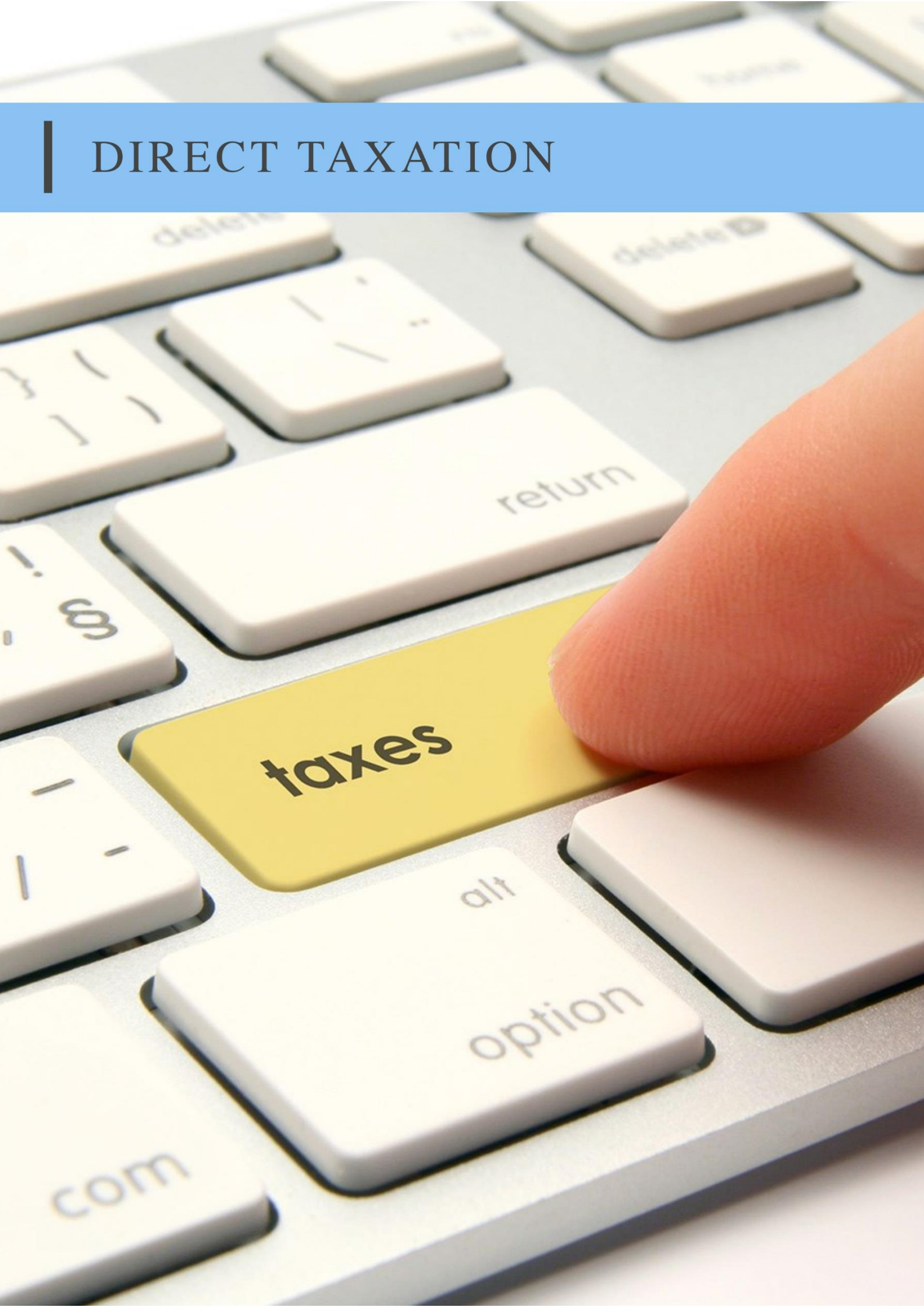
ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

Table of contents

DIRECT TAXATION



RECENT CASE LAWS

Hespera Realty Pvt Ltd (764/Del/2020) (Delhi ITAT)

Recharacterization of 'capital-reserve' from amalgamation rejected; Deletes MAT-addition on 'taken-over' Indiabulls shares-sale

FACTS OF THE CASE

- During Assessment Year (**AY**) 2015-16, the Hon'ble Delhi High Court (**HC**) had approved the scheme of amalgamation of five companies with the taxpayer. Pursuant to the Scheme, all assets and properties of five amalgamating companies including various investment held, all liabilities, stood transferred to the taxpayer.
- Various investment held by the five amalgamating companies, which *inter alia* included shares of M/s. Indiabulls Housing Finance Ltd (**Indiabulls**), stood transferred to the taxpayer at Fair value (**FV**), by following purchase method of accounting, thus leading to capital reserve.
- During the relevant AY 2015-16, the taxpayer transferred shares of Indiabulls acquired under the scheme of amalgamation and claimed the long-term capital gains thereunder (sale price - **cost to previous owner**) as exempt under Section 10(38) under normal provisions of the Income tax Act, 1961 (**IT Act**). These gains however were considered as (Sales – **FV of shares)** while computing book profit under Section 115JB.
- The Tax Officer (**TO**) held:
  - Entire scheme of amalgamation was colorable device, lacked commercial purpose and was a sham transaction which was orchestrated to reduce tax liability.
  - The taxpayer had, under the garb of amalgamation, deliberately adopted 'Purchase method' in order to artificially jack up the value of assets/investments with the intent of undermining its book profit for the purpose of section 115JB of the IT Act.
  - Amount transferred to the capital reserve account actually represented revaluation reserves which qualify for upward adjustment to the book profits under Section 115JB.
- Further, the taxpayer in its return of income, had suo-motu disallowed short term capital loss incurred on purchase and redemption of mutual funds, in terms of provisions of Section 94(7) of the IT Act. While passing the assessment order, the TO had made an upward adjustment in terms of clause (f) of Explanation 1 to Section 115JB of the IT Act, by treating the said loss as expenditure relatable to earning exempt income.
- The order of TO was upheld by the Commissioner of Income tax (Appeals) **(CIT(A)).**

JUDGEMENT

Recharacterization of reserves

- The Income tax Appellate Tribunal (**ITAT**) dispensed the TO's allegation that the scheme of amalgamation is a sham, or the motive was tax evasion or was a colorable device in absence of tangible material on record to prove the surreptitious nature of the scheme.
- Further, the ITAT held that the TO failed to appreciate that the taxpayer had not revalued any of its own assets but only recorded the FV of various assets/ liability acquired/ taken over during the scheme of amalgamation and had accounted for the same as per Accounting Standard (**AS**)-14. ITAT observed that AS-13 (**Accounting for Investment**) does not permit a company to revalue its long-term investment at a value higher than the cost.

- ITAT opined that if the amalgamation is in the nature of purchase and consideration received is greater than net assets acquired from the transferor company, differential amount is required to be credited to 'capital reserves' and cannot, by any stretch of argument be regarded as 'revaluation reserves'.
- ITAT examined the provisions of Section 115JB of the IT Act, Section 129 of the Companies Act 2013 and AS-14, and opined that the TO's only intention to bring 'capital reserves' within the ambit of clause (j) of explanation 1 to Section 115JB (which rightly deals with revaluation reserves) was to make an upward adjustment to the book profits as per the IT Act. Such an action however cannot be sustained.
- ITAT after examining all the facts and provisions, rejected TO's action of treating the scheme of amalgamation of five companies with the taxpayer as 'sham' and TO's plea of recharacterization of 'capital reserve' arising out of the amalgamation as 'revaluation reserve'.
- ITAT, thus deleted upward adjustments made under clause (j) [recharacterize as revaluation reserves] of explanation 1 to Section 115JB of the IT Act.

Loss on redemption of Mutual Fund

- ITAT analyzed SC judgment in case of CIT v SC Kothari (82 ITR 792) wherein it was held that "a loss is something different as it is not a thing which is spent or disbursed. It is a thing which comes upon him ab extra".
- ITAT also placed reliance on Hon'ble Gujarat High Court (**HC**) decision in case of CIT v JK Paper Ltd (206 Taxmann 124) wherein it was held that loss incurred on account of dividend stripping dealt under Section 94 (7) cannot be applied for the purpose of computing business profit in terms of Section 115JB.
- Based on conjoint reading of the provisions of the IT Act and relying on SC judgment, ITAT deleted upward adjustments made under clause (f) [loss on redemption of mutual funds] of explanation 1 to Section 115JB of the IT Act.

Nalwa Investment Ltd (ITA 822/2005 & connected matters) (Delhi HC)

Share-exchange under amalgamation - 'transfer' under Section 2(47); Opines 'business income' taxability where shares held as 'stock'

FACTS OF THE CASE

- The taxpayer held shares of Jindal Ferro Alloy Ltd (**JFAL**). Pursuant to approval of the scheme of amalgamation between JFAL and Jindal Strips Ltd (**JSL**), the taxpayer received shares of JSL in lieu of its shareholding in JFAL. This transaction was claimed as exempt from capital gains tax under Section 47(vii) of the IT Act.
- The TO contended that since the shares of JFAL were held as stock-in-trade and not as a capital asset, the taxpayer was not entitled to exemption under Section 47(vii) of the IT Act. Thus, the TO taxed the difference between the market value of the shares received in exchange of the shares of JFAL and the book value of shares as Business Income taxable under Section 28 of the IT Act.
- The aforesaid position was upheld by the CIT(A) and the same was allowed in favor of taxpayer by the ITAT. There was however no categorical finding of whether shares were held as 'capital asset' or 'stock-in-trade'.
- The main question of law before the Hon'ble HC was whether ITAT was correct in holding that where the taxpayer gets shares of amalgamated company in lieu of shares of amalgamated company, no transfer takes place?

JUDGEMENT

- **If the shares are held to be a Capital Asset – Effect of Section 45 and exception thereto under Section 47(vii) of the IT Act;**
  - The Hon'ble HC analyzed the provisions of Section 2(47) of the IT Act and observed that the transfer of a capital asset is not only confined to sale, exchange, relinquishment of the asset or extinguishment of any right therein but would cover several other situations which may not be understood as 'transfer' in normal parlance.
  - The Hon'ble HC observed that the ITAT had relied on the Hon'ble Supreme Court (**SC**) judgment in case of ***CIT v Rasiklal Maneklal (HUF) (177 ITR 198)*** to hold that there is no transfer of shares in the scheme of amalgamation. The Hon'ble HC, however opined that the sole question decided by the SC in the aforesaid judgment was whether receipt of shares upon amalgamation was 'exchange' or a 'relinquishment' within the meaning of Section 12B of the Income Tax Act, 1922 (**Old Act**).
  - The Hon'ble HC noted that the SC in the case of ***CIT v Grace Collis and Ors (248 ITR 323)*** dealt with the similar proposition of transfer of shares in the scheme of amalgamation. It was ruled that upon amalgamation, the shares held by the shareholders of the amalgamating company are 'extinguished' and covered under the scope of 'transfer' under Section 2(14) of the IT Act for the purpose of capital gain [though exempted under Section 47(vii)].
  - The Hon'ble HC relying on the judgment of Grace Collis (*supra*), set-aside the order of ITAT treating the same as flawed and unstainable, so far as capital assets is concerned. Further, since shares are held as capital assets, it was not disputed by either of the parties that transfer will not be exempted under Section 47(vii) of the IT Act.
  - However, the important debate of relevance that arose in the matter was whether any taxable income would arise if the shares were held as 'stock in trade' (i.e. not as capital asset and thus outside the scope of capital gain).
- **If shares are held as 'stock-in-trade', whether amalgamation would result in income chargeable to tax under the head 'profits and gain of business or profession'**
  - The Hon'ble HC relied on the SC decision in the case of ***Orient Trading Co. Ltd v CIT (224 ITR 371)*** and observed that if the shares are exchanged, it can be said that the taxpayer had made a realization of the value of the shares. The difference in the price of the shares would therefore be treated as profit of the taxpayer for taxation purpose.
  - The Hon'ble HC accepted the basic proposition that no notional gains can be taxed in case of 'stock-in-trade'. However, the Hon'ble HC observed that in the instant case, the taxpayer had received shares of the amalgamated company in lieu of the amalgamating company. These new shares did not represent the same stock in the inventory of the taxpayer and such shares would be valued entirely on different fundamentals.
  - Further, under the scheme of amalgamation, the dissenting shareholders receive the value of their shareholding in cash or equivalent in kind, while the approving shareholders receive the same value in the form of shares of the amalgamated company. The taxation principles would apply equally, irrespective of the status of the shareholder.

- Accordingly, upon receipt of new shares (against shares in the amalgamating company), there was actual realization of income and not notional accretion/profit. In arriving at the conclusion, the Hon'ble HC relied on the SC decision in the case of Orient Trading Co. Ltd (*supra*), (which was in context of exchange of shares) and certain English case laws which dealt with amalgamation.
- The Hon'ble HC remarked that the taxable event is not just a matter of entries made in the account books of the taxpayer - it is essentially one of substance and of the real nature of what transpired in the transaction.
- In the absence of any factual finding by the ITAT on whether the shares of the amalgamating company were held by the taxpayer as a capital asset or as stock-in-trade, the Hon'ble HC remanded the matter to ITAT.

Texas Instruments (India) Pvt Ltd (IT(TP)TA No.702(Bang)/2016) (Bangalore ITAT)

Applies APA-price agreed with amalgamated entity to rollback year pre-amalgamation

FACTS OF THE CASE

- The taxpayer aggrieved by the transfer pricing adjustment made in the final assessment order (dated January 29, 2016) passed under Section 143(3) read with Section 144C of the IT Act, preferred an appeal before the ITAT.
- The main issue that required adjudication in the impugned appeal was with regard to determination of Arm's Length Price (**ALP**). The taxpayer had filed an application for admission of additional grounds of appeal before the ITAT, and the same are as follows:
  - The taxpayer contended that Transfer pricing Officer (**TPO**) as well as TO had passed an order in the name of 'Natsem India Design Private Limited', an amalgamating company not in existence and thus, the order deserved to be quashed and should be declared as void-ab-initio, illegal and bad in law.
  - The taxpayer had also raised a without prejudice plea that a Bilateral Advance Pricing Agreement (**APA**) which was entered between taxpayer and Central Board of Direct Taxes (**CBDT**) on March 28, 2018 for Financial Year (**FY**) 2010-11 to FY 2017-18 ought to be applied for AY 2011-12 for Natsem India Designs Private Limited whose successor in interest was the taxpayer.
- The taxpayer also submitted that the fact of entering into a Bilateral APA was not present before the lower authorities at the time of assessment proceedings of Natsem India since, Memorandum of Appeal was filed on April 1, 2016 i.e. after passing of assessment order.

JUDGEMENT

- ITAT admitted the additional grounds of appeal relating to the Bilateral APA entered between the taxpayer and the CBDT. ITAT observed the provisions of Section 92CC of the IT Act and stated that it empowers the CBDT to enter into an APA with any person for a period, not exceeding 5 consecutive financial years with a roll back of APA's for a maximum period of 4 prior years. ITAT also referred to APA roll back rules.
- ITAT held that since, Bilateral APA entered between the taxpayer and CBDT was with respect to AY 2011-12 (i.e. AY under consideration), the ITAT directed TPO/TO to apply price agreed under the Bilateral APA and determine ALP accordingly. ITAT allowed taxpayer's plea for statistical purpose and directed the TO to grant the taxpayer an opportunity of being heard.

ELP Comments: Companies have to undertake FAR analysis to test whether function performed, assets employed, and risk assumed by the amalgamating company aligns with that of amalgamated company before adopting price agreed under the Bilateral APA.

Archroma India Pvt. Ltd. (306/Mum/2019) (Mumbai ITAT)

Slump-sale falls within ambit of 'succession' under Section 170 and sixth proviso to Section 32 applies

FACTS OF THE CASE

- Archroma India Private Ltd (**taxpayer**) entered into Business Transfer Agreement (BTA) with an Indian private limited company (**transferor**) for purchase of an undertaking under slump sale. As per the BTA, the taxpayer acquired various assets and goodwill from the transferor. Consequently, the taxpayer got these assets valued and added the FV of such to the existing written down Value (**WDV**) of block of assets, thereby claiming depreciation.
- During the assessment proceedings, the TO treated such slump sale as succession and applied Section 170 of the Act along with the sixth proviso to section 32(1) of the IT Act. Thereby disallowing the depreciation claims on the FV of the acquired assets which was added to the WDV during the year.
- The aggrieved taxpayer filed an appeal before the CIT(A) and in this regard, CIT(A) held as under -
  - Transfer of assets under BTA does not qualify as succession – Reliance placed on ***Saipem Truine Engineering Pvt. Ltd. (ITA No. 5239/Del/2012)***
  - The fair value of the assets was to be taken as the cost of the assets belonging to each block
  - Excess of consideration for business acquisition over the cost of individual assets was to be treated as goodwill

JUDGEMENT

On appeal, the Mumbai ITAT ruled as under -

- Section 170 of the ITA deals with transfer of assets pursuant to succession to business by any person otherwise than death. As the taxpayer has acquired the assets under BTA and was succeeded by the transferor company, the provisions of section 170 of the IT Act are applicable to the present case. Relying on the decision of Hon'ble SC in the case of ***K.H. Chambers (55 ITR 674)***, the ITAT dismissed the taxpayers' reliance on several judicial precedence in its argument that slump sale does not come under the realm of Section 170 of the IT Act.
- Section 50B of the IT Act deals with taxability of slump sale in the hands of the transferor. The said provisions do not deal with the tax treatment of slump sale in the hands of buyer. Section 50B does not deal with the issue of depreciation on assets acquired under slump sale. As a natural corollary, the issue of depreciation on assets acquired under slump sale shall be dealt with as per the general provisions of the IT Act.
- Section 32 of the IT Act deals with depreciation on assets. These provisions do not exclude slump sale and the sixth proviso to Section 32 of the IT Act specifically deals with depreciation on transfer of assets in case of succession. Based on the dictum of Noscitur a sociis, the assets transferred under slump sale were covered under sixth proviso to Section 32 of the IT Act. Accordingly, the proportionate depreciation as computed by the TO as per the sixth proviso to Section 32 of the IT Act was correct. Further, relying on certain judicial precedents, ITAT held that excess of consideration over the WDV of assets taken shall be treated as goodwill and shall be eligible for consequent depreciation.

ELP Comments:

In case of slump sale, Section 50B provides for taxability in the hands of the transferor. However, IT Act is silent regarding tax implications on slump sale in the hands of buyer. Given the uncertainty, the TOs often resort to the provisions of Section 170 of the IT Act for treating slump sale as succession. Considering that the book value of an individual asset is not available with the buyer, the buyer usually carries out the valuation of asset acquired and then

claims depreciation on the value so ascribed. After this decision, the buyers claiming higher depreciation after slump sale (based on FV of the assets acquired) may be adversely impacted. However, such adverse impact may stand neutralized considering the fact that the ITAT has acknowledged that the difference between slump sale value and book value of assets acquired (on a slump sale basis) qualify as goodwill, and eligible for consequential depreciation.

Techbooks International (P.) Ltd. (IT Appeal no. 6102 (Delhi) of 2016) (Delhi ITAT)

Where outstanding receivable was more than shareholders' funds, overdue receivable from associated enterprises treated as separate international transaction and imputing interest

FACTS OF THE CASE

- Techbooks International (P.) Ltd. (**taxpayer**) was a wholly owned subsidiary of a US based company engaged in development of customized electronic data.
- During the course of assessment proceedings, the taxpayer was asked to provide the details with respect to the loan taken by the associated enterprises (**AEs**) and the credit spread given to the AEs. Considering the inordinate delays in the recovery of outstanding dues from its AEs, the taxpayer was asked to submit the details of receivable. The TPO held that the actual delay in receipts of outstanding receivables is much more than the stipulated delay without any cogent reason of business expediency.
- It was found that in the year under consideration, outstanding receivable from AEs were more than shareholders' funds available with taxpayer which implied that total profit earned by the taxpayer was enjoyed by its AE out of India fully. It was apparent that AE was only paying the taxpayer the amount which was enough for defraying expenditure to keep it afloat and keeping all other sums in form of outstanding trade receivable.
- The TPO made an addition on account of ALP of interest chargeable on outstanding receivable beyond the specified period of 150 days. Therefore, he computed the interest amount on the outstanding receivable. This issue was agitated by the taxpayer before the learned dispute resolution panel. Aggrieved taxpayer filed an appeal before the ITAT.

JUDGEMENT

- The ITAT observed that at the end of the year, shareholders fund available was INR 1,235,355,303 whereas outstanding receivable from its AE is INR 1,324,807,379. Thus, the outstanding receivable from its AE is more than the shareholders' funds available with the taxpayer. Thus, it implies that the total profit earned by the taxpayer is enjoyed by its AE out of India.
- The ITAT further observed that the AE was only paying the taxpayer, the amount which is enough for defraying expenditure to keep it afloat and keeping all other sums in the form of outstanding trade receivable. In view of the peculiar facts, where total shareholders' funds are available with its AE as an interest free trade receivable clearly shows that outstanding receivable from the AE is not the transaction of sale of goods/services to the taxpayer.
- In view of the peculiar facts and the decision of coordinate bench in taxpayer's own case in earlier year, the ITAT found merit in TPO's action of considering the overdue outstanding receivable from AE as a separate international transaction and making addition on account of ALP of interest chargeable on outstanding receivable beyond the specified period of 150 days.

Mastercard Asia Pacific Pte. Ltd. (W.P. (C) 10944 of 2018) (Delhi HC)

Incidence of Equalization Levy challenged citing double taxation in view of PE in India

FACTS OF THE CASE

- Mastercards Asia Pacific Pte Ltd (**Petitioner**) is incorporated under the laws of Singapore. Mastercard India Services Private Limited (**MISPL**) was incorporated in India to render certain marketing, liaison and support services to the Petitioner.
- In 2014, the Petitioner approached the AAR to seek advance ruling on whether the Petitioner has a PE under Article 5 of the India-Singapore DTAA in respect of services of facilitating authorization, clearing and settlement to be rendered in relation to the processing of card payment transactions for customer banks in India and on whether the transaction processing fees received would be chargeable to tax in India as Royalty or Fee for Technical Services (**FTS**) as per Article 12 of the India-Singapore DTAA. In 2018, AAR held that the petitioner had a Fixed place PE, Service PE and Dependent agent PE in India under Article 5 of the India-Singapore DTAA. The appeal filed by the petitioner before the Hon'ble Delhi HC is pending in this regard.
- The Finance Act, 2020 introduced Section 165A(2)(i) for introduction of equalization levy. This Equalization levy is payable at the rate of 2% on the consideration received or receivable by a non-resident e-commerce operator from e-commerce supply of goods or services made or provided or facilitated, by it to
  - specified persons including persons resident in India
  - and using internet protocol address located in India. This levy is not payable in case the non-resident has a PE in India.
- In view of the above, the petitioner filed a writ petition before the Hon'ble Delhi HC for grant of stay on the applicability of the provisions of new equalization levy. In this regard, the petitioner has stated that levy of income tax in relation to PE and equalization levy would result in double taxation for the petitioner.

JUDGEMENT

- Delhi HC issued notice and listed the petitioner's application seeking stay in respect of the Equalization Levy payment pending the main matter regarding the PE issue August 18, 2020.

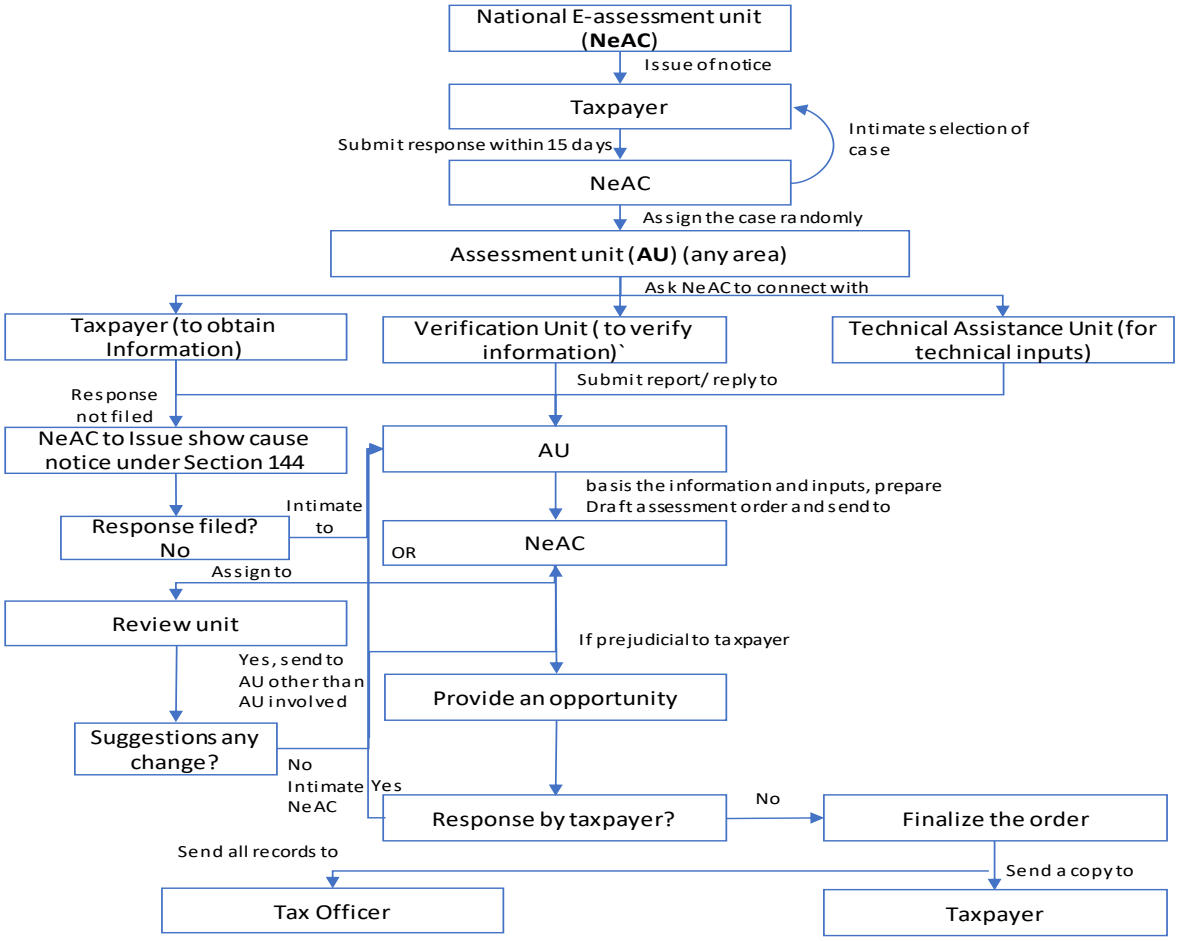
NOTIFICATIONS/CIRCULARS

CBDT grants PAN exemption to Non-resident investing in category I or Category II Alternative Investment Fund (AIF) located in International Financial Services Centre (IFSC)

- CBDT inserted new Rule 114AAB of the Income tax Rules, 1962 notifying class or classes of persons to whom provisions of Section 139A of the IT Act (mandatory obtaining PAN) shall not apply.
- Provisions of Section 139A shall not apply to a non-resident if:
  - It does not earn any income in India, other than the income from investment in Category I or Category II AIF located in IFSC in India; and
  - Income tax on such income has been deducted by the Specified Fund in accordance with Section 194LBB; and
  - the non-resident furnishes specified details and documents to the Specified Fund.
- Further, the new Rule also requires the specified fund to furnish quarterly statement in respect of such non-resident in the newly notified Form 49BA.

CBDT notified amendments in E-assessment Scheme, 2019 to implement faceless assessments. Also issued detailed guidelines for implementation of Faceless Assessment Scheme

- Flow Chart explaining e-assessment scheme is provided below:



Particulars	New Scheme/Amendments
Nomenclature of Scheme	Changed to 'Faceless assessment' from 'E-assessment' scheme.
Scope of assessment	Extends to Best judgment assessment under Section 144 as against regular assessment under e-assessment scheme.
Procedure of assessment (Amendment)	▪ Response to notice issued by NeAC seeking information or documents or evidences from the taxpayer or such other person should be filed within specified time; ▪ If, taxpayer fails to comply with the notice seeking information, documents or evidences, NeAC to service a notice under Section 144. ▪ If, taxpayer fails to file response against the notice under Section 144, NeAC to intimate such failure to AU; ▪ NeAC shall send report received from verification/ technical unit to AU; ▪ Suggestions pointed out by the review unit to be forwarded to different AU other than the AU which was involved in draft assessment order
Penalty Notice	NeAC shall along with the draft order of penalty, serve a demand notice on the taxpayer or any other person, as the case may be.
Appellate proceedings	File an appeal before CIT(A) even against the penalty order.
Exchange of communication	Communication between NeAC and the taxpayer or his authorized representative shall be exchanged exclusively by electronic mode. Internal communication between the units shall also be exchanged exclusively by electronic mode. The above provision shall not apply to enquiry or verification conducted by verification unit in certain specified circumstances.
Authentication of electronic records	Electronic records shall be authenticated by the originator by affixing his digital signature.
Transfer of case to jurisdictional TO	Pr. CCIT or Principal Director General, in charge of the NeAC, may at any stage of the assessment, if considered necessary, transfer the case to jurisdictional TO, with prior approval of the Board.
Request for Personal Hearing	The Chief Commissioner or Director General in charge of Regional E-assessment Centre (ReAC), may approve the request if he is of the opinion that the request is covered under the circumstances as may be notified by the Pr.CCIT/Pr.DG.
Power to specify format, mode, procedure and processes	Such powers shall be exercised by Pr. CCIT/ Pr.DG, with prior approval of the Board. ▪ Circumstances with respect to exchange of communication through electronic mode shall not apply ▪ Circumstances in which personal hearing has been requested with the approval of Chief Commissioner or Director General etc

- Further, all assessment order should be passed by National E-assessment unit (**NeAC**) except for assessment orders in cases assigned to Central and International Tax Charges.
- CBDT has also issued detailed guidelines for implementation of faceless Assessment Scheme, 2019

NEWS

- **PM Modi launched the platform for 'Transparent Taxation' -** Honoring the Honest- Prime Minister (**PM**) Narendra Modi launched 'Transparent Taxation' platform encompassing Faceless assessments, Faceless appeals with effect from September 25, 2020 and Taxpayers' Charter. PM explained that faceless assessments/appeals will have a technology driven interface (e.g. In case of scrutiny assessments, there will be random selection of cases and selection will not be limited to jurisdictional TO). Further the taxpayers charter will outline responsibilities and duties of TO and transfers/postings of officers will be done away with.
- **Designation of Special Courts in Maharashtra -** CBDT Vide Notification 59/2020 dated August 10, 2020, designated 'Special Courts' in Maharashtra to carry the trials for offences punishable under Income-Tax and Black Money Act. The board notified 3 courts *viz.* - Vikhroli, Nagpur and Pune for trials of the respective regions.
- **CBDT notifies Competition Commission of India (CCI) for disclosing assessee related information** – Pursuant to powers under Section 138(1)(a)(ii) of the IT Act, CBDT vide Notification 57/2020 specifies Director General/ Secretary of CCI for disclosure of information in respect of the taxpayers. CBDT or any other income-tax authority specified may furnish such relevant and precise information to CCI which would enable CCI to perform its functions and CCI would be required to maintain absolute confidentiality of the information provided.
- **CBDT releases detailed MAP guidance** – As per the suggestions of Action 14 report on BEPS project of G-20 & OECD Countries for making comprehensive guidelines and in order to align its practices with the BEPS Action Plan 14, CBDT MAP regulations by notifying Rule 44G of the IT Rules, 1962 to replace the existing Rule 44G and 44H. The new Rule 44G applies to all cases pending before the competent authorities (**CAs**) as on May 6, 2020. The MAP guidance in presented in four parts:
  - Part A: Introduction and Basic Information
  - Part B: Access and Denial of Access to MAP
  - Part C: Technical Issues
  - Part D: Implementation of MAP outcomes
- **CBDT releases MLI synthesized text -** Recently, CBDT released MLI synthesized text for India's tax treaties with Czechia Republic and Russia to implement measures for the prevention of Base Erosion Profit Shifting (**BEPS**).

INDIRECT TAXATION

RECENT CASE LAWS

Linde Engineering India Pvt Ltd v. Union Of India [2020-VIL-349-GUJ-ST]

Service provided by an Indian subsidiary to a holding company outside India is export of service

FACTS OF THE CASE

- The Petitioner is a subsidiary of Linde AG, Germany and is *inter alia* engaged in the business of providing taxable output services under the category of consulting engineering services, erection, commissioning and installation service, construction services (other than residential complexes) including commercial/industrial buildings or civil structures and works contract services etc. to various entities located within and outside India.
- On scrutiny by the Central Excise Revenue Audit, it was observed that the Petitioner was rendering various services to its parent company and other establishments of the Linde Group outside India and was not charging service tax on such services treating the same as 'export of services'.
- Demand was raised against the Petitioner on the grounds that both the service provider in India and recipient outside India were establishments of the same person and therefore, the same was not treatable as export of service. Being aggrieved, the Petitioner appealed before the Hon'ble High Court of Gujarat.

JUDGEMENT

- While referring to item (b), explanation 3 of Section 65B (44) of the Finance Act, 1994, it has been held that the subsidiary company and the parent company cannot be treated as two distinct persons. Also, services rendered by the subsidiary to its parent company cannot be considered services rendered to another establishment of the same company.
- The High Court held that the services rendered by the India subsidiary company outside the territory of India to its parent company would be considered 'export of service' as per Rule 6A of the Rules, 1994. Clause (f) of Rule 6A of the Rules, 1994 would not be applicable as the subsidiary company and its parent company, are independent legal entities and cannot be said to be merely establishments so as to be distinct persons.
- In such circumstances, the High Court set aside the show cause notice as the department does not have any jurisdiction to issue the same by invoking the provisions of Section 73 of the Act, 1994 read with Section 65B(44) and Rule 6A of the Rules, 1994.

M/s Downtown Auto Pvt. Ltd. v. Union of India [TS-603-HC-2020-GUJ-NT]

Denial of transitional credit under Section 140(3) of the CGST Act for want of Credit Transfer Document

FACTS OF THE CASE

- The Petitioner is an authorized vehicle dealer who purchased cars and spare parts from the manufacturer directly and other authorized vehicle dealers. It claimed transitional credit on the closing stock as on June 30, 2017. In respect of goods purchased from other dealers, the revenue denied the claim of transitional credit on the basis that excise invoices or credit transfer documents (**CTD**) as prescribed under Rule 15(2) of the CENVAT Credit Rules, 2017 (**CCR Rules**) were required in the name of the Petitioner.
- The Petitioner contended that it was not registered under the excise law and it was not bound by the CCR Rules for claiming transitional credit as per Section 140(3) of the CGST Act. The Petitioner has fulfilled all the conditions

contained in Section 140(3) of the CGST Act and was entitled to the transitional credit in respect of excise duty paid on the goods purchased from dealers prior to June 30, 2017.

JUDGEMENT

- The Hon'ble High Court held that Section 140(3) of the CGST Act does not contain any condition to submit CTD in order to claim transitional credit. The Hon'ble Court noted that the Petitioner had duly submitted document trail evidencing payment of excise duty on goods in question.
- Accordingly, the Court allowed transitional credit to the Petitioner subject to verification of the documents by the revenue that excise duty has been paid by the manufacturer.

M/s Baba Super Minerals Pvt. Ltd. v. The Assistant Commissioner, CGST [2020-VIL-32-GSTAA]

Export related refunds should not be rejected due to minor errors or procedural lapses

FACTS OF THE CASE

- The appellant is an exporter who filed a claim of refund of unutilized ITC balance for the month of March 2018. The claim was partially rejected by the Department on account of some missing details w.r.t. purchase invoices such as address of the appellant, GSTIN of the appellant, invoices not appearing in GSTR-2A, etc.
- The appellant thus filed an appeal contending that the discrepancies in the invoices, already submitted with the Department, have been rectified by the respective suppliers in order to comply with the provisions of Rule 46 of the CGST Rules.
- The appellant submitted that so long there is substantive compliance of the law the refund cannot be denied. Reference was made to Circular No. 37/11/2018-GST, dated March 15, 2018 which stated that '*refunds may not be withheld due to minor procedural lapse or non-substantive errors or omission*'. Reliance was also placed on the decisions of *Mangalore Fertilizers & Chemicals Vs. Deputy Commissioner [1991-VIL-06-SC]; Central Excise & Service Tax, Raipur Vs. Satyam Balaji Rice Industries Pvt. Ltd. [2015-VIL-851-CESTAT-DEL-ST]; Commissioner of Central Excise Pune-I and Vs. Fujitsu Consulting Pvt Ltd. [2015-VIL-852-CESTAT-MUM-ST].*

JUDGEMENT

- The High Court referred to the proviso to Rule 36 of the CGST Rules, which states that *'Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.'*
- Considering the above provisions and the aforesaid Circular, the Hon'ble Court held that the export related refunds shall not be rejected due to minor procedural lapse or non-substantive errors or omission which can be rectified subsequently. Hence, the appellant is directed to submit the rectified invoices before the adjudicating authority for verification, post which the authorities may sanction the refund, if the same is found in order and admissible.

M/s Amani Machine Centre v. State Tax Officer [TS-598-HC-2020(KER)-NT]

Best judgment assessment under CGST Act can be initiated anytime upon detection of non-filing of return

FACTS OF THE CASE

- The Petitioner has not been filing the GSTR 3B returns for the period August 2018 to June 2019. The tax authorities completed best judgment assessment before December 31, 2019 and passed assessment orders under Section 62 (assessment for non-filers of returns) of the CGST Act. The Petitioner subsequently filed belated returns after expiry of 30 days from the service of assessment orders.
- The Petitioner submitted that as per Section 62(1) of the CGST Act, best judgment assessment can be done within a period of five years from the due date specified for furnishing of annual return under Section 44. In other words, the Petitioner had time till 31st December, following the end of the financial year to file annual returns and the tax authorities could alone proceed to complete best judgment assessment only after the said due date.
- Basis the above, the Petitioner challenged the assessment orders passed on best judgment basis.

JUDGEMENT

- The High Court noted that Section 62 of the CGST Act must be seen as enabling an Assessing Officer to proceed to assess the tax liability of a person, who has not furnished the returns *inter alia* under Section 39, on best judgement basis.
- The High Court explained that period of 5 years is the outer limit provided to the officer within which the assessing officer must complete the best judgement assessment. It does not, mandate that the steps for completing the best judgement assessment should be initiated only after 31st December, following the end of the financial year, in which the default as regards filing of monthly returns occurred. It is not indicative of any particular point in time from when (after detection of the default committed by the assessee) the assessing authority can proceed to complete the assessment on best judgement basis.
- Hence, the High Court dismissed the writ petition filed by the Petitioner.

M/S Epson India Pvt Ltd. v. Commissioner Of Customs Bangalore [2020-VIL-354-CESTAT-BLR-CU]

Whether exemption under Notification no.24/2005-Cus. dated 01.03.2005 to 'business projectors' can be denied on the ground that they can be used other than as attachments of computers?

FACTS OF THE CASE

- The Company had imported 'business projectors' and classified them under CTH 8528 6100. Exemption benefit was availed under Notification no. 24/ 2005 dated March 1, 2005 which provided exemption to all goods falling under heading no. 8528 41, 8528 51 or 8528 61 of the First Schedule to the Customs Tariff Act, 1975 w.e.f. January 1, 2007. Accordingly, 'cathode ray tubes', 'monitors', 'other monitors and **projector of a kind solely or principally used in automatic data processing system** of heading 8471' are eligible for exemption.
- The Department has primarily contended that the imported goods were not in conformity with the qualification of being 'solely or principally used' in 'automatic data processing system'. The goods have to be classified in accordance with trade parlance and the projector imported by the company could also be used without a computer for projecting images on a USB or a digital camera.

JUDGEMENT

- The Hon'ble Tribunal held that dichotomizing of the products, with one intended solely, or principally, for use with automated data processing systems, is not intended to exclude the various other usages but to provide a context in which the intended product can be construed. Thus, to the extent the business projectors, are capable of use with computers (automated data processing system), they are classifiable under CTH 8528 6100 and are eligible for the availing exemption.
- The Hon'ble Tribunal also observed as follows:
  - In circumstances of declared classification, denial by customs authorities shifts the burden on to them for justifying the alternative classification and, in the absence of valid reasons, the declared classification is to be restored.
  - Trade parlance is to be resorted to only when the commonly used phraseology describes the goods closely enough to the description of the sub-heading in the tariff. Principle of trade parlance is to be used to disambiguate expressions that may be open to a technical definition and is founded on the premise that the tariff is intended for the trade and not for academics with no scope for definitions to be read into or borrowed from elsewhere.

M/s Bioveda Action Research Company v. DGGSTI & Ors. [TS-599-SC-2020-NT]

Challenge to summons issued to Managing Director (MD) dismissed with direction to seek concession from officer

FACTS OF THE CASE

- An investigation was being conducted against the Petitioner as to whether the products supplied were ayurvedic medicaments or cosmetics. The Managing Director (**MD**) of the Petitioner Company was also a partner in another partnership firm which made similar cosmetics. In this connection, the revenue authorities issued summons to the MD requiring attendance before the tax officers.
- The Petitioner filed an SLP before the Apex Court challenging the summon issued to the MD of the Petitioner against the dismissal of its writ petition before the Punjab and Haryana High Court.
- The Petitioner challenged the summons and submitted that summons cannot be issued to top officials of a company without valid reason, especially when all the information was placed on record and all the concerned employees reported to the tax officers regularly. In its support, Petitioner cited departmental circulars issued by CBEC/CBIC which said top officials of the company can only be called by tax authorities if there is a pressing issue of revenue loss connected to the top official being summoned.

JUDGEMENT

- The Supreme Court dismissed the SLP and thus refused to interfere in the investigation proceedings. The Apex Court asked the Petitioner to directly approach the tax officers conducting the investigation and seek concession of attendance of MD until the lockdown period is over.

RECENT ADVANCE RULINGS

In re: M/s Enfield Apparels Ltd. [2020-VIL-233-AAR]

Assignment of leasehold right in immovable property is liable to GST

FACTS OF THE CASE

- The applicant is undergoing liquidation process and one of the assets under liquidation is a leasehold factory unit taken on lease for 99 years from the state industrial development corporation. As per the lease deed, after expiry of at least 5 years from the date of the lease deed, the applicant was entitled to assign the leasehold rights in such premises to another person for the unexpired lease period upon payment of a transfer fee.
- The following questions were raised before the AAR:
  - Whether GST is payable on the consideration receivable on such assignment of leasehold rights?
  - Whether the appellant is eligible to claim input tax credit for the GST paid on transfer fee to state industrial development corporation?
- The applicant contended that leasehold right to immovable property is an interest in land - in other words it is 'benefits to arise out of land' and thus included in the definition of 'immovable property' as defined under Section 3(26) of the General Clauses Act, 1897. On this basis, it was submitted that assignment of leasehold right is nothing but transfer of immovable property (like land) and no GST is leviable.

JUDGEMENT

- The AAR observed that paragraph 2 of Schedule II of the CGST Act provides that with respect to transactions relating to land and buildings, any lease, tenancy, easement, license to occupy the land, letting out of a building including a commercial, industrial or residential complex for business or commerce is the supply of services. In other words, 'benefits arising from land' in the forms specified in paragraph 2 of Schedule II are not to be treated as transactions in immovable property but as the supply of service for the purpose of the GST Act.
- The AAR pointed that Schedule II of the CGST Act excludes certain specified benefits arising out of land from the ambit of immovable property and treats them to be a service. For instance, it noted that lease of land is treated as a supply of service as per the Schedule II of the CGST Act. It held that the assignment is in nature of agreeing to do transfer of one's leasehold rights in favor of assignee. Thus, it classifies to be a service under 'Other miscellaneous services' and liable to GST at 18%.
- In relation to GST liability on transfer fee and the input tax credit of GST paid by the applicant, the AAR held that the transfer fee charged by the state industrial corporation is a consideration payable for providing a service in the course or furtherance of business, more specifically, because business includes supply or acquisition of goods or services in connection with the closure of a business in terms of Section 2(17)(d) of the CGST Act and GST paid by the applicant is admissible as input tax credit.

In re: M/s Daiecel Chiral Technologies (India) Pvt. Ltd. [2020-VIL-229-AAR]

Denial of ITC on lease charges paid towards lease of land

FACTS OF THE CASE

- The applicant is engaged in providing pharmaceutical Research & Development (**R&D**) services. In order to render such services, it requires a laboratory where analysis can be performed. Accordingly, the applicant acquired a land on lease where it would be constructing a laboratory and shall use the lab for rendering the services.
- The applicant is required to pay one-time lease premium and yearly lease charges and maintenance charges to the lessor. The applicant approached the AAR with its query as to whether it is eligible to claim ITC on payment of one-time lease premium, yearly lease charges and maintenance charges towards lease of land.
- The applicant submitted that lease charges qualifies to be an input service in terms of Section 2(16) of the CGST Act and does not get covered in the ineligible list of input services under Section 17(5).

JUDGEMENT

- The AAR observed that the lease charges paid by the applicant were towards lease of land that would be used for construction of laboratory building (immovable property). In terms of Section 17(5)(d) of the CGST Act, ITC on services received for construction of immovable property, other than plant and machinery, on its own account is denied.
- Thus, the AAR held that ITC a one-time lease premium, yearly lease charges and maintenance charges paid by the applicant for construction of immovable property is not allowed.

In re: M/s. Prasa Infocom & Power Solutions Pvt. Ltd. [2020-VIL-227-AAR]

Setting up a data center qualifies to be composite supply of goods and not a works contract service

FACTS OF THE CASE

- The applicant is engaged to operate and maintain a data center after construction of a civil structure for housing computing devices and equipment. The applicant also supplied ancillary equipment such as UPS and batteries, fire alarm systems, air conditioners, security systems etc. The contract involved supply of goods and services and was in nature of a composite supply.
- The applicant submitted that it is supplying goods and services for setting up a data center which cannot be shifted to another location without dismantling and thus is an immovable property. The applicant argued that the transaction as a whole qualifies as a 'works contract' as per Section 2(119) of CGST Act and all supplies under the agreement should be taxable at 18% GST.
- The revenue raised its contention that works contract is applicable only in case of construction services where the value of goods and services are not distinct. In terms of the agreement, the value of goods and services to be supplied are clearly bifurcated with 85% of the total cost of the contract pertained to supply of goods. It was argued by the revenue that the project of the Applicant primarily involved supply of equipment and machineries and the value of construction is insignificant.

JUDGEMENT

- The AAR perused Section 2(119) of CGST Act which defined works contract and held that in the present case, there has been no construction of 'any immovable property' wherein transfer of property in goods is involved in the execution of such contract. Hence, there is no works contract.

- The AAR stated that the claim of the applicant to classify the services under Chapter 9954 (Construction services) is not tenable as there is no construction of any kind. The data center is a space/room where the computing equipment and other ancillary system are installed. Most of such equipment in nature of machine/ instruments/equipment that are all replaceable. Also, the value of civil construction was insignificant.
- The AAR noted that the agreement had a clear bifurcation in respect of supply of goods and that of services and that major part of supply is that of goods and separate payment is received for such goods sold. The supplies are naturally bundled and in conjunction with each other. Thus, it is a composite supply with principal supply of goods.
- Accordingly, the AAR held that the applicant by setting up a data center is not rendering any works contract service but is involved in a composite supply with principal supply of goods.

In re: M/s Reach Dredging Ltd [2020-VIL-236-AAR]

Taxability of works contract for the activity of dredging a lake with dominant earthwork

FACTS OF THE CASE

- The applicant entered into contract with a lake conservation authority for dredging of lake along with strengthening of embankments of the lake. The contract entered is for a works contract service involving earthwork in excavation and re-excavation of the drainage channels for increasing the water holding capacity of the lake.
- The lake conservation authority had been constituted under the provisions of Jammu and Kashmir Development Act, 1970 for the purpose of preservation and conservation of the lake. The entire control of the Board of the Authority rest with the State Government of Jammu and Kashmir (now Union Territory).
- The applicant approached the AAR with the question as to whether the services supplied by the applicant qualifies to be a supply under Sl.No. 3(vii) of the Notification No. 08/2017 – Integrated Tax (Rate) dated June 28, 2017 and thus qualify to be taxable at 5%?
- It is noteworthy that Sl.No. 3 (vii) of the Notification provides that a supply is taxable at 5% if (a) the contract is a composite supply of works contract (b) involves earthwork exceeding 75% of the contract value and (c) the recipient is the Central Government, State Government, Union Territory, a government authority or a government entity]

JUDGEMENT

- The AAR then observed that the work is aimed to improve the immovable property (lakebed) by involvement of various services and goods in the course of execution. Hence, it qualified to be a 'works contract' for the purpose of the CGST Act.
- The AAR perused the letter of the lake conservation authority certifying the involvement of material of less than 1% of total work order. It noted that the scope of work in the contract laid emphasis on earthwork in the excavation. Accordingly, earthwork exceeded at least 75% of the contract value. The AAR ruled that since the lake conservation authority is under the 100% control of the State Government, it is a Governmental Authority.
- Since all the three conditions of Sl.No. 3(vii) were fulfilled, the services supplied by the applicant to the lake conservation authority qualified to be taxable therein under 5% rate of GST.

In re: Navneeth Kumar Talla [2020-VIL-228-AAR]

Taxability of supply of food to hospitals on outsourcing basis

FACTS OF THE CASE

- The applicant is involved in supply of food to patients from the canteen inside the hospital premises on outsourcing basis. The money for supply of food was directly paid by the hospital (service recipient) on the basis of number of coupons collected by the applicant from the patients.
- The applicant prepares the food using his labor at the hospital premises and the recipient of service is the hospital who pays the applicant.
- In view of the above, the applicant approached the AAR to enquire whether the food supplied to hospitals on outsourcing basis is chargeable to GST? If yes, what shall be the rate of tax?

JUDGEMENT

- The AAR observed that exemption is available under Entry 74 of the *Notification No. 12/2017 – Central Tax (Rate)* dated June 20, 2017 only when the clinical establishment itself provides the service of supply of food as a part of health care services to the in-patients. The exemption is not available when such supply of food is made by a person other than the clinical establishment (based on a contractual arrangement with such establishment). Thus, GST shall be payable on supply of food to patients from the canteen run by outsourced contractor.
- In respect of rate of tax, the AAR held that till July 26, 2018, the GST rate was 18% on such service and from July 27, 2018 onwards, the rate is 5% (without ITC).

NOTIFICATIONS/CIRCULARS

S. No.	Reference	Particulars
1.	**Central Tax Notification No. 60/ 2020 – Central Tax dated July 30, 2020**	▪ New format for e-invoice has been released for taxpayers
2.	**Central Tax Notification No. 61/ 2020 – Central Tax dated July 30, 2020**	▪ Amends earlier Notification No. 13/2020 - CT dated 21.03.2020 to the effect that the turnover limit for mandatory e-invoicing (applicable from 01.10.2020) has been increased from 100 crores to 500 crores. Further, SEZ units are exempted from e-invoicing provisions.
3.	**Instruction No 17/2020-Customs dated 10.08.2020**	▪ Special Drive started with effect from 11.08.2020 till 15.09.2020 for complete disposal of all un-claimed/un-cleared/seized/confiscated goods due for disposal by 01.08.2020 as per prescribed guidelines. Special care would be taken to also confirm that till their disposal all such goods as well as other goods that may become ripe for disposal later, are kept safely and securely (including safe from fire) and do not present any danger to life or property. This is to ensure that no such goods ripe for disposal are held up in any Customs station beyond the prescribed timelines.
5.	**DGFT Notification No. 22/2015-2020 dated 11.08.2020**	▪ Import policy of colour television sets under HS code 8528 7211 to 8528 7219 is amended from 'Free' to 'Restricted'

Authors:
Kumar Visalaksh, Partner
Rahul Charkha, Associate Director
Tejus Pathak, Associate Partner
Arpita Chaudhary, Associate
Bhagyashree Jain, Associate
Saurabh Dugar, Associate

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