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

WRIT PETITION NO. 4914 OF 2022
WITH
INTERIM APPLICATION (L) NO. 17868 OF 2023

Tata Sons Private Ltd.)...Petitioner

vs

1. Union of India, through the Ministry of Finance)
2. Central Board of Indirect Taxes & Customs)
3. Additional Director, Directorate General of GST Intelligence)
4. Joint Director, Directorate General of GST Intelligence)
5. Joint/Additional Commissioner, Mumbai South Commissionerate.)...Respondents

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Mr. Arvind Datar, Sr. Adv. (through V. C.) a/w Mr. Rohit Jain, Chirag Shetty and Ms. Ayushi Agrawal i/b Economic Laws Practice for the petitioner.
Mr. Anil C. Singh, ASG a/w Jitendra Mishra, Aditya Thackker, Sangeeta Yadav, Ashutosh Mishra, Rupesh Dubey, Adarsh Vyas for Respondents.

CORAM: G. S. KULKARNI & AARTI SATHE, JJ.
RESERVED ON: 27 JANUARY 2026.
PRONOUNCED ON: 30 APRIL 2026

JUDGMENT: (Per G. S. Kulkarni, J.)

1. Rule, returnable forthwith. Respondents waive service. Heard finally by consent of the parties.

2. This Petition under Article 226 of the Constitution of India challenges the legality and validity of (i) the intimation under Form DRC-01A bearing F. No. DGGSTI/MZU/I&IS 'A'/12(4)12/2017/3900 dated 28 September 2022 (Impugned Intimation) and (ii) the show cause notice dated 26 July 2023

(Impugned Show cause Notice) issued by the Joint Director of the Directorate General of GST Intelligence, Mumbai Zonal Unit whereby a demand of Rs.1524 crores (Rs.15,24,35,20,405/-) towards payment of Integrated Goods and Service Tax (IGST) is sought to be levied on the petitioner.

3. Briefly stated, the petitioner's case is : The petitioner-Tata Sons Private Limited (for short "**Tata**") is *inter alia* the principal investment holding company of the Tata Group, as also the promoter of its operating companies, and the owner of the Tata brand and trademarks. It is principally engaged in the business of making and holding investments.

4. NTT Docomo Inc. ("Docomo"), a Japanese company, had invested in the shares of Tata Teleservices Limited (for short "**TTSL**") along with Tata, such relationship between the parties was governed by a Shareholders agreement. TTSL and Docomo entered into a Shareholders Agreement (hereinafter referred to as "**SHA**") on 25 March 2009 *inter alia* for providing telecommunication services to their customers. The SHA sets out the terms and conditions of the share transfer between the parties and certain performance indicators to be achieved by TTSL within the time specified therein. The 'First Key Performance Indicators' were set out in Schedule 7 of the SHA and the 'Second Key Performance Indicators' were specified in Schedule 8 of the SHA.

5. Pursuant to the SHA, Docomo acquired 26% of TTSL's equity capital. Under Clauses 5.6.3 and 5.7.2 of the SHA, it was provided that in the event TTSL failed to satisfy the 'Second Key Performance Indicators', Tata was

obligated to find a buyer for Docomo's share at a 'Sale Price'. Upon non-fulfillment of the said indicators, a 'Trigger Notice' would be deemed to have been issued under Clause 5.7.1. A 'Sale Notice' dated 7 July 2014 was issued by Docomo calling upon Tata to find a buyer in terms of Clause 5.7.2. As Tata was unable to comply with the same, disputes had arisen between Tata and Docomo. Such disputes were ultimately referred for adjudication in arbitral proceedings by Docomo, submitting its request for arbitration on 3 January, 2015 to the London Court of International Arbitration (**"LCIA")**. The arbitral proceedings culminated in an unanimous arbitral award dated 22 June 2016 (hereinafter referred to as the "**Award**") rendered by the Arbitral Tribunal, whereunder the following amounts were held to be payable by Tata to Docomo:

(i) Damages amounting to USD 1,172,137,717;
(ii) Interest amounting to USD 65,276,963;
(iii) Arbitration costs amounting to GBP 119,012.59; and
(iv) Legal costs amounting to JPY 1,067,670,175.

6. For enforcement of the aforesaid Award, Docomo initiated proceedings in the Courts of United Kingdom and United States of America. In India, proceedings for enforcement of the arbitral award were filed before the Delhi High Court. In such proceedings, Tata and Docomo filed Consent Terms, pursuant to which the Delhi High Court, by its order dated 28 April 2017, declared the Award to be enforceable in India. It was held that the arbitral award would operate as a deemed decree passed by the High Court. In terms of the said order passed by the Delhi High Court, Tata deposited an amount of Rs. 8,450

Crores with the Registry of the Delhi High Court.

7. Prior to the remittance of the said amounts to Docomo, Tata received a letter dated 25 September 2017 from the Directorate General of GST Intelligence ("DGGI") bearing F No. DGGSTI/MZU/I&S'A'/ 12(1)36/ 2017/ 4870 stating that an enquiry was proposed to ascertain facts relating to levy of Service Tax on such amounts being paid by Tata to Docomo. Tata was called upon to submit documents including the SHA with Docomo, details of damages paid/payable, copies of any invoice/debit note raised and service tax paid on the damages. Tata was also directed to depute an authorized representative to appear and tender evidence on 10 October 2017 in relation to the said matter.

8. In compliance thereto, Mr. Eruch N. Kapadia, the Chief Financial Officer of Tata appeared before the authorities on 10 October 2017 and submitted the documents as called upon. It was informed to the officials that the amount of damages had been deposited with the Registry of the Delhi High Court on 29 July 2016.

9. Meanwhile, in terms of the order dated 28 April, 2017 passed by the Delhi High Court, and upon receipt of approval from the Competition Commission of India and the relevant tax certificates, the amounts awarded by the Arbitral Tribunal were remitted to Docomo on 30 October 2017 and 7 November 2017.

10. On 3 November 2017, Tata informed the department that the Service Tax Department did not have jurisdiction to initiate an investigation, as the payment

made to Docomo was not in lieu of any service, much less a taxable service. However, by its letter dated 15 November 2017, DGGI addressed to Tata, it was recorded that Tata's contention was not acceptable, in view of clause (e) of Section 66E of the Finance Act, 1994. Tata was again called upon to depute an authorized representative and furnish the requisite documents.

11. Thereafter, Tata by letter dated 27 November 2017, reiterated that no service tax was payable on the damages paid to Docomo, although it submitted the documents as requested. Subsequently, by letter dated 26 December 2017, DGGI called upon Tata to submit copies of the *inter se* agreement between the parties dated 25 March 2009, copies of which were duly furnished on 3 January 2018. Tata reiterated its stand that no service tax was payable on the damages paid to Docomo under the arbitral award.

12. After over six months from the last communication, DGGI issued another letter bearing F. No. DGGSTI/MZU/I&IS'A'/12(1)36/2017/4139 dated 25 July 2018 seeking from Tata, a copy of the tax deduction certificate, if received. Tata by its letter dated 3 August 2018 submitted the tax deduction certificates in respect of payments made to Docomo. Thereafter, by letter dated 4 September 2018, DGGI sought further details as to whether the payments as made by Tata to Docomo were reflected in the ST-3 returns. Tata by its letter dated 5 October 2018 replied that the award payments were not in lieu of any taxable service and hence not liable to be declared in ST-3 returns.

13. Things remained quite stagnant, till after almost eleven months, by

communication dated 19 August 2019, DGGI again sought further information and the exact dates of payment made by Tata to Docomo, along with bank details and documentary evidence. Tata's authorized representative was called upon to appear before the concerned official on 30 August 2019. Tata submitted the requisite details on 30 August 2019 and 18 September 2019. Thereafter, on 27 December 2019, Tata filed a representation with Respondent No. 2 (CBIT) seeking clarification on applicability of GST, on payments made by Tata to Docomo pursuant to the orders of the Delhi High Court. By further letters dated 16 January 2020 and 9 February 2021, Tata requested that the investigation be kept in abeyance pending consideration of the representation. However, Tata has not received any response from the office of the Respondent No. 2 on such representation till date.

14. It is Tata's case that to its surprise, by letter dated 15 February 2022, respondent No. 3 informed Tata that the payments made to Docomo on 30 October 2017 and 7 November 2017 under the arbitral award, namely, the damages, interest, legal costs and arbitration costs attracted GST under the Goods and Services Tax Act, 2017. Tata was directed to depute its representative to appear before respondent no. 3 on 23 February 2022. Accordingly, Tata's authorized representative appeared before respondent no. 3 on 23 February 2022 and 22 March 2022.

15. Thereafter, vide letter dated 4 April 2022, Tata informed respondent No. 3 that all the information pertaining to the transaction was provided by Tata to the respondents. Tata *inter alia* requested respondent no. 3 to provide any

communication received by Respondent No. 3 from the office of Respondent No. 2 on the representation filed by Tata dated 27 December 2019.

16. On the aforesaid conspectus, on 28 September 2022, an intimation of tax ascertained as payable under Form DRC-01A bearing F. No. DGGSTI/MZU/I&IS 'A'/12(4)12/2017/3900 was issued, advising Tata to pay Integrated Goods and Services Tax ("IGST") of Rs.1524,35,20,405/- along with interest and penalty under Section 74(5) of the Central Goods and Services Tax Act, 2017 ("CGST Act"). Such intimation *inter alia* refers to the Office Memorandum F. No. 349/168/2017-GST-Pt. 1/314 dated 21 February 2018 issued by Central Board of Excise & Customs (now Central Board of Indirect Taxes and Customs), Policy wing, Government of India recording the grounds on the basis of which IGST was proposed to be demanded from Tata in respect of the payment made to Docomo. Such intimation alleged that Docomo by its act of tolerating the contractual defaults by Tata and by refraining from initiating any further proceedings against Tata in relation to the SHA and/or the Award had rendered "supply of service" of the nature of agreeing to refrain from an act or tolerating an act, falling within the ambit of Entry 5(e) of Schedule II under Section 7 of the CGST Act. It was stated that Tata was liable to discharge IGST on reverse charge basis as the said service was considered to be an import of service. Tata sought time to examine the said intimation and requested for a copy of the Office Memorandum issued by the CBIC-GST Policy Wing, relied upon in the said intimation. Despite reminder letter dated 2 November 2022, the said document was not furnished and/or was refused is Tata's conclusion. Aggrieved

thereby, the petitioner-Tata has preferred the present Writ Petition *inter alia* challenging the intimation under Form DRC-01A.

17. When this petition was listed for hearing on 30 March 2023, a co-ordinate Bench of this Court deferred the hearing to enable Tata to appear before the concerned authority without prejudice to its rights and contentions including that of submitting to the jurisdiction of the authority of the designated officer. It was also ordered that the documents referred to in the intimation, if sought for by Tata shall be supplied to it. Also, liberty was granted to Tata to place on record the order which would be issued by the concerned authority on the outcome of the said proceedings, if the same were adverse to Tata by necessary amendments.

18. Accordingly, Tata addressed a letter dated 6 April 2023 to respondent no. 3 seeking copy of the Office Memorandum dated 21 February 2018, which was furnished by Respondent No. 3 vide letter dated 21 April 2023. Thereafter, Tata by its letter dated 16 May 2023 addressed to respondent no. 3, sought confirmation as to whether any further correspondence existed on the issue subsequent to the said Office Memorandum between CBIC and the office of Respondent No. 3, and requested copies thereof, if any. In the absence of any response from the office of Respondent No. 3 to the said letter dated 16 May 2023, Tata submitted its detailed reply to the intimation under Form DRC-01A under its letter dated 31 May 2023, as per the directions of this Court including on jurisdiction. However, after Tata filed its reply dated 31 May, 2023, on 3 June 2023, Tata received a communication dated 30 May 2023 from Respondent No. 3, which was in response to Tata's letter dated 16 May 2023, *inter alia* stating that

there was no other correspondence in relation to the Office Memorandum dated 21 February 2018 and further directed Tata to file its reply

19. Thereafter, the present writ petition came to be listed for hearing before a co-ordinate Bench of this Court on 6 June 2023, to which one of us (G.S. Kulkarni, J.) was a member. On the even date, this Court passed an order directing Respondent No. 3 to grant Tata a personal hearing and take an appropriate decision within three weeks from 6 June 2023, while adjourning the proceedings to 4 July, 2023.

20. Tata by letter dated 7 June 2023, informed Respondent No. 3 that its reply to the intimation under Form DRC-01A had already been filed on 31 May 2023 and requested for copies of any further correspondence apart from the Office Memorandum dated 21 February 2018.

21. Pursuant to the order dated 6 June, 2023 passed by this Court, the authorized officer of Tata was granted a personal hearing, who addressed submissions on the lines of Tata's reply dated 31 May 2023.

22. When this writ petition was listed before the Court on 7 July 2023, respondent No. 3 moved an Interim Application seeking extension of time to take a decision in the matter on which hearing had stood concluded. By an order of even date, this Court directed Respondent No. 3 to expeditiously dispose of the pending proceedings within a period of three weeks from 7 July 2023.

23. On such backdrop, Tata was issued a Show Cause Notice dated 26 July

2023 under Section 74(1) of the CGST Act by the Joint Director, DGGI, Zonal Unit, Mumbai (Respondent No. 4), calling upon Tata to show cause within 30 days of receipt of the notice as to why IGST amounting to Rs. 1,524,35,20,405/- along with applicable interest and penalty under Section 74(5) of the CGST Act should not be demanded from it. In paragraph 11 of the said Show Cause Notice, the Respondents in detail referred to the circulars dated 3 August 2022 and 28 February 2023 issued by CBIC, which were relied upon by Tata *inter alia* stating that the same were not applicable to the facts of the present case.

24. On the aforesaid backdrop, Tata contends that the respondents have acted arbitrarily and without jurisdiction in demanding GST, by issuance of the impugned intimation and the consequent impugned Show Cause Notice, which is contended to be in violation of the principles of judicial discipline, as well as the principles of natural justice.

25. On the aforesaid conspectus, the prayers as made in the petition (including the amended prayers[*]) are required to be noted which read thus:

> "(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner-Tatas case and after going into the validity and legality thereof be pleased to quash and set aside the intimation under Form DRC-01A bearing F. No. DGGSTI/MZU/I&IS 'A'/12(4)12/2017 /3900 dated 28.09.2022 (Exhibit - T) issued by the Respondent No. 3;
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> (b) that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India ordering and directing the Respondents themselves, their officers and subordinates to forthwith withdraw the intimation under Form DRC-01A bearing F. No. DGGSTI/MZUI&IS 'A'/12(4)12/2017 3900 dated 28.09.2022 (Exhibit T) issued by the Respondent No. 3;

[*] Amended prayers are in italics

(c) that this Hon'ble Court be pleased to issue a writ of prohibition restraining the Respondents from giving effect to and/or proceeding with the intimation under Form DRC-01A bearing F. No. DGGSTI/MZU/I&IS *A'/12(4)12/2017/3900 dated 28.09.2022 (Exhibit - T) issued by the Respondent No. 3;

(ca) that this Hon'ble Court be pleased to issue a Writ of Certiorari/or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner-Tatas case and after going into the validity and legality thereof be pleased to quash and set aside the Show Cause Notice bearing F No. DGGSTI/MZU/I&IS A/12(4)12/2017/7319 dated 26.07.2023 (Exhibit-II) issued by the Respondent No. 4;

(cb) that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India ordering and directing the Respondents themselves, their officers and subordinates to forthwith withdraw the Show Cause Notice bearing F No. DGGSTI/MZU/I&IS A'/12(4)12/2017/7319 dated 26.07.2023 (Exhibit-II) issued by the Respondent No. 4;

(cc) that this Hon'ble Court be pleased to issue a writ of prohibition restraining the Respondents from giving effect to and/or proceeding with the Show Cause Notice bearing F No. DGGSTI/MZU/I&IS *A'/12(4)12/2017/7319 dated 26.07.2023 (Exhibit-II) issued by the Respondent No. 4;

(cd) that pending the hearing and final disposal of this Petition, the Respondents by themselves, their officers, subordinates, servants and agents be restrained from in any manner enforcing or acting upon the Show Cause Notice bearing F No. DGGSTI/MZU/I&IS 'A'/12(4)12/2017/7319 dated 26.07.2023 (Exhibit-II) issued by the Respondent No. 4.

d. In the alternative, declare that Section 7 read with entry 5(e) to Schedule II of the CGST Act of the GST is illegal, ultra vires and unconstitutional;”

Case of the DGGI in the Reply Affidavit

26. The Directorate General of Goods and Services Tax Intelligence (DGGI) has filed a reply affidavit dated 11 January 2023 of Mr. Rahul Raichur, Deputy Director of DGGI prior to issuance of the impugned show cause notice dated 26 July, 2023.

27. At the outset, considering the prayers as made in the writ petition, an objection is raised to its maintainability and/or that no ground to maintain such prayers being made out by Tata. It is also contended that the writ petition is

premature.

28. As regards the challenge to the constitutional validity of Section 7 read with Entry 5(e) of Schedule II of the CGST Act, 2017, the Respondents submitted that the same is wholly academic and does not arise for consideration in the absence of any factual foundation.

Affidavit-in-Rejoinder

29. Tata has filed a para-wise Affidavit-in-Rejoinder dated 25 January 2023 to the Affidavit-in-Reply filed on behalf of the Respondents dated 11 January 2023 (supra), reiterating its case in the Writ Petition in relation to the impugned action of levying tax on the settlement of the arbitral award. Tata has also justified its challenge to the validity of the provisions of the GST Act, as assailed in the petition. It is further contended that the entire action of the respondents in initiating recovery proceedings in respect of the subject matter is wholly without jurisdiction. Tata has denied the contention that the petition is premature or not maintainable. Tata has also reiterated its contention regarding the Circular, namely, Circular No. 178/10/2022-GST dated 3 August, 2022 (supra) and its binding nature.

Submissions on behalf of the petitioner-Tata

30. Mr. Datar, learned Senior Advocate appearing for the petitioner-Tata has made the following submissions:

(i) It is submitted that it is clear from the facts that a contractual dispute

between the petitioner-Tata and NTT Docomo Inc. (Docomo) subject matter of arbitral proceedings, resulted in an award of damages to the extent of Rs. 8,450 crores passed by an arbitral tribunal in London dated 22 June, 2016. The award, which is an international commercial award, was governed by Part II of the Arbitration and Conciliation Act, 1996 (**"A & C Act")**. The award was being enforced by Docomo in terms of sections 48 and 49 of the A & C Act. In the said proceedings initiated by Docomo before the Delhi High Court, it was held by the Delhi High Court that the award was enforceable as a decree of the Court. The petitioner – Tata in such proceedings deposited the award amount with the Registrar of the Delhi High Court, after compliance with other statutory formalities (for which, six months was provided). The amounts were thereafter withdrawn/remitted to Docomo.

(ii) It is submitted that in addition to the proceedings before the Delhi High Court, Docomo has also filed execution proceedings in the Courts of United Kingdom (UK) and the United State of America (USA) for attachment of assets of the petitioner-Tata in Jaguar Land Rover and other Tata companies. It is submitted that since the award was fully satisfied with Tata making payment of damages of Rs.8,450 crores as awarded by the arbitral tribunal under the orders passed by the Delhi High Court. Docomo withdrew the execution proceedings, which were instituted before the Foreign Courts (UK and USA). To this effect, Docomo and Tata filed consent terms before the Delhi High Court agreeing that as the award had stood satisfied, Docomo agreed that the execution proceedings filed before the UK and USA Courts

would be withdrawn. It is Mr. Datar's submission that no consideration was independently paid to Docomo for withdrawal of execution proceedings and that the withdrawal of the execution proceedings was an obvious outcome of discharge by Tata of the decretal amount in full and final, on which no tax could be levied.

Submission on Show Cause Notice dated 26.07.2023

(iii) Mr. Datar would submit that on the aforesaid premise, the show cause notice dated 26 July, 2023 in Form DRC-01A was issued against the petitioner-Tata seeking to levy Integrated Goods and Services Tax Act (IGST) on the damages of Rs.8450 crores on the ground that by withdrawing the execution proceedings, Docomo had "tolerated this act", i.e., the breach, which has attracted a levy of GST under Entry No. 5(e) read with Schedule II of the CGST, 2017, which provides for "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act". It is submitted that *ex-facie* this was misconceived/ wrong, as Docomo had not tolerated the breach and finally was awarded damages of Rs. 8450 crores, which was enforced by the Delhi High Court as a decree of the Court.

(iv) Mr. Datar has next submitted that a Writ Petition was filed for the reason that Circular No.178/10/2022-GST dated 3 August, 2022 had declared that the damages are not taxable, as despite bringing this to the notice of the GST authorities, as directed by this Court, the department proceeded to issue the impugned show cause notice dated 26 July, 2023 once

again seeking to levy IGST on the amount of damages. It is submitted that accordingly, the writ petition was amended to quash the show cause notice.

Show cause notice liable to be quashed contrary to Board Circulars

(v) Mr. Datar would submit that the show cause notice would be liable to be quashed, firstly on the ground that it is contrary to the Board Circulars referring to para 7.1.4 of Circular no. 178/10/2022 which expressly provides that liquidated damages are paid as compensation for an injury/breach of contract, and are not liable to tax. The circular also holds that Entry No. 5(e) of Schedule II of the CGST Act, 2017 will apply only when there is a "separate agreement" to tolerate an act and there is a separate consideration for the same. In such context, Mr. Datar has also referred to paragraphs 7.1.5 and 7.1.6 of the Circular. It is submitted that the said circular, which refers to liquidated damages under section 74, necessarily would apply in the present case, which concerns award of damages.

(vi) Mr. Datar would next submit that Circular no. 214/1/2023-Service Tax dated 28 February, 2023 has once again reiterated the earlier position as set out in Circular No.178/10/2022 and directed withdrawal of appeals in the Supreme Court against CESTAT rulings which had held that damages, penalty, etc. were not liable to service tax. The Circular also directed that no further appeals should be filed in other cases, as clearly seen from paragraph 5 of the circular.

(vii) Mr. Datar would submit that these circulars are binding on the department, hence a writ of Prohibition would certainly lie against the

Department, as a demand for IGST on damages cannot be made for such reason. It is submitted that the impugned show cause notice is hence liable to be quashed and set aside considering the circulars being binding on the Department. In supporting such submission, reliance is placed on the decision of the Supreme Court in **Paper Products Limited v. CCE**[1]

(viii) Mr. Datar would next submit that apart from the Board Circulars, it is settled position in law that damages are the fait of the court. They do not represent consideration for any agreement/contract. In supporting such submission, reliance is placed on the decision of the Supreme in **Union of India v. Raman Iron Foundry**[2]**,** which affirms the view of Chagla CJ in the decision of this Court in **Iron & Hardware (India) Co. vs. Shamlal & Brothers**[3]. Mr. Datar would next submit that the levy of CGST or IGST is on supply of goods or services and on the consideration or transaction value of such supply, for such reason, it would be absurd to treat damages as consideration or the transaction value of supply. This, particularly, when a decree for damages is a consequence of a breach of contract, hence, it cannot be treated as "consideration" or transaction value for supply of services.

(ix) Mr. Datar would submit that apart from the binding nature of the circulars and the settled principles of law in that regard as laid down in several decisions of the Supreme Court and of this Court, it is submitted that having due regard to the statutory provisions, IGST can be levied only if there is a

1 1999(112) ENT 765 (SC)
2 1974 SCC (2) 231
3 1954 SCC OnLine Bom. 5

supply under sections 7 and 7(1A) of the CGST Act, 2017, and it can only be on the value of the taxable supply. It is submitted that under section 15 of the CGST Act, the value is the price actually paid or payable for the supply of goods or services. Damages awarded by an Arbitral Tribunal and affirmed by the High Court become a “decretal amount”, which can never be the transaction value or the price paid for supply of services of "tolerating an act" under Entry No. 5(e) of Schedule II of the CGST Act.

(x) It is submitted that once Docomo has received the entire amount of damages post the award in proceedings before the UK/US Courts and further proceedings before the Delhi High Court, there is no question of the Japanese company/DOCOMO "tolerating any breach." It is submitted that the withdrawal of the UK/US proceedings became consequential and there was no act of toleration by Docomo. It is submitted that thus, the demand is contrary to Entry No. 5(e) of Schedule II, as this entry will not apply in respect of such court proceedings.

Submissions on Alternate remedy:

(xi) It is submitted that the plea of alternative remedy needs to be rejected, as the show cause notice is wholly without jurisdiction. Also, in a writ of prohibition, the writ is a matter of right when there is no jurisdiction.

(xii) It is submitted that a show cause notice as issued is - (i) in an open defiance of two Board Circulars; (ii) It is contrary to judgments of the Supreme Court and this Court on the nature of damages; and (iii) It is in

violation of Sections 7, 7(1A) and 15 read with Entry No. 5(e) of Schedule II of the CGST Act, 2017 and hence the same deserves to be quashed with exemplary costs. In supporting the submission on the plea of alternate remedy to be rejected, reliance is placed on the decision of the Supreme Court on **Whirlpool Corporation v/s Registrar of Trade Marks[4].**

(xiii) It is submitted that the impugned show cause notice is inherently without jurisdiction inasmuch as the arbitral award being compromised in terms of the consent terms as entered before the Delhi High Court between the petitioner-Tata and Docomo cannot be categorized as supply of any service considering the clear provisions of the CGST Act and more particularly Section 7 read with Section 9 and Schedule II Entry 5(e) thereof. In the absence of such jurisdictional authority, the impugned show cause notice needs to fall to the ground.

(xiv) The Arbitral Award necessarily awards damages against the petitioner-Tata, being a result of adjudication of the disputes in the arbitral proceedings. The award of damages necessarily stands recognized in terms of what Section 73 of the Indian Contract Act, 1872, would provide. The legal character of such amounts being leviable to be paid by Tata to Docomo is by way of damages, the nature and character of such amounts to be damages whether under Section 73 or Section 74 (liquidated damages) would not change. The award of damages is to compensate the party to an agreement for the losses it had suffered on account of breach of the contract, and in this

4 (1998) 8 SCC 1

view of the matter, once there is adjudication of the damages and the liability to pay such damages is under an arbitral award, which is akin to a decree of the Court, there is no question of the award *per se* amounting to any supply of service.

(xv) It is next submitted that even if the award is compromised under certain conditions, which would be to do away with the enforcement and recovery proceedings in the other jurisdiction, it would not alter the legal character of the award i.e. the damages being granted in the arbitral proceedings.

(xvi) It is next submitted that the recovery proceedings under the award which are permissible to be instituted in different jurisdictions whenever enforcement and recovery are possible, are a consequence or incidental to the award and are not independent proceedings, much less, categorized as a supply of service in the event of any covenant to dispose of such incidental proceedings. This is an error which the jurisdictional officer has committed in issuing the impugned show cause notice.

(xvii) It is next submitted that in any event the situation akin to the present situation has already been subject matter of consideration of the Central Board of Indirect Taxes and Customs (CBIC) when the Circular dated 3 August 2022 and 28 February 2023 were issued although in terms of liquidated damages (sic 73 of the Contract Act) categorically holding that in respect of an arbitration award for decree of damages, there cannot be any

levy under the GST Laws. The impugned action of issuing show cause notice, hence, is in the teeth of the circulars. The petitioner has hence become entitled for the reliefs as prayed for.

Submissions on behalf of the respondent

31. On behalf of the respondent, Mr. Anil Singh, learned Additional Solicitor General has made the following submissions:

The present Writ Petition was initially filed by the petitioner-Tata *inter alia* challenging the notice dated 28 September, 2022 issued in Form DRC-01A, which was a pre-show cause consultation notice. Pending this petition, this Court passed an order dated 6 June 2023 directing the petitioner-Tata to appear before the GST authority under the said notice and make submissions, without prejudice to the rights and contentions, including submitting to the jurisdiction of the said authority. The petitioner-Tata accordingly appeared before the designated authority by filing its reply and written submissions. After considering the reply and submissions, the respondent issued the impugned show cause notice dated 26 July, 2023 under Section 74 (1) of the CGST Act, which is challenged in this petition by amending the petition. It is submitted that on such premise, the case of the petitioner-Tata is that the Court should consider and arrive at a finding that the payment made by the petitioner-Tata to Docomo is not a "supply of service" as per section 7 of the CGST Act read with entry 5(e) to Schedule II of CGST Act, as also the show cause notice is contrary to Circulars dated 3 August, 2022 and 28 February, 2023 issued by CBIC.

32. It cannot be that the DGGI has no jurisdiction and/or authority to issue the impugned show cause notice. It is submitted that there is no inherent lack of jurisdiction and therefore, the petition is not maintainable. Also, the applicability of the Circulars in the facts and circumstances of the case requires adjudication and the adjudicating authority is competent to determine the issue of taxability as well as jurisdiction, which ought to be raised by the petitioner-Tata. It is submitted that on this count alone, the petition is not maintainable and is liable to be dismissed. In supporting such submissions, reliance is placed on (i) **State of Orrisa vs. Mesco Steel Ltd.**[5], (ii) **Union of India vs. Bajaj Tempo Ltd. & Ors.**[6]; (iii) **Special Director vs. Mohd. Ghulam Ghouse**[7]; (iv) **Union of India vs. Kunisetty Satyanarayana**[8]; (v) **Om Drishian International Ltd vs. Additional Director, Directorate of Revenue Intelligence and Anr.**[9]; (vi) **Union of India vs. Coastal Containers Transporters Association**[10]; (vii) **State of Madhya Pradesh & Ors. vs. Commercial Engineers and Body Building Co.**[11]; (viii) **Oberoi Construction Ltd. vs. Union of India & Ors.**[12]; (ix) **United Bank of India vs. Satyavati Tondon & Ors.**[13].

33. It is next submitted that Docomo and the petitioner-Tata had entered into the shareholders agreement dated 25 March 2009 (Exhibit A, page 54), under which disputes and differences had arisen in relation to performance of clause

5 (2013) 4 SCC 340
6 (1998) 9 SCC 281
7 (2004) 3 SCC 440
8 (2006) 12 SCC 28
9 2021 SCC OnLine Bom 8036
10 2019 (22) G.S.T.L. 481 (SC)
11 2022 SCC OnLine 1425
12 2024 SCC OnLine Bom 3508
13 2010 (8) SCC 110

5.7.2 being a clause whereby the petitioner-Tata was to find a buyer for the shares held by Docomo at a fair price or to buy the shares itself. It is submitted that the arbitral tribunal has made the following observations in the context of the said clause:- "*Docomo contends that its object was to ensure that Docomo could dispose of its shares if TTSL failed to perform and Docomo's losses would never be greater than half of its initial investment & TATA accepts that the clause was intended to assure Docomo a minimum exit price or a guaranteed exit price. The Tribunal considers it fair to characterize this as stop loss protection*". It is submitted that in such context, the Delhi High Court in the proceedings qua enforcement of the award as initiated by Docomo has observed that the Docomo and the petitioner-Tata have arrived at Consent Terms *inter alia* to the effect that petitioner-Tata will comply with and make payment as per the Award. A period of six months was agreed between the parties, as a suspension period during which the Docomo will not precipitate further proceedings and that within such six months the petitioner-Tata has to obtain certain certificates from the tax perspective and make payment of the award amounts, whereupon the proceedings would stand withdrawn by Docomo and if payment is not made then proceedings would continue.

34. In the aforesaid context, it is submitted that the show cause notice raised several grounds. It is submitted that the petitioner-Tata had failed to show cause and address certain portions of the impugned show cause notice which would indicate that *ex facie*, in terms of the 2022 and 2023 circulars, there is a supply which covers an independent contract for an act of forbearance or toleration. In

other words, it is submitted that it is noticed from the operative part of the Award that the monies awarded were due and payable within a period of 21 days from the award.

35. It is next submitted that the petitioner-Tata has not simply agreed to pay as per the award resulting in withdrawal of the enforcement proceedings by Docomo, instead, Consent Terms have been entered into between the parties. It is submitted that even at the time of hearing at the pre show cause notice stage, the complete consent terms were not available, and the petitioner-Tata had referred to the orders passed by the Delhi High Court dated 28 April 2017.

36. Mr. Singh would submit that it is the case of the department that the following contents of the consent terms imply a new and independent agreement and the obligations thereunder go beyond the award inasmuch as :-

> "3. The obligations of the Respondent hereunder shall further be subject to receipt of approval of the Competition Commission of India and (it) receipt of the Withholding Tax Certificate (as defined hereinafter) The petitioner will apply to the Indian Income Tax authorities to obtain the withholding tax certificate ("Withholding Tax Certificate!) in relation to payments under the Award based on which Respondent will remit the Funds, after deduction of taxes, if any, to Designated Bank Account. The petitioner agrees that the amount of Rs. $450,00,00,000 (Rupees Eight Thousand Four Hundred and Fifty Crore Only) along with accrued interest which amounts to a total of Rs. 8,730,59.83:623 (Rupees Eight Thousand Seven Hundred Thirty Crore Fifty Nine Lakh Eighty Three Thousand Six Hundred and Twenty Three Only) as on 30 January 2017 (along with any further interest which may accrue thereon) ("Deposit") deposited in this Hon'ble Court shall be released in accordance with the procedure prescribed in detail in paragraph 4 below. It is clarified that in case there is any difference between the Deposit and the Funds as per the Award, then any shortfall would be made up by the Respondent to the extent of the shortfall, and in case there is any excess amount then the same will get remitted back to Respondent, by way of withdrawal or deposit from/into the Interim Account by the Respondent, and the deduction of tax, if any, shall be computed and withheld on such adjusted amount.
>
> 4. Subject to the ruling and directions of this Honourable Court as provided in paragraph 3 above, the payment of the funds, after deduction of taxes, if any, to

the Designated Bank Account and other related actions shall be made in the following manner:

4.1 The Deposit is to be retained by the Registrar of this Hon'ble Court till requisite clearance from Competition Commission and the Withholding Tax Certificate as mentioned in these consent terms have been obtained. Once the requisite clearances/certificate have been obtained the Deposit will be transferred to an account in the name of the Respondent ("Interim Account")

4.2 The petitioner will then nominate an Authorised Dealer ("AD") for remittance of Funds after deduction of taxes, if any, to the Designated Bank Account ARE

4.3 The petitioner undertakes that it shall, simultaneously with the receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account, complete the process of debiting its dematerialised accounts of all shares of Tata Teleservices Limited ("Shares) held by the petitioner and have the Shares credited to the dematerialised accounts of the Respondent and/or its nominees and the Respondent shall co-operate with the petitioner for having the "Shares" credited to the dematerialised accounts of the Respondent and/or its nominees and in completing and executing Form FCTRS for this purpose.

4.4 Both Parties will take all actions and provide all documents and information as requested by the AD to permit remittance of the Funds, after deduction of taxes, if any, to the Designated Bank Account and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees.

5. In light of the withdrawal of the objections of the Respondent, this Honourable Court may be pleased to declare that the Award is enforceable in India and shall operate as a deemed decree and this Honourable Court shall proceed to execute the same, subject to the ruling on the objections of RBI as raised in RBI's Application for Intervention in these proceedings (and for that purpose the Parties agree not to object to the intervention of RBI).

6. The petitioner agrees and undertakes that the enforcement of the Award in India, and this deemed decree, against the Indian assets of Tata will be limited to the monies deposited (along with interest accrued thereon) in this Hon'ble Court by the Respondent only so long as Respondent complies with its obligation to make up for any difference between the Deposit and the Finds in terms of paragraph 3 of these consent terms.

7. The petitioner undertakes to this Honourable Court that shall suspend proceedings initiated against the Respondent which are currently pending in United Kingdom [Claim No CL-2016-000428 in the High Court of Justice, Queen's Bench Division of the Commercial Court) and in the United States of America [Civil Action No. 1:16-cv-7809, in the United States District Court, Southern District of New York for a period 6 months from the date hereof ("Suspension "Period"). Upon receipt of the Funds, after deduction of taxes, if any, by the petitioner in the Designated Bank Account any time within the unconditionally withdraw all proceedings initiated against the Suspension Period as per paragraph. 4 above, the petitioner shall Respondent in relation to the SIIA and/or the Award, including aforementioned proceedings in the United Kingdom and aforementioned proceedings in the United States of America within one week thereof. In the event of the petitioner not receiving payment of the Funds, after deduction of taxes, if any, in the Designated Bank Account of

the petitioner within the Suspension Period, the petitioner shall be free to pursue the UK and US enforcement actions.

8. The petitioner undertakes to this Honourable Court that it shall not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period, or thereafter, if the Suspension Period, if the Funds, after deduction of taxes, if any, are received during the Suspension Period.

9. The Parties agree that upon receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account by the petitioner, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees, as per paragraphs 3 and 4 above, the Award shall stand fully and finally satisfied and discharged and that the Parties shall have no outstanding claims against each other.

10. The Parties agree that the Consent Terms as set out hereinabove care exhaustive and conclusive, as between the Parties hereto, with respect to the issues dealt hereinabove.

11. The Parties shall co-operate with each other and provide all necessary assistance in completing and filing all forms and completing all other formalities necessary for completing the payment of the Funds, after deduction of taxes, if any, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees as set out in this order.

12. The parties shall bear their respective costs in connection with these proceedings."

37. Relying on the aforesaid paragraphs of the consent terms, it is submitted by Mr. Singh that the consent terms introduced further contractual bargains between the parties which are not limited to merely complying with the award as contended by the petitioner-Tata. It is submitted that apart from the detailed modalities of payment being agreed, one of the most important facets of the consent terms, is to the effect that, despite the award being enforceable, Docomo had agreed to forbear and/or refrain from and/or tolerate the non payment of monies for a period of six months, that is the suspension period. It is submitted that such suspension period is beyond the award and the same is nothing but a new contract between these parties whereby one party has agreed to refrain or tolerate non-payment for a period of six months without precipitating further

action. It is this agreement between the parties which, according to Mr. Singh, squarely falls within Clause 7.1.6 of the 2022 Circular. It is thus submitted that the consent terms go beyond the award and if it was simply the award which was to be complied, then there was no need for consent terms.

38. It is next submitted that the show cause notice specifically refers to the consent terms and the fact that these consent terms make out a new bargain and/or constitute supply and make out a case in paragraph 6(c), 7.5, 7.12, 11.3, 11.4 of the show cause notice. It is hence, submitted that *ex facie* there is a supply and the clear existence of a jurisdictional fact for the show cause notice to be issued, for which an inquiry needs to be conducted by the authorities under the GST Act. For such reason, it is not a case of lack of inherent jurisdiction.

39. In regard to the contention as urged on behalf of the petitioner-Tata that the show cause notice violates the circulars, it is submitted that the said position can be taken before the adjudicating officer and such issue need not be gone into before this Court. On the aforesaid contention it is submitted that the petition deserves to be dismissed.

Analysis & Conclusion

40. Having heard learned counsel for the parties and having perused the record, in the facts and circumstances of the case, the question which would arise for determination is "Whether the settlement between the parties in the proceedings filed by Docomo under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 (ACA), under which the arbitral award for damages stood

settled between the parties, would amount to "supply" within the definition of Section 7(1) of the CGST Act?"

41. As the facts of the case unfold, it is clear that disputes and differences had arisen between Tata and Docomo, which were subject matter of an international commercial arbitration, which culminated into an award of damages against Tata for an amount of US$ 1,172,137,717. The award liability was not discharged by Tata, consequent thereto, Docomo initiated recovery proceedings, which were in the nature of execution of the arbitral award by filing proceedings before UK and US Courts. Also, Docomo filed proceedings before the Delhi High Court invoking the provisions of Sections 44, 46, 47 and 49 of the ACA read with the provisions of Order 21 of the Code of Civil Procedure, 1908 for enforcement and execution of the said arbitral award dated 22 June, 2016. Admittedly, in such proceedings, Tata expressed its readiness and willingness to deposit the award amount with the Delhi High Court. In such proceedings, Tata and Docomo on 25 February, 2017 sought to place on record the consent terms as arrived between the parties, and accordingly prayed for disposal of the enforcement/execution petition filed by Docomo in terms of the said settlement. The consent terms as entered between the parties were to the following effect:

> "26. The consent terms arrived at between the parties read as under:
>
> In the interest of putting an end to a dispute that had arisen between the Parties and in the public interest of preserving a fair investment environment in India, the Parties to the above Petition ("Parties") submit that this Honourable Court be pleased to pass an order in terms of these Consent Terms so as to put an end to the issues and differences between the Parties relating to the arbitration award dated June 22, 2016 passed by the Arbitral Tribunal in London, United Kingdom in LCIA Case No. 152896 ("Award"):

1. **The Respondent has** always been, and remains committed to performing its contractual obligations under the Shareholders' Agreement dated March 25, 2009 ("SHA").

2. **In these circumstances although the Respondent believes it had grounds to resist enforcement of the Award as stated in its affidavit dated September 01 2016 "filed before this Hon'ble Court, as a gesture of good faith and in accordance with the Respondent's record of adherence to contractual commitments that the Respondent has always enjoyed both in India and abroad, the Respondent withdraws its objections to the enforcement of the Award in India.**

3. The Respondent agrees to the disposition of the amount awarded in paragraph 202 of the Award (being the sums of (i) US $ 1,172,137,717, (ii) US $ 65,276,963, (iii) GBP 119,012.59 and JPY 1,067,670,175, and (iv) interest at 3.5% per annum compounded with quarterly rests on the amounts specified in the foregoing items (1),(ii) and (iii) from 21 days of the date of the Award until payment of the said amounts) ("Funds") in the manner set out in paragraph 4 below, and as per the directions of this Hon'ble Court, for payment to the petitioner-Tata in satisfaction of the Award in United States Dollars to a bank account designated by the petitioner-Tata ("Designated Bank Account"), subject to ruling on the objections raised by the Reserve Bank of India ("RBI") in its Application for Intervention in these proceedings after hearing RBI. The obligations of the Respondent hereunder shall further be subject to (i) receipt of approval of the Competition Commission of India and (ii) receipt of the Withholding Tax Certificate (as defined hereinafter). The petitioner-Tata will apply to the Indian Income Tax authorities to obtain the withholding tax certificate ("Withholding Tax Certificate") in relation to payments under the Award based on which Respondent will remit the Funds, after deduction of taxes, if any, to Designated Bank Account.

The petitioner agrees that the amount of Rs. 8450,00,00,000 (Rupees Eight Thousand Four Hundred and Fifty Crore Only) along with accrued interest which amounts to a total of Rs. 8,730,59,83,623.. (Rupees Eight Thousand. Seven Hundred Thirty Crore Fifty Nine Lakh Eighty Three Thousand Six Hundred and Twenty Three Only) as on 30 January 2017 (along with any further interest which may accrue thereon) ("Deposit") deposited in this Hon'ble Court shall be released in accordance with the procedure prescribed in detail in paragraph 4 below. It is clarified that in case there is any difference between the Deposit and the Funds as per the Award, then any shortfall would be made up by the Respondent to the extent of the shortfall, and in case there is any excess amount then the same will get remitted back to Respondent, by way of withdrawal or deposit from/into the Interim Account by the Respondent, and the deduction of tax, if any, shall be computed and withheld on such adjusted amount.

4. Subject to the ruling and directions of this Honourable Court, as provided in paragraph 3 above, the payment of the Funds, after deduction of taxes, if any, to the Designated Bank Account and other related actions shall be made in the following manner:

4.1 The Deposit is to be retained by the Registrar of this Hon'ble Court till requisite clearance from Competition Commission and the Withholding Tax Certificate as mentioned in these consent terms have been obtained.

Once the requisite clearances/ certificate have been obtained the Deposit will be transferred to an account in the name of the Respondent ("Interim Account").

4.2 **Petitioner** will then nominate an Authorised Dealer ("AD") for remittance of Funds after deduction of taxes, if any, to the Designated Bank Account.

4.3 **The petitioner** undertakes that it shall, simultaneously with the receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account, complete the process of debiting its dematerialised accounts of all shares of Tata Teleservices Limited ("Shares") held by the petitioner-Tata and have the Shares credited to the. dematerialised accounts of the Respondent and/or its nominees and the Respondent shall co-operate with the petitioner-Tata for having the Shares credited to the dematerialised accounts of the Respondent and/or its nominees and in completing and executing Form FCTRS for this purpose.

4.4 **Both Parties will** take all actions and provide all documents and information as requested by the AD to permit remittance of the Funds, after deduction of taxes, if any, to the Designated Bank Account and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees.'

5. **In light of the withdrawal of the objections of the Respondent, this Honourable Court may be pleased to declare that the Award is enforceable in India and shall operate as a deemed decree and this Honourable Court shall proceed to execute the same, subject to the ruling on the objections of RBI as raised in RBI's Application for Intervention in these proceedings (and for that purpose the Parties agree not to object to the intervention of RBI)**.

6. **The petitioner*** agrees and undertakes that the enforcement of the Award in India, and this deemed decree, against the Indian assets of Tata will be limited to the monies deposited (along with interest accrued thereon) in this Hon'ble Court by the Respondent only so long as Respondent complies with its obligation to make up for any difference between the Deposit and the Funds in terms of paragraph 3 of these consent terms.

7. **The petitioner** undertakes to this Honourable Court that it shall suspend proceedings initiated against the Respondent which are currently pending in United Kingdom [Claim No.CL-2016-000428 in the High Court of Justice, Queen's Bench Division of the Commercial Court] and in the United States of America [Civil Action No. 1:16-cv-7809, in the United States District Court, Southern District of New York] for a period 6 months. from the date hereof ("Suspension Period"). Upon receipt of the Funds, after deduction of taxes, if any, by the petitioner-Tata in the Designated Bank Account any time within the Suspension Period as per paragraph 4 above, the petitioner-Tata shall unconditionally withdraw all proceedings initiated against the Respondent in relation to the SHA and/or the Award, including aforementioned proceedings in the United Kingdom and aforementioned proceedings in the United States of America within one week thereof. In the event of the petitioner-Tata not receiving payment of the Funds, after

* Petitioner is Docomo
Tata is respondent

deduction of taxes, if any, in the Designated Bank Account of the petitioner-Tata within
the Suspension Period, the petitioner shall be free to pursue the UK and US enforcement actions.

8. **The petitioner** undertakes to this Honourable Court that it shall not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period, or thereafter, if the Funds, after deduction of taxes, if any, are received duringthe Suspension Period.

9. **The Parties agree that upon receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account by the petitioner, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees, as per paragraphs 3 and 4 above, the Award shall stand fully and finally satisfied and discharged and that the Parties shall have no outstanding claims against each other**.

10. **The Parties agree** that the Consent Terms as set out hereinabove are exhaustive and conclusive, as between the Parties hereto, with respect to the issues dealt hereinabove.

11. **The Parties shall** co-operate with each other and provide all necessary assistance in completing and filing all forms and completing all other formalities necessary for completing the payment of the Funds, after deduction of taxes, if any, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees as set out in this order.

12. The parties shall bear their respective costs in connection with these proceedings."

(emphasis supplied)

42. The learned Single Judge of the Delhi High Court passed a final order dated 28 April, 2017 on the said enforcement proceedings, whereby the Delhi High Court rejected even the intervention as made by the Reserve Bank of India (RBI) in the enforcement proceedings of the said arbitral award, when RBI had contended that its prior permission would be required for discharge of such liability under the award by Tata in favour of Docomo. It was also held that in the proceedings for enforcement of the arbitral award, RBI would not have any role to play. The Delhi High Court clearly observed that under the arbitral award, Docomo was entitled to the sum awarded, which was in the nature of damages and not the sale price of the shares and for such reason, special

permission to be taken from RBI as asserted, also did not arise. It was held that Docomo being awarded damages and not the price of shares, was the clear position on record of the arbitral proceedings. It is in these circumstances, considering the settled position in law that the parties to a suit, or as the case may be, an arbitration, may agree to the method of settlement and accordingly enter into a settlement, at the stage of execution of the decree/award, that the Court accepted the consent terms, which were held to be not in any manner contrary to the Indian law much less opposed to the public policy or void or voidable under the Indian Contract Act, 1872. The relevant observations as made by the Delhi High Court are imperative to be noted, which read thus:

> "43. The very stand that RBI is now taking in this Court that without its special permission there cannot be a transfer of monies by Tata to Docomo, was taken by Tata before the AT and was expressly negatived by the AT by a unanimous Award. **The AT decided that since the sum awarded to Docomo was in the nature of damages and not the Sale Price of the shares the question of having to seek the special permission of RBI did not arise If, enforcement of the Award, and the Court finds no impediment to its enforcement, then the Award which takes a view on the requirement of RBI's permission will be enforceable as such. RBI will be bound by such determination and cannot refuse permission.**
>
> 44. **To repeat, the AT has come to a definite conclusion that what has been awarded to Docomo is damages**. It has given effect to the alternative mechanism envisaged by the parties under Clause 5.7.2 of the SHA. It is not even RBI's stand that any general or special permission of RBI would be required if what is being paid by Tata to Docomo is in the nature of damages. ......
>
> 50. **The Award is very clear on this issue. What was awarded to Docomo were damages and not the price of the shares. The order that that the share script must be returned to Tata was only incidental and, in fact, Docomo itself was not interested in retaining the share scrips**. It could be seen as an acknowledgment of Docomo volunteering to return the share scrips as they were of no particular use to it. It is not open to RBI to re-characterise the nature of the payment in terms of the Award to which there is no longer any opposition from Tata, the only party which could possibly oppose its enforcement. RBI has not placed before the Court any requirement for any permission of RBI having to be obtained for Docomo to receive the money as damages in terms of the Award.
>
> .....

61. The Court next proposes to examine if the compromise/consent terms arrived at between the parties are lawful or whether they are void or voidable under the ICA. The Consent Terms were entered into between Docomo and Tata on 20/23 February 2017. They begin by noting that it is with a view to putting an end to their disputes and "in the public interest of preserving a fair investment environment in India" that the parties have decided to enter into the said consent terms. Further, it is noted that "as a gesture of good faith and in accordance with the Respondent's record of adherence to contractual commitments that the Respondent has always enjoyed both in India and abroad, the Respondent withdraws its objections to the enforcement of the Award in India."

62. A perusal of paras 3 to 6 of the consent terms shows that the parties have undertaken to abide by the directions of this Court and obtain all the requisite statutory permissions and clearances. **Another important aspect is that Docomo has in para 7 of the consent terms undertaken that for a period of six months pending compliance with the consent terms, all other enforcement actions instituted in Courts abroad shall stand suspended and after compliance shall stand withdrawn.**

63. **The Court is unable to find anything in the Consent Terms which can be said to be contrary to any provision of Indian law much less opposed to public policy or void or voidable under the ICA. The issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India.**

64. It appears to be a well settled legal position that parties to a suit, or as in this case, an Award, may enter into a settlement even at the stage of execution of the decree or Award. In The Oudh Commercial Bank Ltd. v. Thakurain Bind Bist Kuer (1939) 41 Bom LR 708, the Privy Council held that independent of Order XXIII Rule 3 CPC, the provisions of Order XXI Rule 2 and Section 47 CPC would enable the executing Court to record and enforce a compromise. This was reiterated by the Supreme Court of India in Moti Lal Banker v. Mahraj Kumar Mahmood Hasan Khan AIR 1968 SC 1087. In N.K. Rajgarhia v. Mahavir Plantation Ltd. & Ors. (2006) I SCC 502, it was observed that "the court's freedom to act to further the ends ofjustice would surely not stand curtailed." The Court came to the conclusion that the compromise entered into between the parties during the execution proceedings was valid in law.

Conclusion

65. The result is that:

(i) IA No. 14897/2016 filed by RBI is dismissed.

(ii) IA No. 2585 of 2017 is allowed and the Consent Terms enclosed therewith are taken on record.

(iii)**The Award dated 22" June 2016 passed by the AT in London in Case No. 152896 under the LCIA Rules is declared as enforceable in India and shall operate as a deemed decree of this Court .**

(iii) **The parties are bound by the Consent Terms and will proceed to take steps in terms thereof.**

(iv) The monies deposited in this Court by Tata by way of the FDRs referred to in para 22 of this order together with the interest accrued thereon ('the Deposit') shall be retained by the Registrar of this Court till requisite clearance from the Competition Commission of India and the Withholding Tax Certificate as mentioned in the Consent Terms have been obtained.

(v) Once the requisite clearances/certificate has been obtained, the Deposit will be transferred to an account in the name of Tata ('Interim Account'). For this purpose, the parties are at liberty to mention the matter before the Registrar General of this Court who will from that point onwards either himself deal with the matter or designate a Registrar of this Court for the purpose of the completion of the further steps in terms of this judgment.

(vi) Docomo will nominate an Authorised Dealer ('AD') for remittance of Funds after deduction of taxes, if any, to the Designated Bank Account as stated in the Consent Terms.

(vii) As undertaken by it in the Consent Terms, Tata shall, simultaneously with the receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account, complete the process of debiting its dematerialised accounts of all shares of TTSL held by Docomo and have the Shares credited to the dematerialised accounts of Tata and/or its nominees and Tata shall co-operate with Docomo for having the Shares credited to the dematerialised accounts of Tata and/or its nominees and in completing and executing Form FCTRS for this purpose.

(viii) Both, Tata and Docomo will take all actions and provide all documents and information as requested by the AD to permit remittance of the Funds, after deduction of taxes, if any, to the Designated Bank Account and the credit of the Shares to dematerialised accounts of Tata and/or its nominees.

(ix) **Docomo is bound by its undertaking as recorded in para 7 of the Consent Terms regarding keeping the other enforcement proceedings instituted by it against Tata elsewhere under suspension and to ultimately withdraw them subject to compliance by Tata with its obligations under the Consent Terms. Docomo is also bound by its undertaking that it shall not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period, or thereafter, if the Funds, after deduction of taxes, if any, are received during the Suspension Period.**

(x) Upon receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account by Docomo, and the credit of the Shares to dematerialised accounts of Tata and/or its nominees, as per paragraphs 3 and 4 of the Consent Terms, the Award shall stand fully and finally satisfied and discharged and that the Parties shall have no outstanding claims against each other.

> 66. Liberty is granted to both Tata and Docomo to apply to the Court in the event of any difficulty in complying with any of the directions.
>
> 67. The petition is disposed of in the above terms."
>
> (emphasis supplied)

43. On the aforesaid backdrop, we now proceed to examine the question posed for consideration.

44. As noted hereinabove, on 28 September, 2022, respondent no. 3-Additional Director, DGGI issued an intimation of tax ascertained and alleged to be payable by Tata under section 73(5)/74(5) of the CGST Act, 2017 read with Rule 142(1A) of CGST Rules, 2017. Being the foundation for the subsequent actions as impugned, it is necessary to note the premise/ground on the basis of which intimation of tax ascertained was issued to Tata, which is as follows:

(i) At the outset, it is stated that the amount of tax/ interest/penalty payable by Tata under section 74(5) of the CGST Act was ascertained in terms of the available information, as under:

Act	Period	Tax
IGST Act	2017-18	15,24,35,20,405
Total		15,24,35,20,405

The grounds and qualification are attached to such demand, which recorded that "M/s. Tata Sons Private Limited had not paid GST on damages amount of $117,21,37,717 paid to Docomo under the Arbitration Award of the London Court of International Arbitration (LCIA) dated 22 June, 2016 and upheld by the Delhi High Court on 28 April, 2017".

(ii) A detailed reference to the dispute in the arbitral proceedings has been set out leading to the Arbitral Tribunal (LCIA) awarding the damages of US$117,21,37,717 and Docomo approaching the Delhi High Court and Tata informing the Delhi High Court of its readiness and willingness to deposit an amount of Rs.8450 crores with the Registrar General of the Delhi High Court and ultimately the parties filing consent terms (supra). It is recorded that in such context, all the parties arrived at a settlement of the arbitral award, and thereafter the department recorded the statements of Mr. Eruch N. Kapadia, CFO of Tata and Mr. Sanjeev Mehra, GM-Corporate Taxation of TTSL, purportedly stated to be statements in the course of investigation. The following conclusions were accordingly derived:

> "3.9 On the basis of the investigation conducted as per the directives contained in the Office Memorandum dated 21.02.2018 issued by CBEC, GST Policy wing, Government of India vide F.No. 349/168/2017-GST-Pt.I/314 dated 21.02.2018 it is revealed as under:
>
> 1. **It appears that DoCoMo had tolerated the act of breach of the conditions laid down in the Agreement by and between TSL, DoCoMo & TTSL against which DoCoMo received consideration in the form of damages from TSL.**
>
> 2. **The location of the supplier, ie. DoCoMo, shall be its usual place of residence, under Section 2(15) of the IGST Act, 2017. Since the company is incorporated in Japan, the location of the supplier will therefore be outside India. The location of the recipient of the supply, i.e. TSL is in India. Therefore, to determine the place of supply of this service, Section 13 of the IGST Act, 2017 will have to be referred. Sub-section (2) of Section 13 ibid states that the place of supply of services, except the services specified in sub-sections (3) to (13) of the said section, shall be the location of the recipient of the service. Since the supply of service viz. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", as specified in Schedule II of the CGST Act, 2017, is not covered under sub-sections (3) to (13) of Section 13 of the IGST Act, the place of supply in respect to such service shall be the location of the recipient of the service, i.e. TSL and since the location of the supplier of service is outside**

India and location of the recipient of the service is in India and the place of supply of service is in India, the said service shall be considered to be an import of service under sub-section (11) of Section 2 of the IGST Act, 2017.

3. As per sub-section (4) of Section 7 of the IGST Act, 2017, supply of services imported into the territory of India shall be treated to be a supply of service in the course of inter-state trade or commerce. Accordingly, as per sub-section (1) of Section 5 of the IGST Act, 2017, IGST is liable on such a supply. Vide Notification 10/2017-Integrated Tax (Rate) dated 28.06.2017, the Central Government, in exercise of powers conferred by sub-section (3) of section 5 of the IGST Act, 2017, has notified that on any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient, the whole of integrated tax, leviable under section 5 of IGST Act shall be paid on reverse charge basis by the recipient.

4. The name of the M/s. Tata Sons Limited changed to M/s. Tata Sons Private Limited with effect from 06-08-2018.

3.10. In view of the above, as per the Arbitration Award of London Court of International Arbitration dated 22-06-2016 and upheld by the Delhi High Court on 28-04-2017 M/s. Tata Sons Private Limited have made total payment of Rs.84,68,62,24,473/- to M/s. NTT DoCoMo as damage amount.

Details of the payments made:

Sr. No.	Particulars	Payment on 30.10.2017	Payment on 07.11.2017	Grant Total (INR)
1	Damages	75,91,99,04,381	16,63,46,811	76,08,62,51,192
2	Interest	7,95,62,82,019		7,95,62,82,019
3	Legal Costs	2,87,20,509	60,48,98,147	63,36,18,656
4	Arbitration Costs		1,00,72,606	1,00,72,606
		83,90,49,06,909	**78,13,17,564**	**84,68,62,24,473**

Accordingly, rendering M/s. Tata Sons Private Limited liable to pay IGST amounting to Rs.15,24,35,20,405/- (Rupees One Thousand Five Hundred Twenty-Four Crore Thirty-Five Lakh Twenty Thousand Four Hundred Five)."

(emphasis supplied)

45. The aforesaid conclusion was stated to be the implication which was brought about by the provisions of Section 7(1)(c) read with sub-section (1A) and Schedule II to Entry 5(e) of the CGST Act, which defines "supply" to include the activity specified in Schedule I, made or agreed to be made without

consideration and that under sub-section (1A) "*where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II", as Schedule II in Entry 5(e) treats supply of services to a party "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act."*

46. Based on these provisions, the impugned intimation in paragraph 4.1 (b) to (e) *inter alia* recorded that it clearly appeared that the settlement of the arbitral award constituted supply in accordance with the provisions of sub-section (1) of Section 7 as referred to in Entry 5(e) of Schedule II. It was further recorded that Docomo, as part of the joint consent application filed before the Delhi High Court, had agreed to suspend and later withdraw its enforcement proceedings which it had initiated in the Courts in the UK and the US, threatening to attach properties of Tata's global companies like Jaguar, Land Rover and Tata Steel Europe and agreeing not to initiate any further proceedings in relation to the Shareholder Agreement (SHA) and/or under the award in question. This is stated to be appearing to be an activity in the nature of agreeing to an obligation of refraining from an act; the act being of continuing with the proceedings initiated against Tata, in relation to the execution proceedings which were pending in UK and US Courts. It was further recorded that the act of Docomo also appeared to be one of tolerance with respect to the breach of the SHA by Tata. Such statements, as recorded in asserting the charge against Tata as set out in the said 'Intimation of Tax Ascertained', being payable and issued under 73(5)/74(5)

need to be noted, which read thus:

> "**4.1 Provision of Supply:**
>
> .....
>
> (b) From the above, it can be seen that sub-section (1A) of Section 7 of the CGST Act, 2017 which stated where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II. However, clause 5(e) of Schedule II, specifies that 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act,' as supply of service. Section 7(1) states that for the purposes of this Act, the expression "supply" includes-(a) 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; (b) import of services for a consideration whether or not in the course or furtherance of business. However, Section 7(1A) states that where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.
>
> (c) In the instant case, DoCoMo, as part of its joint consent application filled in the Hon'ble High Court of Delhi, has agreed to suspend and later withdraw its enforcement proceedings which it had initiated the courts in the UK and the US, threatening to attach properties of Tata's global companies like Jaguar Land Rover and Tata Steel Europe. It has also agreed not to initiate any further proceedings in relation to the SHA and/or the Award. This appears to be an activity in the nature of agreeing to an obligation of refraining from an act; the act here being that of continuing with the proceedings initiated against Tata which are currently pending in UK and in the US. DoCoMo has also agreed in the consent application to refrain from initiating any further proceedings against Tata in relation to the SHA and/or the Award.
>
> (d) Further, the act of DoCoMo also appears to be one of tolerance with respect to the breach of the SHA by Tata. The Arbitral Tribunal's ruling, which has now been enforced by the Delhi High Court, is categorical in stating that Tata has committed breach of contract and is liable to pay damages to DoCoMo. These damages appear to be in the nature of consideration for supply of service, from DoCoMo to TTSL, of tolerating the said breach.
>
> (e) It appears from the discussion in para (c) and (d) above that DoCoMo is making a supply of Tata Teleservices (TTSL), as per the definition of supply in Section 7 of CGST Act, 2017."
>
> (emphasis supplied)

47. Referring to the provisions of Section 13 of the IGST Act, 2017 which defines "*Place of supply of services where location of supplier or location of recipient is outside India*" as also, referring to the provisions of Section 2(11) of IGST Act defining "import of services" and Section 7(4) of IGST Act defining

"*Supply of services imported into the territory of India, shall be treated to be a supply of services in the course of inter-State trade or commerce*", it was sought to be concluded that, in the facts of the case, since the location of the supplier of service (Docomo) was outside India and the location of the recipient of the service was in India and the place of supply of service was also in India, such service shall be considered to be an import of service under Section 2(11) of the IGST Act, 2017. Further a reference to Notification 10/2017 issued by the Central Government was incorporated to record that in exercise of powers conferred by sub-section (3) of Section 5 of the IGST Act, the Central Government had notified that on any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient, the whole of integrated tax, leviable under section 5 of IGST Act shall be paid on reverse charge basis by the recipient. It is hence concluded that the Tata is required to discharge the IGST liability on such alleged supply. The relevant contents of the Intimation in that regard also need to be noted, which read thus:

> **"4.2 Nature of the Supply and Taxation:**
> .....
>
> b) The location of the supplier, ie. DoCoMo, shall be its usual place of residence, under Section 2(15) of the IGST Act, 2017. Since the company is incorporated in Japan, the location of the supplier will therefore be outside India. The location of the recipient of the supply, i.e. TTSL is in India. Therefore, to determine the place of supply of this service, Section 13 of the IGST Act, 2017 will have to be referred. Sub-section (2) of the said section states that the place of supply of services, except the services specified in sub-sections (3) to (13) of the said section, shall be the location of the recipient of the service. **Since the service of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act, as specified in Schedule II of the CGST Act, 2017, is not covered under sub-sections (3) to (13) of Section 13 of the IGST Act, the place of supply in respect to such service shall**

be the location of the recipient of the service, Le. TTSL, further, since the location of the supplier of service is outside India, the location of the recipient of the service is in India and the place of supply of service is in India, the said service shall be considered to be an import of service under sub-section (11) of Section 2 of the IGST Act, 2017.

(c) **As per sub-section (4) of Section 7 of the IGST Act, 2017, supply of services imported into the territory of India shall be treated to be a supply of service in the course of inter-state trade or commerce. Accordingly, as per sub-section (1) of Section 5 of the IGST Act, 2017, IGST is liable on such a supply.**

4.3. Vide Notification 10/2017-Integrated Tax (Rate) dated 28.06.2017, the Central Government, in exercise of powers conferred by sub-section (3) of section 5 of the IGST Act, 2017, has notified that on any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient, the whole of integrated tax, leviable under section 5 of IGST Act shall be paid on reverse charge basis by the recipient. Therefore, it appears that TSPL is required to discharge the IGST liability on the above mentioned supply."

(emphasis supplied)

48. The Intimation further records that the time of supply of the alleged services would be as provided for in Section 13(3) of the CGST Act, 2017. The relevant contents in that regard are required to be noted, which read thus:

" **4.4. The time of supply**

(a) As per sub-section (3) of Section 13 of the CGST Act, 2017: Time of supply of services

"(3) <u>In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely</u>:

(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier, or

(b) the date immediately following sixty days from the date of issue of invoice or other document, by whatever name called, in lieu thereof by the supplier: any

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:

Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the

date of payment, whichever is earlier."

(b) As regarding the time of supply, since the tax is liable to be paid on reverse charge basis, the time of supply shall be determined in accordance with sub-section (3) of Section 13 of the CGST Act, 2017. The said sub-section states that in case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the date of payment and the date immediately following sixty days from the date of issue of invoice. The date of payment has been defined as the date of payment, as entered in the books of accounts of the recipient or the date, on which the payment is debited in his bank account, whichever is earlier. In the instant case, since the concept of issuance of an invoice is not applicable, the date of payment shall be the time of supply of the service.

(c) **As per para 4 of the terms of consent, jointly submitted by the petitioner-Tata and the respondent, the deposit (in the form of fixed deposit receipts) is to be retained by the Registrar of Delhi High Court till requisite clearance from Competition Commission and Withholding Tax Certificates from Income Tax Authorities are obtained. Once the requisite clearance/certificate has been obtained, the deposit will be transferred to an account in the name of the Respondent (ie. DoCoMo). Therefore, it appears that the date on which the amount, as specified in para 3 of the terms of consent, is debited from the bank account(s) of TTSL. shall be the time of supply of the service**.

(emphasis supplied)

49. On the aforesaid basis, it was asserted that Tata was liable to pay IGST amounting to Rs.15,24,35,20,405/- on the payments made by Tata to Docomo amounting to Rs.84,68,62,24,473/- and the same is recoverable from Tata in terms of Section 74(1) of the CGST Act. Accordingly, Tata was called upon to pay the amount of tax as ascertained along with the amount of applicable interest and penalty under Section 74(5) of the CGST Act by 6 October, 2022, failing which, a show cause notice shall be issued under Section 74(1) of the CGST Act. Also, it was recorded that in case Tata wishes to file any submissions against the above ascertained, the same be furnished by 6 October, 2022. The relevant extract in such context are required to be noted, which read thus:

"5. Accordingly, M/s Tata Sons Private Ltd. is liable to pay IGST amounting to Rs.15,24,35,20,405/- (Rupees One Thousand Five Hundred Twenty-Four Crore Thirty-Five Lakh Twenty Thousand Four Hundred Five only) on the

> payments made by M/s. Tata Sons Private Limited to M/s. NTT DoCoMo amounting to Rs.84,68,62,24,473/- (Rupees Eight Thousand Four Hundred Sixty-Eight Crore Sixty-Two Lakhs Twenty-Four Thousand Four Hundred only) and the same is recoverable from them in terms of Section 74(1) of the Central Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act, 2017, by invoking the extended period of limitation, along with interest, as applicable, under Section 50 of the said Act and penalty as per Section 74 of the CGST Act, 2017."
>
> You are hereby advised to pay the amount of tax as ascertained above along with the amount of applicable interest and penalty under Section 74(5) of the CGST Act, 2017 by 06/10/2022, failing which Show Cause Notice will be issued under Section 74(1) of the CGST Act, 2017.
>
> In case you wish to file any submissions against the above ascertained, the same may be furnished by 06/10/2022 In Part B of this form ."

50. Such intimation was responded by Tata by its letter dated 6 October, 2022 addressed to respondent no. 3-Additional Director, DGGI *inter alia* recording that the same was received on a weekend/festive holiday and an additional time of 30 days would be required to make an appropriate response. By further letter dated 12 October, 2022, Office Memorandum dated 21 February, 2018 as referred to in paragraph 3.9 of the copy of intimation was requested while denying the contents of the intimation. Further, it was stated that Tata's request as made by letter dated 12 October, 2022 not being responded which was stated to have been again reiterated and recorded in its further letter dated 2 November, 2022.

51. On such backdrop, Tata approached this Court by filing the present petition in assailing the intimation. On the present proceedings on 30 March, 2023 an order came to be passed, wherein this Court recorded a statement on behalf of the revenue that if the petitioner-Tata, appears before the proper officer, pursuant to the intimation for a pre-show cause consultation, and places before

the concerned authority its stand, based on the Circulars and other grounds taken in the petition, the concerned authority will look into the same as per Section 74 of the CGST Act and inform the petitioner-Tata the outcome by communication in writing.

52. Tata, in its reply dated 31 May 2023 to the impugned intimation dated 28 September 2022, contended that -

(i) The demand of GST on damages paid to Docomo under the arbitral award whose validity and enforceability was confirmed by the Delhi High Court, was illegal and contrary to CBIC Circular No. 178/10/2022-GST dated 3 August 2022, which clarified that damages for breach of contract do not fall within Schedule II Entry 5(e) of the CGST Act and are not consideration for supply; this position was reiterated in Circular No. 214/1/2023 dated 28 February 2023 clarifying that even under the pre-GST regime no service tax was leviable on such damages; Tata further recorded that CBIC had relied on CESTAT decisions holding no such tax was leviable, chose not to appeal adverse decisions, and withdrew pending Supreme Court appeals, treating proceedings as closed; hence, such circulars being binding on the Additional Director, the intimation was liable to be withdrawn.

(ii) Tata contended that once a decision is taken in favour of an assessee, it must be extended to all similarly placed assessees. In such context, reliance was placed on the decision in **India Cements Ltd. v CCE**[14] and

14 (1989) 2 SCC 676

Simplex Castings v. CCE[15], wherein it was held that no appeal can be filed contrary to CBIC circulars; hence, if an appeal cannot be filed, even a show cause notice cannot be issued, and the department cannot selectively demand duty from one assessee while dropping it for others. It was further contended that the department cannot take a stand contrary to its own circulars, while placing reliance on the decision in **CCE vs. Tikatar Industries**[16], which held that once orders have attained finality, the Revenue cannot accept such decisions in one case and challenge them in another. Further, in such context, reliance was also placed on the decision in **CCE v Amar Bitumen and Allied Products Private Ltd**.[17].

(iii) Without prejudice to the aforesaid, Tata submitted that the impugned intimation was liable to be withdrawn not only in view of the circulars but also as it lacked legal and jurisdictional basis, being founded on a perverse appreciation of facts also relying on CBIC Office Memorandum dated 21 February 2018 to contend that a pre-determined view was seen when the intimation recorded that IGST is payable, thereby rendering adjudication by DGGI (a subordinate authority bound by CBIC) a futile and premeditated exercise. It was further contended that whether the payment of damages constitutes "service" under Entry 5(e) of Schedule II and consequently "supply" under Section 7 of the CGST Act was the foundational jurisdictional fact. They placed reliance on the

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15 (2003) 5 SCC 528
16 (2010) 13 SCC 73
17 (2010) 13 SCC 76

decision of the Supreme Court in **Arun Kumar & Ors vs. UOI**[18] and **Raza Textiles Ltd. vs. Income tax Officer, Rampur**[19], which according to Tata would support its contention that unless such determination is made, jurisdiction to levy GST on damages awarded under the arbitral award for breach of the Shareholders Agreement dated 25 March 2009 cannot be assumed.

(iv) The Circular dated 3 August 2022 (paras 6 and 7.1.5) conclusively clarified that taxability under Entry 5(e) requires two essential elements: (i) an independent contract to refrain from or tolerate an act, and (ii) consideration for such act. It was contended that in the present case no independent contract existed whereby Docomo agreed to withdraw proceedings for consideration, making the allegation of "supply" erroneous; the circular clarified that toleration must arise from an independent agreement for consideration, whereas breach of contract merely gives rise to compensation for loss; the damages awarded by the arbitral tribunal and upheld by the Delhi High Court were compensation for breach and not consideration for any independent activity, and were paid because Docomo did not tolerate the breach. It was contended that the decisions of the CESTAT under Section 66E(e) of the Finance Act, 1994 in **M/s South Eastern Coal Fields Ltd v. Commissioner of Central Excise And Service Tax, Raipur**[20]; **Western Coalfields Ltd vs.**

18 (2007) 1 SCC 732
19 (1973) 1 SCC 633
20 2020(12) TMI 912

Commissioner of CGST & Central Excise[21] and **Dy. GM (Finance), Bharat Heavy Electricals Ltd. vs. Commissioner of Customs& Central Excise, Bhopal**[22] had held that no service tax is leviable on such damages, which position has been accepted by CBIC and applies equally under GST.

(v) Tata contended that the impugned demand was unsustainable as the primary condition for levy of GST, namely that the activity must qualify as "supply" under Section 7 of the CGST Act, was absent, since for an act to constitute supply of service it must be made or agreed to be made for consideration with a sufficient nexus between the activity and the consideration, as reflected in Schedule II, which was not satisfied in the case of payment pursuant to an arbitral award. Referring to Entry 5(e) of Schedule II, it was contended that there must be a positive agreement whereby one party agrees to refrain from an act or to tolerate an act in return for consideration, implying voluntary relinquishment of a contractual or statutory right or consensual toleration by a person who otherwise has the right to resist such act, whereas a party with such rights may instead enforce them and seek specific performance or damages. It was contended that the department's case that Docomo, under consent terms before the Delhi High Court, agreed to withdraw enforcement proceedings in the UK and US and not initiate further proceedings, thereby tolerating breach, was wholly unfounded, as Docomo initiated

21 2022 (9) TMI 741
22 2022(9) TMI 1005

enforcement proceedings only to realise the damages awarded by the arbitral tribunal, and once payment was agreed and made by Tata, there was no reason or locus for Docomo to continue or initiate proceedings in India, UK, or US. Thus, Docomo's agreement not to pursue further proceedings was merely to bring finality to the dispute with no separate ascribable value to it.

(vi) That Docomo's agreement to withdraw proceedings did not constitute a separate supply of service but was only a condition for complete settlement upon payment of compensation. The conclusion that damages were paid in consideration of withdrawal of proceedings was fundamentally erroneous, as withdrawal was merely consequential. The payment of damages had no nexus with withdrawal and did not fall within Entry 5(e). Further, Docomo did not tolerate breach but enforced its rights fully, obtained an arbitral award, pursued enforcement, and only after satisfaction of the decree upon payment by Tata, did the proceedings come to an end, which cannot be construed as toleration of an act.

(vii) Referring to Section 73 of the Indian Contract Act, Tata contended that compensation for loss or damages caused by breach of contract is a statutory entitlement of the aggrieved party, and in cases of failure to discharge obligations resembling those created by contract, the injured party is entitled to receive the same compensation from the party in default as if such party had contracted to discharge it and had broken the contract. It was hence contended that payment of compensation to the

aggrieved party does not imply any positive act of toleration of breach, and acceptance of damages cannot be construed as tolerating an act. Accordingly, the payment of damages by Tata to Docomo does not fall within the scope of Entry 5(e) of Schedule II of the CGST Act, and the impugned intimation suffered from a fundamental error in invoking GST provisions when the alleged activity does not qualify as "service" or "supply"; hence, the demand is contrary to the CGST Act and violative of Article 14 of the Constitution. On such proposition, Tata placed reliance on the decision of this Court in **Bai Mamubai Trust vs. Suchitra**[23].

(viii) Tata next contended that Section 74 of the CGST Act, which applies to cases involving fraud, willful misstatement, or suppression of facts, was inapplicable in the present case, as none of these elements were attracted, since the payments made were pursuant to judicial orders and proceedings before the Delhi High Court and the department was fully aware of all material facts even prior to remittance being made by Tata to Docomo. It was thus contended that the allegations of fraud, suppression, or willful misstatement were unfounded and unsustainable in law, particularly as the department itself had conducted an inquiry for levy of service tax from 2017 and only in 2022 changed its view to contend that GST, and not service tax, was leviable on the said payment, thereby negating any basis for such allegations.

53. On the aforesaid backdrop, a personal hearing was held on 16 June 2023.

23 2019 (31) GSTL 193

However, the department did not accept Tata's case and consequentially the impugned show cause notice was issued by respondent No.4-Joint Director, Directorate General of GST Intelligence, Zonal Unit Mumbai, calling upon the petitioner-Tata to show cause as to why IGST amounting to Rs.15,24,35,20,405/- (Rupees One Thousand Five Hundred Twenty-Four Crore Thirty-Five Lakh Twenty Services Tax Act, 2017) should not be demanded from Tata under Section 74(1) of the CGST Act read with Section 20 of the IGST Act, along with interest and penalty, which is impugned in the present petition.

54. On perusal of the impugned show cause notice, it appears that the basis on which the impugned demand has been made in the show cause notice, is not on the grounds different from what was set out in the impugned intimation dated 8 September 2022 (supra) which is clear from the following contents of the show cause notice:-

> "(b) From the above, it can be seen that sub-section (1A) of Section 7 of the CGST Act, 2017 which stated where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II. However, clause S(e) of Schedule IL, specifies that 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act, as supply of service. Section 7(1) states that for the purposes of this Act, the expression "supply" Includes-(a) 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; (b) import of services for a consideration whether or not in the course or furtherance of business. Section 7(1A) states that where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.
>
> (c) In the Instant case, DOCOMO, as part of its joint consent application filed in the Hon'ble High Court of Delhi, agreed to suspend and later withdraw its enforcement proceedings which it had initiated in the courts in the UK and the US, threatening to attach properties of Tata's global companies like Jaguar Land Rover and Tata Steel Europe. The act here being that of not continuing with the proceedings initiated against Tata which were currently pending In

UK and in the US. The act of DOCOMO also appears to be one of tolerance with respect to the breach of the SHA by TSPL & others. Thus, from the above it appears to be an activity agreeing to an obligation of refraining from an act, the act here being that of not continuing with the proceedings initiated against Tata which were pending in UK and in the US. The activity is thus, not in the nature of only tolerating the breach of contract as referred by TSPL.

Supply of service (As per Section 7 of the CGST Act, 2017)

DOCOMO has also agreed in the consent application to refrain from Initiating any further proceedings against Tata in relation to the SHA and/or the Award. Further, the act of DOCOMO also appears to be one agreeing to obligation to refrain from initiating any proceedings i.r.o. SHA and other proceedings. The Arbitral Tribunal's ruling, which has now been enforced by the Delhi High Court, is categorical in stating that Tata has committed breach of contract and is liable to pay damages to DOCOMO. These damages are in the nature of consideration for supply of service, from DOCOMO to TSPL, of tolerating the said breach.

Hence, from the discussion above, it can be seen that DOCOMO is making a supply to Tata Sons Pvt. Ltd. (TSPL), as per the definition of supply in Section 7 of CGST Act, 2017.

In view of the above facts, it appears that DOCOMO has rendered the supply vide their act of Tolerance of the contractual Defaults by TSPL along with agreeing to obligation to refrain from initiating any proceedings and the same appears to squarely fall within the ambit of definition of 'supply' as envisaged under section 7(1A) of the CGST Act, 2017 and the damages referred to herein above is the 'consideration' paid by TSPL to DOCOMO in the course and furtherance of their business. Thus, the sald 'supply by DOCOMO to TSPL would fall within in the ambit of entry no. [e] of Sr. no. 5 of the Schedule - II to section 7 ibid as "supply of services viz. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act".

(d) Further, the act of DOCOMO also appears to be one of tolerance with respect to the breach of the SHA by Tata and agreeing to obligation to refrain from initiating any proceedings i.r.o SHA. The Arbitral Tribunal's ruling, which has now been enforced by the Delhi High Court, is categorical in stating that Tata has committed breach of contract and is liable to pay damages to DOCOMO. These damages appear to be in the nature of consideration for supply of service, from DOCOMO to TTSL, of tolerating the said breach.

"7.5 ……

It is clear from the consent terms that the petitioner is agreeing to refrain from act,ie, DOCOMO will not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period and agreeing to unconditionally withdraw all the proceedings initiated against the Respondent.

Schedule 11.1

11.3.). i] <u>During the course of investigation, it appears that DOCOMO had tolerated the act of breach of the conditions laid down in the Agreement by and between TSPL, DOCOMO & TTSL against which DOCOMO received consideration in the form of damages from TSPL.</u>

<u>ii). DOCOMO, as part of its joint consent application filed in the Hon'ble High Court of Delhi, agreed to suspend and later withdraw its enforcement proceedings which it had initiated in the courts in the UK and the US, threatening to attach properties of Tata's global companies like Jaguar Land Rover and Tata Steel Europe. The act here being that of not continuing with the proceedings initiated against Tata which were pending in UK and in the US. The act of DOCOMO also appears to be agreeing to obligations to refrain from act of legal proceedings with respect to the breach of the SHA by TSPL & others.</u>

<u>11.4. Thus, from the above it appears to be an activity of agreeing to an obligation of refraining from an act; the act here being that of not continuing with the proceedings initiated against Tata which were pending in UK and in the US. The activity is not only in the nature of tolerating the breach of contract as represented by TSPL but it is also the act of DOCOMO which appears to be agreeing to obligations to refrain from act of legal proceedings with respect to the breach of the SHA by TSPL & others.</u>

As regards TSPL contention that, the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing an act or situation or simply doing an act is considered as "Supply". In the instant case both the parties agreed and pursuant to this DOCOMO, as part of its Joint consent application filed before the Hon'ble High Court of Delhi, agreed to suspend and later withdrew its enforcement proceedings which it had initiated in the courts in the UK and the US, threatening to attach properties of Tata's global companies like Jaguar Land Rover and Tata Steel Europe, thus tolerating/ refraining from doing an act for which it received consideration from TSPL and DOCOMO too withdrew its objections to the enforcement of Award in India. Thus, it appears to be a case of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act and the amount paid by TSPL is consideration for service.

In the Instant case, DOCOMO has also agreed in the consent application to refrain from initiating any further proceedings against Tata in relation to the SHA and/or the Award. Further, the act of DOCOMO also appears to be one of tolerance with respect to the breach of the SHA by TSPL & others. The Arbitral Tribunal's ruling, which has now been enforced by the Delhi High Court, is categorical in stating that Tata has committed breach of contract and is liable to pay damages to DOCOMO. These damages are in the nature of consideration for supply of service, from DOCOMO to TSPI, of tolerating the said breach.

From the above facts, it appears that DOCOMO has rendered the supply vide their act of toleration and agreeing to obligations to refrain from act of legal proceedings to TSPL and the same squarely falls within the ambit of definition of 'supply' as envisaged under sub-section [1] of section 7 of the CGST Act, 2017 and the damages referred to herein above is the 'consideration' paid by

TSPL to DOCOMO in the course and furtherance of their business. Thus, it appears that the said 'supply' by DOCOMO would fall within in the ambit of entry no. [e] of Sr. no. 5 of the Schedule - II to section 7 ibid as "supply of services viz. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act".

As per para 7.1.1 of the said circular "It is common for the parties entering into a contract, to specify in the contract itself, the compensation that would be payable in the event of the breach of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or parties of the contract is referred to as liquidated damages. Black's Law Dictionary defines "Liquidated Damages' as cash compensation agreed to be a signed, written contract for breach of contract, payable to the aggrieved party."

From the above, it appears that the compensation paid by TSPL cannot be considered as liquidated damages as the said consideration was paid to DOCOMO after they had agreed to refrain from initiating any further proceeding against Tata in relation to SHA and/or the reward and withdrawal of Court proceedings in UK and US. Thus, this act of DOCOMO appears to be one of tolerance with respect to the breach of the contract.

11.5. Para 7.1.4 of the CBIC circular which deals with the taxability states as under "taxability of liquidated damages is that where the amount paid as liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable"

From the paras above, it appears from the consent terms (Joint consent application filed in the Hon'ble High Court of Delhi) that DOCOMO is agreeing to refrain from act the DOCOMO will not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period and agreeing to unconditionally withdraw all the proceedings initiated against TSPL. Accordingly, it appears that damages are paid to the DOCOMO and there is an agreement to refrain from an act and accordingly, the same appears to be taxable and not merely flow of money.

11.8. Circular No. 214/1/2023-Service Tax dated 28.02.2023 was issued for leviability of Service Tax on declared services "Agreeing to the obligations to refrain from an act or to tolerate an act or a situation, or to do an act" under Clause (e) of Section 66E of the Finance Act, 1994. This circular also referred the earlier circular dated 03.08.2022. However, Circular No. 214/1/2023-Service Tax dated 28.02.2023 and the case laws mentioned in the circular pertains to the Service Tax matters and does not interfere with the present issue in hand as the taxability in the present case arises at the time of payments made ie. GST period.

11.9. Further, it appears that it is a case of suppression of facts. Had the officers of DGGI, Mumbai Zonal Unit (MZU) not observed the activity in hand, the

said facts would not have come to light. Further, the case is very clear and known to the noticee that he has paid the damage amount to DOCOMO. "The activity is considered as supply' by DOCOMO and the same would fall within in the ambit of entry no. [e] of Sr. no. 5 of the Schedule - II to section 7 ibid as "supply of services viz. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"." Accordingly, TSPL was required to declare the value of service in GSTR-3B returns declaring the correct nature and correct value of the services received. Accordingly, as per explanation 2 to the Section 74 of the CGST Act, 2017, any failure to declare information required to be declared in statutory returns leading to non-payment of appropriate GST thereon, has to be taken as GST not paid by reason of suppression of facts. The said irregularities would not have come to light bot for the Investigations conducted by the department officers.

11.10. In view of the above facts, it appears that DOCOMO has rendered the supply vide their act of tolerance of the contractual Defaults by TSPL and refrained from Initiating any further proceedings against TSPL in UK and USA and in relation to the Shareholding Agreement (SHA) and/or the Award, the same appears to squarely fall within the ambit of definition of 'supply' as envisaged under sub-section [1] of section 7 of the CGST Act, 2017 and the damages referred to herein above is the 'consideration' paid by TSPL to DOCOMO in the course and furtherance of their business.

12. Contraventions of Provisions:

It appears that M/s Tata Sons Private Ltd. had contravened the following provisions of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the rules made thereunder:

i. Section 5 of the Integrated Goods and Services Tax Act, 2017 read with Section 7 of the CGST Act, 2017 inasmuch, they failed to pay Integrated Goods and Services Tax in the manner and at the rate provided under the said provisions.

ii. Section 7 of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 inasmuch, as they failed to account for the taxable supply received by them.

iii. Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017 notified under subsection (3) of Section 5 of the IGST Act, 2017 Inasmuch, they failed to pay Integrated Goods and Services Tax under Reverse Charge Mechanism and at the rate provided under the said provisions.

iv. Section 15 of the Central Goods and Services Tax Act, 2017 read with Rule 30 of the CGST Rules, 2017 and further read with Section 20 of the Integrated Goods and Services Tax Act, 2017 Inasmuch, they failed to correctly determine the correct value of taxable services.

v. Section 38, 39 & 44 of the CGST Act, 2017 read with Rules 59, 60, 61 & 80 of the CGST Rules, 2017 as made applicable in the case of IGST vide Section 20 of the IGST Act, 2016 and Rule 2 of IGST Rules, 2017 inasmuch as they have failed to furnish proper outward, inward and monthly returns mentioning

the particulars of services, the correct value of taxable services determinable under the category of taxable services and other particulars in the manner as provided therein and incorporating such information in such returns."

(emphasis supplied)

55. Having noted the basis for demand being made in the impugned show cause notice, it is clear that respondent Nos.3 and 4 have proceeded to consider such payment as made by Tata to Docomo as supply of services under Section 7 read with Schedule II Entry 5(e).

56. Thus, the fundamental question which has arisen for determination is whether the parties settling the arbitral award in question in enforcement proceedings filed before the Delhi High Court under Sections 47 and 48 of theACA when incorporated Clause 7 (supra) in the consent terms in regard to the proceedings before the UK and US Courts, would at all attract Section 7 of the CGST Act. In our opinion, the answer would certainly be in the negative, as would be clear from the following discussion which would lead us to the said conclusion.

57. Section 7 of the CGST Act falls under Chapter III - 'Levy and Collection of Tax'. Section 7 pertains to 'Scope of supply' which is required to be noted which reads thus:

"Chapter III : Levy and Collection of Tax

Section 7 : Scope of supply

(1) For the purposes of this Act, the expression "supply" includes---

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.---For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(b) import of services for a consideration whether or not in the course or furtherance of business;[2][and]

(c) **the activities specified in Schedule I, made or agreed to be made without a consideration;**

[(1A) **Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section *(1)*, they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]**

(2) Notwithstanding anything contained in sub-section *(1)*,---

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections *(1)*, *(1A)* and *(2)*, the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as---

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

(emphasis supplied)

58. A reference is made by the aforesaid provision to Schedule I and Schedule II which read thus:

SCHEDULE I [See section 7]

ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business: Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

3. Supply of goods—

(a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or

(b) by an agent to his principal where the agent undertakes to receive such

goods on behalf of the principal.

4. Import of services by a 1 [person] from a related person or from any of his other establishments outside India, in the course or furtherance of business

SCHEDULE II [See section 7]

ACTIVITIES 1 [OR TRANSACTIONS] TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

…..

5. Supply of services

…..

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

…..

(e) **agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and**

(emphasis supplied)

59. Having noted the provisions of the CGST Act, the relevant provisions of the IGST are also required to be noted:

"**Section 2. Definitions**.—In this Act, unless the context otherwise requires,—

(1) …..

(11) "**import of services**" means the supply of any service, where—

(i) the supplier of service is located outside India;
(ii) the recipient of service is located in India; and
(iii) the place of supply of service is in India;

(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;

Section 5. Levy and collection.—(1) Subject to the provisions of sub-section

(2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption and un-denatured extra neutral alcohol or rectified spirit used for manufacture of alcoholic liquor, for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods other than the goods as may be notified by the Government on the recommendations of the Council imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

Section 7. **Inter-State supply**.

(1) …..

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

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."

60. It is clear that the revenue has considered Clause 7 of the consent terms / settlement as brought about before the Delhi High Court between Tata and Docomo as supply of services, to the foreign recipient and hence attracting the provisions of the IGST Act as noted by us hereinabove. Considering the provisions of Section 20 of the IGST Act, which provide for 'Application of provisions of CGST Act' to the provisions of the IGST Act, *inter alia* the scope of supply and other aspects as set out in clauses (i) to (xxv) are concerned and

from a plain reading of the provisions of Section 7 of the CGST Act, we are at a loss to understand as to how a settlement of an arbitral award in the manner as accepted by the Delhi High Court, which is a matter purely *inter se* between the parties and that too in the Court proceedings, which pertain to the enforcement of a foreign arbitral award qua the incorporation of condition 7 in the consent terms amount to supply and / or import of services, that too without involving any independent consideration, when *per se* there is no question of any consideration, once there was a monetary award under which damages were awarded against Tata, payable to Docomo.

61. Under Entry 5(e) of Schedule II to the CGST Act 'supply of services' includes 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;". Thus, the words "agreeing to the obligation … … .. " are a pointer that necessarily there needs to exist an independent agreement, where the parties in the normal course of business bind themselves to refrain from an act, or to tolerate an act or a situation, or to do an act involving consideration, which would amount to supply of services of such nature. As to whether such ingredients would at all fit into, what the parties have agreed under the award, as being found relevant by the department to be the charging element, i.e., Docomo agreeing that having received the award amounts, it would not pursue the recovery proceedings initiated before the U.S., U.K. and Indian Court.

62. On a plain purport of the relevant provisions, it would not require any deep diving/elaboration to observe that the recovery of the amounts under a decree of the Court and for that matter an arbitral award, which is for damages by

any stretch of imagination ought not to amount to 'supply of services'. The reason being multiple in the facts of the present case. We may observe that as a general principle, under the scheme of recovering amounts for breach of contract by seeking damages, either in a civil suit or in arbitral proceedings, is a part of the requirement of law or the rule of law, even when it comes to compliance of an arbitral award of a foreign arbitral tribunal. Any award of damages being recognized, in the context of its enforcement applying the Indian law, namely, the ACA and recognition of the principles for award of damages under the Indian Contract Act form part of a legal scheme integral to the arbitral process. Conversely, if it were not so, even assuming that such award of damages was not in the arbitral proceedings but under a decree of a Civil Court in a civil suit, on the defendant not discharging its obligation under the decree, necessarily the decree would be subjected to execution under the provisions of Order XXI of the Code of Civil Procedure, 1908. Any settlement brought about thereunder necessarily becomes "integral to" and *or* "intricately connected", to the decree itself. The reciprocal obligation even in settlement of a decree necessarily emanates from a decree, which cannot be construed to be an independent agreement *de hors* the decree and/or alien to the decree itself.

63. Similarly, the proceedings which are incidental, integral to the execution of the decree and falling under the decree (here an arbitral award) also cannot be considered to be alien to the decree, as such proceedings certainly partake the character of the original/principal proceedings, namely, execution of a decree. For illustration, in the process of execution of a decree, the properties

(immovable/movable) of the defendant being attached, which are situated at different places, certainly would be the proceedings under the umbrella of the decree, and not outside the decree. Hence, if the money decree itself is being satisfied by the defendants by making a full and final payment to the satisfaction of the decree holder, as a natural consequence, of such satisfaction of such decree, the plaintiff agreeing to withdraw the collateral proceedings, which are in the aid of the execution and for realization of the decretal dues, it certainly cannot be said that the plaintiff is discharging an obligation alien to the decree in withdrawing of such proceedings. Moreover, such collateral proceedings which are incidental to the execution of the decree cannot be regarded as independent proceedings, having legs different from the principal proceedings i.e. the proceedings for execution of a decree.

64. Similar would be the position insofar as the arbitral award is concerned when in the present case a foreign award was subjected to enforcement before the Indian Court, that is, the Delhi High Court and realization of the award amount was also resorted in the proceedings initiated before the US and UK Courts. Such proceedings for recovery of the award amount certainly draw their colour from the arbitral award. The proceedings were in relation to or under the arbitral award only, hence any satisfaction of the award amounts in the manner as agreed in Clause 7 of the consent terms, in law would result in such collateral proceedings necessarily coming to an end, as a natural corollary, on the principle that once the decree itself stands satisfied and accepted, the collateral proceedings to recover the very decretal amounts would not survive, as they need to

necessarily yield to the decree being satisfied and would accordingly stand extinguished.

65. In the facts of the present case, the parties merely recording in the terms, the conditions towards satisfaction of the decree of the nature as agreed in Clause 7 (supra) of the consent terms that the collateral proceedings would not be pursued for the full and final satisfaction of the award being worked out, this being considered to be supply of services, itself is untenable considering the purport of the provisions of Section 7 read with Entry 5(e) of Schedule II.

66. The reason being Section 7 which defines 'Scope of supply' categorically provides that "supply" would *inter alia* include all forms of supply of goods or services or both of the nature such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for "a consideration" by a person in the course or furtherance of business. Coupled with this, in the present case what is being applied is the provision of Schedule II Entry 5(e) to the effect of which is *"a party agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"*. These provisions are being applied to the consent terms as entered between Docomo and Tata. In our view, considering as to what is provided by Entry 5(e), the same cannot be read beyond the purview and/or the context of principal provision, namely, Section 7, as noted by us hereinabove. Reading Entry 5(e) *de hors* the provision would amount to an erroneous reading of this provision, which are sought to be applied by the revenue. In the facts of the case, neither there is any independent agreement involving any consideration nor Clause 7 of the consent terms can be implied to

be any independent agreement, for which any separate consideration has been promised by Tata to be paid to Docomo so as to even remotely attract the provision of Section 7 read with Entry no. 5(e). Thus, in our view, Clause 7 of the consent terms cannot be construed to mean, that it is bringing about an independent contract between Docomo and Tata and on a consideration, so as to attract the applicability of Section 7 of the CGST Act. When Section 7 itself is not attracted, there is no question of the provisions of Entry 5(e) of Schedule II of the CGST Act and the corresponding provisions of IGST Act being made applicable. We are thus also afraid as to how the corresponding provisions of IGST as invoked and noted by us hereinabove, can at all be applied on the basis that Docomo is receiving supply of services by virtue of Clause 7 of the consent terms and/or on the arrangement between the parties, which is purely in the context of realization of the arbitral dues in the proceedings before the Delhi High Court. It also cannot be overlooked that in the facts of the present case, the situation is not that, Docomo and Tata has agreed for something different, that is, to some independent obligation/ arrangement for a consideration falling beyond the purview of the arbitral award, so as to categorize such obligation to be an independent obligation, amounting to supply of service within the purview of Section 7 read with entry 5(e) of Schedule II.

67. It is thus difficult to comprehend as to how Docomo having received the principal amount under the award, having agreed not to proceed in the enforcement proceedings in U.S., U.K. or India, which was a logical consequence of the arbitral award itself being satisfied, could be said to create any independent

obligation, that too under Section 7 of the CGST Act. Thus, the approach of the department on the premise of Docomo merely agreeing not to pursue the UK/US proceedings in the course of realization of the decretal amounts would create any obligation on Docomo to refrain from an act or to tolerate an act or a situation or to do an act, as contemplated by Entry 5(e) of Schedule II, appears to be quite absurd.

68. As rightly contended on behalf of Tata, the clear intention of Docomo in initiating enforcement proceedings before the Delhi High Court and before different Courts namely U.S., U.K., was to realize the award amount. Attributing any other purpose remains to be an ingenuity without any basis the law could recognize, as nothing is brought on record much less any independent agreement *de hors* from what was *inter se* brought out between the parties i.e. Tata and Docomo in the enforcement proceedings. Hence, in the absence of any such independent contract creating rights and obligations which can stand independent of the award/decree, to label the proceedings before the Delhi High Court and the parties agreeing to settle the claim under the award being characterized as "supply" within the meaning of Section 7 of the CGST Act read with Entry 5(e) of Schedule II, in our opinion, is a fundamental flaw. Such approach on the part of respondent No.3-Joint Director, Directorate General of GST Intelligence, is wholly without jurisdiction and patently perverse.

69. In our opinion, if such logic as adopted by the Revenue in the present case if is accepted, in that event, the settlement of every money decree where parties are before the Court and agree to a course of action purely under the decree

without creating any independent obligation, would be required to be regarded as 'supply of service' as sought to be alleged on behalf of the revenue. This would amount to creating a situation wholly not recognized by law, in the context of the relevant provisions of the CGST Act, when it comes to execution of a decree and / or settlement of a decree, as the parties may mutually decide and which would receive the imprimatur of the Court as in the present case, when such arrangements between the parties in the course of execution/enforcement proceedings stand recognized by the Court. This is precisely what has happened in the present case, as the subject matter of the intimation as also the impugned show cause notice emanates from the proceedings relating to the enforcement of the foreign award in question, which stands confirmed by the Delhi High Court. It appears to us that as merely the award amounts are large amounts, the impugned action without application of mind to the law and the facts, has been resorted. Such action has no basis whatsoever in law, looked from any angle. This, more particularly, when the revenue at all material times was aware about the legal position in terms of what is clearly notified in Circular No.178/10/2022 dated 3 August 2022, in paragraph 7.1.4 and 7.1.5 which read thus:

> "7.1.4 In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.
>
> 7.1.5 Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers

to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

(emphasis supplied)

70. The position is not different in the second circular dated 28 February 2023, being Circular No. 214/1/2023-Service Tax, wherein again the following has been reiterated.

"5. The issue also came up in the CESTAT in Appeal No. ST/50080 of 2019 in the case of M/s Dy. GM (Finance) Bharat Heavy Electricals Ltd in which the Hon'ble Tribunal relied on the judgment of divisional bench in case of M/s South Eastern Coal Fields Ltd Vs. CCE Raipur {2021(55) G.S.T.L 549(Tri-Del)}. Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB] dated 20.09.2022 in this case and also against Order A/85713/2022 dated 12.8.2022 in case of M/s Western Coalfields. Ltd. Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s South Eastern Coalfields Ltd. supra (CA No. 2372/2021). M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) on this ground.

6. **In view of above, it is clarified that the activities contemplated under section 66E(e), i.e. when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are the activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.** Field formations are advised that while taxability in each case shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST dated 3rd August. 2022, may also be referred to in this regard."

(emphasis supplied)

71. The position the revenue has accepted in regard to the liquidated damages would necessarily apply in respect of unliquidated damages. This would be clear when one considers the award of damages under Section 73, as the damages awarded by the Court and the damages (penalty) agreed between the parties, the legal character of the payment is nothing but flow of money from the party who causes a breach of the contract to the party who suffers loss or damage due to such breach so as to be the damages as awarded by the Court in its decree. Thus, the parameters in recovery of such damages either in the decree of the Court or in the arbitral award, would not be different.

72. In such context, it would be necessary to note the provisions of Sections 73 and 74 of the Contract Act providing for "*Compensation for loss or damage caused by breach of contract.*" and "*Compensation for breach of contract where penalty stipulated for*" respectively, which read thus:

> **Section 73 of Contract Act - Compensation for loss or damage caused by breach of contract**.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.
>
> **Section 74 of Contract Act - Compensation for breach of contract where penalty stipulated for**.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is

> proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.] Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 2 [Central Government] or of any 3 [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

73. As seen in the facts of the present case, disputes *inter se* between Docomo and Tata, had arisen between the said parties, on Docomo's case of the breach of the terms and conditions of the shareholders' agreement, which was the subject matter of the international commercial arbitration. The arbitral proceedings resulted in the arbitral tribunal pronouncing the arbitral award in question, whereby the damages were awarded in favour of Docomo by the arbitral tribunal, i.e., the London Court of International Arbitration. Thus, the legal character of the amounts which were entitled to Docomo are the amounts as granted under the Arbitral award, being the damages payable by Tata to Docomo. The award of such damages in the context of the Indian law would stand recognized under Section 73 of the Contract Act (supra) being a provision which ordains compensation for loss or damage caused by breach of contract. It is recovery of such award amount which was the subject matter of the proceedings before the Delhi High Court. In such context, we examine the applicability of the circulars as issued by the CBIC, considering the petitioner/Tata's contention that it is a settled principle of law that the department would be bound by the provisions of the circulars, this apart from the fact that respondents are certainly bound by law

74. It is clear from the contents of the aforesaid circular that, in cases where the amount of liquidated damages are paid, the same is regarded by the Department being amount paid, only to compensate, for injury, loss or damage suffered by the aggrieved party, due to breach of the contract and such amounts are regarded not to be any independent agreement, express or implied, in the hands of the aggrieved party receiving the liquidated damages, so as to infer that the aggrieved party would refrain from or tolerate an act or to do anything for the party paying the liquidated damages. Such receipt of amount is regarded as a mere flow of money from the party, who causes breach of the contract to the party, who suffers loss or damage due to such breach. For such reason, such payments do not constitute consideration for a supply and are not taxable, is the purport of the circular. The circular also has given clear examples in paragraph 7.1.5 (supra) being cases of damages which also include the penalty stipulated in a contract, forfeiture of earnest money, etc. Most significantly, the Circular provides that it is necessary to consider whether the payments constitute consideration for "another independent contract" in envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. The circular states that if the answer is yes, then it constitutes a 'supply' within the meaning of the CGST Act, otherwise it is not a "supply".

75. Insofar as the second Circular, being Circular no. 214/1/2023-Service Tax dated 28 February, 2023 is concerned, the applicability of the same was considered by the CESTAT in the case of **M/s. Dy. GM (Finance), Bharat Heavy Electricals Ltd**. *(supra)*, wherein CESTAT relied on the judgment of the Division

Bench of the High Court of Chattisgarh in **South Eastern Coalfields Ltd. vs. Commissioner of Central Excise and Service Tax, Raipur**[24]. In such case as informed to the Court, the Board had decided not to file an appeal against the order passed by CESTAT. A similar view was taken in the case of **M/s. Western Coalfields Ltd., M/s. Paradip Port Trust and M/s. Neyveli Lignite Corporation Ltd**. It is in the context of paragraph 6 of the said Circular, a clarification was issued that when one party agrees to refrain from an act, or tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and in such situation, if there is a flow of consideration for this activity, the departmental officers were advised that, while taxability in each such case, shall depend on the "facts of the case", the guidelines which are set out and the principles that have evolved over the time, were required to be followed in determining whether service tax on an activity or transaction needs to be levied treating it as a service by a party agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Thus, the basis and focus is on a specific agreement in regard to such activity, to attract the provisions of Section 7 of the CGST Act.

76. Having discussed the Circulars, we are of the opinion that the circulars in fact appropriately consider the legal position that in the normal circumstances, once liquidated damages are an amount being received by a party on account of breach of contract, receipt of such amount would not constitute consideration for a supply and accordingly, such amounts would not be taxable. There would be

24 2020 (12) TMI 912

hardly any distinction between a party receiving such amount being categorized as liquidated damages and a party receiving such amount as damages awarded by the Civil Court or by an arbitral tribunal, for the reason that the legal character and nature of such payment is nothing but receipt of compensation for a breach of contract. In these circumstances, also in the present case, once the award amount was received by Docomo as paid by Tata, was an amount payable towards damages under the arbitral award in question, considering the surrounding facts, there is no question of such amounts to be regarded as constituting consideration for a supply and accordingly being taxable, in the absence of any independent agreement of the nature as the law would envisage, creating distinct rights and liabilities, independent of the arbitral proceedings or totally alien to the arbitral award.

77. The above discussion would lead us to conclude that the action on the part of the respondents in raising the impugned demand on the ground that Docomo agreed not to pursue the execution proceedings instituted before the Courts of different jurisdictions (UK and USA etc.) would by any stretch of imagination amount to an independent agreement between Docomo and Tata, under which Docomo tolerated an act or a situation, in our opinion, is totally untenable. In adopting such approach, the Designated Officer has completely overlooked the following:

i) The amounts received by Docomo from Tata under the arbitral award was an indisputed position.

(ii) In the event, a party succeeding in a Civil Suit or the arbitral

proceedings and who is the beneficiary of the monetary decree/award of damages on a default of honouring the decree/award by the award debtors, the only procedure known to law for the award creditor is to institute execution proceedings for recovery of the award amounts, within the jurisdiction of the appropriate Courts where the Judgment debtor/award debtor, would have properties/ resources. For such recovery, necessarily proceedings/ applications before the appropriate jurisdictional Courts* would be required to be instituted is the arbitration jurisprudence. Such proceedings necessarily owe their pursuit only to the arbitral award/decree

(iii) In the event, in any such proceedings, the judgment debtor/award debtor takes a position to satisfy the decree/award, the necessary consequence, is to the effect that the decree-holder/award creditor would not be entitled in law to pursue the execution proceedings wherever instituted to recover the decretal/award dues for the satisfaction of the decree/award. As a natural corollary, such proceedings would come to an end and would stand concluded. In these circumstances, the decree-holder/award creditor in any scheme of settlement of the award/decree making a statement before the Court in such legal proceedings, that for receiving the amounts in full and final settlement of the decree, the decreeholder/award creditor would not pursue the proceedings as initiated before the different courts for recovery of such amounts, would

* Sch. II Ent. 5(e) of the CGST Act

in fact become a mandatory legal requirement, recognizing the legal incapacity of the decree holder/award creditor to pursue such proceedings, in view of the decree/award being satisfied. Thus, looked from any angle, in these circumstances, such position taken before any Court by the decree holders/award creditor cannot bring about any independent agreement outside the scope and purview of the execution proceedings, as such position being taken by the decree holder/award creditor, would be incidental or integral to the satisfaction of the decree/award.

78. Such legal consequences have been overlooked by the designated officer in attributing an independent agreement between Docomo and Tata, when in the course of enforcement of the arbitral award in question, the award creditor/Docomo took a position that in receiving the award amount in full and final, from Tata, it would not pursue the execution/recovery proceedings for recovery of the award amount. Thus, such statement by Docomo, that too, made before the Delhi High Court, in our clear opinion, does not create any independent agreement, so as to constitute a supply of services within the meaning of Section 7(1)(c) read with Entry 5(e) of Schedule II of the CGST Act.

79. We may also observe that in the facts and circumstances of the case, it would be difficult to accept a proposition that the decision taken by Docomo before the Delhi High Court which was exercising powers under Sections 47 and 48 of the ACA in regard to enforcement of the arbitral award in question, does not bring about any independent agreement between the parties, and of the

nature as contemplated by the provisions of Section 7 read with Section 9 and Schedule II Entry 5(e) of the CGST Act. The reason being that the orders passed by the Delhi High Court recorded the stand as taken by Docomo agreeing not to pursue the execution proceedings instituted before the UK and US Courts in view of Tata depositing and permitting Docomo to withdraw the entire award amount. The designated officer, therefore, could not have construed any different intention between Docomo and Tata arriving at an independent contract of the nature amounting to supply of service so as to attract levy of IGST. In fact, the designated officer assuming some intention between the parties on the basis of the consent terms, in our opinion, is quite an absurdity. Such impression as formed by the designated officer militates not only against the orders passed by the Delhi High Court but also the intention of the parties, inasmuch as, any proceedings to execute the arbitral award in the facts of the present case were incidental and inextricably connected to the principal proceedings, namely, the proceedings adopted by Docomo before the Delhi High Court to enforce the award for recovery of the amounts within the territory of India.

80. Also, what has not been appreciated by the Designated Officer is that insofar as the foreign lender/Docomo was concerned, the recognition of the award for enforcement was upheld by the Delhi High Court. Thus, once the award amount was received by Docomo, as a direct consequence thereof, the execution proceedings before the UK and US Courts being ancillary and in aid of the claim of Docomo to receive the award amount, which was discharged by Tata,

the incidental proceedings before the US and UK Courts, necessarily could not have been pursued and/or were to become inconsequential on the award debt being discharged by Tata.

81. In the context of levy of tax on the amount of damages received from the suppliers, on account of material breach of the terms and conditions of the contract, such issue had fell for consideration of the Tribunal in the case of **South Eastern Coal Fields Ltd. vs. Commissioner of Central Excise and Service Tax, Raipur** (supra). The revenue had fastened upon South Eastern Coal Fields Ltd. - the appellant, a liability under Section 65B read with Section 66E(e) of the Finance Act for the period from July 2012 till March 2016 on the ground that by collecting the said amount, the appellant had agreed to the obligation to refrain from an act or to tolerate the non-performance of terms of contract by the other party. Referring to the decision of the Supreme Court in **Commissioner of Service Tax vs. M/s. Bhayana Builders (P.) Ltd.**[25] wherein it was held that any amount charged which has no nexus with the taxable service and which is not a consideration for the services provided, does not form part of the value which is taxable under Section 67 of the Finance Act. The Tribunal also considering the decision of the Supreme Court in **Fateh Chand vs. Balkishan Das**[26] on damages, held that it was not possible to sustain the view taken by the Commissioner that the penalty amount, forfeiture of earnest money deposit and liquidated damages were received by the appellant towards 'consideration' for 'tolerating an act' leviable to service tax under Section 66E(e) of the Finance Act and accordingly

25 2018(2) TMI 1325 SC

26 AIR 1963 SC 1405

decided the appeal in favour of the appellant. Also considering the decision of the Constitution Bench of the Supreme Court in **Fatehchand** (supra), it was held that the contention of the department that compensation received was synonymous to 'tolerating an act' was held to not the correct position. The view taken by the Commissioner that the penalty amount, forfeiture of earnest money and liquidated damages were received by the appellant towards consideration for tolerating an act, was held to be not the correct approach. Accordingly the orders passed by the Commissioner levying tax were set aside.

82. Mr. Datar's reliance in support of the propositions on damages being awarded to Docomo, and payable by Tata in the arbitral proceedings, is premised as to what would be the legal character of the amount of damages being received, and as considered by the Supreme Court in **Union of India vs. Raman Iron Foundry**[27]**,** which, according to him, would aptly apply to the present facts. In Raman Foundry, tender was accepted by the Government of India, which was subject to the General Conditions of Contract, contained in the Standard Form of Contract. The performance of the contract ran into difficulties. Dispute had arisen between the parties which gave rise to claims by both parties. The Government of India intimated to **Raman Iron Foundry**, that in case of failure to pay the damages within the stipulated time, the amount would be recovered from its pending bills in respect of other contracts. Consequent thereto, **Raman Iron Foundry** filed an application under Section 20 of the Arbitration Act, 1940 for filing the arbitration agreement. Such application was allowed and accordingly

27 (1974) 2 SCC 231

arbitration proceedings were initiated. During the pendency of the arbitration, apprehending that the amounts due and payable by the Government of India are likely to be appropriated towards the recovery of the amount of damages, **Raman Iron Foundry** made an interim application before the High Court under Section 41 read with the Second Schedule of the Arbitration Act, praying that the status quo be maintained and the appellant should be restrained from recovering its claim for damages from the pending bills of **Raman Iron Foundry**. The High Court issued an interim injunction. It is such order, which was the subject matter of consideration. In such context, the issue which fell for consideration of the Court, was to the purport of Clause 18, which intended to provide a right to recovery of claim for payment of a sum of money arising out of or under the contract. It is in such context, in examining as to whether there was any qualitative difference in the nature of a claim whether it be for liquidated damages or for unliquidated damages, it was held that, it makes no difference of the claim being for liquidated damages, as such claim stood on the same footing, as a claim for unliquidated damages. Referring to the decision of Chagla, CJ in **Iron and Hardware (India) Co. vs. Firm Shamlal and Bros.**, the Supreme Court observed that the statement of law as made in the said judgment of this Court, represented the correct legal position and would have full concurrence of the Supreme Court. The relevant observations as made by the Supreme Court are required to be noted, which read thus:

> 11. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts: The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are

liquidated damages under cl. 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Sec. 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrors is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not in actionable claim and this position is made amply clear by the amendment in s. 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we, find it stated by Wightman, J., in Jones v. Thompson, "Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has. been signed".. It was held in this case that a claim for damages dots not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O' Driscoll v. Manchester Insurance Committee, (2) Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages : "…….. in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik, S. Milkha Singh v. M/s N. K. Gopala Krishna Mudaliar and Iron & Hardware (India) Co. v. Firm Shamlal & Bros.* Chagla, C. J. in the last mentioned case, stated the law in these terms:

> " In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.
>
> **As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the**

> **breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."**

> This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under cl. 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of cl. 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under cl. 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim Injunction restraining the appellant from doing so."

(emphasis supplied)

83. In the aforesaid circumstances, the position in law is clear that when damages were awarded by the arbitral tribunal in favour of Docomo, being compensation for the injury which it had suffered on account of breach of contract by petitioner-Tata. Such compensation was not being granted by reason of any different obligation on the part of petitioner-Tata, as Docomo became entitled to such compensation, only on being determined and awarded by the arbitral tribunal. Thus, as held in **Iron and Hardware (India) Co.** (supra), no pecuniary liability had arisen till the arbitral tribunal had determined, that Docomo complaining of the breach was entitled to damages, and for such reason when damages were assessed, the arbitral tribunal was not ascertaining the pecuniary liability otherwise than the claim for damages. Hence, till such determination by the arbitral tribunal, there was no liability on Tata to pay any such amount as damages. Such was the legal character of the determination in

the arbitral proceedings, i.e., the arbitral award bringing about a consequence that the claim for damages for breach of contract was not a claim for a sum which was *ipso facto* due and payable on the date of alleged breach and it was only after the determination by the Tribunal, on the proof of such breach, the damages being quantified and the entitlement of Docomo as recognized by the award was brought into existence. Thus, for such reason in the context of applicability of provisions of Section 7(1)(c) read with Entry 5(e) of Schedule II of CGST Act, there was no scope for the Designated Officer to read any independent contract between the parties whereby reciprocal obligations, *dehors* the arbitral proceedings and the satisfaction of the award by payments made by Tata to Docomo could at all be inferred or created.

84. In the above circumstances, we proceed to answer the question framed by us to hold that the settlement as brought about between Docomo and Tata before the Delhi High Court settling the arbitral award would not amount to supply within the meaning of Section 7(1) of CGST Act, 2017. The consent terms entered between the parties on the basis of which the Delhi High Court passeD the final orders on the proceedings filed by Docomo under Sections 47 and 48 of the ACA, cannot be construed to create any independent agreement between the parties, de hors the arbitral award and/or bring about any legal consequence other than recognizing Docomo's entitlement for the award amounts. Thus, these facts and circumstances did not attract the provisions of CGST and IGST Act so as to create tax liability on Tata. The award of damages in the proceedings before the arbitral tribunal is a judicial exercise (**See: Raman Foundry**). The sequitur being

that satisfaction of the arbitral award as recorded by the Delhi High Court in terms of any such judicial or arbitral determination, would not attract liability for payment of IGST under the provisions of Section 7 of the CGST Act, as neither the payment made by Tata to Docomo, nor Docomo agreeing not to pursue the execution/enforcement proceedings, can be regarded to be any 'supply of services'.

85. In the light of the above discussion, we are inclined to accept the case as urged on behalf of the petitioner-Tata for grant of reliefs as prayed for, while rejecting the case as urged on behalf of the respondents that the respondents were justified in proposing to levy GST on the settlement of arbitral award in the proceedings adopted by Docomo under Sections 47 and 48 of ACA.

86. Now coming to the objections as raised on behalf of the respondents, we are also not inclined to accept the case as urged on behalf of the respondents that the Writ Petition ought not to be entertained in view of an alternate remedy being available to the petitioner-Tata, relying on the decisions which we have referred hereinabove. In such context, we may observe that the principles of law in regard to the parties being relegated to alternate remedy are well-settled. It is purely the discretion of the Court whether its writ jurisdiction needs to be exercised or not. Such discretion is required to be judicially exercised. In this context, we may refer to the recent decision of the Supreme Court in **Godrej Sara Lee Limited vs. Excise and Taxation Officer**[28] wherein on the Writ Petition to be entertained and maintainable, the Supreme Court held thus:-

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28 [(2023) SCC OnLine SC 95]

4. …. … … … ... The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh vs. Mohd. Nooh) had the occasion to observe as follows:

> 10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to

> quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"

6. At the end of the last century, this Court in paragraph 15 of the its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:

(i) where the writ petition seeks enforcement of any of the fundamental rights;
(ii) where there is violation of principles of natural justice;
(iii) where the order or the proceedings are wholly without jurisdiction; or
(iv) where the vires of an Act is challenged.

7. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax vs. M/s. Commercial Steel Limited) has reiterated the same principles in paragraph 11.

8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India vs. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. **What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."**

(emphasis supplied)

87. Adverting to the aforesaid settled principles of law, we may observe that no doubt the principles of law as laid down by the Supreme Court in the decisions as relied on behalf of the respondents in the facts pertaining to the said

decisions, are well settled, however, considering the facts of the present case, we are not inclined to accept the respondent's contention that this petition ought not to be entertained and the petitioner-Tata needs to be relegated to the remedy of appeal. The reason being, that when have we come to a considered conclusion, that the designated officer had no jurisdiction to issue a show cause notice, so as to bring such demand within the purview of Section 7(1)(c) read with Schedule II Entry 5(e), on the basis of what had emanated between the parties, forming part of the consent order passed by the Delhi High Court in the proceedings filed by Docomo under Sections 47 and 48 of ACA. Thus, when the jurisdictional authority itself was absent for the designated officer, to exercise jurisdiction to tax a settlement between the parties as arrived in the proceedings for enforcement of a foreign arbitral award, in our opinion, there is no gainsaying that the petitioner-Tata nonetheless needs to be relegated to an alternate remedy. We have accordingly entertained the petition.

88. While parting, we may also observe that we have discussed only the relevant decisions so as not to burden the judgment, considering that such decisions, on the issue they decide, lay down the settled principles of law.

89. Considering the nature of reliefs which we intend to grant to the petitioner-Tata, we are not inclined to examine the petitioner-Tata's alternate prayer, namely, challenge as mounted to Section 7 read with Entry 5(e) to Schedule II of the CGST Act being illegal and ultra vires.

90. In the light of the above discussion, we are certain that the petition needs

to be partly allowed. It is accordingly allowed in terms of prayer clauses (a) and (ca).

91. Rule is made absolute in the aforesaid terms.

92. No costs.

93. In view of disposal of Writ Petition, Interim Application does not survive and the same is accordingly disposed of.

(AARTI SATHE, J.) **(G. S. KULKARNI, J.)**