ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

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# DIRECT TAXATION

## RECENT CASE LAWS

### Network Construction Company v ACIT (2279/Mum/2017) (Mumbai ITAT)

*Section 50C inapplicable to capital contribution of 'development rights' to an Association of Person (**AOP**)*

**FACTS OF THE CASE**

- The taxpayer had acquired development rights to develop seven buildings, of which, the taxpayer had developed and sold four buildings on its own. The profits earned thereon were disclosed as business profits in its return of income (**ROI**). The development rights in respect of the remaining three buildings were reflected under the head 'Investments' on the assets side of the balance sheet for the year ended March 31, 2010.
- Thereafter, the taxpayer entered into a Joint Venture agreement with M/s. Benchmark Properties, an AOP, wherein the taxpayer agreed to contribute the said remaining development rights as 'capital contribution' to the AOP at an agreed consideration of INR 5,00,00,000.
- The taxpayer filed its ROI for Assessment Year (**AY**) 2012-13 declaring a long-term capital gains on transfer of development rights as per the provisions of Section 45(3) of the Income-tax Act, 1961 (**IT Act**).
- The Tax Officer (**TO**) however rejected the taxpayer's computation of capital gains under Section 45(3) and held that transfer of development right is a capital asset and thus, assessable under Section 50C of the IT Act.
- Relying on the decision of Income tax Appellate Tribunal (**ITAT**), Lucknow bench in case of ***Carlton Hotels Pvt Ltd v ACIT (35 SOT 26)***, the Commissioner of Income tax (Appeals) **(CIT(A))** upheld the order of the TO.
- The taxpayer preferred an appeal before the ITAT, wherein it was argued that:
  - Capital gains are taxable under Section 45(3) and the amount credited to the Capital account in the AOP's books of accounts (i.e INR 5,00,00,000) is to be treated as the deemed sale consideration for the purpose of computing capital gains under Section 48 of the IT Act.
  - Section 50C could only apply to a situation where there was a transfer of land or building, and not merely a transfer of development rights in, as in this case;
  - Taxpayer was never the owner of the land and building and had only acquired development rights which was transferred by it to the AOP;
  - Even though the transfer of development rights by way of capital contribution is treated as a transfer, it is not a sale because there is neither **any receipt nor any accrual of any consideration** (relying on the Hon'ble Supreme Court (**SC**) decision in case of ***Sunil Siddharthbhai v CIT (156 ITR 509)*** in this regard).

**JUDGEMENT**

- ITAT, Mumbai noted the provisions of Section 45(3) of the IT Act and observed that the charging provisions of Section 45(3) of the IT Act has two limbs joined by the word 'AND'. The first limb, which states that the levy of capital gain tax on gains arising from contribution of capital asset in the AOP by a member and the second limb, is an essential **deeming** fiction for determining the value of consideration without which the charging provision would fail.
- ITAT also noted that the provisions of Section 50C of the IT Act **deems** only the value of consideration for the purpose of calculating capital gains in the transfer of capital asset from one person to another.

- ITAT thus held that provision of Section 45(3) of the IT Act was applicable in the instant case and not provisions of Section 50C of the IT Act. Thus, it reversed the orders of the lower authorities.

**ELP Comments**

It is a settled principle of law that a special provision applies over a general provision. Section 50C is more general in nature as it applies to all transactions of transfer of capital asset, being land and building, from one person to another, whereas Section 45(3) is applicable only under special circumstances i.e. only when the person is contributing the capital assets into a firm or AOP/BOI. In this regard, the ITAT Mumbai, in the case of ***DCIT v M/s Amartara Pvt Ltd (6050/Mum/2016)*** on the controversy of 45(3) vs. 50C held that, since Section 45(3) itself provides for deemed consideration to be adopted for the purpose of computation of capital gains, another deeming fiction provided by Section 50C cannot be extended to compute the deemed full value of consideration. This legal proposition is further supported by the decision of Hon'ble Supreme Court in the case of ***CIT v Moon Mills Ltd (59 ITR 574),*** wherein it was observed that one deeming fiction cannot be extended by importing another deeming fiction.

## M/s. Classic Stripes Pvt Ltd v DCI (2378/Mum/2017) (Mumbai ITAT)

*Difference between 'net assets' of 'loss-making' division taken-over & shares allotted - Goodwill; Allows depreciation*

**FACTS OF THE CASE**

- Taxpayer is engaged in the business of manufacturing and sale of printed self-adhesive stripes, labels, glow signs and all kinds of trade and advertising material and trading of car accessories.
- A scheme of merger of the Safely Products division of M/s Forma Sports Pvt. Ltd (**FSPL**) with the taxpayer was approved by the Hon'ble Bombay HC.
- In accordance with the scheme, the taxpayer had recorded the value of assets and liabilities at the **existing book value** i.e. the values appearing in the books of Safely Products division of FSPL. The taxpayer issued shares valuing more than the net assets acquired by it from the Safely Products division of FSPL. The excess consideration was treated as goodwill in the taxpayer's books of accounts .
- The taxpayer had not claimed depreciation on goodwill in the original ROI. However, the taxpayer made a claim during the assessment proceedings by way of filing a revised computation of total income.
- The TO disallowed taxpayer's claim of depreciation on goodwill on the following grounds:
  - Goodwill means reputation of the business and it was not clear as to how a consistent loss-making division would bring advantage of reputation and brand to the business of the taxpayer;
  - Goodwill in the instant case is a self-generated goodwill and the taxpayer had accrued the commercial benefit but not a commercial right;
  - Claim of deduction has to be made at the time of filing of ROI, no fresh claim could be entertained at the stage of assessment proceedings; and
  - Placed reliance on the decision of co-ordinate bench of Jaipur ITAT in the case of ***Jaypore Sugar Co Ltd v ACIT (44 SOT 625)*** to support its proposition.
- On appeal, CIT(A) upheld the action of the TO in disallowing the depreciation claimed on goodwill.

## JUDGEMENT

- **Depreciation on goodwill**

  - ITAT rejected TO's stand that no goodwill could have arisen as the said division was a loss making one and hence, the goodwill is a self-generated one, not entitled for depreciation. ITAT held that '*whether the unit is incurring losses or not, has got nothing to do with the existence of goodwill prevailing in the said unit*'.
  - ITAT explained that goodwill could arise on account of various factors such as continuing clients, continuing business & business relationships, established set up for smooth conduct of business, commercial and industrial rights and licenses to the successor company/merged entity etc. It held that these commercial, business and industrial rights were duly acquired by the taxpayer through a scheme of merger and due consideration was passed on for the same by way of allotment of shares.
  - ITAT observed that subsequent to the decision of Jaypore Sugar Co Ltd (*supra*), the Hon'ble SC in the case of ***CIT v Smifs Securities Ltd (348 ITR 302)*** held that goodwill arising on account of amalgamation would constitute an intangible asset eligible for depreciation under Section 32 of the IT Act.
  - Thus, following the Hon'ble SC decision in case of Smifs Securities (*supra*), ITAT held that the taxpayer is eligible for depreciation on goodwill arising on account of the merger.

- **Depreciation not claimed in the ROI**

  - ITAT placed reliance on Ahmedabad ITAT decision in case of ***CIT v Zydus Wellness Ltd (162 ITD 604)*** which followed the Hon'ble Bombay HC judgment in the case of ***CIT v Pruthvi Brokers and Shareholders Pvt. Ltd (349 ITR 336),*** and held that the taxpayer is entitled to depreciation on goodwill claimed through revised computation of income.

- **Depreciation on capital assets acquired during the year**

  - ITAT disallowed depreciation attributable to the Value Added tax (**VAT**) portion of certain capital assets acquired by the taxpayer, since the taxpayer could not present the vendors whose names were appearing in the negative list of sales tax department of the Government of Maharashtra.
  - ITAT stated that it could be safely concluded that the taxpayer could have purchased these capital goods from the grey market in order to save the liability of VAT.

## Next Gen Films Private Ltd (3782/Mum/2016 & 3783/Mum/2016)(Mumbai ITAT)

*Payments made to a United Kingdom (UK) company for production & delivery of 'Desi Boyz' film not taxable in India in absence of PE*

## FACTS OF THE CASE

- The taxpayer, a company resident in India had entered into a commissioning agreement with a UK based company namely M/s Desi Boyz Production Ltd (**DBPL**) to produce, complete and deliver a feature film 'Desi Boyz'. DBPL was responsible to produce the film and to ensure its delivery as per given specifications.
- The film involved production in India as well as in UK. Accordingly, DBPL entered into a production services agreement with a company resident in India namely, Eros International Films Private Limited (**EIFPL**) for managing

the India part of production of the film. EIFPL was responsible for arranging crew, requisite equipment, coordination and undertaking arrangements in India.

- The TO observed that the taxpayer did not withhold taxes on the remittances made to DBPL. The taxpayer submitted that in absence of PE of DBPL in India, no income could be attributable to India. However, the TO opined that since the entire film production activities and budgeting of the film was carried out by EIFPL in India, EIFPL constituted a PE of DBPL in India. Additionally, the TO contended that the taxpayer had control over management and budgeting of the film production activities of DBPL and this will be regarded as its Associated Enterprise (**AE**) and thereby the taxpayer constituting a PE of DBPL in India. In view of the same, the TO regarded the taxpayer as an assessee-in-default for failure to withhold taxes.
- The CITA(A) dismissed the taxpayer's plea and upheld the order passed by the TO. Aggrieved by the order of CIT(A), the taxpayers filed an appeal before the ITAT.

## JUDGEMENT

- The ITAT observed that the commissioning agreement between the taxpayer and DBPL was on a principal-to-principal basis. The entire responsibility to produce, deliver and ready the film for commercial purposes was on DBPL.
- The ITAT observed that DBPL acted as an independent service provider, free to take its own decisions including hiring of independent contracts. Further, all the activities of DBPL were carried out with the taxpayer's consultation only with a view to ensure that the film was produced exactly as per the specification and is in line with the storyline.
- Basis the above, the ITAT concluded that it could not be said that the taxpayer participated directly or indirectly in management, control or capital of DBPL and hence, it did not constitute a PE of DBPL in India.
- With respect to the production services agreement between DBPL and EIFPL, the ITAT observed that the relationship between the two entities was primarily that of a principal and agent. However, the ITAT observed that the activities rendered by EIFPL were independent in nature. The ITAT observed the financial statements of EIFPL and noted that the proportion of fees received from DBPL vis-a-vis the total turnover of EIFPL was very miniscule. Accordingly, the ITAT concluded that EIFPL carried out its activities as an independent agent and therefore it could not be termed as a PE of DBPL in India.
- The ITAT allowing the appeal of the taxpayer concluded that since DBPL did not have a PE in India, no profit could be said to have accrued to DBPL in India. Accordingly, the taxpayer could not be treated as an assessee-in-default

## Ampacet Cyprus Ltd v DCIT (1518/Mum/16 and 560/Mum/2017) (Mumbai ITAT)

*Recommends Special-Bench constitution for interpreting term 'paid' under Article 11 of India-Cyprus DTAA*

## FACTS OF THE CASE

- The taxpayer, a company incorporated in Cyprus had advanced a loan to its Indian subsidiary company, which was covered by moratorium. Interest was not paid by the Indian subsidiary company according to moratorium placed in the loan agreement.

- The Transfer Pricing Officer (**TPO**) disregarded the moratorium on the grounds that it was an understanding between the AE's not to pay interest. TPO thus made an upward transfer pricing adjustment and added notional interest to the taxpayer's income.
- On appeal before the ITAT, the taxpayer contended that the TO, Dispute Resolution Panel and the TPO had erred in imputing and charging notional interest to tax in India by making an upward transfer pricing adjustment, disregarding the provisions of Article 11 of India-Cyprus DTAA (which provides for taxability of interest only on 'paid' basis).
- The taxpayer argued before the ITAT that the question of making transfer pricing adjustment did not arise because interest was not paid by the Indian subsidiary company to the taxpayer.
- ITAT sought whether the expression 'paid' is defined under the DTAA, and, if this is not the case, then the meaning of the expression 'paid', as assigned under Section 43(2) of the IT Act should be considered. In response, the taxpayer submitted that, '*there are direct decisions of the coordinate benches on the issues which hold that taxability of interest under India- Cyprus DTAA could only be done on cash basis*'.
- When the ITAT enquired whether these decisions dealt with the implications under Article 3(2) of the DTAA read with the definition provided under Section 43(2) of the IT Act, the taxpayer submitted that it would require reference to a lot of papers. The taxpayer thus withdrew its consent for the virtual court hearing and prayed that the matter be adjourned for hearing before a physical court.

## JUDGEMENT

- ITAT admitted the taxpayer's additional grounds of appeal challenging notional interest adjustment.
- However, ITAT recommended that the two-member bench would deem fit and proper to refer the additional grounds of appeal raised by the taxpayer to a special bench of three or more Members. To support its proposition, the ITAT relied on the Hon'ble SC decision in case of ***Union of India v. Paras Laminates (P.) Ltd. (186 ITR 722).***
- ITAT accepted taxpayer's plea to adjourn the matter and held that in the light of special bench reference, the matter stands adjourned *sine die.*
- While refraining from making any observation on merits, the ITAT observed that the decisions relied on by the taxpayer in this regard could be considered '*per incuriam*' because they were rendered without considering the applicability of Article 3(2) to the term 'paid'. Thereby, these decisions did not consider the domestic law definition of 'paid' as provided in Section 43(2) of the IT Act.
- ITAT noted that Article 3(2) of the India-Cyprus DTAA uses the expression '*the meaning that it (i.e. the undefined treaty term) has at that time under the law of that State (i.e. under the Indian law)*'. ITAT thus opined that Section 43(2) of the IT Act is relevant since it provides that the term 'paid' means '*actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head 'Profits and gains of business or profession'*.
- ITAT held that while it is true that, the meaning cannot be imported in the DTAA mechanically, without any application of mind and as a sort of automated process, undoubtedly a call has to be taken by the bench as to whether or not, the domestic tax law meaning of the expression 'paid' would be relevant.

- ITAT referred to the Hon'ble SC decision in case of ***Standard Triumph Motor Co Pvt Ltd v CIT (201 ITR 391)*** wherein it was held that the credit entry in the taxpayer's books would amount to receipt for the recipient in UK and would accordingly be taxable and it is immaterial when the credit was actually received in UK.
- ITAT thus opined that it is worth exploring whether the meaning assigned to the expression 'received by the taxpayer', which essentially corresponds to and has to be treated as equivalent to 'paid to the payee', by the Hon'ble SC can be assigned to the undefined treaty expression 'paid'.

## ACIT v M/s. Tata Sons Ltd. (ITA No.4630/Mum/2016)

*Interest on borrowed funds utilized for acquiring controlling interest, allowable under Section 36(1)(iii)*

### FACTS OF THE CASE

- The taxpayer is a promoter investment holding company and for the purpose of making investments the taxpayer had to use borrowed funds, on which it had paid interest during the year.
- The taxpayer had also disclosed certain exempt income against its tax-free investments. The taxpayer made a voluntary disallowance under Section 14A of the IT Act as expenditure related to such exempt income.
- Amongst various other issues, the TO on the issue of allowing of interest expenditure, disallowed the interest expenditure incurred on such borrowed funds under Section 36(1)(iii) of the IT Act.
- On appeal, the CIT(A) noted that the activity of controlling, managing, administrating and financing various companies by the taxpayer was an elaborate activity which was not only for the purpose of earning dividend income but variety of other purposes including developing brand value, setting up of new enterprises, receiving royalty, and business development. Further, the CIT(A) observed that the taxpayer was competent to perform these functions because of its controlling stake in these companies and hence, investments in these companies would be capital investment.
- Further, the CIT(A) noted that the borrowed funds utilized in making investments which had yielded tax free income would be governed by Section 14A of the IT Act and not Section 36(1)(iii) of the IT Act. Accordingly, the CIT(A) held that interest on borrowed capital utilized for making investments would be eligible for deduction under Section 36(1)(iii) of the IT Act subject to Section 14A of the IT Act.
- Aggrieved by the order of CIT(A), the TO has filed an appeal before the ITAT.

### JUDGEMENT

- The ITAT noted that the taxpayer had earned both taxable income as well as tax free income out of its investments and accordingly, there is no question of disallowance of interest under Section 36(1)(iii) of the IT Act. Even otherwise, there is absolutely no bar for allowability of interest under Section 36(1)(iii) of the IT Act, if the borrowed funds were utilized for making investments which are meant for the purpose of business of the assessee. The ITAT noted that business and commercial expediency of the taxpayer making investments in group companies either with or without the use of borrowed funds have been proved beyond doubt.
- The ITAT opined that the CIT(A) has correctly dealt with the concerned issue that if borrowed funds have been used for making investment for shares which in turn yield exempt income, then, the allowability of such interest needs to be looked into from the angle of Section 14A of the IT Act read with Rule 8D(2)(ii) of the IT Rules.

- The ITAT observed that the said issue is also covered in favor of the taxpayer's group company - ***Tata Industries Ltd., vs. ITO (ITA No.4894/Mum/2008 dated July 20, 2016)***, wherein the ITAT by placing reliance ***CIT vs. Phil Corporation Ltd. (202 Taxman 368)*** and various other decisions of Hon'ble HCs had decided the issue in favor of taxpayer with regard to allowability of interest.
- In view of the above, the ITAT affirmed the observation of the CIT(A) that interest on borrowed funds used for making investments would be allowable under Section 36(1)(ii) of the IT Act subject to Section 14A of the IT Act.
- The taxpayer had raised an additional ground with respect to disallowance under Section 14A of the IT Act vis-à-vis computation of book profits under Section 115JB of the IT Act.
- The ITAT observed that the taxpayer had made disallowance under Section 14A by identifying the actual expenditure under normal provisions of the IT Act. The ITAT placed reliance on the decision of Special Bench of Delhi ITAT in the case of ***Vireet Investments (165 ITD 127)*** wherein it was held that actual expenditure alone should be considered for disallowance in terms of clause (f) to Explanation 1 to Section 115JB of the IT Act. Accordingly, the ITAT directed the TO to disallow the amount of disallowance offered by the taxpayer under Section 14A while computing its book profits under Section 115JB of the IT Act.

## NOTIFICATIONS/CIRCULARS

### Central Board of Direct Taxes (CBDT) re-constitutes Regional e-Assessment Centres (ReAC) under Faceless Assessment Scheme

- CBDT re-constitutes ReAC with 30 headquarters spread over 20 cities, in pursuance of 'Faceless assessment scheme' notified vide notification S.O 2745(E)/2746(E) dated August 13, 2020 and in supersession of earlier Officer Order-2 vide F. No. 187/7/2019 ITA-1 dated October 3, 2019. Also announces composition of each ReAC.

### CBDT notifies eligibility conditions for Pension Funds to qualify for 'infrastructure' income exemption under Section 10(23FE) of the IT Act

- CBDT notifies new Rule 2DB under the Income-tax Rules, 1962. New Rule 2DB specifies six-fold conditions to be satisfied by the Pension Funds for the purpose of Section 10(23FE), i.e.
  - it is regulated under the law of a foreign country;
  - it is responsible for administering or investing the assets for meeting the statutory obligations and defined contributions of one or more funds or plans established for providing retirement, social security, employment, or any similar compensation to the participants or beneficiaries of such funds or plans;
  - the earnings and assets of the pension fund are used only for meeting statutory obligations;
  - it does not undertake any commercial activity whether within or outside India,
  - it shall intimate the details in respect of each investment made by it in India on quarterly basis within one month from the end of the quarter in Form No. 10BBB;
  - it shall file return of income within the due date prescribed under Section 139(1) and furnish along with such return a certificate in newly notified Form No. 10BBC;

- Further inserts new Rule 2DC laying down guidelines for notification of Pension Funds under Section 10(23FE). Also, requires pension funds to make an application in newly notified Form No. 10BBA.

### Other notification

- CBDT notifies amendments in income-tax authorities' jurisdictions under Section 120 of the IT Act.

## NEWS

- The Institute of Chartered Accountants of India (**ICAI**) has issued the revised version of the Guidance Note on Report under Section 92E of the IT Act (Transfer Pricing). It explains the nuances of the law relating to transfer pricing considering the changes effected by the Finance Act, 2020.

# INDIRECT TAXATION

## RECENT CASE LAWS

### UOI v. Agricas LLP and Ors. [2020-VIL-26-SC-CU]

*Central Government need not follow procedure under Section 9A of the FTDR to impose restriction under Section 3(2)*

#### FACTS OF THE CASE

- The Directorate General of Foreign Trade (**DGFT**), through Notifications dated March 29, 2019 and April 16, 2019 (**Notifications**) and subsequent Trade Notices, amended the import policy conditions for items falling under Chapter 7 of the ITC(HS), such as moong dal, split peas and others, from 'free' to 'restricted', and also imposed quantitative restrictions on their import under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 **(FTDR Act)**.
- The case arose out of a series of Writ Petitions filed by importers before various High Courts challenging the imposition of restrictions *vide* the aforesaid Notifications and consequent Trade Notices issued by the DGFT, on the following grounds:
  - The impugned Notifications were in the nature of 'quantitative restrictions' under Section 9A of the FTDR Act, which could be only imposed by the Central Government after conducting such enquiry as is deemed fit, and on being satisfied that the '*goods are imported into India in such quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry*.' In terms of Section 9A(3), the Safeguard Measures (Quantitative Restrictions) Rules, 2012 have been issued, which prescribe a mandatory and detailed procedure for initiation, investigation, hearing of parties and adjudication by the Authorized Officer, in which statutory mandate has not been followed.
  - The impugned Notifications stand in violation of Article XI of the GATT, i.e. the general prohibition on quantitative restrictions, which was reflected in Section 3 of the FTDR Act.

#### JUDGEMENT

- The Court held that Section 9A of the FTDR Act does not negate the Central Government's power to impose restrictions on imports under Section 3(2) of the FTDR Act. The Court held that the powers of the Central Government to restrict imports under Sections 3(2) of the FTDR Act was completely distinct and had no connection with Section 9A.
- The Court held that the impugned Notifications were issued under Section 3(2) of the FTDR Act, which permits the Central Government to '*make provision for prohibiting, restricting or otherwise regulating…the import or export of goods'* without any qualifications. Section 9A, on the other hand, was an enabling provision empowering the imposition of 'quantitative restrictions' (or a 'safeguard measure') after following the procedure therein. The Court found that Section 9A did not limit or restrict the scope of the powers of the Central Government to prohibit, regulate or restrict imports of goods under Section 3(2) of the FTDR Act.
- Furthermore, in its analysis of whether the notifications were violative of the GATT law, the Court observed that an international convention must go through 'act of transformation' into municipal law before it is enforceable. Accordingly, the Court found that Article XI of the GATT, had not been statutorily made a subject of the 'act of transformation' and incorporated into domestic legislation, either under Section 3 or 9A of the FTDR Act.

**ELP Comments:** While the Hon'ble Supreme Court's order deals with the scope of powers of the Central Government under Section 3 of the FTDR Act, it does not address when such powers may be exercised given the specific provision on quantitative restrictions under Section 9A of the FTDR Act.

## CST, Ahmedabad v. Adani Gas Ltd. [2020-VIL-27-SC-ST]

*Supply of measuring units by gas distribution company is supply of tangible goods for use, leviable to Service Tax*

### FACTS OF THE CASE

- The Respondent is engaged in the business of distributing natural gas to industrial, commercial, and domestic consumers. To facilitate the distribution of piped natural gas to various customers, the Respondent installs measuring unit/equipment described as 'SKID' at their customers' sites, to regulate the supply of gas and record the quantity of natural gas consumed by the customer, which is then used for billing purposes.
- During an audit exercise, it was noticed that the Respondent received gas connection charges for installation of pipes and measuring equipment at the time of giving new gas connections to its customers. However, there is no transfer of ownership or possession of the measuring equipment by the Respondent to the customers.
- The issue under consideration is whether the supply of measurement equipment amounts to supply of tangible goods for their 'use', and is, therefore, leviable to Service Tax under Section 65(105)(zzzzj) of the Finance Act, 1994 or is a transfer of right to use any goods amounting to a deemed sale under Article 366(29A) of the Constitution of India.

### JUDGEMENT

- At the outset, the Hon'ble Supreme Court examined the scopes of: (i) Article 366(29-A)(d) of the Constitution of India pertaining to deemed sale of goods, and (ii) Circular D.O.F. No.334/1/2008-TRU dated February 29, 2008 relating to 'supply of tangible goods for use service' under Section 65(105)(zzzzj) of the Finance Act, 1994, in order to distinguish the two species of transactions.
- The Hon'ble Supreme Court observed as under:
  - The dictionary meaning of the term 'use' connotes the use of a thing that one is to enjoy, hold, occupy or have some manner of benefit thereof. 'Use' also means usefulness, utility, advantage, productive of benefit.
  - The expression 'use' does not have a fixed meaning. The content of the expression must be based on the context in which the expression is adopted. The use of an article may or may not result in a visible change in its form or substance. The nature of 'use' is conditioned by the kind of article which is put to use. Technical expertise over the goods in question is not a *sine qua non* for determining the ability of the consumer to 'use' the goods. Therefore, the expression 'use' also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.
- Accordingly, the transaction in question cannot be construed as a sale/deemed sale in as much as the consumer of gas is as interested as the seller in ensuring and verifying that the correct quantity of the gas is supplied through the instrumentality of the measurement equipment and the pipelines. The role of regulating pressure and ensuring the safety of supply of gas performed by the measurement equipment is an essential aspect for the 'use' of the consumer. The measuring equipment, therefore, fulfils the description in Section 65(105)(zzzzj) of a taxable

service: service in relation to 'tangible goods' where the recipient of the service has use (without possession or effective control) of the goods.

## Kanishka Matta v. UOI [2020-VIL-411-MP]

*Cash suspected of being sale proceeds from supplies on which tax was evaded constitutes a 'thing' capable of being seized during investigation*

### FACTS OF THE CASE

- The Petitioner is the proprietor of a firm involved in the business of Pan Masala items. A search operation was conducted at its premises which resulted in the seizure of *inter alia* INR 66 lakhs of unaccounted cash. The Department stated that the seizure was carried out in terms of Section 67(2) of the CGST Act under a reasonable belief that the cash resulted from Pan Masala sold illegally without payment of GST.
- The Petitioner contended that under Section 67(2) of the CGST Act ,'any documents or books or things' could be confiscated, and that cash (which constitutes 'money' as per the definition under Section 2(75) of the CGST Act) is not a 'thing' for the purposes of Section 67(2). The Department is, therefore, not permitted to seize the same.

### JUDGEMENT

- The Hon'ble High Court referred to dictionary meanings of the word 'thing' which covers any subject matter of ownership within the sphere of proprietary or valuable right. The Hon'ble High Court also referred to the Apex Court's decision in the case of **D. Vinod Shivappa vs. Nanda Belliappa [(2006) 6 SCC 456]** which held that *"..in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy…"*. The High Court thus accorded a wide meaning to the word 'things' as appearing in Section 67(2) of the CGST Act.
- In view of the aforesaid interpretation and basis the circumstances of the case, it held that the word 'things' would include money, and the cash in question cannot be excluded from the scope of Section 67(2), as prayed for by the Petitioner.

## DGAP v. Puri Construction Pvt. Ltd. [2020-VIL-66-NAA]

*Penalty is not imposable for acts of profiteering for the period prior to January 1, 2020*

### FACTS OF THE CASE

- The National Anti-Profiteering Authority (**NAPA**) noted that the benefit of Input Tax Credit (**ITC**) during the period July 2017 to June 2018 was not passed on by the company to flat buyers.
- NAPA confirmed the allegations against the construction company in relation to violation of anti-profiteering provisions under Section 171 of the CGST Act, pursuant to which an SCN was also issued for imposition of penalty.

### JUDGEMENT

- The NAA observed that no penalty provisions existed under the CGST act prior to January 1, 2020 for violation of the provisions of Section 171, as Section 122 of the CGST Act does not provide for a penalty for not passing on the benefits of tax reduction and ITC, and the profiteered amount is not a tax imposed under the CGST Act.

- The NAA further held that penalty cannot be retrospectively imposed under Section 171(3A), as the provisions were not in existence during the period when the profiteering took place.

## RECENT ADVANCE RULINGS

### Volvo-Eicher Commercial Vehicles Ltd. [2020-VIL-42-AAAR]

*Recipient of warranty services provided by Indian distributor is the foreign manufacturer and not the customer of the vehicle*

#### FACTS OF THE CASE

- The applicant is involved in selling of vehicles and providing after sales support services, including warranty service, to customers of Volvo-branded vehicles in India. Under its warranty obligation, the applicant replaces the defective parts of the vehicles of the customers for free. The applicant then raises an invoice on Volvo Sweden for reimbursement of the cost of defective parts and services charges. Volvo Sweden reimburses such expenses in convertible foreign exchange to the applicant.
- The following questions were raised before the Authority for Advance Rulings (**AAR**):
  - Whether the supply made by the applicant to M/s Volvo Sweden is a supply of services?
  - Whether the repair services performed by the applicant with regard to Volvo vehicles for Indian customers under warranty is an activity amounting to a supply of service to Volvo Sweden, and, consequently, whether the same is a zero-rated supply?
- The AAR ruled that the supply is a composite supply of goods and service wherein the principal supply is that of supply of service. It also ruled that the supply is not an export supply as the recipient of services is the customer in India. Aggrieved by the said ruling the applicant approached the Appellate (**AAAR**).

#### RULING

- The AAAR observed that during the warranty period, the applicant undertakes the activity of repair and replacement of defective parts at the behest of the foreign manufacturer, viz. Volvo Sweden. The applicant therefore fulfils the warranty obligations of the foreign manufacturer, even though the beneficiary may be the buyer of the vehicle.
- The reimbursement paid by the Volvo Sweden is in the nature of consideration paid to the applicant. The AAAR noted that the recipient of service is the person who is required to make payment for getting the job done.
- The AAAR accordingly held that the recipient of the supply of warranty service is the foreign manufacturer (i.e. Volvo Sweden) and not the customer of the vehicle in India. It, however, upheld the AAR ruling to the extent of the finding that the supply is a composite supply wherein the principal supply is that of supply of service.

## Mr. Rajendran Santhosh [2020-VIL-41-AAAR]

*Person making sales presentation to prospective customers of a foreign company is an intermediary*

### FACTS OF THE CASE

- The applicant is appointed as an independent regional sales manager by a US company engaged in manufacturing and selling of transformer components. The applicant is required to make presentations on products offered by the US company. In return, the applicant receives monthly compensation for his services. The customers approached by the applicant place their orders with the company directly.
- The applicant approached the AAR to *inter alia* determine the classification of services supplied by it to the US company. The AAR had held that the applicant is an 'intermediary' and the services provided by him are classifiable under HSN 9983.11 as 'other professional, technical and business service', which would not qualify as export of service, but would be liable to GST in India.
- In the view of the applicant, he was not an intermediary, but was instead providing market research services to the US company, which would qualify as export of service. Aggrieved by the said ruling the applicant approached the AAAR.

### RULING

- On perusal of the definition of 'intermediary', the AAAR observed that the terms 'arranging' and 'facilitating' would cover a wide range of activities, including marketing or sales promotion of goods or services of the client. The applicant's sole intent behind providing his services is to facilitate the sales of the product of the principal, i.e. the US company.
- The AAAR noted that the applicant is not engaged in sale of goods on his own account.
- Basis the above, the AAAR upheld the decision of AAR that the applicant is providing an intermediary service, with the place of supply being in India. Accordingly, the service would not qualify as an export of service.

## Cartus India Pvt. Ltd. [2020-VIL-39-AAAR]

*Composite supply of services should be 'naturally bundled', instead of put together to suit one's business model*

### FACTS OF THE CASE

- The applicant provides 'Relocation Management Service' involving the facilitation of relocation of a client's employees from one location to another. Under the 'Relocation Management Service', there is a complete gamut of different services, such as home finding programs, leasehold assistance, school finding assistance, visa services etc. In terms of the agreement, the client can opt for certain services only from a list of many services (à la carte services) or may opt for a package which is a bundle of certain services.
- In respect of certain services, the client entered into agreements directly with a third-party supplier but the applicant remains responsible for full execution of the relocation. In such cases the third-party contractor raises an invoice on the client and emails a copy to the applicant for payment processing via the applicant.
- The applicant approached the AAR with the following question:
  - Whether various services collectively referred as 'Relocation Management Service' would constitute a composite supply or a mixed supply?

- The AAR held that the services qualify to be a mixed supply and also held such services to be intermediary service to the extent that the applicant facilitates service between the client and the third party. Aggrieved by the said decision, the applicant approached the AAAR contending that the service is a composite supply on the grounds that different service elements are rendered with a common intent of a main service of relocation from one country to another. To further support its submission, the applicant submitted that the services are advertised in the form of a package.

**RULING**

- The AAAR observed that the package advertised by the applicant has a combination of certain basic services like policy counseling, home search, settling in, temporary living and travel coordination, car, school etc. added to the basic package. The entire combination of services is then charged at a single price. It was noted that for constituting a composite supply, supplies should be such that they are naturally bundled. In the instant case, the "naturally bundled" aspect of the transaction is not present and the bundle of services put together by the applicant is as per his own business model.
- The AAR, therefore, held that such packages of bundled services are a mixed supply in terms of the GST law. However, the 'à la carte' services provided by the applicant relating to employee relocation do not constitute either a composite supply or a mixed supply, as there is only one service being provided, whereas for qualification as a composite or mixed supply, there should be more than one service.
- In addition, the AAAR modified the order of the AAR and expunged the averments made in respect of intermediary services on the basis that the advance ruling was not sought on determination of classification of services, but on the question of whether the services qualified as a composite supply or mixed supply.

## George Jacob [2020-VIL-240-AAR]

*Renting of water channel for fish farming is covered under exemption provided for 'services of rearing of animals by way of renting of vacant land'*

**FACTS OF THE CASE**

- The applicant entered into an agreement with a Gram Panchayat for taking a water channel on lease to be used for fish farming. The Panchayat (Local Authority) informed the applicant that GST is liable to be paid under reverse charge by the applicant at the rate of 18% on the lease rentals, as there is no exemption provided for renting or leasing of 'water channel'.
- The applicant was of the view that the activity is covered under Sl. No. 54 of *Notification No. 12/2017 – Central Tax (Rate)* dated June 28, 2017, which provides for exemption in relation to services of rearing of all life forms of animals by way of renting or leasing of vacant land with or without structures.
- The applicant approached the AAR with the question as to whether the lease rent charged by the Gram Panchayat for the 'water channel' used for fish farming would fall within the meaning of 'services relating to rearing of all life forms of animals - by way of renting or leasing of vacant land', and, consequently, eligible for exemption.

**RULING**

- The applicant relied on the definition of 'land' as per Black's Law Dictionary, which stated that 'land' includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, *whether by nature as water,* trees, grass, herbage, other natural or perennial products, growing crops or trees, mineral under the surface, or by hand of man, buildings, fixtures, fences, bridges as well as *works constructed for use of water, such as dikes, canals* etc.

- The AAR observed that fish and crabs being reared by the applicant in the water channel taken on rent/lease are animals *and* the service of renting/leasing of the water channel has been availed by the applicant for the rearing of these animals. It was accordingly held that the said activity is squarely covered under 'services relating to rearing of all life forms of animals - by way of renting or leasing of vacant land', and the lease rent charged by Gram Panchayat for fish farming is, therefore, exempt from GST.

## Kochi Metro Rail Ltd. [2020-VIL-224-AAR]

*Construction services w.r.t. water metro project for State Government is in the nature of 'pure service' and exempt*

### FACTS OF THE CASE

- The applicant is a Government Company formed by equal equity participation of the Government of India and Government of Kerala. It is entrusted with the task of developing an integrated water transportation system in Kochi.
- The Government of Kerala is the *de jure* owner of the assets and the applicant is the executing agency of the water metro project. The water metro project includes providing modern watercraft, jetties, access roads etc.
- The project cost is funded by a tripartite loan arrangement involving the Government of India, a German financing entity and the Government of Kerala.
- In view of the above, the applicant approached the AAR to *inter alia* determine whether GST is applicable on the funds received by it from the Government of Kerala for paying the project cost, and whether the services rendered by the applicant as an executing agency are exempt in terms of Sl. No. 3 of the Notification No.12/2017 ('Exemption Notification')?

### RULING

- The AAR held that, since the applicant is a joint venture with equal participation of the Government of Kerala, the two constitute related persons for the purpose of GST. Consequently, services rendered by the applicant to the Government of Kerala, even without consideration, will qualify as a supply.
- However, it would be necessary to examine whether the supply by the applicant to the Government of Kerala is eligible for exemption under Sl. No. 3 of *Notification No. 12/2017- Central Tax* as pure services supplied to Government/Governmental authority by way of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution.
- It was noted that the applicant squarely falls within the definition of a 'Governmental authority' since its equity shares are 100% held by the Government of India and Government of Kerala, and the construction of water metro is part of the urban planning function entrusted to a municipality under Article 243W of the Constitution.
- The AAR also perused the Explanatory Note to the scheme of classification of services pertaining to '998339: Project Management services for construction projects', and ruled that the services rendered by the applicant to the Government of Kerala as executing and operating agency of the integrated water transport project are classifiable as pure services falling under HSN 998339.

- In view of the foregoing, it was concluded that the services of the applicant are exempted from payment of GST by virtue of the Sl. No. 3 of the Exemption Notification.

## NOTIFICATIONS/CIRCULARS

| S. No. | Reference | Particulars |
|---|---|---|
| 1. | **Notification No. 75/2020-Customs (N.T.) and Circular No. 36/2020-Customs, both dated August 17, 2020** | ▪ Notifies the Manufacture and Other Operations in Special Warehouse Regulations, 2020<br>▪ CBIC clarification covers the procedure to be followed in cases of manufacturing or other operations undertaken in special warehouses under Section 65 of the Customs Act, including application for seeking permission under Section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit etc. |
| 2. | **Notification No. 78/2020-Cus (NT) and Circular No. 37/2020-Customs, both dated August 19, 2020** | ▪ Prescribes extension of the benefit of deferred payment of Customs duty benefits for Authorized Public Undertakings<br>▪ Circular specifies the procedure for availing such facility |
| 3. | **Notification No. 81/2020-Customs (N.T.) and Circular No. 38/2020-Customs, both dated August 21, 2020** | ▪ Notifies the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 **(CAROTAR)** effective from September 21, 2020.<br>▪ Prescribes the guidelines regarding implementation of Section 28DA of the Customs Act, 1962 and CAROTAR, 2020 in respect of Rules of Origin under Free Trade Agreements and verification of Certificates of Origin<br>▪ It is noteworthy that CAROTAR 2020 provides a form containing the list of basic information which an importer is required to obtain while importing goods under a claim of preferential rate of duty<br>▪ The Circular also states that in case of any doubt as to the country of origin of the goods, information should first be sought from the importer before initiating verification with the partner country |
| 4. | **DGFT Trade Notice No. 26/2020-21 dated August 31, 2020** | ▪ Grants extension of six months, as a one-time relief in all SCOMET export authorizations involving technology transfer expiring by September 30, 2020 on submission of prescribed application<br>▪ Going forward, the validity for SCOMET export authorizations for |

| S. No. | Reference | Particulars |
|---|---|---|
| | | transfer of technology/software under any category of SCOMET will be 24 months only or the validity period of export authorization allowed in terms of Para 2.16 of HBP of FTP 2015-20 |
| **5.** | **Notification No. 62/2020 – Central Tax dated August 20, 2020** | ▪ Notifies provision for Aadhar based authentication for GST registration, and *inter alia* provides that where a person (other than those notified under Section 25(6D)) fails to undergo authentication of Aadhaar number or does not opt for authentication of Aadhaar number, the registration shall be granted only after physical verification of the place of business |
| **6.** | **Notification No. 63/2020 – Central Tax dated August 25, 2020** | ▪ Notifies amendment to Section 50 of the CGST Act to provide that interest in respect of delayed payment of tax is to be levied on 'Net Liability' w.e.f. September 01, 2020. |
| **7.** | **Notification No. 64/2020 dated August 31, 2020** | ▪ Notifies extension in last date for filing of return by composition dealer in GSTR-4, to October 31, 2020. |

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