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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 14048/2021

UBER INDIA SYSTEMS PRIVATE LIMITED ..... Petitioner

Through: Mr. Bharat Raichandani with Mr. Arjyadeep Roy, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Asheesh Jain, CGSC with Mr. Adarsh Kumar Gupta and Mr. Keshav Mann, Advocates for UOI along with Mr. Abhishek Khanna, Government Pleader for UOI.
Mr. Aditya Singla, Sr. Standing Counsel for CBIC/R-2 with Mr. Yatharth Singh & Ms. A. Sahitya Veena, Advocate.

\+ W.P.(C) 14579/2021 & CM APPL. 45963/2021

PRAGATISHEEL AUTO RIKSHAW DRIVER UNION ..... Petitioner

Through: Mr. M.Shoeb Alam with Ms.Fauzia Shakil, Advocates.

versus

UNION OF INDIA AND ANR. ..... Respondents

Through: Mr. Asheesh Jain, CGSC with Mr. Adarsh Kumar Gupta and Mr. Keshav Mann, Advocates for UOI along with Mr. Abhishek Khanna, Government Pleader for UOI.
Mr. Aditya Singla, Sr. Standing Counsel for CBIC/R-2 with Mr.

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10:45:04

Yatharth Singh & Ms. A. Sahitya Veena, Advocate.

\+ W.P.(C) 14826/2021 & CM APPL. 28849/2022

IBIBO GROUP PRIVATE LIMITED & ANR. ..... Petitioners

Through: Mr. V. Lakshmikumaran, Ms. Charanya Lakshmikumaran, Mr. Karan Sachdev & Mr. Kunal Kapoor, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Vivek Goyal, CGSPC for UOI. Ms. Arunima Dwivedi, Sr. Standing Counsel for CBIC with Mr. Ved Prakash & Ms. Ashi Sharma, Advocates for R-2 & R-3.

Reserved on: 14th September, 2022

% Date of Decision: 12th April, 2023

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

CM APPL. 45963/2021 in W.P.(C) 14579/2021

Exemption allowed, subject to all just exceptions.

Accordingly, present application is disposed of.

W.P.(C) 14048/2021
W.P.(C) 14579/2021
W.P.(C) 14826/2021 & CM APPL. 28849/2022

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10:45:04

Factual Background

1. Present writ petitions have been filed by Uber India Systems Private Limited in W.P.(C) No. 14048 of 2021 ('Petitioner 1'), Pragatisheel Auto Rickshaw Driver Union in W.P.(C) No. 14579 of 2021 ('Petitioner 2') and IBIBO Group Private Limited along with Make My Trip (India) Private Limited in W.P.(C) 14826/2021 (collectively referred to as 'Petitioner 3'). The petitions have been filed challenging the Clauses (iii) and (iv) of Notification No. 16/2021- Central Tax (Rate) and Clauses 1(i) and 2(i) of Notification No. 17/2021 - Central Tax (Rate), both dated 18.11.2021 ['impugned Notifications'], as *ultra vires* to the Constitution of India ('Constitution') and Section 9(5) and 11 of Central Goods and Service Tax Act, 2017 ('the Act of 2017').

1.1. All these petitions were heard together and are being disposed of by this common judgment.

2. The factual background that has given rise to the present batch of writ petitions are dealt herein under.

2.1. The Respondents issued Notification No. 11/2017 dated 28.06.2017 notifying the rate of tax on supply of services. The relevant portions of Notification No. 11/2017 read as under:

> *"**Notification No. 11/2017-Central Tax (Rate)***
>
> ***New Delhi, the 28th June 2017***
>
> *G.S.R. 690(E) - In exercise of the powers conferred by sub-section (1), sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the central tax, on the intra-State supply of services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of*

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10:45:04

scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table:-

Table

Sl. No.	***Chapter Section or Heading***	***Description of service***	***Rate (per cent)***	***Condition***
(1)	*(2)*	*(3)*	*(4)*	*(5)*
…	…	…	…	…
…	…	…	…	…
8	*Heading 9964 (Passenger transport services)*	*(i) …*	…	…
		(ii) Transport of passengers, with or without accompanied belongings by- *(a) air conditioned contract carriage other than motorcab;* *(b) air conditioned stage carriage;* *(c) radio taxi.* *Explanation.-* *(a) "contract carriage" has the assigned to it in clause (7) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);* *(b) "stage carriage" has the meaning assigned to it in clause (40) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);* *(c) "radio taxi" means a taxi including a radio cab, by whatever name called, which is in two-way radio communication with a central control office and is enabled for tracking using Global Positioning System (GPS) or General Packet Radio Service (GPRS).*	*2.5%*	*Provided that credit of input tax charged on goods and services used in supplying the service has not been taken* *Please refer to Explanation no. (iv)*
		…	…	…
		(vi) ***<u>Transport of passengers by any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient</u>***.	*2.5*	*Provided that credit of input tax charged on goods and services used in supplying the service, other than the input tax*

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Signing Date:13.04.2023
10:45:04

				credit of input service in the same line of business (i.e. service procured from another service provider of transporting passengers in a motor vehicle or renting of a motor vehicle), has not been taken. *[Please refer to Explanation no. (iv)]*
				Or
			6	*-*

4. Explanation. -For the purposes of this notification, -

(i) …
(ii) …
(iii) …

Wherever a rate has been prescribed in this notification subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that, -

(a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and

(b) credit of input tax charged on goods or services used partly for supplying such service and partly for effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of sub-section (2) of section 17 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder."

(Emphasis supplied)

2.2. Notification No. 12/2017- Central Tax (Rate), dated 28.06.2017 ('the parent Notification'), was also issued by the Respondents which provided for unconditional exemption from payment of Goods and Service Tax ('GST') in cases of i) supply of services by auto rickshaws ii) transportation

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Signing Date:13.04.2023
10:45:04

of passengers by stage carriage other than air-conditioned stage carriage. The said exemption of tax on the 'fare' was available to the individual auto-rickshaw driver, bus operator and the ECO irrespective of the mode of booking availed by the consumer, i.e., online/offline or offline agents.

2.3. Subsequently, the Respondents issued impugned Notification dated 18.11.2021 amending the parent Notification and thereby withdrawing the exemption to the Electronic Commerce Operators ('ECOs') granted *vide* the parent Notification for the aforesaid services. Consequently, with effect from 01.01.2022, with respect to a booking made by a consumer through the electronic platform of an ECO for an auto-rickshaw ride or a bus ride, the 'fare' has become exigible to tax.

The relevant portions of the parent Notification, as it stood prior to the amendment read as under:

"Notification No. 12/2017- Central Tax (Rate)

New Delhi, the 28th June, 2017

xxx xxx xxx

Table

Sl. No.	***Chapter, Section, Heading, Group or Service Code (Tariff)***	***Description of service***	***Rate (per cent)***	***Condition***
(1)	***(2)***	***(3)***	***(4)***	***(5)***
..	..	..	..	..
..	..	..	..	..
15	*Heading 9964*	*Transport of passengers, with or without accompanied belongings, by-* *(a) … …;* *(b) … …;* ***(c) <u>Stage carriage other than air conditioned stage carriage.</u>***	*Nil*	*Nil*
...	..	..	..	..
17	*Heading 9964*	*Service of transportation of passengers, with or without*	*Nil*	*Nil*

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Signing Date:13.04.2023
10:45:04

		accompanied belongings by- *(a) Railways in a class other than-* *(i) first class; or* *(ii) an air-conditioned coach;* *(b) metro, monorail or tramway;* *(c) inland waterways;* *(d) public transport, other than predominantly for touring purpose in a vessel between places located in India; and* ***(e) metered cabs or auto rickshaws (including e-rickshaws)***		

(Emphasis supplied)

3. The relevant portions of the impugned Notification No. 16/2021 read as under:

> *"**Notification No. 16/2021- Central Tax (Rate)***
> ***New Delhi, the 18th November, 2021***
>
> *G.S.R. 810(E). - In exercise of the powers conferred by sub-sections (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby **makes the following amendments further to amend the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No.12/2017-Central Tax (Rate), dated the 28th June, 2017,** published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 691(E), dated the 28th June, 2017, namely:-*
>
> *In the said notification, in the TABLE, -*
>
> *... ... ...;*
>
> ***(iii) against serial number 15, in column (3), in the heading "Description of Services", after item (c), the following shall be inserted, namely, -***
>
> ***"Provided that nothing contained in items (b) and (c) above shall apply to services supplied through an electronic commerce operator, and notified under sub-section (5) of Section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017).";***
>
> ***(iv) against serial number 17, in column (3), in the heading "Description of***

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Signing Date:13.04.2023
10:45:04

Services", after item (e), the following shall be inserted, namely,-

"Provided that nothing contained in item (e) above shall apply to services supplied through an electronic commerce operator, and notified under sub-section (5) of Section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017)."

2. This notification shall come into force with effect from 1st day of January, 2022."

(Emphasis supplied)

3.1. The relevant entries at Sl. Nos. 15 and 17 of the parent Notification, after the amendment read as under:

Table

Sl. No.	***Chapter, Section, Heading, Group or Service Code (Tariff)***	***Description of service***	***Rate (per cent)***	***Condition***
(1)	*(2)*	*(3)*	*(4)*	*(5)*
..	..	..	..	..
..	..	..	..	..
15	*Heading 9964*	*Transport of passengers, with or without accompanied belongings, by-* *(a) Air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim or Tripura or at Bagdogra located in West Bengal;* *(b) Non-airconditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or hire; or* ***(c) Stage carriage other than air-conditioned stage carriage.*** ***[81][Provided that nothing contained in items (b) and (c) above shall apply to services supplied through an electronic commerce operator, and notified under sub-section (5) of Section 9 of Central Goods and Services Tax Act, 2017 (12 of 2017).]***	*Nil*	*Nil*

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Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

16	..	..	..	..
17	*Heading 9964*	*Service of transportation of passengers, with or without accompanied belongings by-* *(a) Railways in a class other than-* *i. first class; or* *ii. an air-conditioned coach;* *(b) metro, monorail or tramway;* *(c) inland waterways;* *(d) public transport, other than predominantly for touring purpose in a vessel between places located in India; and* ***(e) metered cabs or auto rickshaws (including e-rickshaws)*** ***[82][Provided that nothing contained in item (e) above shall apply to services supplied through an electronic commerce operator, and notified under sub-section (5) of Section 9 of the Central Goods and Services Tax, 2017 (12 of 2017).]***		

(Emphasis supplied)

4. The Petitioner 1 and 2 have also challenged the amendments made to Notification No. 17/2017- Central Tax (Rate) dated 28.06.2017 *vide* Clauses 1(i) and 2(i) of impugned Notification No. 17/2021.

4.1. The relevant portions of Notification No. 17/2017- Central Tax (Rate) dated 28.06.2017 reads as under:

> *"**Notification No. 17/2017- Central Tax (Rate)***
> ***New Delhi, the 28th June, 2017***
>
> *G.S.R…(E)- In exercise of the powers conferred by sub-section (5) of Section 9 of the Central Goods and Services Tax, Act (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies that in case of the following categories of services, the tax on intra-State supplies shall be paid by the electronic commerce operator-*
>
> *(i) services by way of transportation of passengers by a radio-taxi, motorcab, maxicab and motor cycle;*
>
> *xxx xxx xxx*

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Signing Date:13.04.2023
10:45:04

Explanation- For the purposes of this notification,

….

(b) "maxicab", "motorcab" and "motor cycle" shall have the same meanings as assigned to them respectively in clauses (22), (25) and (26) of section 2 of the Motor Vehicles, 1988 (59 of 1988).

2. This notification shall come into force with effect from 1st day of July, 2017."

4.2. The relevant portions of the impugned Notification No. 17/2021 read as under:

*"**NOTIFICATION NO. 17/2017- Central Tax (Rate)***
New Delhi, the 18th November, 2021

…..

1. In the notification,-

(i) in clause (i), for the words "and motor cycle;", the words, "motor cycle, omnibus or any other motor vehicle;" shall be substituted;

(ii) after clause (iii), the following clause shall be inserted, namely:-

"(iv) supply of restaurant service other than the services supplied by restaurant, eating joints etc. located at specified premises"

xxx xxx xxx

2. In the said notification, in Explanation,-

sIn item (b), for the words, brackets, numbers and figures "and "motor cycle" shall have the same meanings as assigned to them respectively in clauses (22), (25) and (26) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988).", the words, brackets, numbers and figures ,", motor cycle, motor vehicle and omnibus shall have the same meanings as assigned to them respectively in clauses (22), (25), (27), (28) and (29) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988)." shall be substituted;"

5. The summation of the grounds on which Petitioner 1, 2 and 3 have challenged the impugned Notifications, are as under:

5.1. Petitioner 1 and 2 have challenged the impugned Notifications on four main grounds, which are as under:

a) impugned Notifications fail to satisfy the test of reasonable classification under Article 14 of the Constitution as there is differential

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

treatment between auto rickshaw drivers providing services through the Petitioner 1 and street hailing auto rickshaw drivers; it suffers from palpable arbitrariness and not in conformity with the doctrine of level playing field;

b) they are against public interest and impact the livelihood of the auto rickshaw drivers providing services through ECOs and freedom of choice to the consumers/riders ('consumers'), thereby violating Articles 19(1)(g) and 21 of the Constitution;

c) the value of conveniences offered by ECOs, i.e., Petitioner 1 is charged separately and liable to GST; and there are no other instances of transportations supplied through ECOs being taxed differently such as that levied through the impugned Notifications, therefore, the same are liable to be struck down.

5.2. Petitioner 3 has challenged the validity of Clause (iii) of the impugned Notification No. 16/2017 on the ground that the benefits of exemption from levy of GST on passenger transportation services by a non-air-conditioned stage carriage has been denied when such services/supply are availed through ECOs, even though such supplies continue to be exempted when booking is made by consumers directly through bus operators (offline/online) or offline agents.

Submissions of Petitioner 1 and 2

6. Mr. Bharat Raichandani, the learned counsel, has made detailed submissions on behalf of Petitioner 1. Mr. M. Shoeb Alam, learned counsel, argued on behalf of Petitioner 2. The summation of the arguments of the learned counsel for Petitioner 1 and 2 are as follows:

6.1. The core issue is that by way of the impugned Notifications, passenger transportation services by way of auto-rickshaws mediated by

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Signing Date:13.04.2023
10:45:04

ECOs like Petitioner 1 have now been made taxable which was earlier exempted whereas autorickshaw services not mediated by platforms like Petitioner continue to be exempted.

6.2. The impugned Notifications fall foul of Article 14 of the Constitution, inasmuch as they seek to treat equally placed service providers in an unequal manner. Passenger transportation services when provided through ECOs like the Petitioner 1 and auto rickshaws which are availed through offline modes, by street hailing, without the involvement of ECOs are treated as different class, when the underlying nature of the passenger transportation provided by both the service providers remains the same.

6.2.1. It is a settled principle of law that classifications for the purpose of taxation have to meet the criteria of intelligible differentia. [***Ayurveda Pharmacy and Anr. v. State of Tamil Nadu*, *1989 2 SCC 285*, *Aashirwad Films v. Union of India & Anr*, *2007 6 SCC 624***]. Auto rides booked by flagging down on the street or any other mode and auto rides booked through ECO like that of the Petitioner 1 do not form a different class.

6.2.2. The impugned Notifications suffer from palpable arbitrariness. **[*Swaroop Vegetables Products Industries v. State of U.P and Others, 1983 4 SCC 24*].** A tax notification can be said to be in contravention of Article 14 of the Constitution, if it purports to impose on the same class of persons, similarly situated, an incidence of taxation which leads to obvious inequality.

6.2.3. Article 14 of the Constitution embodies the principle of non-discrimination and includes the opportunity of level playing field. Level playing field provides space within which equally placed competitors operate. However, the impugned Notifications create a distinction between

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

the similarly situated people and seek to take away the level playing field from auto rickshaw drivers who render their services through ECO such as that of Petitioner 1.

6.3. The impugned Notifications are against public interest and violative of Articles 19(1)(g) and 21 of the Constitution.

6.4. The market is always price sensitive. The customers may not opt for booking auto rickshaws through Petitioner 1, if the ultimate cost of services is on the higher side. Apart from the financial implications it may have on Petitioner 1, the financial autonomy of the drivers will be completely jeopardized. There is a strong likelihood that due to the impact of impugned Notifications, the general public would become reluctant to avail auto rickshaws services rendered by ECO like Petitioner 1. This will lead to a loss of livelihood for the auto rickshaw drivers rendering their services through ECO maintained by Petitioner 1. The entire segment may become unviable for the ECO leading to cessation affecting the livelihoods of the 2,40,000 registered driver partners of Petitioner 1. It will also deprive them of the benefits provided by the ECO.

6.5. The impugned Notifications are *ultra vires* Section 11 of the Act of 2017. The livelihood of lakhs of auto drivers will be adversely affected if this segment is closed down by the ECO. Lakhs of auto drivers provide their services through ECO like Petitioner 1. Online apps provide a broader consumer base to the auto rickshaw drivers, benefits and facilities as enlisted in paragraph B.12 of W.P.(C). 14048/2022.

6.6. While there are five entries in Sl. No. 17 (from series ‘a’ to ‘e’) in the parent Notification, the impugned Notification dated 18.11.2021 withdraws the exemption only for entry ‘e’ i.e., “metered cabs or auto rickshaws

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Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

(including e-rickshaws)." Other forms of transportation, for instance, air travel (for North-East States) or through mono-rail, metro rail etc., continue to be exempt from GST irrespective of whether the same are booked through an online mode or offline mode. There are no other instances of levying tax on a service simply on the basis that they are provided through an ECO.

6.7. In addition to the transportation services, there are various other supplies of goods and services that are facilitated through ECOs, illustrated as under:

6.7.1. There is no distinction in the rate of tax on the sale of groceries made through online and offline channels.

6.7.2. There is no levy of GST, if metro rail cards are recharged through physical or online platforms, i.e., they are still exempted.

6.7.3. Even with the shifting of the responsibility on collection and payment of GST on the supply of restaurant services facilitated through ECOs, the GST rate continues to be the same. The responsibility to pay tax has shifted from the restaurant to the ECOs as per Section 9(5) of the Act of 2017.

6.8. No classification is made for imposing the levy of GST based on the mode of supply of services in the above-mentioned illustrations. It is only with respect to the services rendered by the auto rickshaws and facilitated through the ECOs, wherein the discrimination is meted out.

6.9. The Respondents have failed to appreciate that nature of the ultimate service provided to the consumer remains the same i.e., an auto rickshaw ride. Irrespective of whether the passenger transportation services are facilitated through ECOs or are availed directly through the street hailing auto rickshaws, it is an undisputed fact that the underlying nature of service remains the same.

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Signing Date:13.04.2023
10:45:04

6.10. The only difference that can be attributed to the transportation of passenger through the auto rickshaw driver by availing the services of ECO *versus* without availing the services of ECO, is the ease of booking that is facilitated by ECO such as Petitioner 1.

6.11. The Respondents, while correctly identifying the difference in the mode used by the consumer in availing the underlying service, however, failed to appreciate that the convenience availed by the consumer for using the mobile application ('the Uber App') of Petitioner 1 is separately charged as 'convenience fee', which fee is already exigible to GST. The Petitioner 1 collects and pays GST on the said convenience fee charged by it, thereby eliminating the differentia pointed out by the Respondents.

6.12. A levy of GST has to be premised on the nature of the service availed by the consumer and not on the basis of the medium used by the said consumer for availing the service. Merely because an ECO such as Petitioner 1 has the ability to comply with the compliances under the statute, it cannot be a ground to tax a service supplied through ECO and continue with an exemption for the same service availed through other mediums, when the underlying nature of service continues to remain identical and similar.

6.13. The taxing event does not change if the auto rickshaw is booked through ECOs. Merely because Petitioner 1 can recover the tax component from the final consumers do not in effect mean Petitioner 1 would not suffer any legal injury.

6.14. The Petitioner 1 is an aggrieved party and has the locus standi to file the present writ petition as the business of the Petitioner 1 and the 2,40,000 registered driver partners will be severely impacted.

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Signing Date:13.04.2023
10:45:04

6.15. The underlying transactions of transportation in Sl. No. 17 of parent Notification *before* the impugned Notifications and *after* the impugned Notifications are illustrated as under:

TRANSACTION (Before)

USAGE FEE/CHARGE	FARE
|<-----18% GST----->|	|<----------**0% GST**----------\>|

BEFORE THE IMPUGNED NOTIFICATION

		A	B	C	D	E
		Railways (other than 1st class or A/C)	Metro, Monorail, trams	Inland waterways	Public Transport in a vessel	Metered cabs and auto rickshaw (including e-rickshaws)
1	Whether GST payable on **convenience fee?**	✓	✓	✓	✓	✓
2	Whether GST payable on fare?	X	X	X	X	X

*other than predominantly for tourism purpose, in a vessel between places located in India

TRANSACTION (After)

USAGE FEE/CHARGE	FARE
|<-----18% GST----->|	|<----------**5-12% % GST**----------\>|

AFTER THE IMPUGNED NOTIFICATION

		A	B	C	D	E
		Railways (other than 1st class or A/C)	Metro, Monorail, trams	Inland waterways	Public Transport in a vessel	Metered cabs and auto rickshaw (including e-rickshaws)
1	Whether GST payable on **convenience fee?**	✓	✓	✓	✓	✓
2	Whether GST payable on FARE?	X	X	X	X	✓

*other than predominantly for tourism purpose, in a vessel between places located in India

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Signing Date:13.04.2023
10:45:04

6.16. Thus, it is only *vis-a-vis* passenger transport services facilitated by ECOs in the case of auto rickshaws that have been made taxable on the basis of mode of booking. Hence, the impugned Notifications are discriminatory and hence invalid.

Submissions of Petitioner 3

7. Mr. V. Lakshmikumaran, learned counsel has advanced arguments on behalf of Petitioner 3 and Ms. Charanya Lakshmikumaran, appeared for Petitioner 3 for rejoinder arguments. The arguments and rejoinder arguments as put forth by the learned counsel are as follows:

7.1. The impugned Notification is discriminatory, arbitrary and violative of Article 14 of the Constitution.

7.2. The Petitioner 3 is an ECO that acts as a facilitator for the consumers to book bus tickets through their websites or mobile applications.

7.3. By the impugned Notification dated 18.11.2021, Petitioner 3 is a deemed supplier of transportation of passenger services by a non-air-conditioned stage carriage and declared as not entitled to claim exemption from GST in respect of the same.

7.4. The Respondents have denied the benefit of exemption from GST to the said transportation service only when availed by the consumers through ECOs like Petitioner 3. However, such service continues to remain exempt when the booking is availed by the consumer through any other mode i.e., directly through bus operators (offline/online) or offline agents.

7.5. The discriminatory treatment can be illustrated as follows; for a bus operator (ABC) registered with the Petitioner 3, the tax implication would be as under:

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

Basis	Situation 1	Situation 2	Situation 3
Bus Operator	ABC	ABC	ABC
Nature of transport	Non-air conditioned bus	Non-air conditioned bus	Non-air conditioned bus
Mode of booking ticket	Online (Using operator's website)	Offline (booked through an offline agent)	Online (using Petitioners' website or mobile application)
Exemption benefit	Available (GST not leviable)	Available (GST not leviable)	Not available **(GST leviable)**

(Emphasis supplied)

7.6. When an exemption is granted to a particular class of persons (i.e., suppliers), then the said benefit of exemption must be extended to all similar persons and the Respondents cannot create a sub-classification to exclude one sub-category. *(**Union of India and Others v. N.S. Rathnam and Sons, (2015) 10 SCC 681, Paras 12 &13**)*

7.7. A differential tax treatment is made for the very same supply only on the basis of the mode of booking. Bookings made through ECOs are taxable, while bookings made for the same service through other modes are exempt from GST. Even when the bookings are made online, there is discrimination when bookings are facilitated through ECOs and when the booking is made *via* the bus operator's own website. There is no rationale or intelligible differentia for such differential tax treatment for the very same underlying service, provided through the same bus operator. It creates an artificial distinction with no basis and treats the same supply differently. [***Aashirwad Films v. Union of India, (2007) 6 SCC 624, Paras 14 & 25, Ayurveda Pharmacy & Anr. v. State of Tamil Nadu, Para 6, 1989 2 SCC 285, State***

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

of UP v. Deepak Fertilizers & Petrochemical Corporation Ltd.,* (2007) *10 SCC 342, Paras 13, 15 & 16].

7.8. The irrationality and arbitrariness are evident from the following illustration. If on the very same bus, there are three seats, one is booked offline, one is booked through the website of the bus operator and the third one is booked through an ECO, in the first and the second instances, there are no GST that is levied on the fare. However, when the very same ticket is booked through an ECO, there is tax on the fare as well. It is stated that taxing cannot be based on the financial status of a person but on the service availed.

7.9. The impugned Notification is also violative of Article 19(1)(g) of the Constitution, because, denial of benefit of the exemption by the impugned notification is prejudicial to the business of ECOs. In the absence of the exemption benefit, the tickets booked through the website and mobile application of Petitioner 3 would be costlier than the tickets booked offline through agents or even directly with the bus operators, either online or offline. Due to this price differentiation, consumers will not prefer booking through ECOs, thereby resulting in loss of the business of Petitioner 3.

7.10. The impugned Notifications are contrary to Sections 9 and 11 of the Act of 2017. In terms of Section 9(5) read with Section 11 of the Act of 2017, Petitioner 3 is eligible for the grant of all exemptions as are available to other suppliers of the underlying service.

7.11. However, by way of the impugned Notification, the Respondents seek to deny the benefit of exemption only to the ECOs. The impugned Notification artificially creates a distinction based on the mode of booking availed by the consumer and denies the exemption benefit available under

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

the parent Notification to the ECOs i.e., Petitioner 3 in respect of the same specified services, which is beyond the powers conferred under Section 11 of the Act of 2017.

7.12. Section 11(1) of the Act of 2017 provides that the exemption benefit may be granted in public interest and thus, as a corollary, the same can also be denied only in public interest. The denial of the exemption benefit to the ECOs is not in public interest.

7.13. The impugned Notification seeks to deny the benefit of exemption under the parent Notification to Petitioner 3 which is otherwise available to the suppliers of such services. Therefore, the impugned Notification is *ultra vires* to Section 9(5) of the Act of 2017.

7.14. In case of other supplies (i.e., services of plumbers or carpenters) through an ECO, the said supplies are *per se* taxable. However, if such service is provided by the plumbers or carpenters directly by themselves, the same is exempted for the reason that their turnover is below the threshold specified in Section 22 of the Act of 2017. Thus, once the turnover of the individual plumbers or carpenters exceeds the threshold, they are liable to pay GST on all supplies without any distinction on the basis of mode of booking such supplies. However, in the instant case, the exemption benefit is denied to the consumer of ECOs in respect of the same supply/supplier only on the basis of mode of booking such supply.

7.15. If the liability to collect and pay tax is shifted on the ground of administrative convenience of the ECOs, then the same should be levied and collected in respect of all such similar supplies and it cannot be sub-categorized on the basis of the mode of booking.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

7.16. The reliance placed by the Respondents on the judgment of the Supreme Court in ***All India Haj Umraj Tour Organiser Association Mumbai v. Union of India & Ors., (2023) 2 SCC 484*** ('Haj case') dated 26.07.2022 is distinguishable from the instant case for the following reasons:

7.16.1. Services in Haj case were not *per se* exempt. However, in the instant case, the service of the transportation of passenger by a non-air-conditioned stage carriage is *per se* exempt unconditionally.

7.16.2. In Haj case, exemption is available only when the service is provided by the Haj Committee.

7.16.3. The services provided by the Haj Committee and Haj Committee Operators/Private Tour Operators were on their own account.

7.16.4. The Supreme Court noted points of distinction in the services provided by the Haj Committee and the Haj Committee Operators/Private Tour Operators on the basis of statutory recognition, functions, profit motive, quality of services, government control and object of exemption.

Submissions of the Respondents

8. Mr. Aditya Singla, learned senior standing counsel, led the arguments on behalf of Respondent No.2 in response to the submissions of Petitioner 1 and 2. It was submitted as under:

8.1. The impugned Notifications are not violative of Article 14 of the Constitution. The test for reasonable classification was laid down by the Supreme Court in the case of ***R.K Garg v. Union of India, (1981) 4 SCC 675*** wherein it was held that in order to pass the test, two conditions must be fulfilled, namely, (a) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others;

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

(b) the differentia must have a rationale relation to the object sought to be achieved by the Act.

8.2. The services are classified into two groups- i) services which are taxable and ii) services which are exempted. Such classification is based on a clear intelligible differentia. In this case, the services of transport by auto rickshaws supplied through ECOs at the doorstep of the consumer falls under the taxable group; whereas those which are availed directly by the consumer by street hailing i.e., without intervention of the ECOs and through direct dealing with the auto rickshaw drivers falls under the exempt group.

8.3. This abovementioned differentia has a rational nexus to the object sought to be achieved by the Act of 2017. The object of the GST law is to levy GST on every transaction of supply of goods or services as elucidated in the text of the Constitutional (One Hundred and First) Amendment Act, 2016 ('the Constitutional Amendment Act of 2016'). To tax is the rule and exemptions are to be kept to a bare minimum. One of the stated objectives of introducing GST in India is to comprehensively tax all supplies of goods and services so that the burden of tax does not fall only on a few suppliers of goods and services.

8.4. There is no equality in taxation. The Supreme Court in ***Union of India v. M.V. Valliappan, (1999) 6 SCC 259, para 12*** held that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made on the objects sought to have been achieved, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

8.5. The purpose behind exempting auto-rickshaw drivers is that the said drivers are not in a position to bear the burden of compliance of the provisions of the Act of 2017. The classification and the differentia in levying GST is that, while the former is an unorganized small sector of independent auto-rickshaw drivers, who neither have the means nor the resources for compliance, ECOs admittedly have the resources and are in a position to meet the compliance requirements of Act of 2017.

8.6. GST is an indirect tax and is borne by the consumers i.e., the consumer and not the ECO. Thus, no GST compliance burden has been added to operators supplying their services through ECOs. Therefore, the only difference between the final fare to be paid by a consumer is as below:

Particulars	Base Fare	GST	Total
Passenger transport services hailed directly through an operator/service provider	Rs. X (Say Rs. 50)	Nil	Rs. X (Rs. 50)
Passenger transport services hailed using an intermediary service of ECOs	Rs. X (Say Rs. 50)	Rs. Y (Say Rs. 5)	Rs. X+Y (Rs. 55)

8.7. There is admittedly no administrative difficulty in collection of taxes in case of passenger transportation services supplied through ECOs. The Section 9(5) of the Act of 2017 provides that the government may on recommendation of the GST Council specify categories of services, the taxes on which shall be collected and paid; by the ECOs and all the provisions of the Act of 2017 would be applicable to the ECOs as if it is the supplier liable for paying tax in relation to supply of such services.

8.8. The classification is also valid as the ECOs owing to their platform and technology provides ease of convenience and value-added services to the consumer by providing the facility of doorstep pickup, an option of

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

payment through digital mode, security of third person's supervision on the ride, etc., and other related services available on their platform. The aforesaid value-added services are not available to the consumer when the service of street hailed auto rickshaw is availed.

8.9. The ECOs leverage their financial, organizational and informational technology resources to give a value-added experience to its consumers, which disrupts the level playing field for individual auto rickshaw drivers providing service through street hailing. The impugned Notifications bridges the gap between the unorganized auto rickshaw drivers and organized ECOs.

8.10. The argument of Petitioner 1 that the impugned Notifications treat equals unequally is incorrect in view of the fact that Petitioner 1 charges from the rider an additional convenience fee of Rs. 20 per ride for all auto-rickshaws booked through its platform. The average fare of an auto-rickshaw ride is between Rs. 90-100, and the convenience fees of Rs. 20 along with GST results in about 25% increase in the fare of the auto ride booked through an ECO. The Uber App also charges surge prices in fare during peak hours, which are accepted by the consumers. Therefore, there is a disparity which exists between street hailed auto rickshaws and the ones that are booked online, not only in the nature and quality of service, but also in terms of the price.

8.11. The Petitioner 1 is already paying taxes on services of passenger transport supplied through them for vehicles other than auto rickshaws such as radio taxi, motor cab, maxi cab and motor cycle. By way of the impugned Notifications, the said taxation system has been extended to all types of passenger transport including metered cabs and non-air-conditioned stage carriage, whose services are being provided by ECOs.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

8.12. The Minutes of the 45th GST Council Meeting records the decision for plugging the leaks in collection of GST, and transport of passenger, through any motor vehicle supplied through ECOs as one such area, which needed to be addressed.

8.13. Different rates on different goods or services; or on different types or categories or sub-categories of goods or services are common under the GST law. Examples include:

8.13.1. Different rates of GST of 5% and 12 % have been levied on garments and made-ups depending upon whether the value of the garment is below or above rupees one thousand.

8.13.2. Footwear having retail sale price not exceeding rupees five hundred per pair attracts GST at the rate of 5% while those with price exceeding rupees five hundred attract GST at the rate of 18%.

8.13.3. The services supplied by a supplier having annual turnover below Rs. 20 lakhs are not taxable as per Section 23 of the Act of 2017, however, the same services supplied by a person having annual turnover of more than Rs 20 lakhs are taxable as evidenced under Section 22 of the Act of 2017.

8.13.4. Services supplied by plumbers or carpenters through ECOs are taxable, however, the said services when supplied by the same individual plumbers or carpenters are not taxable as their annual turnover is below the registration threshold of Rs. 20 lakhs as per Section 22 of the Act. Notification No. 23/2017- Central Tax (Rate) dated 22.08.2017 demonstrates the same.

8.13.5. Accommodation services supplied by hotels having annual turnover of Rs. 20 lakhs or less supplied through ECOs are taxable,

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

however, the same hotel accommodation services supplied offline are not taxable. Notification No. 23/2017- Central Tax (Rate) dated 22.08.2017 and Notification No. 17/2017- Central Tax (Rate) dated 28.06.2017 annexed as Annexure A-1 to the short counter affidavit demonstrates the same.

8.13.6. Restaurant services supplied by restaurants having annual turnover of Rs. 20 lakhs or less, supplied through ECOs such as Swiggy, Zomato etc. are taxable even though the same restaurant services supplied offline are not taxable.

8.14. The Supreme Court upheld different rates of GST of 12% and 28% which existed on lottery run by States and lottery authorized by States. [***Skill Lotto Solutions v. Union of India, 2020 SCC OnLine SC 990***].

8.15. The Petitioner 1 is an ECO facilitating transport of passenger services supplied through various modes and has no locus to file the present writ petition as no tax has been levied on the Petitioner by way of the impugned Notifications. Even though GST is to be paid by ECOs, the same are recoverable from the consumer, who ultimately pays the GST on the said transport. Thus, Petitioner 1 being an ECO cannot be said to be aggrieved party and has no locus to file the writ petition.

8.16. The Petitioner 2, the union of auto rickshaw drivers has no locus to maintain the present petition as held by a Coordinate Bench of this Court in ***Sitaram Mehto & Ors. v. Govt. of NCT of Delhi, W.P.(C) No. 2878/2011*** dated 17.09.2012.

8.17. The Petitioner 1, 2 and 3 have contended that the impugned Notifications adversely impact their livelihood since they are providing their services through ECOs. However, the levy of GST is pass-through in nature and would be borne by the consumer. Thus, the question of impacting the

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

livelihood of auto-drivers providing their service otherwise and not through ECOs does not arise.

8.18. The Petitioner 1 has further argued that there is no difference between the auto rickshaws supplying their service through offline mode and those who supply their service through ECOs. However, this is factually incorrect and untrue.

8.18.1. The auto-rickshaws operated through ECOs owing to the involvement of ECOs provide a wider range of services and are more convenient to the consumers as opposed to the auto rickshaws that are street hailed and are not operated through ECOs.

8.18.2. When an auto is operating on ECO like Petitioner 1, the auto-rickshaw driver has the option of accepting or cancelling the ride. The moment the ride is accepted by the auto rickshaw driver, the auto rickshaw comes to the place of the consumer. There are options to track the route of auto rickshaw as well. The consumer can make payment either through cash or several online modes such as UPI, card payments etc. Such benefits provided by the ECO makes the service more convenient for the consumer and adds value to the service provided.

8.18.3. Therefore, there is a clear difference in the service experience provided by auto rickshaw drivers supplying their service through offline mode and auto rickshaw drivers who supply their service through ECOs. Petitioner 1 has enlisted the benefits and facilities it extends to the driver partners registered with it, which are admittedly not available to the non-registered auto rickshaw drivers.

8.19. The Section 9(5) of the Act of 2017 is not the charging Section nor has the transportation of passenger services through ECOs been taxed under

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

the same. The tax is levied upon all services under Section 9(1) unless they are exempt under Section 11(1) of the Act. The exemption on transportation by auto rickshaws and non-air-conditioned stage carriage through ECOs has been withdrawn and thus tax on the same is being levied under Section 9(1), which is the charging section of the Act of 2017.

8.20. The entities supplying goods and services through their own website does not attract the provisions of Sections 9(5) and 52 of the Act of 2017.

8.20.1. As per the definitions provided in Sections 2(44) and 2(45) of the Act of 2017, tour operator/bus operator selling tickets for their fleet of buses on their own website would come under the definition of ECOs. However, in terms of Section 52 of the Act of 2017, the Tax Collected at Source ('TCS') is required to be collected on the net value of taxable supplies made through it by other suppliers where the consideration is to be collected by the ECOs.

8.20.2. Further, the ECOs are liable to pay tax on the supplies made through them by other suppliers under a notification issued under Section 9(5) of the Act of 2017. Therefore, in cases where someone is supplying their own goods or services or both through their own website, the provisions of Sections 9(5) and 52 would not be applicable.

8.21. As regards the other forms of transportation in entries at Sl. No. 17 in the parent Notification, the remaining categories from (a) to (d) are those which are provided by the sovereign with an element of public welfare and subsidized rates, thus are not at par with the services provided through ECOs in (e). The said classification is founded on an intelligible differentia having a rational relation to the object sought to be achieved by the Act of 2017.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

8.22. The scope of judicial review in relation to economic legislation is extremely narrow and economic regulations require due judicial deference. **[*R.K Garg (supra)*]**

9. Ms. Arunima Dwivedi, senior standing counsel on behalf of Respondents 2 and 3, in response to the arguments of Petitioner 3 has submitted as under:

9.1. The reliance placed by Petitioner 3 on the case of ***Ashirwad Films (supra)*** is misplaced. The Supreme Court in the said case has held that the State enjoys greater latitude in the matter of a taxing statute, it may impose a tax on a class of people, whereas, it may not do so in respect of the other class. She states this undoubtedly aides the stand of the Respondents.

9.2. Further, the reliance on the case of ***Ayurveda Pharmacy (supra)*** is also incorrect as the said case is dealing with overlapping entries prescribing different rates of tax. The facts of the said case are completely distinguishable from the facts of the present case.

9.3. Taxing transportation services supplied through ECOs does not violate Article 14 of the Constitution as equality has to be maintained amongst equals. The entire concept of protective discrimination is based on this. There is no equality between transporters supplying services through ECOs and those supplying their services without the involvement of ECOs. The various players supplying services through ECOs ('vendors') benefit not only from the IT infrastructure and other resources of ECOs, but also from their organizational as well as logistics capacity and other wherewithal.

9.4. Being persuaded to exempt certain categories of vendors due to their administrative incapacity cannot be a reason to not impose tax on all other

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

categories of supplies even when it is administratively possible for the supplier to collect and pay tax.

9.5. Further, the impugned Notification is applicable to all ECOs engaged in facilitating passenger transport services supplied through various modes and not just to Petitioner 3.

9.6. She states that transport of passengers by any motor vehicle designed to carry passengers, which includes non-air-conditioned stage carriage and auto rickshaw, is covered by Entry 8(ii) and (vi) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, issued under Section 9(1) of the Act of 2017. The withdrawal of exemption under the impugned Notification results in attracting levy under the Notification No. 11/2017 and therefore, the contention of the Petitioner 3 that liability has been created *vide* impugned Notifications under Section 9(5) of the Act of 2017, without there being any levy under Section 9(1) of the Act of 2017 is factually incorrect.

9.7. Under Central Excise law, small sector industries with turnover below 1.5 Crores were fully exempted. But it cannot be said that exempting small individual unorganized players and imposing tax on bigger organized players restricts people's choice of procuring goods and services from the larger organized players or makes it difficult for larger players to practice profession of their choice.

9.8. The contention that the impugned Notification is contrary to Sections 9 and 11 of the Act of 2017 is unfounded. The Section 11(1) of the Act of 2017 empowers the government to exempt supply of goods or services or both, either absolutely or subject to specific conditions. The impugned Notification *vide* which the exemption was granted to transport of

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

passengers by stage carriage other than air-conditioned stage carriage, has been subjected to the condition that, the said exemption will not apply to services supplied through an ECO is within the power of the Respondent.

9.9. It was that the government is empowered to grant exemption in public interest, thus, as a corollary, the exemption may also be denied to any supplier only if it is in public interest. On the other hand, it was also contended that the impugned Notification is not in public interest as it restricts the freedom of choice and access to transportation facilities. The said contentions of the Petitioner are completely unfounded as it is a settled position of law that there is no promissory estoppel in taxation.

Findings and Analysis

10. This Court has heard the learned counsel for the parties and perused the records.

The Issue

11. The crux of the dispute in the present batch of writ petitions is whether the impugned Notifications arbitrarily create a classification between the ECOs and the individual service providers solely based on the 'mode of booking' availed by the consumer for availing the said service; and consequently, discriminates against the ECOs by denying the ECOs the benefit of exemption available to the individual service providers under the parent Notification. In view of the same, the question that arises for consideration in the present writ petitions is as under:

> *Whether the impugned Notifications withdrawing from the ECOs the benefit of exemption from payment of GST on service of transportation through auto rickshaws and non-air-conditioned stage carriage, which continues to remain available to the individual service providers is violative of Articles 14, 19(1)(g) and 21 of the Constitution?*

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

The impugned Notifications are not violative of Article 14 of the Constitution and fulfil the test of 'reasonable classification' [and the impugned Notifications are not ultra vires of the Act of 2017]

12. To begin with, we would like to note that in a catena of judgments, the Supreme Court[1] has laid down that a taxing statute for the reasons of functional expediency and even otherwise, can pick and choose to tax some; so long as the classification is reasonable.

12.1. The Supreme Court in ***R.K Garg*** *(supra)* held that the question which the Constitutional Court must address to itself is whether the classification made by the statute satisfies the test of real and substantial distinction or is it arbitrary and irrational and hence violative of the equal protection clause in Article 14 of the Constitution. The exposition of law in paragraph 6 reads as follows:

> *"6. That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject-matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J., as he then was) in In re The Special Courts Bill, 1978 [(1979) 1 SCC 380 : AIR 1979 SC 478 : (1979) 2 SCR 476 : (1979) 2 SCJ 35] . It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:*
>
> *"1.* ***The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are***

[1] Aashirward Films v. Union of India (supra)

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from other and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privilege sought to be conferred or the liabilities proposed to be imposed it does not forbid classification for the purpose of legislation provided such classification is not arbitrary in the sense above mentioned."

It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14."

(Emphasis supplied)

The statute itself recognises the ECOs as a distinct and separate class from the individual service providers

13. The provisions of the Act of 2017 itself recognises the ECOs as a class separate from the individual service providers selling their services through the e-commerce platform. In fact, notifications issued under Section 9(5) of the Act of 2017 thereunder from time to time give effect to this statutory classification.

14. To elucidate the aforesaid opinion, this Court deems it appropriate to refer to the relevant provisions under the Act of 2017, which are as follows:

14.1. Section 2(44) defines an electronic commerce as under:

"electronic commerce means the supply of goods or services or both,

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

including digital products over digital or electronic network;"

14.2. Section 2(45) defines electronic commerce operator as:

"electronic commerce operator means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce;"

14.3. Sections 9(1) and (5) explains the levy of tax on supply of goods or services or both through an ECO, as follows:

*"**9. Levy and collection.***

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 and at such rates, not exceeding twenty 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.

xxx xxx xxx

*(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator **if such services are supplied through it**, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:*

....."

(Emphasis supplied)

14.4. Section 22(1) prescribes the persons who are liable for registration under GST as under:

*"**22. Persons liable for registration.***

(1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees:
....."

14.5. The persons who are exempted from registering under GST are provided in Section 23(2), which reads as follows:

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

> *"**23. Persons not liable for registration.***
>
> *xxx xxx xxx*
>
> *(2) The Government may, on the recommendations of the Council, by notification, specify the category of persons who may be **exempted** from obtaining registration under this Act."*

14.6. Section 24(ix) describes the compulsory registration for persons, if the supply of goods or services or both are through ECO. The relevant portion reads as under:

> *"**24. Compulsory registration in certain cases***
>
> *"Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,-*
>
> *(ix) persons who supply goods or services or both, other than supplies specified under sub-section (5) of Section 9, through such **electronic commerce operator** who is required to collect tax at source under Section 52;"*

14.7. Section 52(1) provides for the collection of tax at source by the ECO. The same is reproduced herein below:

> *"**52. Collection of tax at source**.*
>
> *(1) Notwithstanding anything to the contrary contained in this Act, **every electronic commerce operator** (hereafter in this section referred to as the "operator"), not being an agent, **shall collect an amount calculated at such rate not exceeding one per cent.,** as may be notified by the Government on the recommendations of the Council, **of the net value of taxable supplies made through it by other suppliers** where the consideration with respect to such supplies is to be collected by the operator."*

15. The ECOs for the purpose of Section 9(5) and Section 52 of the Act of 2017 are entities, which are liable to collect and pay tax on the supplies made through it by other individual suppliers. Thus, Sections 9(5) and 52 of the Act of 2017 statutorily recognises the ECO as a class distinct from the individual supplier registered with the ECO.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

15.1. The ECOs under Section 9(5) are liable to pay tax for the services provided by individual suppliers through it, even when the said individual supplier is otherwise exempt from taxation under Section 22(1) read with 23(2) of the Act of 2017.

15.2. Similarly, the ECOs under Section 52 are liable to collect tax at source for the taxable supplies made through it by other suppliers, even when the individual supplier itself is otherwise exempt from taxation as is evident from Section 24(ix) of the Act of 2017.

15.3. An analysis of the above referred provisions of the statute elucidates that the scheme of the Act of 2017, recognises the supply of services through the ECOs as an independent taxable event of supply distinct from the individual service providers.

15.4. Section 9(5) of the Act of 2017 creates a deeming fiction to the effect that if a supply of service is made through the ECOs, the ECOs shall be deemed supplier of the service.

15.5. The Respondents, in recognition of the said statutory classification, have from time to time issued notifications[2] under Section 9 of the Act of 2017, which evidence that even when the individual supplier is exempt from taxation, the said supply when provided through the ECO is exigible to tax under the Act of 2017. The said notifications are discussed herein after.

Sections 22(1), 23(2), and 24(ix) of the Act of 2017 read with Notification Nos. 17/2017-CT (R), dated 28.06.2017 and Notification No. 23/2017-CT(R) dated 22.08.2017

16. For appreciating the effect of Notifications No. 17/2017 – CT(R) dated 28.06.2017 and Notification No. 23/2017 – CT(R) dated 28.08.2017, the relevant abstracts are reproduced herein below:[3]

[2] Notification Nos. 17/2017-CT (R), dated 28.06.2017 and Notification No. 23/2017-CT(R) dated 22.08.2017

[3] Ashok Batra, GST LAW & PROCEDURE, (2021), Referencer 30

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

<table>
<tr><th colspan="2">Table 1</th></tr>
<tr><th colspan="2">Salient Features and Important Meaning/Definitions</th></tr>
<tr><th>Section</th><th>Particulars</th></tr>
<tr><td>…</td><td>…</td></tr>
<tr><td>…</td><td>…</td></tr>
<tr><td>9(5) of CGST Act & 5(5) of IGST Act</td><td>Tax on the following Intra-State/Inter-State supplies shall be paid by the ECO if such services are supplied through it:
<table>
<tr><td>(i)</td><td><u>With effect from 01.07.2017</u>
N.No. 17/2017-CT(R), dated 28.06.2017
Transportation of passengers by Radio-Taxi, Motorcab, Maxicab and Motor Cycle</td></tr>
<tr><td>(ii)</td><td><u>With effect from 01.07.2017</u>
N.No. 17/2017-CT(R), dated 28.06.2017
<u>Accommodation in Hotels, Inns, Guest Houses, Clubs, Campsites or Other Commercial Places meant for residential or lodging purposes</u>, except where the person supplying such service through electronic commerce operator is liable for registration under Section 22(1) of the CGST Act- i.e. where the Aggregate Turnover of the person supplying such service through ECO exceeds Rs. 20 Lakh or Rs. 10 Lakh, as the case may be.</td></tr>
<tr><td>(iii)</td><td><u>With effect from 22.08.2017</u>
N.No. 23/2017-CT(R), dated 22.08.2017
<u>Services by way of House-Keeping, such as plumbing, carpenting etc.,</u> except where the person supplying such service through ECO is liable for compulsory registration under Section 22(1).</td></tr>
<tr><td colspan="2">All the provisions of the CGST/SGST/IGST Act shall apply to such ECO as if he is the supplier liable for paying the tax in relation to the supply of such services.</td></tr>
</table></td></tr>
</table>

16.1. As per the aforesaid notifications, for instance, hotel ABC International[4] is exempt under Section 23(2) of the Act of 2017 from registration and if a customer walks into the hotel for a direct booking, he will not be liable to pay GST on the room rent. However, if another

[4] Fictional name

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

customer makes a booking through the e-platform of an ECO, for a room in same hotel ABC International, he will be charged with GST on the room rent and the ECO will be liable to pay the GST to the treasury.

16.2. Similarly, if a customer directly avails service of a plumber, Mr. XYZ[5], who is exempt under Section 23(2) of the Act of 2017 from registration, the customer will not be liable to pay GST on the services rendered by the said plumber. However, if the same plumber also is registered with an ECO and a customer avails the service of the said plumber through the ECO, the supply of service by the same plumber will be exigible to payment of GST and the ECO will be liable to pay GST to the treasury.

16.3. Section 52 makes the ECOs liable to collect the amount of tax collected at source from suppliers, who have made supplies through the ECO. To enforce this obligation of the ECO, the individual supplier who is otherwise exempt from registration under Section 23(2) is required to obtain the compulsory registration under Section 24(ix) to enable the ECO to comply with the said obligation. This interplay of Section 24(ix) and 52 of the Act of 2017 also evidences the distinction between the supply of service through the e-platform of the ECO and the individual supplier, as a separate class of persons under the statute.

16.4. A conjoint reading of the Sections 22(1), 23(2) and 24(ix) with the Notifications Nos. 17/2017 and 23/2017 shows that it is the underlying scheme of the Act that even when the individual supplier is *per se* exempt from levy of GST under Section 23(2), however, if the service is provided by the same said individual supplier through an ECO, the said services are

[5] Fictional name

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

exigible to levy of GST under Sections 9(5) and 52 of the Act of 2017 respectively.

16.5. Admittedly, services pertaining to accommodation at hotels etc., such as ABC International, are made available through the website and electronic application of Petitioner 3; and GST is levied on the room rent in accordance with Notification Nos. 17/2017 and paid by the said ECO under Section 9(5) of the Act of 2017. The Petitioner 3 herein is therefore aware of this statutory classification and has not objected to the same as being discriminatory as between the ECO and the said hotel.

The effect of the impugned Notifications in withdrawing the exemption from the ECOs and making the levy of GST, on the fare of non-air-conditioned stage carriage ticket booked through the electronic platform of Petitioner 3 is identical and not discriminatory.

16.6. Similarly, on a conjoint reading of the aforesaid sections and Notification No. 17/2017 with respect to transportation of passengers by radio taxi, motor cab, maxi cab and motor cycle shows that if the said service is provided by the individual taxi drivers of the said motor vehicles through ECOs, the said services are exigible to levy of tax by the ECO under Section 9(5) of the Act of 2017.

16.7. The services of radio taxi, motor cabs, maxi cabs and motor cycles are also available through the Uber App of Petitioner 1 and similarly, GST is being levied under Section 9(5) of the Act of 2017 on the fare of these cabs when booked through its App. Similarly, Petitioner 1 has not objected to the said levy of GST being discriminatory. The effect of the impugned Notifications in levying GST on the fare of an auto-rickshaw ride booked through the Uber App is identical and not discriminatory.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

ECOs seeking parity with the individual auto-rickshaw drivers and bus operators and therefore seek equality amongst unequals

16.8. It is contended by Petitioner 1 and 2 that ECO supplying the transportation of passenger service through their registered driver partners, i.e., auto-rickshaw drivers, is on parity with the individual auto-rickshaw drivers which are street hailed.

Similarly, Petitioner 3 asserts that the ECO supplying the transportation of passenger service by a non-air-conditioned stage carriage is at par with the individual bus operator.

16.9. To sum it up, Petitioner 1, 2 and 3 contend that the fare charged by the Petitioner 1 and 3 from the consumer booking the ride through the ECO should continue to remain exempt from GST as is the case when the booking is made by the consumer directly with the individual auto-driver through street hailing and the individual bus operator through his booking office. In effect, the ECOs in the present matter are seeking parity of rates of fare with the individual auto-rickshaw driver and the individual bus operator. In the opinion of this Court, the ECO by seeking parity with the individual service provider, is seeking equality amongst unequals.

16.10. In W.P.(C) 14826/2021, the Respondents have taken a stand that ECOs such as Petitioner 3, due to their financial, organisational and informational technological resources have the capacity to disrupt the level playing field for individual operators i.e., the bus operator. The taxation in the hands of the ECO for booking made through their electronic platform would therefore, also subserve the interest of the individual bus operator and in no manner, adversely affect the interests of the consumer. (***Kerala Hotel and Restaurant Association and Others v. State of Kerala and Others, (1990) 2 SCC 502,*** **paragraph 24**)

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

16.11.In the opinion of this Court, this distinguishing fact would equally apply to auto-rickshaw drivers who are street hailed. It is an admitted fact that ECO charges commission to the auto-rickshaw drivers for providing the digital platform to get connected with the potential consumer, which is in addition to the conveyance charges the ECO collects from the consumers. The auto rickshaw driver who is street hailed does not have to pay this commission to the ECO. The exemption from GST available to a street hailed auto rickshaw driver therefore provides the individual auto rickshaw driver the capacity to economically compete with the services provided by the ECO and have an option to operate independently.

Further, the benefits which are available to the registered driver partners of ECOs, which are represented by Petitioner 2, has been enlisted by the Petitioner 1 in paragraph B.12 of W.P.(C) 14048/2021 and ground K in W.P.(C) 14579/2021.The non-registered auto-rickshaw driver who opts out from the registration with ECOs does not have the same benefits and is for this additional reason is a distinct class *vis a vis* the registered driver partner (i.e., member of Petitioner 2).

16.12.There is also merit in the contention of the Respondents that the profile of the consumer who uses the online application of the ECO on a smartphone or uses the website for making reservation forms a distinct category of consumer who has the wherewithal to pay GST.

16.13.It is an admitted fact that, when a consumer books an auto rickshaw using the Uber App, (i) the auto rickshaw comes to pick up the consumer at his/her doorstep; (ii) it tracks the ride through its 'share your trip status' to assure the safety of the consumer; (iii) there are multiple payment options available to the consumer which includes digital payments in addition to

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

cash, (iv) the supervisory role which the ECO plays to monitor the transaction etc. Therefore, whereas the quality of the physical ride in the auto rickshaw may remain the same even if it is street hailed, the experience of the doorstep convenience and the assurance Petitioner 1 is assuming the safety for the ride makes the experience different for the consumer. Therefore, the consumer who uses Uber App to an auto rickshaw ride and the consumer who uses a street hailed auto rickshaw fall under a different category.

16.14. The Petitioner 1 and 3 admitted that the implementation of the notification has resulted in loss of revenue in this segment to the ECO. In the opinion of this Court, therefore, it is apparent that the withdrawal of the exemption from the ECOs has led to a pricing war, wherein the ECOs find themselves at a disadvantage. In essence, the ECOs have competing commercial interest with the bus operator or the auto rickshaw drivers and by way of these petitions are seeking parity with the said individuals.

16.15. This Court is thus unable to accept the said contention of Petitioner 1, 2 and 3 seeking parity. If the submissions of the ECOs are accepted, it would amount to lack of reasonable classification, resulting in gross inequality. The contention of the Petitioner 1, 2 and 3 is thus, clearly hit by the prohibition to deny equality as held by the Supreme Court in ***Kunnathat Thatehunni Moopil Nair, etc. v. State of Kerala and Another, (1961) 3 SCR 77*** which reads as under:

> *"8. It is common ground that the tax, assuming that the Act is really a taxing statute and not a confiscatory measure, as contended on behalf of the petitioners, has no reference to income, either actual or potential, from the property sought to be taxed. Hence, it may be rightly remarked that the Act obliges every person who holds land to pay the tax at the flat rate prescribed, whether or not he makes any income out of the property, or whether or not the property is capable of yielding any income. The Act, in terms, claims to be "a*

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Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

> *general revenue settlement of the State" (Section 3). Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The second one does not make any income, but could raise some crop after a disproportionately large investment of labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realisation of the public demand. It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification.* ***It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution****.*
>
> (Emphasis supplied)

16.16. Therefore, this Court is of the opinion that the classification of the ECOs like Petitioner 1 and 3, as a class of service providers, which are separate and distinct from the individual supplier is, therefore, statutorily classified and recognised in the provisions of the Act of 2017 and more specifically in Sections 9(5) and 52 of the Act of 2017.

16.17. In view of the statutory recognition in the Act of 2017 that the ECOs are a distinct category, the submission of the Petitioner 1 and 3 that an ECO is necessary entitled to all the exemptions, which are available to an individual service provider is incorrect**.** Hence, this Court is of the view that the impugned Notifications are not *ultra vires* to Sections 9(5) of the Act of 2017.

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

Classification has a rational nexus with the object sought to be achieved by the Act of 2017

17. The Respondents have contended that the object of the GST law is to levy tax on 'every' transaction of supply of goods and services. In this regard, reliance has been placed upon the text of the Constitutional Amendment Act of 2016. It has been contended that the objective of introducing GST is to comprehensively tax 'all' supplies of goods and services as far as possible so that the burden of tax does not fall only on a few suppliers of goods and services. It is stated that the impugned Notifications withdrawing exemption from ECOs is in furtherance of the said object to tax the transaction supplied through the ECOs.

17.1. On the other hand, the Petitioner 1 and 3 are contending that the object which this Court must consider while testing the classification is the *per se* 'exemption' granted to the service of transportation through the auto-rickshaw and non-air-conditioned stage carriage, in terms of the parent Notification as it stood prior to the amendment. It is stated therefore the withdrawal of exemption to the transportation service when availed through ECO has no rationale.

17.2. However, in this regard, the Respondents have explained that the exemption continues to extend to the individual service providers i.e., the individual auto rickshaw drivers or the individual bus operators since the said individuals do not have the wherewithal to meet the burden of compliances required under the Act of 2017.

17.3. This Court is of the view that the object which has to be borne in mind for determining validity of the classification, which is the subject matter of challenge in the present petition is the objective of the GST law. The constitutional scheme of GST has been looked into by the Supreme

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

Court, in ***Union of India (UOI) and Others. v. VKC Footsteps India Private Limited (2022) 2 SCC 603,*** wherein it has been observed as under:

> *"**47**. The Statement of Objects and Reasons appended to the Constitution (One-Hundred and Twenty-Second Amendment) Bill 2014 which eventually became the Constitution (One Hundred and First Amendment) Act 2016 postulated that GST shall replace a number of indirect taxes levied by the Union Government and the State Governments. The object was to introduce a goods and service tax which would fulfil two fiscal priorities namely, (1) removing the cascading effect of taxes; and (2) providing for a common national market for goods and services. An extract from the Statement of Objects and Reasons is set out below:*
>
> > *The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurring taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied **on all transactions involving supply of goods and services,** except those which are kept out of the purview of the goods and services tax."*
>
> (Emphasis supplied)

17.4. To achieve the aforesaid objective of the law, it is evident that to tax is the rule and exemptions are to be kept to the bare minimum. In this regard, it would be instructive to refer to the exposition of law under erstwhile Central Excises and Salt Act, 1944, by the Supreme Court in ***Empire Industries and Others. v. Union of India and Others, (1985) 3 SCC 314,*** more specifically to paragraph 53, wherein it was held as under:

> ***"53.** It was contended on behalf of the petitioners that they are carrying on only the processing activity and the wholesale cash price is not theirs on the entire product. Section 4 of the Act is the section which deals with the valuation of excise goods for the purpose of charging duty (sic) of the same would be applicable. Where for the purpose of calculating assessable profits, a notional and conventional sum is laid down by the Legislature to be arrived at on a certain basis, it is not permissible for the courts to engraft into it any other deduction or allowance or addition or read it down on the score that the*

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

> *said deduction or allowance or addition was authorised elsewhere in the Act or in the Rules. A conventional charge should be measured by its own computation and not by facts relating to other method of computation.* ***The circumstances that thereby the benefit of any exemption granted by the Legislature may be lost and that in some cases hardship might result are not matters which would influence courts on the construction of the statute. A taxpayer is entitled only to such benefit as is granted by the Legislature. Taxation under the Act is the rule and benefit and exemption, the exception.*** *And in this case there is no hardship. When the textile fabrics are subjected to the processes like bleaching, dyeing and printing etc. by independent processes, whether on their own account or on job charges basis, the value for the purposes of assessment under Section 4 of the Central Excise Act will not be the processing charges alone but the intrinsic value of the processed fabrics which is the price at which such fabrics are sold for the first time in the wholesale market. That is the effect of Section 4 of the Act. The value would naturally include the value of grey fabrics supplied to the independent processors for the processing. However, excise duty, if any, paid on the grey fabrics will be given pro forma credit to the independent processors to be utilised for the payment on the processed fabrics in accordance with the Rules 56-A or 96-D of the Central Excise Rules, as the case may be."*
>
> (Emphasis supplied)

17.5. The Petitioner 1, 2 and 3 have not disputed the aforesaid stated objective of the GST law that every transaction must be taxed. Therefore, the impugned Notifications, which seek to withdraw the exemption and tax the consumers who elect to avail a ride in the auto rickshaw or a non-air-conditioned stage carriage through ECOs, is in conformity with the stated objective of the Act of 2017.

17.6. Section 9(5) of the Act of 2017 creates a statutory fiction which permits the Respondents to consider the ECOs as the deemed suppliers of the services availed by the consumer through the online platform facilitated by the ECOs. And thereby, this results in liability of tax compliance for the services availed through the ECO. The intent of Section 9(5) is to plug leaks in collection of GST and therefore, the Respondent is empowered under the said section to consolidate the liability to collect and pay tax for the services

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

supplied through ECO. This is also evident from the provision of Section 52 of the Act of 2017.

17.7. The object of the parent Notification, as it stands today post amendment, with respect to entries pertaining to auto rickshaws and non-air-conditioned stage carriage is now limited to exempt the individual service providers only and this is in conformity with Section 11 of the Act of 2017 which permits the Respondent to grant an exemption absolutely or conditionally. This Court has already opined and held that the ECOs are a distinct class and the Respondents are well within their jurisdiction to exclude the said class from exemption. There is no vested right in the ECOs to claim the continuation of exemption. The provision of Section 11 of the Act of 2017 reads as under:

> *"**11. Power to grant exemption from tax.**— (1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, **on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both** of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.*
>
> *(2) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an exceptional nature to be stated in such order, exempt from payment of tax any goods or services or both on which taxis leviable.*
>
> *(3) The Government may, if it considers necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.*
>
> *Explanation.—For the purposes of this section, where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both."*

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

(Emphasis supplied)

17.8. Therefore, in the opinion of this Court, the classification between ECO and the individual service provider has a rational nexus with the object sought to be achieved by the Act of 2017.

The impugned Notifications does not result in an artificial discrimination and classification based on the 'mode of booking'

18. The contention of the Petitioner 1 and 3 that the ECOs are merely facilitating a 'mode of booking' and are therefore, entitled to the exemption as available to the individual suppliers providing the service is a half-truth.

18.1. The relationship between the ECOs, the consumer and the vendor are on a principal-to-principal basis. In this regard, this Court deems it appropriate to refer to the terms and conditions (as on 01.03.2023) as made available from the website of Petitioner 1 and 3, which reads as under:

Petitioner 1

> ***"2. The Services***
> *The Services constitute a technology platform that enables users of Uber's mobile applications or websites provided as part of the Services (each, an "Application) to arrange and schedule transportation and/or logistics services with independent third party providers of such services, including independent third party transportation providers and independent third party logistics providers under agreement with Uber or certain of Uber's affiliates ("Third Party Providers"). Unless otherwise agreed by Uber in a separate written agreement with you, the Services are made available solely for your personal, noncommercial use.* ***YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION OR LOGISTICS SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE NOT EMPLOYED BY UBER OR ANY OF ITS AFFILIATES****."*

Petitioner 3

> *"4.* ***BUS***
> *ROLE OF Goibibo*
> - *Goibibo only* ***provides a technology platform that connects intending travelers with the with bus operators.*** *It doesn't operate any bus or offer the*

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

service of transportation to the User. ***Goibibo also doesn't act as an agent of any bus operator in the process of providing the above-mentioned technology platform services.***

- *The bus ticket booking voucher which Goibibo issues to a User is solely based on the information provided or updated by the bus operator regarding the seat availability.*
- *The amenities, services, routes, fares, schedule, bus type, seat availability and any other details pertaining to the bus service are provided by the respective bus operator and Goibibo has no control over such information provided by the bus operator."*

(Emphasis supplied)

18.2. In view of the aforesaid terms and conditions, it is abundantly clear that Petitioner 1 and 3 are not acting as agents of the auto-rickshaw drivers and the bus-operators. The ECOs charge commission to the registered driver partners and the bus operators for providing digital platform to connect with the potential consumers. This is in addition to the convenience charge, the ECOs collect from the consumer.

18.3. The ECOs like Petitioner 1 and 3 assure a quality of service to the consumer with value added services such as security, digital payments, etc., which is in addition to the service provided by the individual suppliers.

18.4. For instance, in case of the cancellation of the ride, the refunds are an issue arising between the ECO and the consumer, without any reference to the supplier. Similarly, the services which are provided by the ECO to the consumer has add on features for which the ECO assumes responsibility. The consumer while opting to avail the services of ECO, is also opting for these add on services and therefore, the ECO itself steps into the shoes of the supplier and is not acting as an agent of the supplier.

18.5. In this conspectus of facts, the contention of the Petitioner 1 and 3 that ECOs are merely a platform which facilitates a mode of booking, is incorrect as the ECOs assume responsibility for the discharge of services

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

assured by the ECOs to the consumer, which are rendered by the ECO. The ECOs are providing bundle of services and partake a charge/commission from both the consumers and the individual supplier. Therefore, for all purposes, the ECOs are an independent supplier of service to the consumer. And, the service provided by the individual supplier is only one facet of the bundle of services assured by the ECOs to the consumer booking through it. Hence, the impugned Notifications do not result in discrimination on the basis of the mode of booking.

The Petitioner 1, 2 and 3 cannot claim exemption from taxation as a vested right. The Respondents are well within their power to withdraw the exemption granted previously under the unamended parent Notification

19. It is trite law that there can be no vested right in claiming exemption from payment of tax. If the Respondents are of the opinion that the exemption which was earlier extended by the unamended parent Notification to the ECOs in 2017 should be withdrawn, with the passage of time in 2022, such a decision would be within the scope of their jurisdiction under Section 11 of the Act of 2017. There is admittedly no constitutional guarantee or statutory entitlement to exemption.

19.1. The Supreme Court in ***VKC Footsteps India Private Limited (supra)***, while upholding the *vires* of Section 54(3) of the Act of 2017 and repelling the challenge under Article 14 of the Constitution held as under:

> *"**100.** The submission which has been urged on behalf of the assessees is that if Section 54(3) is construed to confine a refund of unutilised ITC only to the extent that the accumulation arises on account of the rate of tax on inputs (meaning input goods) exceeding the rate of tax on outward supplies, the principles underlying Article 14 of the Constitution would be attracted and the statutory provision would suffer from the vice of arbitrariness. The submission is that this has become an incident of a class legislation: the class consists of registered persons having unutilised ITC. The class comprises of the following species (i) domestic suppliers; and (ii) exporters. The sub-species are (i) input goods; and (ii) input services. Opposing this submission, the learned ASG's submission is that this is a valid classification, denying one of the species,*

Signature Not Verified
Digitally Signed
By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

namely, input services the benefit of refund.

108. *In Spences Hotel (P) Ltd. v. State of W.B. [Spences Hotel (P) Ltd. v. State of W.B., (1991) 2 SCC 154] , a two-Judge Bench, speaking through K.N. Saikia, J. revisited the precedents of this Court governing the principles of classification in tax legislation and held : (SCC pp. 168-69, para 24)*

> *"24. … The history of taxation is one of evolution as is the case in all human affairs. Its progress is one of constant growth and development in keeping with the advancing economic and social conditions; and the fiscal intelligence of the State has been advancing concomitantly, subjecting by new means and methods hitherto untaxed property, income, service and provisions to taxation. With the change of scientific, commercial and economic conditions and ways of life new species of property, both tangible and intangible gaining enormous values have come into existence and new means of reaching and subjecting the same to contribute towards public finance are being developed, perfected and put into practical operation by the legislatures and courts of this country, of course within constitutional limitations."*

109. *The Court held that the principle of equality does not preclude the classification of property, trade, profession and events for taxation — subjecting one kind to one rate of taxation and another to a different rate. The State may exempt certain classes of property from any taxation at all and impose different specific taxes upon different species which it seeks to regulate. The Court held : (Spences Hotel case [Spences Hotel (P) Ltd. v. State of W.B., (1991) 2 SCC 154] , SCC p. 171, para 27)*

> *"27. 'Perfect equality in taxation has been said time and again, to be impossible and unattainable. Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void.' 'Perfectly equal taxation', it has been said, 'will remain an unattainable good as long as laws and government and man are imperfect.' 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream.'*

110. *Parliament while enacting the provisions of Section 54(3), legislated within the fold of the GST regime to prescribe a refund. While doing so, it has confined the grant of refund in terms of the first proviso to Section 54(3) to the two categories which are governed by clauses (i) and (ii). A claim to refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in clause (i) of the first proviso allowed a refund of the unutilised ITC in the case of zero-rated supplies made without payment of tax.*

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Signing Date:13.04.2023
10:45:04

> *Under clause (ii) of the first proviso, Parliament has envisaged a refund of unutilised ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.* ***When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated on a par on a matter of a refund of unutilised ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive.*** *Many of the considerations which underlie these choices are based on complex balances drawn between political, economic and social needs and aspirations and are a result of careful analysis of the data and information regarding the levy of taxes and their collection. That is precisely the reason why courts are averse to entering the area of policy matters on fiscal issues. We are therefore unable to accept the challenge to the constitutional validity of Section 54(3).”*
>
> (Emphasis supplied)

19.2. In this regard, it is also instructive to refer to the judgment of Supreme Court in ***State of Rajasthan and Another v. J.K Udaipur Udyog Ltd. and Another, (2004) 7 SCC 673***, wherein it was held as follows:

> *“**25.** An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge.* ***It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant.*** *This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted. (See Shri Bakul Oil Industries v. State of Gujarat [(1987) 1 SCC 31 : 1987 SCC (Tax) 74], Kasinka Trading v. Union of India [(1995) 1 SCC 274] and Shrijee Sales Corpn. v. Union of India [(1997) 3 SCC 398]) .”*
>
> (Emphasis supplied)

19.3. We are therefore, unable to accept the challenge of the Petitioner 1, 2 and 3 to the impugned Notifications on the ground that they have a continuing right to claim exemption along with the individual suppliers.

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Signing Date:13.04.2023
10:45:04

20. This Court is of the opinion that if Respondents have decided to withdraw the exemption from this distinct category of consumer who opts to use the ECO for making bookings, the same is well within their legislative purview as held hereinabove.

20.1. In this regard, this Court deems it appropriate to refer to the judgment of Supreme Court in ***N.S. Rathnam (supra)*** wherein it was laid down as follows:

> *"**12.** The judgment of this Court in Kasinka Trading case [(1995) 1 SCC 274], no doubt, lays down the principle that there is wide discretion available to the Government in the matter of granting, curtailing, withholding, modifying or repealing the exemptions granted by earlier notifications. It is also correct that the Government is not bound to grant exemption to anyone to which it so desires.* ***When the duty is payable under the provisions of the Act, grant of exemption from payment of the said duty to particular class of persons or products, etc. is entirely within the discretion of the Government. This discretion rests on various factors which are to be considered by the Government as these are policy decisions.*** *In the present case, however, the issue is not of granting or not granting the exemption.* ***When the exemption is granted to a particular class of persons, then the benefit thereof is to be extended to all similarly situated persons. The notification has to apply to the entire class and the Government cannot create sub-classification thereby excluding one sub-category, even when both the sub-categories are of same genus. If that is done, it would be considered as violating the equality clause enshrined in Article 14 of the Constitution. Therefore, judicial review of such notifications is permissible in order to undertake the scrutiny as to whether the notification results in invidious discrimination between two persons though they belong to the same class.*** *In Aashirwad Films v. Union of India [(2007) 6 SCC 624] , this aspect has been articulated in the following manner: (SCC pp. 628-29, paras 9-12)*
>
> > *"9. The State undoubtedly enjoys greater latitude in the matter of a taxing statute. It may impose a tax on a class of people, whereas it may not do so in respect of the other class.*
> >
> > *10. A taxing statute, however, as is well known, is not beyond the pale of challenge under Article 14 of the Constitution of India.*
> >
> > *11. In Chhotabhai Jethabhai Patel & Co. v. Union of India [AIR 1962 SC 1006] , it was stated: (AIR p. 1021, para 37)*
> >
> > *'37. But it does not follow that every other article of Part III is inapplicable to tax laws. Leaving aside Article 31(2) that the*

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

provisions of a tax law within legislative competence could be impugned as offending Article 14 is exemplified by such decisions of this Court as Suraj Mall Mohta & Co. v. A.V. Visvanatha Sastri [AIR 1954 SC 545 : (1955) 1 SCR 448] and Shree Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri [AIR 1955 SC 13 : (1955) 1 SCR 787] . In K.T. Moopil Nair v. State of Kerala [AIR 1961 SC 552] the Kerala Land Tax Act was struck down as unconstitutional as violating the freedom guaranteed by Article 14. It also goes without saying that if the imposition of the tax was discriminatory as contrary to Article 15, the levy would be invalid.'

12. A taxing statute, however, enjoys a greater latitude. An inference in regard to contravention of Article 14 would, however, ordinarily be drawn if it seeks to impose on the same class of persons or occupations similarly situated or an instance of taxation which leads to inequality. The taxing event under the Andhra Pradesh State Entertainment Tax Act is on the entertainment of a person. Rate of entertainment tax is determined on the basis of the amount collected from the visitor of a cinema theatre in terms of the entry fee charged from a viewer by the owner thereof."

13.** It is, thus, beyond any pale of doubt that the justiciability of particular notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly situated/placed, they have to be treated equally.* ***At the same time, the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. *The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to same class/category.* ***Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State.*** *Article 14 prohibits class legislation and not reasonable classification."*

(Emphasis supplied)

20.2. There is no mandate in the Act of 2017 which precludes Respondent from granting exemption to a recognised/distinct class of suppliers of

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Signing Date:13.04.2023
10:45:04

service. The conditional exemption granted by the Respondents given to individual plumbers/carpenters illustrates the same.

20.3. Since, the Petitioner 1, 2 and 3 have failed to prove that they are similarly placed with the individual suppliers to whom the exemption have already been granted, this Court is of the opinion that the Respondents are well within their purview to deny the exemption to the ECOs like the Petitioner 1 and 3 in view of the impugned Notifications.

Instances of levying tax on other transportations facilitated through ECOs

21. The contention of the Petitioner 1 and 3 that there are no instances of levying tax on a service simply on the basis that they are provided through an ECO is factually incorrect. In this regard, this Court has already taken note hereinbefore of Notification No. 17/2017, Notification No. 23/2017 and newly inserted Clause (iv) in Notification No. 17/2017 *vide* impugned Notification No.17/2021 [there is no challenge to this clause (iv) in the present proceedings].

21.1. The Petitioner 1 and 2 contended that among the five entries in Sl. No. 17 (from series 'a' to 'e') in parent Notification, the impugned Notifications selectively withdraw the exemption for services facilitated by ECO only for entry 'e' i.e., auto rickshaws and not for the other entries. It has been demonstrated that for bookings made through ECOs, for the other specified forms of transport such as trains, included in entry 'a', no GST is levied on the fare. It is stated that the withdrawal of exemption only with respect to auto rickshaws is discriminatory.

21.2. In this regard, this Court is satisfied that the Respondents have sufficiently explained that since the services at categories 'a' to 'd' are those which are provided by the sovereign with an element of public welfare and

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By:MAHIMA SHARMA
Signing Date:13.04.2023
10:45:04

subsidised rates, the decision to not levy tax on bookings made through ECO for the said services is based on public interest.

21.3. The Petitioner 1 and similarly placed ECOs are already paying GST on services supplied through them for motor vehicles, including motor cycle other than auto rickshaw. By way of the impugned Notifications, the said levy has been extended to all the types of passenger transport services which are being provided by the ECOs. In the opinion of this Court, the distinction drawn by the Respondents with respect to the nature of the services between entries 'a' to 'd' on one hand, and entry 'e' on the other sufficiently justifies the reasons which weighed with the Respondents for withdrawing the exemption.

The taxing event which attracts the levy of GST

22. The scheme of the statute shows that Respondents are entitled to exclude a class of suppliers from the levy of tax under Sections 11, 22 and 23 of the Act of 2017 while the service or the goods itself may continue to be exigible to tax.

22.1. The issuance of the impugned Notifications by the Respondents evidences that the service of transportation by mode of auto rickshaw and non-air-conditioned stage carriages when availed through ECOs has been made exigible to tax with effect from 01.01.2022.

22.2. In this regard, the submission of learned counsel for the Respondent, Ms. Arunima Dwivedi that transport of passengers by any motor vehicle designed to carry passengers, which includes non-air-conditioned stage carriage and auto rickshaw, is covered by Entry 8 (ii) and (vi) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, issued under Section 9(1) of the Act of 2017 is apposite. The withdrawal of exemption

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Signing Date:13.04.2023
10:45:04

under the impugned Notification results in attracting levy under the Notification No. 11/2017 and therefore, the contention of the Petitioner 3 that liability has been created *vide* impugned Notifications under Section 9(5) of the Act of 2017, without there being any levy under Section 9(1) of the Act of 2017 is factually incorrect.

22.3. Thus, even in the case of the ECO, though the supply of service of transportation through the auto-rickshaw or the bus continues to be provided by an individual supplier, the said supply of service when provided through the ECO has been made exigible to tax under Section 9(1) read with Section 9(5) of the Act as a taxable event under Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 read with the impugned Notifications.

The locus of the Petitioner

23. The Respondents have raised an objection that Petitioner 2 which is a union has no locus to maintain the present petition. It is stated that since the withdrawal of the exemption effects the consumer using the auto rickshaw and since no consumer has objected to the said levy, the present petition is not maintainable at the behest of the Union. In this regard, reliance has been placed on a judgment of a coordinate Bench of this Court in ***Sitaram Mehto*** (supra).

23.1. The Respondents have also, on similar grounds, raised an objection that Petitioner 1 and 3 ECOs are not entitled to maintain the present petition since the levy has been made on the consumer and is payable by the rider.

23.2. In view of the fact that the petitions have been finally heard and the issues have been decided on the merits, the said objection has become academic and therefore, this issue is not being opined upon by this Court.

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Signing Date:13.04.2023
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Conclusion

24. Therefore, the conclusions drawn by this Court are as under:

a) the Clauses (iii) and (iv) of Notification No. 16/2021- Central Tax (Rate) and Clauses 1(i) and 2(i) of Notification No. 17/2021- Central Tax (Rate), both dated 18.11.2021 are not violative of Articles 14, 19(1)(g) and 21 of the Constitution;

b) the impugned Notifications do not create an unreasonable classification on the basis of the 'mode of booking' availed by the consumers;

c) the Respondents are empowered to issue the impugned Notifications under Section 9(5) and 11 of the Act of 2017 and we are, therefore, unable to accept the challenge to the constitutional validity of the said notifications.

In view of the aforesaid findings, we are of the view that the Petitioner 1, 2 and 3 are not entitled to the reliefs as sought in the writ petitions. Therefore, the present batch of writ petitions are dismissed. The pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

APRIL 12, 2023
kv/ms/msh

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