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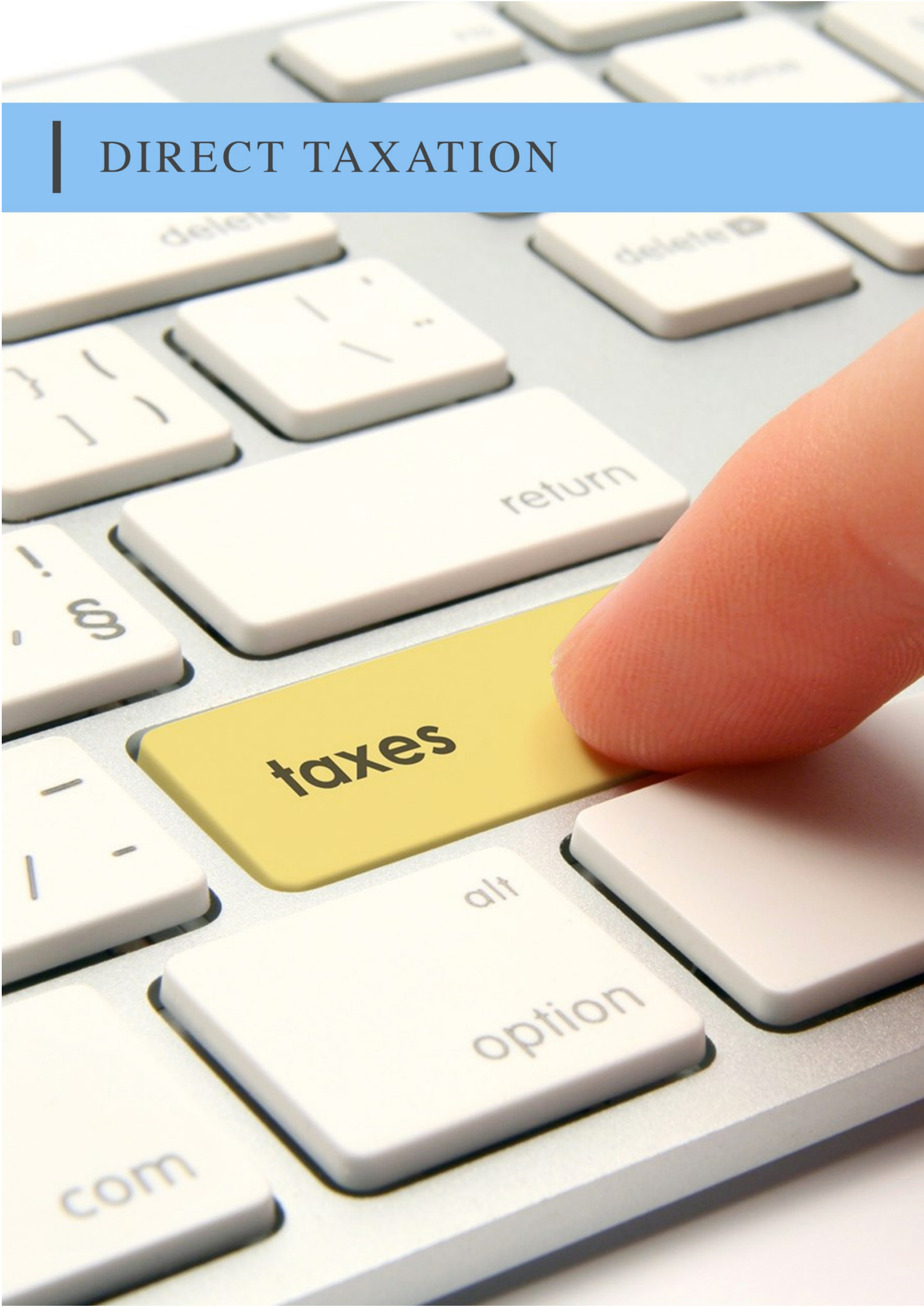
DIRECT TAXATION



RECENT CASE LAWS

Tata Motors Ltd v DCIT (ITA no. 3424/Mum/2019)

Dividend income from 'specified' foreign companies under Section 115BBD is eligible for set-off against business income

FACTS OF THE CASE

- The taxpayer is a company engaged in the business of manufacture of chassis and vehicles for transport of goods and passengers including motor cars and its parts. For the relevant Assessment Year (AY), assessment was completed, wherein the Tax Officer (TO) assessed the total loss at an amount lesser than the amount returned by the taxpayer under the normal provisions of Income-tax Act, 1961 (IT Act), after giving effect to dividend income received from the specified foreign company.
- The Commissioner of Income tax (CIT) invoked the provisions of Section 263 of the IT Act and issued notice to the taxpayer requesting him to submit a detailed submission as to why dividend income received from its foreign company should not be taxed separately at the rate of 15%.
- The taxpayer filed a detailed submission in response to the impugned notice and submitted that it has correctly taxed dividend income received from the foreign company after setting off the business loss. Income taxable at a specified rate must first be set off against income/ (loss) taxable at a higher rate. Had the legislature intended not to allow deduction for set-off of losses, it could very well provide the same under Section 115BBD as done in the case of Section 115BBE of the IT Act.
- However, the CIT rejected the submissions of the taxpayer and held that the provisions of Section 263 are correctly invoked and directed the TO to tax dividend income separately at 15% before setting off any losses.

JUDGEMENT

- On appeal before the Income tax Appellate Tribunal (Tribunal), it was held that, there is no provision to eliminate the dividend income received from the specified foreign company before setting-off business loss unlike Sections 115BBE & 115BBDA wherein a specific restriction is imposed on setting-off any loss;
- Taxable income has to be computed by first computing the total income (based on heads of income) and then applying aggregation of income and set off of losses and deductions. The Tribunal further held that “After determining the taxable income by applying the above Chapters and if still there is profit, then such taxable profit has to be taxed according to the prevailing rates as per the various applicable provisions of the IT Act”. Since, the taxpayer has a substantial loss which is to be set off before applying any other provisions of the IT Act, the Tribunal concluded that “we do not see any reason to treat this assessment as erroneous nor it is passed by erroneous interpretation of facts or law”. Thus, the Tribunal set aside the order passed under Section 263 of the IT Act.

Rajasthan State Electricity Board Jaipur v DCIT (Civil Appeal No.8590 of 2010)

Excess depreciation claimed inadvertently, not 'tax evasion'

FACTS OF THE CASE

- The taxpayer is a Government Company as defined under Section 617 of the Companies Act, 1956. While filing its return of income, the taxpayer had declared a loss, however, it had inadvertently claimed 100% depreciation on written down value of assets instead of 75% in view of the amended law under Section 32(2) of the IT Act.
- The taxpayer was in receipt of intimation under Section 143(1A) of the IT Act wherein the TO had disallowed the excess depreciation claim i.e. 25% and had raised an additional tax demand against the taxpayer under Section 143(1A).

- The taxpayer had filed a rectification petition for rectification of the demand, which was rejected. Simultaneously, the taxpayer also filed a petition under Section 264 of the IT Act praying to delete the additional tax demand, wherein the demand was upheld. The taxpayer challenged the demand before the High Court, wherein the Single Judge allowed the writ petition quashing the demand. On appeal by the Revenue before Division Bench, the writ petition was quashed, upholding the demand of additional tax.

JUDGEMENT

- Supreme Court observed that the object of Section 143(1A) was prevention of tax evasion and to persuade the taxpayers to file their returns carefully to avoid mistakes. The burden of proof is on the department to establish that the taxpayer has, in fact, attempted to evade tax.
- Supreme Court notes that it was due to a bona fide mistake and oversight that the taxpayer claimed 100% depreciation instead of 75%. Additionally, the Supreme Court observed that "in the present case, not even whisper, that claim of 100% depreciation by the taxpayer, 25% of which was disallowed was with intend to evade tax".
- Supreme Court held that Section 143(1A) could not be applied 'mechanically' without establishing that the taxpayer had willfully filed an incorrect return to evade tax and in this case it was uncalled for.

Sony Pictures Networks India DICT (ITA No.971/Mum/2016)

Sony Channel distribution fee payment of cannot be termed as 'royalty'

FACTS OF THE CASE

- The taxpayer is a joint venture company and was engaged in distribution of channels to Local Cable Operators (LCOs), Multi System Operators (MSOs) and Direct to Home (DTH) Operators.
- During AY 2011-12, the taxpayer filed its return of income and reported international transaction with its Associate Enterprise (AE) with respect to distribution fee. The taxpayer benchmarked the transaction of distribution fee by adopting Transaction Net Margin Method (TNMM) and selected software distributor as comparable.
- However, during the proceedings before the Transfer Pricing Officer (TPO), the taxpayer was asked to benchmark its transaction taking LCOs, MSOs & DTH operators as comparable. The TPO held that distribution fee paid by the taxpayer was in the nature of 'royalty' and accordingly benchmarked the international transaction on the basis of 7 Royalty-stat database. The Dispute Resolution Panel (DRP) upheld the adjustments made by the TPO with variations in terms of the agreements selected by the TPO. The DRP also carried out alternative benchmarking by applying internal TNMM as compared to Net Margin earned by taxpayer by distributing AE channel and Non-AE channels
- Pursuant to receipt of directions from DRP, the TO passed the final assessment order by making upward adjustment, which order was challenged before the Tribunal.

JUDGEMENT

- Tribunal considered taxpayer's submission that it acted as an intermediary between the broadcaster and the ultimate customers who use the channels and thus, distribution fee paid by the taxpayer couldn't be termed as Royalty. The Tribunal observed that the said fact was not controverted by tax department nor any contrary facts were brought on record by the lower authorities.
- Following Bombay High Court (HC) ruling in case of SET India Pvt Ltd and MSM Satellite (Singapore) it held that the distribution fee cannot be termed as Royalty. In view of the above observation, it was held that "discussion on the royalty agreement selected for comparability has become academic".

- The Tribunal accepted the taxpayer's plea and included four comparable companies on account of being functionally similar to the taxpayer as they were engaged in distribution of software products.

Feroke Boards Ltd [TS-139-ITAT-2020(COCH)]

*Sale of 'brand-name' acquired under amalgamation characterized as Long-Term Capital Gains (**LTCG**), considering previous owner's holding period*

FACTS OF THE CASE

- The taxpayer vide a manufacturing and assets transfer agreement sold certain assets (viz. brand name, trademark, packaging design, knowhow, product intangibles and marketing intangibles), which were acquired pursuant to a scheme of amalgamation on April 1, 2008.
- Since there was no cost of acquisition, the taxpayer offered the entire sale consideration as Long Term Capital Gains (LTCG) in the return of income. The TO sought to treat the assets sold as "financial asset" as laid out in Explanation 1(i)(e) to Section 2(42A) of the IT Act and since the period of holding of the assets was less than 36 months, held the sale proceeds as Short-Term Capital Gain (STCG).
- The CIT(A) held that the assets transferred are not "financial assets" and Explanation 1(i)(b) to Section 2(42A) of the IT Act is applicable to the current case and the period of holding of the asset will also include the period held by the previous owner. Accordingly, the CIT(A) treated the sale of asset as LTCG. Aggrieved by the order of CIT(A), the department has approached the Tribunal, Cochin Bench.

JUDGEMENT

- The Tribunal analyzed the definition of the term "financial asset" under Explanation 1(i)(d) to Section 2(42A) of the IT Act and noted that "financial asset" has been described to mean shares or security and the assets transferred by the taxpayer does not fall in the category of "financial asset".
- The Tribunal also noted that Section 2(11) of the IT Act defines the term "block of asset" which includes intangible assets. Since the intangible assets are covered in the definition of "block of asset", the same cannot be again covered under the definition of "financial asset".
- Considering that the intangible assets were acquired pursuant to the scheme of amalgamation, Explanation 1(i)(b) to Section 2(42A) of the IT Act is applicable and accordingly the period of holding of the asset will also include the period held by the previous owner as per Section 49(1) of the IT Act. Pursuant to Section 47(vi) of the IT Act, there was no transfer which took place on April 1, 2008, therefore, the TO was not correct to arrive at the conclusion that the assets were acquired on this date. Thus, the Tribunal upheld the order of the CIT(A) in treating the sale of assets as LTCG.

Virmati Software & Telecommunication Limited [TS-164-ITAT-2020(Ahd)]

'Profit', not gross receipts relevant for determining foreign tax rate to claim relief under Section 91 of the IT Act

FACTS OF THE CASE

- The taxpayer had rendered software services to foreign parties based in Afghanistan. The foreign parties had withheld taxes at the rate of 7% of the income received by the taxpayer.
- The taxpayer contended that it is entitled to relief claimed under Section 91 of the IT Act with respect to doubly taxed income for the entire amount of TDS deducted in the foreign country (i.e. 7%) which is lower than the rate of tax in India (i.e. 30%) and accordingly, claimed entire TDS amount as Foreign Tax Credit (FTC) under Section 91 of the IT Act.
- However, the TO disagreed with the contention of the taxpayer by observing that the tax in foreign country cannot be applied to the amount of gross receipts. Accordingly, the TO held that the expenses incurred by the

taxpayer against the gross income from foreign countries needs to be adjusted for determining the rate of tax in the foreign country.

- The TO held that whole of the gross receipt of the taxpayer is not made subject to tax in India. It is only profit of the company i.e. 5.56% in the gross receipts which is being taxed in India 30.9%. Accordingly, the TO applying the same ratio with respect to the gross receipts generated from the foreign countries worked out the doubly taxed income and allowed FTC to that extent. The CIT(A) upheld the order of the TO. Aggrieved by the order of CIT(A), the taxpayer has approached the Tribunal, Ahmedabad Bench.

JUDGEMENT

- The controversy before the Tribunal was that whether the rate of tax in foreign country needs to be determined after considering the gross receipts or the net receipts/profit embedded in such gross receipts. The Tribunal observed that Explanation (iii) to Section 91 of the IT Act, requires that the income tax actually paid in the foreign country to be divided by the whole amount of income as assessed in the foreign country.
- The Tribunal observed that the word used "whole amount of income" denotes the income which signifies after the expenses. The word gross receipts have not been used.
- The Tribunal observed that the taxpayer has not given any working about the expenses incurred in the foreign country and thus, in the absence of sufficient details, the TO had no alternative, except to work out the proportionate amount of income eligible for relief under Section 91of the IT Act.
- The Tribunal on the argument of allowability of expenses under Section 37(1) of the IT Act (placed reliance on the judgment of Hon'ble Bombay HC in the case of Reliance Infrastructure Ltd v. CIT (390 ITR 271)), held that the tax was paid in the course of business and the corresponding business receipts were made to tax in India. In view of the above, the Tribunal held that the taxpayer is eligible for deduction of FTC under Section 37(1) of the IT Act, which was not allowed as tax relief under Section 91 of the IT Act

Sesa Goa Limited [TS-163-HC-2020(BOM)]

Bombay HC rules inapplicability of Section 40(a)(ii) of the IT Act to allow deduction of "education cess" paid

FACTS OF THE CASE

- The Taxpayer had made a claim of deduction of Education Cess and Higher and Secondary Education Cess (Cess), paid at the time of scrutiny assessment. However, the TO by relying on the SC decision in the case of Goetze (India) Ltd vs. CIT (284 ITR 323) rejected the claim of the taxpayer.
- The CIT(A) and the Tribunal also upheld the actions of the TO and held that Cess forms part of income-tax and disallowed the expenditure under Section 40(a)(ii) of the IT Act. Aggrieved by the order of lower appellate authorities, the taxpayer has approached the Bombay HC.

JUDGEMENT

- The question of law before the HC is whether the expression "any rate or tax levied" appearing under Section 40(a)(ii) of the IT Act includes Cess within its ambit.
- Taking note of the principles of interpretation of taxing statue and the IT Act, the HC noted that it was well established that no tax can be imposed on the subject without words in the IT Act clearly showing an intention to lay a burden on him. In view of the same, the HC observed that there is no reference to any Cess under Section 40(a)(ii) of the IT Act. Therefore, there is no scope to accept department's contention that Cess being in the nature of a "Tax" is equally not deductible in computing income chargeable under the head "Profits and Gains of Business or Profession".
- The HC opined that if the legislature intended to prohibit the deduction of amounts paid towards education Cess or any other Cess, then, the legislature could have easily included reference to Cess under Section 40(a)(ii)

of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid towards the Cess.

- The HC also relied upon the Central Board of Direct Taxes (CBDT) Circular No. F. No.91/58/66-ITJ(19), dated May 18, 1967, wherein a similar interpretation of Section 40(a)(ii) has been notified by the CBDT.
- In view of the above and relying on the decision of the Division Bench of Rajasthan HC in the case of Chambal Fertilisers and Chemicals Ltd. Vs CIT (ITA No.52/2018 dated 31st July, 2018), the HC concluded that though, Cess may be collected as a part of income tax, that does not render such Cess as either rate or tax, and accordingly, it cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection is really not determinative in such matters. Accordingly, the HC decided the question of law in favor of the taxpayer.
- As regards the contention of the department, that the taxpayer had not claimed a deduction of cess in the original or revised return, therefore the TO had no power to grant such a deduction to taxpayer, the HC opined that "Although, it is true that the Appellant - Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant - Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant - Assessee in the facts and circumstances of the present case".

VIVAD SE VISHWAS, ACT 2020 AND DIRECT TAX VIVAD SE VISHWAS RULES, 2020

- On 17 March 2020, Direct Tax Vivad Se Vishwas Bill, 2020 received Presidential assent and it was enacted into law. On March 18, 2020, the Government of India notified the Direct Tax Vivad se Vishwas Rules, 2020 (the Rules) and Forms relating to the scheme.
- The Rules are summarized hereunder:

Sr. No.	Particulars	Key Provisions
1	**Definitions**	**a) Dispute means** ▪ Appeal, writ or Special Leave Petition (SLP) filed or appeal or SLP to be filed by the declarant or the Income-tax Authority (ITA) before the Appellate Forum, or ▪ Arbitration, conciliation or mediation initiated or given notice thereof, or ▪ Objections filed or to be filed before the DRP under Section 144C of the IT Act, or ▪ Application filed under Section 264 of the IT Act; **b) "Issues covered in favor of the declarant" means issues in respect of which**: ▪ An appeal, writ or SLP is filed/ to be filed by the income-tax authority; or ▪ An appeal or objection is filed/ to be filed before the CIT(A) or the DRP by the taxpayer, and such issue is covered in the taxpayer's own case in its favor by the order of the Tribunal [not reversed by the HC or the SC] or the HC (not reversed by the SC); or

<table>
<tr><td></td><td></td><td>▪ An appeal is filed/ to be filed before the Tribunal by the taxpayer, and such issue is covered in the taxpayer's own case in its favor by the order of the HC (not reversed by the SC).</td></tr>
<tr><td>2</td><td>Manner of computing disputed tax</td><td>Disputed Tax</td></tr>
<tr><td>A</td><td>where Minimum Alternate Tax (MAT) credit or loss or unabsorbed depreciation is reduced</td><td>▪ To include the amount of tax related to such credit/loss/ unabsorbed depreciation in the amount of disputed tax and carry forward the entire loss or unabsorbed depreciation or MAT credit; or
▪ To carry forward the reduced amount of tax credit/ loss/ unabsorbed depreciation, subject to the following:
▪ The taxpayer would have to pay taxes (along with interest), if any, in subsequent years because of carrying forward of the reduced tax credit/ loss/ depreciation.
▪ The written down value of the block of assets should not be increased by the amount of reduction in unabsorbed depreciation.
▪ The carry forward of the reduced amount of tax credit/ loss/ unabsorbed depreciation would be computed as follows:
<table>
<tr><th>Nature of dispute</th><th>Amount of tax credit/ loss/ unabsorbed depreciation to be reduced by</th></tr>
<tr><td>Issues covered in favor of the taxpayer</td><td>50% of such tax credit/ loss/ unabsorbed depreciation</td></tr>
<tr><td>Eligible search cases</td><td>125% of such tax credit/ loss/ unabsorbed depreciation (to the extent such amount does not exceed amount of tax credit/ loss/ depreciation to be carried forward before its reduction)</td></tr>
<tr><td>Eligible search cases, wherein the issues covered in favor of taxpayer</td><td>62.5% of such tax credit/ loss/ unabsorbed depreciation</td></tr>
<tr><td>In any other case</td><td>100% of such tax credit/ loss/ unabsorbed depreciation</td></tr>
</table></td></tr>
<tr><td>B</td><td>Where issues covered in favour of the declarant</td><td>Disputed tax = (A)*(B)/(C),

Where,</td></tr>
</table>

			A = Amount of tax payable on all issues; B = Disputed income in respect of issues covered in favour of the declarant); and C = Disputed income in relation to all issues in dispute
3	**Type of Form**	**Nature**	**Key Content of the Form**
1	Form-1	Declaration before the designated authority	**a)** Information/ details relating to ▪ Pending appeal / writ / SLP /DRP Objections/ Revision application/Arbitration / Conciliation / Mediation ▪ Tax in Arrears, tax paid or payable **b)** Schedules to be filled based on types of tax arrears and / or option opted by the taxpayer ▪ Schedule A – disputed tax cases where taxpayer opts to pay tax (11 combinations). ▪ Schedule B – disputed tax deducted/ collected at source cases (9 combinations). ▪ Schedule C – disputed penalty, interest, fee cases (9 combinations). ▪ Schedule D – disputed tax cases where taxpayer opts to carry forward reduced amount of loss or depreciation or MAT credit. **c)** Declaration should be signed and verified by the declarant or any person competent to verify the return of income in this behalf
2	Form 2	Undertaking	**a)** Undertaking to voluntarily waive all the rights to seek or pursue any remedy or any claim in relation to the dispute for which the declaration is being filed. **b)** Undertaking should be signed and verified by the declarant or any person competent to verify the return of income in this behalf
3	Form 3	Certificate	Nature of tax arrear, tax arrear, amount payable, amount already paid against tax arrear and Balance amount payable/ refundable after adjusting amount already paid
4	Form 4	Intimation of Payment	▪ Detail of payments made pursuant to the certificate issued in Form 3 ▪ Proof of withdrawal of the relevant dispute.
5	Form 5	Order	Details of dispute settled by the taxpayer alongwith nature of tax arrear (disputed tax / disputed penalty / disputed interest / disputed fee) and amount of tax arrear

- Forms 1 and 2 are to be filed/ viewed online on the e-filing portal of the income-tax department, under the link "Vivad se Vishwas" tab.
- The government has also notified procedure for making declaration in Form 1 and Furnishing undertaking in Form 2

NEWS

Presidential assent to Finance Bill, 2020

The Finance Bill, 2020 which was passed by the Lok Sabha on March 23, 2020 has now received the assent of the President of India on March 27, 2020.

India notify Agreement for Exchange of Information with Brunei

The Government of India had signed a Tax Information Exchange Agreement (**TIEA**) with the Government of Brunei Darussalam on 28 February 2019. The TIEA has been notified in the Gazette of India on 9 March 2020.

The TIEA shall enable exchange of information, including banking and ownership information, between the two countries for tax purposes. Further, it provides for assistance in collection of tax claims between the two countries which will help curb tax evasion and tax avoidance.

INDIRECT TAXATION

NOTIFICATIONS/CIRCULARS

S. No.	Notification	Particulars
1	**Central Tax Notifications No. 13/2020 and 14/2020, both dated March 21, 2020 (CBIC)**	Certain class of registered persons such as insurance company, banking company, financial institution, GTA, passenger transportation service etc., have been exempted from issuing e-invoices or capturing dynamic QR code. The mandatory implementation of e-invoicing has been deferred from April 1, 2020 to October 1, 2020.
2	**Notification No 15/2020 – Central Tax dated March 23, 2020 (CBIC)**	Due date for furnishing Annual return under GSTR-9 and Reconciliation statement under GSTR-9C for FY 2018-19 has been extended from March 31, 2020 to June 30, 2020.
3	**Notification No 16/2020 – Central Tax dated March 23, 2020 (CBIC)**	Various amendments have been made in the CGST Rules, 2017 relating to: ▪ Introduction of Aadhaar authentication in obtaining GST registration; ▪ Change in method of ITC reversal in case of capital goods under Rule 43 of CGST Rules, 2017; ▪ Increase in threshold limit in turnover for GST audit to INR 5 crores; ▪ Refund of excess or wrong GST paid to be credited to the Electronic credit ledger; ▪ Norms prescribed for valuation of the exported goods for the purpose of seeking refund of unutilized ITC.
4	**Central Tax Notifications No. 17/2020, 18/2020 and 19/2020, all dated March 23, 2020 (CBIC)**	Specified the category of persons, such as individual, managing or authorized partner, etc. who would undergo the newly introduced mechanism of Aadhaar authentication while obtaining GST registration.
5	**Notification No 02/2020 – Central Tax (Rate) dated March 26, 2020 (CBIC)**	Reduction in GST rate on Maintenance, Repair and Overhaul (**MRO**) services in respect of aircraft from 18% to 5% with full ITC and change in the place of supply for B2B MRO services to the location of recipient with effect from April 1, 2020 with a view to protect domestic MRO.
6	**Notification No 03/2020 – Central Tax (Rate) dated March 25, 2020 (CBIC)**	GST rate on mobile phones to be increased from 12% to 18% w.e.f. April 1, 2020; Single GST rate notified on Matches @ 12% w.e.f. April 1, 2020. Earlier, there were different rates for handmade and other matches.
7	**Circular No 132/2/2020 – GST dated March 18, 2020** **(CBIC)**	Several appellate authorities are delaying the appellate process on account of non-constitution of appellate tribunal under GST. *Vide* this Circular, the CBIC, while referring to the CGST (Ninth Removal of Difficulties) Order, 2019 dated December 3, 2019, has advised for early disposal of pending appeals. The prescribed time limit to make application to the appellate tribunal, will be counted from the date on

		which President or the State President of such appellant tribunal enters office or from date of communication of order, whichever is later.
8	**Circular No 133/3/2020 – GST dated March 23, 2020 (CBIC)**	Various issues have been clarified by CBIC in situations of apportionment of ITC in case of Business re-organization pursuant to valuation of assets, filing of Form GST ITC-02, etc.
9	**Notification No 11/2020 – Central Tax dated March 21, 2020 (CBIC)**	Special procedures related to registrations, returns and ITC under GST have been notified which shall be followed by the Interim Resolution Professionals or Resolution Professionals, appointed for the corporate debtors, undergoing insolvency resolution process under IBC, 2016.
10	**Circular No 134/4/2020 – GST dated March 23, 2020 (CBIC)**	In line with Notification No. 11/2020 – Central Tax dated March 21, 2020, CBIC has issued clarifications on various issues faced by the corporate debtors, undergoing Insolvency Resolution Process under IBC, 2016.
11	**Notification No. 03/2020-Central Excise dated March 13, 2020 (CBIC)**	Increase in effective rate of Special Additional Excise Duty on petrol as well as high-speed diesel oil falling under CTH 2710 by INR 2/litre each.
12	**Notification No. 04/2020-Central Excise dated March 13, 2020 (CBIC)**	Increase in effective rate of Road and Infrastructure Cess collected as additional duty of excise on petrol as well as on high-speed diesel oil falling under CTH 2710 by INR 1/ litre each.
13	**Notification No. 15/2020-Customs dated March 13, 2020 (CBIC)**	Increase in effective rate of Road and Infrastructure Cess collected as additional duty of customs on petrol as well as high-speed diesel oil falling under CTH 2710 by INR 1/ litre each.
14	**PIB dated March 13, 2020** **(CCEA)**	The Cabinet Committee on Economic Affairs has approved the "Remission of Duties and Taxes on Exported Products" or "**RoDTEP**" scheme to boost exports and make Indian exporters cost competitive in the international market. The scheme seeks to reimburse taxes/duties/levies at the central, state and local level, which are currently not being refunded and are WTO compliant. Items from the existing MEIS scheme will be shifted to RoDTEP scheme in a phased manner.
15	**Public Notice No. 65/2020 dated March 17, 2020** **(DGFT)**	With a view to implement the 'Global Authorization for Intra-Company Transfers' or "**GAICT**" scheme, which was notified in July 2019, the DGFT *vide* this Public Notice has notified the application form and other documents for the purpose of making the application. Under this Scheme, exporters can obtain a single export authorization for re-exportation of multiple consignments of certified SCOMET items to their related subsidiary or parent companies abroad, subject to fulfilment of specified conditions.

16	**Notification No. 51/2015-2020 dated March 18, 2020** **(DGFT)**	Amendment in the Import Policy and policy conditions for Zinc Dross, Light Naphtha, Heavy Naphtha, Full Range Naphtha and Aviation Gasoline specified under Principal Notification No. 36/2015-2020, dated January 17, 2017.
17	**Notification No. 52/2015-2020 dated March 19, 2020** **(DGFT)** *[Related to COVID-19 pandemic]*	Export of ventilators, surgical/disposable (2/3Ply) masks and Textile raw material for masks and coveralls falling under the respective tariff headings is prohibited with immediate effect. However, other items allowed as freely exportable under Notification No. 48 dated 25.02.2020 [except surgical/disposable (2/3Ply) Masks], shall remain "free" for exports.

RECENT CASE LAWS

M/s Commercial Steel Company vs The Assistant Commissioner of State Tax [2020-VIL-116-TEL]

Whether detention of a vehicle merely on the possibility of the goods being sold in the local market, is reasonable

FACTS OF THE CASE

- The petitioner's purchase consignment was travelling from Karnataka to Hyderabad. During the transit, the goods were detained by the Tax Authorities under section 129(3) of the CGST Act, contending that the place where goods were detained was not the place mentioned in the invoice. The consignment was detained at a place which came later than the place mentioned on the Invoice.
- Accordingly, the SCN was served to the petitioner on the presumption that the goods were taken to the 'wrong destination' for illegal sale in order to evade tax. The SCN sought the payment of intra-state tax and penalty.
- The petitioner got the goods released by making interim payment to the Tax department. In his submission, the petitioner contended that the tax and penalty was recovered through coercion and threat, and that under section 129(1), the Department, at best, can collect a security equivalent to the demand. The petitioner, therefore, pleaded for refund.

JUDGEMENT

- The Court observed that 'wrong destination' is not a permissible ground for detention of goods under the law, inasmuch as the vehicle was carrying all the requisite documents.
- The Court further observed that mere **possibility** of carrying out local sale cannot clothe the Department to detain goods and levy tax and penalty where there was no material on record to show that any such attempt was made by the Petitioner. Since the goods had already suffered IGST, and no provision of SGST was shown to have been violated, there seems to be no such pressing circumstances for the Department warranting levy of intra-state tax.
- On the insistence by the Department for making the payment, *qua* release of the goods, the Court found the action arbitrary and absurd in law. In this regard, the Court relied on *Dabur India Ltd. vs State of Uttar Pradesh (1990) 4 SCC [1990-VIL-09-SC]*, where it was held that the State cannot coerce its citizens to make payments, by taking extra-legal steps, which the citizens are not obliged to make.
- Accordingly, the Department was directed to refund the amount along with interest.

Customs v. M/s K.G. Denim Limited [2020-VIL-130-MAD-CU]

Whether a Policy Circular could deny the benefit which is otherwise not restricted by the statutory provision

FACTS OF THE CASE

- The Respondent Company in DTA had engaged a 100% EOU Unit as a job worker converting yarn into Denim Fabrics and exported the said goods out of India with a view to claim the benefit of drawback.
- The Department denied the benefit of drawback relying on the Circular No.74/1999-Cus dated November 5, 1999, which, apart from clarifying the procedural aspects as well as authorities authorized to assess the exports in relation to the present transaction, also provided that, "*no drawback/DEPB benefits shall be admissible either to EOU/ EPZ units or to the DTA unit for such exports.*". In addition to the above, reliance is also placed by the Department on the Circular No.31/2000-Cus dated April 20, 2000 which, in relation to the present case, *inter alia*, stated that "*…under no circumstances, such exporters will be allowed to claim All-Industry Rate of Drawback.",* and therefore seeks to restrict the drawback claim to only an All-industry drawback rate.
- Therefore, in effect, the drawback was denied to the Respondent company relying on the aforesaid Circulars.

JUDGEMENT

- Relying on the decision of the Madras High Court in Commissioner of Customs, Tuticorin vs L.T. Karle & Co. [2007 (207) E.L.T. 358 (Mad.)] and the Karnataka High Court in Karle International vs Commissioner of Customs, Bangalore [2012 (281) E.L.T. 486 (Kar.)], the Court held that the Departmental Circulars issued by the Central Board cannot restrict or curtail the benefits provided under the statutory provisions.
- The Madras High court quoted the Karle International (supra), where the Karnataka High Court observed that in terms of Section 75 of the Customs Act, to be eligible for Duty drawback, all that the exporter has to satisfy is that the goods are manufactured, processed or on which any operation has been carried out is in India. It is immaterial where the said manufacturing or processing has taken place. It may be in his Unit or it may be in EOU unit. The guiding principle is, it should have been manufactured or processed in India and exported.
- Accordingly, the Court while overruling the interpretation of the Department on the aforesaid Circulars, held that no such benefit which is otherwise bestowed by the statute can be denied to the Assessee under the guise of a clarification for which, in the opinion of the court, no power was bestowed on the Central Board.

M/s Hindustan Unilever Ltd vs Commissioner of Central Excise [2020-VIL-136-CESTAT-KOL-CE]

Classification of toilet soap sold under the brand name of "Rexona" and "Lux" is under dispute

FACTS OF THE CASE

- The Company is *inter alia* engaged in the manufacture of toilet soaps under the brand names "Rexona" and "Lux" and clearing them under CETH 3401.10 *(Soap and organic surface-active products)* of the Central Excise Tariff Act, 1975.
- The Department issued SCN alleging that these soaps are classifiable under CETH 3307.30 *(Perfumed bath salts and other bath preparations)* as the Totally Fatty Mater (TFM) content is less than 60% and therefore it is a bathing preparation and not toilet soap. Aggrieved by the order of Commissioner, the Company had appealed to the Tribunal.

JUDGEMENT

- The Tribunal while allowing the appeal held that the issue is no longer *res integra* and has been covered by *Hindustan Lever Ltd. [2000 (121) ELT 451 (Tri.)]* (later affirmed in *2013 (291) ELT 483 (SC)*) and *Wipro Ltd. [2001 (136) ELT 885 (Tri.)]* where it was held that classification of soaps on the basis of TFM content by giving reference to the Drugs and Cosmetics Act, 1940 is based on misconstrued and erroneous understanding. The

Tribunal held that when the tariff does not make such a distinction, then the classification has to be adopted by following the common parlance test.

- The Tribunal also relied on the CBIC Circular No. 360/76/97-CX dated 03.12.1997 where it was clarified that while interpreting any word in the Tariff, resort must not be made to its scientific or technical meaning given under Drugs and Cosmetics. It also relied on the Circular No. 31/89 dated 12.05.1989 where it was clarified that "Nirma" brand toilet soap and similar soaps would fall under CTEH 3401 only.

M/S Inova India vs The Commissioner Of Central Excise [2020-VIL-138-CESTAT-CHE-CE]

Goods whether manufactured on principal to principal basis or as job worker is under dispute

FACTS OF THE CASE

- The Company was *inter alia* engaged in the manufacture of Electronic Flushing System (EFS) bearing the brand name 'Parryware' and was clearing the same on the payment of duty.
- During the relevant period, the Company was purchasing urinal casing from one M/s. Roca Bathroom Products Pvt. Ltd ('**M/s Roca**') and after fixing the EFS, selling the automated urinal casings back to M/s. Roca. The price was arrived at by the Company on the basis of cost construction method with profit margin added, as agreed between the parties on which duty was paid.
- The Department issued an SCN alleging that the transactions between the parties were not on principal to principal basis and the Company was manufacturing as a job worker for M/s. Roca on contract basis based on the following facts:
  - That there is a difference of 200 – 250% in the price of the product sold by the Company to M/s Roca vis-à-vis the price charged by M/s Roca from the third parties for the final product.
  - The brand name 'Parryware' was originally owned by M/s. Roca and that the Company did not have any claim on such trademark. As the brand name is affixed, the ownership of the product rests with M/s. Roca only and that the Company had no right to sell the goods. When there is no right to sell the goods, the amount received by the Company was only compensation of the expenditure incurred by them and received through sales invoices.
- Therefore, according to the Department, the price adopted for payment of duty by the Company was not the sole consideration for sale as per Section 4 (1) (a) of the Central Excise Act, 1944 and therefore, the valuation of goods manufactured by job workers should be determined as per Rule 10A of the Central Excise Valuation Rules.

JUDGEMENT

- The Tribunal relied on the decision in M*/s. Sujhan Instruments vs Commissioner of Central Excise, Chennai-II [2019 (368) E.L.T. 135 (Tri. - Chennai)]* where the Chennai Tribunal expounded on Rule 10 of the Central Excise valuation rules. It held that a party shall be a job worker where it is engaged in manufacture of goods on behalf of another manufacturer, the inputs are supplied by the principal manufacturer, and manufacturer will not be required to be paid to the principal manufacturer for the inputs supplied.
- Applying the ratio in the instant case, the Tribunal observed that the Company was purchasing inputs from M/s Roca and those are not supplied free of cost. Further, after manufacturer, the Company was removing goods to M/s Roca by discharging appropriate duty. Thus, just because the goods manufactured or produced by the Company are purchased by M/s Roca on a contract basis, it should not detract the Department from accepting the transaction between the two parties to be one of principal to principal basis.

- Consequently, while admitting that M/s. Inova has procured the urinal casings from M/s. Roca by transaction of purchase and sale and that merely because the goods manufactured by M/s. Inova bear the brand name of M/s. Roca, there is no merit in holding the transaction as that of job work, the demand was set aside.

RECENT ADVANCE RULINGS

In re: M/s Harmilap Media Private Ltd. [2020-VIL-55–AAR-Uttarakhand]

Sale of unit of space/ time for advertising in print media whether construed as Pure Service

FACTS OF THE CASE

- The applicant is an advertising company/ agency engaged in the business of buying space from newspapers and further selling the unit of space in various print media on DAVP /DIPR approved or open market rates, depending upon the type of client.
- The applicant seeks ruling on the following three issues:
  - Applicable GST rate on selling of space/ time for advertisement in print media by advertising companies;
  - Applicable GST rate where advertising companies also undertake designing/composing advertisement without separately charging in Invoice;
  - Whether the above supply is categorized as a 'Pure service' or not and if yes, whether exemption *vide* Notification No. 12/2017-CT (R), dated June 28, 2017 is available to the Company while invoicing to local authorities.
- The applicant submitted that since it is working on a principal to principal basis, the said supply shall be chargeable to 5% GST. It is further submitted that the services where there is no component of supply of goods are categorized as Pure service, however since the present supply imbibes the material component (i.e. newspaper), it shall not be construed as Pure service and accordingly exemption benefit shall not be eligible.

JUDGEMENT

- On the first question, the AAR referring to Entry No. 21 of the Notification No. 11/2017-CT(R), dated June 28, 2017, ruled that the applicable GST rate on the said supply is 5%.
- On the second question, the AAR held that supply of space in print media and supply of designing/ composing services, would together constitute a 'Composite Supply' wherein supply of space in print media shall be considered as principal supply and accordingly, rate applicable to that supply, *viz.* 5%, shall be applicable.
- On the last question, the AAR, while upholding the contention of the applicant, stated that the aforesaid supply would not be a pure service since the selling of space invariably includes the supply of material in the form of a newspaper, and accordingly, the relevant exemption, (which is only applicable to pure service) shall not be available in the present case.

In re: M/s Swapna Printing Works Pvt. Ltd. [2020-VIL-62-AAR-West Bengal]

Printing services which involves printing and supply of books in India is chargeable under GST, irrespective of the fact that the recipient of service is a foreign company

FACTS OF THE CASE

- The applicant, engaged in the business of printing, receives a contract from a US based company for printing books in different Indian languages and delivers the same to various locations in India. The content would be provided by the foreign company, however inputs like paper, ink, etc. would be procured by the applicant itself.
- The applicant seeks a ruling whether the aforesaid service should be considered as export of service given that the recipient of service is located outside India and the consideration is received in foreign currency.

JUDGEMENT

- The AAR relied on Circular No. 11/11/2017-GST dated October 20, 2017, wherein CBIC, *inter alia*, has clarified that printing of books are composite contracts where the goods (being printing material) have no better utility than carrying the printed matter. Accordingly, the service of printing is the predominant element in such contracts and the goods supplied, having no use other than displaying the printed matter, is ancillary to the principal supply of printing.
- Consequently, being a composite supply, the printing service is inseparable from supply of the goods, i.e. printed booklets, and therefore, place of supply in this transaction would be the place where the said printed booklets would be delivered, *i.e.* in India.
- Further, while clarifying the definition of 'recipient', the AAR observed that in cases where consideration is received, the recipient would be the person liable to pay such consideration. However, any reference to a person to whom a supply is made includes a reference to the recipient of supply or his agency acting as such on behalf of the recipient. Since in the present case, it would be impossible to make a separation between the person to whom the supply is made and the one liable to pay the consideration, the person receiving the supply of booklets in India shall be considered as recipient.
- Accordingly, the AAR ruled that, since the recipient and place of supply, both falls in India, the supplies shall be chargeable to GST.

In re: M/s Parvatiya Plywood Pvt. Ltd. [2020-VIL-56-AAR-Uttarakhand]

Classification and GST applicability on wood scrap

FACTS OF THE CASE

- The applicant is primarily engaged in the business of manufacturing of plywood, block board and flush doors falling under HSN 4412 31 90, 4412 94 00 & 4418 2010 respectively.
- The issues for consideration before the authority are:
  - HSN classification and applicable GST rate on wood scrap generated during the process of manufacturing plywood;
  - Applicability of GST on the security forfeited by Uttarakhand Forest Corporation in the event of non-deposit of balance amount for the wood purchased in auction;
  - Applicability of GST under RCM on the Mandi fees payable on purchase of wood from Uttarakhand Forest Corporation as per Agricultural Produce Marketing (Development and Regulation) Act, 2011 (**APMDR Act**);
  - Applicability of GST on penalty amount recoverable for damage of material by labor.

JUDGEMENT

- On each the aforesaid questions, the AAR made the following rulings:
  - Wood scrap left after peeling process is not usable as timber, but rather treated as manufacturing waste used for further manufacturing of paper, particle board fiber, etc. Thus, it is classifiable under HSN 4401 31 00 or 4401 39 00 (supra), attracting GST @5%.
  - Forfeiture of security amount would be a provision of service in the form of 'agreeing to tolerate an act' referred to in Entry No. 5(e) of Schedule II of the CGST Act, 2017. Thus, it is leviable to GST @ 18% under SAC 9997 94.
  - Mandi fees is a form of levy under the APMDR Act which, by virtue of Section 15(2)(a) of the CGST, 2017, form part of the value of supply. However, since the same is not notified under section 9(3) or 9(4) of the

CGST Act, GST under RCM shall not be applicable on the Mandi fees paid on the purchase of wood from the unregistered person/farmer.

- Penalty amount recoverable for damage of material by labor would be a provision of service in the form of 'agreeing to tolerate an act' referred to in Entry No. 5(e) of Schedule II of the CGST Act, 2017. Thus, leviable to GST @ 18% under SAC 9997 94.

In re: M/s Bilaspur Infrastructure Pvt. Ltd. [2020-VIL-58-AAR-Chhattisgarh]

First occupancy shall be considered only if it is valid as per the municipal laws

FACTS OF THE CASE

- The applicant is a real estate developer having a residential-cum-commercial project at Bilaspur, wherein out of the 77 saleable units, the applicant had already received booking and consideration amount for 33 units during its construction, and paid applicable service tax / GST thereon. Of these 33 units, possession has already been granted to 4-5 buyers, thereby providing first occupancy in the project premises.
- Presently, the project is completed, and the completion certificate is pending with the competent authority for approval. The applicant now wishes to book the rest of the 44 units for which no consideration has been received till date. The Advance ruling is sought regarding the GST applicability on the booking of these 44 units.
- The applicant refers to Schedule II of the CGST Act, 2017 which provides that construction of a complex, building, etc. intended for sale to a buyer shall be considered as a supply of service, except where the entire consideration has been received after the issuance of completion certificate by the competent authority, or after its first occupation, whichever is earlier.
- The applicant refers to Section 191 of the Chhattisgarh Municipalities Act, 1961 and Section 301 of the Chhattisgarh Municipal Corporation Act, 1956, wherein it has been stated that if the authority fails to communicate its refusal to grant permission/completion certificate within 15 days of request received, then the permission shall be deemed to have been granted. Accordingly, the applicant submits that no GST is leviable on subsequent bookings of 44 units since the first occupancy has already been provided to 4-5 buyers in the first lot and completion certificate is deemed to have been granted.

JUDGEMENT

- The AAR observed that the competent authorities have not issued the completion certificate till date, owing to the non-compliance of section 301 of the Chhattisgarh Municipal Corporation Act, 1956 *read with* Rule 98 of Land Development Rules, 1984 by the applicant. Therefore, the occupancy of the residential units without observance of the measures mandated by law cannot be termed as valid/ bona fide occupancy, especially when the matter is pending with the authorities. Therefore, the first occupancy, as contended by the applicant, is found to be devoid of any merit.
- The AAR also ruled that that whenever authorities will issue the completion certificate, the same shall be issued bearing the date of completion of the property, accordingly, if entire consideration is received post this date, then the same shall be out of the purview of the GST.

In re: M/s Vidit Builders [2020-VIL-64-AAR-Madhya Pradesh]

Activity involving development of land and common facilities shall be construed as supply of service under GST

FACTS OF THE CASE

- The applicant is a real estate developer who entered into a development agreement with a land-owner, wherein the applicant would develop and provide certain common facilities in the colony, like – roads, drainage, electricity, garden, etc. The plots would then be sold to the respective buyers and their revenue would be shared between the land-owner and the applicant as per the terms of their agreement.

- After the development of the common facilities, the same would be handed over to the local municipal corporation for further maintenance, post which the corporation will review the developments and issue a completion certificate.
- The issues before the Authority was whether the above transaction shall be considered as sale of land or that of works contract service, and if it is considered latter, the appropriate valuation mechanism.
- The applicant contended that they are primarily engaged in the sale of land, which is not liable to tax under GST, as per Entry 5 of Schedule III of the CGST Act, 2017.

JUDGEMENT

- The AAR observed that a seller can claim that he is engaged in the supply of land only if he himself enjoys the title of the land. Merely because the applicant has a role in the activity of sale cannot make the applicant the seller of land. From the agreement, it is clear that the activities to be undertaken by the applicant are in the nature of development of land and not the sale of land and the land-owner continues to remain so till the property is transferred in the name of purchaser.
- The AAR, therefore, ruled that the activities undertaken by the applicant are not qualified to be covered under Entry 5 of Schedule III of the CGST Act, 2017 and these are very much tantamount to supply of service.
- On the second question of valuation, the AAR observed that the applicant received a share of revenue from the sale of plots which is nothing but the remuneration for the provision of the services related to the development of the land and their subsequent activities for sale of plots. Hence, applying the provisions of Rule 31 *read with* Section 15, the value supply shall be the amount of shared revenue, received by the applicant.

UPDATES

Reliefs announced by the Hon'ble Finance minister due to COVID-19 outbreak on March 24, 2020

- Extension of filing GSTR-3B returns falling in the months of March'20 to May'20 till June 30, 2020 with waiver of late fees and penalty. An interest at a reduced rate of 9% shall be charged for taxpayers having aggregate turnover more than INR 5 crores, however, for other taxpayers, interest is waived;
- Due date for payment of taxes under "Sabka Vishwas Legacy Dispute Resolution Scheme, 2019" has been extended from March 31, 2020 to June 30, 2020, without any interest.
- Any compliance under the GST Act, Customs Act and other allied laws relating to the due date for issuance of notice, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents, the time limit of which is expiring between March 20, 2020 to June 29, 2020 has been extended till June 30, 2020.
- Date for opting composition scheme for FY 2020-2021 has been extended from March 31, 2020 to June 30, 2020.
- Due date for payment of taxes and filing of return under the composition scheme for the month of March 2020 has been extended from April 18, 2020 to June 30, 2020.
- Implementation of 24 X 7 customs clearance facility to all sea ports and customs ports to be extended to June 30, 2020.

Key takeaways from GST council meeting held on March 14, 2020

- Retrospective amendment w.e.f. July 1, 2017 in the CGST Act to levy interest on delayed payment of GST on net tax liability, i.e. after adjustment of ITC balances;
- A one-time relief for taxpayers whose registration has been cancelled till March 14, 2020, to file an application for revocation of such cancellation up to June 30, 2020;
- Mandatory implementation of new GSTR forms has been deferred from April 1, 2020 to September 30, 2020. During this period, old forms, i.e. GSTR-1 and GSTR-3B will prevail;
- Aggregation of refund claims filed in different financial years to be allowed to facilitate exporters.
- GSTR-9C for FY 2018-19 not required to be filed by taxpayers having aggregate turnover below INR 5 crores. Due date for GSTR-9 and GSTR-9C for FY 2018-19 extended to June 30, 2020. Waiver of late fees for GSTR-9 and GSTR-9C for FY 2017-18 and 2018-19 for taxpayers having aggregate turnover below INR 2 crores.
- Dates for implementation of e-invoicing and QR Code to be extended to 01.10.2020 along with exemption to certain class of persons from its issuance.
- Proposed IT developments on GST portal
- Linking of the details of outward supplies in GSTR-1 to the liability in GSTR-3B;
- Linking of the input tax credit in GSTR-3B to the details of the supplies reflected in the GSTR-2A.
- To increase the threshold capacity of taxpayers on the portal to 3 Lakhs from the existing 1.5 Lakhs.
- A new facility called 'Know Your Supplier' to be introduced on the GST portal to enable taxpayers to have some basic information about their suppliers with whom they conduct business;

- To formulate special procedure for taxpayers who are corporate debtors under IBC, 2016 to enable them to comply with the provisions of GST Laws during the CIRP period;
- To curb fake invoicing and fraudulent passing of ITC, restrictions to be imposed on passing of the ITC in case of new GST registrations, before physical verification of premises and Financial KYC of the registered person.

Note: These are recommendations of the GST Council which shall be given effect through relevant Circulars/ Notifications or amendments in GST laws. For some of the aforesaid recommendations, Circulars and Notifications have already been issued and listed above.

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

109 A, 1st Floor, Dalamal Towers
Free Press Journal Road, Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice