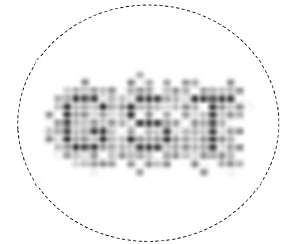




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Principles of Interpretation, Indian Contract Act, Limitation Act applicable to GST

REFRESHER COURSE ON INTERPLAY OF GST WITH OTHER LAWS

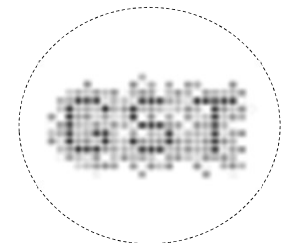
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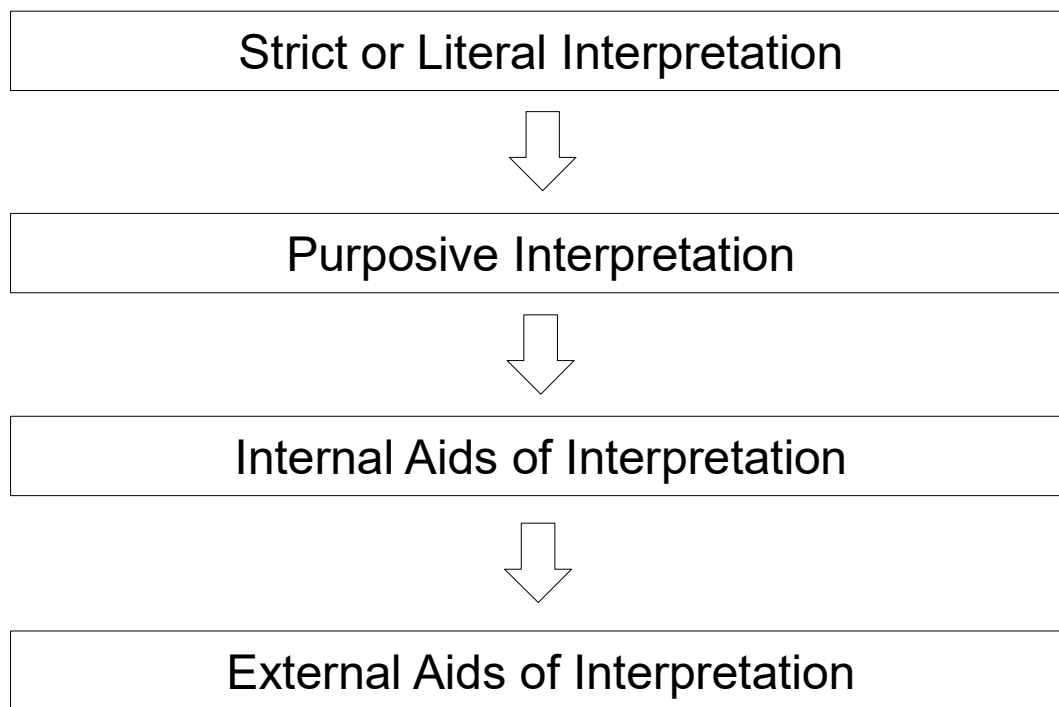
Western India Regional Council of
The Institute of Chartered Accountants of India
(Setup by an Act of Parliament)

Agenda

- Principles of Statutory Interpretation & GST
 - Aids of interpretation
 - Legislative Amendments: Retrospective or Prospective
 - Input Tax Credit – vested right or creation of the statute ?
- Limitation Act & GST
 - Appeal , Credit and Refund
- Interpretation of Contract
 - Taxable Supply and ingredients from the Contract Act
 - Conditions of the Contract
 - Breach of the Contract
 - Novation & Assignment
 - Slump Sale – Business Transfer Agreements
- Q&A



Rules of Statutory Interpretation – Manner of Application



Literary and Purposive Interpretation

- **Strict/ Literary Interpretation** –

- The first and primary rule of construction provides that the intention of the Legislature must be found in the words used by the Legislature itself.
- What one may believe or think to be the intention of Parliament is only secondary to the literary meaning of the words/ language of the statute does not support that view.

- **Golden Rule of Interpretation** –

- This rule is a hybrid of literal and purposive interpretation of statutes
- In case the literal rule of interpreting the natural meaning leads to any sought of repugnance, absurdity or hardship, then the court must modify the meaning to the extent of injustice or absurdity caused and no further to prevent the consequence.

- **Purposive Interpretation** –

- In cases where the words used by the Legislature do not bear a plain meaning,
- The object and purpose of the statute or reason and spirit behind it may aid to best understand the statute.

Heydon's Rule of Interpretation : Mischief rule

- The Heydon's rule which is also known as "purposive construction" or "mischief rule", enables consideration of four matters in construing an Act:
 - (i) What was the law before the making of the Act,
 - (ii) What was the mischief or defect for which the law did not provide,
 - (iii) What is the remedy that the Act has provided, and
 - (iv) What is the reason of the remedy.
- **Kirloskar Electric Co. v. State of Karnataka 2018 (16) G.S.T.L. 564 (Kar.)**- Credit provisions cannot be interpreted so as to defeat the intention of the legislature.

Refund of input services in case of inverted tax structure

- Refund of input services in case of inverted tax structure – Section 54(3) of the CGST Act and Rule 89 (5) of the CGST Rules
 - VKC Footsteps India Pvt. Ltd. v. UOI [2020-VIL-340-GUJ] – Adopted a purposive interpretation by keeping in mind the scheme and object of the CGST Act to hold that the ‘Net ITC’ referred to in Rule 89(5) pertain to both input and input services
 - Transtonnelstroy Afcons Joint Venture vs UOI [2020-VIL-459-MAD] – Adopted a strict interpretation of the section 54(3) and observed that the unamended Rule 89(5) exceeded the scope of the section and thus upholding the validity of the amended rule.

External Aids of Interpretation: Parliamentary History

- Parliamentary History – Over the years, the Supreme Court has upheld the view that the legislative history within circumspect limits may be consulted by courts in resolving ambiguities. Some of the external aids relied by the Court over the years are as follows:
 - Parliamentary Debates
 - Speeches by the Minister introducing the Bill
 - Reports of Commissions or Inquiry Committees or Drafting Committees

Fitment and Law Committee Recommendations

Minutes of GST Council Meetings

Circulars

FAQs / Press Releases

Notifications

Examples:

- Schedule III amendment – High Sea Sales , Bond Sales and Merchant Trading
- Amendment to Section 50 - interest on delayed payment of GST shall be levied on net tax liability after giving effect to Input Tax Credit (ITC) utilized for payment of taxes i.e. on GST portion discharged in cash.
- GST exemption for Toll – GST council discussion

Binding Nature of Circulars vis-à-vis Court Decisions

- **COMMISSIONER OF C. EX., BOLPUR Versus RATAN MELTING & WIRE INDUSTRIES - 2008 (12) S.T.R. 416 (S.C.)**
 - Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes,
 - However, the same cannot be binding on the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive.
 - In cases where, the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court.
 - So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions.
 - Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.



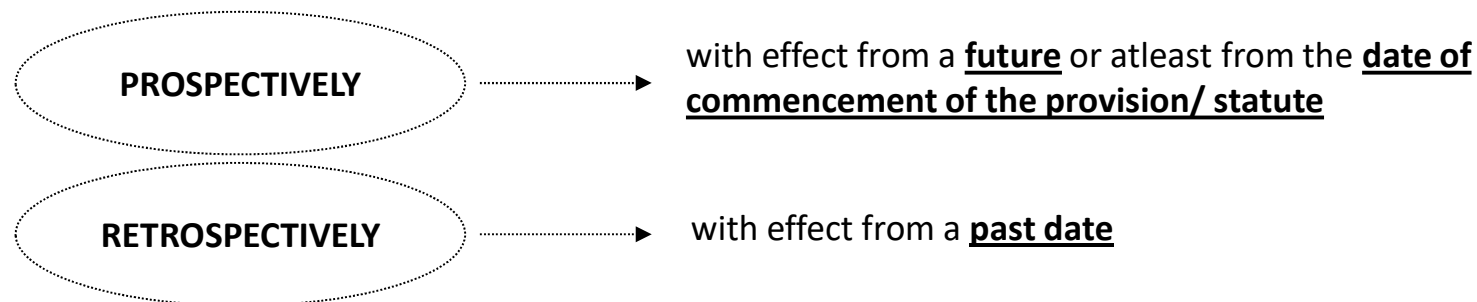
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Prospective Vs. Retrospective

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Prospective Vs. Retrospective Amendments



Article 20(1) of the Constitution Of India

Prohibits legislature to make retrospective criminal laws, & guarantees rights against ex-post facto laws

Does not prohibit a civil liability retrospectively, & thus, tax can be imposed retrospectively.

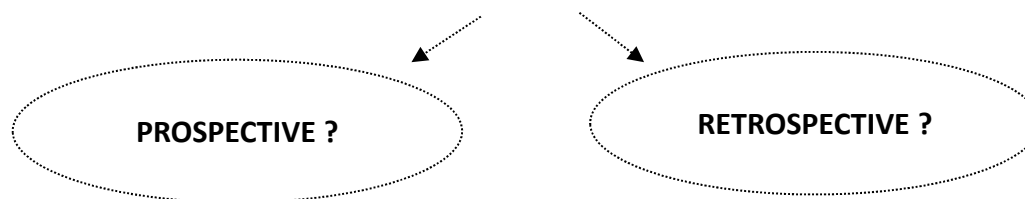
Union and State have plenary powers to legislate prospectively & retrospectively

However, any affected party can contend that retrospective operation, on following grounds –

1. they are **discriminatory (violative of equality before law)**
2. they are **unduly burdensome or harsh**
3. Unreasonable **restriction on right to carry business**

Prospective Vs. Retrospective Amendments

Insertion of Proviso to Section 50(1) of the CGST Act



39th GST Council meeting (held on 14th March, 2020)	Recommended - amendment of interest to be charged on net cash liability – <u>retrospectively (i.e., 1st July 2017)</u>
Section 100 of the Finance Act, 2019 read with Notification 63/2020 - CT dated 25th Aug, 2020	amendment is made applicable <u>prospectively</u> with effect <u>from 1st September, 2020.</u>
Press Release dated 26th August, 2020	Clarified that Notification No. 63/2020-CT has been issued prospectively due to certain technical limitations and <u>assured that no recoveries shall be made for the past period (from 1st July, 2017 to 30th August 2020) in accordance with the decision taken in the 39th Meeting of GST Council</u>
Administrative instruction released dated 18th Sept, 2020	Tax authorities are instructed to <u>recover interest based on net cash liability for the period between 1st July, 2017 to 30th August 2020 and, any SCN issued on gross tax payable may be kept in abeyance</u> by the tax authorities <u>until the retrospective amendment in Section 50 is made.</u>



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Input tax credit – Vested right or creation of the statute?

Input tax credit – Vested right or creation of the statute?

EICHER MOTORS LTD, 1999 (Supreme Court); (2002-TIOL-149-SC-CX-LB)

Facts –

- Rule 57F(4A) under MODVAT was introduced providing for lapsing of credit lying unutilised on 16-3-1995 with manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06.
- Further, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed

Held

- Input credit is a vested right being given, which cannot be taken away
- Provision for facility of credit is as good as tax paid till tax is adjusted on future goods
- The scheme introduced cannot be made applicable to the goods which had already come into existence on account of earlier scheme where the assessee had availed credit facility on payment of taxes
- It is on the basis of the earlier scheme that the taxes have to be adjusted and payment is to be made complete

Input tax credit – Vested right or Concession

<p>ALD AUTOMOTIVE PVT LTD, 2018 (Supreme Court)</p>	<p>Input Credit is in nature of benefit/ concession extended to dealer under the statutory scheme</p>
<p>NELCO LTD, 2020 (Bombay HC)</p>	<p>Availment of input credit under Section 140(1) of CGST Act is a concession attached with conditions of its exercise within the time limit.</p>
<p>M/s AMPLEXOR INDIA PVT LTD, 2020 (Madras HC)</p> <p>Writ petition pending, wherein 5 questions raised)</p>	<ol style="list-style-type: none"> 1. ITC is a vested right? Imposition of time limit for transitioning /utilisation is constitutionally impermissible? 2. Time limit imposed in Rule 117 of the CGST Rules is mandatory or directory? 3. Section 140 of the CGST Act read with Rule 117 of the CGST Rules divests the assessee of an alleged vested right or whether it prescribes conditions relating to the enforcement of such right? 4. Whether the assessee has a legitimate expectation that ITC availed under the erstwhile tax regime should be permitted to be transitioned to the new tax regime without imposing a time limit? 5. Deprivation of the benefit of transitional ITC would amount to double taxation of the assessee as alleged?



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Limitation

- APPEALS
- REFUND
- ITC

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Limitation : Appeals

- Statutory time limit
 - Extension by Government u/s 168A
 - Extension by Supreme Court under Article 142 – specific instances
 - Powers under Article 142 when Statute provides for time limit (ONGC vs GETCL)
 - Issue in Sagufa Ahmed case – extension not applicable to condonation of delay
- Non-applicability of Limitation Act to appeals, reference. Prescription of time limit under tax laws to have binding effect
 - Singh Enterprises vs CCE, Jamshedpur : 2008 (221) E.L.T. 163 (S.C.)
 - CCE vs Hongo India Pvt. Ltd. : 2009 (236) E.L.T. 417 (S.C.)

Time limit for Refund and Forum

Mafatlal Industries Limited vs. Union of India [1997(89)E.L.T. 247 (S.C.)]

Refund claims on account of

- **Class I** :“Unconstitutional levy” —tax was levied is unconstitutional
- **Class II** :“Illegal levy” —mis-interpretation/mis-application/erroneous interpretation of Act
- **Class III** :“Mistake of Law” — where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction
- Article 265 of the Constitution – Tax collected without authority of Law
- Majority opinion rendered by Jeevan Reddy, J., permits the remedy of a writ petition or a civil suit under Section 72 of Contract Act only for Class I Refund Claims
- Limitation period as specified in Section 17(1)(c) of the Limitation Act – discovered the mistake
- Unjust enrichment in all situations

Time limit for Refund – Specific issues

- IGST on freight in CIF import transactions
 - Mohit Minerals Pvt. Ltd. v. UOI [2020-VIL-36-GUJ]
 - Gokul Agro Resources Ltd v. UOI [2020] 116 taxmann.com 1 (Gujarat)
- Refund u/s 77 – supply incorrectly classified as intra-State instead of inter-State and vice versa – whether time limit provided in section 54 applicable?
- Rectification of Form GSTR-3B of previous months
 - Bharti Airtel Ltd vs Union of India - [2020] 116 taxmann.com 416 (Del)

Time limit for availing ITC

- Prescription of time limit – condition to avail ITC to be construed strictly
 - ALD Automotive Pvt. Ltd. vs. UOI [2018 (364) ELT 3 (SC)]
- Uploading of details by supplier and ITC u/r 36(4) capped at 110%
 - Proviso to rule 36(4) – ITC reversal
 - Specific provision to re-avail? Can ITC be re-availed suo moto?
 - Re-availment of ITC after lapse of time limit u/s 16(4)
- Section 16(4) – time limit of September / annual return
 - Bill of entry – whether covered by section 16(4)?
 - ITC on re-assessment of bill of entry
 - Issuance of debit note after September – ITC to recipient – impact of amendment



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Contract Law and GST

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Taxable Supply

- **Taxable Supply under Section 7 of the CGST Act :**

- **7 Scope of Supply –**

- (1) For the purposes of this Act, the expression “supply” includes—

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

- Section 2(31) ‘consideration’ in relation to the supply of goods or services or both includes—

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

Consensus ad idem – Important for a taxable supply?

- **Consensus ad idem – meeting of minds – As per section 13 of the Indian Contract Act,** 'consent' means when the parties agree upon the same thing in the same sense.

- A **contract will** be rendered void ab initio if there is a lack of **consensus**.

Intention to create a legal relationship?

- **Implications of a proposal which has not being explicitly accepted**

Unilateral agreement to supply goods or services – Taxable supply under Act?

1. A performer providing entertainment services to passer-by – taxable supply?
2. Loyalty gifts/payments to regular customers – taxable supply?
3. Acquisition of land/property by an Authority under its Statutory rights – Taxable supply under GST?

Intention to supply?

Scope of 'Consideration' under GST

- The Indian Contract Law, duly stresses on the condition that consideration should be in exchange of the proposal made by the promisor.
- Under GST, “consideration” in relation to the supply of goods or services or both includes—
- (a) any payment **made or to be made**, whether in money or otherwise, **in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person** but shall not include any subsidy given by the Central Government or a State Government;

Nexus between the supply made and consideration received or agreed

Scope and implications of third party consideration?

Nexus between supply and consideration

- Australian GST Ruling – 2006/09 provides for a substance test to aid in establishing nexus between consideration and supply -

“71. In determining whether a sufficient nexus exists between supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between parties will be characterised not merely by the description that parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made.”

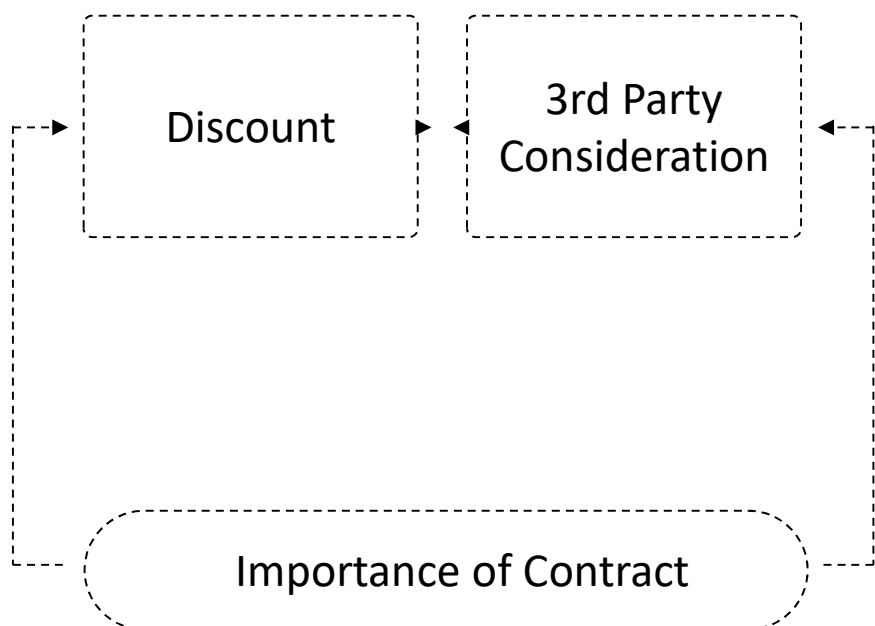
Prize Money won by participating in a horse racing event

Incentive Payments made to dealers

Money Off vouchers to customers

Consideration for any
supply made?

Conflict – Discount v. Third Party Consideration



Key Point

- Consideration:
 - Includes 3rd party payment
 - Excludes Govt. Subsidy
- Transaction Value:
 - Excludes Discount
 - Includes non-Govt. Subsidy
- Circular No. 105/2019 withdrawn

Composite and Mixed Supply – Implications of Contractual Arrangements

Composite Supply

A composite supply comprising two or more supplies which are naturally bundled, one of which is a principal supply, shall be treated as a supply of such principal supply

Mixed Supply

A mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax

Naturally bundled vs. intention of the parties?

Supplies by two suppliers – Not composite

- **Abbott Healthcare Private Ltd vs The Commissioner Of State Tax – Kerala HC**

Issue - Whether the transaction of placing the medical instruments to unrelated customers like hospitals/laboratories for their use without any consideration, in the backdrop of an agreement containing minimum purchase obligation of products like reagents/consumables from independent contractors constitute a “composite supply” ?

Observations by the HC –

- In order for the supply to be composite, it has to be made by one taxable person.
- In the instant case, the instruments are supplied by the applicant and the supply of reagents/consumables by the distributors who purchase it from the company on a principal to principal basis.
- Although it could be argued that there is a relationship between the said persons that influences the valuation of the supply, the same does not take away from the fact that the supplies are, in reality made by two different taxable persons.

Implications of a cross-fall breach clause/ wrap agreement?

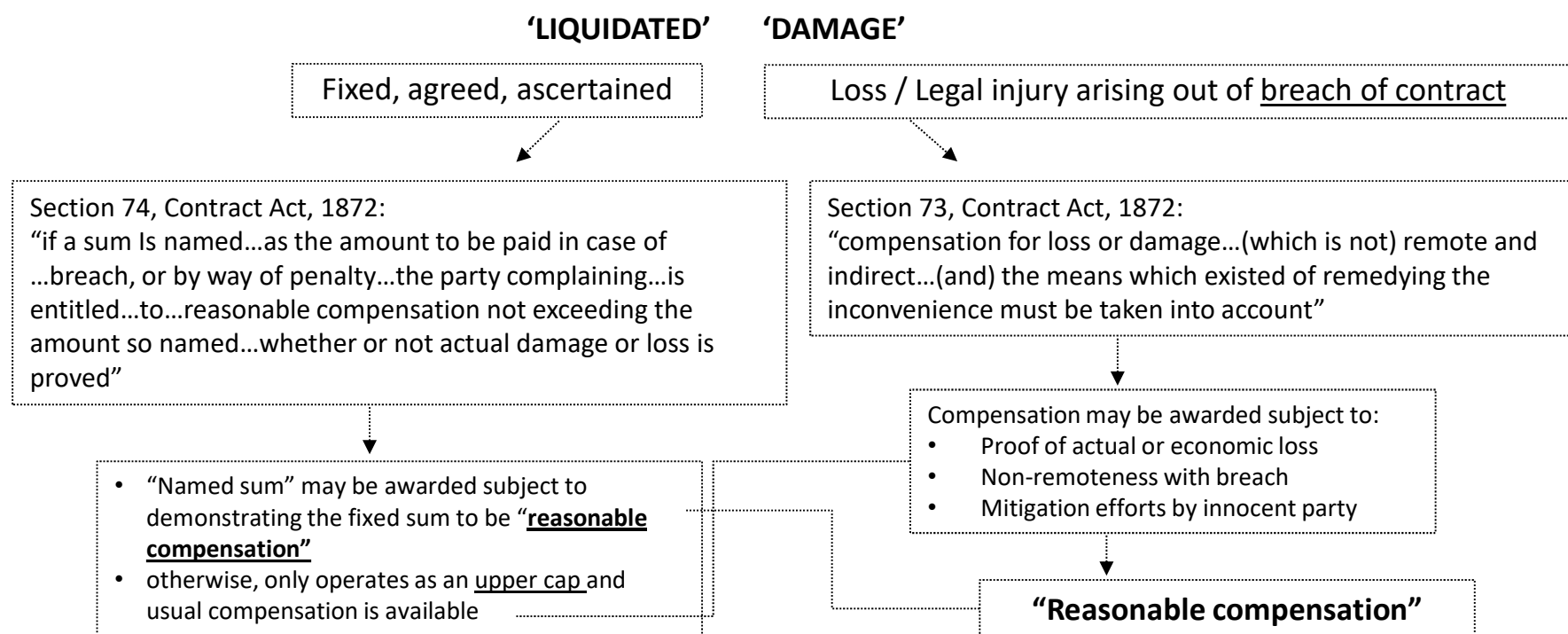
Conditions and Consideration

Performance and Breach

Declared service / Schedule II

- Agreeing to the obligation to:
 - refrain from an act
 - tolerate an act
 - tolerate a situation
 - do an act
- Should they be contract in themselves?
- Impact of difference between conditions of contract and consideration for contract?

Liquidated Damages: Principle



Breach of contract – specific issues

- Whether obligation to tolerate of an Act?
- Compensation / Liquidated Damages identified in the contract in following manner:
 - One way LD clause – in favour of Employer
 - Compensation to Contractor for delay by employer, suspension of work (when identified by contract)
- Whether supply of service?
 - Reciprocity for payment - Bai Mamubai Trust vs Suchitra [2019 (31) GSTL 193 (Bom.)]
 - GE T&D India Ltd vs Dy. CCE, Chennai [2020 (35) GSTL 89 (Mad.)]

Conditions of contract vs consideration

- GST: Supply made or agreed to be made for a consideration
 - contract-based levy dependent on contractual understanding between the parties

- *Chatturbhuj Vithaldas Jasani v. Moreshwar & Others, AIR 1954 SC 236*

When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately.

Structuring of the contract

Repco Finance – Larger Bench ratio

- **Issue: Whether foreclosure charges is consideration for services provided ‘in relation to lending’ and thus chargeable to Service Tax?**
 - Look at contractual understanding of the parties
 - Each condition having assigned monetary value not equivalent to consideration for a supply
 - Unilateral act of one party coupled with a payment v. quid pro quo
 - Mere specification of liquidated damages in an agreement not to imply consideration for a supply
 - Liquidated damages and alternative mode of performance

Specific issues

- Non-compete fee as part of a slump sale (with or without identified consideration)
- Liquidated damages/ Compensation for delay in performance
- Notice pay
- Late payment charges: Margin Trading Facility by Stock Broker
- FOC supplies received by a supplier
 - Diesel in mining, transportation, infrastructure service contracts
 - Cement/ steel in works contract
 - Moulds and dies
- Barter transactions: Developer-Landowner arrangements

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