v. *Sudhansu Sekhar Misra* [*State of Orissa* v. *Sudhansu Sekhar Misra*, (1968) 2 SCR 154 : AIR 1968 SC 647] , SCR at pp. 162-63 : AIR at pp. 651-52, para 13).

27. This being the case, it is obvious that the beneficial purpose of the exemption contained in Section 3(1)(*b*) must be given full effect to, the line of authority being applicable to the facts of these cases being the line of authority which deals with beneficial exemptions as opposed to exemptions generally in tax statutes. This being the case, a literal formalistic interpretation of the statute at hand is to be eschewed. We must first ask ourselves what is the object sought to be achieved by the provision, and construe the statute in accord with such object. And on the assumption that if any ambiguity arises in such construction, such ambiguity must be in favour of that which is exempted. Consequently, for the reasons given by us, we agree with the conclusions reached by the impugned judgments [*Mother Superior* v. *State of Kerala*, 2007 SCC OnLine Ker 578] , [*Unity Hospital (P) Ltd.* v. *State of Kerala*, 2010 SCC

OnLine Ker 4679] of the Division Bench and the Full Bench."

(emphasis added)

50. The submission of the petitioners is that clause (5) of the Mega Exemption Notification contains a beneficial exemption and therefore, the same will have to be construed in accordance with the object sought to be achieved. The submission is that as there is an ambiguity in the construction of Clause 5, the construction in favour of that which is exempted should be accepted.

51. Now, adverting to sub-clause (b) of Section 5, we find that the exemption has been granted in respect of services by a person by way of conduct of any religious ceremony. Thus, it refers to a person who is naturally the service provider. The sub-Clause (b) applies when the service provider renders service by way of conduct of any religious ceremony. The notification does not say that service provided to the service receiver to enable him to conduct religious ceremony, has been exempted. It only exempts service provided by way of conduct of any religious ceremony.

52. It must be noted here that Clause 5A of the same Mega Exemption Notification grants exemption to the service

rendered by Haj Committees in respect of a religious pilgrimage. Thus, the same Mega Exemption Notification makes a clear distinction between 'religious ceremony' and 'religious pilgrimage'. As Haj Committees render services only in respect of Haj pilgrimage, the religious pilgrimage referred to in Clause 5A as regards the Haj Committee, is Haj pilgrimage. Thus, the Mega Exemption Notification exempts the two specified organisations that render services in respect of a religious pilgrimage. This exemption under Clause 5A is not applicable to HGOs as the HGOs are not the specified organizations. If the intention and object was to provide service tax exemption to services provided by HGOs in respect of religious pilgrimage, the notification would have specifically provided so. However, the exemption as regards religious pilgrimage has been confined only to the services rendered by the specified organisations in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India under a bilateral arrangement. An exemption has not been provided to any other service provider rendering service in respect of a religious pilgrimage. Whereas, sub-Clause (b) of Clause 5 is applicable to services rendered by way of conduct of any religious

"ceremony". A clear distinction has been made between a service provided in respect of religious pilgrimage and a service rendered by way of conduct of any religious ceremony. We may give an example of a person engaging a priest to perform certain religious ceremonies or ritual or puja on his behalf. In such a case, the priest renders service by way of conducting a religious ceremony. The service rendered by HGOs to Haj pilgrims is to facilitate them to reach at the destination to perform rituals/religious ceremonies. No religious ceremony is performed or conducted by the HGOs. The religious ceremony is conducted by Haj pilgrims or by someone else in the Kingdom of Saudi Arabia. According to us, there is absolutely no ambiguity in sub-clause (b) of clause 5 and therefore, there is no occasion to apply the test laid down by this Court in the case of ***Mother Superior Adoration Convent***[2].

53. The submission of Shri Datar, learned senior counsel was that in Haj pilgrimage there are six entities involved which include concerned Ministry of the Kingdom of Saudi Arabia, the Government of India, Tawafa establishments, Molliums, approved HGOs and Haj pilgrims. His submission is that the word 'person' used in sub-clause (b) of clause 5 of the exemption

notification will also include the plural of the term 'person'. The submission is that a Haj pilgrim will fall in the category of 'person'. According to us, this submission is completely fallacious. The word 'person' used in Clause 5 refers to a service provider and not to the receiver of service. Even assuming that some services are provided by the Kingdom of Saudi Arabia, the Government of India, Tawafa establishments or Maollims to Haj pilgrims from India, it may be noted here that they are not subjected to payment of service tax. The service tax is levied on HGOs being service providers. The real question is whether HGOs are rendering service by way of conduct of any religious ceremony. As held earlier, HGOs have no role to play in actual conduct of religious ceremonies which are a part of Haj pilgrimage. The service rendered by HGOs is by way of providing air bookings, arranging for the stay of Haj pilgrims in Saudi Arabia, arranging for food while they are in Saudi Arabia, arranging for foreign exchange and arranging registration with Tawafa establishment in the Kingdom of Saudi Arabia.

54. An attempt was made to bifurcate the services rendered by HGOs into two parts. The first part is of the service rendered regarding providing air booking and making available foreign

exchange. A submission was made that service tax or GST will be payable on these two items and for the rest of the services rendered, service tax or GST will not be payable as the services rendered are outside the taxable territory. HGOs render service to Haj pilgrims in respect of the Haj pilgrimage by providing a single package which consists of several parts such as making air booking, providing foreign exchange and making arrangements for stay and catering in Saudi Arabia, etc. HGOs offer a comprehensive package of services relating to Haj pilgrimage. They receive charges from Haj pilgrims for the entire package. It is not the case of the HGOs that they charge separately for different services forming a part of the comprehensive package. Only a part of the package cannot be picked up for invoking exemption. A particular service rendered cannot be divided into parts. For the purposes of levy of service tax, the service rendered cannot be dissected like this. The service rendered as a whole by the HGOs to the Haj pilgrims will have to be taken into account. This is apart from the fact that no part of the package offered by HGOs involves a service by way of conduct of any religious ceremony. Therefore, in our considered view, sub-clause (b) of clause 5 of the Mega

Exemption Notification cannot be invoked by the HGOs. We may also note here that the exemption under sub-clause (b) of clause 5 is to the service provider. We are noting this as one of the petitions has been filed by a service recipient.

55. Before we go to the argument regarding discrimination, we may note here that with effect from 1st July 2017, service tax became payable under the IGST Act. Even GST Act came into force from the same date. Under both the enactments, tax is payable on the supply of goods or services. Sub-Section (2) of Section 13 of IGST Act provides that the place of supply of services except services specified in Sub-Sections (3) to (13) shall be the location of the recipient of services. Under sub-Section (1) of Section 5 of the IGST Act, service tax is payable on services supplied inter-state. Under sub-Section (1) of Section 9 of the GST Act, service tax is leviable on services supplied intra-state. None of the sub-sections (3) to (13) of Section 13 of the IGST Act is applicable in this case. Clause (14) of Section 2 of the IGST Act defines the location of the recipient of service. This provision is *pari materia* with the same definition under the 2012 Rules. As in case of 2012 Rules, there are four categories. The service received from HGOs in connection with

the Haj pilgrimage falls in the fourth category which lays down that the location of the recipient of service will be the location of usual place of residence of the recipient. Similar are the provisions in GST Act except that the service tax is leviable on services supplied intra-State. Therefore, as far as the services rendered by HGOs are concerned, there is no material change brought about by the GST and the IGST Acts except for the fact that the service tax is chargeable under these two statutes and not under the Finance Act. Thus, the HGOs supply service to the service recipient having location in India. The service is rendered by providing a package for the Haj Pilgrimage to the service recipient who is located in the taxable territory. That is how the service provided by HGOs is taxable for service tax.

CONSIDERATION OF THE ISSUE OF DISCRIMINATION

56. The other issue which arises for consideration is about the submissions based on discrimination made under the Mega Exemption Notification between the services rendered by specified organisations and the services rendered by other service providers in respect of religious pilgrimage.

57. The submission of the petitioners is that there is no difference between the service rendered by HGOs and the

service rendered by the Haj Committee to the Haj pilgrims. It is contended that the nature of service rendered by both is the same. The submission of the petitioners is that for the purposes of this exemption, the Haj Committee cannot constitute a class in itself. In short, the submission is that two equals are being treated as unequal. The question is whether Haj Committees under the 2002 Act, can be treated as a separate class. Article 14 does not prohibit the classification of persons or class of persons provided it is not arbitrary. The classification has to be reasonable. The classification is permissible provided it is founded on an intelligible differentia which must distinguish the persons grouped together from those who are left out. Moreover, the classification must have a rational nexus to the objects sought to be achieved by it. While we examine this question in the context of the infringement of Article 14 of the Constitution of India, it must be remembered that only on the ground that both HGOs and the Haj Committee render service to the same class of persons, the classification made by treating the Haj Committee as a separate class, cannot be questioned. In a given case, different classes of service providers may be rendering the same service to the same class of service

recipients. That, *per se,* does not amount to discrimination. The attack on the ground of discrimination will have to be considered in the context of taxable persons namely, the Haj Committee and HGOs. Under Section 3 of the said Act of 2002, the Haj Committee of India was constituted. Similarly, under Section 17, the State Haj Committees were constituted. Both the categories of Haj Committees are body corporate, having perpetual succession and a common seal with the power to acquire, hold and dispose of movable and immovable properties. Section 4 determines the composition of the Haj Committee of India and Section 18 determines the composition of State Haj Committees. Section 9 lays down the duties of the Haj Committee, which reads thus:

> **"9.Duties of Committee**-(1) The duties of the Committee shall be-
>
> (i) to collect and disseminate information useful to pilgrims, and to arrange orientation and training programmes for pilgrims;
>
> (ii) to advise and assist pilgrims during their stay at the embarkation points in India, while proceeding to or returning from pilgrimage, in all matters including vaccination, inoculation, medical inspection, issue of pilgrim passes and foreign exchange, and to liaise with the local authorities concerned in such matters;
>
> (iii) to give relief to pilgrims in distress;

(iv) to finalise the annual Haj plan with the approval of the Central Government, and execute the plan, including the arrangements for travel by air or any other means, and to advise in matters relating to accommodations;

(v) to approve the budget estimates of the Committee and submit it to the Central Government at least three months before the beginning of the financial year for its concurrence;

(vi) to co-ordinate with the Central Government, railways, airways and travel agencies for the purpose of securing travelling facilities for pilgrims;

(vii) to generally look after the welfare of the pilgrims;

(viii) to publish such proceedings of the Committee and such matters of interest to pilgrims as may be determined by bye-laws made in this behalf by the Committee;

(ix) to discharge such other duties in connection with Haj as may be prescribed by the Central Government.

(2) The Central Government shall afford all reasonable assistance to the Committee in the discharge of the duties specified in sub-section (1)."

58. Under Section 27 of the 2002 Act, it is the duty of the State Committees to implement the policies and directions of the Haj Committee and perform prescribed duties. The functions and

duties assigned to the Haj Committee need to be considered in the context of the preamble of the 2002 Act. The object is to establish Committees for making arrangements for the Muslims for the pilgrimage of Haj. The HGOs are otherwise the tour operators carrying on business of arranging tours. They get themselves registered as HGOs. As can be noticed from Section 9, the functions of the Haj Committee are not confined only to making arrangements for enabling the pilgrims to undertake the Haj pilgrimage. Its first duty is to collect and disseminate the information useful to the pilgrims and to arrange orientation and training programmes for the pilgrims. It is the duty of the Haj Committee to give relief to pilgrims and visitors. It is its duty to generally look after the welfare of the pilgrims. The Haj Committee has an important duty to assist the pilgrims in distress. One of the duties is to finalize the Annual Haj Plan with the approval of the Central Government and to execute the same. The Haj Committee is under an obligation to publish proceedings of the Committee. Under Section 30, it is the duty of the Committee to create Central Haj Fund. Similarly, under Section 32, the State Committees are under an obligation to create State Haj Funds. The Central Government has the power

to reconstitute the Haj Committee and to remove the Chairperson, the Vice-Chairperson and the Members of the Committee. There is a similar power vesting in the State Government in respect of the State Committees. Thus, the Haj Committees are statutory bodies working under the control and supervision of the Government. The Haj Committees are the agencies and instrumentalities of the State. Apart from arranging visits of Haj pilgrims for the purposes of Haj pilgrimage, there are important statutory duties assigned to the Haj Committee which we have set out above. As per clause (b) of Section 30, money collected from pilgrims for the performance of the Haj pilgrimage becomes a part of the Central Haj Fund, which can be utilized only for the purposes specified under Section 31. The funds can be used only for the purposes of paying salary and allowances to the officers and employees of the Committee and for payment of charges and expenses incidental to the objects specified in Section 9. Other expenditure can be made only with the approval of the Central Government. Therefore, when the Haj Committee facilitates the Haj pilgrims by making arrangements for their visit to the Kingdom of Saudi Arabia for undertaking the Haj pilgrimage,

there is a complete absence of profit motive. On the contrary, the money received by the Haj Committee from the Haj pilgrims goes to the statutory fund, which in turn, has to be used *inter alia* for the benefit of Haj pilgrims. Even the budget of the Haj Committee is required to be submitted to the Central Government. Thus, the Central Government has all pervasive control over the Haj Committee. The State Governments have the same control over the State Committee. On the other hand, there are no onerous duties attached to HGOs. They earn profit by rendering service to Haj pilgrims. Except for the stringent conditions for the registration, the Government has no control over HGOs.

59. Shri Gopal Sankarnarayanan, the learned senior counsel relied upon certain observations made by this Court in the case of ***Rafique Sheikh Bhikan***[1]. He relied upon paragraphs 11 and 12 of the said judgment, which read thus:

> **"11.** The pilgrim is actually the person behind all this arrangement. For many of the pilgrims Haj is once in a lifetime pilgrimage and they undertake the pilgrimage by taking out the savings made over a lifetime, in many cases especially for this purpose. Haj consists of a number of parts and each one of them has to be performed in a rigid, tight and time-bound schedule. In case due to any mismanagement in the arrangements regarding the journey to Saudi Arabia or stay or travelling inside Saudi Arabia any of the parts is not performed or performed

improperly then the pilgrim loses not only his life savings but more importantly he loses the Haj. It is not unknown that on landing in Saudi Arabia a pilgrim finds himself abandoned and completely stranded.

12. It is, thus, clear that in making selection for the registration of PTOs the primary object and purpose of the exercise cannot be lost sight of. The object of registering PTOs is not to distribute the Haj seats to them for making business profits but to ensure that the pilgrim may be able to perform his religious duty without undergoing any difficulty, harassment or suffering. A reasonable profit to the PTO is only incidental to the main object."

(emphasis added)

However, the learned counsel has not referred to paragraph 10 of the same judgment, which takes a note of very substantial profits earned by the PTOs. Paragraph 10 reads thus:

"10. From these facts, it is not difficult to deduce that the dispute between the private operators/travel agents and the Government of India in regard to registration as PTOs arises from a conflict of object and purpose. **For most of the private operators/travel agents registration as PTOs is mainly a question of more profitable business. Under the bilateral agreement no PTO can be given a quota of less than fifty pilgrims. Normally, a quota of fifty pilgrims would mean, on an average and by conservative standards, a profit of rupees thirty-five to fifty lakhs. This in turn means that any private operator/travel agent, successful in getting registered as a PTO with the Government of India would easily earn rupees thirty-five to**

> **fifty lakhs in one-and-a-half to two months and may then relax comfortably for the rest of the year without any great deal of business from any other source.** For the Government of India, on the other hand, the registration of the PTOs, is for the purpose to ensure a comfortable, smooth and trouble-free journey, stay and performance of Haj by the pilgrims going through the PTOs."
>
> (emphasis added)

In fact, what is observed in paragraph 12 is in the context of the controversy before this Court. It can be seen from paragraph 17 of the said decision that the controversy was about the stringent conditions imposed for the registration of PTOs. The observations in paragraph 12 are in that context. This Court held that the object of putting such stringent conditions is to ensure that proper service is rendered to the Haj pilgrims. In this context, the aforesaid observation has been made that the reasonable profit to PTOs is incidental. It is not the case of the HGOs in these petitions that they are doing any kind of charitable work by providing service to Haj pilgrims. It is not their case that they are not earning any profit while providing a package to Haj pilgrims. They are rendering the services with the object of earning profit.

60. Thus, the Haj Committee is a statutory committee which is entrusted with various functions for the welfare of Haj pilgrims.

Moreover, the profit motive is completely absent in the case of the Haj Committee. The money received by the Haj Committee from the pilgrims for rendering service goes to a statutory fund created under the 2002 Act which is to be used only for the purposes specified in the 2002 Act. That is the reason why the Haj Committee constitutes a class in itself when it comes to rendering service to Haj pilgrims. It is a separate class as distinguished from HGOs. There is an *intelligible differentia* for this classification. The object of exemption in paragraph 5A of the Mega Exemption Notification is to promote the activity of the specified organisations of rendering service for the religious pilgrimage. Both the organisations which are specified in the notification are statutory organisations over which the Government has an effective control. Moreover, the service rendered by the specified organisations to the devotees is not with the object of making profit. Therefore, there is a nexus between the classification made and the object sought to be achieved by granting exemptions.

61. The learned senior counsel relied upon the decision of this Court in the case of ***S. K. Dutta***[6]. Certain provisions of the Income Tax Act, 1961 granting exemption to the members of the

Scheduled Tribes were the subject matter of challenge before the High Court. While granting exemption to the members of the Scheduled Tribes, the class of the government servants who were the members of Scheduled Tribes was excluded from the benefits. It is in this context that the Apex Court observed that the classification made on the basis of imaginary distinction cannot be a valid classification. There has to be a reasonable and substantial distinction for the purposes of making a valid classification. On facts, the said decision will not help the petitioners.

62. In the meeting of the Fitment Committee, there were deliberations on the representation made by the petitioners. The decision/recommendation of the Fitment Committee contains valid reasons for making a distinction between HGOs and Haj Committees. We are reproducing the reasons recorded by fitment committee on the plea of discrimination which read thus:

> **"Ground 3: GST exemption [SL No. 60 of Notification No.12/2017-CTR and Sl. No. 63 of Notification No. 9/2017-ITR] has been granted only to the pilgrims for whom Haj Committee of India is organizes the Haj/Umrah pilgrimage and not for the pilgrims for whom HGO[PTO] organizes and conducts the pilgrimage. It is discriminatory and violative of Article 14 of the Constitution of India.**

Services provided by a specified organisation in respect of a religious pilgrimage facilitated by the Government of India, under a bilateral arrangement, is exempt from GST. "Specified organizations" are Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking and 'Committee' or "State Committee as defined in section 2 of the Haj Committee Act, 2002 (35 of 2002).

GST is leviable on tour operator service for organizing Haj/Umrah pilgrimage tour. GST exemption is available only on services of religious pilgrimage facilitated by Central govt or State govt, under a bilateral arrangement. There is no exemption available to services of religious pilgrimage of any religion provided by any private tour operator. Therefore, existing exemption available on services of religious pilgrimage facilitated by Government of India is not discriminatory. **The legislature intends to exclude private tour operators from the purview of Service Tax/GST exemption.** Catena of court judgments have upheld that legislature has wide latitude in taxation to choose the subject and people to be taxed.

Article 14 prohibits class legislation and not reasonable classification. It is very much within the powers of legislature to categorize goods and services for the purpose of taxation in such manner as meets the policies and objectives of the government. The legislation intends to differentiate between tour operator services rendered by public and private entities. There is no discrimination between religious pilgrims. All pilgrims who undertake Haj/Umrah pilgrimage or any other religious pilgrimage through private tour operators are treated equally.

The Constitutional bench of Supreme Court in R.K. Garg v. Union of India(1981) 4 SCC 675,

laid down the test of classification by reference to article 14 was as under –

"The clarification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the person grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia, which distinguishes those that are grouped together from others, and (2) that differentia must have a rational relation to the object sought to be achieved by the Act."

The classification of pilgrims undertaking Haj/Umrah pilgrimage tours through Haj Committee of India under bilateral arrangement and those undertaking tours through private tour operators is based on an intelligible differentia having a rational relation to the object sought to be achieved by the statute in question. Therefore, services Tax/GST exemption on services provided by a specified organization in respect of a religious pilgrimage facilitated by Government of India under bilateral arrangement are not discriminatory and not violative of Article 14 of the Constitution.

As discussed above, the service of organizing and conduct of tour for Haj/Umrah pilgrims by private tour operators is taxable under GST. It is not covered under any of the existing exemptions from GST. Therefore, the request to not levy GST or to clarify that GST is not leviable on the same is not acceptable.

As regards the request for exemption GST on the services of Haj and Umrah tour provided by Haj Group Operators [Private Tour Operators], the same has no merit. **The private tour operators supply such services on purely commercial**

> **basis to pilgrims who can afford it. GST is an indirect tax. The burden of the tax is not on the suppliers but on the recipients. The service was taxable in Service Tax also. There is no justification for granting a new exemption.** Exemptions not only cause loss of revenue but also block input tax credit chain and credit distortions.**"**
>
> (emphasis added)

The reasons recorded are based on consideration of relevant factors.

63. Strong reliance was placed by the Revenue on the decision of this Court in the Case of ***M. Jhangir Bhatusha & Ors***[13]. The subject of this petition was an order passed by the Government under sub-Section (2) of Section 25 of the Customs Act, 1962. By the said order, import of the specified oils by the State Trading Corporation was made liable to customs duty at the rate of 5% only and total exemption from auxiliary and additional duty was granted. On the other hand, import of the same specified oils by private importers was made liable to customs duty at the rate of 12.5% *ad velorem.* Discrimination was alleged in this case by contending that there is no rational basis for treating State Trading Corporation differently. In paragraphs 13 to 15 of the said decision, this Court held thus:

> **"13.** First, as to the contention that both the reasons set forth in the exemption notifications

under Section 25(2) of the Act are without foundation. It seems to us that the two reasons set forth in the exemption notifications can constitute a reasonable basis for those notifications. **It does appear from the material before us that international prices were fluctuating, and although they may have shown a perceptible fall there was the apprehension that because of the history of fluctuations there was a possibility of their rising in the future. The need to protect the domestic market is always present, and therefore encouragement had to be given to the imports effected by the State Trading Corporation by reducing the rate of customs duty levied on them. This involved a long term perspective, since the exclusive monopoly to import these edible oils was now entrusted to the State Trading Corporation.** What appears to have dominated the policy of the government in issuing the exemption notifications was the consideration that the domestic prices of vanaspati should be maintained at reasonable levels. It cannot be doubted that the entire edible oil market is an integrated one, and that it is not reasonable to treat any one of the edible oils or vanaspati in isolation. It is a well accepted fact that vanaspati manufacturers constitute a powerful organised sector in the edible oil market, and a high vanaspati price would encourage an unauthorised diversion of the edible oils to vanaspati manufacturing units, resulting in a scarcity in the edible oil market, giving rise to erratic prices and depriving consumers of access to edible oils. The need for preventing vanaspati prices ruling high was also to prevent people normally using vanaspati from switching over to other edible oils, thus leading to an imbalance in the oil market. An overall view made it necessary to ensure that domestic prices of vanaspati remained at reasonable

levels. To all these considerations the learned Attorney-General has drawn our attention, and we cannot say that they are not reasonably related to the policy underlying the exemption orders. So that the government would have sufficient supplies of edible at hand in order to feed the market, the learned Attorney-General says, it was considered desirable and in the public interest to reduce the rate of customs duty to 5 per cent on the imports made by the State Trading Corporation. **Now it is the Central Government which has to be satisfied, as the authority appointed by Parliament under Section 25(2), that it is necessary in the public interest to make the special orders of exemption. It has set out the reasons which prompted it to pass the orders. In our opinion, the circumstances mentioned in those notifications cannot be said to be irrelevant or unreasonable. It is not for this Court to sit in judgment on the sufficiency of those reasons. The limitations on the jurisdiction of the court in cases where the satisfaction has been entrusted to executive authority to judge the necessity for passing orders is well defined and has been long accepted.**

14. It is true that the State dons the robes of a trader when it enters the field of commercial activity, and ordinarily it can claim no favoured treatment. But there may be clear and good reason for making a departure. **Viewed in the background of the reasons for granting a monopoly to the State Trading Corporation, acting as an agent or nominee of the Central Government in importing the specified oils, it will be evident that policy considerations rendered it necessary to make consummation of that policy effective by imposing a concessional levy on the imports. No such concession is called for in the case of the private importers who, in any event,**

> **are merely working out contracts entered into by them with foreign sellers before 2-12-1978.**
> **15.** We are also not satisfied that any of the private importers have made out that their business will be crippled or ruined in view of the rate of customs duty visited on their imports. The material before us is not sufficient to warrant any conclusion in their favour."
>
> (emphasis added)

64. We are tempted to quote what the majority view in the case of ***R. K. Garg v. Union of India & Ors.***[22] on the approach of the Court in such matters. We quote paragraph 8:

> "**8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in 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.** The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [351 US 457 : 1 L Ed 2d

[22] 1981 (4) SCC 675

1485 (1957)] where Frankfurter, J., said in his inimitable style:

"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."

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry".

(emphasis added)

In the matter of grant of exemptions in tax matters, latitude has to be given to the decision making. Ultimately, it is also a matter of policy. We have already held that there is a rational basis for classifying specified organisations as a class and keeping out the Private Tour Operators from exemption under Clause 5A. We will have to show judicial self-restraint in this case.

65. Hence, we are of the considered view that the arguments based on discrimination have no substance at all, as HGOs and the Haj Committees do not stand on par and in fact, the Haj Committees constitute a separate class by themselves, which is based on a rational classification which has a nexus with the object sought to be achieved.

66. Therefore, there is no merit in the challenge in the petitions. We have already clarified that we have not dealt with the issue of extra-territorial operation of the service tax regime which is kept open to be decided in appropriate proceedings, as requested by the parties.

67. We are, therefore, of the view that the petitions are devoid of merit and the same are, accordingly, dismissed. No order as to costs.

.....J.
(A.M.Khanwilkar)

.....J.
(Abhay S. Oka)

.....J.
(C. T. Ravikumar)

New Delhi;
July 26, 2022.