

***THE HON'BLE SRI JUSTICE SUJOY PAUL**

AND

***THE HON'BLE SRI JUSTICE NAMAVARAPU
RAJESHWAR RAO**

+WRIT PETITION No.8405 of 2023

% 06-08-2024

#Sri Avantika Contractors (I) Limited.

...Petitioner

vs.

\$Appellate Authority for Advance Ruling (GST) and others.

... Respondents

!Counsel for the Petitioner: Sri C. V. Narasimham.

^Counsel for Respondents: 1. Sri Dominic Fernandes, Senior Standing
Counsel for CBIC.
2. Ms. Shireen Sethna Baria for
respondent No.2.

<Gist :

>Head Note :

? Cases referred

1. 2017 SCC OnLine Jhar 290
2. (2004) 3 SCC 553
3. (2023) 3 SCC 629
4. (1998) 8 SCC 237
5. (2024) 162 taxmann.com 276 (Gujarat)
6. (2023) 147 taxmann.com 212 (Bombay)
7. 1978 (1) SCC 405
8. 2015 (322) E.L.T 587 (SC)
9. (1985) 1 SCC 591
10. (2004) 11 SCC 641
11. (2007) 5 SCC 447

IN THE HIGH COURT FOR THE STATE OF TELANGANA
HYDERABAD

* * * *

WRIT PETITION No.8405 OF 2023

(Per Hon'ble Sri Justice Sujoy Paul)

Between:

Sri Avantika Contractors (I) Limited.

...Petitioner

vs.

Appellate Authority for Advance Ruling (GST) and others.

... Respondents

JUDGMENT PRONOUNCED ON: 06.08.2024

THE HON'BLE SRI JUSTICE SUJOY PAUL
THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? :
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? :
3. Whether His Lordship wishes to
see the fair copy of the Judgment? :

SUJOY PAUL, J

NAMAVARAPU RAJESHWAR RAO, J

**THE HONOURABLE SRI JUSTICE SUJOY PAUL
AND
THE HONOURABLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO**

WRIT PETITION No.8405 OF 2023

ORDER: *(per Hon'ble SP,J)*

This Writ Petition filed under Article 226 of the Constitution impugns the Order-in-Appeal (OIA) No.AAAR/04/2022 dated 16.07.2022, whereby the view of the Advance Ruling Authority dated 05.08.2021 (Annexure P-18) was affirmed.

Petitioner's case:-

2. The Government of India (GoI) entered into Memorandum of Understanding (MoU) with Government of Maldives for constructing a Police Academy funded by the GoI. In turn, the GoI appointed respondent No.2 i.e., National Buildings Construction Corporation Ltd., (NBCCL) to execute the construction of Police Academy by itself or through a contractor. NBCCL awarded contract to the petitioner.

3. In order to complete the work at Republic of Maldives (Maldives), the NBCCL set up an office and in turn the petitioner also set up their office at Addu city, Maldives. The Authorized Dealer Bank {Oriental Bank of Commerce (OBC)}, which is acting on behalf of Reserve Bank of India approved the establishment of branch office of petitioner in Maldives.

4. The stand of the petitioner is that it exported various goods to its Maldives office. The turnover of such goods was declared under the GST as 'zero rate supplies'. The petitioner treated the consideration received towards 'works contract service of construction' which was completely executed in the territory of Maldives through their Maldives establishment as outside the scope of GST laws of India. Respondent No.2 did not pay GST on the construction to the petitioner and also opined that supplies rendered outside India are beyond the purview of GST.

5. Learned counsel for the petitioner placed reliance on agreement dated 08.07.2016 (Annexure P-5) to show that NBCCL has awarded contract to the petitioner for setting up of the Institute of Security and Law Enforcement Studies (ISLES) at Addu city, Maldives. Clause 1.1 of the said agreement clearly shows that construction was to be carried out in Addu city, Maldives. The Ministry of External Affairs, GoI, New Delhi, issued certificate dated 14.07.2016 (Annexure P-7), which makes it clear that NBCCL working under the aegis of Ministry of Urban Development has been appointed by the Ministry of External Affairs, GoI, New Delhi, as 'Executing Agency' for construction of ISLES at Addu city, Maldives. The petitioner has been duly awarded contract by NBCCL on behalf of Ministry of External

Affairs, GoI, New Delhi, for implementation of said project. In turn, the petitioner got 'Certificate of Re-registration' dated 22.02.2017 (Annexure P-8), which was issued by the Registrar of Companies, Ministry of Economic Development, Republic of Maldives. The petitioner also entered into a rental agreement in order to have a 'fixed establishment' in Maldives. The petitioner during the time of construction of said building got employment approval from the Maldives Government in Addu city for its number of employees. Few of such documents are also placed on record as Annexure P-9.

6. Much emphasis is laid on the agreement of petitioner with Ministry of Economic Development, Republic of Maldives dated 18.04.2017 (Annexure P-10). The petitioner got itself registered under Maldivian GST Law and notification dated 19.02.2020 (Annexure P-11) was issued. A letter dated 27.12.2017 (Annexure P-13) is relied upon to submit that the OBC informed the petitioner that consideration for project will be paid by NBCCL in Indian rupees against submission of running bills passed during the progress of project ISLES at Addu city, Maldives.

7. During the course of arguments, attention of this Court is drawn to an agreement entered into between Ministry of External Affairs and NBCCL dated 11.03.2015 (Annexure R-2). Clause 6.1 (e) and Clause 8.0 were referred to show that the service tax or any other tax, levy or duty shall be reimbursed to the executing agency i.e., NBCCL. Clause 8.0 provides that reimbursement can be to NBCCL or its designated contractor/sub-contractor or supplier. The NBCCL opened its office at Addu city, Maldives, as is evident from the document dated 16.12.2020 (Annexure-3) filed with the counter of respondent No.2. Another contract filed with the rejoinder is referred to show that it is entered into between NBCCL and the petitioner and clause 18.2 of this contract makes it clear that taxes, duties and levies shall be reimbursed by NBCCL to the contractor/petitioner.

8. Learned counsel for the petitioner submits that the construction of ISLES was completed and the same was inaugurated in the presence of high dignitaries of India and Maldives. Photographs of the event are placed on record with the counter of respondent No.2. It is submitted that when contract was entered into between GoI and Government of Maldives and work started, service tax regime was holding the field. The GST law came into force with effect from 01.07.2017.

9. In furtherance of the petitioner's letters dated 04.07.2017 and 22.08.2017, NBCCL wrote a letter dated 13.04.2018 to the petitioner which was filed with the counter of respondent No.3. Learned counsel for the petitioner, by taking this Court to this letter, submits that NBCCL obtained a legal opinion wherein it was opined that the ISLES project executed in Addu city of Maldives is neither taxable under the Service Tax regime before 01.07.2017 nor thereafter under the GST regime. Hence, no amount of GST is to be reimbursed to the contractor/petitioner. However, it was opined in the letter that since a huge amount of Rs.29.85 crores is involved in respect of GST, the petitioner may request for an 'advance ruling' from GST authority on the taxability issue. In turn, the petitioner prayed for advance ruling. The competent authority by order dated 05.08.2021 gave advance ruling against the petitioner.

10. Aggrieved, the petitioner preferred an appeal which was rejected by the impugned OIA dated 16.07.2022 (Annexure P-1). This appellate order is subject matter of challenge in this Writ Petition.

11. Learned counsel for the petitioner, by placing reliance on various provisions of the Central Goods and Services Act, 2017

(CGST Act) and Integrated Goods and Services Tax Act, 2017 (IGST Act), urged that the respondents have erred in passing the advance ruling and affirming it in the appeal. The aim and object of both the aforesaid acts demonstrates that the law makers never intended to apply them beyond the territory of India. Section 2 (56) of the GST Act is relied upon to submit that 'India' is defined and by no stretch of imagination, the works contract service provided by the petitioner at Maldives falls within the territory of India. Section 3 (119) talks about 'works contract' and there is no dispute between the parties that the petitioner performed the work at Addu city, Maldives in furtherance of a 'works contract'.

12. The bone of contention of learned counsel for the petitioner is that both the authorities while passing the order dated 05.08.2021 and OIA dated 16.07.2022 have not considered Section 2 (14) and 2 (15) of the IGST Act in correct perspective and also failed to consider Explanations 1 and 2 of Section 8 and Section 13 (1) & (4). The authorities erred in interpreting *proviso* to sub-section (3) of Section 12. A combined reading of Section 2 (14) (b), 2 (15) (b), Section 8 (Explanations 1 and 2), *proviso* to Section 12(3) and Section 13 leaves no room for any doubt that GST law cannot be made applicable beyond the territory of India

and in relation to a 'works contract service' provided by the petitioner through his 'fixed establishment' at Addu city, Maldives. The 'location' of the petitioner/supplier for present purpose must be the location of 'fixed establishment' at Addu city and not at the registered office at Hyderabad (Telangana).

13. The *alternative* submission of learned counsel for the petitioner is that even assuming that the petitioner is covered under the GST law of India and he is required to pay tax based on it, in view of terms of contracts dated 11.03.2015 and another filed with the rejoinder, the tax amount is required to be reimbursed by the GoI to NBCCL and in turn by NBCCL to the petitioner. Thus, it is an arrangement because of which money will go from one pocket to another pocket of the Government. The petitioner cannot be made to suffer and pay the tax under the GST law of India for the activity carried out in the Maldives.

14. It is further submitted that the petitioner has already paid taxes under the GST law of Maldives. The object behind bringing GST and IGST Acts is to levy tax for the activity which takes place within the territory of India and not outside the territory of India. Lastly, on the basis of judgment of **Abhishek Kumar v.**

NBCCL¹, it is submitted that respondent No.2 is a 'State' within the meaning of Article 12 of the Constitution and is amenable to the writ jurisdiction of this Court. Being a 'State', respondent No.2 is bound to act fairly and fulfill its contractual obligation and reimburse the tax to the petitioner. In turn, it can get the reimbursement from the Central Government. Reference is made to **ABL (ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.)**² and **Gas Authority of India Ltd. Indian Petrochemicals Corporation Ltd.**³.

Contention of Revenue:

15. Countering the argument of learned counsel for the petitioner, Sri Dominic Fernandes, learned Senior Standing counsel for CBIC, submits that as per Section 2 (105) of the CGST Act, the petitioner is a 'supplier'. Similarly, Section 2 (93) of the CGST Act, which defines 'recipient', makes it clear that where a consideration is payable for supply of goods or services or both, the person who is liable to pay that consideration is the 'recipient'. In the instant case, the consideration was payable by NBCCL, which is located and registered in New Delhi, India. Section 2 (70) of the CGST Act is *pari materia* to Section 2 (14) of

¹ 2017 SCC OnLine Jhar 290

² (2004) 3 SCC 553

³ (2023) 3 SCC 629

the IGST Act, which describes 'location of the recipient of services'. As per Clause (a) of Section 2 (14) of the IGST Act, where a supply is received at place of business for which the registration has been obtained, shall be the location of such place of business. Based on this definition, it is urged that in the present case, the supply, agreement to perform is received at the place of business for which registration has been obtained by NBCCL at New Delhi, India. Hence, New Delhi will be the location for recipient of services. The petitioner and respondent No.2 did not have any 'fixed establishment' in Maldives as per Section 2 (50) of the CGST Act.

16. Based on Section 2 (71) of the CGST Act, which is *pari materia* to Section 2 (15) (a) of the IGST Act, it is argued that 'location of supplier of services' means where the supply is made from a place of business for which the registration has been obtained, the location of such place of business. The agreement to perform is being made in this case from the place of business for which registration has been obtained i.e. M/s. Sri Avantika Contractors (I) Limited, Hyderabad, India.

17. Section 2 (50) of the CGST Act, which is *pari materia* to Section 2 (7) of the IGST Act, is referred to highlight the definition

of 'fixed establishment'. The definition of 'person' mentioned in Section 2 (84) of the CGST Act is also referred to contend that the definition of 'person' and definition of 'company' and 'foreign company' under Section 2 of the Companies Act, 2013 shows that a 'company' is company incorporated in India and foreign company is company incorporated outside India are separated persons under provisions of the CGST Act and hence, both are separate 'persons' and separate legal entities. Hence, registered place of business of the petitioner in Maldives cannot be considered as 'fixed establishment' of M/s. Sri Avantika Contractors (I) Limited.

18. Furthermore, Sri Dominic Feranandes, learned Senior Standing counsel for CBIC, submits that no doubt the work performed by the petitioner at Maldives is based on 'works contract' as per Section 2 (119) of the CGST Act and relates to contract of services, yet 'works contract' is essentially a contract. The contract was between the petitioner and respondent No.2. The contract was entered into between two parties located in India which means the location of 'supplier' and 'recipient' both is in India.

19. It was strenuously contended that Section 16 of the IGST Act deals with 'zero rated supply' and Clause (a) is about export of goods or services or both. Section 2 (6) of the IGST Act talks about 'export of services'. Supply of any such services takes place when the supply of services is located in India. To bolster this submission, clauses (i) and (iv) of Sub-section 6 of Section 2 of the IGST Act were referred. Since the petitioner has filed their returns by declaring the said services rendered as 'zero rated supply' (exports), the petitioner's contention that they were located in Maldives for the purpose of CGST and IGST cannot be accepted. The petitioner has not received any payment in convertible foreign exchange and for this reason alone, the present Writ Petition deserves to be dismissed.

20. Section 12 (3) of the IGST Act is referred to 'show the place of supply of services' and to contend that location of immovable property is although located in Maldives, location of recipient i.e., NBCCL is in New Delhi. Since location of 'supplier' and location of 'recipient' both are in India, Section 13 of the IGST Act is not applicable.

21. Sri Dominic Fernandes, learned Senior Standing counsel for CBIC, placed reliance on the judgment of Supreme Court in

the case of **The Appropriate Authority v. Sudha Patil**⁴ to emphasis the scope of judicial review in exercise of power under Article 226 of the Constitution. It is submitted that this Court is not required to sit in appeal and reevaluate the entire things. Basically, flaw in decision making process, perversity in decision and where the impugned decision is such, which no reasonable person can reach alone can form basis for interference. Even if two views are possible, one of which has been taken in the impugned order, no interference is warranted. For the same purpose, he relied on the judgments of Gujarat High Court in the case of **Isotex Corporation (P.) Limited v. Union of India**⁵ and Bombay High Court in the case of **Jotun India (P.) Limited v. Union of India**⁶.

22. Learned Senior Standing counsel for CBIC further submits that Sub-section 3 of Section 12 of the IGST Act cannot be read in the manner suggested by the petitioner and respondent No.2. Otherwise, the *proviso* will be otiose. The location of the recipient must be treated to be at New Delhi and cannot be at Addu city of Maldives. It is faintly argued that the petitioner has only challenged the OIA/appellate order and not assailed the order

⁴ (1998) 8 SCC 237

⁵ (2024) 162 taxmann.com 276 (Gujarat)

⁶ (2023) 147 taxmann.com 212 (Bombay)

dated 05.08.2021 (Annexure P-18) in specific passed by the Advance Ruling Authority.

Contention of respondent No.2:-

23. Sri S.Dwarakanath, learned Senior Counsel appearing for respondent No.2, at the outset, fairly submits that respondent No.2 is sailing with the petitioner in all respects, except on the aspect of reimbursement of tax to the petitioner by respondent No.2. The learned Senior Counsel urged that the impugned advance ruling (Annexure P-18) is cryptic in nature and does not deal with certain statutory provisions of the GST/IGST Act. For example, the impact of both the 'Explanations' appended to Section 8 of the IGST Act has escaped notice of the said authority. The appellate authority confirming the advance ruling, although referred about certain statutory provisions, did not deal with it in correct perspective. The impugned orders will make the petitioner almost remediless so far in-house mechanism under the aforesaid Acts are concerned. Once advance ruling is issued which is affirmed by the appellate authority, in any proceeding under Section 73/74 of the GST Act, the authorities of almost same level will be influenced, guided and prejudiced by advance ruling. In this backdrop, the writ remedy is the only appropriate remedy and case of the petitioner

falls within the four corners of writ jurisdiction of this Court. As per the judgment of Supreme Court in **Sudha Patil** (supra) on which Sri Dominic Fernandes has placed reliance, the judicial review of impugned orders is permissible because there exist patent illegality in understanding and interpreting the provisions of the Acts.

24. On facts, it is submitted that the petitioner and respondent No.2 both established their 'fixed establishment' at Maldives. A huge construction of ISLES had taken place at Addu city of Maldives which took several years. During this time, through their 'fixed establishments', the petitioner and respondent No.2 had monitored and executed the work and had taken care of all Ministerial activities arising thereto.

25. By placing reliance on Section 94 of the Companies Act, 2013 of Maldives, learned Senior Counsel urged that re-registration of petitioner's company was the essential requirement of the law of said country. The said re-registration does not mean that a new or separate legal entity came into being. At best, at a new location i.e., 'fixed establishment' was created and a bare perusal of *proviso* to Section 12(3) of the IGST Act makes it clear that the advance ruling and OIA are bad in

law. Sub-sections (3) and (4) of Section 13 were heavily relied upon to contend that in a case of this nature where registered offices of the petitioner and the respondents were situated within the boundary of India but the works contract service activity has been admittedly taken place beyond the territory of India i.e., in Maldives, it is the location of such 'fixed establishment' which will be the determinative factor.

26. So far question of reimbursement of tax, etc., is concerned, learned Senior Counsel urged that although respondent No.2 being a 'State' is amenable to writ jurisdiction of this Court, the prayer for reimbursement is arising out of a contractual obligation. This prayer cannot be granted in a Writ Petition. The appropriate remedy for petitioner is under the civil law. To this extent, respondent No.2 opposed the petition.

Rejoinder Submissions:

27. In rejoinder submissions, the learned counsel for the petitioner submits that the document dated 16.12.2020 (Annexure P-3) filed with counter of respondent No.2 shows that between February, 2020 to November, 2020, 436 persons worked with respondent No.2 at Addu city of Maldives. Thus, this is also

a relevant factor for determining whether there exists a 'fixed establishment' in Maldives.

28. Apart from this, to counter the argument of the Revenue relating to filing of 'zero rated returns', it is urged that this is not the reason for passing the impugned order by Advance Ruling Authority and Appellate Authority. Reliance is placed on Constitution Bench judgment of Supreme Court in the case of **Mohinder Singh Gill v. The Chief Election Commissioner**⁷, to canvas that validity of order of statutory authority is to be judged on the basis of grounds mentioned therein and same cannot be supplemented by filing counter affidavit in the Court.

29. By placing reliance on another judgment of Supreme Court in the case of **Jayaswal Neco Ltd. v. Commissioner of Central Excise**⁸, it is submitted that there cannot be any 'estoppel' against the law. Merely because the petitioner erroneously filed 'zero rated returns', it will not operate as 'estoppel' against the petitioner. More-so, when the petitioner filed its 'zero rated returns', GST laws just came into being and there was lot of confusion amongst the tax payers about its provisions. In this backdrop, the aforesaid ground deserves to be discarded.

⁷ 1978 (1) SCC 405

⁸ 2015 (322) E.L.T 587 (SC)

30. The parties confined their arguments to the extent indicated above and filed written synopsis. We have heard them at length and perused the record.

FINDINGS:

31. Taxation fundamentally operates as a legal principle, structured by a comprehensive set of laws, regulations, and statutory provisions that establish the processes for calculating, levying, and allocating taxes. These legal instruments, enacted by legislative bodies, aim to ensure fairness, equity, and the effective financing of public services. They are crafted to prevent tax evasion, stimulate economic progress, and equitably distribute the tax obligation. However, the application of tax law is not a mere application of set rules. The determination of taxes involves a deep dive into the factual aspects of each taxpayer's circumstances. The practical details of each case including income streams, allowable deductions, business operations, and investment activities are critical in applying the legal framework. Each taxpayer's circumstances are distinct, necessitating a careful approach to determine tax obligations based on factual elements.

Admitted facts:

32. There is no dispute between the parties that an MoU was entered into between the GoI and Government of Maldives for construction of ISLES. In turn, another contract was entered into between the GoI and respondent No.2. Respondent No.2 was treated to be an 'Executing Agency' which is evident from the document dated 14.07.2016 (Annexure P-7) issued by the Ministry of External Affairs, GoI and was authorized to get the work done through any other agency. In turn, another contract between respondent No.2 and the petitioner was entered into pursuant to which the works contract services were rendered in Addu city of Maldives.

33. It is not in dispute that OBC issued letter dated 27.12.2017 to the petitioner and in Clause 5, it is clearly stated that the petitioner company has already set up site office/liaison office at Sri Avantika Contractors (I) Limited, Reef View, Feydhoo, Hirudhu Maa Magu, S.Hithadhoo, Addu City, Republic of Maldives. Clause 1.1 of the agreement dated 08.07.2016 entered between respondent No.2 and the petitioner reads as under:

“1.1 SCOPE OF WORK: NBCC has awarded the contract to M/s Shri Avantika Contractors (1) Limited for the setting up of the Institute for security and Law Enforcement Studies (ISLES) at ADDU city in Maldives on the terms and conditions contained in its letter of Award No.NBCC/GM

(CPG)/2016/817 dated: 04.06.2016 and the documents referred to therein. The award has taken effect from 04.06.2016 i.e. the date of issue of aforesaid letter of intent. The terms and expressions used in this agreement shall have the same meanings as are assigned to them in the “Contract Documents” referred to in the succeeding Article.”

34. Similarly, Clause 2.5, 6 (e) and 8.0 of the agreement entered into between MEA and NBCCL are worth mentioning, which read as under:

“2.5: The Executing Agency shall invite tenders, on behalf of the Employer, for awarding the different work packages of the Project. For this, it shall prepare the tender documents comprising of the technical specifications BOQ, General Terms and Conditions, Special Conditions etc. Tender(s) shall then be invited by the **Executing Agency for an on behalf of the Employer through open tenders or tenders from the short listed, Pre-qualified contractors/agencies meeting prequalification criteria for different packages. The Executing Agency, on behalf of the Employer, shall accordingly award the work/packages to the technically qualified lowest bidder.**

6 (e):- Service Tax, if applicable, shall be reimbursed to the Executing Agency Any other tax levied by Government after signing this agreement is to be paid extra.

8.0 TAXES AND DUTIES:-

All statutory taxes/levies, duties, cess, entry tax or any kind of imposition(s) whatsoever imposed/charged by any Government (Indian Central/State) and/or Government of Maldives and/or any other local bodies/authorities on “Executing Agency” and for its designated Contractor(s)/Sub-Contractor(s) or suppliers in respect of execution of “Project and Service Tax on Consultancy Fee of Executing Agency” (including any variation thereof) shall be reimbursed to “Executing Agency”.

35. Clause 2.5 of this contract authorizes respondent No.2 to invite tenders on behalf of employer (GoI) for the purpose of execution of the work at Addu. In furtherance of this enabling provision, respondent No.2 entered into contract with the petitioner and in turn, received 'works contract' services from the petitioner.

36. It is also not in dispute between the parties that object for bringing CGST Act and IGST Act into statute book is to make provision for levy and collection of tax of intra-state supply of goods and services or both and for inter-state supply of both respectively.

37. Undisputedly, the petitioner was 're-registered' at Maldives under provisions of Maldivian laws. The petitioner engaged a sizable number of persons to execute the work and also established a site office. Similarly, respondent No.2 in order to supervise the work and get it executed through petitioner, established its office and both engaged a sizable number of persons.

38. It is equally admitted that the location of registered office of petitioner and respondent No.2 are in India and all the contracts mentioned hereinabove were entered into between the parties

within the territory of India. The payment was required to be made in Indian Rupees. These are the only events which have taken place within the territory of India. The other things i.e., 're-registration' of the petitioner at Maldives, establishment of site office/establishment by the petitioner and respondent No.2 at Addu city of Maldives and the construction of ISLES pursuant to works contract services had taken place within the territory of Maldives. In this backdrop, the interesting conundrum is whether the Advance Ruling Authority and Appellate Authority were justified in giving a ruling against the petitioner.

39. As noticed above, the parties are at loggerheads on the question whether the establishment/site office maintained by the petitioner and respondent No.2 fall within the ambit of Section 2 (7) 'fixed establishment' of the IGST Act. The parties have also taken diametrically opposite stands on the question relating to 'location of recipient of services' and 'location of supplies or services'.

40. These aspects deserve serious consideration. However, before dealing with the statutory provisions, we deem it proper to briefly state reasons assigned by learned Appellate Authority in OIA dated 16.07.2022 (Annexure P-1) for ruling against the

petitioner. The contention of the petitioner was not accepted because (i) as per Clause 3.6 of the agreement, the petitioner will receive consideration from respondent No.2 in 'Indian Rupees'. (ii) Sri Avantika Contractors (I) Limited was registered under laws and regulations of Maldives. (iii) NBCCL was engaged under the aegis of the Ministry of Urban Development as the 'Executing Agency' and its office was located at New Delhi. (iv) From where 'individual goods and services' involved in the works contract are supplied and from where services are received is immaterial in determining the location of recipient and supplier. (v) The services (works contract services) have to be looked in a holistic manner and the promise to deliver has been made by M/s. Sri Avanthika Contractors (I) Limited which will be held responsible for the non-performance of the agreement. (vi) In the instant case, the supply agreement to perform is being made from the place of business for which registration has been obtained at Hyderabad. Thus, Hyderabad will be the location for the supplier of services. (vii) As per definition of 'person', 'company' and 'foreign company', M/s Avanthika Contractors (I) Limited, the petitioner and re-registered company at Maldives are separate legal 'persons' and thus, are separate legal entities. (viii) The registered place of business of M/s. Sri Avanthika Contractors (I)

Limited, Maldives cannot be considered as 'fixed establishment' of the petitioner. (ix) The 'location of the supplier' is the registered place of business of the applicant i.e., Hyderabad. (x) NBCCL is the recipient of services located at New Delhi. Thus, New Delhi will be the 'location of the recipient of services'. Since the location of the recipient of services and location of supplier of services are located in India and services are directly in relation to contract of immovable property Section 12 (3) (a) of the IGST Act would apply. Since locations of both are held to be in India, the questions raised by the petitioner were answered against him.

Fixed Establishment/Separate Legal Entity:

41. The petitioner and respondent No.2 have admittedly opened their establishments to execute and oversee the work at Maldives. The construction activity of ISLES admittedly took several years. During this period, a sizeable number of persons were engaged by the petitioner and respondent No.2. In this backdrop, the question is whether such establishments of the petitioner and respondent No.2 can be treated to be 'fixed establishment' under Section 2 (7) of the IGST Act. The said provision reads as under:

“2(7) “fixed establishment” means a place (other than the **registered place** of business) which is characterized by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services or to receive and use services for its own needs.”

(Emphasis Supplied)

42. A bare perusal of this provision makes it clear that the necessary ingredients to bring the ‘establishment’ within the definition of ‘fixed establishment’ are existence of (i) establishment with sufficient degree of permanence, (ii) suitable structure in terms of human and technical resources to receive or supply services and (iii) such establishments must be a place other than their registered place of business. In our considered opinion, the expression ‘registered place’ means registration under Indian laws. The registration under Maldivian law is not covered under Section 2 (7). The necessary ingredients to treat the establishment of the petitioner and respondent No.2 are available which brings it within the definition of ‘fixed establishment’ because there existed sufficient degree of permanence of such establishments which were used for several years for construction of huge building of ISLES. The letter of OBC dated 27.12.2017 makes it clear that suitable structure/office existed in terms of human and technical resources to supply services or receive the same. Sizable number of human and technical resources were employed at Addu for

completing the task. The establishments are situated at Addu which is other than the place of registration where business of the petitioner and respondent No.2 were carried on.

43. We are unable to accept the line of argument of learned counsel for the Revenue that since the petitioner itself got registered under Maldivian law, the 'fixed establishment' has to be at a place other than the 'registered place'. At the cost of repetition, the words 'registered place' mentioned under Section 2 (7) of the IGST Act does not mean 're-registration' under foreign law of different jurisdiction.

44. Apart from this, the nature of 're-registration' of the petitioner needs to be looked into. The relevant portion of the said Re-registration Certificate reads as under:

“ **Certificate of Re-registration**

THEREBY certify that **SRI AVANTIKA CONTRACTORS (I) LIMITED** (610B, Nilgiri Block, Aditya Enclave, 6th Floor, Hyderabad. Ameerpet 500038, India) having the Registry Number 045200AP2005PLC46422 and registered in India, is on this day re-registered in the name **SRI AVANTIKA CONTRACTORS (I) LIMITED**, in the Republic of Maldives under the Companies Act of the Republic of Maldives (Law No.: 10/96) To construct a Police Academy/Training Facility in Addu City (Hithadhoo).

Given under my hand and seal at Male'. Republic of Maldives on this **22nd day of February 2017**”

(Emphasis Supplied)

45. The aforesaid re-registration was a requirement of Companies Act of Republic of Maldives. Section 94 (a) reads thus:

“Companies registered outside the Republic of Maldives shall before commencing any business in Maldives, obtain the necessary permits under the Laws and Regulation of the Republic of Maldives and shall submit to the Registrar, the following documents **to register the company** in the Ministry of Trade and Industries as a foreign company doing business in the Maldives”.

(Emphasis Supplied)

46. A careful reading of Section 94 (a) aforesaid leaves no room for any doubt that an existing company registered outside Maldives needs to get itself ‘re-registered’ before commencing any business in Maldives. The aforesaid Certificate of Re-registration was obtained by the petitioner as per the requirement of Section 94 (a). It is clear like noon day that same company registered outside Maldives (in India) got re-registered. Thus, it is difficult to hold that merely because petitioner got Certificate of Re-registration under the Maldivian law, the Maldivian entity became a separate legal entity or person.

47. We say so for yet another reason. If this finding given in OIA is accepted that the petitioner and re-registered Maldivian entity are two separate legal entities, it will be difficult to understand under which authority/contract the said

independent legal entity of Maldives was permitted to execute the work. Admittedly, no contract is entered into between respondent Nos.1 and 2 with the re-registered entity of Maldives. In absence thereof, it is difficult to give seal of approval to the finding that the 'works contract services' were rendered at Maldives by independent/separate legal entity. For these cumulative reasons, we are constrained to hold that the petitioner and respondent No.2 had 'fixed establishments' at Addu city, Maldives and the petitioner was 're-registered' at Addu which is evident from the re-registration certificate.

Scope of Judicial Review:-

48. We are in agreement with the argument of learned counsel for the parties about the scope of interference under Article 226 of the Constitution. The parties have rightly placed reliance on the judgment of Supreme Court in the case of **Sudha Patil** (supra). As per the said judgment, the interference can be made if (i) High Courts come to the conclusion that in arriving at the conclusion, the authority has failed to consider some relevant material (ii) has considered some extraneous irrelevant materials, (iii) findings are based on no evidence and (iv) the finding is such that no reasonable man can come to such a conclusion on the basis of which the finding has been arrived.

Validity of Order-in-Appeal:

49. In view of *litmus* test laid down by Supreme Court, we propose to examine the reasons given by learned Appellate Authority. In the impugned OIA dated 16.07.2022, up to para 6, the factual background of the case and contentions of the parties were recorded. '*Discussion and findings*' begins from para No.7 onwards. It is worth remembering that learned counsel for the petitioner and respondent No.2 strenuously contended that Sections 8 and 13 of the IGST Act, which were governing provisions have escaped notice of the learned Appellate Authority.

50. We have carefully examined the 'discussion and findings' given in para No.7 onwards. In para No.7 (1), the learned Appellate Authority although mentioned that petitioner's main contention was based on Section 13 (4) of the IGST Act, during the entire analysis, he has not assigned any reason as to why Section 13 (4) cannot be pressed into service and instead Section 12 (3) of the IGST Act will hold the field. Similarly, Section 8 and Explanations appended to it on which reliance is placed by the petitioner and respondent No.2 have not been considered. Thus, one of the parameters for judicial review i.e., Authority has failed to consider relevant material is certainly attracted. The impact of

such non-consideration of said provisions will be discussed hereinafter.

51. In para No.12 and 21 of impugned OIA, it was held as under:

Para No.12	Para No.21
<p>The discussion from where the “Individual” goods and services involved in the works contract are supplied from, is immaterial in determining the Supplier or the Location of the Supplier. The service (works contract service) has to be looked in a holistic manner and the <u>promise to deliver has been made by M/s Avantika Contractors (1) Limited, who will be held responsible in the event of any non-performance of the agreement.</u></p>	<p>The discussion from where the “individual” goods and services involved in the works contract are received is immaterial in determining the Location of the Recipient, instead, the place where the total service (works contract service), of agreeing to perform has been received will be the location of recipient of service.</p>

(Emphasis Supplied)

52. In para Nos.14 of same order, it is mentioned that since supply, the agreement to perform is being made from the place of business for which registration has been obtained i.e., Hyderabad, location of ‘supplier of service’ will be Hyderabad. Same parameter is applied for recipient in para 22.

Para No.14	Para No.22
<p>In this case, <u>the supply, the agreement to perform is being made from the place of business for which registration has been obtained (i.e. M/s Avantika</u></p>	<p>In this case, <u>the supply, the agreement to perform is received at the place of business for which registration has been obtained (i.e. NBCC (India)</u></p>

Contractor (I) Limited, 401/A wing D.No.6-3-352/2&3, Astral height complex, road No.1, Banjarahilla, Hyderabad 500034). Hence, this location, i.e. M/s.Avantika Contract (I) Limited with GSTIN : 36AAJCS55046C1ZG at Hyderabad will be the location of <u>the Supplier of services.</u>	Limited (with GSTIN : 07AAACN3053B1Z2) at <u>New Delhi will be the location of the recipient of services.</u>
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(Emphasis Supplied)

53. In our judgment, the learned Appellate Authority clearly erred in holding that from where services were supplied pursuant to 'works contract' is immaterial. This finding runs contrary to the statutory provisions. Section 2 (14) of the IGST Act defines 'location of recipient of services'. To support the OIA, the emphasis was laid by Sri Dominic Fernandes on Clause (a) of Section 2(14) to submit that registered place of business shall be the location of recipient. We do not see any merit in the finding given in the OIA and argument advanced to support it for the simple reason that the language employed in Clause (a) is 'where a supply is received at a place of business for which the registration has been obtained'. Where supply is received is certainly the determinative factor and learned Appellate Authority has gone wrong in holding that the said aspect is immaterial. The 'works contract services' were supplied and received at Maldives and not at Hyderabad or New Delhi where registered

office of respondent No.2 is situated. Thus, Clause (a) of Section 2 (14) has no application in the instant case. In our view, Clause (b) of Section 2 (14) will hold the field which reads thus:

“2(14) **“location of the recipient of services”** means:-

(a)...

(b) **where a supply is received at a place** other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment.”

(Emphasis Supplied)

54. The Clause (b) in no uncertain terms throws light that where supply is received, is material and determinative factor to decide 'location of recipient. The supply in the instant case is admittedly received by the 'fixed establishment' of respondent No.2 at Maldives. No registration of recipient under the Indian law was separately made for respondent No.2 at Maldives. Thus, it is crystal clear that it was received at 'fixed establishment' i.e., a place other than the place of business for which registration was obtained i.e., New Delhi. Section 2(15) defines 'location of the supplier of services'. The relevant portion reads as under:

“2(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.”

(Emphasis Supplied)

55. A comparative reading of definitions of 'location of recipient of services' and 'location of supplier of services' shows that only difference between two provisions is relating to 'receiving' and making the 'supply'. Otherwise, provisions are identically worded. For the simple reason mentioned in preceding para interpreting Section 2(14) of the IGST Act, we hold that the location of the supplier is covered by Clause (b) of Section 2(15). The supply is certainly made through 'fixed establishment' at Maldives, which is other than the place of registration of business of the petitioner i.e., Hyderabad. Hence, in our opinion, the Appellate Authority erred in interpreting and understanding the definitions of 'location of recipient and supplier'. The erroneous reading and understanding of Section 2(7), (14) and (15) in the OIA has 'dislocated' the location of recipient and supplier.

56. The matter may be viewed from another angle. Section 8 of the IGST Act deals with *Intra-State* Supply. The relevant portion reads as under:

“8. Intra-State Supply:

(1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:

Provided ...

(2)...

Explanation 1: For the purposes of this Act, where a person has,—

- (i) an establishment in India and any other establishment outside India;
- (ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
- (iii) an establishment in a State or Union territory and any other establishment registered within that State or Union territory,

then such establishments shall be treated as establishments of distinct persons.

Explanation 2: A person carrying on a business through a branch or an agency or a **representational** office in any territory shall be treated as having an establishment in that territory.”

(Emphasis Supplied)

57. In **Sundaram Pillai v. Pattabiraman**⁹, the Apex Court summed up the objects of an Explanation to a statutory provision as under:

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

⁹ (1985) 1 SCC 591

- (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

58. While prescribing about 'Intra-State Supply', the statute (Explanation 1) takes care of a situation where a person has an 'establishment' in India and any other 'establishment' outside India. Explanation 2 further provides that if the person carrying on a business has a branch or agency or representational office in any other territory, it shall be treated as an establishment in that territory. This provision has totally escaped notice of learned Advance Ruling Authority and Appellate Authority.

59. A combined reading of Explanations 1 and 2 shows that if the petitioner had any 'establishment' in Maldives, it must be treated to be his 'establishment' in that territory and such establishment shall be treated as 'establishment' of distinct person. Once such 'fixed establishment' is treated to be as establishment of distinct person and treated as his 'representational office' in other territory, it will be clear that the 'work contract services' performed by the petitioner are relating with the 'establishment' of the petitioner in India and his 'fixed establishment' in Maldives is his other establishment or 'representational office'.

60. In the peculiar facts of this case, distinct person mentioned in Explanation-I will not mean that petitioner's Maldivian establishment is a separate and independent legal entity as projected in impugned OIA dated 16.07.2022. At best, it may be treated as an artificial juridical person as per Section 2 (84) (n) of the CGST Act. Similarly, the location of the petitioner's registered office at Hyderabad or NBCCL's office at New Delhi will not be the decisive factor. If the aforesaid Explanations to Section 8 of the IGST Act are read conjointly with Section 2 (14)(b) and 2 (15)(b), the conclusion will be inevitable that the 'establishments' of the petitioner and respondent No.2 were 'fixed establishments' at Maldives which were not at a place of the registered place of business i.e., Hyderabad and New Delhi respectively.

61. The finding given by learned Appellate authority in paras 12 and 14 of the impugned order are mutually inconsistent. On the one hand in para 12, he opined that where the services were supplied is immaterial and on the other hand in para 14, it is held that the supply and the agreement to perform is being made from the place of business i.e., Hyderabad which became decisive factor for him. We are unable to countenance the said finding which runs contrary to the statutory provision.

62. The operative reason for ruling against the petitioner appears to be based on Section 12(3) (a) of the IGST Act and the *proviso* appended to sub-section (3). The relevant portion reads thus:

“12. Place of supply of services where location of supplier and recipient is in India.

(1) The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.

(2) ...

(3) The place of supply of services:-

(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or

(b) to (d) ...

shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located;

PROVIDED that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the **place of supply** shall be the **location of the recipient.**

(Emphasis Supplied)

63. The heading of Section 12 of the IGST Act suggests that the provision was introduced in order to *determine the place of supply of services where the location of supplier and recipient is within the territory of India.* Except *proviso* to sub-section (3) of

Section 12, the entire Section 12 deals with the aspect of determination of place of supply of services where location of both i.e., recipient and supplier is within India. The *proviso* to Section 12(3) was interpreted by learned Appellate Authority in the line of his finding that Avantika Contractors (I) Limited, Maldives, cannot be treated as 'fixed establishment'. The re-registered body of the petitioner at Maldives is a different legal entity than the petitioner and Sections 2(14)(a) and (15) (a) will be applicable for deciding the 'location of supplier and recipient'.

64. We have already disapproved the said reasoning given by the learned Appellate Authority. Still, it is relevant to carefully read the said *proviso* on which heavy reliance is placed by learned Appellate Authority and by Sri Dominic Fernandes, during the course of hearing. The said *proviso*, in no uncertain terms, makes it clear that if location of immovable property is outside India, the place of supply shall be the location of recipient.

65. We will be failing in our duty if contention of the learned Senior Standing counsel for CBIC on another aspect of *proviso* to Section 12(3) of the IGST Act is not considered. Learned counsel urged that if *proviso* to Section 12(3) is read in the manner

suggested by the petitioner, there will be no difference in result of interpretation of the *proviso* and two lines mentioned in the statute before the *proviso* and below sub-section (3) i.e., 'shall be the location at which immovable property or boat or vessel, as the case may be, is located or intended to be located'. The aforesaid *proviso* deals with a situation where immovable property is outside India. In that eventuality, place of supply shall be the location of the recipient.

66. The purpose of *proviso* is considered by the Supreme Court in several matters (see **Sundaram Pillai** (supra), **Swadeshi Match AB v. Securities and Exchange Board of India**¹⁰ and **Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO**¹¹. (See also statutory principles of interpretation by Justice G.P. Singh 12th edition page 208-209). As per these judgments, by and large, a *proviso* serves following four different purposes:

- (i) Qualifying or excepting certain provisions from the main enactment;
- (ii) It may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (iii) It may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire

¹⁰ (2004) 11 SCC 641

¹¹ (2007) 5 SCC 447

the tenor and colour of the substantive enactment itself; and

- (iv) It may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

The aforesaid summary cannot however be taken as exhaustive and ultimately a *proviso* like any other enactment ought to be construed upon its terms.

67. The first and second purpose mentioned above squarely covers *proviso* to Section 12(3) of the IGST Act. It is qualifying/excepting a situation from Section 12 of the IGST Act which necessarily deals with a situation which happens within India. Similarly, it changes the concept of intendment in cases where location of immovable property is outside India. Thus, we are of the opinion that even as per the aforesaid *proviso*, the location of recipient will be in Maldives. The *proviso* was inserted with above mentioned purpose and its literal interpretation does not make it redundant or otiose.

68. In the peculiar factual backdrop of this case, admittedly the location of immovable property i.e., ISLES is located in Maldives/outside India. Hence, the place of supply shall determine the 'location of recipient'. As analysed above, the place of supply of services is at Addu, Maldives. The 'location of

recipient' is already interpreted by us by holding that as per Section 2(14)(b), it will be the 'fixed establishment' of respondent No.2 which will be the location of recipient. Thus, even as per the aforesaid *proviso* to Section 12(3), we are unable to give our stamp of approval to the OIA passed by the Appellate Authority.

69. Section 13 of the IGST Act deals with place of supply of services where location of supply and recipient is outside India.

The relevant portion reads as under:

“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) ...

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

(a) ...

(b) ...

(4) **The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, **shall be the place where the immovable property is located or intended to be located.**”**

(Emphasis Supplied)

70. As heading suggests, Section 13 of the IGST Act is a direct and special provision which deals with a matter of this nature where the place of supply of service (carrying out construction work) and location of supplier and location of recipient is outside the territory of India. The learned Appellate Authority although referred about sheet anchor of argument of learned counsel for the petitioner based on Section 13 of the IGST Act in para 7(1) of impugned order, did not deal with it any further. A plain reading of Section 13 (4) makes it clear like cloudless sky that the 'place of supply' in relation to an immovable property for carrying out construction work shall be the place where the immovable property is located. Section 13 is clear and unambiguous and hence must be given effect to irrespective of its consequences. In the peculiar facts of this case, since the supply of service and location of recipient and supplier is outside India, the question of levy and collection of tax in the teeth of Section 9 of the CGST Act or Section 5 of IGST Act does not arise. The said provisions can be pressed into service only in cases of intra-state and inter-state supplies respectively. Hence, we are constrained to hold that the learned Appellate Authority has taken a view which no reasonable man well-versed with the subject can take upon reading the relevant provisions of the Acts.

71. So far as the argument relating to filing of 'zero rated return' is concerned, suffice it to say that argument must fail for twin reasons: (i) the OIA in question is not based on this reason. As per Constitution Bench judgment of the Supreme Court in **Mohinder Singh Gill** (supra), the validity of an order of statutory authority is to be examined on the basis of reasons mentioned therein and it cannot be supplemented by filing counter in the Court. (ii) Filing of an incorrect return will not operate as '*estoppel*' in view of the judgment of the Supreme Court in **Jayaswal Neco Ltd.** (supra).

72. Another argument faintly advanced by the learned Senior Standing counsel for CBIC was that the singular challenge in this petition is to the OIA dated 16.07.2022 and original order of advance ruling dated 05.08.2021 is not called in question. We do not find any force in this contention. The order of advance ruling stood merged in the OIA in view of 'doctrine of merger'. Thus, if order dated 05.08.2021 (Annexure P-18) is not separately challenged, it will not cause any dent to the relief claimed.

73. In view of foregoing analysis, we are unable to countenance OIA dated 16.07.2022. Resultantly, the said order and as a consequence, the merged order dated 05.08.2021 are set aside.

The respondents shall reimburse the amount of GST, interest and penalty (if any) deposited by the petitioner to him in respect of construction services provided in Maldives as per contract dated 08.07.2016 within 90 days from the date of production of copy of this order.

74. The Writ Petition is **allowed**. There shall be no order as to costs. Miscellaneous applications pending, if any, shall stand closed.

SUJOY PAUL, J

NAMAVARAPU RAJESHWAR RAO, J

Date: 06.08.2024
L.R. copy be marked.
B/o. TJMR