TAX SCOUT

A quarterly update on recent developments in Taxation Law

JANUARY 2020 – MARCH 2020

FOREWORD

The sudden COVID-19 outbreak has halted regular business in an unprecedented manner as Governments across the globe are imposing partial/full lockdown of their cities and provinces. The Indian Government had imposed full lockdown of the entire nation until May 3, 2020. As we venture into the dawn of respites of 3rd lockdown upto May 17, 2020, we at Cyril Amarchand Mangaldas, have endeavored to keep up the tradition of delivering the work products in a timely manner in these turbulent times as well in order to ensure that the business of our clients is not impacted.

As a part of this, we are pleased to present our regular quarterly update on direct and indirect tax, covering some of the important decisions and legislative changes that took place in the last quarter of financial year 2019-20 i.e. January 1, 2020 to March 31, 2020. As you would be aware, the Finance Minister presented the Budget on February 1, 2020 and the Finance Bill, 2020, received the assent of the President on March 27, 2020.

It is pertinent to note that since we have discussed the provisions of Finance Bill, 2020 and the amendments to the Finance Bill, 2020 incorporated in the Finance Act, 2020, by way of separate newsletters titled Union Budget, 2020 Highlights and Finance Act, 2020 Highlights respectively, they have not been discussed here again.

In our cover story, we have discussed the amnesty scheme announced in Budget 2020-21 for resolution of pending direct tax disputes. Pursuant to the announcement, the Central Government enacted the Direct Tax Vivad se Vishwas Act, 2020, specifying the eligibility criteria, amount of relief, procedure to apply and other mechanics. Notably, the legislature in the past has issued several amnesty schemes for both direct and indirect tax related litigations, the last one being Sabka Vishwas (Legal Dispute Resolution) Scheme, 2019, for pending indirect tax cases. As a part of the Cover Story, we have discussed the features of this amnesty scheme, other similar amnesty schemes introduced by the legislature in the past, and the possible factors, which could influence the taxpayers' decision to opt for resolution under the scheme.

We hope you find the newsletter informative and insightful. Please do send us your comments and feedback at cam.publications@cyrilshroff.com.

Regards,

Cyril Shroff
Managing Partner
Cyril Amarchand Mangaldas
Email: cyril.shroff@cyrilshroff.com

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LIFE AFTER COVID 19: WILL IT BE BUSINESS AS USUAL?

India is currently in the midst of a lockdown, that began on March 25, 2020, to contain the spread of the novel coronavirus ("**COVID 19**"). The outbreak of the coronavirus disease across the world has left the global economy badly disrupted.

While very few businesses and workplaces are able to continue their daily work remotely, most of the businesses in the country are completely shut. While right now these businesses have been formally closed down and they have no other option, they are already facing and shall have to adapt themselves to overcome some major challenges, including for certain companies, an existential crisis.

While the unorganised and informal sector, daily wage workers and small and medium enterprises are the ones worst affected by the ongoing crisis, it is the impact on the organised sector that will be gradually seen and is expected to increase in the coming months. While the impact of the present crisis would vary across various businesses lines, one can safely say that the coming times will be one of the most testing times for businesses in the past so many years.

With the steep fall in stock prices, disruption of business activity in most sectors and slowing down of the world economy as a whole, the global mergers and acquisitions and deals market might have to hit a pause button. Dealmakers may be hesitant to go ahead right away and might want to sit back and watch the current market scenario and act only once the markets recover from this terrible crisis. The total number of M&A deals is likely to be low, even though it might provide strategic investors a tremendous opportunity to look for some bargain deals as companies facing financial difficulties at this point will need to postpone or cancel their existing and proposed expansion or diversification plans. Even the upcoming IPOs may get postponed or even cancelled in some cases. Further, there might be a liquidity crisis in the market for both small and big businesses, which can severely impact the availability of finance during the duration of the crisis and even afterwards.

For instance, China has reported that the outbreak prompted buyers to hold off on acquisitions in the hope of snapping up assets at a lower price. Also, some US companies have had to postpone their IPOs indefinitely, hoping to go in for IPOs only once the market improves.

There is also a possibility that potential acquirers may want to take advantage of the lower valuations of target businesses and hence they might want to enter into strategic deals at this point. It has been observed that deals done during such times sometimes create significant value for dealmakers over a period of time.

From a business perspective, it seems that the current crisis has rattled both the demand and the supply side of businesses. They are trying to sustain themselves over the course of the next few months and might need to take certain bold steps afterwards. Some businesses might go in for debt restructuring in order to cut costs and to be able to meet their financial and other business obligations in the coming months. Businesses are also expected to reorganise themselves and look into possible restructuring options in order to come up with more cost-efficient structures for running their business to save costs, strengthen their cash flow position and to deal with the possibility of a fall in their market demand.

In any event, it is a universally accepted proposition that businesses will not be run the way they used to prior to the introduction of COVID-19. Most businesses will have to change the way they used to operate and many others will have to come up with their own version of what can be regarded as their own new normal. Many businesses may shut shop and many others may have to reimagine and reorient their business plans so as to work within the scope of what can be regarded as the new normal way of doing businesses. Businesses that are unable to adapt themselves to the new normal may have to shut shop.

The government for now has taken some measures to help businesses navigate through these difficult times, such as extending time limits under taxation and other laws, announcing moratorium on loans and even announcing a INR 1.7-trillion relief package for those most affected.

This crisis may also give rise to a number of new tax issues. To begin with, as people are unable to travel to meet their business exigencies, this may result in their having to stay at a place, which is not their regular place of work, which may create a potential permanent establishment related issues for their employer, especially in the case of multi-national and multi-jurisdictional conglomerates. Moreover, this crisis has also resulted in several employees requesting their employers to give them permission to work from home at their respective own jurisdictions instead of their place of work. For example, Indian employees working in places like Singapore, Hong Kong, etc., are requesting their employers to allow them to travel to India and work from their respective homes.

Similarly, even for employees working within India, this has created a lot of unique opportunities and challenges. Many employees, who were working at places that offered their employers specific tax incentives and benefits, also had certain challenges because it warranted them to work from the specified position. Fortunately, the Government has already clarified that people are allowed to work from home and it would be regarded as if they are working from their regular place of employment for the purposes of granting them specific benefits under Indian tax regulations.

This crisis may lead to a significant amount of restructuring of businesses, which is expected to result in specific challenges and tax implications. Businesses that have high liquidity and are cash rich may have multiple opportunities to diversify and expand their operations while companies that are short of cash may have a tough time in this environment. However, they need to look at their business model carefully and rejig their businesses to survive and potentially benefit from the crisis. Tax planning is going to play a very critical role in this internal/ external restructuring.

Nevertheless, at present, there is much uncertainty about how this situation will evolve, the amount of time it will take for businesses to re-open and resume work as usual and most of all for markets to revive completely. One hopes that the government measures will assist businesses to stay afloat during the present phase of the crisis, post which businesses will take the best possible steps to recover.

COVER STORY

TO SETTLE OR NOT TO SETTLE! ZERO HOUR FOR TAXPAYERS

The Hon'ble Finance Minister ("**FM**") in her Budget Speech on February 1, 2020, announced an amnesty scheme for reducing the pending direct tax disputes. *"Vivad se Vishwas scheme"* ("**VsV scheme**") has been introduced by the government to deal with the huge backlog of cases in various appellate forums and to boost tax collections.

The VsV Scheme was introduced in the Lok Sabha on February 5, 2020, as "The Direct Tax Vivad se Vishwas Bill, 2020" ("**VsV Bill**"). Subsequently, amendments were proposed to VsV Bill on February 14, 2020, aimed at covering a larger tax base and with an objective of providing this amnesty scheme to more taxpayers. The Bill finally received Presidential assent and the Direct Tax Vivad se Vishwas Act, 2020 ("**VsV Act**") was notified on March 17, 2020. It may be pertinent to note that the VsV Act has been designed primarily to settle pending tax disputes being litigated in various appellate forums, and has not been made to include an option for tax amnesty as well, i.e. allowing for voluntary disclosure of undisclosed tax liability of taxpayers on payment of taxes.

The scheme is broadly similar to the Sabka Vishwas (Legal Dispute Resolution) Scheme, 2019 ("**Sabka Vishwas Scheme**") introduced in 2019 for indirect taxes. The last time the government came up with any schemes for settlement of tax disputes or for disclosure of undisclosed income in direct taxes was when the Direct Tax Dispute Resolution Scheme, 2016 ("**DTDRS 2016**") and Income Declaration Scheme, 2016, were announced in the Union Budget speech for the year 2016-17.

Win-win for the government, dilemma for taxpayers

A dispute settlement scheme like the VsV Scheme is ideally brought to reduce mounting pressure of litigation on both, the taxpayer and the government. Above all, it helps taxpayers to limit their tax exposure and cut down on the estimated tax outgo on ongoing tax disputes. It is greatly helpful in putting an end to costs and trouble of prolonged litigation.

However, one cannot lose sight of the fact that it puts the taxpayers in a terrible dilemma as they have to choose between litigating a case to establish their position, which they believe to be correct, as against minimising exposure to mounting costs of litigation, ever increasing interest burden and risk of very high penal consequences, if additions are sustained.

Therefore, first and foremost, a taxpayer needs to assess in depth the facts and merits of its matters pending before various forums and available judicial precedents on the matter and evaluate if a settlement is actually beneficial in its case or not. The decision could depend on several factors, for instance:

- whether the outcome of the matter can be estimated to some extent or if there is some binding judicial precedent on the issue involved;
- whether or not a substantial portion of the disputed tax has already been paid while the matter is still pending in appeal. In case a substantial portion of the tax liability has not yet been paid and there is a stay in operation, interest costs get accrued and multiplied over the years while the matter is pending in appeal before CIT(A)/ITAT/HC/SC, which can sometimes take more than 15-20 years;
- in case the addition is sustained on merits, whether or not it merits imposition of penalty for concealment of income under the provisions of the IT Act and the minimum and maximum penalty that can be levied, for instance penalty can be levied in the range of 100-300% of disputed tax for matters prior to AY 2017-18. Since penalty proceedings are separate from assessment proceedings, risk exposure to penalty needs to be analyzed separately. For example, if a substantial portion of the disputed tax amount has already been paid due to which interest costs are not escalating with each passing month and let's say the nature of the matter is such that the additions, even if sustained, do not warrant the imposition of penalty under the law and as per settled precedents, the taxpayer may choose to continue to contest the matter on its merits instead of settling the matter since there is not much exposure to interest and penalty costs.

Apart from the above, there are a few other commercial considerations that would impact the taxpayer's decision to opt for the VsV Scheme:

- availability of funds for making instant payment under the scheme, even though the payment schedule has been extended till June 30, especially in the wake of the ongoing Covid-19 outbreak;
- future business plans of the company as it has often been seen that certain companies face difficulty in executing their business restructuring plans due to pending tax disputes and they may avail the scheme depending on the facts and circumstances of their case.

From the standpoint of the government, a tax dispute settlement scheme such as this one is seen as an effective measure to reduce pending tax matters. As per the FM's Budget speech on February 1, 2020, presently there are around 4,83,000 direct tax cases pending in various appellate forums and approximately INR 9 trillion is tied up in litigation. Hence, a tax dispute settlement scheme will greatly help augment tax collection of the government while also reducing the pressure of pending cases on government and judicial machinery.

VsV scheme: Scope and payment terms

In her Budget Speech, the FM divulged limited information to the extent that an Assessee having pending appeals as on January 31, 2020, will be required to pay only the disputed tax amount by March 31, 2020, and will get complete waiver on interest and penalty. Further, if payment is made after March 31, 2020, but before June 30, 2020, payment of 110% of disputed tax will be required to be made i.e. an additional 10% of the disputed tax amount. In case it is the interest or the penalty amount, which is primarily in dispute, then 25% of the disputed amount will be required to be paid by March 31, 2020, and if payment is made after March 31, 2020, but before June 30, 2020, then 30% of the dues will be required to be paid.

Pursuant to the announcement of the Budget, the VsV Act came into effect after it received the President's assent on March 17, 2020. The government also issued FAQs[1] to provide more clarity on the scheme to the taxpayers. Further, The Direct Tax Vivad Se Vishwas Rules, 2020 ("**VsV Rules**"), laying out the forms and procedures for availing the scheme were released by the Central Government *vide* Notification dated March 18, 2020.

As per the final scheme given under the VsV Act, the taxpayer can pay 100% of the disputed tax amount by March 31, 2020, to avail the benefits under the VsV Scheme. It is worthwhile to highlight that post all these announcements, the country had to deal with significant disruptions due to the Covid-19 outbreak and there was a partial lockdown in several states before a country-wide lockdown was announced on March 25, 2020. As a result, the government decided to extend the deadline under the VsV scheme from March 31, 2020, to June 30, 2020.

The final scheme also covered search and seizure cases (which were not originally included in the VsV Bill) if payment of 125% of disputed tax is made before the due date. The scheme covers all appeals pending before CIT(A), ITAT, HC or SC and also orders for which time for filing appeal has not expired by January 31, 2020. It also covers cases where objections have been filed by the taxpayer before the DRP, where directions have not been issued by DRP by January 31, 2020, and in case directions have been passed, final assessment order has not been passed by the AO by January 31, 2020. It also covers cases where the Assessee has filed revision application under section 264 of IT Act on or before January 31, 2020. In addition, the final scheme also covers cases where the matter is pending in arbitration, but no appeal as such is pending before any forum.

As per the VsV Act, in cases where the IRA has gone in appeal, taxpayer is required to pay 50% of what he is required to pay under the scheme. For instance, where appeal is filed by IRA, the taxpayer is required to pay 50% of the disputed tax amount in normal cases, 62.5% of disputed tax amount in search and seizure cases and 12.5% of the disputed amount in cases where interest or penalty is in dispute.

It should be noted that the following cases have been specifically excluded from the ambit of the final scheme:

i. search and seizure cases where the disputed tax amount exceeds INR 50 million;

[1] Circular No. 9 of 2020 dated April 22, 2020.

ii. pending appeals where prosecution has been instituted on or before the date of filing declaration under the scheme;

iii. cases related to undisclosed foreign income or foreign assets;

iv. cases based on information received under DTAA agreement or agreement under section 90A of the IT Act;

v. cases where prosecution has already been initiated by the IRA under the Indian Penal Code or for the purpose of enforcement of any civil liability under any law on or before the date of filing declaration under the scheme; and

vi. person in respect of whom prosecution for any offence punishable under the provisions of the Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002, the Prohibition of Benami Property Transactions Act, 1988 has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of those Acts or any person notified under Special Courts Act, 1992.

Interestingly, a tax dispute settlement scheme such as this can be used by taxpayers to settle disputes arising due to additions on account of any unexplained cash deposits made at the time of demonetisation, as no exclusion has been made in VsV scheme for such category of cases.

It should also be noted that the government has not given an option to the taxpayers to settle pending cases in a piecemeal fashion. Therefore, the taxpayers who are desirous of availing the scheme for a particular issue out of the total number of adjustments made by the tax authorities in a particular year, will need to settle all the issues for the year as selective picking and choosing of issues for settlement is not allowed. While the option of a partial settlement might seem fairer and more reasonable from a taxpayer's standpoint, as he might want to continue to litigate at least those issues where he is confident of a win, however, the government might be of the opinion that allowing such a piecemeal settlement could defeat the main purpose of such a scheme, which is to reduce the overall pendency of cases in various appellate forums.

However, in certain cases, inability to settle issues on piecemeal basis might make it very challenging for certain taxpayers to opt for the scheme, especially in cases where some issues in the assessment order have already been covered in his favour by previous ITAT or HC or SC order while other issues might be contentious. As per FAQs issued by the government, an issue which is covered in the case of an assessee by a SC order will not be considered for calculating disputed tax amount. In case of issues covered by an earlier order of ITAT or HC (not subsequently reversed by the higher appellate authorities), 50% of the disputed tax amount will be payable. Hence, where the pending issues in an appeal include issues, which are contentious as also those that are settled in his favour in earlier years, an assessee will need to properly estimate possible tax outgo in either case and decide accordingly.

Other tax settlement cum resolution schemes by government over the years

DTDRS 2016 was announced by the government in 2016 and for availing the scheme, an assessee was required to pay the disputed tax amount along with interest till date of assessment and if the disputed tax was more than INR 10 lakhs, 25% of the minimum penalty leviable was also to be paid. DTDRS 2016 was applicable to only those direct tax disputes, which were pending in appeal before the CIT(A) and also those disputes that had arisen as a consequence of any retrospective amendment to the IT Act, which were then pending before CIT(A)/ITAT/HC/SC. It should be noted that post the announcement of the said scheme, reasonable time was offered to the taxpayers to make their decision viz. a window of seven months to avail the scheme i.e. from July to December 2016 (extended only by a month till January 2017), as compared to the VsV Scheme, which initially had a very restrictive timeline, though it can now be considered reasonable, taking into account the extension granted on account of COVID-19.

Another such scheme for settlement of direct and indirect tax disputes was introduced as a part of the

Finance Act (No.2) of 1998 and called the “Kar Vivad Samadhan Scheme”. For settlement of direct tax disputes, the amount payable under the scheme was 35% of disputed income in case of company/firm and 30% of disputed income in the case of any other assessee.

Further, an indirect tax dispute settlement-cum-amnesty scheme was also introduced last year i.e. Sabka Vishwas Scheme. Since the indirect taxes were subsumed in GST, it was considered logical to clear the baggage of pending tax disputes and hence Sabka Vishwas Scheme was introduced for closure of pre-GST litigations of Service Tax and Central Excise. Under the Sabka Vishwas Scheme, 70% of the tax was waived if the disputed tax was less than INR 50 lakhs and 50% of the tax was waived if the disputed tax was more than INR 50 lakhs, along with complete waiver of interest, penalty and prosecution. In addition to dispute settlement, it also provided tax amnesty to taxpayers who opted for voluntary disclosure of their undisclosed indirect tax liability on payment of the entire amount of tax in which case the interest and penalty got waived. The scheme was open from September 1, 2019 and was concluded on January 15, 2020. As per the recent Budget speech, it resulted in the settlement of over 1,89,000 cases and as a result a scheme to reduce litigation in direct taxes was also felt necessary.

Fast and simple resolution, but might not be the correct answer to a very complex problem

This scheme is a rare window of opportunity for taxpayers to settle their legacy tax disputes. It might even be a saviour for some companies overburdened with costs and pressures of litigation and where potential interest and penalty costs could be several times the disputed tax amount or where there is a possibility of prosecution proceedings being initiated by the IRA.

The government's narrative is clear that its aim is to clear the huge backlog of income tax cases. Increase in lower limit of tax effect in case of appeals to be filed by the IRA vide a recent Circular[2] dated August 8, 2019, is also a part of the government's efforts to reduce the total number of cases in various appellate forums. Though not specifically articulated in the Budget speech, it naturally follows that VsV scheme is also a measure to augment the tax revenues of the government and fill up its coffers.

However, most importantly, it should be noted that clearing the previous backlog of cases after every few years is not greatly helpful if it is not done along with carrying out systematic changes in our administrative and judicial system that should ideally be able to dispose such cases on merits in a timely manner. The government needs to bring deep rooted changes in the overall system so as to make it a taxpayer friendly regime with minimum litigation and maximum clarity and certainty in law. It is imperative that the government simplifies what is considered as a really complex and ever-changing taxation system and brings in simplified provisions that are easier to understand and comply with. It should also expand its system of getting advance rulings and make it more efficient and easily accessible so as to avoid litigation in contentious matters in the first place.

The government should also ensure that tax laws are not frequently amended, at the very least, retrospective amendments should not be done as they have resulted in serious tax disputes in the past. Further, if our overall tax structure is made simpler and the tax rates are kept moderate, the taxpayers might also be able to discharge their responsibilities more honestly and effortlessly. In fact, it has time and again been said that moderate tax rates will also help in curbing black money in the system.

It has been seen that sometimes the IRA ignores settled judicial precedents or makes high pitched assessments just to meet unachievable tax collection targets set by the Government. It is important that additions/disallowances be made at the assessment stage only in deserving cases and the IRA should not pursue matters endlessly at the litigation stage if the taxpayer has a genuine case. For instance, in transfer pricing matters, where the issues in appeal are very subjective, such as selection of quantitative filters or comparables for carrying out benchmarking, it has often been seen that the higher appellate authorities provide complete or substantial relief to the assessee.

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[2] Circular No. 17 of 2019 dated August 8, 2019.

In addition, where provisions are not completely clear and could be interpreted differently by taxpayers, IRA may choose to be mindful of the taxpayer's situation and instead of litigating the matter, could choose to bring appropriate amendments in the provisions instead or issue necessary clarifications. Efforts should be made to instill faith in the minds of the taxpayers and improve overall sentiments of businesses as it is much needed in present times and conscious steps should be taken to minimise litigation.

It is also pertinent to note that the success rate of the Government before higher appellate authorities and Courts has been pretty abysmally low i.e. less than 30%. Hence, the Government and the CBDT need to look into it and understand what is wrong with their process. It is also very important for the tax authorities to carry out an ABC analysis of their pending litigations and accordingly, apply their best brains in cases where their success rate is expected to be high. A lot of the Government's bandwidth and revenue is locked in small and frivolous cases, which impede their ability to fight more important and winnable cases. It is also observed that many a times, the Government counsel is either overworked or underprepared and that also results in very poor representation before the litigating authorities.

Thus, in addition to the focus on electronic and faceless assessments, the Government may also focus its attention on training and preparation of its staff for the new and complex environment, given that every country will try to get their respective share of revenue; while tax advisors will continue to find loopholes and advise corporates to come up with strategies that will help them in minimising their overall tax outgo. If that happens, then along with this VsV Scheme, it is expected that India could become one of the most sought-after investment designations and places to do business.

CASE LAW UPDATES - DIRECT TAX

CASE LAW UPDATES - INTERNATIONAL TAX

PROFITS FROM OFFSHORE SUPPLIES UNDER A COMPOSITE CONTRACT ATTRIBUTABLE TO PE IN INDIA

In the case of ***Voith Paper Gmbh v. DDIT, Delhi ITAT***[3] observed that supply and service contracts constituted a single composite contract and held that the income from offshore supply of equipment was taxable in India. Accordingly, Delhi ITAT attributed 35% of the profits accruing from offshore supplies to the PE in India.

FACTS

Voith Paper Gmbh ("**Assessee**"), a company incorporated under laws of Austria, entered into two contracts: (i) equipment supply contract for engineering, designing, manufacturing, drawing and supplying of machinery for a multilayer packaging coated board plant; and (ii) service contract for supervision of erection, start-up, training, commissioning and performance test of the said machinery, with Century Pulp and Paper Company ("**CPPC**"), a division of Century Textiles Industries Ltd., on the same date. The Assessee filed return of income as a non-resident for AY 2010-2011, declaring nil return of income. However, the tax authorities held that the two contracts constituted a composite contract and the supply of equipment took place in India and, therefore, was taxable in India. This order was assailed before the ITAT.

> **Supply of parts of machinery and plant was concluded in India and thus a part of profit was directly attributable to PE.**

ISSUES

1. Whether the supply and service contracts constituted a composite contract?
2. Whether the income from the supply of equipment was taxable in India?

ARGUMENTS

The Assessee contended that the supply and the service contracts were two separate contracts and the supply of equipment being an offshore supply was neither taxable under the provisions of the IT Act nor under the DTAA between India and Austria. The Assessee relied on the provisions of Sale of Goods Act, 1930, and contended that as the title of the goods was transferred by the Assessee to CPPC outside India, entire activities essential for transfer of the title of the equipment took place outside India and the property in equipment was vested in CPPC at the port of shipment; the sale was concluded outside India. The Assessee placed reliance on ***DIT v. Ericsson AB,***[4] **("Ericsson")** to contend that acceptance test was an irrelevant consideration in determining whether the title of the equipment passed to CCPC outside or in India. With respect to the service contract, the Assessee admitted that it had a deemed PE in India as it was undertaking supervision of erection in relation to machines supplied under the supply contract **("Service PE")**.

The IRA, on the other hand, relied on several clauses of the supply and service contracts and submitted that the two contracts were interconnected and dependent on each other, thereby constituting a composite contract. The IRA also contended that the Assessee had a business connection in India, the part of the income from offshore supply of machinery was deemed to accrue or arise in India and hence, was taxable in India in terms of the Act as well as the DTAA.

[3] ITA No. 1077/Del/2014.
[4] (2011) 16 taxmann.com 371 (Delhi).

DECISION

The Delhi ITAT after analysing the supply and the service contracts in detail, held that the presence of various clauses such as the date of completion of delivery being the date of delivery of last consignment, provision of monthly progress report in both the contracts, performance warrantee clause, cross-fall breach clause[5], etc., indicated that the intention of the parties was to provide a multilayer packaging coated board plant in a deliverable state and, therefore, supply and service contracts constituted a single composite contract.

With respect to the issue of determination of the place of supply, the Delhi ITAT observed that the goods supplied by the Assessee were further assembled in India to bring them in a deliverable state and, therefore, held that the title in the equipment was passed in India. It specifically noted that the finding of the Delhi HC in the ***Ericsson*** case that acceptance test was an irrelevant consideration to determine taxability of offshore supply of equipment, was qualified with the caveat that the position may differ where the buyer had the right to reject the equipment in the event the acceptance test fails. As in the present case, the consequence of failure of acceptance test was repayment of price already paid by CPPC against return of equipment already delivered by Assessee, the Delhi ITAT held that the ***Ericsson*** case was not applicable.

The Delhi ITAT also noted that a substantial part of the business activity of the Assessee i.e. manufacturing and commissioning of the plant was carried out in the taxable territory of India and supply of equipment was incidental to the service contract. Accordingly, the Delhi ITAT held that the PE played an instrumental role in marketing related activities, supervision of erection and commissioning of the plant and attributed 35% of the profits accruing from the offshore supplies to the Indian operations by relying on the ***Rolls Royce PLC v. DIT***[6] case.

SIGNIFICANT TAKEAWAYS

The Delhi ITAT distinguished the ***Ericsson*** case on the ground that CPPC's right to refuse the acceptance of goods implied that the ownership of the equipment had not passed to CPPC and, therefore, the sale was concluded in India. Notably, section 19 of the Sale of Goods Act, 1930, places emphasis on the intention of the parties to a contract to determine when the title in the goods passes to the buyer. In the present case, the terms of the contract, as discussed above, indicate that the intention of the parties was to pass the title of the equipment outside India. The SC in the case of ***Mahavir Commercial Company v. CIT***[7], held that the buyer's right to examine and repudiate goods does not per se indicate that the property in the goods has not been passed to the buyer prior to examination. Therefore, basis the reading of the above provision, clauses in the contracts and the above referred judgments, one may argue that the acceptance test may not be the sole factor basis which the place of sale would be determined and as such, the sale may be said to be concluded in India if the intention so appears from overall reading of the contract. In the case of ***Atomstroy Export v. DDIT***[8], where the supply contracts had a clause that in the event of termination of contract, the concerned taxpayer was entitled to contract price attributable to supply and services extended as on the date of termination, the Mumbai ITAT held that the sale was concluded outside India and hence, was not chargeable to tax in India.

Nonetheless, it is now settled by virtue of plethora of decisions[9], including the decision of the Delhi HC in the case of ***Linde AG v. DDIT***[10], wherein it was held that it in order to exempt the offshore supplies from the Indian tax net, the roles and responsibilities of the parties regarding the same shall have to be segregated categorically, including the consideration to be paid for such offshore supplies. Therefore, it is advisable for parties, especially those entering into an EPC contract, to delineate the roles, responsibilities and consideration to be paid for offshore supplies vis-à-vis onshore supplies and services. Otherwise, the risk of offshore supplies getting taxed in India cannot be ruled out.

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[5] Cross-fall breach clause provides that default in one contract will be deemed to constitute default in another contract.
[6] (2011) 339 ITR 146 (Delhi).
[7] (1972) 86 ITR 147 (SC).
[8] (2017) 80 taxmann.com 178 (Mumbai).
[9] Shanghai Electric Group Co. Ltd. v. DCIT, (2017) 84 taxmann.com 44 (Delhi ITAT); In re Alstom Export SA, (2012) 208 taxman 223 (AAR Delhi); Vodafone International Holdings B.V. v. Union of India, (2012) 204 taxman 408, In re Roxar Maximum Reservoir Performance WLL, (2012) 207 taxman 293 (AAR Delhi), Ishikawajma Harima Heavy Industries v. DIT, (2007) 158 Taxman 259 (SC); DIT v. Ericsson AB (2011) 16 taxmann.com 371 (Delhi); DIT v Nokia Networks OY (2013) 212 Taxman 68 (HC).
[10] Linde AG v. DDIT, (2014) 365 ITR 1 (Delhi HC).

UP-LINKING AND BROADCASTING PAYMENTS SUBJECT TO TDS UNDER SECTION 194C AND NOT SECTION 194J

In the case of ***Media World Wide Pvt. Ltd.***[11], it was held that the provision of up-linking and broadcasting programmes by permitting the service recipient to use an existing electronic platform in lieu of a fee cannot be considered provision of "technical services", instead it falls within the ambit of "work" under section 194C of the IT Act. The HC, therefore, held that TDS on the payment made for such services was to be withheld under section 194C (which deals with payments made under a works contract) and not under section 194J (which *inter alia* deals with FTS).

FACTS

Media World Wide Pvt. Ltd ("**Assessee**") was carrying on the business of media broadcasting and telecasting. The Assessee had entered into two agreements, namely with (i) ESSEL Shyam Communication Ltd. ("**ESCL**") for availing up-linking and bandwidth services; and (ii) Celebrities Management Private Limited for availing airtime service charges ("**Contracts**"). The Assessee at the time of making payments under the Contracts withheld TDS at the rate of 2% under section 194C of the IT Act. During the course of the survey proceedings at the office premises of the Assessee, the AO perused the Contracts and thereafter, passed an assessment order holding that payments made under the Contracts fell within the ambit of section 194J as FTS and not under section 194C of the IT Act. The Assessee was thus held liable for short deduction and an interest and penalty was imposed for the same. The Assessee appealed before the CIT (A). The CIT (A) held that services provided under the Contracts were related to broadcasting and telecasting and, therefore, were covered under Explanation (iv) after sub-section (7) of section 194C, which included broadcasting and telecasting within the ambit of 'work' for the purposes of the said section. The tax authorities subsequently appealed before the ITAT, which dismissed the appeal. The ITAT, relying on its decision in the case of ***Sristi Television***[12], held that the services under the Contracts did not constitute managerial, technical or consultancy services and that the telecasting of a programme was specifically covered under section 194C of the IT Act. Therefore, the tax authorities had appealed before the Calcutta HC.

> **"Mere collection of a 'fee' for the use of a standard facility, which is available to everybody against the payment of a fee, does not amount to the provider of the facility receiving FTS."**

ISSUE

The principal issue before the HC was whether the payments made by the Assessee under the Contracts were remuneration for availing of managerial, technical or consultancy services i.e. FTS?

DECISION

The HC perused the meaning of FTS to infer that the scope of services under FTS, included managerial, technical and consultancy services, and thus, the said provision contemplated a provision of a 'service'. The HC relied on various decisions for determining whether the nature of payments made were FTS and upheld well-established principles in relation to the same. It reiterated the following principles in determining the character of services as technical services: (i) the word 'technical' should be read in light of the terms 'managerial' and 'consultancy' and, therefore, there must have been a personal element in the provision of these services; (ii) provision of standard facilities could not amount to provision of

[11] CIT v. Media World Wide Pvt. Ltd., TS 7 HC 2020 (Cal HC).
[12] ITA No. 1297/KOL/2012 & 276/KOL/2013 (Kolkata ITAT).

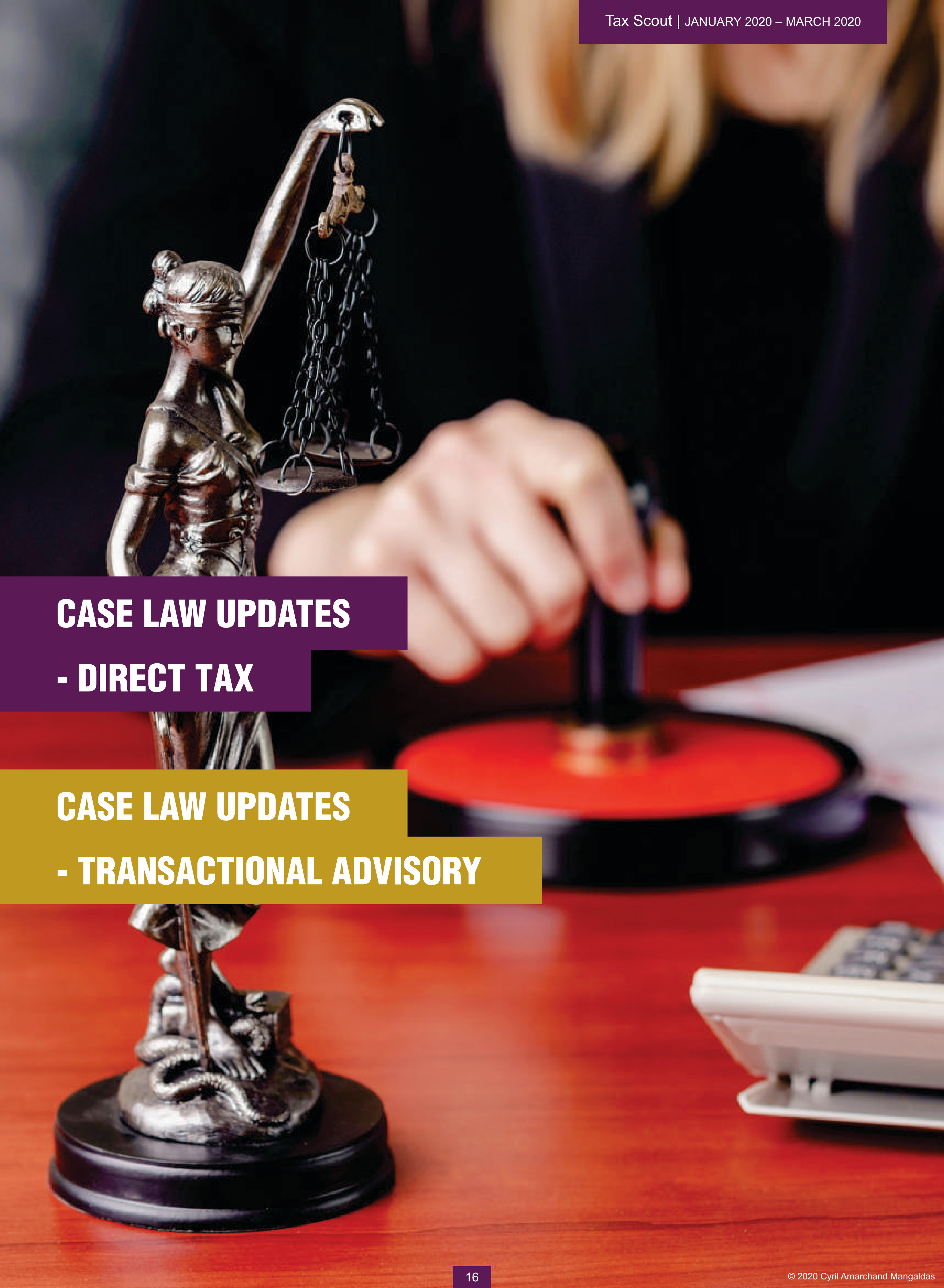
technical services; (iii) the provision of sophisticated equipment did not tantamount to provision of technical services; (iv) services must have been provided by human intervention and must have been separate and exclusive/customised to be considered technical services.

The HC held that the payments made under the Contracts were fees for use of standard facility, which is available to other persons on payment of a fee and the same cannot be said to be FTS. The HC further noted that the services provided were mechanised and automated and there is no involvement of any personal element. The HC relied on other decisions to hold that the services rendered under the Contracts were purely contractual in nature. The Assessee had the right to use the platform only for the duration of the Contracts. Further, since the definition of 'work' under section 194C included broadcasting and telecasting, the payments under the Contracts were specifically covered under section 194C and not under section 194J.

SIGNIFICANT TAKEAWAYS

The judgment reiterates the principle that services within the ambit of FTS need to have an element of personal touch or human intervention. Therefore, it would be vital to assess the nature of the services and the mechanics involved for the purpose of determining the characterisation of the payments involved. The nature of the service would, therefore, play a critical role in assessing the applicable implications under the IT Act.

It is important to note here that section 194J (prior to its amendment by Finance Act, 2020) provided for a higher TDS rate of 10% as against the lower rates of 1% and 2% under section 194C. This led to disputes between tax authorities and the taxpayer in many instances as in this case. The tax authorities have claimed that tax is to be deducted under section 194J instead of section 194C of the IT Act. In order to prevent unnecessary claims from the tax authorities and reduce litigation, the Finance Act, 2020, has amended section 194J to provide for a lower tax rate of TDS on FTS (excluding professional services) to 2% from 10%.



CASE LAW UPDATES - DIRECT TAX

CASE LAW UPDATES - TRANSACTIONAL ADVISORY

ADDITION UNDER SECTION 56(2)(VIIB) AT THE TIME OF ISSUANCE CAN BE JUSTIFIED IF SUCH SHARES ARE SUBSEQUENTLY SOLD AT A HIGHER PRICE

In the case of ***M/s. Clearview Healthcare Pvt. Ltd.***[13]**,** the ITAT held that the price at which shares have been subsequently sold to non-residents could be a valid evidence to justify the price paid to acquire the shares at the time of issuance.

FACTS

M/s. Clearview Healthcare Pvt. Ltd. ("**Assessee**") was incorporated on January 29, 2010, and was engaged in the business of setting up advance machines for diagnosis and treatment of cancer in association with hospitals across India. For AY 2014-15, the Assessee filed its return of income, claiming losses of INR 16,285 and was selected for scrutiny assessment.

> **"Subsequent share purchase by a buyer at a premium could be a valid justification for issuance of shares at a premium."**

During the assessment proceedings, the AO observed the share premium received in excess of valuation of shares as determined under rule 11UA of IT Rules and accordingly, made an addition under section 56(2)(viib) of IT Act as income from other sources.

The Assessee went on appeal before CIT(A), which was dismissed. Accordingly, the Assessee assailed the order of CIT(A) before the ITAT.

ISSUES

Whether the addition under section 56(2)(viib) was justified on account of sale of shares at a premium?

ARGUMENTS

The Assessee argued that the IRA refused to appreciate the legislative intent behind section 56(2)(viib), as appearing from the memorandum to the Finance Bill, 2012, which *inter alia* stated that the said provision was introduced as an anti-abuse provision i.e. the legislative intent was to tax the money received as share premium only when such money was unaccounted for and was received in the garb of share premium. As per the Assessee, the instant transaction was undisputedly not carried out for routing unaccounted money.

Further, in order to establish the genuineness of the share premium received, the Assessee stated that during AY 2015-16, the acquired shares were sold to Medipass SRL, Italy, at a higher price of INR 380.53 per share. For this purpose, a copy of the resolution dated December 12, 2013, as duly attested by the notary public of Italy, was submitted to the AO during the assessment proceeding, along with the letter that categorically stated that the transaction had actually taken place at a mutually agreed upon rate of INR 380.53. Thus, the Assessee justified its disputed valuation of subsequent sale/ purchase of same shares at a much higher price to a non-resident given that such higher price was mutually agreed upon after required due diligence by the non-resident buyer.

While the IRA argued that the FMV was to be determined as per the methodology prescribed under Rule 11UA(2) of the IT Rules, which inter alia stated that the same shall have to be determined at the book value of shares of the company. Accordingly, the IRA contended that other factors such as the price at which the shares were subsequently sold was irrelevant for the purpose of determining income under section 56(2)(viib) of the IT Act.

[13] M/s Clearview Healthcare Pvt. Ltd. v. ITO, Ward 6(2); ITA No. 2222/Del/ 2019.

DECISION

The ITAT accepted the argument of the Assessee that section 56(2)(viib) was an anti-abuse mechanism and the intent of the section was not to tax clean money forming part of the share premium. Relying on this argument, the ITAT agreed to the justification provided by the Assessee. The ITAT held that the additions made by the AO under rule 11UA, read with section 56(2)(viib) were unlawful.

The ITAT also relied on the decision of the Chennai bench in case of ***M/s Lalitha Jewelry Mart***[14] ("***Lalitha Jewelry***"), wherein it was held that the valuation made by a company should be to the judicial satisfaction of the AO. Judicial satisfaction means that the AO must take into consideration well established methods of valuation of shares. The AO must use judicial and established principles in arriving at his satisfaction, and it cannot be arbitrary.

Based on the aforesaid case and the arguments presented by the Assessee, the AO held that the addition made by the AO was unjustified.

SIGNIFICANT TAKEAWAYS

Clause (ii) of explanation under section 56(2)(viib) is very clear -- that the FMV would include the value that maybe substantiated by the company to the satisfaction of AO. As established by Chennai ITAT in the case of ***Lalitha Jewelry***, the AO cannot use his discretion in an arbitrary manner and where the satisfaction is a judicial satisfaction provided through well-established methods, it has to be accepted by the AO.

The liberty of the assessee to adopt any well-established method of valuation and substantiate and justify the same has also been acknowledged by the Ahmedabad Bench of ITAT in the case of ***Unnati Inorganics***[15], which followed the same line of reasoning as ***Lalitha Jewelry***, relying on clause (ii) of the explanation under section 56(2)(viib) .

It has been made clear in the memorandum to the Finance Bill, 2012, that the intent behind taxing share premium as income from other sources was to track down unaccounted money. However, it has created an additional burden on companies trying to raise capital by means of share sale. The ITAT ruling is a positive precedent towards giving assessee companies an opportunity to justify their share valuations and giving a push-back to IRA, preventing them from taxing share premium where valuation can be justified.

[14] Lalitha Jewellery Mart (P.) Ltd. v. Assistant Commissioner of Income – tax, Central Circle – 1(4), Chennai, (2019) 108 taxmann.com 490 (Chennai ITAT).
[15] Unnati Inorganics (P.) Ltd. v. Income Tax Officer, Ward – 1(5), Bhavnagar, (2019) 109 taxmann.com 165 (Ahmedabad ITAT).

AAR INVOKES SUBSTANCE RULE AND DENIES CAPITAL GAINS TAX EXEMPTION UNDER INDIA-MAURITIUS DTAA, DESPITE A VALID TRC

In the case of ***Bid Services Division (Mauritius) Ltd in re***[16], AAR denied the taxpayer the benefit of capital gains tax exemption under the India-Mauritius DTAA, prior to its amendment in May 2016, on the grounds that the taxpayer was merely a shell entity interposed to avoid Indian taxes.

FACTS

Bid Services Division (Mauritius) Ltd. ("**Applicant**") was a company incorporated in Mauritius and was a wholly-owned subsidiary of a South African company, Bid Services Division (Proprietary) Limited, which was in turn held by Bidvest Group Limited ("**BGL**"), a South-African listed company. The Applicant had a valid Category 1 Global Business Licence and a valid Tax Residency Certificate ("**TRC**") issued by the Mauritian revenue authorities. Further, the Applicant had its POEM outside India, i.e. Mauritius.

> **It is open for the IRA to discard an entity interposed for the purpose of avoiding tax, even in absence of a limitation of benefit clause under the DTAA.**

The Airport Authority of India ("**AAI**"), which held 26% shareholding in Mumbai International Airport Limited ("**MIAL**"), invited bids for undertaking development, operation and maintenance activities of MIAL. Eventually, AAI selected the bid of the Applicant in consortium with GVK Airport Holdings Private Limited ("**GAHPL**") and ACSA Global Limited. The Applicant being a part of the consortium subscribed to 27% of shares of MIAL over a period of four years. Subsequently, the applicant entered into a share sale agreement with GAHPL to sell 13.5% of the shareholding in MIAL.

ISSUE

The Applicant sought a ruling on whether gains arising to it from the sale of shares to GAHPL were liable to be taxed in India under the India-Mauritius DTAA?

ARGUMENTS

The IRA pointed out that the while the bidding process was a long-drawn process, the Applicant was only incorporated towards the end of the bidding process to invest in MIAL. It was also submitted that even if the BGL group wanted to undertake the said project through a special purpose vehicle, Mumbai or South Africa would have been an ideal choice. Thus, it was argued that the Applicant was a sham entity, which lacked commercial substance and was merely interposed as an intermediary entity to take advantage of the India-Mauritius DTAA. The IRA also placed reliance on various case laws[17] to argue that principles of substance over form, piercing the corporate veil, etc., may be relied upon to identify sham or dubious transactions.

IRA further argued that the Applicant's case clearly fell within the ambit of section 93 of the IT Act, which provides that where a transfer of Indian assets results in a non-resident acquiring the rights to enjoy the income accruing from the said transfer, then such income would be taxed in the hands of such a non-resident. Thus, it was asserted that pursuant to the sale of MIAL shares by the Applicant, BGL acquired the right to enjoy the capital gains arising from the same, therefore, such gains should be taxed in its hands in India.

[16] (2020) 114 taxmann.com 434 (AAR).
[17] Vodafone International Holding BV. v. UOI (2012) 17 taxmann.com202 (SC); CIT v. Panipat Woolen and General Mills Co. Ltd., (1976) 103 ITR 66 (SC); CIT v. Wipro Ltd. (2104) 50 taxmann.com 421(Karnataka HC); DIT v. Copal Research (2014) 49 taxmann.com 124 (Delhi HC).

On the other hand, the Applicant relied on the CBDT Circular No. 789, dated April 13, 2000, and argued that TRC was sufficient evidence of residence as well as beneficial ownership for applying the provisions of the DTAA. The Applicant also placed reliance on various decisions[18] to support the said argument. Thus, it was argued that the Applicant is entitled to avail the benefit of the DTAA and it was also submitted that capital gains arising on account of sale of shares of MIAL to GAHPL would not be taxable in India, pursuant to Article 13(4) of the India-Mauritius DTAA (prior to its amendment in May 2016).

It was further submitted that section 93 of the IT Act was enacted with the intention of taxing income arising out of transactions, which residents undertake to externalise assets, while continuing to enjoy the rights over such assets and the income therefrom. Thus, it was argued that the section does not apply in the instant case as the assets were not transferred by a resident.

Additionally, the Applicant also argued that even if the transaction was undertaken to obtain tax benefit, the DTAA benefit could not be denied in the absence of limitation of benefit clause under the India-Mauritius DTAA.

DECISION

The AAR held that the Applicant was not entitled to DTAA benefit as the dominant purpose of interposing the Applicant entity was to avoid tax. The AAR noted that the Applicant was only interposed at the end of the bidding process and it had failed to provide any commercial or economic rationale for setting up a special purpose vehicle in Mauritius. The AAR also observed that the Applicant was merely a shell company with no assets, employees, office or independent funds of its own.

Further, it was pointed out that the Applicant did not make any contributions to the decision-making process and it merely kept on endorsing the decision of the holding companies. Thus, the AAR, after applying various tests such as fiscal nullity test, commercial/ business substance test, look-at principle test, etc., to the facts of the case, held that the Applicant was merely a device to avoid tax and denied the treaty benefit.

The AAR also placed reliance on the SC decision in the case of ***Vodafone***[19], and held that though look through provisions or limitation of benefit clause could not be read into the DTAA, it was open for the IRA to discard a company interposed as a device to avoid tax, to consider the real transaction. It would be relevant to note that since the ruling was given against the Applicant, the AAR did not comment on the applicability of section 93 and other ancillary issues.

SIGNIFICANT TAKEAWAYS

The position that capital gains exemption under the India Mauritius DTAA can be claimed by merely producing the TRC had been well understood by way of CBDT Circulars[20] and various other precedents[21]. The AAR, in the instant case, has observed that the IRA may deviate from this position in certain cases such as where an entity has been interposed for the purposes of avoiding tax. It would be relevant to note that the AAR, in the case of ***Seedworks Holdings Mauritius***[22], had also overlooked the interposed Mauritius entity to tax the transaction. Considering this judicial trend, it would be pertinent for taxpayers to have proper commercial rationale, backed by necessary documentation, for incorporating an entity in a particular jurisdiction. The importance of having a proper commercial rationale for transactions is further increased with the introduction of principal purpose test under the MLI and with the advent of the GAAR in Indian domestic tax laws, which can be invoked and treaty benefits can be denied if the principal purpose of a transaction is to claim tax benefits and which is not supported by commercial and business rationale.

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[18] UOI v. Azadi Bachoa Andolan and another (2003)132 taxman 373 (SC); In re, E trade Mauritius (2010) 324 ITR 1 (AAR); D.B. Zwirn In re, Mauritius Trading No. 3 Limited (2011) 333 ITR 32 (AAR).

[19] Vodafone International Holding BV. v. UOI (2012) 17 taxmann.com 202 (SC).

[20] Circular No. 789 dated April 13, 2000; Circular No. 682 dated March 30, 1994.

[21] UOI v. Azadi Bachoa Andolan and another (2003) 132 taxman 373 (SC); In re, E trade Mauritius (2010) 324 ITR 1 (AAR); D.B. Zwirn, In re, Mauritius Trading No. 3 Limited (2011) 333 ITR 32 (AAR).

[22] Seedworks Holdings Mauritius, In re (2017) AAR No. 1128/2011 (AAR).

CASE LAW UPDATES - DIRECT TAX

CASE LAW UPDATES - MISCELLANEOUS

SC HOLDS "POSSESSION" UNDER THE DEFINITION OF 'TRANSFER' UNDER THE IT ACT DENOTES CONTROL OVER THE PROPERTY AND NOT MERE PHYSICAL POSSESSION

In the case of ***M/s. Seshasayee Steels Pvt. Ltd.***[23]*,* the SC dismissed the appeal of the Assessee stating that the transfer, under section 2(47) of IT Act, took place only at the time of transfer of control and not on mere physical possession of the property by the transferee.

FACTS

Seshasayee Steels Pvt. Ltd. ("**Assessee**") entered into an agreement with Vijay Santhi Builders Ltd. ("**Builders**") on May 15, 1998, for development and sale of property for a total consideration of INR 55 million ("**Agreement**"). Pursuant to this Agreement, through a power of attorney ("**PoA**") dated November 27, 1998, the Assessee appointed Mr. Chandan Kumar, director of the Builders for execution of sale agreement or sale deeds after developing the same into flats. The PoA also enabled the Builder to present before all the competent authorities such documents as were necessary to enable development on the property and sale thereof to persons.

> **Transfer of possession along with control would constitute transfer and not mere physical possession.**

For AY 2004-05, the Assessee did not file any return of income. Subsequently, the AO discovered that the sale Agreement had a memo of compromise that was entered into later in July, 2003 i.e. in AY 2004-05 as per which the sale under the Agreement would be concluded after payment of sale consideration by the Builder in instalments. Based on this, the AO issued a notice under section 148 of the IT Act, directing the Assessee to file return of income, which the Assessee failed to do. Thereafter, the AO issued a notice under section 142(1) of IT Act and called the Assessee for a hearing, for which the Assessee failed to turn up. After second round of such notice and Assessee failing to show up again, the AO finally passed a best judgement order under section 144 of the IT Act dated December 31, 2009, wherein the AO held that the transfer of property took place in AY 2004-05 and gains arising from the entire sale consideration was to be treated as capital gains and accordingly subjected to tax for AY 2004-05.

Against the AO order, the Assessee preferred an appeal before the CIT(A), which was rejected by the CIT(A).

On appeal to ITAT, the ITAT upheld the order of the CIT(A). The ITAT observed that the Builder had taken possession of the property and had started developing it after the sale Agreement. However, a compromise deed was entered into between the Assessee and the builder in July, 2003, as per which the sale consideration was to be paid in seven instalments and the last two instalments were subject to the Assessee fulfilling certain conditions. The seven instalments were paid in AY 2004-05. Accordingly, the ITAT stated that the transaction is to be considered as transfer of capital asset under section 2(47)(v) of the IT Act in AY 2004-05, when the compromise deed was entered into. As per ITAT, the fact that a compromise deed had to be signed in July 2003, was indicative of the fact that the agreement to sell was not carried out in its true letter and spirit at the time of signing the agreement, but at the time of signing of the deed of compromise. It may be pertinent to note here that as per section 2(47)(v) of the IT Act, the term "transfer" in relation to a capital asset includes any transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract referred to in section 53A of Transfer of Property Act ("**TPA**").

[23] M/s. Seshasayee Steels Pvt. Ltd v. Assistant commissioner of Income-tax, Company Circle VI(2), Chennai, Civil Appeal No. 9209 of 2010.

The HC further agreed with the findings of ITAT and dismissed the appeals in favour of the revenue.

ISSUES

Whether mere physical occupation by the Builder prior to AY 2004-05 can be considered as transfer under section 2(47) of IT Act.

ARGUMENTS

As per the Assessee, the IRA was only treating the transaction as "transfer" under section 2(47)(v) of the IT Act because they were reading the sale Agreement along with the PoA and the compromise deed, while as per the Assessee, only the sale agreement had to be taken into consideration. Secondly, the Assessee gave an *in arguendo* argument, if this had to be treated as a transfer, it should have been done under section 2(47)(vi) of the IT Act, which refers to a transaction that had the effect of enabling the enjoyment of any immovable property. Since the said section 2(47)(vi) was not invoked by any of the lower authorities, it could not be invoked now. Lastly, the Assessee argued that no transfer can be said to have been made through the compromise deed, since the same did not fall under any of the clauses mentioned under section 2(47) of the IT Act.

On the other hand, the revenue argued on the basis of the findings of CIT(A) and ITAT as well as the HC and insisted that purely on the basis of the orders of these authorities, the appeal should be dismissed.

DECISION

The SC reiterated section 53A of TPA and stated that section 53A was attracted only on satisfaction of two conditions–first, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof and second, the transferee must have performed or be willing to perform his part of the agreement. Clause 16 of the sale agreement between the Assessee and the builder stated that the Assessee gives the builder 'permission' to start construction on the land. As per SC, Clause 16 of the Agreement leads to the position that a licence was given to the builder to develop the land into flats and sell the same. Such licence cannot be taken to be 'possession' within the meaning of Section 53A, which is a legal concept denoting control over the land and not physical occupation of the land. Thus, section 53A of the TPA cannot be attracted to the facts of this case.

On the argument of the Assessee that transaction would attract the definition of "transfer" under section 2(47)(vi) of IT Act, the SC held relied on the test laid down by the SC in the case of ***Balbir Singh Maini***[24], which stated that the object of section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes colour from the preceding expression "transferring", so that it is clear that any transaction that enables the enjoyment of immovable property must be enjoyment as a purported owner only. The intention is to bring within the tax net, transaction where though title may not be transferred by law, there is in substance transfer of title in fact. Applying the test in the case of the Assessee, the SC held that on the date of the agreement to sell, the Assessee's rights were completely intact both with respect to ownership and to possession even *de facto,* therefore, section 2(47)(vi) cannot be said to be attracted.

On the third argument of the Assessee to pigeonhole the compromise deed into one of the clauses of section 2(47), SC held that from the perusal of the compromise deed, it was evident that the agreement to sell and the PoA were confirmed. Clause 3 of the compromise deed also confirmed that the Assessee had received INR 46.82 million out of the agreed total sale consideration and a balance of INR 10.50 million was remaining towards the full and final settlement in respect of the agreement, which had to be paid by seven post-dated cheques. The SC reiterated the ITAT finding that all the cheques mentioned in the compromise deed were encashed. Given the same, the rights of the Assessee extinguished on receipt of the last cheque and, therefore, the compromise deed was stated to be a transaction, which effected the transfer of the immovable property in question. Given the same, the SC held that the compromise deed fell under clause (ii) and clause (vi) of Section 2(47) of the IT Act.

[24] Commissioner of Income Tax v. Balbir Singh Maini, (2018) 12 SCC 354.

The SC dismissed the appeal of the Assessee, but for reasons separate from the HC, ITAT and CIT(A).

SIGNIFICANT TAKEAWAYS

The SC may have undertaken a critical analysis of the facts, however, it is a reflective reading of what constitutes part performance to qualify as transfer under section 2(47) of the IT Act. In this case, SC has explicitly held that mere licence to develop the property would not result in legal concept of 'possession' under section 53A of TPA. This is in contradiction to the ruling of Kolkata ITAT in the case of ***ICI India Ltd.***[25], where mere allowing a licence to the purchaser to use the property was held as sufficient condition for part performance under section 53A of TPA and therefore held to be a transfer under section 2(47)(v) of the IT Act.

In relation to classifying the transaction as transfer under clause (vi) of section 2(47), it may also be relevant to note that the same is in alignment with the intent behind insertion of clause (vi) to section 2(47). As per CBDT Circular no. 495, enacted on September 22, 1971, the clause was inserted to bring into ambit the practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted. A person holding the power of attorney is authorised to act as an owner, which includes the power to take decisions with respect to the construction of the property. The legal ownership in such cases continues to be with the transferor. In this case, the SC read together the Agreement and the deed of compromise to hold that the Assessee had transferred or enabled the enjoyment of property to the transferee in AY 2004-05 under section 2(47)(vi) of the IT Act.

[25] ICI India Ltd. v. Deputy Commissioner of Income-tax, (2002) 80 ITD 58 (Cal).

HC WAIVES INTEREST LIABILITY AS THE TAXPAYER WAS LEGALLY INCAPACITATED

In the case of ***Tvl. Sanmac Motor Finance Ltd.***[26], the HC held that since the taxpayer was ordered to be wound up, it was under the control of the official liquidator and was accordingly legally incapacitated from making any payments. Consequently, the HC waived off the interest liability of the taxpayer for the period it was incapacitated.

FACTS

Tvl. Sanmac Motor Finance Ltd ("**Assessee**") was engaged in the business of sale of motor vehicles and operated as a non-banking financial company. The Assessee had duly filed its income tax returns for the AYs 1995-96, 1996-97 and 1997-98. The assessment for AY 1995-96 was completed in September 2000, whereby the AO determined the tax payable by the Assessee and interest thereon. For AYs 1996-97 and 1997-98, assessment was completed in March 2002, pursuant to which the AO determined the tax and interest liability.

> **The taxpayer was legally incapacitated from paying its tax liability, and hence deserves waiver of interest.**

The Assessee filed an application before the CIT, requesting waiver of interest levied under section Sections 234A (for delay in furnishing the return of income), 234B (for default in payment of advance tax) and 234C (for shortfall/deferment in the payment of advance tax), for AYs 1995-96 to 1997-98. The application was filed under section 119 of the IT Act, read with CBDT Notification dated June 26, 2006 ("**Notification**"), which *inter alia* provides for the class of incomes or class of cases in which the reduction or waiver of interest u/s 234A/B/C, as the case may be, can be considered by the IRA.

In its application the Assessee, accepted the tax liability determined by IRA, and requested for waiver of interest on the ground that while the assessment for the impugned AYs was being finalised, Assessee encountered difficulties in servicing the deposits to its depositors, as a result of which it was on the verge of being wound up. It was further pointed that before the assessments for the AYs 1996-97 and 1997-98 were finalised, the HC had directed the Assessee to be wound up, *vide* order dated June 18, 2001. It was further highlighted that this order was subsequently set aside by the HC only in October 2006 when a scheme of reconstruction was approved. Post which the Assessee was revived and the tax demand was eventually paid by it in January 2007.

The CIT rejected the Assessee's request on the ground that the case of the Assessee did not fall within any of the circumstances specified in the Notification. Subsequently, the Assessee approached the HC by way of writ petition against the CIT order rejecting its request.

ISSUE

Whether in the facts and circumstances of the case, the Assessee was entitled to waiver of interest, determined on its tax demands?

ARGUMENTS

The Assessee, while reiterating the arguments advanced in its application to CIT, requested the HC to waive the interest demand on the ground that when the tax demands were raised, the Assessee was on the verge of being wound up and even the official liquidator failed to protect its interest. Further, the Assessee placed reliance on the decision of ***R. Mani***[27], wherein the HC had waived of the interest liability of the taxpayer, even though the conditions specified in

[26] TVL Sanmac Motor Finance Ltd v. CIT, W.P.No.12500 of 2010 (Madras HC).
[27] R. Mani v. CIT, 2017 SCC OnLine Mad 15884 (Madras HC).

the Notification were not satisfied. Accordingly, it was argued that even though the Assessee's case did not fall within the ambit of the Notification, its interest demand should be waived off considering it was facing financial difficulties.

IRA placed reliance on various cases[28] and argued that the CIT had no power or authority to waive or reduce the interest, unless the taxpayer's case fell within the circumstances provided within the Notification.

DECISION

HC at the very outset observed that the Assessee's case was not covered within the Notification and accordingly the CIT had no power to grant waiver of interest under the Notification. However, the HC held that despite the Assessee's case not being covered within the Notification, it was entitled to the waiver of interest and the HC in exercise of its writ jurisdiction could order waiver, applying the legal principles applicable in the case of winding up of a company.

The HC observed that the company under liquidation continues to exist as a juristic personality till the order of its ultimate dissolution is passed and only after such order is passed, the company ceases to exist. The HC noted that the Assessee was directed to be wound up by an order dated June 18, 2001, and it was only in October 2006 that this order was set aside by the HC. Thus, it held that the Assessee was under a legal disability during the said period as it could not have discharged any liabilities without the approval of the court.

Further, it also noted that the IRA had the opportunity to participate in the winding proceeding or the revival proceeding to protect its interest, however, it had failed to do so. Thus, the HC held since the Assessee was under the control of the court and the official liquidator from June 18, 2001, to October 2006, it suffered a legal disability and could not pay its taxes. Accordingly, the HC in exercise of its writ jurisdiction waived off the interest demand for the said period and granted relief to the Assessee.

SIGNIFICANT TAKEAWAYS

HC in this case met the Assessee with equity and waived off the interest liability after noting that the Assessee was legally incapacitated to pay its liability. It would be relevant to note that in this case, the HC held the Assessee legally incapacitated from paying its dues, because the Assessee had been ordered to be wound up and it was under the control of the court/liquidator.

This decision reinforces that the HC may, in deserving circumstances, invoke its equity jurisdiction to grant relief to bona fide taxpayers.

[28] De Souza Hotels (P.) Ltd. v. CCIT, (2012) 2017 Taxman 84 (Bombay HC); CCIT v. Rajanikant & Sons W.A.Nos.2020 to 2024 of 2010 (Madras HC).

MAT NOT APPLICABLE TO BANKING COMPANIES BEFORE AY 2013-2014

In the case of ***ING Vysya Bank***[29], the Karnataka HC held that MAT provisions were not applicable to banking companies before AY 2013-2014.

FACTS

ING Vysya Bank ("**Assessee**") was engaged in the business of banking. The Assessee computed its business income and filed returns for the AY 2002-2003. The Assessee claimed that as it was a banking company, section 115JB was not applicable to it. Section 115JB of the Act pertained to special provisions for payment of tax by certain companies and provided a formula for payment of minimum tax in case of companies whose tax payable on the total income worked out to be below a certain minimum threshold percentage of its book profit. The AO held that section 115JB, i.e. MAT provision was applicable to all companies. The order was approved by CIT(A). On further appeal, the ITAT allowed the appeal of the Assessee and held that section 115JB was not applicable to the Assessee as it was a banking company. This order of the ITAT was assailed by the IRA before the Karnataka HC.

> **Banks are not required to pay MAT under section 115JB till AY 2012-2013.**

ISSUE

Whether section 115JB was applicable to banking companies?

ARGUMENTS

The IRA contended that the then section 115JB(2) of the IT Act[30], mandated companies to prepare its profit and loss account for the relevant previous year in accordance with provisions of Part-II and Part-III of Schedule-VI to the Companies Act, 1956. Therefore, the said provision is applicable to every company and no exclusion was made in respect of banking companies or insurance companies. The IRA further contended that section 115JB(2) of the IT Act, contained a legal fiction insofar as it pertained to the requirement contained in section 210 of the Companies Act, 1956, which prescribed that the company shall lay down its accounts before the annual general meeting.

The Assessee, on the other hand, contended that banking companies are not required to prepare their accounts as per schedule VI of the Companies Act, 1956 since they are governed under Banking Regulation Act, 1949. It further submitted that while these banking companies are under an obligation to lay their accounts in their annual general meeting in terms of section 210 of the Companies Act, 1956, but the said accounts are not prepared under Schedule VI of the Companies Act, 1956, as required under section 115JB(2) of the IT Act. Therefore, the vires of section 115JB of the IT Act is not applicable to banking companies.

DECISION

The Karnataka HC agreed with the contention of the Assessee that section 115JB(2) of the IT Act applied to every company, which prepared its profit and loss account for relevant previous year in accordance with provisions of Part II and Part III of Schedule VI of the Companies Act, 1956. The Assessee being a banking company was not required to prepare its account in accordance with provisions of Part II and Part III of Schedule VI of the Companies Act, 1956, but had to prepare its accounts in accordance with the Banking Regulation Act, 1949. Further, in terms of section 210 of the Companies Act, 1956, the companies are required to place the accounts prepared in

[29] CIT v. Vysya Bank Ltd., ITA No 18/2014 (Karnataka HC).
[30] Prior to its amendment with effect from 01.04.2013.

accordance with Part II or Part III of Schedule VI in the annual general meeting. However, the Assessee in terms of the Companies Act, 1956, was required to prepare those accounts in accordance with the provisions of the Banking Regulation Act, 1949.

It further held that section 211 of the Companies Act, 1956 required companies to prepare the accounts under Schedule VI, but the proviso to section 211(1) of the Companies Act, 1956 excluded the banking companies/insurance companies from the ambit of section 211. By virtue of the same, banking/insurance companies were excluded from the ambit of section 115JB of the IT Act as well.

The HC also held that a banking company under Section 115JB(2) of the Act can prepare additional accounts as per Part II and Part III of Schedule VI of the Companies Act or place the accounts prepared as per Banking Regulation Act, 1949 before the annual general meeting, but it cannot fulfil both the conditions. The HC relied on ***CIT v. B.C. Shrinivasa Setty***[31] and held that machinery provisions provided in section 115JB were wholly unworkable in case of a banking company. Therefore, the HC held that MAT provision was not applicable to Assessee.

SIGNIFICANT TAKEAWAYS

The decision is in line with the Bombay HC decision in ***CIT v. Union Bank of India***[32] wherein the Bombay HC after analysing the legal provisions and legislative history of the provisions, took a similar view and held that MAT provisions were not applicable to banking companies. Notably, the IRA has filed a special leave petition in the SC against this judgment, which was admitted by the SC last year on September 30, 2019. Therefore, the issue is not yet finally settled and the possibility of SC taking a contrary view cannot be ruled out.

It is pertinent to note that section 115JB was amended prospectively by Finance Act 2012 w.e.f. AY 2013-2014, which *inter alia* states that the companies that are not required prepare their accounts as per Schedule VI of the Companies Act, 1956, but governed under some other legislations would also be covered under the ambit of section 115JB of the IT Act. Therefore, MAT provisions are applicable to banking/insurance companies as well from AY 2013-2014 onwards.

[31] (1981) 128 ITR 294 (SC).
[32] CIT v. Union Bank of India, (2019) 263 taxman 685 (Bombay HC).

"SOURCE OF SOURCE" NEED NOT TO BE PROVED UNDER SECTION 68

In the case of ***M/s Ami Industries (India) P Ltd***[33], the Bombay HC held that the taxpayer having proven the genuineness of the transactions and identity and credit-worthiness of the parties from whom share application money was received, onus placed on it under the provisions of section 68 of the IT Act stood discharged. Bombay HC concluded that the taxpayer was not required to prove the source of funds of the parties from whom share application money was received.

FACTS

M/s Ami Industries (India) Private Limited ("**Assessee**") received share application money from three companies based out of Kolkata during the FY 2009-10. The AO made inquiry from the Assessee regarding the share application money received by it, in response to which the Assessee submitted the following documents:

i. PAN of the investor companies;

ii. Copy of their income tax returns for AY 2010-11;

iii. Confirmation letter from investor companies in respect of share application money paid by them; and

iv. Copy of bank statements of investor companies.

In order to verify the contentions of the Assessee, the AO also called for a report from the investigation wing of the IRA. In its report, the investigation wing concluded that the investor companies were very much in existence and had filed income tax returns as well. However, the AO in his order observed that these companies were mere entities on paper and did not respond to his notices. The AO further recorded in his order that these companies had no funds of their own and had disclosed meagre income in their income tax returns. On this basis, the AO held in his order that the credit worthiness of these companies was doubtful and made addition in case of Assessee under section 68 of the IT Act.

The Assessee filed appeal before CIT(A) and submitted certain additional evidence, which included a copy of board resolutions of investor companies for payment of share application money to the Assessee. The CIT(A) deleted the addition made by the AO and held that the Assessee had already discharged his onus under section 68 of IT Act. The CIT(A) further held that not responding to the notice issued by AO would not mean that investor companies do not have credit worthiness and although they had meagre income in their income tax returns, they could have still invested the money out of borrowed funds. Further, the CIT(A) held that there was no requirement under section 68 of the IT Act for the Assessee to explain the *"source of source"* of credit i.e. source of funds of investor companies.

The issue was carried in appeal to the ITAT and the ITAT dismissed the appeal of the IRA and held that Assessee had duly discharged its onus under section 68 of IT Act. It held that copy of bank statements of investor companies showed that these companies had necessary funds available at the time of transfer of share application money to Assessee. ITAT further specified that the Assessee need not prove the *"source of the source"* of funds and that it was the AO who failed to show whether the investor companies were fictitious persons or benamidars. Being aggrieved by the ITAT order, the IRA preferred the instant appeal to the HC.

ISSUES

Whether the onus is on the Assessee under the provisions of section 68 of the IT Act to prove the source of the source of credit i.e. source of funds of

[33] Pr. Commissioner of Income Tax -1 v. M/s. Ami Industries (India) P Ltd., ITA No. 1231 of 2017, (Bom HC).

investor companies making payment for share application money to the Assessee?

ARGUMENTS

The IRA argued that the Assessee was not able to substantiate the source of funds of the investor companies. Hence, the Assessee did not prove credit worthiness of the aforesaid companies and failed to discharge the onus placed on it under the provisions of section 68 of the IT Act.

In this regard, it placed reliance on SC's ruling in the case of ***NRA Iron & Steel Pvt Ltd.***[34] In the said case, several companies from whom share capital/ premium was received by the taxpayer were found to be non-existent at the address given by the taxpayer during the course of the inquiry carried on by the AO. Further, some companies from whom share capital/ premium was received by the taxpayer did not produce their bank statements from which their balance and source of funds could have been verified and some of them even had meagre income in their income tax returns. Basis the above, the SC in its order had held that the taxpayer was not able to establish the credit worthiness of the investor companies and failed to discharge the onus placed on it under the provisions of section 68 of IT Act.

“No requirement under section 68 to explain the “source of source” of credit till AY 2012-2013.”

The Aassessee argued that the aforesaid decision of the SC was not applicable in the present case and it nowhere held that the taxpayer is required to prove the *“source of the source”* of funds. The Assessee further placed reliance on the report of the investigation wing of the IRA and orders passed by the CIT(A) and ITAT and contended that it had already discharged its burden under section 68 of IT Act.

DECISION

The HC in its order held that the ruling in the case of ***NRA Iron & Steel Pvt Ltd.***[35] was not applicable to the facts of this case as in that case, the internal report of the IRA itself indicated that some of the shareholders were non-existent or lacked credit worthiness and accordingly, it was held by the SC that the identity of shareholders was not proved.

The HC distinguished the aforesaid ruling and held that in the present case, the AO had referred the matter to the investigation wing of the IRA in Kolkata for enquiring into the aforesaid three investor companies. The investigation wing in its report noted that aforesaid companies existed and had duly filed their income tax returns. The HC further observed that the AO did not consider the findings of its investigation wing in his assessment order and did not even share the aforesaid report with the Assessee.

Insofar as the argument of the IRA that the credit-worthiness of the parties was not proved, the ITAT in its order had already held that there were sufficient documents on record in the form of bank statements of investor companies along with their board resolutions to show that there were funds available in the bank accounts of the investor companies from which they had made payments to the Assessee.

Further, the HC held that the Assessee was not required to prove the *“source of the source”* of the funds under the provisions of section 68 of the IT Act. In this regard, it relied on its recent decision in the case of ***Gaurav Triyugi Singh***[36]. In the said case, the AO enquired into the source of funds of the party which had extended an unsecured loan to the Assessee and found that this particular lender had received gifts in the form of money from its family members. The AO further found out that these family members had received cash deposits in their bank accounts right before transferring funds to the aforesaid lender and finding it questionable made addition under section 68 in the hands of Assessee, which was upheld by the CIT(A) and the ITAT. However, the Bombay HC deleted the addition in aforesaid case and held that there is no requirement under the provisions of section 68 of the IT Act for an Assessee to further explain the source of credit of the party from whom it receives funds.

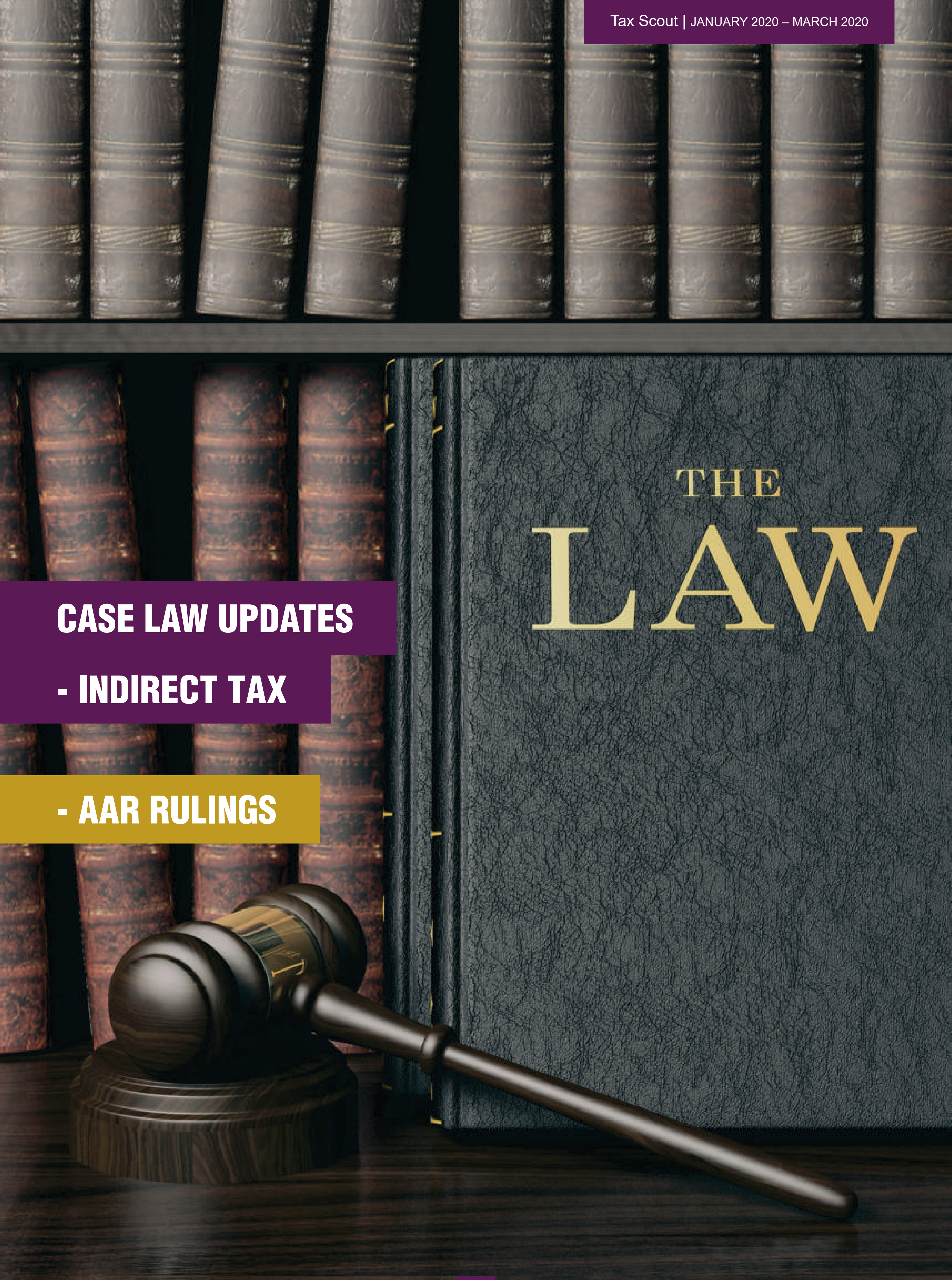
[34] NRA Iron & Steel Pvt Ltd. v. Principal Commissioner of Income Tax (Central) 1, C.A. No. 2463/ 2019 (SC).
[35] NRA Iron & Steel Pvt Ltd. v. Principal Commissioner of Income Tax (Central) 1, C.A. No. 2463/ 2019 (SC).
[36] Gaurav Triyugi Singh v. Income Tax Officer-24(3)(1), ITA No. 1750 of 2017 (Bombay HC).

Basis the above judgement, the facts being similar, the HC upheld the deletion of additions made in the case of the Assessee.

SIGNIFICANT TAKEAWAYS

Section 68 of the IT Act seeks to tax *"any sum"* credited in the books of an Assessee, if the Assessee is not able to offer a satisfactory explanation as to the nature and the source of such credit. In order to curb circulation of unaccounted money, section 68 is considered an important section vide which burden is placed on an Assessee to prove the genuineness of the party from whom funds are received. However, the scope of this section was limited and an Assessee could not be held liable if AO is not satisfied with the *"source of its source"* of funds in view of section 68 as it stood prior to amendment made *vide* Finance Act, 2012. It was of course open to the AO to undertake separate scrutiny of these other parties and if they were unable to offer a proper explanation as to the immediate source of their funds and AO was not satisfied with their response, he was at liberty to proceed against such parties and could make separate addition in their hands.

It should be noted that Section 68 was amended *vide* Finance Act, 2012, and two provisos were inserted to Section 68 w.e.f. AY 2013-14, which specifically provided that if a closely held company received share application money/ share capital/ share premium or like amount from any party, it should also establish the source of the money in the hands of such shareholders and thus a higher onus was placed on the taxpayers from AY 2013-14 onwards. If the Assessee failed to discharge the said additional onus, the sum would be treated as undisclosed income.



CASE LAW UPDATES
- INDIRECT TAX
- AAR RULINGS

GENERATION OF ELECTRICITY USING COAL SUPPLIED BY THE PRINCIPAL AMOUNTS TO 'JOB WORK'

In the case of ***JSW Energy Ltd.,***[37] the Maharashtra AAAR held that the conversion of inputs into another form will not change the character of the activity from being a job work. It also clarified that the involvement of a third party for transportation of the processed inputs to the principal does not result in non-compliance of the requirements under section 143 of the CGST Act.

FACTS

JSW Energy Ltd. ("**Appellant**") was engaged in the business of manufacturing and supplying of electricity to M/s. JSW Steel Limited ("**JSL**"). JSL was engaged in the business of manufacturing steel and required electricity. The Appellant proposed to enter into a job work agreement with JSL for generation of power for which coal was provided by JSL. The title in coal as well as the power generated vested with JSL. The electricity generated was to be transmitted to JSL by using a power grid of Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**").

The Appellant approached the Maharashtra AAR to determine the treatment of its supplies to JSL in terms of the CGST Act. The AAR held that the supply of electricity obtained from converting coal was a supply of goods and the activity of the Appellant would not qualify as job work. Aggrieved by the ruling, the Appellant appealed to the AAAR, which modified the ruling of AAR. However, the AAAR held that the activity was not job work due to the involvement of a third entity MSEDCL and substantial use of air and water (Appellant's input). It also relied on two new grounds to arrive at its decision:

> **"A transaction will continue to be a job work even when a third party is involved in the same transaction."**

I. Coal was not covered as an input under the Standard Input Output Norms (SION) for steel products under the FTP;

ii. JSL's inputs i.e. coal was consumed/ transformed and could not be returned back to JSL.

The Appellant challenged the ruling before the HC. The HC set aside the AAAR ruling for violation of principles of natural justice and directed the AAAR to reconsider the appeal.

ISSUE

Whether the activity of generating electricity undertaken by the Appellant on behalf of JSL, amounted to "job work"?

ARGUMENTS

The Appellant contended that electricity, which was used as intermediate goods for manufacture of final products by JSL, could be generated on job work basis. The Appellant relied on various judicial precedents in support of its claim.[38] The Appellant submitted that coal was an input for the principal (i.e. JSL). In this regard, the Appellant relied on the definition of 'input' under the CGST Act, which was wide in nature and included coal that was used in generating electricity, which was further utilised in manufacture of steel. The Memorandum of Association of JSL was furnished to show that generation of electricity was one of the businesses of JSL. Additionally, Circular No. 79/53/2018-GST, dated December 31, 2018, provided that coal would be considered as an input for the production of aluminium as it was indirectly consumed for the captive generation of electricity. The Appellant also submitted that it had been availing credit of tax paid on procurement of coal, which was upheld in Appellant's own case.

Additionally, the Appellant contended that it fulfilled the necessary conditions required to be satisfied for its

[37] In re, JSW Energy Ltd., TS-133-AAAR-2020-NT (AAAR-Maharashtra).
[38] Commissioner of Central Excise, Nagpur v Indorama Textiles Ltd., 2010 (260) ELT 382 (Bom HC); Haldia Petrochemicals Ltd. v. CCE, Haldia, 2006 (197) ELT 97 (Tri- Delhi).

activity to qualify as job work under the GST legislations. The inputs provided by JSL were returned in form of electricity within postulated timelines. The AAAR erroneously observed that job work arrangement required only two persons. In this regard, the Appellant contended that movement of inputs from JSL to Appellant's premises and subsequent return on completion were undertaken on a medium. The Appellant drew a parallel with tangible goods where they were transported through rail and the same was being regulated by the railway authorities. Similarly, in the instant case, MSEDCL was a regulator and medium to transfer the electricity through grid. In this context, the Appellant placed reliance on various judicial precedents, that input tax credit was available where electricity generated was made available through the power board.[39] Thus, the transaction of supply back of power generated to JSL on processing of inputs supplied by JSL fulfilled the condition of bringing back of inputs.

The Appellant also contended that coal provided by JSL constituted 95% of the cost of manufacture of power, and air and water constituted a negligible cost. The Appellant relied on the case of ***Prestige Engineering (India) Limited***,[40] wherein the SC had held that addition or application of minor items by job worker would not exclude the underlying transaction from being treated as job-work.

The department on the other hand contended that the conditions for job work were not satisfied. Firstly, JSL would require cooking coal to manufacture steel, and not just steam coal. Therefore, steam coal used for the generation of electricity was not an input for JSL. Thus, JSL was availing credit, which was otherwise not available to it. Thus, the department was of the view that as steam coal was an input for the Appellant and not an input for JSL, the condition regarding supply of inputs belonging to JSL for job work was not satisfied. Secondly, in the instant case, the Appellant received coal (tangible goods) and supplied electricity (intangible goods) in return. Thus, the requirement that the goods were required to be returned within a specified timeline was also not satisfied. In this regard, the department also submitted that the electricity produced by the Appellant would not be solely for JSL's consumption on account of absence of agreement. Thirdly, in relation to the contention that third party was involved, the department alleged that in terms of the CGST Act, only two parties were involved in job work. The example cited by the Appellant regarding rail authority was contended to be unsustainable as rail authority did not engage in buying products and selling them, whereas, MSEDCL bought and sold electricity.

DECISION

The AAAR revised its earlier ruling and held that coal was an input for JSL, as the same was utilised for generating electricity, which was used in manufacturing of steel. In this regard, the AAAR relied on the Appellant's submissions, such as, the definition of inputs, judicial interpretation, circular and the MOA of JSL, which clearly reflected that coal was an input for the Appellant.

In relation to the fulfilment of essential conditions for an activity to qualify as job, the AAAR followed the settled position of law that electricity could be produced in a job work transaction. The irreversibility of electricity to coal would not lead to non-fulfilment of conditions prescribed for job work. Also, utilisation of a thirty party to act as a medium to transfer electricity did not violate any conditions.

Further, as regards the utilisation of air and water, the AAAR relied on the case of ***Prestige Engineering (India) Limited***, and was of the view that as the cost of coal (primary raw material) was substantial, addition of minor inputs did not alter the character of the underlying transaction.

SIGNIFICANT TAKEAWAY

Various big enterprises establish separate companies for proper management and diversification of specific activities essential to their core business. Such companies are related and provide services to each other. The earlier ruling by AAAR had disturbed their functioning and made them reconsider their business model. However, the present ruling has resettled the principle that the conversion of inputs into another

[39] DCW Ltd. v. Commissioner of C. Ex., Triunelveli, 2016 (332) ELT 142 (Tri.-Chennai).
[40] Prestige Engineering (India) Limited v. Collector of C. Excise, Meerut, 1994 (73) ELT 497 (SC).

form will not change the character thereof, for the purposes of job work. The goods supplied by the principal to the job worker for conversion into another form, which are to be used in manufacture of the final product directly or indirectly, shall be treated as 'inputs' under the GST regime. It has also been clarified that the involvement of a third party for transportation of the processed inputs to the principal does not result in non-compliance of procedure contemplated in relation to job-work. Thus, the ruling would play a significant role in functioning of enterprises that get electricity generated captively on job work basis.

CASE LAW UPDATES

- INDIRECT TAX

- OTHER JUDICIAL PRONOUNCEMENTS

ALLOWING EMPLOYEES TO EXIT THE COMPANY WITHOUT SERVING NOTICE PERIOD IS NOT IN THE NATURE OF TOLERATING AN ACT

In the case of ***GE T&D India Limited***,[41] the Madras HC held that the amount recovered from an employee in lieu of not serving notice period would not be supply of service by the employer or employee. Thus, it would be outside the scope of levy of service tax.

FACTS

M/s GE T&D India Limited ("**Petitioner**") had entered into employment agreements wherein the employees were required to serve a notice in advance for a period ranging from two to three months, prior to quitting from employment. Such period was utilised by the Petitioner to find and recruit new employee to enable a smooth transition of work. The employment agreement also provided an option to the outgoing employee to avoid serving the notice period in lieu of compensation of certain amount. This amount was equivalent to the pro-rata salary for the duration of the notice period not served. Thus, the Petitioner had received compensation in lieu of not serving notice period from the outgoing employees. The department ("**Respondent**") was of the view that the Petitioner had facilitated the termination of employment. It relied on section 66E(e) of the Finance Act, which provided that the service of agreeing to refrain from an act or to tolerate a situation would be deemed to be a declared service. Hence, service tax would be leviable on such amounts received by the Petitioner. Thus, the Respondent issued seven show cause notices to different units of the Petitioner, alleging non-payment of service tax on compensation in lieu of notice period. The Respondent confirmed the levy of service tax by its order. Aggrieved by the order, the Petitioner challenged it by filing a batch of writ petitions in the HC.

> **Notice pay, in lieu of sudden termination, does not give rise to rendition of service either by the employer or the employee.**

ISSUE

Whether acceptance of compensation in lieu of notice period from outgoing employees by the Petitioner amounts to tolerating an act under section 66E(e) of the Finance Act?

ARGUMENTS

The Respondent put forth an argument that payment in lieu of notice period constituted payment to an employer by the employee for the notice period in case the employee desired an immediate exit from the organisation. Such an act of the Petitioner accepting payment in lieu of waiving the notice period amounted to an act of tolerating the situation of an immediate exit by the employee. Thus, it was a declared service as per section 66E(e) of the Finance Act.

The Petitioner argued that no service of tolerating an act was provided by it. The Petitioner further relied on Paragraph 2.9.3 of the Education Guide issued by the CBIC. The said paragraph provided that where amounts had been received by an employee from the employer in case of premature termination of contract of employment, the same formed a part of provision of service by an employee to the employer and was therefore, outside the ambit of taxable service under the Finance Act.

[41] GE T&D India Limited v. Deputy Commissioner of Central Excise, Chennai, 2020-VIL-39-MAD-ST (HC- Mad).

DECISION

The HC reviewed the clarification specified in Education Guide and observed that the clarification provided dealt with a reverse situation as compared to the instant case. The HC was of the view that the Petitioner had merely facilitated the exit of the employee by recovering compensation in lieu of notice period. The definition of declared service under section 66E(e) of Finance Act did not apply in the current scenario as the Petitioner had not tolerated any act of the employee but had permitted an exit upon payment of compensation. The employment agreement had to be read as a whole. Only those situations, which in terms of the contract constitute rendition of service, such as, non-compete would be exigible to service tax.

SIGNIFICANT TAKEAWAY

The present ruling would be significant even after the implementation of GST as the provision of Entry 5(e) of Schedule II of the CGST Act is *pari materia* with section 66E(e) of the Finance Act. Most of the advance rulings dealing with Entry 5(e) of Schedule II of the CGST Act have been pro-revenue. They have held that amounts received on account of penal charges or compensation or delayed charges are in the nature of consideration in lieu of agreeing to tolerate certain acts.[42]

However, recently the Bombay HC in ***Bai Mamubai Trust v. Suchitra***,[43] dealing with Entry 5(e) of Schedule II of the CGST Act also held that an act of illegal occupation, which may be compensated in damages would not amount to a voluntary act of granting access of the property. Such payment lacks the necessary quality of reciprocity to make it a 'supply'. More such rulings are necessary for buttressing the scope of Entry 5(e) of Schedule II of the CGST Act and section 66E(e) of the Finance Act.

[42] In re Maharashtra State Power Generation Company Limited, TS-464-AAAR-2018-NT; In re: M/s North American Coal Corporation India Private Limited, 2018 (10) TMI 1399; In re: M/S. Dholera Industrial City Development Project Ltd, 2019 (8) TMI 1217; In re: M/S. General Manager Ordnance Factory Bhandara, 2019 (6) TMI 1236.

[43] Bai Mamubai Trust v. Suchitra, TS-736-HC-2019 (BOM)-NT - (HC-Bom).

LEVY OF TAX ON OCEAN FREIGHT ULTRA-VIRES THE IGST ACT

In the case of ***Mohit Minerals Pvt. Ltd.,***[44] the Gujarat HC held that the Central Government lacked the legislative competency to impose a levy of IGST on ocean freight. Therefore, levy of IGST on ocean freight is *ultra-vires* with respect to the IGST Act.

FACTS

Mohit Minerals Pvt. Ltd. ("**Petitioner**") was engaged in importing non-cooking coal and supplying the same to various domestic industries. The Petitioner was paying IGST on Cost, Insurance and Freight ("**CIF**") value at the time of import itself, which *inter-alia* included value of ocean freight. However, in terms of Entry 10 of the Notification No.10/2017-Integrated Tax (Rate), dated June 30, 2017[45] ("**RC Notification**"), read with Corrigendum to Notification No.8/2017-Integrated Tax (Rate), dated June 28, 2017[46] (to the extent it related to ocean freight) (referred together as "**Impugned Notifications**"), the Petitioner was made liable to pay IGST again on ocean freight.

Therefore, the Petitioner challenged the legality and validity of the Impugned Notifications.

ISSUES

1. Whether IGST could be levied on supply of services by a person located in non-taxable territory by way of transportation of goods from a place outside India up to the ports in India, under the IGST Act?
2. Whether the Impugned Notifications to the extent they imposed IGST on ocean freight were *ultra vires* the IGST Act?

ARGUMENTS

The Petitioner argued that in terms of the mandate of section 1 of the IGST Act, the IGST Act extended only to the whole of India and not outside India. Therefore, the Central Government lacked legislative competency to impose IGST on a transaction where both the service provider and the service recipient were outside India.

The Petitioner also argued that wherever the intention of the Government was to have an extra-territorial jurisdiction, it provided for explicit provisions to extend its operations. For instance, the provisions of section 1 of the Customs Act as amended by the Finance Act, 2018, extended its operation to offences committed outside India. However, the IGST Act did not extend to the supplies made outside India, and therefore, IGST could not be levied on supplies provided outside India merely by way of issuing the Impugned Notifications.

> **"Collection of IGST on ocean freight from importer is not permissible in law."**

The Petitioner further argued that at the time of import, IGST was levied on coal goods purchased on the CIF value and the Petitioner had paid taxes on the same. In such circumstances, to levy and collect IGST once again under the same Act on the same aspect of supply would amount to double taxation. The Petitioner argued that double taxation was impermissible under the law and therefore, the Impugned Notifications were liable to be held illegal and unconstitutional.

The Petitioner also argued that the supply of goods along with transportation, insurance, etc., was a composite supply, where the principal supply was the supply of coal. Accordingly, where the IGST was already paid on the value of coal on CIF basis (including the ocean freight), IGST could not be

[44] Mohit Minerals Pvt. Ltd. v. Union of India & others, 2020-TIOL-164-HC-AHM-GST, (Gujarat HC).

[45] Entry 10 of the RC Notification provided that for services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the importer of such goods shall be the recipient of services and be liable to tax on the same under reverse charge.

[46] The Corrigendum provided that where the value of taxable service in relation to the Ocean Freight Transaction was not available with the person liable for paying integrated tax, the same shall be deemed to be 10 % of the CIF value of imported goods.

charged again on ocean freight as a separate supply under the Impugned Notifications.

Lastly, the Petitioner argued that under section 5(3) of the IGST Act,[47] the tax liability could only be shifted on the 'recipient' on reverse charge basis by way of issuing a notification. However, as per the Impugned Notifications, the liability to pay tax was shifted to the 'importer' and not on the 'recipient', and that too in case of a transaction, which was not even exigible to tax under the IGST Act. Therefore, the Impugned Notifications to the extent they related to ocean freight, were *ultra vires* under section 5(3) of the IGST Act.

The Union of India and others ("**Respondents**") on the other hand, contended that the levy of IGST on ocean freight under the Impugned Notifications was aimed at providing level playing field to the Indian shipping lines. The Respondents contended that as the transportation of goods by foreign shipping lines was not taxable in India, importers preferred foreign shipping lines over Indian Shipping lines, which rendered them uncompetitive vis-à-vis foreign shipping lines.

The Respondents also argued that there was no double taxation in levying IGST on import freight service, as the taxing event for the said levy was 'transportation of goods', which was distinct from the tax on 'import of goods'. Additionally, the levy did not result in any additional cost to the importer as GST paid by the importer on inward transportation of goods as well as on import freight services was available as ITC. The Respondents further argued that as per section 13(9) of the IGST Act, the place of supply of services of transportation of goods was the place of destination of such goods. Accordingly, in the instant case, as the goods were destined for India, such supply were taxable in India, being inter-state supply under section 8 of the IGST Act.

The Respondents contended that supply could only be said to be principal supply when all the supplies were separately mentioned in the invoice and one of the supplies was identified as the principal supply. However, in case of supply on CIF basis, only the total value of goods was stated in the invoice and therefore, it could not be held to be a composite supply. Therefore, the Respondents argued that the argument of the Petitioner that tax was charged on composite supply and hence it should not have been charged again, cannot stand.

Lastly, the Respondents argued that the Impugned Notifications to levy IGST on ocean freight, were issued in terms of the power granted to the Central Government under section 5(3) of the IGST Act and therefore, could not be held to be without the authority of law and ultra vires the IGST Act.

DECISION

The Gujarat HC, at the outset, noted that section 5(3) of the IGST Act provided power to the Government to specify the categories of supply on which tax was payable by the recipient of the supply and not any other person. Whereas, in the instant case, the foreign exporter entered into a contract with the shipping lines for availing the services of transportation of goods in a vessel. The obligation to pay consideration for such transportation was of the foreign exporter and the Petitioner was not at all concerned with either the manner of delivery or the consideration to be paid to the shipping company. Thus, the Petitioner had neither availed the transportation services nor had paid consideration to the foreign shipping lines, and hence, could not be held to be 'recipient' of the service of transportation of goods as per section 2(93) of the CGST Act.[48] Therefore, the Gujarat HC held that the Petitioner could not be made liable to pay IGST on ocean freight.

The Gujarat HC also observed that the legislature while enacting the IGST Act was aware of the wide provisions under the Finance Act, which provided the Government the power to collect tax under reverse charge basis not only from the recipient of the service, but from any other person as may be prescribed. However, while enacting the IGST Act, the legislature consciously curtailed the power of the Government to collect tax under the reverse charge basis from any person and restricted it only to the recipient of the supply.

As regards the argument of supply of transportation of goods and/ or services being taxable in India, the HC observed that for section 8 of the IGST Act to apply,

[47] Section 5(3) of the IGST Act provides that "the Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be made on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or Both.

[48] Section 2(93) of the CGST Act provides the definition of recipient of supply of goods or services or both.

both the location of the supplier and the place of supply should be in India. However, in the present case, the location of the supplier, i.e. the foreign shipping line and the place of supply, were both outside India. Therefore, the HC held that the supply of services by way of transportation of goods was not an intra-state supply under section 8 of the IGST Act.

The HC held that having paid IGST on the amount of freight, which is included in the value of the imported goods, the Impugned Notifications levying tax again as a supply of service, without any express sanction by the statute, was illegal and liable to be struck down.

SIGNIFICANT TAKEAWAY

This is another landmark decision of the Gujarat HC wherein it has quashed the levy of tax on ocean freight paid for import of goods under reverse charge. It may be noted that earlier, the Gujarat HC had also struck down the notification levying service tax on ocean freight under reverse charge mechanism. Following the decision of the Gujarat HC in the present case, the Calcutta HC has also held that levy of IGST on ocean freight is *ultra-vires* with respect to the IGST Act.[49]

The levy of IGST under the Impugned Notifications had caused a lot of hardship on the importers as the they were subjected to double taxation, with no certainty on the availability of ITC on payment of such taxes. The situation of importers was further worsened by the decisions of the AARs, which had confirmed the levy of IGST on ocean freight. In such circumstances, this decision of the Gujarat HC brings huge relief to importers by putting a full stop on the confusion and burden of double taxation.

However, as the Impugned Notifications (to the extent applicable to ocean freight) have been held to be unconstitutional, the question that arises now is that what happens to the past transactions where the importers have already paid taxes on ocean freight. Therefore, it is now imperative that the Government provide clarity on such issues. The Gujarat HC has in another writ petition, issued direction to file for refund of the GST paid on such import and also directed the authorities to process such claim at the earliest.

[49] MCPI Private Ltd. & another v. Union of India & Others, W. P. 11303 (W) of 2019, Calcutta HC.

LIMITATION ON TRANSITION OF UNUTILISED CREDIT INTO GST IS REASONABLE AND VALID

In ***Nelco Limited***,[50] the Bombay HC held that the limitation stipulated under rule 117 of the CGST Rules[51] for transition of CENVAT credit was not *ultra-vires* with respect to the CGST Act. The HC held that the aforesaid rule was neither arbitrary nor unreasonable, and the same was traceable to the power conferred under section 164(2) of the CGST Act.[52]

FACTS

Nelco Limited ("**Petitioner**") was engaged in the supply of various network-related services. The Petitioner had accumulated CENVAT Credit in the pre-GST regime. The Petitioner attempted to file TRAN-1 Forms on December 27, 2017. However, it could not file the same due to technical problems on the common portal. The Petitioner wrote emails to the concerned authority, highlighting the technical issue. Subsequently, the GST Anti-evasion officials visited the premises of the Petitioner on March 28, 2018. However, the grievance of the Petitioner was not addressed.

> **Rule 117 of the CGST Rules is neither unreasonable nor arbitrary and hence, is not violative of Article 14 of the Constitution**

The Petitioner made its last communication on April 23, 2018, requesting the GST authorities to permit filing TRAN-1 Form. However, the same was also not answered. As there was no option of manually filing the TRAN-1 Form, and the Petitioner was in danger of losing the CENVAT Credit accrued.

Therefore, the Petitioner filed the present writ petition, challenging rule 117 of the CGST Rules as *ultra vires* to section 140 of the CGST Act[53] to the extent that it prescribed a time limit for filing of TRAN-1 Form.

ISSUE

Whether rule 117 of the CGST Rules was *ultra vires* to section 140 of the CGST Act and Article 14 of the Constitution?

ARGUMENTS

The Petitioner argued that phrase used in section 140 as "prescribed manner" could not empower the tax authorities to prescribe the period of limitation. It contended that whenever legislatures wanted to confer rule-making power, they used specific phraseology to provide such power. Therefore, where the phrase 'prescribed manner' was used, the legislature only intended to confer ruling making power for prescribing the manner for transition of CENVAT credit and not to provide any time limit.

The Petitioner further argued that the rule-making power to prescribe time limit could not be traced to general rule-making power under section 164 of the CGST Act as well. Therefore, rule 117 of the CGST Rules, to the extent it provided a time limit, was *ultra vires* the CGST Act.

The Petitioner lastly contended that even assuming there was a general rule-making power under section 164 of the CGST Act, it could not have been exercised to take away substantive rights. The Parliament, under this provision had given a right to transition the credit for the earlier period without any limitation under section 140(1), and this substantive right could not have been taken away by the CGST Rules.

The Union of India and others ("**Respondents**") on the other hand argued that there was a presumption to the legality and validity of subordinate legislation, and the burden was heavy on those who asserted its invalidity.

The Respondents further contended that section 140 of the CGST Act was a transitional provision, which by its very nature was limited by time duration. It was also

[50] Nelco Ltd. v. Union of India & others (Writ Petition no. 6608 of 2018) (Bombay HC).
[51] Rule 117 of the CGST Act provides for the limitation for transition of CENVAT credit from the erstwhile regime into the GST regime.
[52] Section 164(2) of the CGST Act empowers the Government to make rules for all or any of the matters which by CGST Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.
[53] Section 140 of the CGST Act provides for transitional arrangements for ITC.

argued that rule 117 of the CGST Rules was traceable to section 164(2) of the CGST Act, which provided the general rule-making power. The Respondents, therefore, contended that rule 117 of the CGST Rules was neither contrary to any provisions of the CGST Act, nor did it take away any substantive right.

DECISION

The Bombay HC looked into the provisions pertaining to ITC and rule-making power under the CGST Act and observed that under the GST regime, the availment of ITC was a time bound process. The HC also observed that the under the pre-GST regime also, the CCR prescribed conditions for availment of that credit. The HC, therefore, held that as the availment of ITC itself was conditional, the transition of the same could not be without any limitation.

The HC further observed that under the scheme of the CGST Act, the reference to ITC was not by way of a right, but as a concession. Therefore, prescribing a condition by way of time-limit under the CGST Rules was not contrary to the object of the CGST Act.

The HC further observed that the powers conferred by section 164(2) of the CGST Act were broad and pervasive and the time limit in rule 117(1) of the CGST Rules was traceable to the rule-making power conferred in section 164(2) of the CGST Act.

In light of the above, the HC held that the time limit under rule 117(1) of the CGST Rules was not *ultra vires* to the CGST Act.

Further, with regard to the violation of Article 14 of the Constitution, the HC noted that under the fiscal laws, in order to allocate the resources, it was necessary to know the amount of taxes available by a particular time. The time limit for availing of ITC in the transitionary provisions was thus rooted in the larger public interest of having certainty in allocation and planning. The HC held that upholding only the right to carry forward the credit and ignoring the time limit would have made the transitional provision unworkable, and therefore, could not be exercised in perpetuity, and therefore, had to be a time bound provision.

Accordingly, the HC held that the time limit stipulated under rule 117 of the CGST Rules was neither unreasonable or arbitrary nor violative of Article 14 of the Constitution.

SIGNIFICANT TAKEAWAY

This decision of the Bombay HC once again confirms that while CENVAT credit is a vested right, the same is not absolute and the Government can, rightly so, impose restrictions and limitations on the availment thereof. In this decision, the HC, however, did acknowledge that section 140 of the CGST Act only gave the power to prescribe the manner in which the transition could be done.

However, it may be noted that the aforesaid provision i.e. section 140 of the CGST Act has now been amended by the Finance Act, 2020, to empower the Government to prescribe time limit for transition of credit. This indicates that the Government was mindful of its mistake on lack of power to prescribe the time limit under the transitional provision. However, now that the Bombay HC has in the present held that as the legislature was empowered to prescribe time limit under the wider power prescribed under section 164 of the CGST Act, the insertion of such power in the transition provision, is seemingly redundant.

POWER TO CONDUCT SERVICE TAX AUDIT EVEN AFTER INTRODUCTION OF GST UPHELD

In ***Aargus Global Logistics Pvt. Ltd.***,[54] the Delhi HC upheld the validity of rule 5A of the ST Rules, post the introduction of GST and directed the company to comply with the notice issued for conducting audit in terms of rule 5A of the ST Rules.

FACTS

Aargus Global Logistics Pvt. Ltd. ("**Petitioner**") was engaged in the business of providing freight forwarding services to its clients. It had offices across the country, including Delhi, Gujarat, Haryana, Karnataka, etc. For the purpose of service tax, the Petitioner had a centralised registration at Delhi.

The Petitioner received notices under rule 5A of the ST Rules, dated November 06, 2019 and January 13, 2020, issued by the Assistant Commissioner ("**Respondent No. 2**"), requiring the Petitioner to provide several documents and records for verification.

ISSUES

1. Whether rule 5A of the ST Rules was beyond the rule-making power of the Union of India ("**Respondent No. 1**") and was *ultra vires* the Finance Act?
2. Whether rule 5A of the ST Rules had lapsed after introduction of the GST, on the premise that there was no saving of the said provision under the CGST Act?

ARGUMENTS

The Petitioner contended that rule 5A of the ST was in conflict with the provisions of the Finance Act and beyond the rule-making power of Respondent No. 1, as the provisions of the Finance Act did not specifically grant the power to Respondent No. 1 to make a rule of the kind framed in rule 5A of the ST Rules.

The Petitioner further contended that rule 5A of the ST Rules did not survive the enactment of the CGST Act, as Chapter V of the Finance Act, which brought in the service tax regime, stood omitted. The Petitioner submitted that Clauses (d) and (e) of section 174(2) of the CGST Act should be read in conjunction; on conjoint reading it is evident that what was not affected by the omission of Chapter V of the Finance Act, was "*duty, tax, surcharge, fine, penalty, interest*", which were due, or may become due even after the enactment of the CGST Act and the omission of Chapter V of the Finance Act.

> **Power vested in the Competent Authorities to recover short or non-paid service tax would remain a dead letter, if they are not empowered in terms of rule 5A of the ST Rules.**

The Petitioner argued that the failure of the Parliament to mention the word "*Rules*", along with the Finance Act in section 174(2) of the CGST Act, meant that the ST Rules were not saved for the purpose of enforcing the saving provisions.

The Petitioner submitted that under sub-clause (2) of rule 5A of the ST Rules, only specified documents could be called for and not the documents as sought by the Respondents vide notice dated November 06, 2019, read with notice dated January 13, 2020.

DECISION

The HC observed that the Parliament had consciously, while enumerating the specific matters in respect of which Rules may be framed in terms of section 94(2) of the Finance Act, preserved the general rule making power of the Central Government. The only statutory limitation placed on the said rule making power was that the Rule(s) should have been framed for the purpose of enforcing the service tax regime. The HC held that there was

[54] Aargus Global Logistics Pvt Ltd vs. Union of India & Anr. (2020-VIL-137-DEL-ST) (Delhi HC).

absolutely nothing that suggested that the said power did not encompass the power to frame a Rule of the kind as rule 5A of the ST Rules. The HC also held that the power vested in the competent authorities to recover service tax under section 73 of the Finance Act would remain a dead letter, if the competent authority under the said Act was not empowered in terms of rule 5A of the ST Rules.

The HC observed that clause (e) of section 174(2) of the CGST Act clearly empowered the competent authorities to initiate and institute fresh proceedings under service tax legislations, despite it being omitted by section 173 of the CGST Act. The HC stated that there was nothing to show that the Parliament intended to grant blanket immunity to all assessees whose past acts and omissions fell afoul of the provisions of, *inter alia*, Chapter V of the Finance Act.

The HC observed that to the extent the provisions of Chapter V to the Finance Act were saved, they would not stand omitted by amendment to the Finance Act. The HC also held that the ST Rules were framed under Chapter V of the Finance Act and were saved by Clause (b) of section 174(2) of the CGST Act, which stated that, *inter alia*, anything duly done under Chapter V of the Finance Act, shall not be affected by the amendment of the Finance Act. The HC also observed that the powers of the competent authorities to, *inter alia*, institute investigation, inquiry, etc., stood preserved by virtue of section 6 of the General Clauses Act, 1897.

The HC observed that perusal of the notice dated November 06, 2019, showed that the Respondents had called for records, which the Petitioner was obliged to maintain in terms of rule 5 of the ST Rules.

Basis above, the HC held that rule 5A of the ST Rules had not lapsed after the introduction of GST and accordingly, dismissed the petition and directed the Petitioner to comply with the notices.

SIGNIFICANT TAKEAWAY

Interestingly, there are divergent rulings on the legality of the power of the department to undertake audit under rule 5A of the ST Rules, under the service tax regime and the GST regime. However, under the service tax regime the matters challenging the validity of rule 5A of the ST Rules are sub-judice before the SC.[55]

The detailed judgment of the Delhi HC, upholding the legality of rule 5A of the ST Rules, i.e., powers of the authority to conduct service tax audit even after the enactment of the GST law, may impact various interim orders passed in similar matters by different high courts across jurisdictions in India. It is also likely to cast additional burden on taxpayers as most of them would have already undergone an investigation/ audit for the same period.

[55] Union of India v. Mega Cabs Pvt. Ltd., 2015 (44) STR 277 (SC); Union of India v. Travelite (India), 2016 (45) STR J317 (SC).

POWER TO PROVISIONALLY ATTACH A BANK ACCOUNT CAN BE USED ONLY IN LIMITED CIRCUMSTANCES AND CONTINGENCIES

In ***Kaish Impex Private Limited***,[56] the Bombay HC quashed an order for provisional attachment of bank account belonging to a person, who was merely summoned to produce documents and evidences (in relation to an investigation initiated against another person), holding the same to be without jurisdiction. The Bombay HC held that the power to issue an order for provisional attachment of property was not an omnibus power and could be exercised only in limited circumstances and contingencies mentioned in section 83 of the CGST Act.[57]

FACTS

Kaish Impex Private Limited ("**Petitioner**") was engaged in the export of perfumes and compound fragrance oil and in this regard, had carried out various transactions with different export firms.

The Director General of GST Intelligence ("**Respondent**") initiated an enquiry against an export firm M/s Maps Global ("**Firm**"), alleging its involvement in fraudulent availment of ITC. The Respondent alleged that the Firm utilised ITC for payment of export goods, and later sought a refund of the same. During the enquiry, the Respondent noticed that the Firm had transferred INR 28,50,000 to M/s Balajee Enterprises ("**Balajee**") in June and July 2019 and Balajee had subsequently transferred INR 1,63,00,000/- to the Petitioner on October 17, 2019.

In this regard, on October 22, 2019, the Petitioner was issued summons under section 70 of the CGST Act[58] to give evidence and produce documents to the Respondent. The Respondent alleged that they had reasons to believe that the Petitioner had facts and documents material to the inquiry. On the same day, the Respondent also issued a communication to the State Bank of India ("**Bank**"), requesting for a provisional attachment the bank account of the Petitioner under section 83 of the CGST Act. Accordingly, the Bank issued a communication to the Petitioner on November 5, 2019, regarding attachment by the Respondent.

Aggrieved by the above, the Petitioner challenged the action of attachment the bank account by the Respondent under section 83 of the CGST Act.

ISSUE

Whether the action of the Respondent to issue direction for attachment of the bank account was legal and valid under section 83 of the CGST Act?

ARGUMENTS

The Petitioner contended that the action of provisional attachment of a bank account could be taken only when there was pendency of proceedings under sections 62, 63, 64, 67, 73 and 74 of the CGST Act[59] and the parameters laid down in section 83 of the CGST Act were satisfied. The Petitioner submitted that it had merely received a summon to appear before the Respondent to produce documents and evidence under section 70 of the CGST Act and no other proceedings under any of the aforesaid provisions were initiated against him.

> **"Bank account of a taxable person cannot be provisionally attached when specific proceedings are initiated against another taxable person."**

[56] Kaish Impex Private Limited v. the Union of India (2020-TIOL-151-HC-MUM-GST) (Bombay HC).

[57] Section 83 of the CGST Act provides for the provisional attachment to protect the revenue in certain cases including the pendency of proceedings under sections 62, 63, 64, 67, 73 and 74 of the CGST Act.

[58] Section 70 of the CGST Act provides power to the proper officer to summon any person whose attendance he considers necessary to give evidence or to produce documents or any other thing in any inquiry.

[59] Sections 62, 63, 64, 67, 73 and 74 of the CGST Act provide for provisional assessment where the taxable person is unable to determine the value of supply or the rate of applicable; assessment of unregistered persons; summary assessment in certain special cases; power of inspection, search and seizure; proceedings for determination of tax not paid or under paid for any reason other than fraud or any wilful-misstatement or suppression of facts; and proceedings for determination of tax on account of fraud or any wilful-misstatement or suppression of facts, respectively.

The Petitioner further argued that since the enquiry for fraudulent availment of ITC was initiated against the Firm, then if at all required, the order for provisional attachment of bank account could only be made against the Firm and not the Petitioner. Therefore, it was argued that the Respondent had no jurisdiction to issue an order for provisional attachment of bank account of the Petitioner.

The Respondent, on the other hand, argued that power of provisional attachment was conferred upon them to protect the interests of Revenue, and this was a fit case where this power had to be exercised. The Respondent further argued that language of section 83 of the CGST Act indicated that during the pendency of any proceedings (in this case under section 67 of the CGST Act), if a summon was issued under section 70 of the CGST Act to further the inquiry to other taxable persons, provisional attachment of the bank account of other taxable persons was also permissible and contemplated. Accordingly, the present petition was liable to be dismissed.

DECISION

The Bombay HC observed that under section 83 of the CGST Act, a property could be provisionally attached only when there were proceedings under sections 62, 63, 64, 73 and 74 of the CGST Act, pending against a person and the relevant authority had an opinion that it was necessary to attach the property for protecting the interest of the Government's revenue. The HC further noted that rule 159 of the CGST Rules[60] required issuance of an order for provisional attachment of property in the prescribed format. As per the format, the order had to refer to the provisions under which the proceedings were launched against such a taxable person and contain the name of the said taxable person

The HC, however, observed that in the present case, the order for provisional attachment had referred to proceedings under sections 67 and 70 of the CGST Act (and not under any of the provisions mentioned under section 83 of the CGST Act), as being initiated against the Petitioner.

The HC held that the order for provisional attachment of the bank account could only be issued to a taxable person against whom the proceedings under the provisions referred in section 83 of the CGST Act were initiated. Section 83 of the CGST Act did not provide for an automatic extension of the power to issue order against any other taxable person, from an inquiry specifically launched against a taxable person under these provisions.

The HC further held that the power to provisionally attach the bank account was a drastic power and could not to be routinely exercised. Such power was not an omnibus power and had to be exercised only in contingencies provided under section 83 of the CGST Act.

Accordingly, the HC held that where specified proceedings were launched against one taxable person, the bank account of another taxable person could not be provisionally attached merely based on the summons issued under section 70 of the CGST Act to him. The Bombay HC, therefore, held that the order pertaining to provisionally attaching the bank account of the Petitioner was without jurisdiction and liable to be quashed and set aside.

SIGNIFICANT TAKEAWAY

The present decision of the Bombay HC is the first decision where the Court has examined the power of the authorities under the GST laws to issue order for provisional attachment of bank account in detail. In its decision, the HC seemed to be mindful of the fact that while there has been an increase in the number of tax frauds under GST laws, under the guise of protecting the Revenue of the Government, the tax authorities have been increasingly invoking this provision and illegitimately harassing innocent taxpayers. Therefore, the HC has rightly held that considering the consequences that ensue from provisional attachment of bank accounts, the power given to the GST authorities to provisionally attach the property has to be exercised in good faith. Thus, this decision gives a breather to all businesses that are under the constant fear of getting their bank accounts attached.

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60 Rule 159 of the CGST Rules provides for the procedure for provisional attachment of property.

AAR CAN DECIDE ON THE QUESTION PERTAINING TO PLACE OF SUPPLY

In ***Sutherland Mortgage Services Inc,***[61] the Kerala HC held that AAR had the jurisdiction to determine 'place of supply' and clarified that the same would be covered within the larger entry pertaining to 'determination of liability to pay tax'.

FACTS

Sutherland Mortgage Services Inc. ("**Petitioner**") was the Indian branch office of M/s Sutherland Mortgage Services Inc. USA ("**Principal Company**"). The Petitioner did not have a legal existence separate from the Principal Company. The Principal Company was engaged in mortgage business and as per the applicable laws in the US, it was prevented from outsourcing its work to any third party. Accordingly, the Petitioner executed an intra-company agreement with the Principal Company to provide Information Technology enabled services (*viz*. mortgage orientation, primary servicing, special servicing, cash management and analytics and reporting) to customers located outside India. The Principal Company also entered into agreements with customers outside India for provision of services from the US and the Indian branch (i.e. location of the Petitioner). The Petitioner invoiced the Principal Company for the costs incurred by it in performance of the abovementioned services on actuals and the same was reimbursed by the Principal Company.

> **Power to determine liability to pay GST on a transaction encompasses reviewing of its place of supply.**

The Petitioner was of the opinion that the services were directly provided by it to overseas customers and no services were provided to the Principal Company. Therefore, such services qualified as exports in terms of the IGST Act. The Petitioner filed an application for advance ruling on whether supply of services by the Petitioner to customers outside India was exigible to GST. The AAR rejected the application of the Petitioner on the basis that it involved determination of "place of supply", which did not fall within the ambit of issues that could be determined by the AAR in terms of section 97(2) of the CGST Act and the AAR lacked jurisdiction to entertain the application of the Petitioner. Aggrieved by the said ruling, the Petitioner filed the present writ petition before the Kerala HC.

ISSUE

Whether AAR was legally correct in not examining questions pertaining to place of supply in terms of section 97(2) of CGST Act?

ARGUMENTS

The Petitioner contended that determination of place of supply of a transaction was relevant to ascertain taxability of a transaction. The Petitioner further contended that the view taken by AAR was legally wrong and that AAR had jurisdiction to entertain the application on merits and to determine all the issues, including the issue relating to the determination of the place of supply in terms of section 97(2) of the CGST Act.

The Respondents strongly urged that the view taken by AAR was legally correct and did not require any interdiction in the current judicial review proceedings. The Respondents argued that the crucial issue to be determined in this case was in relation to the determination of the place of supply and the same could not be the subject matter of an advance ruling, as it was not covered within the ambit of section 97(2) of the CGST Act. Hence, the AAR lacked jurisdiction to decide on the said issue and that the AAR had rightly refused to answer the query in terms of section 97(2) of the CGST Act.

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[61] Sutherland Mortgage Services Inc v. The Principal Commissioner and Ors. (2020 (3) TMI 186) (Kerala HC).

DECISION

The HC observed that section 97(2)(e) of the CGST Act i.e. determination of liability to pay tax on any goods or services or both was wide in nature and the Parliament clearly mandated that one could seek advance rulings on the aforesaid issue and the authority was obliged to answer. The HC acknowledged the fact that issues relating to determination of place of supply was not expressly covered under section 97(2) of the CGST Act, but such an issue would come within the ambit of the larger issue of determination of liability to pay tax on any goods or services or both in order to provide precision and clarity on taxability.

The HC held that the AAR rejected the application and proceeded on a tangent, missing the crucial aspect of the matter, by taking a very hyper technical view that it lacked jurisdiction since the said issue was not expressly enumerated in the CGST Act. The HC observed that the view taken by the AAR is legally wrong and thus, the matter required a judicial review in the instant proceedings. The HC disposed-off the writ petition and remitted the matter back to the AAR for fresh consideration.

SIGNIFICANT TAKEAWAY

The judgment is a welcome decision as it provides much needed clarity to AAR while dealing with matters involving determination of 'place of supply' in order to determine taxability. Further, considering the fact that many applications have been rejected by the AAR on the ground that determination of the “place of supply” is not covered under section 97(2) of the CGST Act; this judgment holds considerable significance. However, the Government need to relook at the provisions pertaining to AAR as section 97(2) of the CGST Act as it is still not wide enough to cover all the issues where a taxpayer may seek a ruling such as refund of tax, applicability of penal provisions, procedural issues, etc.

REGULATORY DIRECT TAX UPDATES

Ordinance promulgated to give effect to the extension of time limits related to direct tax compliances

The Central Government promulgated The Taxation And Other Laws (Relaxation Of Certain Provisions) Ordinance, 2020 ("**Ordinance**") on March 31, 2020, to bring into effect compliance relief measures for taxpayers in the wake of COVID -19 that were announced by the Ministry of Finance last week.

The last date of filing of original as well as revised income-tax returns for the FY 2018-19 has been extended till June 30, 2020. Aadhaar-PAN linking last date has been pushed to June 30, from March 31. Taxpayers can also avail the Vivad se Vishwas Scheme till June 30, without additional payment of 10% for settling outstanding tax disputes.

The date for commencement of operation for SEZ units for claiming deduction under deduction 10AA of the IT Act has also been extended to June 30, for the units which received necessary approval by March 31, 2020. Also, investment, construction or purchase made up to June 30, shall be eligible for claiming deduction from capital gains under sections 54 to 54GB of the IT Act, arising in FY 2019-20. Further, reduced rate of interest of 9% shall be charged for non-payment of income-tax, including advance tax, tax deducted at source, tax collected at source, equalisation levy, Securities Transaction Tax, Commodities Transaction Tax, which are due for payment from March 20 till June 29, if they are paid by June 30. Further, no penalty or prosecution shall be initiated for these non-payments.

The Ordinance clarified that taxpayers could make investments or payments in LIC, Public Provident Fund and National Savings Certificates under section 80C, medi-claim under section 80D and donations under section 80G till June 30, for claiming deductions for FY 2019-20. The Ordinance also allowed for 100% exemption on donations made to PM CARES fund, set up to aid containment and relief efforts against the virus outbreak.

CBDT notifies common application form for FPI's registration and PAN allotment

Rule 114 of the IT Rule, *inter alia*, provides that a non-resident may obtain a PAN by filling Form 49AA and submitting certain specified documents. However, Rule 114 also provides that a certain category of taxpayers as notified by the Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems) may apply for a PAN under a common application form, as notified by the Central Government.

Recently, the Ministry of Finance, Department of Economic Affairs (SEBI) vide notification F. No. 411 5/2016-ECB, dated 27/01 /2020 has notified a common application form for FPIs, to enable them to seek registration as a FPI, obtain PAN and for opening a bank and a Demat account.

Pursuant to this notification, the CBDT, vide Notification No.11 of 2020 ("**Notification**"), has notified FPIs, as the class of person who may apply for PAN through the common application form i.e. as notified in the notification F. No. 411 5/2016-ECB. The Notification also lays down the procedure of filling the form and provides that SEBI after conducting due examination and generating the FPI registration certificate will forward the data in Form 49AA to prescribed Income tax authority through the signature of authorised signatories of its designated depository participants.

CBDT issues notification to make PAN inoperative if not linked with Aadhaar

On February 13, 2020, CBDT amended the IT Rules to introduce a new Rule 114AAA for making PAN inoperative if not linked with the Aadhaar. Rule 114AAA prescribes that where a person who has been allotted PAN as on the July 1, 2017, and is required to intimate his Aadhaar number under sub-section (2) of section 139AA, fails to do so on or before March 31, 2020, the PAN of such a person shall become inoperative from April 1, 2020, for the purposes of IT Act. In order to make the PAN operative, the concerned person would have to intimate the Aadhar number. The PAN would become operative again from the date of intimation of Aadhar number. In light of the coronavirus pandemic, the Central Government *vide* Taxation and other Laws (Relaxation of Certain Provisions) Ordinance, 2020, dated March 31, 2020, has extended the date of PAN-Aadhar linking to June 30, 2020.

However, during the period that the PAN is inoperative, Rule 114AAA(2) provides that furnishing of an inoperative PAN is deemed to have not furnished or intimated PAN, consequently, such a person would be liable to consequences under the IT Act read with IT Rules.

Section 139AA(2) of the IT Act, inserted *vide* Finance Act 2017, provides that every person who has been allotted PAN as on July 1, 2017, and who is eligible to obtain an Aadhar number, shall intimate his Aadhar number to the prescribed authority. The SC in the case of ***Justice K.S. Puttaswamy (Retd)***[62] upheld the constitutional validity of section 139AA of the IT Act. However, the Gujarat HC in the case of ***Bandish Saurabh Soparkar v. Union of India***[63], noted that the question of whether the Aadhar Act, 2019, has been rightly introduced as 'money bill' has been referred to a larger bench by SC in ***Rojer Mathew v. South Indian Bank Ltd.***[64] and held that PAN not linked with Aadhar shall not be declared inoperative till the SC delivers judgment in the aforesaid case.

CBDT notifies "other securities" for IFSC related capital gains exemptions under section 47(viiab) of IT Act

The IT Act levies taxes on gains arising from the transfer of capital assets, subject to certain exemptions. However, transfers of specific capital assets taking place at a recognised stock exchange located in an IFSC are exempt from the levy of capital gains tax. Among the list of exempt transfers, any transfer made by a non-resident, of:

a) bonds or Global Depository Receipts ("**GDRs**") or;

b) rupee denominated bonds ("**RDBs**") of Indian Company or;

c) derivative[65] or;

d) any other securities[66] notified by the Central Government;

on a recognised stock exchange located in an IFSC is exempt from the levy of capital gains tax.[67] However, such transaction would be exempt only when the consideration for the transaction is paid or payable in foreign currency.

CBDT, *vide* notification 16 of 2020 dated March 05, 2020, has notified what constitutes *other securities* for the purposes of exemption. Accordingly, the circular specifies following five securities to be covered under the ambit of *other securities:*

a) foreign currency denominated bond;

b) unit of a mutual fund;

c) unit of a business trust;

d) foreign currency denominated equity share of a company; &

e) unit of alternative investment fund,

which are listed on a recognised stock exchange located in any IFSC, in accordance with SEBI/IFSC regulations, as the case may be, are now eligible for the said exemption.

CBDT issues notification notifying new rules pertaining to application for opting for reduced corporate tax rate under section 115BAA and section 115BAB

Domestic companies and newly incorporated manufacturing companies may avail the option to pay lower corporate tax at the rate of 22% and 15%, respectively, under section 115BAA and section 115BAB upon fulfilment of certain conditions. CBDT issued a notification on February 12, 2020, to amend the IT Rules to provide for the form of application to be submitted by companies opting for concessional taxation regime. The notification has introduced two new rules, namely rule 21AE and 21AF in the IT Rules. Rule 21AE states that in order to exercise the option of paying corporate tax at the rate 22% under section 115BAA, the domestic company must make an application in Form No. 10-IC on or after April 01, 2020. Form No. 10-IC requires standard details about the domestic company, including PAN, nature of business, registered address and date of incorporation. Rule 21AF states that in order to exercise the option of paying corporate tax at the rate

[62] (2019) 1 SCC 1 (SC).
[63] (2020) 113 taxmann.com 416 (Gujarat HC).
[64] (2019) 111 taxmann.com 208 (SC).
[65] As defined under Section 2(ac) of the Securities Contracts (Regulation) Act, 1956.
[66] As defined under Section 2(h) of the Securities Contracts (Regulation) Act, 1956.
[67] Section 47 (viiab) of IT Act.

of 15% under section 115BAB, newly incorporated manufacturing companies, must make application in Form No. 10-ID on or after April 01, 2020. Further, tax authorities have been empowered under rule 21AE and rule 21AF to specify the procedure for filing of Form No. 10-IC and Form No. 10-ID and verification process for the same.

CBDT extends the deadline for submission of Form 9A and Form 10

The CBDT *vide* the Income-tax (1st Amendment) Rules, 2016[68] amended Rule 17 of the IT Rules and notified Form 9A and Form 10 to be electronically filed by charitable trusts or institutions in order to exercise the option of accumulation of income provided for under section 11(1) and section 11(2) of the IT Act, applicable from AY 2016-17 onwards.

However, several representations had been made to CBDT for condonation of delay in filing Form 9A/ Form 10 as AY 2016-17 was the first year of e-filing of these forms and several trusts were not able to make the filings within the specified time. In this regard, the CBDT has powers under section 119(2)(b) of the IT Act to authorise any income tax authority to admit an application for granting any relief under the IT Act, after the expiry of the specified period for avoiding genuine hardship that the assessees may face and deal with the same on merits.

Consequently, the CBDT *vide* Circular[69] dated December 20, 2018, in exercise of its powers under section 119(2)(b) of the IT Act, authorised the Commissioner of Income Tax (Exemptions) ("**CIT(E)**") to admit applications for belated filing of Form 9A and Form 10 filed by assessees for AY 2016-17 and to decide such applications on merit, depending on whether there is reasonable cause to allow such applications for condonation of delay. Subsequently, *vide* another Circular[70] dated December 17, 2019, the applicability of the aforementioned Circular was extended to AY 2017-18 as well.

Now, the CBDT *vide* another Circular[71] dated February 19, 2020, has stated that as per the provisions of section 13(9) of IT Act, the condonation of delay in filing Form 9A or Form 10 is not of use as long as the other condition specified under section 13(9) is satisfied. Hence, it has announced that for AY 2016-17, 2017-18 and 2018-19, where income tax returns have been filed before March 31 of the respective AYs, CIT(E) shall admit the applications for condonation of delay in filing income tax returns and decide them on merit, thus providing valuable relief to trusts and charitable institutions that have not been able to file their income tax returns within the due date under section 139(1) of IT Act.

[68] CBDT Notification dated January 14, 2016.
[69] Circular No. 7 of 2018 dated December 20, 2018.
[70] Circular No. 30 of 2019 dated December 17, 2019.
[71] Circular No. 6 of 2020 dated February 19, 2020.

REGULATORY INDIRECT TAX UPDATES

CBIC notifies requirement of Aadhar

Notification No. 18/2020-Central Tax and Notification No. 19/2020-Central Tax dated March 23, 2020, provide that with effect from April 01, 2020, a taxpayer shall undergo authentication of Aadhaar number at the time of submitting an application for registration under GST legislations.

In case where a taxpayer is not an individual, the authentication would be carried out for the following persons:

i. Authorised signatory of all types;

ii. Managing and authorised partners of a partnership firm; and

iii. Karta of a Hindu undivided family.

Where an Aadhaar number is not assigned to a relevant person, the registration shall be granted only after physical verification of the principle place of business in the presence of the said person.

Notification No. 17/2020 dated March 23, 2020, provides that the requirement of authentication of Aadhaar number would not apply to a person who is not a citizen of India or to a class of person other than an individual seeking registration or (a), (b) and (c) mentioned above.[72]

Amendment to CGST Rules

Notification No. 16/2020 – Central Tax dated March 23, 2020 notified the following major amendments to the CGST Rules:

i. Ceiling fixed for computation of turnover of zero-rated supply of goods: The definition of "Turnover of zero-rated supply of goods" has been amended to provide that the value of zero-rated supplies of goods would be the lesser of:

   a. The value of zero-rated supplies of goods made during the relevant period, without the payment of tax under bond or letter of undertaking; or

   b. the value, which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier.

ii. Nature of refund in case of excess payment of tax: The mode of refund in case of excess payment of tax has been prescribed. The refund would be in cash (proportionate to the amount paid in cash against the total tax liability for the relevant period) and the rest by recrediting the ITC.

iii. Benefit of refund in case of export of goods or services: A taxpayer is eligible to claim refund of IGST paid on exports of goods or services, where it has not availed benefit of certain notifications stated in rule 96(10) of the CGST Rules. An explanation has been added in Rule 96(10) of the CGST Rules, w.e.f. October 23, 2017, to clarify that where only exemption of BCD is availed, the taxpayer would continue to be eligible for refund.

iv. Recovery of refund on export of goods where export proceeds are not realised within the time prescribed under FEMA: A new rule 96B in the CGST Rules has been introduced to recover amounts, which have been refunded on export of goods in case the export proceeds are not realised within the period allowed under the FEMA (including any extension of such period) ("**Period**"). A taxpayer is now obliged to deposit the refund to the extent of non-realisation of sale proceeds, along with applicable interest within thirty days of the expiry of the Period. In case of a failure to do so; recovery proceedings would be initiated in terms of sections 73 or 74 of the CGST Act.

The Rule provides that recovery proceedings would not be initiated where the RBI writes off the requirement of realisation of sale proceeds on merits. Additionally, any recovered amount would be refunded where the taxpayer produces evidence of realisation within a period of three months from the date of realisation of sale proceeds (extended period as permitted by the RBI).

Standard Operating Procedures ("SOP") for exporters

CBIC *vide* Circular No. 131/1/2020-GST dated January 23, 2020, has prescribed SOPs to expedite verification of genuine exporters, while mitigating the risk of monetisation of credits fraudulently obtained or

[72] Notification No. 17/2020-Central Tax dated March 23, 2020.

ineligible through refund of IGST on exported goods. The SOP provides the following:

i. The refund scrolls of exporters selected through department internal mechanism ("Exporter(s)") are to be kept in abeyance till the verification report is received.

ii. Such Exporters would be notified by the department.

iii. Exporter to provide details in the form prescribed in the circular.

iv. The jurisdictional CGST authorities may seek additional information if required.

v. The verification has to be completed within 14 working days of receipt of information from exporter. The jurisdictional nodal cell to be informed, if verification is not complete within the timeline.

vi. Mechanism to escalate the matter and manner of registering grievances.

Clarification on appeal to the Appellate Tribunal with regard to its non-constitution

CBIC *vide* Circular No. 132/2/2020-GST dated March 18, 2020, provided that the limitation period prescribed to file an appeal before the Appellate Tribunal against an order in appeal would be three months (six months in case of appeals by the Government) from the date of communication of order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later. The authorities have also been advised to dispose all pending appeals expeditiously without waiting for the constitution of the Appellate Tribunal.

Foreign airlines exempted from furnishing reconciliation statement

Notification No. 09/2020-Central Tax dated March 16, 2020, provides a foreign airline company (who are complying with requisite Company law provisions) shall not be required to furnish reconciliation statements in FORM GSTR-9C, along with annual returns. However, this would be subject to submission of a statement duly certified by a CA, pertaining to receipts and payments for the FY (in respect of its Indian Business operations) by September 30 of the year succeeding the said FY.

Change in valuation rule and rate of lottery run by state

Notification No. 01/2020-Central Tax (Rate) dated February 21, 2020, read with Notification No. 08/2020-Central Tax dated March 02, 2020, provides that even state-run lottery would be exigible to GST @ 28%, which is the same as rate on lottery authorised by the state. The value of supply of state-run lottery shall be deemed to be 100/128 of the face value of ticket or of the price as notified in the Official Gazette by the Organising State, whichever is higher.

Exemption of duties of Customs against scrips issued under Regional Authority under the Scheme for Rebate of State and Central Taxes and Levies ("RoSCTL") scheme

Notification No. 13/2020, dated February 14, 2019, provides that goods imported against a scrip issued under RoSCTL scheme would be exempt from levy of BCD and additional customs duty[73] ("**Additional Duty**").

Similarly, goods imported against a scrip, issued under Additional ad hoc incentive scheme, would be exempted from the levy of BCD and Additional Duty.

Such exemption would be subject to prescribed conditions, *inter alia* including issued as per FTP. scrips are registered with the Customs Authority at the port of registration, imports and exports are undertaken through the notified ports, etc.

Exemption of duties of Customs against scrips issued under the 2% Additional ad hoc incentive

Notification No. 14/2020, dated February 14, 2019, provides that goods imported against a scrip issued under the 2% Additional ad hoc incentive would be exempted from the levy of BCD and Additional Duty. However, such Additional ad hoc incentive scrips must be issued against export of following goods (LET order

[73] Duties levied under section 3 (1), 3(3) and 3(5) of CT Act.

dates from January 01, 2020, to March 31, 2020), namely:-

i. Mobile phones, other than push button type; and

ii. Mobile phones, push button type.

Transportation of Goods (through Foreign Territory), Regulations, 2020, notified

Notification No. 16/2020-Customs (N.T.) dated February 21, 2020, notified documentation and compliances for the movement of goods:

i. under the Agreement on the Use of Chattogram and Mongla Ports for Movement of Goods to and from India between the People's Republic of Bangladesh and the Republic of India;

ii. under the Protocol on Inland Water Transit and Trade between the People's Republic of Bangladesh and the Republic of India (not applicable to the movement of export-import cargo between India and Bangladesh or export to third countries under the said agreement); and

iii. from one part of India to another through a land route, which lies partly over the territory of a foreign country, not being a movement covered above.

Amendment to FTP and HBP

Notification No. 57/2015-2020, dated March 31, 2020, and Public Notice 67/2015-2020, dated March 31, 2020, notified the following major amendments to the FTP and HBP:

i. To ensure policy continuity, the current FTP and HBP, has been extended till March 31, 2021.

ii. The services eligible and the rate of reward for SEIS scrips for services rendered during the period April 01, 2019 to March 31, 2020 would be as per Appendix 3 X. The last date for filing SEIS applications for FY18-19 shall be December 31, 2020. For the services rendered w.e.f. April 01, 2020, decision on continuation of the SEIS scheme will be taken subsequently and notified accordingly.

iii. Exemption from payment of IGST and Compensation Cess on imports made under Advance Authorisations / EPCG Scheme and by EOUs, etc., has been extended up to March 31, 2021.

iv. Validity of period for making import expiring between February 01, 2020 and July 31, 2020 in the case of DFIA and EPCG stands automatically extended by six months from the date of expiry, without requirement of obtaining such endorsement on these authorisations.

v. Similarly, where the period to make export is expiring between February 01, 2020 and July 31, 2020 under various authorisations, automatic extension in the export obligation period is allowed for another six months from the date of expiry, without payment of any composition fee.

vi. Validity period of the Status Holder Certificates is also extended. This will enable Status Holders to continue to avail the specified facilities/benefits.

GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
AAAR	Hon'ble Appellate Authority for Advance Rulings
ACIT	Learned Assistant Commissioner of Income Tax
AE	Associated Enterprises
AO	Learned Assessing Officer
APA	Advance Pricing Agreement
AY	Assessment Year
BCD	Basic Customs Duty
Customs Act	Customs Act, 1962
CbC	Country by Country Reporting
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CCR	CENVAT Credit Rules, 2004
CEA	Central Excise Act, 1944
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Service Tax Appellate Tribunal
CETA	Central Excise Tariff Act, 1985
CGST	Central Goods and Service Tax
CGST Act	Central Goods and Service Tax Act, 2017
CGST Rules	Central Goods and Service Tax Rules, 2017
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeal)
CRISIL	Credit Rating Information Services of India Limited
CST	Central Sales Tax
CST Act	Central Sales Tax Act, 1956
CT Act	Custom Tariff Act, 1975
CVD	Countervailing Duty
DCIT	Learned Deputy Commissioner of Income Tax
DIT	Learned Director of Income Tax
DGFT	Directorate General of Foreign Trade
DRP	Dispute Resolution Panel
DTAA	Double Taxation Avoidance Agreement
EPCG	Export Promotion Capital Goods
Finance Act	Finance Act, 1994
FMV	Fair Market Value
FTP	Foreign Trade Policy
FTS	Fees for Technical Services
FY	Financial Year

ABBREVIATION	MEANING
GAAR	General Anti-Avoidance Rules
GST	Goods and Service Tax
GST Compensation Act	Goods and Services Tax (Compensation to States) Act, 2017
HC	Hon'ble High Court
IBC	Insolvency and Bankruptcy Code, 2016
IFSC	International Financial Services Centre
IGST	Integrated Goods and Services Tax
IGST Act	Integrated Goods and Services Tax Act, 2017
INR	Indian Rupees
IRA	Indian Revenue Authorities
IT Act	Income-tax Act, 1961
ITAT	Hon'ble Income Tax Appellate Tribunal
ITC	Input Tax Credit
ITO	Income Tax Officer
IT Rules	Income-tax Rules, 1962
Ltd.	Limited
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
MLI	Multilateral Convention to Implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting
MoU	Memorandum of Understanding
MRP	Maximum Retail Price
NAA	National Anti-profiteering Authority
NCLT	National Company Law Tribunal
OECD	Organization for Economic Co-operation and Development
PAN	Permanent Account Number
PCIT	Learned Principal Commissioner of Income Tax
PE	Permanent Establishment
Pvt.	Private
PY	Previous Year
R&D	Research and Development
SC	Hon'ble Supreme Court
SEBI	Security Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Services Tax
SGST Act	State Goods and Services Tax Act, 2017
SLP	Special Leave Petition
ST Rules	Service Tax Rules, 1994
TCS	Tax Collected at Source
TDS	Tax Deducted at Source

ABBREVIATION	MEANING
TPO	Transfer Pricing Officer
TRC	Tax Residency Certificate
UK	United Kingdom
USA	United States of America
UTGST	Union Territory Goods and Services Tax
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VAT Tribunal	Hon’ble VAT Tribunal

cyril amarchand mangaldas

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DISCLAIMER

Cyril Amarchand Mangaldas
Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai - 400 013 (India)
Tel: +91 22 2496 4455 | Fax:+91 - 22 2496 3666
Website: **www.cyrilshroff.com**
Other offices: New Delhi | Bengaluru | Hyderabad | Chennai | Ahmedabad