ECONOMIC
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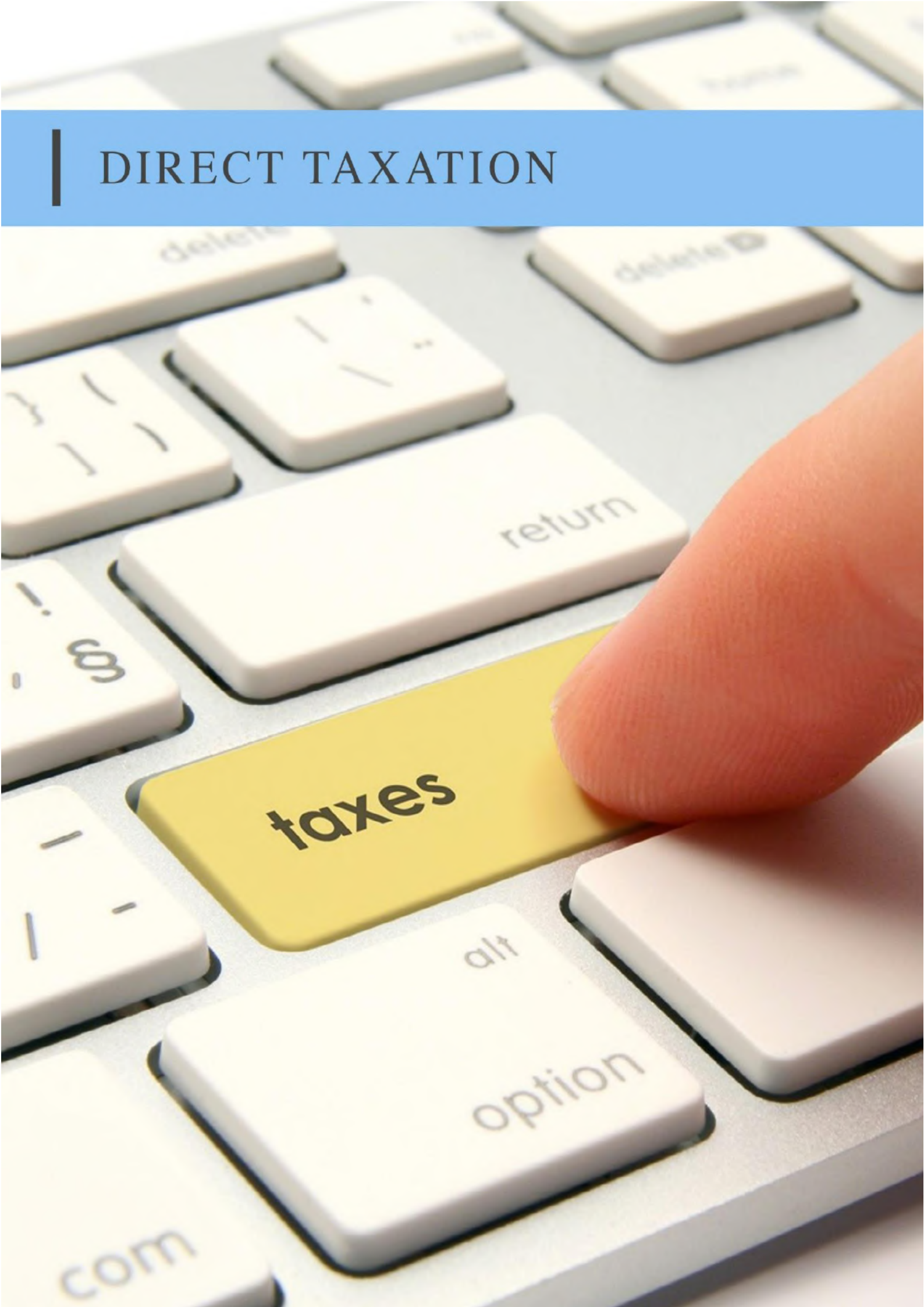
# DIRECT TAXATION



## RECENT CASE LAWS

### Overseas Transport Co. Ltd (ITA no. 3129/Mum/2002 & CO no. 107/Mum/2003)

*Indian agents earning a meagre income from a foreign shipping company does not constitute a Dependent Agent Permanent Establishment (DAPE)*

#### FACTS OF THE CASE

- The taxpayer, a resident of Mauritius, filed its return of income (**ROI**) declaring gross total income of USD 3,88,810 under presumptive taxation i.e. under Section 44B of the Income tax Act, 1961 (**IT Act**). These shipping profits were claimed as exempt under Article 8 of India-Mauritius Double taxation Avoidance Agreement (**DTAA**) as the place of effective management of the company (**POEM**) of the taxpayer was in Mauritius.
- The Tax Officer (**TO**) denied exemption on the grounds that POEM of the taxpayer was in India, since most of its board meetings, except very few, were held in the UAE. The TO also held that the taxpayer had a DAPE in India under Article 5(5) of the India-Mauritius DTAA through its two dependent agents through whom the taxpayer had carried on its shipping activity in India. The TO also held that the taxpayer had a fixed place PE under Article 5(1) of the India-Mauritius DTAA on account of its POEM in India.
- The Commissioner of Income tax (Appeals) (**CIT(A)**) rejected constitution of DAPE as well as fixed place PE thereby, deleting the addition made by the TO. Aggrieved by the order of CIT(A), the TO filed an appeal before the Income tax Appellate Tribunal (**ITAT**), Mumbai.
- The taxpayer contended before the ITAT that it did not constitute a fixed place PE, since the effective control and management always remained in Mauritius. Additionally, it also did not constitute a DAPE, since the activities were carried out in the ordinary course of business and the agents were independent.

#### JUDGEMENT

- The only matter that required adjudication in the impugned appeal was whether the taxpayer had a fixed place PE or a DAPE.
- In the absence of cogent evidence, ITAT rejected TO's allegation that the taxpayer constituted a fixed place PE under Article 5(1) of the India-Mauritius DTAA as its POEM is in India, ITAT noted that:
  - Nothing was placed on record to establish that the taxpayer carried on its core business activity through a fixed place of business in India;
  - The taxpayer did not have permanent infrastructure, an office, supervisory staff or tangible and intangible assets in India to constitute a fixed place PE;
  - None of the conditions of Article 5(1) were satisfied and a mere stay of directors and exercising control over the affairs of the company from UAE does not lead to creation of a fixed place PE in India.
  - As regards the contention of the TO that the taxpayer had DAPE in India, ITAT examined the status of both the dependent agents and opined that:
  - Both the entities were acting in the ordinary course of their business;
  - The agents provided their services to other shipping companies as well and their income from the taxpayer was a meagre 12.14% and 2.79% respectively;
  - The agents were not exclusively working for the taxpayer and were independent.

- The co-ordinate bench decision in the case of ***Bay Lines (Mauritius) (91 taxmann.com110)*** and various other decisions were relied upon by the taxpayer, wherein it has been held that if the agent was not exclusively acting on behalf of the taxpayer, it cannot be considered as a dependent agent so as to constitute a DAPE. ITAT thus upheld the view of CIT(A) and held that taxpayer did not constitute a PE in India under Article 5(5) of the DTAA and hence, the taxpayer would be eligible to avail the benefit of DTAA.

## HDFC Sales Pvt Ltd (ITAT no. 852/Mum/2019)

*HDFC Sales' year-end provision for expenses, not ad-hoc; Disallowance under Section 37 or Section 40(a)(ia), impermissible*

### FACTS OF THE CASE

- The taxpayer, was a company engaged in the business of marketing and selling of home loans and other financial products, carrying out the operations of HDFC Realty Limited and providing Corporate Agency services to HDFC Standard Life Insurance Company Limited. The taxpayer is a part of HDFC group.
- The taxpayer filed its ROI for Assessment Year (**AY**) 2015-16 declaring a loss of INR 6.21 crore. During the said AY, the taxpayer had created a provision for expenses under 31 heads of expenses amounting to INR 10.24 crores on which tax was not deducted at source. The TO held that these provisions are contingent in nature and are a pure *adhoc* provision. The TO, therefore, disallowed the entire provision of expenses.
- On appeal before the CIT(A), relief was granted to the taxpayer by taking a view that the provision made by the taxpayer cannot be held to be contingent in nature, as the expenditure has been made on a certain basis under each head of expense.
- CIT(A) also held that no disallowances could be made under Section 40(a)(ia) of the IT Act, since the scheme of TDS proceeds on the assumption that the person whose liability is to pay an income, knows the identity of the beneficiary or the recipient of the income. Aggrieved by the order of CIT(A), the TO filed an appeal before the ITAT.
- The taxpayer reiterated its submission and contended before the ITAT that the provision was made with due diligence and since the estimation was based on consistency of expenses incurred over the years it, cannot be considered as *adhoc*. A regular practice of creating provision and reversal based on actual payment was followed by the taxpayer and thus, expenses cannot be said to be contingent. No disallowance can be made in the context of section 40(a)(ia) as no payment was exactly identified or quantified.

### JUDGEMENT

- ITAT noted that the TO had not examined whether the provision made for the month of March 2015 was not a reliable estimate on account of past obligations. It thus rejected the TO's contention that there was no scientific basis for making provision for expenses and the estimation projected was misleading.
- ITAT distinguished TO's reliance on the decision of ***Hardik Jigishbhai Desai (ITA No 1084/Ahd/2013) and Abad Builders (P.) Ltd (43 taxmann.com 128)*** and held that in both the cases the recipients were identifiable and the taxpayer had not pleaded that such an obligation was a result of the past events. In the present case the TO had not brought any fact on record to substantiate that the recipient was certain or identifiable.
- ITAT upheld CIT(A)'s observation that no disallowance can be made in the context of Section 40(a)(ia) as no payment was exactly identified or quantified. The ITAT accepted the taxpayer's contention that the provision was created after due diligence which cannot be said to be an *adhoc* provision.

## Scheme A1 of ARCIL CPS (ITAT no. 2293/Mum/2018)

*Securitization Trust neither Association of Person (AOP) nor irrevocable trust; Grants Section 61 benefit*

### FACTS OF THE CASE

- The taxpayer, a trust, was set up by the Asset Reconstruction Company (India) Ltd (**ARCIL**) in accordance with the guidelines issued by Reserve Bank of India and provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) to acquire financial assets of the borrowers classified as non-performing assets (**NPAs**).
- ARCIL acts as a trustee of the taxpayer and acquires stressed financial assets that are classified as NPAs from the banks/FIIs. The trust received a revocable contribution from Security Receipts holder (**SR holder**) for acquisition of financial assets.
- The taxpayer filed its ROI declaring its total income as NIL. The case was selected for scrutiny and during the course of assessment proceedings, the TO observed that the taxpayer had claimed income derived from assets reconstruction activity and handling of NPA's of bank and FII's as not liable to tax. It was the contention of the taxpayer that as per the provisions of Section 61 to Section 63 of the IT Act, such contribution is taxable in the hands of transferor i.e. SR holder.
- However, the TO completed the assessment assessing the taxpayer as an AOP and not as a trust. The TO rejected the taxpayer's contention that the contributor had paid taxes on their respective share and therefore, taxing of the income again in the hands of taxpayer would lead to double taxation of income. The TO also contended that the taxpayer had created a smokescreen in the name of a trust with an ulterior motive to evade taxes. Thus, the taxpayer was liable to be assessed at the maximum marginal rate of 30% since the shares of the beneficiaries were not specified in the trust deed and were indeterminate.
- Alternatively, TO was of the view that the taxpayer being an irrevocable trust was anyway not eligible for the benefit under Section 61 to Section 63 of the IT Act.
- The CIT(A) partly allowed the appeal of the taxpayer. Thus, the TO is in appeal before the ITAT.

### JUDGEMENT

- **The Trust was a colorable device to evade taxes**- ITAT upheld the view of CIT(A) that the taxpayer is a valid trust. ITAT noted that in case the allegation of TO i.e. it is not a valid trust and was created only for evasion of taxes was accepted then there would be no legal sanction to treat the trust as an AOP. Thus, if the taxpayer's existence was disregarded, it would imply that the investment in financial assets was made directly by the beneficiaries and therefore, the question of assessing the taxpayer as an AOP or under any other head of income would be totally out of question.
- **Holding the trust as a non-revocable trust-** ITAT upheld the view of CIT(A) that the taxpayer is a revocable trust and is eligible to claim benefit under Section 61 to Section 63 of the IT Act. Further, it referred to CIT(A)'s observation stating that Clause 5 of the Trust deed makes it amply clear that contribution made by the SR holders is 'revocable'. ITAT held that income arising therein needs to be taxed in the hands of the SR holders as per the provisions of section 61 to 63 of the IT Act.
- **Status of the trust as that of an AOP-** Affirming the view of CIT(A), ITAT held that in absence of material on record - which would even remotely suggest that there was a concerted effort by the beneficiaries to earn income jointly- the taxpayer cannot be treated as an AOP.

- **Taxability of the income at the right place and in right hands-** ITAT noted that at the initial stage, even before the money flows to the taxpayer, it was always intended to be passed on to and only to the beneficiaries i.e. SR Holder. Thus, affirming the view of the CIT(A), ITAT held that merely because the realization flows through the taxpayer, it would not mean that it is the income in the hands of the taxpayer.
- Reliance was placed on the Hon'ble Supreme Court (**SC**) judgment in case of ***Tollygunje Club Ltd (107 ITR 776)*** wherein it was held that every receipt in the hands of the taxpayer need not be its income. It is only when it bears the character of income at the time when it reaches the hands of the taxpayer that it becomes liable to tax. ITAT thus concurred with the view of the CIT(A) that the receivable of NPAs were the income of the SR holders, irrespective of the fact that the same had flowed through the books of accounts of the taxpayer.
- **Holding taxpayer trust as an indeterminate trust-** ITAT noted that the names and holding of the beneficiaries were provided in the Trust Deed and were known from the inception. Also, the proceeds were distributed as per their respective share. Therefore, the ITAT concurred with the view of the CIT(A) that taxpayer is a determinate trust.

## Asian Satellite Broadcast Pvt Ltd (W P no. 2749/2019)

*Shares 'gifted' under internal restructuring, not a 'colorable device'; Quashes reassessment*

### FACTS OF THE CASE

- The taxpayer, a private limited company, is engaged in the business of trading in farm yarn, investment and finance. The taxpayer e-filed its ROI declaring a loss of INR 3.69 lacs which was subsequently revised to INR 1.91 lacs. The case was selected for scrutiny and the assessment was completed under Section 143(3), accepting the returned income of the taxpayer.
- The case was selected for re-assessment proceedings on the basis of the reasons to believe that transfer of shares of a listed entity at NIL consideration to its AE by the taxpayer was done with the sole purpose of evading payment of capital gains tax. Therefore, such transfer clearly fell within the scope of a colorable device.
- The TO thus held that the taxpayer has not fully and truly disclosed all material facts and had a reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the IT Act.
- Following the judgment of SC in the case of ***GKN Driveshafts (India) Limited (259 ITR 19)***, the taxpayer submitted its objection against issuance of notice under Section 148, which was subsequently rejected by the TO.
- Aggrieved, the taxpayer filed a writ petition against the order of the TO rejecting the objections. The taxpayer submitted before the HC that:
  - It had disclosed fully and truly all material facts necessary for assessment to the TO;
  - View taken by the TO on the basis of which the impugned notice has been issued amounts to a clear change of opinion;
  - Information on the basis of which the impugned action was initiated was not furnished to the petitioner.
- HC vide its order dated September 16,2019 issued a notice and granted ad-interim stay to the notice issued under Section 148 by taking a view that it is a clear case of change of opinion. The TO filed an affidavit in response to the notice issued by the HC and submitted that the notice was issued pursuant to the order of CIT(A) in case of a group company (25FPS Media Pvt Ltd), wherein such transfer was held to be a colorable device and was not considered eligible for exemption from capital gains under Section 47(iii) of the IT Act.

- The taxpayer contended before the HC that:
  - No new material was available on record post completion of assessment and all relevant materials were placed on record before the AO at the time of completing the assessment;
  - Impugned notice under Section 148 has been issued without jurisdiction and the same should be set aside and quashed.

**JUDGEMENT**

- HC observed that all primary facts regarding the transfer of shares to AE without consideration were disclosed and re-assessment was initiated merely based on the CIT(A) order. HC stated that though the assessment order as such was silent on this aspect, the preceding communications between the taxpayer and the TO clearly evidenced that the taxpayer had fully disclosed the facts and the re-assessment was initiated on account of mere change of opinion.
- HC noted that while initial contention of the taxpayer that such transfer of shares was a gift without consideration was accepted, subsequently the above view was revisited to treat the said transfer of shares not as a gift and to tax the said transaction on the market value of the shares. This amounts to a change of opinion.
- HC referred to Mumbai ITAT decisioning case of ***Jayneer Infrapower and Multiventures (103 taxmann.com 118)*** wherein after due deliberations, ITAT recorded a categorical finding - that such transaction of transfer of shares without consideration was a gift which was valid, permissible, genuine and cannot be treated as a colorable device.
- Perusing Section 47(iii), HC stated that Section 47(iii) makes it very clear that any transfer of a capital asset under a gift or a will or an irrevocable trust shall not be liable to income tax under the head 'capital gains'. Thus, HC opined that '*the very foundation on which the impugned notice was issued no longer survives*.'

## National Co-Operative Development Corporation [Civil Appeal no. 5105-5107 of 2009]

*Calls for 'vibrant system of Advance Ruling' to reduce litigation, recommends changes to current system*

**FACTS OF THE CASE**

- The taxpayer was established under the National Cooperative Development Corporation Act, 1962 (**NCDC Act**).
- The funds received by the taxpayer from the Central Government, are treated as capital receipts and hence are not chargeable to tax. Further, the interest component, is treated as taxable income and is taxed as 'business income'.
- The present issue pertains to whether the component of interest income earned on the funds received under Section 13(1) of the NCDC Act, and disbursed by way of 'grants' to national or state level co-operative societies, is eligible for deduction to determine the 'taxable income' of the taxpayer.
- The TO opined that non-refundable grants were in the nature of capital expense and not a revenue expense and thus, disallowed the same as a deduction.
- While the CIT(A) ruled in favor of the taxpayer, the ITAT rejected the claim of the taxpayer on the grounds that the grants and other sums received by the taxpayer from the Central Government went to a single fund and were not treated as its income and thus, disbursements made from the same could not be treated as revenue expenses.

- The High Court (**HC**) further upheld the order of the ITAT and ruled against the taxpayer. Aggrieved by the order of the HC, the taxpayer has approached the Hon'ble SC.

**JUDGEMENT**

- The Hon'ble SC opined that what may be a capital receipt in the hands of the taxpayer may still be a revenue expenditure. It further held that it is not in disagreement with the said proposition to the extent that there can be an amount treated as a capital receipt while the same amount expended may be a revenue expenditure.
- The Hon'ble SC remarked that disbursement of grants has been held to be the core business of the taxpayer. Once that requirement is satisfied, the expenditure incurred in the course of business and for the 'purpose of business', would naturally be an allowable deduction under Section 37(1) of the IT Act. The Hon'ble SC held that source of funds from which the expenditure is made is not relevant and it is also not really relevant as to whether the expenditure is incurred out of the corpus funds or from the interest income earned by the taxpayer.
- The Hon'ble SC rejected the contention of the TO that the pay outs constitute a mere application of income, which does not tantamount to expenditure. Accordingly, the Hon'ble SC dismissed the order of the TO, ITAT and the HC and upheld the order of CIT(A).
- Additionally, as a postscript to its judgement, the Hon'ble SC opines that a vibrant system of Advance Ruling can go a long way to reduce taxation litigation. The Hon'ble SC remarked that instead of first filing a return and then facing consequences from the Department because of a different perception which the Department may have, an Advance Ruling System can facilitate not only such a resolution, but also avoid the tiers of litigation which such cases go through as in the present case.
- The Hon'ble SC recommends the Central Government to consider the efficacy of the current advance tax ruling system and make it more comprehensive as a tool for settlement of disputes rather than battling it through different tiers.
- The Hon'ble SC noted that the petition rate of the tax department with the Hon'ble SC is 87% and noted that this methodology has proved to be illusionary because there is an increasing number of applications pending before the AAR due to its low disposal rate. In fact, contrary to the expectation that a ruling would be given in 6 months, the average time taken is stated to be close to 4 years. This delay is primarily attributable to a large number of vacancies and delayed appointment of AAR members.
- The Hon'ble SC recommended considering the limit of INR 100 crore for making an application by a resident to AAR. It stated that it is time to reconsider and reduce the ceiling limit, more so in terms of the recent announcement pertaining to a tax friendly face-less regime.

## Shri Manchukonda Shyam [ITA no. 87/Viz/2020 & CO no. 14/Viz/2020)

*Addition made merely on basis of Whatsapp messages unsustainable*

**FACTS OF THE CASE**

- A search was conducted in the residential premises of the taxpayer and simultaneously a search was also conducted in the residential premises of the Executive Director of M/s Navaratna Estates, in which the taxpayer is a partner. During the search, whatsapp messages were found on the mobile phone of the Executive Director which established the receipt of monies.

- A statement was also recorded from the Executive Director who had stated that the messages contained on his mobile phone represent the conversation between himself and the taxpayer and the amounts represent cash loan taken from the taxpayer business purposes.
- The TO held that the taxpayer has not discharged the burden of proof to establish that the amounts were not given by him as an advance to the Executive Director. In the absence of corroborative evidence to disprove the statement of the Executive Director, the TO treated the sum as undisclosed income in the hands of the taxpayer and added back to the income of the taxpayer.
- The CIT(A) ruled in favor of the taxpayer by holding that except the whatsapp messages, there was no other evidence found by the TO to support the statement of the Executive Director to believe that the taxpayer has given advances to the Executive Director. Therefore, following various decisions, the CIT(A) deleted the addition made by the TO and allowed the appeal of the taxpayer.
- Aggrieved by the order of CIT(A), the TO has approached the ITAT.

**JUDGEMENT**

- The ITAT noted during the search proceedings no evidence was found by the TO either in the premises of the taxpayer or in the premises of M/s Navaratna Estates with respect to the f loan given to the Executive Director. The ITAT noted that merely on the basis of the statement given by the Executive Director (which was subsequently retracted and clarified that he has not received any cash loans from the taxpayer) the TO made a presumption that the taxpayer had advanced sums to the Executive Director without bringing any evidence on record.
- The ITAT remarked that the TO neither gave any opportunity to the taxpayer to cross examine the third party nor disproved the explanation given by the taxpayer.
- The ITAT upheld the finding of the CIT(A) which held that on the basis of notings and loose sheets found from third parties and the statement of third parties, additions cannot be made without having corroborative / independent evidences.
- The ITAT ruled that since the addition was made merely on the basis of whatsapp messages and the statement recorded from the Executive Director (which was subsequently retracted), the said addition made by the TO is unsustainable and the CIT(A) rightly deleted the addition.

| **Amounts paid as export commission is not Fees for technical services** | | |
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| **Sr. No** | **Name of the Party, citation and Court** | **Facts and Judgement** |
| **1.** | Snap Computer Systems Pvt Ltd (ITA no. 448 & 449/Ind/2019) (Indore ITAT) | The taxpayer made a payment to a US based non-resident company without deducting tax at source (**TDS**). The TO on perusal of Form 15CB and invoices, held that payments were in the nature of fees for consultancy/technical services (**FTS**) and thus, the taxpayer was liable to withhold taxes under Section 9(1)(vii) read with Section 195. The CIT(A) upheld the order of the TO. When the appeal was filed before the ITAT, it was observed/held as under: |

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| | | ▪ Pursuant to the perusal of the Service agreement, invoices and certificate issued by the non-resident company, ITAT clarified that though the nomenclature of the payment in the agreement is 'consulting services', the non-resident had not rendered any services except for directing the customers to the taxpayer for supply of software services for which it (non-resident) was paid 'commission'.<br>▪ Relying on the ruling of the Authority for Advance Ruling (**AAR**) in case of ***Dr. Reddy Laboratories Ltd (DRL) (73 taxmann.com144)***, ITAT held that the non-resident company has not provided any technical services to the taxpayer and the alleged amount represents commission for liaison work and procurement of orders from customers. Since the non-resident company neither has a PE nor a business connection in India, the alleged payment was not subject to TDS under Section 195 of the IT Act.<br>▪ In light of the above, the order of CIT(A) was set aside by the ITAT and demand for TDS default and interest under Section 201(1A) was deleted. |
| **2.** | Gepach International (ITA no.5943/5942/Mum/2018) (Mumbai ITAT) | The TO held that taxpayer's payment of INR 2.15 crores towards reimbursement of expenses to a UAE based agent for marketing and sale promotion activities as well as export commission on sales made in Russia, was liable to TDS under Section 195 and thus, disallowed the said expenses, which was deleted by the CIT(A). When the appeal was filed before the ITAT it was observed/ noted/ held as under:<br>▪ ITAT noted that the taxpayer had entered into an agreement with Pharmark appointing them as an agent for business in Russia. Consequently, Pharmark appointed employees/staff to promote the taxpayer's products and for marketing and sales promotion activities in Russia.<br>▪ ITAT took note of CIT(A)'s observation that the agent provided marketing support service as per |

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| | | the strategies devised by the taxpayer while the taxpayer retained full control over all the marketing activities in Russia and the agent was simply implementing the same.<br>▪ ITAT opined that the services provided by the agents are not managerial in nature and the non-resident has no business connection in India, thus held that the payment doesn't constitute FTS under Section 9(1)(vii).<br>▪ ITAT had upheld the view of CIT(A) that the provisions of Section 195 are not attracted on the said payment in the absence of 'chargeability under provisions of the IT Act'. |

## Jeans Knit Private Limited [TS-472-HC-2020(KAR)]

*Payment for NR's inspection & quality check services, not FTS*

### FACTS OF THE CASE

- The taxpayer, a 100% export-oriented undertaking is engaged in the business of manufacturing and export of garments. The taxpayer requires accessories to be imported, for which it had engaged Sharp Eagle International, Hong Kong (**NR Co**) to render various services at the time of import (inspection of fabrics, timely dispatch of material etc). The taxpayer paid 12.5% of the import value as charges to NR Co.
- The taxpayer did not deduct tax while making payments to NR Co. The TO treated the taxpayer as an 'assessee in default' and *inter alia* held that the services rendered by NR Co have to be treated as FTS which are covered within the ambit of Section 9(1)(vii) of the IT Act.
- The taxpayer filed an appeal before the CIT(A), however, the CIT(A) upheld the order of TO. Thereafter, the ITAT ruled in favor of the taxpayer by holding that the quality of material is already determined by the taxpayer and NR Co is only required to make physical inspection of the material to examine if it resembles the quality specified by the taxpayer. Therefore, no technical knowledge was required in the said case. The ITAT held that NR Co is not providing any technical services and payments made by the taxpayer to NR Co do not fall within the ambit of FTS.
- Aggrieved by the order of the ITAT, the TO has approached the Karnataka HC.

### JUDGEMENT

- The singular question which arose for consideration before the HC was whether the fee paid by the taxpayer to NR Co is FTS and covered within the ambit of Explanation 2 to Section 9(1)(vii) of the IT Act.
- The HC noted from the agreement executed between the taxpayer and NR Co that it is evident that NR Co is required to inspect the quality of fabric and other accessories in accordance with the sample approved by the taxpayer and coordinate with the suppliers to ship the goods within the stipulated timeline.
- The HC further noted that the NR Co is nowhere involved either in identification of the exporter or in selecting the material and negotiating the price. The quality of material is also determined by the taxpayer and NR Co is only required to make physical inspection to see if it resembles the quality specified by the taxpayer.

- In view of the above, the HC held that for rendering the aforesaid services no technical knowledge is required. The HC upheld the order of the ITAT that NR Co is not rendering any consultancy service to the taxpayer and therefore the same may not fall within the services contemplated under Section 9(1)(vii) of the IT Act. Accordingly, the HC dismissed the appeal of the TO.

## KEC International Ltd (ITAT no. 17/Mum/2018) & (ITA no. 115/Mum/2018)

*Treats business advance to loss-making Joint Venture as capital contribution; Rejects re-characterization as loan*

### FACTS OF THE CASE

- The taxpayer, being a resident company, was engaged in the business of designing, fabrication, galvanizing and testing of transmission lines & telecom towers, supply and erection of sub-station structures and overhead equipment for railway electrification and managing infrastructure sites for telecommunication services.
- During the AY 2012-13, assessment was framed under Section 143(3) read with Section 144C(3) wherein the income was determined at INR 251.41 crores as against the returned income of INR 185.05 crores, which was later on revised to INR 198.26 Crores. However, during the assessment proceedings, the taxpayer furnished a revised computation of total income reflecting an income of INR 229.71 crores. Thereafter, the TO made a reference to the Transfer Pricing Officer (**TPO**) for determination of arm's length price (**ALP**) in respect of various international transactions.
- During the course of assessment proceedings, the TPO transpired that certain advances were given by the taxpayer to its AE in foreign currency without any security. The taxpayer submitted before the TPO that:
  - Advances were given to resolve the problem of cash crunch and the ultimate beneficiary would be taxpayer himself since the taxpayer was 50% partner in the joint venture;
  - Internal comparable uncontrollable price (**CUP**) was selected as the most appropriate method (**MAM**) for benchmarking this transaction;
  - Advances were given out of taxpayer's accumulated/undistributed profits;
  - Did not avail any external commercial borrowings (**ECB**);
  - The transaction was in the nature of advances and not loan, hence, no interest was charged during the AY;
  - Business interest of the taxpayer would have been adversely impacted by not making such advances;
  - Advancement was nothing but a matter of commercial prudence primarily to protect the business interest of the taxpayer in projects of Joint Venture.
- However, not convinced with the submission of the taxpayer, the TPO rejected the taxpayer's computation of ALP by applying internal CUP and held that interest should be at the rates applicable for fixed rates loans and the benchmarking was to be done on the basis of LIBOR plus some spread, thereby making an upward TP adjustment while framing the assessment.
- CIT(A) upheld the adjustment but, agreed with the taxpayer's submissions that the ALP for the loans was to be determined on the basis of rate of interest being charged in the country where the loan was received /consumed. It therefore directed the TO to recompute the ALP.

- Aggrieved, taxpayer filed an appeal before the ITAT. The TO also filed an appeal on various other issues before the ITAT. Below is the ruling of the ITAT in the case of taxpayer's appeal.

**JUDGEMENT**

- The ITAT opined that there was pre-existing liability to make such advances to the Joint Venture and the business interest of the taxpayer would have been adversely impacted by not making such advances. The ITAT further observed that the advances were more in the nature of capital contribution and by advancing the same, the taxpayer had protected its own business interest which was evident from the financial statements of Joint Venture.
- ITAT noted that any financial incapacitation of Joint Venture would adversely affect the continuation of the project and ultimately jeopardize the interest of the taxpayer. It therefore opined that *'said advances could not be put in the category of loans as done by the lower authorities.'*
- The ITAT also stated that it could not be said that the Joint Venture entity derived / gained certain benefits out of such advances. Rather, it was the taxpayer who would ultimately gain by continuing and earning profits from the projects. Therefore, ITAT deleted the said TP adjustment.

## Associated Capsules Pvt Ltd (ITAT no. 2750/Mum/2014)

*Holds corporate-guarantee an international-transaction; Limits commission to extent of facility actually availed*

**FACTS OF THE CASE**

Impugned appeal, filed by the taxpayer, is directed against the order of CIT(A) for AY 2008-09. Ground-wise contention raised by the department and the TO is as under:

- **Ground 1 & 2: Whether corporate guarantee granted to its AE is an international transaction**
  - During the course of hearing before ITAT, it was contented by the taxpayer that the corporate guarantee provided to its AE did not amount to an international transaction and hence, no ALP was determined for the said transaction. On the Contrary, the TO relying on the Hon'ble Bombay HC decision in case of ***Everst Kento Cylinders Ltd (378 ITR 57)*** held that Corporate Guarantee to an overseas AE is an international transaction.
  - Without prejudice, the taxpayer contended that, in case the corporate guarantee is treated as an international transaction, the adjustment be restricted to the extent of 0.5% of the facility availed as against 2.5% considered by the TPO, since the AE had availed the loan facility to the extent of INR 2.48 crores as against INR 15.19 crores sanctioned.
- **Ground 3: Addition made on account of unexplained paintings**
  - Search action was initiated at the premises of the group companies and residential premises of the promoter whereby certain paintings were seized. The taxpayer had furnished various documentary evidence to substantiate that the paintings were either acquired directly from the painter or from the gallery and the same was partially accepted by the TO. Further, it was the contention of the taxpayer that paintings acquired before the search block period, addition qua such paintings cannot be made in the search block period, placing reliance on the ITAT decision in case of ***Kavita Singh (ITA no. 1242/Mum/2012)*** wherein on similar facts, ITAT deleted the addition.
  - On the contrary, the TO argued that the documents produced were not genuine and various documentary evidence were not furnished.

- The taxpayer also contended that the acquisition/ purchase value of the paintings should be considered for the purpose of addition to the total income and not their current value.

**JUDGEMENT**

- Relying on the jurisdictional HC decision in case of ***Everst Kento Cylinders (supra***), the ITAT held that corporate guarantee provided to its AE is an international transaction for AY 2008-09. However, following the aforesaid HC ruling, ITAT upheld the taxpayer's without prejudice contention that the corporate guarantee should be restricted to 0.5% instead of TPO's 2.5%.
- ITAT observed that in catena of decisions, it has been held that corporate guarantee and bank guarantee (where commission is charged on the entire guarantee facility extended) are at variance. ITAT pointed out that unlike a bank guarantee, in the case of corporate guarantee there is no commitment of financial or capital assets of the entity as a security.
- ITAT explained that corporate guarantee is extended by one corporate entity to a third party for or on behalf of its AE and is in the nature of a contingent liability. Placing reliance on the decision of ***BS Ld (94 taxmann.com 346),*** ITAT accepted the taxpayer's plea that ALP of corporate guarantee commission should be restricted to the extent of facility availed by taxpayer's AE. However, for the purpose of determination of corporate guarantee commission, ITAT remitted the issue to the TO.
- ITAT accepted the contention of the taxpayer that the paintings acquired before the date of search should be excluded while assessing the total income. Further, ITAT observed that since the facts are similar to the case of ***Kavita Singh (supra)***, ITAT directed the TO to issue the decision in line with the said decision.

## Haier Appliances India Pvt Ltd (ITAT no. 2279/Del/2018)

*Excludes selling & distribution expenses and AE-grant from AMP expenses; Restricts Transfer Pricing (TP) adjustment*

**FACTS OF THE CASE**

- The taxpayer, manufacturer of consumer products had entered into an agreement with its AE viz., Haier Electrical Appliances Corp. Ltd., China, (**Haier China**). The taxpayer had used, promoted the trademark and brand name owned by Haier China and had incurred advertisement, marketing and promotional (**AMP**) expenditure.
- The taxpayer reported purchase of finished products and capitals items from its AE as an international transaction in its transfer pricing report. Thus, the AMP expenses were not submitted as an international transaction by the taxpayer.
- The TPO noting that AMP/sales ratio of the taxpayer was 16.04% as compared to 3.87% of the comparable, held that the advertisement expenses over and above the normal AMP expenses incurred by the comparable was towards brand building and accordingly made a TP adjustment. The Dispute Resolution Panel (**DRP**) confirmed the action of TPO.
- Relying on the decision of the Hon'ble Delhi HC in the case of ***Sony Ericsson Mobile Communications India (P.) Ltd. (374 ITR 118),*** the ITAT remanded the matter to the TO/TPO with a direction to examine all the functions carried out by comparables as per the guidelines laid down by the HC.

- Aggrieved, the taxpayer appealed before the HC, contending that at the time when the ITAT passed the order, it did not have the benefit of the order subsequently passed by Delhi HC in the case of Sony Ericsson Mobile Communications (*supra*) and thus, HC remitted the matter back to the ITAT.
- During the course of hearing before the ITAT, the taxpayer
  - Submitted break -up of AMP expenses and benchmarking analysis of AMP expenses applying Resale Price Method (**RPM**);
  - Argued that the TPO for the purpose of benchmarking AMP expenses, considered an appropriate comparable, by applying bright line test (**BLT**). It, however, ignored the fact that the said comparable did not own any brand and is just the trader/reseller of home appliances;
  - Without prejudice, the adjustment made by TPO/DRP should be restricted to INR 2.85 crores (i.e. after excluding selling and distribution expense) as against INR 13.50 crores arrived by the TPO.
- ITAT noted that HC in its order dated October 25, 2016, while remanding the matter to ITAT, has categorically mentioned that decision should be laid in the light of Sony Ericsson ruling (*supra*) and that whether the MAM is RPM or CUP is left for application by the TPO, based on the nature of the business of the taxpayer.

**JUDGEMENT**

- ITAT observed that, the TO has not pointed out as to how the RPM will be inapplicable for benchmarking of AMP expenses. Further, regarding TPO's consideration of the comparable and application of BLT, ITAT noted that BLT has been rejected by jurisdictional HC in Sony Ericsson ruling (supra). It was observed that the element of adding value to the goods by incurring AMP expenditure, thereby, creating market intangibles and enhancing brand value of the product was missing in present case.
- ITAT noted that after excluding selling and distribution expenses, the adjustment works out to INR 2.85 crores which has not been disputed by the TO. ITAT thus directed the TPO/DRP to restrict the adjustment to the extent of INR 2.85 crores.

## Mattel Toys (India) Pvt. Ltd. (ITA 3903/2016)

*AMP-expenditure not international transaction, deletes TP-adjustment for manufacturer cum distributor; Follows earlier-order*

**FACTS OF THE CASE**

- The taxpayer is engaged in manufacturing, distribution and sale of 'Mattel' toys. Its operations include import of finished goods from group companies, purchase of finished goods from local manufacturer and also manufacturing, mainly involving component assembly to core party manufacturers. The TO had observed from the P&L account that the taxpayer has incurred AMP expenditure of 10.25% of its sales. The TO observed that taxpayer is incurring brand promotion expenses for promotion of brands which are owned by AE. The TO made adjustment to ALP in respect of AMP expenditure being excess AMP expenditure in respect of re-investment for brand promotion and marketing intangible of the AE in India.
- The taxpayer preferred an appeal before the CIT(A) which deleted the ALP adjustment in respect of AMP expenditure on the grounds that the taxpayer's operating profit was higher than that of the comparable selected by the TO. However, the preliminary objection raised by the taxpayer that AMP expenditure is not an international transaction was dismissed by the CIT(A).

- Aggrieved by the order of CIT(A), the TO has approached the ITAT.

**JUDGEMENT**

- ITAT noted that in taxpayer's own case for another year, this ITAT had already held that AMP expenditure is not an international transaction and hence, no ALP adjustment could be made thereon. Further, ITAT had held that it is the taxpayer who has to decide how much to spend for earning its income and the tax authorities are prevented from entering into the shoes of the taxpayer to decide the justification of the expenditure.
- Respectfully following the decision of this ITAT in taxpayer's own case, ITAT held that AMP expenditure is not an international transaction and hence no adjustment to ALP needs to be made thereon. Accordingly, the appeal filed by the TO was dismissed.

## NOTIFICATIONS/CIRCULARS

### CBDT- Guidelines for compulsory selection of returns for Complete scrutiny during the FY 2020-21

- CBDT vide **Circular F. NO. 225/126/2020/ITA-II**, dated September 17, 2020 prescribed five broad parameters for compulsory selection of returns for complete scrutiny for FY 2020-21 with respect to search & seizure, survey cases, cases where Section 148 notice have been issued, cases relating to registration / approval under Sections 12A / 10(23C) and cases where notices under Section 142(1) have been issued calling for return of income.
- Without prejudice to the above, CBDT states that the cases which are selected for compulsory scrutiny by the International Taxation and Central Circle charges following the above prescribed guidelines, shall, as earlier, continued to be handled by these charges.
- The communication further mandates that the exercise of the selection of cases for compulsory scrutiny on the basis of defined parameters shall be completed by **September 30, 2020.**

### CBDT- Notifies amendment in Rule 29B of the Income tax Rules, 1962 (IT Rules)

- CBDT vide Notification No. 75/2020 amends Rule 29B of the IT Rules dealing with application for certificate under Section 195(3) of the IT Act for authorizing receipt of interest and other sums without deduction of tax. The Rule 29B allowed foreign banks to make such application, the amended Rule 29B now allows an 'Insurer' defined under Section 2(9)(d) of Insurance Act 1939 to make an application under Section 195(3) for non-deduction of tax.

### Faceless Appeals

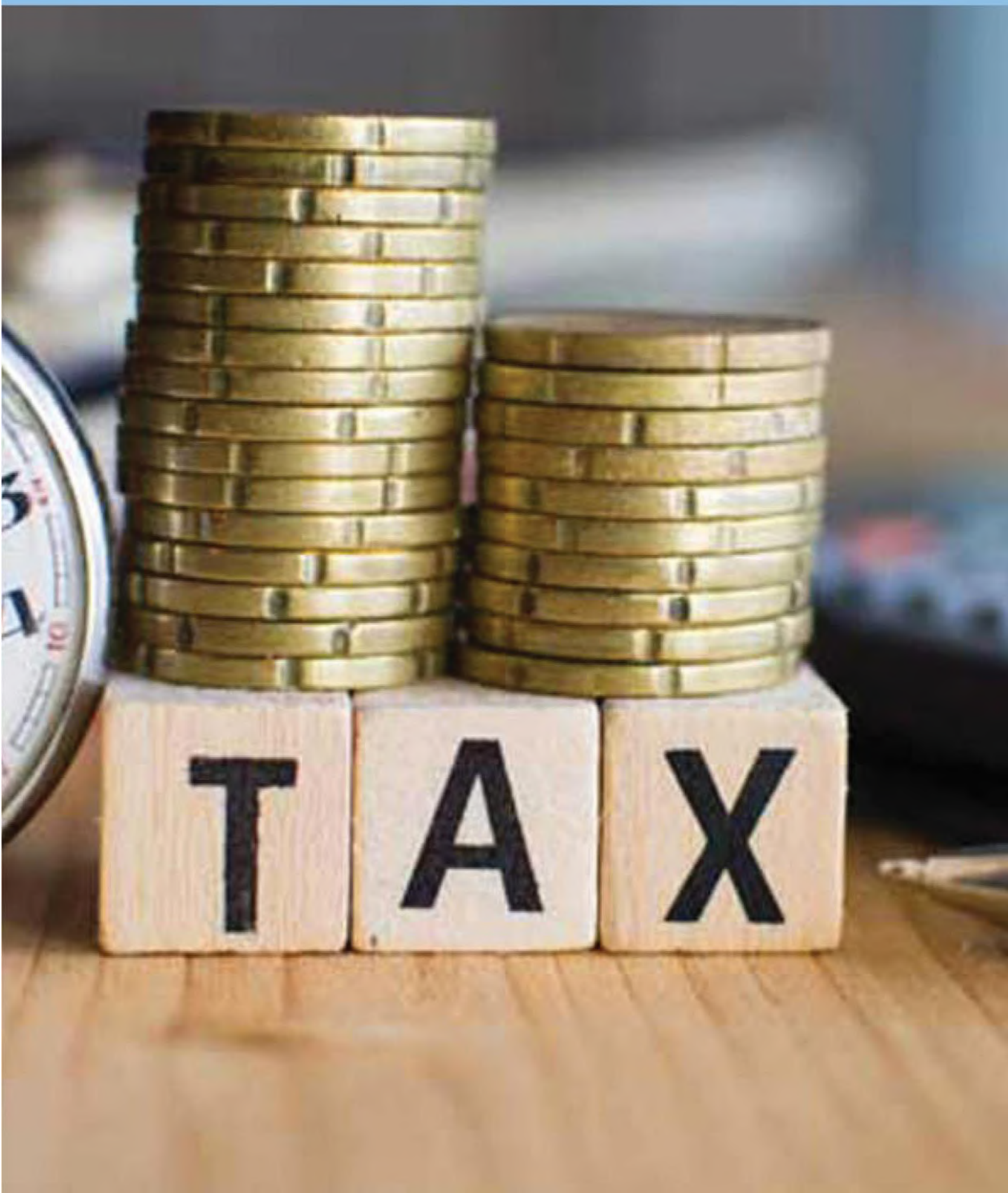
- In line with Government's widely promoted objective of ensuring efficiency and transparency in tax administration, the CBDT has notified Faceless Appeal Scheme, 2020 (**Scheme**) vide Notification No. 76/2020 dated September 25, 2020 to provide a framework for disposal of appeals by the CIT(A) and made it operative with immediate effect.
- The above Scheme has been announced in view of the powers vested to the Government under section 250(6B) of the IT Act, inserted by the Finance Act, 2020. The above reform is also part of the Government's attempt to honor 'honest' taxpayers of the country and to make the tax system 'seamless, faceless and painless' and is also in furtherance to the Hon'ble Prime Minister's initiative of the 'Transparent Taxation' Platform launched on August 13, 2020 comprising of faceless assessments, faceless appeals and taxpayers' charter.

- Further, in exercise of powers conferred by Section 250(6C), for the purpose of giving effect to the Scheme, CBDT has also issued certain directions vide CBDT Notification no. 77/2020 dated September 25, 2020.
- CBDT vide its press release dated September 25, 2020 has, however, specified that the appeals relating to serious frauds, major tax evasion, sensitive and search matters, international tax and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 matters shall be kept outside the ambit of the Scheme.
- Under the Faceless Appeals, everything from e-allocation of appeal, e-communication of notice/ questionnaire, e-verification/e-enquiry to e-hearing and finally e-communication of the appellate order, the entire process of appeals will be online, dispensing with the need for any physical interface between the taxpayer and the Department. There will be no physical interface between the taxpayers or their counsel/s and the Income Tax Department. The taxpayers can make submissions from the comfort of their home and save their time and resources. The Scheme provides for setting up centers and units to facilitate the conduct of e-appeal proceedings, provides stepwise process to conduct appeal/penalty/rectification proceedings, exchange of communication exclusively by electronic mode, authentication/ delivery of electronic record etc.
- The Scheme also states that appeal against an order passed by National Faceless Appeal Centre shall lie before ITAT having jurisdiction over the jurisdictional TO of the taxpayer.

## NEWS

- **35,074 taxpayers opt for Vivad Se Vishwas Scheme** - The total number of taxpayers who have opted for the Direct tax Vivad Se Vishwas Act since its enactment is 35,074 through Form-1 (Declaration under the scheme), which has been submitted till September 8, 2020. The revenue generated till date through the Vivad Se Vishwas Act is INR 9,538 crore.
- **Tiger Global International** has filed writ petition before Delhi HC challenging the ruling of AAR dated March 26, 2020. Delhi HC vide order dated September 22, 2020 **(W. P (C) 6764/6765/6766 of 2020)** has stayed the regular assessment proceedings and fixed the next date of hearing in the matter on January 18, 2021. Further, HC has directed the parties to file a short-written submission on or before December 23, 2020.
- **Digital tax proposal -** The EU Commission vide a press release stated that it will move ahead with a digital tax proposal in the first half of next year, if the OECD does not reach a global consensus.
- **Indirect transfer -** Vodafone wins international arbitration case pertaining to 'indirect transfer' tax dispute under India-Netherlands Bilateral Investment Protection Agreements (**BIPA**). Pursuant to the retrospective amendments to Section 9 of the IT Act vide Finance Act, 2012, Vodafone invoked the arbitration clause under the India-Netherlands BIPA wherein the Arbitral Tribunal ruled that India's conduct in respect of the imposition on the Claimant of an asserted liability to tax notwithstanding the Hon'ble SC judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4(1) of the India-Netherlands BIPA.

# INDIRECT TAXATION



## RECENT CASE LAWS

### Transtonnelstroy Afcons JV and Ors. V. Union of India and Ors. [TS-800-HC-2020(MAD)-NT]

*Sec 54(3)(ii) inverted duty refund only when accumulation is due to rate on input goods being higher than rate on output supplies; exclusion of input services is constitutionally valid. Rule 89(5) held intra-vires Section 54.*

**FACTS OF THE CASE**

- In this case the lead Petitioners were facing a higher rate of GST than the rate on output supplies for both input goods and input services. As a result, there was an accumulation of unutilized input tax credit. It was the view of the Petitioners that they ought to be entitled to a refund of the entire unutilized input tax credit, irrespective of whether such credit accumulated on account of procurement of input goods and/or input services.
- Clause (ii) under Proviso to Section 54(3) provides that refund of unutilized input tax credit shall be allowed only if the credit has accumulated on account of the rate of 'tax on inputs' being higher than the rate of tax on output supplies. Further, Rule 89(5), which provides the formula for the calculation of maximum amount of refund on account of inverted duty structure, defines 'Net ITC' to be the input tax credit availed on inputs only.
- The Petitioners sought to challenge these provisions *inter-alia* on the following grounds –
  - The object and purpose of GST laws is to consolidate the indirect tax legislation and provide a common regime for goods and services. Moreover, preventing the cascading of taxes is a primary objective of the laws.
  - Section 54(1) does not empower the legislature to frame rules in a manner to create disabilities that are not contemplated in the parent act itself. The language of Section 54(3) is to be interpreted such that refund of any unutilized input tax credit ought to be allowed, as long it falls within the two classes of registered persons entitled to refund, namely those with zero-rated supplies, and those facing an inverted duty structure.
  - The word 'inputs' used in common parlance in Proviso (ii) to Section 54(3) ought to mean both "input goods" and "input services". Else, it would amount to a violation of Article 14 of the Constitution as it makes a discrimination amongst contractors who avail input goods but not to those who avail input services.
  - One of the Petitioners submitted that the Proviso did not curtail the entitlement to refund of the entire unutilized input tax credit but merely set out an eligibility condition for claiming refund. That being the case, the amendment made to Rule 89(5), which restricted refund on input services in spite of crossing the threshold in the second Proviso to Section 54(3), is thus *ultra vires* Section 54(3). Moreover, there is no such restriction in the case of zero-rated supplies, which shows a clear legislative intent to allow a refund on account of input goods as well as input services.
  - Reliance was placed on the decision of the Hon'ble Gujarat High Court in ***VKC Footsteps India Pvt. Ltd. v. Union of India (TS-585-HC-2020(GUJ)-NT)***, wherein the amended Rule 89(5) which only allowed refund of credit accumulated from inputs was held to be *ultra vires* to Section 54(3) which provided refund of 'any unutilized input tax credit'.

**JUDGEMENT**

The Bench, though cognizant of the decision of the Hon'ble Gujarat High Court in the ***VKC Footsteps*** decision (cited *supra*), went on to independently analyze the issue to conclude their view.

The Hon'ble Court *inter-alia* held that:

- Section 54(3)(ii) enables claim a refund of unutilized ITC only where such ITC has accumulated on account of the rate of tax on input goods being higher than the rate of tax on output supplies.
- The Hon'ble Court negated the submission that the word ''inputs'' should be read so as to include ''input services'' merely because the undefined word ''output supplies'' is used in Section 54(3)(ii).
- Refund is a statutory right and restriction on right of refund only in respect of unutilized ITC accumulating on rate of tax on input goods being higher than the rate of tax on output supplies does not infringe Article 14. There is no need to read down the provisions contained therein.
- There is a classification of sources of unutilized input tax credit into sources that give rise to a right to refund, i.e. input goods, and those that do not, i.e. input services. This is a valid classification and is a valid exercise of legislative power.
- Section 164 confers power on the Central Government to frame rules for carrying out the provisions of the CGST Act and no fetters are discernible therein except that the rules should be in furtherance of the purposes of the CGST Act.
- Rule 89(5) of the CGST Rules, as amended, is *intra vires* both the general rule making power and Section 54(3) of the CGST Act. There is no dispute as regards the power to amend with retrospective effect either as such power is conferred under Section 164 of the CGST Act, albeit subject to the limitation that it cannot pre-date the date of entry into force of the CGST Act.

**ELP Comments:** The Hon'ble Gujarat High Court had in ***VKC Footsteps (supra)*** inter-alia held that Rule 89(5) is ultra vires Section 54(3) and that the term 'Net ITC' should mean "input tax credit" on "inputs" and "input services". The Hon'ble Madras High Court has taken a contrasting view. The decision of the Hon'ble Madras High Court is much wider in amplitude as it upholds the constitutional validity of Section 54(3)(ii) in addition to holding that Rule 89(5) *is intra-vires* the CGST Act. As expected, the matter will only attain finality when decided by the Hon'ble Supreme Court.

## Commissioner of Service Tax, Ahmedabad v. M/s Adani Gas Ltd. [2020-VIL-27-SC-ST]

*Amounts collected towards equipment installed by seller of gas at customer's premises to ensure and verify correct quantity of gas supplied, is leviable to Service tax as 'supply of tangible goods service'*

### FACTS OF THE CASE

- The case is an appeal against the order of the Hon'ble CESTAT, Ahmedabad which set aside the demand for payment of Service tax on the charges collected by the Respondent for equipment installed at customers' premises.
- The Respondent is in the business of distributing natural gas to industrial, commercial and domestic consumers through pipes. The Respondent installs an equipment called 'SKID' at the customers' sites which regulates the supply of piped natural gas being distributed and records the consumption by the customer for billing purposes.
- An audit conducted by the Department revealed that charges were collected for the supply equipment etc. while providing new gas connections to the customers and the ownership of the equipment was retained by the Respondent. A show cause notice was issued seeking to levy Service tax on these charges as the 'supply of tangible goods service' under Section 65(105)(zzzzj) of the Finance Act, 1994. The Respondent replied stating that the equipment was being used by the Respondent for his own purpose and not by the customers. Moreover, right to

use, maintain, clean etc. all remained with the Respondent. The amount collected was only in the form on an interest-free security deposit and no Service tax was leviable thereon.

- The matter went up to the Hon'ble CESTAT, where it was *inter-alia* held that the purpose of the equipment is to measure the amount of gas supplied to the customer for purpose of billing by the company and not for use by the consumers. Accordingly, the Hon'ble Tribunal allowed the appeal and ruled in favor of the Respondent.
- The Revenue then filed an appeal against the order of the CESTAT before the Hon'ble Supreme Court of India, and made the following submissions:

- The equipment is of as much use to the buyer as it is to the seller. Moreover, the quantum of refund allowed to the buyers has varied in different cases.
- Reference was made to the CBEC circular No. 334/1/2008-TRU dated February 29, 2008 which has clarified that transactions that enable usage of goods without transferring the right to use, are in the nature of a service under Section 65(105)(zzzzj) and not sale under Article 366(29-A)(d) of the Constitution of India. Since the Respondent has not paid VAT for the charges collected on supply of pipelines and the measurement equipment, it was argued that this transaction must be treated as a service.

**JUDGEMENT**

- The Hon'ble Apex Court observed that the intention of introducing Section 65(105)(zzzj) in the Finance Act, 1994 was to tax activities that enable the customer's use of the service provider's goods without transfer of the right of possession and effective control.
- This provision creates an element of taxation over a service, as opposed to a 'deemed sale' under Article 366 (29-A)(d). The Court drew attention to Circular No. 33/1/2008-TRU which also highlighted this distinction.
- The Hon'ble Court went on to discuss the meaning of the term 'use' to determine if the supply of tangible goods was for the use of the purchaser. The Hon'ble Court held that the equipment was of mutual benefit for both the parties and helped to ensure that reciprocal obligations were fulfilled by the seller and buyer properly.
- No deposit receipts for domestic customers were provided and instead, the Respondent relied on the tabulation of the refund of deposit to industrial consumers. The argument of the Respondent that these gas connection charges collected from industrial, commercial and domestic consumers constituted a refundable security deposit was rejected.
- It was held that the supply of measurement equipment (SKID equipment) by the Respondent, was of use to the customers and was taxable under Section 65(105)(zzzzj) of the Finance Act 1994.

## In Re. Mayank Jain [2020-VIL-49-AAAR]

*Facilitation services to consultant managers on employee based immigration held to be 'intermediary services' and hence liable to GST*

**FACTS OF THE CASE**

- The Applicant-Appellant was exploring the business opportunity of providing marketing and handholding services to consultant manager(s) in USA in relation to Employee Based Immigration 5th Reference Program **(EB-5 Program)**.
- The EB - Program envisages that an investor is eligible to a permanent residence permit in the United States of America subject to an investment of USD 500,000 and job creation in a commercial entity or investment fund.

- Under the proposed Agreement with consultant manager, the services to be provided covered: (i) marketing services; and (ii) handholding services. The scope of services included conducting market surveys to identify the market and prospective investors for the consultant manager, preparing reports, marketing plans, market intelligence, compiling list of prospective investors for the consultant manager, formulating a strategy plan for the benefit of the consultant manager, addressing queries of the consultant manager and conducting sales prospection through necessary participation in industry events.
- The consideration for the aforesaid services shall be fixed and contingent upon successful investment/ repatriation by the investor.
- The Applicant had earlier sought a ruling before the Maharashtra AAR on whether the services would be classified as 'intermediary services' or 'support services', and whether the same would amount to an export of service.
- The AAR had held that the services would qualify as 'intermediary' services and would be taxable. The Applicant thus approached the AAAR against the order of the AAR.

**JUDGEMENT**

- The AAAR observed that the proposed agreement expressly provided that neither party would represent itself to be an agent of the other. However, as per the AAAR, the terms 'Agent' or 'Intermediary' are not interchangeable and have completely different essence and characteristics under the provisions of GST law.
- As per the AAAR, even though there is mention of the term 'Agent' in the definition of 'Intermediary', an Agent does not necessarily mean Intermediary, unless the conditions prescribed under the meaning assigned to the Intermediary under section 2(13) of the IGST Act, 2017 is satisfied i.e. he should be merely acting as facilitator of the supply of goods or services or both between the two or more persons, and not supply of the goods or services or both on his own account.
- The AAAR further observed that all the activities undertaken by the Applicant are culminating into the exploration and identification of the prospective investors. The activities have no relevance when performed independently and in isolation until all these services, when combined together, culminate into the supply of facilitation services between the consultant manager and the prospective investors. This makes all the activities of the Appellant as those of an Intermediary in terms of Section 2(13) of the IGST Act, 2017.
- As regards the classification of the services provided by the Intermediary, it would aptly be classified under the Heading 9997 bearing description other services.
- The issue of whether the services were in the nature of exports was held to be beyond the ambit of the ruling.

## Union of India and Ors. V. M/s G S Chatha Rice Mills and Anr. [2020-VIL-33-SC-CU]

*Revised rate of duty not applicable to imports where bills of entries for home consumption were presented and self-assessment completed before the time of uploading the notification.*

**FACTS OF THE CASE**

- After the Pulwama terrorist attack on February 2, 2019, the Union Government issued Notification No. 5/2019-Cus dt. 16.02.2019 under Section 8A of the Customs Tariff Act 1975 imposing an enhanced customs duty of 200% on all goods originating in or exported from Islamic Republic of Pakistan.

- While the notification was uploaded on the e-Gazette at 20:46:58 hours, the Customs authorities sought to impose the enhanced rate on importers who had already presented bills of entry for home consumption prior to the notification itself, which was then challenged before the High Court of Punjab and Haryana.
- The Hon'ble High Court vide ***Rasrasna Food Private Limited v. Union of India - 2019-VIL-408-P&H-CU*** held that since the importers, who had imported goods from Pakistan, had presented their bills of entry and completed the process of "self-assessment" before the notification enhancing the rate of duty to 200 per cent was issued and uploaded, the enhanced rate of duty was not attracted. The Hon'ble High Court held that the importers were liable to pay the duty applicable at the time when the bills of entry for home consumption were filed under Section 46 of the Customs Act, 1962 (**The Customs Act**).
- The Union of India filed the present appeal against this order on the grounds that Section 15 of the Customs Act contemplates that the rate of duty to be the rate in force during the day on which the bill of entry is presented and as the Notification was published on February 16, 2019 , it has operation throughout the day, i.e., February 16, 2019. Moreover, they have submitted that there cannot be two rates of duty which are at loggerheads with each other on a single day.

## JUDGEMENT

- The Hon'ble Court analyzed the proviso to Section 15 of the Customs Act, which states that if a bill of entry has been presented before the date of entry inwards of the vessel, aircraft or vehicle, the bill of entry shall be deemed to have been presented on the date of such arrival. Hence, there is a dual requirement in Section 15 namely, (i) the presentation of the bill of entry; and (ii) the entry inwards of the vessel or, as the case may be, the arrival of the aircraft or vehicle. The Court held that these twin conditions stood determined prior to the issuance of Notification 5/2019 on February 16. 2019 at 20:46:58 hours.
- Moreover, the rate of duty was already determined by the presentation of the bills of entry for home consumption in the electronic form under Section 46.
- As per Section 17 of the Customs Act, self-assessment was on the basis of rate of duty which was in force on the date and at the time of presentation of the bills of entry for home consumption. This could not have been altered in the purported exercise of the power of re-assessment under Section 17 or at the time of the clearance of the goods for home consumption under Section 47.
- The Court held that power of reassessment under Section 17(4) could not have been exercised since this is not a case where there was an incorrect self-assessment of duty. The duty was correctly assessed at the time of self-assessment in terms of the duty which was in force on that date and at the time. The subsequent publication of the Notification bearing 5/2019 did not furnish a valid basis for re-assessment. Moreover, Section 8A did not provide the power to increase rate of duty with retrospective effect.
- On this basis, the Revenue appeal was dismissed, and it was held that there could be no reassessment in the present case.

## Vijay Baburao Shirke [TS-815-AAAR-2020-NT]

*Taxability of prize money received in horse races*

### FACTS OF THE CASE

- Vijay Baburao Shirke **(The Applicant)** *inter alia* owns horses and participates in horse races organized by race clubs in India. The Applicant is required to pay Entry fees to race clubs for participating in races and is entitled to prize money in the event of winning or getting place in a race. The Applicant was paying GST and simultaneously claiming ITC on various inputs / input services including on entry fees paid to race clubs.
- The Applicant had approached the AAR to understand whether the prize money received is a transaction liable to GST and consequently, if the Applicant would be entitled to claim ITC on inputs and input services.
- The AAR held in the affirmative, against which ruling, the Department filed appealed on the following grounds:
  - An investigation conducted by DGGI revealed that 95-96% of the horse owners have not paid GST on prize money received since it is not considered as consideration for any taxable service.
  - Prize money does not represent consideration for supply of service and therefore no GST is payable since: (1) owner's participation is their *Suo moto* decision and not a result of a mutual pre-agreement or pre-concert between the owners and race clubs, (2) participation in race is not an activity carried out by a person at the behest of or for another person, (3) prize money does not represent *quid pro quo* since it is paid to owners whose horse either wins or gets a place in the race, and (4) receiving prize money is a consequence of chance, skill and circumstance and in the absence of any certainty it cannot be treated as 'consideration' against owner's participation in the race.
  - The Department sought to recover the ITC claimed and adjusted by the Applicant while paying the GST amounts collected by them from race clubs. It was contended by the Department that since the Applicant collected GST on the amount on which no tax was leviable, such GST collected must be deposited. Further, ITC claimed and adjusted by the Applicant towards GST liability is to be separately paid since the Applicant was not entitled to claim ITC in the absence of an output supply.
- As per the Respondent Applicant, both the race organizer and the horse owner receive a direct and individual benefit from the transaction as participation in the race enables the club to arrange an event which public may attend, which media undertakings may broadcast and which may be of interest to advertisers and sponsors. It was therefore argued that there is an element of supply of service by the horse owners to the club by way of participation in the event and in which prize money is given as consideration for undertaking such activity.

### JUDGEMENT

- The AAAR held that there is no direct nexus between the activities carried out by the horse owners viz. by providing thoroughbred horses to clubs for organizing events and the prize money received. It was further noted that since the prize money is conditional and event based, it cannot be treated as consideration against the activity of participation in the event and consequently no GST is payable.
- The AAAR, accordingly, held that the Respondent Applicant is not eligible to avail credit on goods / services procured since ITC is restricted to the portion of taxable supplies. Therefore, ITC of input services including entry fee, training charge paid to horse trainers and charges paid to jockeys is not eligible.

## BG Exploration and Production India Limited v. Commissioner of Service Tax [TS-820-CESTAT-2020(Mum)]

*Levy of service tax on joint operations undertaken by joint venture formed under Production Sharing Contract*

### FACTS OF THE CASE

- The Appellant is engaged in the exploration, development and production of hydrocarbons under 'production sharing contracts' (**PSC**) entered into by Government of India with ONGC Limited, Reliance Industries Limited and the Appellant. Under the PSC, the Government brings its rights over natural resources, ONGC handles contracts and documentation, Reliance manages financial and commercial requirements, and the Appellant is vested with the responsibility for technical operations.
- The PSC stipulates that for the development and production activities undertaken, entities will be compensated by 'cost petroleum' to be shared between themselves before the Government is entitled to a share of the 'profit petroleum' with the three co-venturers.
- The petroleum operations are conducted under a joint operating agreement between the co-venturers whereunder the Appellant books expenses incurred for deploying manpower. The Department sought to levy service tax on such amount booked by the Appellant on the premise that by virtue of Explanation to Section 65B(44) of the Finance Act, 1994 (which stipulates that unincorporated association or body of persons shall be treated as distinct persons), the Appellant had rendered service to the joint venture.
- The Department relied on Circular No. 179/5/2014-ST dated September 24, 2014 wherein it was clarified that "*JV and the members of the JV are treated as distinct persons and therefore, taxable services provided for consideration, by the JV to its members or vice versa and between the members of the JV are taxable.*"
- The Appellant challenged such levy of Service Tax on the principle of mutuality and on the basis that the Explanation to Section 65B(44) restricts its applicability to 'unincorporated association' or 'body of individuals' and cannot be extended to joint ventures where participation is result of stipulation in the PSC.

### JUDGEMENT

- It was held that the 'joint operations' does not amount to 'service' as there is no beneficiary entity outside the PSC to which the 'joint operations' is subordinated. The Hon'ble CESTAT noted that the adjudicating authority did not weigh in that the concept of demutualization envisaged in the Explanation restricts its applicability to 'unincorporated association' or 'body of individuals' only and is not applicable otherwise.
- Considering the nature of activities which are sought to be taxed under the Act, it was noted that 'service' is the extent of activity entrusted to a provider for consideration as rendered it economically gainful to be outsourced.
- In the present facts, it is incumbent upon the participants in a collaborative undertaking to contribute capital for attainment of common purpose and the deployment of personnel by the Appellant is pursuant to the obligation stipulated under the PSC. It was held that "*the activity undertaken by the appellant with its cost equivalence recorded in the books is nothing but capital contribution*" and is therefore not liable to service tax in the absence of any service being rendered by the Appellant.

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