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**B.COM Program**

**Research Based Assignment**

**For VI Semester**

**Course Code : UM19BC352**

**Course Title : GST (Goods and Service Tax)**

**Topic :** **In Its Writ Petition filed in the High Court of Punjab and Haryana Subway Systems.**

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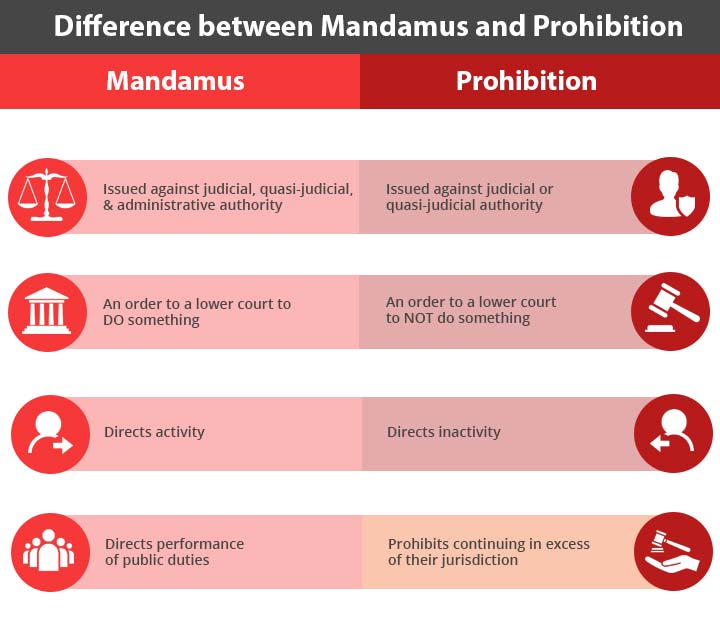
**Department of Commerce 6th Sem BCOM ‘E’**

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* **Abstract :**
  + American fast food chain company Subway has dragged the indirect tax department to court over allegedly forcing it to pay differential Goods and Services Tax(GST) on services before issuing any notices.
* **Introduction and Examination of the Case:**
  + The American fast food chain company told the Court that the taxman kept issuing summons without following due Process. These summons were issued in spite of explaining to the tax authorities that an advance ruling application is pending.
  + In its writ petition filed in the High Court of Punjab and Haryana Subway Systems India said that the tax department had issued multiple summonses to top management over taxability of intellectual property rights.
  + The Company also Said that the tax department kept issueing summons without following the due process that could “traumatise” anyone. The Milford headquartered company said that these summons were issued in spite of explaining to the tax authorities that an advance ruling application is pending.
  + Legal Experts say that this would mean that tax authorities will not be able to make any recovery till the matter is adjudicated.
  + The dispute emanates from the controversy over the taxability of intellectual property rights and royalty.
  + Multinationals including fast food chains , hotels and tech companies that operate through franchisee models in India Have come Under the taxman’s lens.
  + The Tax department is questioning the nature of agreement and wants to levy 18% GST on income or royalty received by the multinationals.
* **Analysis of the Case :** 
  + Most Multinational pay about 12% GST on the amount as they claim that they are not transferring the brand name or allowing the Indian entity to use the brand name for perpetuity.
  + Multinationals claim that there is a difference between “right to use ” and “transfer of right to use” a brand name and so GST rates royalty receipts too differ. Tax department claims that this is just nomenclature aimed at tax arbitrage.
  + Under the Franchisee Model , the Multinationals allow Indian Companies to operate certain stores hotels or entities with their global brand name. Against that the franchisor or Multinational charge percentage of profit or royalty or any other income.
  + Many Fast Food Companies which operate on Franchisee Model were also received summons without following the due process.
  + It was argued that in response to the first summon served, the petitioner had submitted that it would require two weeks to appear with all the material but further summons was being issued without any breathing time.
  + **‘No coercive action’ :**
    - While the application is pending for disposal, tax authorities have issued various summons to submit huge data and information and tried to recover tax without the issuance of the show cause notice.
    - The writ petition filed before the court asked that no coercive action must be taken and that any recovery must be made only subsequent to the passing of an appropriate order after following due process of law.
* **Impact on the Organizations :**
  + The recent trend is that numerous summonses are issued to top management and they are forced to pay a substantial amount even before issuance of any show cases , while application for advance ruling is pending for disposal , the tax authorities issue numerous summons without any breathing time to submit data/information and try to recover without issuance of the show cause notice.
  + Restaurants and Food Service Businesses in India, is the fastest growing business. Therefore due to the changes in tax collection framework the development of the business is being affected. Goods and services Tax introduction has created some perplexity among the restaurant proprietors. The concept of goods and services tax was implemented to abrogate all extra money charging schemes which was before embraced by the retailer in order to make money. This reform will clearly decrease the consistence cost for the tax payer as under this system the operation will change into uniform entity across states and the tax structure will also be harmonize. The restaurant sector was burdened with multiple high costing taxes and changes under previous tax collection framework. Previously consumers use to pay VAT, service tax and additional service charge on every restaurant bill but in GST all the extra and unnecessary charges were eliminated. In the GST taxation system all the slabs were clearly stated but many restaurants still are confused and restaurant owners are applying rates and taxes as they interpret, or according to their own wish. This study analyses impact of GST on Restaurants and Food Service Businesses in India. This will provide insights to see how GST will function in this sector and will enable us to know the benefits and drawbacks of GST in this regards. The study finds that GST has both benefit and drawbacks on restaurants and food service business. GST has also affected the promotional schemes of the different companies with this the companies are now looking for the alternative promotional schemes.
* **Introduction to Writ Petition :**
  + **What is Writ Petition :**
    - Writ Petition is an order by a higher court to a lower court or courts directing them to act or stop them from doing an activity. Read on to know what writ petition is, how to file writ petitions in High Court or Supreme Court, how many types of writs petitions are there and their samples.
    - In the Indian legal systems, you can file or draft a writ petition under Article 226 in the High Court and under Article 32 of the Indian Constitution in the Supreme Court. Article 32 and Article 226 of the Indian constitution elaborate on the process and meaning of the writ petition. Or else, at any point in time, you can consult an expert lawyer to draft a writ petition for you. You can also file a criminal or civil writ petition in the High Court or the Supreme Court, depending on the case matter. In case the High Court doesn’t give a suitable judgment, you can then submit the petition of the writ in the Supreme Court.
    - Writ in India is the formal order of the court directing the authorities if there is a violation of the Fundamental Rights by a government authority or body. You can file a writ petition in the Supreme Court under Article 32 of the Indian Constitution, whereas you can file the writ petition in High Court under Article 226 of the Indian constitution. You can also file writ petitions in India for a civil or a criminal act.
    - You can file a criminal writ petition when the cause of action in relation to the criminal law such as the right of accused, bail, etc
    - You can file a civil writ petition when someone commits a civil wrong such as IPR, taxes, etc.
* **Types of Writs in the Constitution of India :**
  + The Indian Constitution gives the power to the Supreme Court, where it issues Writ Petitions in India for the enforcement of any fundamental rights guaranteed under Article 32 of the Indian Constitution.
  + The power to issue a writ petition in India is primarily a provision - to the Right of Constitutional Remedies to every citizen and this right acts as a guarantor of all other fundamental rights in India.
  + There are five writ petition types in the Indian constitution, which you can file either before the High Court or Supreme Court such as:
    - **Habeas Corpus**
    - **Mandamus**
    - **Prohibition**
    - **Certiorari**
    - **Quo Warranto**
  + **Habeas Corpus :**
    - The literal meaning of the term Habeas Corpus means, ‘you may have the body of.’ You can file this type of writ petition when a person is illegally detained. Meaning, if the court finds out that the person is illegally detained, then it can order for the release of that person.
  + **Who Can file a Writ of Habeas Corpus:**
    - Generally, the person who is an illegal detainee files the writ of habeas corpus. To begin the writ process for filing a petition of Habeas Corpus, one can file it and issue it against any public authority or any particular individual. However, in certain cases, the court may allow other people to file a writ of habeas corpus on behalf of the detained person, who is their friend or relative.
* **Writ of Mandamus :**
  + Mandamus is a Latin word meaning ‘we command’. Mandamus is a court writ whereby the higher courts orders the lower court, tribunal, forum or any other public authority to do any act which otherwise also falls under the purview of their duty.
  + **One issues the writ of mandamus when a public officer fails to perform his/her official duty or something which forms part of his/her official duty. Writ of Mandamus is a matter of grace and not a matter of right. But it is the discretionary power of the court to allow the writ of mandamus. This means - if the court thinks that there may have been a failure in performing the duty by the lower court or public authority, then the court may allow the writ of mandamus.**
  + **The court laid down the following requirements of the writ of mandamus**:
    - There should be a legal right in existence.
    - The legal right should be enforceable by the court.
    - Enforcement of such a right must impose a responsibility of per on a person, public authority, corporation or government.
    - Such duty is of public nature.
  + **Writ of mandamus can be issued against the following** :
    - An individual or a private body
    - If the duty which is the subject matter is discretionary and not mandatory.
    - It can be issued against the president or the governor of the state.
    - Against an acting chief justice.
    - To enforce a private contract.
  + **Who Can File The Writ of Mandamus:**
    - Any person - be it an individual or a private body can file for the court petition under the writ of mandamus, so long as they have legal rights in the concerned matter to do so.
* **Writ of Prohibition :**
  + As the name suggests, the writ of prohibition is a court petition issued either by the Supreme Court or High Court to prohibit.
  + **When the lower courts including the tribunals, forums or any public authority (magistrate, commissions or any other judicial officers) do something which exceeds their jurisdiction, the Supreme Court or High Court prohibits them by issuing the writ of prohibition.**
  + Prohibition writ for the court is issued to stop or put a stay on the power exercised by the authority and is commonly known as stay order. In India, a writ petition is issued against the proceedings going on in lower courts and in such proceeding, the lower court is exceeding its powers. Once the writ of prohibition is allowed either by the Supreme Court or in High Court the proceedings of the lower court come to an end.
  + Writs of prohibition can be subdivided into "alternative writs" and "peremptory writs". An alternative writ directs the recipient to immediately act, or desist, and "show cause" why the directive should not be made permanent. A peremptory writ directs the recipient to immediately act, or desist, and "return" the writ, with certification of its compliance, within a certain time.
  + Prohibition is not a continuation of the proceedings to be prohibited. Its object is on the contrary to arrest the inferior tribunal's proceedings. It is a collateral matter progress essentially between the two tribunals, an inferior one and other superior one by which the latter, by virtue its power of superintendence over the former, restrains it within its rightful competence. Its nature is held to depend upon the nature of proceeding to be prohibited.
  + It can be issued only against a judicial and quasiujudicial body and not against a legislative or administrative body.

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* **Difference between Mandamus and Prohibition :**
  + The Writ of Mandamus, where the court like the High Court, directs the performance of an activity to a lower court. Whereas in the Writ of Prohibition, the higher court like the Supreme Court orders to stop doing something which is in excess of their jurisdiction.
  + You can issue the writ of mandamus against any judicial, quasi-judicial and administrative authority. Whereas you can issue a writ of prohibition only against judicial or quasi-judicial authority and not against the administrative authorities.
* **Writ of Certiorari :**
  + In the literal sense, the word certiorari means, ‘to be certified’. One can issue the writ of certiorari by the Apex court for transfer of the matter to it or any superior authority for proper consideration. You can issue the writ of certiorari against the inferior court or tribunal.
  + **In simple terms, one can issue the writ of certiorari when the subordinate courts or the quasi-judicial bodies act in:**
    - The absence of their jurisdiction, or
    - Exceeds their jurisdiction or
    - Fails to make use of their jurisdiction
  + In this case it was held that whenever anybody of person having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, a writ of certiorari will lies. it does not lie to remove merely ministerial act or to remove or cancel executive administrative acts. Writ lies on Judicial bodies one of the fundamental principles in regard to the issuing of a writ of certiorari is that the writ can be availed of only to remove or to adjudicate upon the validity of judicial acts.
  + **The Essential Condition for Writ of Certiorari :**
    - There should be court, tribunal or an officer having the legal authority to determine the question with a duty to act judicially.
    - Such a court, tribunal or officer must have passed an order acting without jurisdiction. Or in excess of the judicial authority vested by law in such court, tribunal or officer.
    - The order could also be against the principles of natural justice. Or the order could contain an error of judgment in appreciating the facts of the case.
* **Writ of Quo-Warrento :**
  + Writ of quo warranto means a writ that you can be issued to restrain a person from acting in the capacity of public office to which he/she does not have the entitlement. Here, the term Quo-Warranto means, ‘by what authority’ or, ‘on whose authority is one holding a public office’.
  + **For example:**
    - **There is a vacancy in the government and by giving a job to a 63-year-old person, they fill that vacancy**
    - **But since, the retirement age is 60 years, so in this case, one can file a writ of quo-warranto to remove such person from the public office**
  + **the requirements of the petition of quo-warranto which are as follows:**
    - A disputed post must be the public post
    - The post should be held by the person without any legal authority.
    - The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.
    - The office was created by the Constitution or by any other statute.
    - The nature of the duties which arises from this office is public.
    - This Writ can also be issued in those cases where a person was entitled to hold the office earlier but after getting disqualified he is still in possession of the office.
    - There must have been a contravention of the constitution or a statute or statutory instrument, in appointing such person to that office.
* **Conclusion :**
  + In India several Multinationals operate through different franchise models. Most Multinational Fast-food chains-burgers,pizza,coffee,sandwiches-tend to allow micro geography based exclusivity. In most cases the contract mentions that the contract is for 99 years or so Tax department claims that is essence this is just nomenclature. Under the tax framework the way the contracts are worded tends to decide the tax rate.
  + Tax department wants to scrutinise “substance over form” of these contracts. That is , whether the contracts are merely drawn in a particular manner to save taxes.