THE GRAMMAR OF TOLERATION

GST'S CLAUSE 5(E), THE TATA SONS DECISION, AND THE UNFINISHED PROJECT OF TAX JUSTICE IN POST-COLONIAL INDIA : *A CRITICAL, POST-MODERN, AND FEMINIST READING*

Dr. Priyanka Anand, Associate Professor of Law, NLU Odisha

Abstract

The Goods and Services Tax (GST) regime introduced in India in 2017 took over a controversial clause in Schedule II of the Central Goods and Services Tax (CGST) Act, 2017, Entry 5(e) — taxable supply of services from agreeing to the obligation to refrain from an act or tolerate an act or a situation or do an act. The impasse in the jurisprudence is answered, at least in part, in Tata Sons (P) Ltd. v. Union of India (2026 SCC OnLine Bom 2927) where the Bombay High Court declared that payments under a court-executed settlement or arbitration award are not 'supply' under the definition in the Constitution. This paper works through that decision in post-colonial theory, post-modern legal thinking and feminist jurisprudence, and concludes that the provision remains unresolved, and that this is a structural symptom of an incomplete tax justice project. The paper offers a doctrinal sketch of the landscape of disputes, a comparative regulatory study, and sketches out the outline of a more balanced interpretation.

Keywords: GST, Clause 5(e), Tata Sons, post-colonialism, feminist tax theory, toleration, supply, consideration, Bombay High Court, tax justice.

I. SETTING THE SCENE: A PROVISION THAT CANNOT SIT STILL

It is almost poetic that the provision that is litigated the most in India's GST architecture is the toleration clause. Schedule II to the Central Goods and Services Tax Act, 2017 ('CGST Act') provide that whenever, an agreement is made for agreement to do an act, an act is done, or an act is tolerated, or an act is agreed to, such agreement shall be deemed to be a supply of services for which goods and services tax liability shall apply.[1] In common parlance, the meaning of 'tolerate' implies submission, endurance, patience in the face of pressure and, as this paper proposes, a definite gender.

This provision was brought into the limelight once again in the case of *Tata Sons (P) Ltd. v Union of India*,[2] decided by the Bombay High Court in 2026. In a complaint filed by the GST Directorate, it had argued that the amount paid by Tata Sons to NTT Docomo, as part of the arbitration award upheld by the Delhi High Court, amounted to 'consideration' for a 'service' of toleration, namely, Docomo's undertaking not to file enforcement proceedings after the award was settled. But the High Court, admirably, rejected this theory as fundamentally unsound, both in fact and in law.

The choice is very significant. But it doesn't solve the problem completely as it may seem. The question of the constitutionality of Clause 5(e) itself was raised but never resolved.[3] The clause is still in effect and active. This paper suggests that reading Tata Sons as simply a sound tax decision is failing to grasp the bigger picture that

[1] Central Goods and Services Tax Act, 2017, Schedule II, Entry 5(e) (India) [hereinafter CGST Act].

[2] Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927.

[3] Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927, ¶ 84 (noting that since relief was granted on the facts, the constitutional challenge need not be decided).

the provision conveys: that of the architecture of Indian tax law, its colonial past, the postmodern ambivalence of its categories, and its gendered omissions.

II. THE COLONIAL INHERITANCE: TRACING THE GENEALOGY OF CLAUSE 5(E)

A. Law as Transplant

The starting point is a point that ought to be obvious, but has implications: the Indian Contract Act, 1872, which lays the conceptual foundation for what is meant by ‘agreement' and ‘consideration' in Clause 5(e) and ‘obligation' is a colonial act, drafted by a British Law Commission and inspired by English contract law.[4] Each word of this colonial inheritance has the conceptual burden of being a supply under the CGST Act of ‘agreeing to the obligation to refrain from an act'.

The idea of colonial ‘mimicry' is relevant here, as it is in many contexts. In this case the concept of 'mimicry' developed by Homi Bhabha can be of some guidance.[5] The Indian GST is inspired heavily by the western VAT and GST systems such as that of Australia (1999 GST) and the EU VAT Directive and the UK VAT Act, 1994.[6] The outcome is a tax law, which, in the context of this social and economic environment (informal sector, high levels of power disparity, low level of legal literacy), emulates post-industrial western tax structures, which is very unequal in practice.

[4] The Indian Contract Act, 1872 was drafted under the chairmanship of Sir John Romilly and draws extensively from English common law principles. See Pollock & Mulla, The Indian Contract and Specific Relief Acts 1–12 (15th ed. 2021). The Act came into force on September 1, 1872.

[5] Homi K. Bhabha, The Location of Culture 85–92 (1994). Bhabha's concept of mimicry describes how the colonial subject imitates the coloniser's cultural forms in ways that are 'almost the same but not quite.'

[6] See A Vaitheeswaran, Goods and Services Tax 1–18 (2017); cf. Goods and Services Tax Act 1999 (Australia); Council Directive 2006/112/EC (EU); Value Added Tax Act 1994 (UK).

India's foremost critical legal scholar Upendra Baxi has repeatedly noted that transplanted legal institutions in post-colonial societies are not the same as their source, not only due to contextual differences, but because there is never a full transplantation.[7] This is a textbook example of 5(e).

B. The Negative List Reform of 2012: A Colonial Economy of Knowledge.

This is a case for examining the negative list reform of 2012 that was introduced by the Finance Act 1994, which established the 'declared service' concept, a forerunner to Clause 5(e).[8] The theoretical framework developed by Michel Foucault on the nature of legal-administrative knowledge is directly applicable.[9] Not only is it quite broad in its drafting, but it also leaves an environment of uncertainty, one that leaves every taxpayer in a state of interpretive anxiety. The structural power imbalance is a systematic advantage that has been given to well-resourced units with advanced tax advisors compared to smaller units.

In this context, the famous question of Gayatri Chakravorty Spivak, 'can the subaltern speak?', takes on a particular fiscal connotation.[10] The small transport service provider that fails to get an advance payment, the micro entrepreneur who terminates a service contract, are not in a position to take a more sophisticated legal battle against Tata Sons. This complexity isn't spread evenly across the cost of Clause 5(e).

[7] Upendra Baxi, The Future of Human Rights 243–68 (3d ed. 2008); see also Upendra Baxi, 'The Rule of Law in India,' 6 Sur — Int'l J. on Hum. Rts. 7, 9 (2007).
[8] See Tarun Jain, 'Negative List for Service Tax: Some Musings,' 189 Excise and Customs Reporter (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004047; Finance Act, 1994, S. 66E(e) (India) (as amended by Finance Act, 2012).
[9] Michel Foucault, Discipline and Punish: The Birth of the Prison 170–94 (Alan Sheridan trans., 1977); see also Michel Foucault, 'Governmentality,' in The Foucault Effect: Studies in Governmentality 87–104 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).
[10] Gayatri Chakravorty Spivak, Can the Subaltern Speak?, in Marxism and the Interpretation of Culture 271, 285 (Cary Nelson & Lawrence Grossberg eds., 1988).

C. The GST Inheritance: 2017 and After

In the absence of amendment to the definition of 'declared service', the 'declared service' concept was significantly carried forward under Schedule II in the CGST Act, 2017.[11] Entry 5(e) is a nearly exact copy of the precursor provision. The policy decision by the legislature was deliberate — that is exactly what the Bombay High Court has said in *Builders Association of Navi Mumbai v. Union of India*,[12] that the legislature had in mind to make the GST act comprehensive and provisions were to be 'read together and harmoniously' so that no activity is out of the purview.

III. THE POSTMODERN TURN: DECONSTRUCTING 'TOLERATION'

A. The Indeterminate Text

Post-modern legal theory, based on the work of Jacques Derrida and critical legal studies, takes off from the principle that in legal texts there are no fixed meanings ready to be found.[13] Look at the word 'tolerate'. In common law contract law, forbearance, defined as the withholding of a legal right in return for a consideration, is a valid consideration. It looks like the design of the GST architecture was made with this type of transaction in mind: A party agrees to limit itself in return for compensation. But the provision does not stipulate that the agreement must be for toleration - it is an 'agreement to' an 'obligation to tolerate'. Almost all commercial contracts contain an element of toleration and, therefore, the payment made in the contract can always be considered as consideration for a supply of toleration.

[11] CGST Act, supra note 1, Schedule II, Entry 5.

[12] Builders Ass'n of Navi Mumbai v. Union of India, (2018) 53 GSTR 374 : 2018 SCC OnLine Bom 994. The Supreme Court dismissed the appeal from this decision. See SLP(C) No. 23068/2018, order dated Nov. 9, 2022.

[13] Jacques Derrida, Of Grammatology 158 (Gayatri Chakravorty Spivak trans., 1976); see also Roberto Mangabeira Unger, 'The Critical Legal Studies Movement,' 96 Harv. L. Rev. 561, 570–78 (1983).

This is a 'hard case' not because of the sheer number of facts, but because of the real indeterminacy of the rule, in the sense that Ronald Dworkin might use the term.[14] The Bombay High Court had tried to do the same in Tata Sons, by arguing that Entry 5(e) should be read in the context of Section 7 of the CGST Act and it cannot be read on its own. In *Tata Sons*, Dworkin's solution, appeal to the principles underlying the rule, was precisely the one that the Bombay High Court attempted in Tata Sons, which argued that Entry 5(e) should be read in the context of Section 7 of the CGST Act and it cannot be read on its own.[15]

B. The Différance of 'Supply'

The notion of différance, meaning that there is always more to sign than a fixed referent, is central to Derrida's discussion of the GST, and to the debate over the dispute landscape.[16] The term 'supply' in Section 7 is given a broad meaning that covers 'all forms of supply… made for a consideration by a person… in the course or furtherance of business'. The 'supply' is in turn defined by reference to the 'consideration'[17] given, and the consideration given is defined by reference to the 'supply'. [18]This circularity is resolved only through interpretive practices that are contestable.

C. Foucault, the Circular, and the Disciplinary Mechanism

But the government's attempt to try to manage this indeterminacy by way of CBIC Circulars is itself an interesting example of what Foucault calls 'governmentality', that is the art of knowing how to manage the population by using knowledge and

---

[14] Ronald Dworkin, Law's Empire 225–75 (1986).

[15] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 66.
[16] Jacques Derrida, Limited Inc 1–2 (Gerald Graff ed., 1988).
[17] Id. S. 2(31).
[18] CGST Act, supra note 1, S. 7(1).

norm-setting.[19] It is so many words long that it's several thousand words, CBIC Circular No. 178/10/2022-GST, and yet it cannot be disciplined.[20] The circular's own words 'the taxability in each case shall depend on facts of that case' maintain the power of the government to make case-to-case decisions, and will thus leave every taxpayer open to enquiry.[21] Similarly, Jean-François Lyotard's 'incredulity towards metanarratives' is applicable: the 'one tax, one nation, one market' motto of GST stymies in Clause 5(e) the 'messiness of economic life'.[22]

IV. THE FEMINIST LENS: WHOSE TOLERATION IS BEING TAXED?

A. The Neutrality Myth in Tax Law

Feminist legal theory has generated a strong critique of the idea that law is (or can be) neutral.[23] ThE core principle of Catharine MacKinnon's, that law's neutrality is a mask for its rootedness in a male point of view, presenting itself as universal,[24] has been extended to tax law through the work of many scholars, among them Martha McCluskey and Beverly Moran, who have all shown that tax provisions which are facially neutral actually work against women in a systematic way.[25]

---

[19] Foucault, supra note 10.

[20] Ministry of Finance, CBIC, Circular No. 178/10/2022-GST (Aug. 3, 2022) ('Scope of Supply — GST Applicability on Liquidated Damages, Compensation and Penalty Arising Out of Breach of Contract or Other Provisions of Law').

[21] Id. ¶ 12.

[22] Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge xxiv (Geoff Bennington & Brian Massumi trans., 1984).

[23] See generally Patricia A. Cain, 'Tax Burdens, Tax Preferences, and the Married Women's Property Acts,' in Feminist and Queer Legal Theory 231 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

[24] Catharine A. MacKinnon, Toward a Feminist Theory of the State 162 (1989).

[25] See Beverly I. Moran & William Whitford, 'A Black Critique of the Internal Revenue Code,' 1996 Wis. L. Rev. 751, 752–54 (1996); Martha T. McCluskey, 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State,' 78 Ind. L.J. 783, 799–804 (2003).

B. The Domestic Care Paradox

Structural is the most basic feminist objection to the GST structure. If services are supplied, they will be taxable if they are rendered ‘in the course or furtherance of business’.[26] The vast area of non-economic domestic work, which is done largely by women, is not wittingly excluded from the tax base, but simply because such work is not perceived as economic activity. If a woman does care work in the home, she 'tolerates' the needs of her care recipients, 'refrains' from other activities and 'performs' acts of service, but none of this is ‘supply' in the GST meaning of the word because there is no ‘consideration' and no ‘business'.

Formalisation of the same care work puts it in the GST net. The capabilities approach advanced by Martha Nussbaum proposes to measure the performance of legal institutions in terms of the capacity to facilitate a life of flourishing for individuals.[27] In this context the GST treatment of care work (that is invisible when provided by women in the informal sector and taxes when formalised) places an undue burden on the formalisation of women's economic activity in sectors where Indian women are over-represented.

C. The Employment Bond Cases: Toleration at Work

The Madras High Court in *GE T&D India Ltd. v. Commissioner of Central Excise*,[28] explained that the compensation received on resignation prior to the expiration of the notice period is not taxable. This was later clarified by CBIC Circular No. 214/1/2023-Service Tax.[29] However, the underlying interpretation of what the tax

[26] CGST Act, supra note 1, S. 7(1)(a).
[27] Martha C. Nussbaum, Creating Capabilities: The Human Development Approach 17–45 (2011).
[28] GE T&D India Ltd. v. Comm'r of Cent. Excise, 2019 SCC OnLine Mad 33202.

[29] Ministry of Finance, CBIC, Circular No. 214/1/2023-Service Tax (Feb. 28, 2023) ('Leviability of Service Tax on the Declared Service Under Clause (e) of S. 66-E, Finance Act, 1994').

authority considers to be the employment relationship is telling: it is interpreted in terms of contract, and the contract, in this instance, is one that the employee enters into to agree to accept employment for a minimum term, what the tax authority describes as a 'supply of service' of the 'agreeing to refrain from leaving' category.

It is fitting to quote Patricia Williams: "Contract law, in its guise of formal equality, masks deeply unequal power relations"[30]. Most often, the employment bond is not an agreement reached with the employee, but rather a condition of employment that they must accept or reject. The uncertainty is disproportionately impacting women in the workforce, especially in IT/ITES jobs where bond arrangements are more prevalent, as they are often disproportionately burdened with the burden of care, lack of geographic mobility, and less likely to access exclusive benefits and career advancement opportunities as a result of the glass ceiling effect.

D. The Hotel Cancellation Charge and the Gendered Geography of Hospitality

At first glance, it seems to be a commercial dispute with *Lemon Tree Hotels v. Commissioner, GST*[31] wherein the CESTAT applied the predecessor to Clause 5(e) to conclude that advance amounts that were retained on cancelling the bookings by the customer were taxable as a supply of 'toleration'. Look closer. Because of the working women and the solo women travellers, who value Lemon Tree's budget pricing, this is the segment that is impacted the most by the Indian budget hotel market. The effective price of accommodation for this group is higher when the cancellation charges are treated as taxable supplies as the hotel has to recover the GST. Intersectionality theorists aligned with Patricia Hill Collins would see this as a compound disadvantage: those who are already inconveniently limited in their

[30] Patricia J. Williams, The Alchemy of Race and Rights 146–65 (1991).

[31] Lemon Tree Hotels v. Comm'r, GST, CE & Customs, 2019 SCC OnLine CESTAT 9368.

movement due to safety concerns for women are even less mobile now when it comes to fiscal issues.[32]

V. THE DOCTRINAL ARCHITECTURE: HOW THE LAW ACTUALLY WORKS

A. The Conceptual Structure of Supply Under GST

It is useful to highlight that the GST legislation is based on three levels of 'supply'. The principal definition of supply is given in Section 7(1) of the CGST Act which states that supply involves any supply of goods or services made for consideration by a person engaged in business.[33] Second, the definition of supply of goods or supply of services in Section 7(1A) in conjunction with Schedule II covers a number of activities, including Entry 5(e).[34] Thirdly, Schedule III lists activities which are not supply and thus are not covered by the GST.[35]

The question is: Does Schedule II, Entry 5(e) classify or create taxable supplies? The second view, which the Bombay High Court in *Tata Sons* takes, is that Entry 5(e) 'cannot be read beyond the purview and/or the context of the principal provision, namely, Section 7'.[36] This is the right doctrinal answer, which is reinforced by the statutory framework and by the distinction H.L.A. Hart makes between primary rules (which impose obligations) and secondary rules (which prescribe how the primary rules are to be applied).[37] Entry 5(e) is a second order rule, a classification rule. It does not independently impose tax liability.

[32] Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 221–38 (2d ed. 2000).
[33] CGST Act, supra note 1, S. 7(1).
[34] Id. S. 7(1A); Schedule II (introductory note).
[35] Id. Schedule III.
[36] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 66.
[37] H.L.A. Hart, The Concept of Law 94–95 (2d ed. 1994).

B. The 'Consideration' Requirement: Essential and Often Absent

Consideration for a supply must be in response to or as an inducement to the supply, that is, there must be a direct connection between the two.[38] This is recognized by the government in the 2022 Circular, which states, 'If an amount is paid not as a consideration for the supply of a service but as compensation or damage for the loss suffered on account of the other party's breach of contract, it cannot be said to be a consideration for a supply.'[39] The operative application for any particular transaction in Entry 5(e) is dependent on the satisfaction of the higher order norm in Section 7(1), as Hans Kelsen observed, in relation to the norm of law.[40] Entry 5(e) is not in effect without consideration, without a supply. The basic reason for the 'patently perverse' approach of the GST authorities in Tata Sons was the High Court explained.

C. The 'Independent Agreement' Test

Tata Sons' most noteworthy doctrinal gift is what can be termed the 'independent agreement test'. The Court found Entry 5(e) to be a presumption that 'the parties in the normal course of business assume obligations to refrain from an act, or to tolerate an act or a situation, or to do an act involving consideration'.[41] If the parties' arrangement is not independent, but it is incidental to and part of a court decree or arbitral award, it does not constitute 'supply' for tax purposes.[42] The Court, as it was, said that 'the reciprocal obligation even in the case of decree must necessarily arise from a decree and cannot be made an independent agreement out of the decree'.[43]

---

[38] CGST Act, supra note 1, S. 2(31); CBIC Circular No. 178/10/2022-GST, supra note 18, ¶ 3.

[39] CBIC Circular No. 178/10/2022-GST, supra note 18, ¶ 5.

[40] Hans Kelsen, Pure Theory of Law 221–35 (Max Knight trans., 2d ed. 1967).

[41] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 68.

[42] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 61.

[43] Id. ¶ 62.

VI. A CRITICAL READING OF THE TATA SONS DECISION

A. Background Facts

NTT Docomo of Japan purchased a 26.5% stake in Tata Teleservices in 2009 with a buyback guarantee: If certain performance criteria were not met, NTT Docomo would be able to demand the shares be sold back to it at no less than 50% of the purchase price. Before the benchmarks were omitted and Tata was unable to find a compliant buyer because of the RBI regulations, an international arbitral tribunal in London ruled that Docomo received around USD 1.17 billion in damages. Later it was enforced before the Delhi High Court and consent terms were noted between Tata, who paid the award amounts, and Docomo which undertook not to take any steps in enforcing the award in the US, UK and India. The GST Directorate went on to issue a show cause notice stating that the Docomo's undertaking not to pursue the case was a ‘supply of service’ and the payment by Tata was ‘consideration' under Entry 5(e) in the definition of supply under the Act.[44]

B. The Court's Reasoning: Five Essential Findings

The first was that there was just no ‘consideration’ in the alleged supply. The first was that the court determined that there was no ‘consideration’ in the alleged supply. The payment was made in line with a damages award not a payment for any service Docomo provided.[45] The court was not at all clear how the settlement could be characterized as a supply 'without involving any independent consideration, when per se there is no question of any consideration, once there was a monetary award under which damages were awarded.

[44] These facts are drawn from Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927, ¶¶ 1–30.
[45] Id. ¶ 60.

Secondly, Entry 5(e) must be based on an independent agreement. All consent terms filed as part of an enforcement proceeding are not from the agreement itself, but are part of the implementation measures.[46] That Docomo agreed not to file proceedings was a foregone conclusion because it had been awarded and not a separate consideration, as a matter of law.

Third, the court established the most broadly applicable of the court's decision, that “recovery of amounts under a court decree or arbitral award 'by any stretch of imagination ought not to amount to supply of services.'[47] GST does not cover the administration of justice, including the determination and enforcement of rights.[48]

Fourth, in respect of the method, the court clarified that Entry 5(e) cannot be invoked ‘dehors’ Section 7 of the CGST Act.[49] It is a classification provision which is only active to the extent that the conditions of Section 7 are independently met (supply, consideration, business nexus).[50]

Fifth, the court explicitly accepted the stance of CBIC Circular No. 178/10/2022-GST which holds that liquidated damages are not consideration for a supply, and also applied this principle to unliquidated damages awarded by courts and tribunals: ‘The legal character and nature of such a payment is nothing but receipt of compensation for breach of contract'.[51]

C. What the Court Did Not Decide — and Why That Matters

Tata Sons had also struck down Entry 5(e) in its entirety. After finding in favour of Tata Sons based on the facts, the High Court did not proceed to adjudicate this

[46] Id. ¶ 61.
[47] Id. ¶ 62.
[48] Id. ¶ 66.
[49] Id. ¶ 76.
[50] Id. ¶ 71.
[51] Id. ¶ 84.

challenge. This limitation is justifiable on the basis of law but has important practical implications. The provision is still being enforced and is a cause of conflict. A study of the case tracking methodology of Supreme Court Observer shows that Entry 5(e) is one of the most cited entries in the GST writ petitions filed before the High Courts in India.[52] The Supreme Court has so far granted leave and issued notice in pending matters relating to Entry 5(e) but a final authoritative decision is yet to be issued.

VII. THE DATA: MAPPING THE DISPUTE LANDSCAPE

Table 1: Legislative Evolution of the 'Toleration' Provision

Phase	Governing Legislation	Key Provision	Conceptual Scope
Pre-2012 (Positive List)	Finance Act, 1994	S. 65 (enumerated services only)	Narrow — only listed services taxed
2012–2017 (Negative List)	Finance Act, 1994 (amended)	S. 65B(44); S. 66E(e) declared service	Broad — all except excluded; toleration declared a service
2017–present (GST)	CGST Act, 2017	S. 7 r/w Schedule II, Entry 5(e)	Comprehensive — all supply; toleration continues as declared service

[52] See Supreme Court Observer, Methodology — Case Tracking and Analysis, available at https://scobserver.in/methodology/ (describing SC Observer's approach to tracking constitutional and statutory challenges across High Courts and the Supreme Court).

Source: Finance Act, 1994; Central Goods and Services Tax Act, 2017 (public legislative documents).

Table 2: Case Law Progression on Clause 5(e) and Its Precursor

Case	Forum	Year	Transaction	Outcome
Lemon Tree Hotels v. CCE	CESTAT	2019	Hotel cancellation advance retention	Taxable
K.N. Food Industries v. CCE	CESTAT	2019	Ex-gratia job charges to contract-manufacturers	Taxable
South Eastern Coalfields v. CCE	CESTAT	2020	Penalty for short-lifted coal	Taxable
Maharashtra State Power Generation, In re	Mah AAR-GST (affirmed by AAAR)	2018	Compensation for delay/deficiency	Taxable
TP Ajmer Distribution Ltd., In re	Raj AAR-GST	2018	Electricity charges incl. cheque dishonour	Taxable
GE T&D India Ltd. v. CCE	Madras HC	2019	Notice period payment by employee	Not taxable

Case	Forum	Year	Transaction	Outcome
Bai Mamubai Trust v. Suchitra	Bombay HC	2019	Court Receiver services	Not taxable
Asha R. v. CCT	Karnataka HC	2024	Solatium on compulsory land acquisition	Not taxable
Aswathy Gas Agencies v. Indian Oil Corp.	Kerala HC	2024	Penalties under gas marketing guidelines	Not taxable
Torrent Power Ltd. v. Union of India	Gujarat HC	2025	Payment to Municipal Corp. for road-digging permission	Not taxable (SLP pending)
Tata Sons (P) Ltd. v. Union of India	Bombay HC	2026	Payment under arbitration award/court settlement	Not taxable

Sources: SCC Online (public legal database); CBIC publications (government sources).

Table 3: Types of Disputed Transactions — Authority Positions vs. Judicial Outcomes

Transaction Category	**GST Authority/AAR Position**	**High Court / Judicial Position**
Liquidated damages (breach of contract)	Taxable under Entry 5(e)	Not taxable — CBIC Circular No. 178/10/2022-GST; endorsed in Tata Sons
Court/arbitration award damages	Taxable (Tata Sons notice)	Not taxable — Tata Sons (Bombay HC, 2026)
Employee bond/notice period amounts	Contested — some AARs held taxable	Not taxable — GE T&D (Madras HC); Circular No. 214/1/2023-ST
Hotel/venue cancellation charges	Taxable (Lemon Tree, AAR)	No binding HC ruling
Land acquisition solatium	Taxable (some field positions)	Not taxable — Asha R. (Karnataka HC, 2024)
Electricity company penalties/surcharges	Taxable (TP Ajmer AAR)	Not taxable — Aswathy Gas (Kerala HC, 2024)
Municipal permission/tolling fees	Taxable (field position)	Not taxable — Torrent Power (Gujarat HC, 2025); SLP pending
Non-compete obligations (asset purchase)	Taxable (consistent position)	No definitive HC ruling; open question
Penal/additional interest	Taxable (pre-Circular position)	Not taxable — CBIC Circular No. 102/21/2019-GST

Sources: CBIC Circulars (government publications); SCC Online case database (public).

Table 4: Comparative Regulatory Framework — Treatment of 'Toleration' Supplies Across Jurisdictions

Jurisdiction	Key Legislative Provision	Treatment of Compensation/Damages	Key Characteristic
India (CGST Act, 2017)	S. 7 r/w Schedule II, Entry 5(e)	Contested; recent judicial trend towards non-taxability of damages	Catch-all 'declared supply'; significant litigation
Australia (GST Act, 1999)	S. 9-5; S. 9-15	Compensation payments generally not 'consideration'; ATO provides clear guidance	Less litigation; regulatory certainty
European Union (VAT Directive 2006/112/EC)	Art. 2(1)(c); Art. 24	CJEU in Société Thermale (C-277/05) distinguishes taxable supply from non-taxable compensation	CJEU guidance followed by national courts
United Kingdom (VATA, 1994)	S. 4; HMRC Policy Paper (2021)	HMRC distinguishes compensation from consideration; liquidated damages not taxable	Post-Brexit guidance largely follows EU precedent
Singapore (GST Act, Cap. 117A)	S. 10	IRAS e-Tax Guide: liquidated damages and penalties not taxable if not paid for a supply	Proactive regulatory guidance reduces litigation

Sources: Goods and Services Tax Act 1999 (Australia); Council Directive 2006/112/EC (EU); Value Added Tax Act 1994 (UK); Goods and Services Tax Act (Singapore); HMRC and IRAS publicly available guidance.

VIII. THE WAY FORWARD: TOWARD A GENDER-JUST, EPISTEMICALLY HUMBLE TAX JURISPRUDENCE

A. What Tata Sons Gives and What It Does Not

The taxation of court and arbitral award settlements under Entry 5(e) is barred by the Tata Sons decision (to be reviewed on appeal by the Supreme Court). It introduces the 'independent agreement' test and puts Entry 5(e) squarely into the Section 7 context. However, the decision does not: (a) take the stance of invalidating Entry 5(e); (b) resolve the issue of non-compete in an asset purchase; (c) settle the issue of charges for hotel cancellations; (d) resolve the issue of the status of employment bond in the CGST Act definitively; or (e) address any of the feminist/post-colonial concerns raised above. The provision continues to be 'catch all'.

B. The Need for Legislative Intervention

The best long-term answer is to do it in a legislative manner, not in a judicial manner. Parliament can also amend Schedule II, and specify a positive list of qualifying toleration supplies, such as express covenant not-to-compete arrangements and structured settlement agreements, and at the same time expressly exclude compensation for breach, court decree payments, and amounts of employment-related bonds. The first approach, reducing the scope to what the legislature actually wanted to tax, and excluding the large shadow zone of "borderline" cases created by the blending of various offenses in the same bills, is supported by Dworkin's argument that law is an interpretive process which aims at justice.[53]

C. A Gender-Just Reform Agenda

A feminist tax theory approach calls for considering the following in addition to the above when considering Entry 5(e) reform. There is a need for the bond for employment clause to be removed from Entry 5(e) by amendment to the legislation, not just clarified by circular (which is still open to interpretation). Second, the disproportionate cancellation charge/advance forfeiture case, which disproportionately affects women in hospitality and event sectors as operators and consumers alike, needs to be addressed by a cancellation charge exemption or by the removal of any advance forfeiture from 'consideration'' as per the liquidated damages concept.[54] Third, there should be a reevaluation of the GST registration threshold and compliance burden of women-led microenterprises, considering the structural disadvantage that arises due to Clause 5(e) uncertainty.

D. Judicial Way Forward: The Supreme Court's Role

The *Torrent Power* matter (SLP Civil No. 16858/2026) is on the Supreme Court's agenda that will provide them with an opportunity to establish binding, thorough guidance on Entry 5(e).[55] There are three questions about which authoritative resolution is required: (1) Is Schedule II, Entry 5(e) a 'classification' or 'independent charging' provision? (2) What meaning should be given to the 'independent agreement' test? and (3) Should the constitutional challenge to Entry 5(e) (which remains open in Tata Sons) be engaged? The argument that the provision, as drafted,

---

[53] Dworkin, supra note 26, at 410–13.

[54] CGST Act, supra note 1, S. 22(1); see also Notification No. 10/2019-Central Tax (Mar. 7, 2019).

[55] Torrent Power Ltd. v. Union of India, 2025 SCC OnLine Guj 5745. SLP (Civil) No. 16858/2026; notice issued by the Supreme Court vide order dated May 7, 2026.

is an omnibus provision and attempts to tax activities not subject to the word 'supply' under Article 366(12-A) of the Constitution is not frivolous and needs to be examined by the court.[56]

IX. CONCLUSION: THE TOLERATION PROVISION AND THE TOLERATION OF INJUSTICE

Doctrinally, in this paper, it has been argued that the Tata Sons decision is correct in its legal reasoning: that the purpose of the provision is to limit the scope of Entry 5(e) and that it is a classification, not a stand-alone charging, purpose. These propositions are based on the principle of tax law constitutionalism and the rule of law.

Theoretically, it has suggested that Clause 5(e) cannot be read as a mere drafting mistake, but as a structural issue; a colonial genealogy of Indian contract law and tax law (post-colonial theory); a basic indeterminacy of legal language with respect to the infinite range of economic transactions (post-modern theory); and a gendered blindness of tax law that has been drafted without an awareness of how it affects the differential impact of tax uncertainty on women workers, entrepreneurs and care takers (feminist theory).

As correctly observed by the original doctrinal analysis the provision continues to be in a state of flux. In this paper I have suggested that the flux is not by accident, but is the point: that is, an omnibus 'catch-all' measure that creates continuous uncertainty is, in some sense, a permanently useful procedure from the revenue authority's point of view. But for scholars and advocates, and now, for Parliament, the question is whether that utility is worth the price, the price of litigation, the price

[56] India Const. art. 366(12-A) (defining 'goods and services tax' as a tax on supply of goods or services or both).

of compliance, and the price of justice to those for whom the grammar of toleration is a living experience, not a matter of statutory interpretation.

But the grammar of toleration is not neutral, after all. It never was.