

GST - LEVY

K.VAITHEESWARAN
ADVOCATE & TAX CONSULTANT

Mobile: 98400-96876

E-mail : vaithilegal@yahoo.co.in / vaithilegal@gmail.com

LinkedIn: www.linkedin.com/in/vaithilegal

‘VENKATAGIRI’

**Flat No.8/3 & 8/4, Ground Floor,
No.8 (Old No.9), Sivaprakasam Street,
T. Nagar, Chennai - 600 017, India
Tel.: 044 + 2433 1029 / 4048**

**402, Front Wing,
House of Lords,
15/16, St. Marks Road,
Bangalore – 560 001, India
Tel : 080 22244854/ 41120804**

BACKGROUND

Goods and services tax – Constitution of India

Article 246A(1)	Parliament and legislature of every State have power to make laws with respect to goods and services tax imposed by the Union or by such State.
Article 246A(2)	Parliament has exclusive power to make laws with respect to GST where the supply of goods or services or both takes places in the course of inter-State trade or commerce.
Article 269A	Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India.
Explanation to Article 269A	Supply of goods or services or both <i>in the course of import into the territory of India</i> shall be deemed to be a supply of goods or services or both in the course of inter-State trade or commerce.

CGST – SUPPLY – SECTION 7

- Supply includes
 - All forms of supply of goods or services or both such as **sale, transfer, barter, exchange, license, rental, lease or disposal** made or agreed to be made for a consideration by a person in the course or furtherance of business.
 - **Import of service for a consideration and whether or not in the course or furtherance of business.**
 - **Activities specified in Schedule-I – made or agreed to be made *without a consideration*.**

CGST – SUPPLY

- *Made or agreed to be made indicates that advances would attract GST.*
 - *No GST on advance for goods while GST is applicable for advances for services.*
- *In respect of import of service, nexus to business is not required for GST applicability*
- *Activities in Schedule – I treated as supply even if made without consideration*

SUPPLY

- None of the terms used in supply defined.
- 101st Constitutional Amendment did not delete Article 366(29A).
- Whether the definition of 'sale' in the Constitution has any impact?
- What is a transfer?
- Barter treated as supply but not defined
- *Who is liable in the case of barter?*

CHARGING PROVISIONS

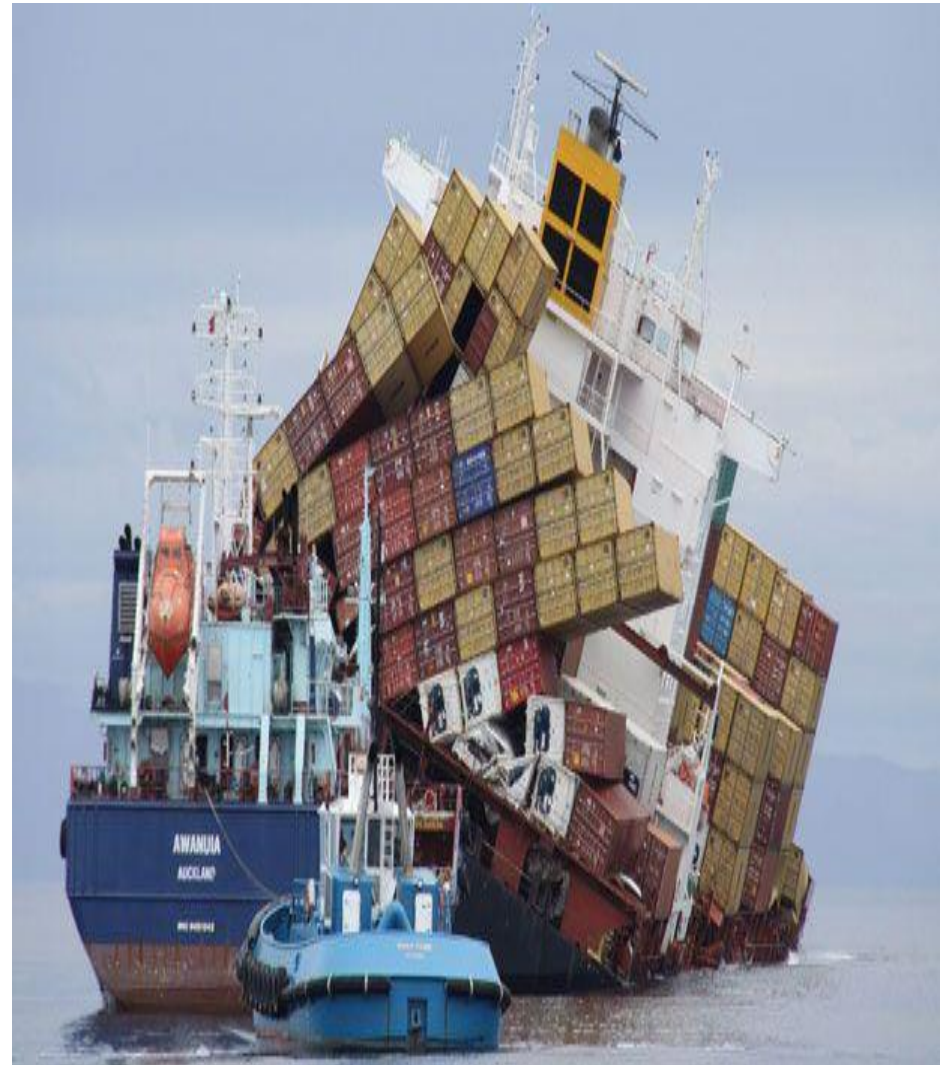
- Section 9(1) of the CGST Act – CGST on *intra-State supply of goods or services or both* except on supply of alcoholic liquor for human consumption
- On the value determined under Section 15
- At such rates not exceeding 20%, as may be notified by the Government on the recommendations of the Council
- Collected in such manner as may be prescribed
- And shall be paid by the taxable person

CHARGING PROVISIONS

- Reverse charge
- Section 9(3) of the CGST Act
 - Categories of supply of goods or services or both as notified
 - Tax shall be paid on reverse charge basis **by the recipient**
- Section 9(4) of the CGST Act
 - Class of registered persons in respect of supply of specified categories of goods or services or both, as notified
 - Goods or services or both received from unregistered supplier
 - Tax shall be paid on reverse charge basis by such class of registered persons, as the recipient of such supply
- Section 5(3) of the IGST Act
- Section 5(4) of the IGST Act

CASE STUDY – 1

- Accident
- Insurance compensation as per policy
 - Is there a supply?
 - Is compensation consideration?
 - Does the asset exist post the transaction?
 - Transfer presumes the existence of the asset and the transferee to whom it is transferred – *Vania Silk Mills (SC)*



CASE STUDY – 1

- ***Jurgen Mohr Vs. Finanzamt Bad Segeberg***
 - Farmers agreed to discontinue milk production as per directions of the Government.
 - Compensation paid by the Government for such discontinuance.
 - The ECJ held that the tax is a consumption based tax and cannot be levied without consumption of service.
- ***Landboden Agrardienste GmbH & Co. LG Vs. Finanzat Calau***
 - Government awarded compensation for reduction of potato production to a farmer.
 - Compensation is not a consideration for any service as there is no consumption involved in this case.

CASE STUDY – 2

- Food and beverages to passengers
- Vendors permitted to advertise in lieu of payment



SUPPLY - CONSIDERATION

- In relation to supply of goods and / or services **includes**
 - Payment made or to be made whether in money or otherwise in respect of or in response to or for the inducement of, supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central or State Government.
 - Monetary value of any act or forbearance, in respect of or in response to or for the inducement of supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central or a State Government.
 - Deposit in respect of supply shall not be payment unless the deposit is applied as consideration for supply by the supplier.
- Section 2(1) of the Malaysia GST Act, 2014

SUPPLY - CONSIDERATION

Decision	Case Reference
'valuable consideration' takes colour from the preceding expression 'cash or deferred payment'. Therefore, it can cover only other monetary payments in the nature of cash or deferred payment.	<i>Devidas Gopal Krishnan Vs. State of Punjab (1967) 20 STC</i>
<i>When goods are exchanged for goods it is a contract of barter or exchange</i>	<i>CIT Vs. Motor and General Stores AIR – 1968 – SC – 200.</i>

BARTER

- Can there be a barter in services?
- Can there be a barter between goods and services?
- Railways providing services for which consideration is goods
- Vendor supplying goods to the passengers during the journey for which consideration is the right to advertise
- Can there be a non-monetary consideration?
- Are both taxable?
- Valuation?
- Can both claim ITC?



IN THE COURSE OR FURTHERANCE OF BUSINESS

Decision	Case Law Reference
Sale of publications spreading the message of Sai Baba cannot be considered as business	<i>Sai Publication (SC)</i>
Sale of Prasadam is not in connection with business	<i>Arulmigu Dhandayuthapani Swami Thirukkoil (Mad)</i>
Charitable Organisation engaged in construction of latrines is not a dealer	<i>Sulabh International (Mad)</i>
Sale of food in canteen run by temple is not taxable	<i>Shree Bhramaramba (AP)</i>
Publishing admission forms does not constitute business. University is not a dealer	<i>Mahatma Gandhi Kashi Vidyapeeth (All)</i>
Providing accommodation to devotees by Trust of temples without profit motive is not business	<i>Palani Dhandayuphabani Devasthanam (Mad)</i>
Sale of business as a going concern is not business	<i>Coromandel Fertilizers (AP)</i>

CASE STUDY - 3

- Old jewellery given by a customer to a jeweller.
- Old jewellery to be melted and converted into new jewellery.
- Supply?



CASE STUDY - 4

- Mr. X had purchased a car in 2016 which is now sold for Rs.21 lakhs. Is there a supply by Mr.X?



CASE STUDY – 3 & 4

- Press Release dated 13.07.2017
 - *Even though sale of old gold by an Individual is for consideration, it cannot be said to be in the course or furtherance of his business (as selling old gold jewellery is not in the business of said individual)*
- FAQ – 15.12.2018
 - *When an individual buys a car for personal use and sells it after a year to a car dealer, the sale of old and used car is not in the course or furtherance of business and hence not a supply*
 - *Sale of used car by dealers who was a dealer in chemicals are not sales in connection with or incidental to the business of manufacture and sale of goods – **Morarji Bros Pvt. Ltd. Vs. State of Maharashtra (1995) 99 STC 117 (Bom HC)***

CASE STUDY - 5

- M/s. XYZ Ltd. provides breakfast and lunch at subsidized rates (35% of the costs) to its employees. Is there a supply?



*Frankly, I've seen better menus on
my computer Accounts Package*

CASE STUDY - 5

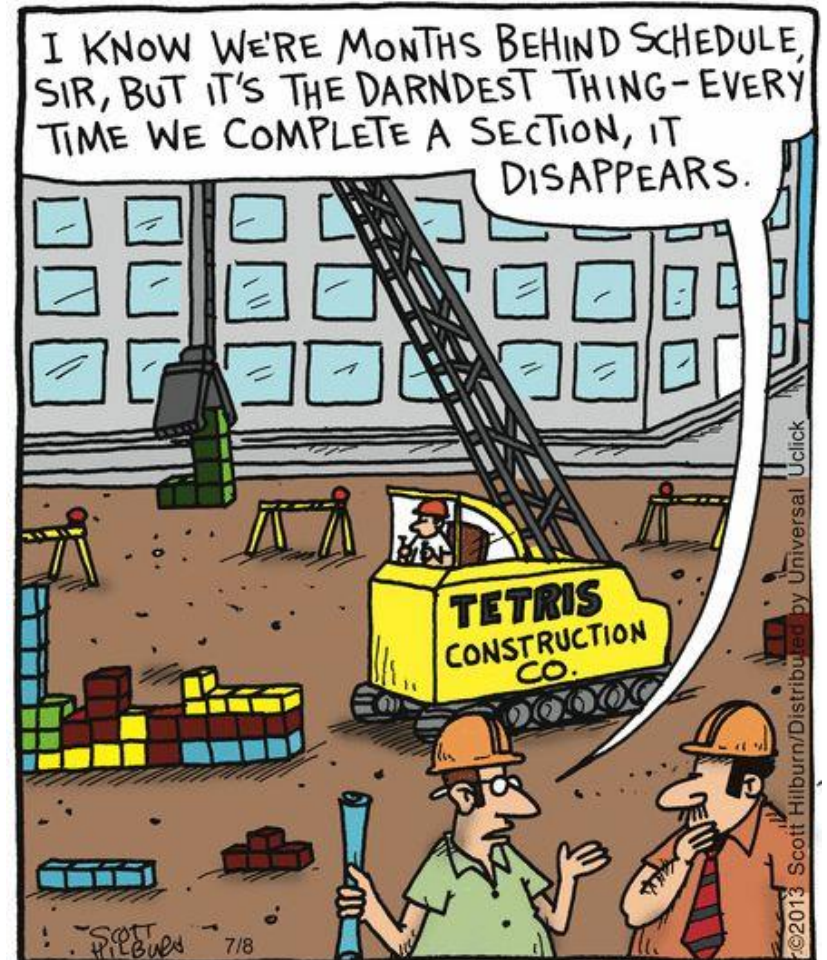
- Public offices in Finland provided legal services free of charge or on part payment based on income / wealth group of the recipient
- ECJ in the case of ***Commission of the European Communities Vs. Republic of Finland*** held that
 - payment made by recipient of services was only a part payment and did not cover whole amount of fees set by law by reference to nature of dispute.
 - Although part payment represented a portion of fee, but, it was fixed based on recipient's income and assets and not on basis of number of hours worked by public offices and complexity of case concerned.
 - Link between legal aid services provided by public offices and payment to be made recipients, was not sufficiently direct for that payment to be regarded as consideration for those services and therefore not taxable.

CASE STUDY - 5

- Provision of food at subsidised cost identified in the employment contract
- Schedule III provides that services by an employee to an employer in the course of or in relation to his employment is neither supply of goods nor supply of services
- *Once the activity undertaken by the petitioner in the form of supply of food to its workers at a subsidized rate is understood to be part of their industrial obligation, it is unthinkable that the same can be construed as service falling within the definition of the expression 'service' under Section 65B(44) of the Finance Act – AP HC – **Bhimas***
- Non-taxable?
- Taxability and ITC

CASE STUDY - 6

- JDA between Landowner and Developer
- Development Rights
- Is there a supply?
- New Notifications



CASE STUDY - 6

- While dealing with specific performance of Agreement for use of TDR held that FSI/TDR are benefits arising from the land consequently must be held as immovable property. The Court observed that an **immovable property** under the General Clauses Act, 1897 under section 3(26) has been defined as to include benefits arising out of land - ***Chheda Housing Development Corpn. Vs. Bibijan Shaikh Farid & Ors. (Bom)***
- Profit a prendre is considered as a right of taking soil, gravel, minerals and the like from the land of another. It is a benefit arising out of land and it is immoveable property within the meaning of Transfer of Property Act, 1882 - ***Ananda Behera and Another (SC)***
- In order that a transaction may be treated as 'business transaction', it must be a transaction that answers the above description from the standpoint of both the parties to the transaction. It cannot be a business transaction from the standpoint of one party to the transaction and something else from the other. So viewed, a single transaction where an owner of immovable property agrees to sell his land to a society may or may not constitute a business transaction depending upon whether the seller is in the business of selling property for profit - ***Bhanushali Housing Co-operative Society Ltd. (SC)***

CASE STUDY - 6

- Development Rights can be considered as immovable property
 - *DLF Commercial Projects Corporations (CESTAT Chandigarh)*
- Supply is not in the course or furtherance of business in the hands of the Landowner
 - When purchase of property is an isolated transaction, on execution of JDA, it cannot be said that the owner of land also intended to carry on business using the subject land as stock in trade since the may well have decided to part with the land for other reasons also - *Devineni Avinash (AP HC)*.
- If it is not a supply in the hands of the Landowner, can RCM apply?

CASE STUDY - 6

- The Hyderabad Bench of the Tribunal in the case of ***Vasantha Green Projects vide Final Order dated 11.05.2018*** has held that it is undisputed that the appellant provided construction services to landowners and received legal rights on his share of land; constructed villas and sold them.
- The Appellant had discharged service tax liability on the transaction with prospective customers and for such customers the cost of land has been included in the value.
- Since the value arrived for prospective customers included the consideration paid or payable for the acquisition of land it cannot again suffer service tax.
- The amount attributable to consideration received in the form of land right from the owner stands included in the value of villas sold to prospective customers.

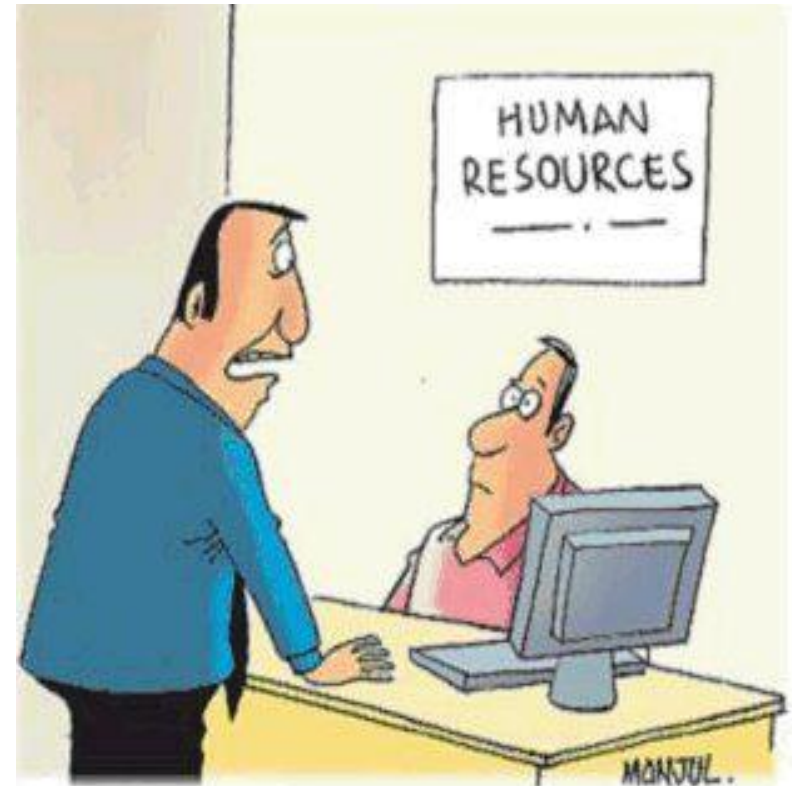
CASE STUDY - 6

- ***Faqir Chand – Supreme Court***

- *An agreement between the owner of a land and a builder for construction of apartments and sale of those apartments so as to share the profits may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.*
- *On facts there is a contract for construction of an apartment and there is consideration for such construction flowing from the land owner to the builder (in the form of sale of undivided share in the land and permission to construct and own the upper floors).*
- *The land owner is the consumer, builder is the service provider.*
- *Can a decision rendered in the context of Consumer Protection Act apply to service tax / GST?*

CASE STUDY - 7

- Notice pay
 - Supply?
 - Consideration?
 - Schedule – II?



I want to withdraw my resignation.
The company which hired me is
hiring my boss too.

CASE STUDY - 7

- New Section 7(1A) w.e.f. 01.07.2017
- Where certain activities or transactions constitute a supply in accordance with provisions of sub-section (1), ***they shall be treated either as supply of goods or supply of services as referred to in Schedule II***
- **Whether Section 7(1A) has diluted the scope of supply?**
 - Section 7(1) deals with supply
 - Such supplies could now be supply of goods or supply of services
 - **Schedule-II has become a classification mechanism**
 - There is no deemed supply

CASE STUDY - 7

- Whether agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act is taxable?
- Whether notice pay is taxable?
- Whether construction of complex is taxable?
- Whether clubs are liable?
- Whether renting of immovable property is taxable?

CASE STUDY - 7

- Schedule-II is now linked with Section 7(1A) of the CGST Act which provides that *where certain activities or transactions constitute a supply in accordance with the provisions of subsection (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule-II.*
 - Whether all these transactions can be considered as a supply under Section 7(1)?
 - Whether the transaction should have the character of service?
 - Mere mention in Schedule II may not be enough unless the transaction fits within the ambit of supply in Section 7(1)

CASE STUDY - 7

- The Federal Court of Appeal Australia in the case of ***AP Group Limited Vs. Commissioner of Taxation*** has observed that
 - The definition of 'supply' and 'consideration', even if read literally as part of that requirement do not result in the omission of the word 'for'.
 - *Section 9-15 and Section 9-17 identify circumstances which are included within the meaning of consideration including, relevantly in Section 9-15(1)(a), 'any payment or any act or forbearance, in connection with a supply of anything'.*
 - *Even if these words are substituted for 'consideration', the result is simply repetition of the 'in connection with' element of the statutory condition, not omission of the word 'for'.*
 - *The consideration must be 'in connection with' the supply but the supply must also be 'for' the consideration.*
 - *The word 'for' thus functions in the statutory description to identify the character of the connection which is required.*
 - *It ensures that not every connection between the giving of consideration and the provision satisfy the first condition of making a taxable supply. If it were otherwise, any form of connection of any character between the making of supply and the payment of consideration would suffice.*

CASE STUDY - 8

- Cost allocation to other state locations
- Third party costs
- Employee costs
- IT systems, management costs



**“Why should I have to put money in?
All I did was sniff your food.”**

CASE STUDY - 8

- Can an activity be a supply even without consideration?
- Can there be a levy without a deeming fiction?
- Can it be said that an employee identified with Hyderabad is providing services to the Chennai location when the company is the employer?
- When employee services are out of GST, can allocation of employee cost be taxable?
- Can an accounting allocation mandate a tax liability?

CASE STUDY - 9

- The Supreme Court has settled the law in the context of inclusion of free supply material in the value for the purpose of calculation of service tax by confirming the view of the Larger Bench of the Tribunal in the case of ***Bhayana Builders***. The Supreme Court vide its judgement dated **19.02.2018** in the case of ***CST Vs. Bhayana Builders*** has held that
 - Service Tax is payable on the gross amount charged.
 - The words 'gross amount' only refers to the entire contract value between the service provider and the service recipient. The word 'gross' is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word 'gross', the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services.
 - In terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

CASE STUDY - 9

- The amount charged should be for 'for such service provided'. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act.
- By using the words 'for such service provided', the Act has provided for a nexus between the amount charged and the services provided. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67.
- Cost of free supply goods provided by the service recipient is neither an amount charged by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever for the taxable services for which value is sought to be determined.
- **A value which is not part of a contract between the service provider and the service receiver has no relevance in the determination of the value of taxable services provided by the service provider.**

FREE SUPPLY OF MATERIALS

- Section 2(31) of the CGST Act, 2017 defines 'consideration' as under:
- *Consideration in relation to the supply of goods or service or both include-*
 - (a) *a payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.*
 - (b) *the monetary value of any act or forbearance in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government*

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply."

- *Free supply of materials in GST ?*
- *What is the meaning of 'payment' whether in money or otherwise?*

FREE SUPPLY OF MATERIALS

- The Madras High Court in the context of income tax in the case of ***CIT Vs. Guruswami Gounder (K.S) and Krishna Raju (KS) (1973) 92 ITR 90*** has held that the cost of the materials supplied to the contractor by the contractee cannot be included in the total receipts for computing income of the contractor.
- The Supreme Court in the case of ***Brij Bhushan Lal Parduman Kumar Vs. CIT (1978) 115 ITR 524*** has held that in substance and reality the material supplied by the contractee always remains with him and the contractor merely had custody and fixed or incorporated them into the works. The Supreme Court approved the decision of the Madras High Court in the case of ***Guruswami Gounder*** cited supra.

FREE SUPPLY OF MATERIALS

- Transaction value
 - price actually paid or payable for the said supply of goods or services or both
 - supplier and the recipient are not related
 - price is the sole consideration for the supply.
- *Concept of sole consideration*

SOLE CONSIDERATION

- Section 15(4) provides that where the value of supply of goods or services or both *cannot be determined under Section 15(1), the same shall be determined in the manner as may be prescribed.*
- *Are there Rules framed for dealing with violation of sole consideration condition?*
- There is no Rule similar to Rule 6 of the Central Excise Valuation Rules.

REVENUE BAR ASSOCIATION VS. UNION OF INDIA (2019) 70 GSTR 277

- The Madras High Court has struck down the provisions of Section 109(3) and Section 109(9) of the CGST Act which prescribed that the Tribunal shall comprise of one Judicial Member, one Technical Member (Centre) and one Technical Member (State).
- The Parliament therefore only has power to set up an alternative institutional mechanism which is no less effective than a High Court. To be effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent.
- The number of expert members cannot exceed the number of Judicial Members on the Bench.
- The High Court also struck down Section 110(1)(b)(iii) of the CGST Act which states that a member of Indian Legal Services who has held a post not less than Additional Secretary for three years can be appointed as Judicial Member.

THANK YOU

***Mobile:* 98400-96876**

***E-mail :* vaithilegal@gmail.com**

LinkedIn: www.linkedin.com/in/vaithilegal

Twitter: [@vaithilegal](https://twitter.com/vaithilegal)