



ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS



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# DIRECT TAXATION



## RECENT CASE LAWS

### **Bombardier Transportation Sweden AB (ITA no. 859/Del/2016) (Delhi ITAT)**

*Indian Associate Enterprise (AE) fails 'disposal test' for constituting Swedish Company's permanent establishment (PE); Intermediary services, not fees for technical services (FTS)*

#### FACTS OF THE CASE

- The taxpayer, a company registered and incorporated under the laws of Sweden, had rendered intermediary services including marketing, sales, business development, project management, customer services, etc. to Bombardier Transportation India Ltd (**BTIN**). The consideration received from intermediary services were not offered to tax.
- During the year, the taxpayer had entered into international transactions with its AE. The case was referred to the Transfer Pricing Officer (**TPO**) drawing no adverse inference with respect to international transactions carried out by the taxpayer and, therefore, no adjustment was made to the taxable income.
- The Tax Officer (**TO**) asked the taxpayer to show cause as to why revenue received from intermediary services should not be taxed in India as FTS. In response to the same, the taxpayer submitted that the taxpayer was entitled to benefits of Indo-Sweden Double taxation Avoidance Agreement (**DTAA**) and protocols thereof. Protocol 7 of the DTAA provides scope of taxability of FTS which is restricted on account of agreement between India and a third state. DTAA between India and Portugal restricts the scope of FTS on account of requirement of 'Make Available' clause.
- The TO held that the nature of intermediary services provided by the taxpayer to BTIN were in the nature of FTS as it was of the opinion that not only technical knowledge or skills must be made available but even common place 'experience', 'know-how', or 'process' if made available results in taxability of FTS. The TO placed reliance on Bangalore Income tax Appellate Tribunal (**ITAT**) decision in case of **Bovis Land Lease India Pvt Ltd** to hold that revenue from intermediary services rendered to BTIN are taxable in India. The Dispute Resolution Panel (**DRP**) dismissed taxpayer's objection and upheld the order of the TO.
- However, during the course of DRP proceedings, the DRP examined clauses from the agreement between DMRC as well as Consortium agreement between the taxpayer and BTIN and held that the taxpayer has PE in India in the form of BTIN and accordingly, attributed income earned from offshore supply of goods and equipment to the PE on gross basis. Further, DRP held that the contract between DMRC and Consortium consisting of the taxpayer and BTIN were interlinked, intervened and indivisible.
- Aggrieved the taxpayer preferred an appeal before the ITAT. The taxpayer argued before the ITAT that on identical issues, for Assessment Year (**AY**) 2010-11 and AY 2012-13, the Commissioner of Income tax (Appeals) (**CIT(A)**) had categorically observed that the said intermediary services rendered by the appellant to BTIN does not satisfy the 'Make Available' clause and does not amount to FTS.

#### JUDGEMENT

- ITAT remarked that payment of consideration would be regarded as fees for technical/included services only if the twin test of rendering services and making technical knowledge available at the same time was satisfied.
- ITAT held that since, intermediary services rendered by the taxpayer do not make available any technical knowledge, skill etc. to BTIN and BTIN was not equipped to apply technology contained in services rendered by the taxpayer, therefore the same does not tantamount to FTS and accordingly, not taxable in India.
- ITAT noted that:
  - As per the MoU, the scope of work between the taxpayer and BTIN was 'clearly bifurcated';
  - Equipment supplied had been manufactured at an overseas manufacturing facility and sale of equipment and payment for such sale both occurred outside India;

- The taxpayer did not have any place of business in India and all business activities with respect to offshore supplies were carried outside India.
- ITAT opined that the entire findings of the DRP were based on erroneous appreciation of wrong facts. On such wrong facts, the DRP held that taxpayer had a PE in India in the form of BTIN without appreciating that the taxpayer had no place of disposal in India in the office of BTIN from where the taxpayer could have conducted its business in India.
- ITAT thus held that the Indian AE (BTIN) did not constitute taxpayers PE in India during AY 2011-12 and thereby directed TO to delete addition of income attributable to the alleged PE.

### **Kaseya Software India Private Limited (ITA no. 1304/Bang/2018) (Bangalore ITAT)**

*Section 195, TDS applicable on software payments to foreign AE, rejects taxpayer's distributor's plea*

#### **FACTS OF THE CASE**

- The taxpayer was a wholly owned subsidiary of a Jersey based entity. The taxpayer was an intermediary/ distributor of computer software produced by the AE for sale within the geographical territory of India.
- The taxpayer submitted before the ITAT that there was no agreement entered with the AE but there was a letter dated January 3, 2009 ('letter') as per which it was stated by the AE that:
  - The taxpayer was eligible for a margin of 15% on the cost and it should be retained by the taxpayer;
  - The AE will reimburse all expenses incurred by the taxpayer on salary, including directors' remuneration, advertisement, travelling and travelling related expenses, business promotion expenses, communication expenses, marketing expenses, public relations cost, seminar and sponsorship, etc.
  - Arrangement between the taxpayer and its AE was not that of a buyer and seller but the taxpayer was acting as an intermediary and was eligible to retain 15% margin on cost of AE and was also eligible to get reimbursement of various expenses as specified in this letter.
- During the Financial Year (FY) 2012-13, corresponding to AY 2013-14, the taxpayer remitted a sum to its AE towards software and debited the same to its profit and loss account as software expense. The taxpayer did not withhold taxes while remitting the sum to its AE on the following basis:
  - It was only a distributor of the products and enabled the transaction (i.e. the taxpayer was acting as an intermediary) and the taxpayer did not purchase any software from its AE directly.
  - The amount debited by the taxpayer as purchase of software license was just the price payable to the AE after retaining applicable margin.
  - The taxpayer was eligible to retain 15% margin on cost of AE and was also eligible to get reimbursement of various expenses as specified in the letter dated January 3, 2009.
  - The taxpayer did not have the right to have a copy of the software.
- The TO dismissed taxpayer's contention and based on earlier judicial judgment in this regard, disallowed the deduction for the said payment made towards software expenses under Section 40(a)(ia) for failure to withhold tax at source under Section 195 of the Income tax Act, 1961 (IT Act). The order was upheld by CIT(A) and the taxpayer is now in appeal before the ITAT.

#### **JUDGEMENT**

- The main issue in dispute in the impugned appeal was whether the sum debited to the profit and loss account by the taxpayer as software expenses was payment made towards purchase of software or mere reimbursement of expenses to the AE (being the cost incurred by the AE after retaining 15% of cost incurred by the AE).



- ITAT, pursuant to perusal of letter held that, the manner of fixing purchase price of the taxpayer would not alter the nature of the transaction. ITAT held that it was not established that the contents of the letter were being acted upon. Even if it was acted upon, the conditions of the letter about reimbursement of various expenses to the taxpayer by the AE such as salary, travelling and travelling related expenses etc. would not alter the nature of the transaction.
- ITAT perused the audited profit and loss account of the taxpayer and noted that margin retained by the taxpayer was calculated by subtracting total purchases from sales which in turn was equal to 15% on purchases (cost). ITAT remarked that it failed to understand as to how the net payment made by the taxpayer to its AE is cost of the AE.
- ITAT further observed that the taxpayer had debited certain sum under the head 'Employees' benefit expenses' whereas the letter dated January 3, 2009 explicitly stated that the taxpayer's AE will reimburse all expenses incurred by the taxpayer on account of salary including director remuneration. ITAT assumed that amount debited could be in relation to salary payment not connected with the AE's business activity or the amount could be the net of reimbursement amount, however the taxpayer did not provide any details on this respect.
- With regard to reimbursement of other expenses (i.e advertisement, travelling, business promotion expense, communication expense, marketing expense etc) debited to profit and loss account, ITAT remarked that the taxpayer did not provide any clarification/details whether the same were after reimbursement.
- ITAT observed that the product was produced by the AE of the taxpayer and not by the taxpayer and therefore, the amount payable by the taxpayer to its AE was nothing but purchase price of the computer software. ITAT observed that the taxpayer obtained purchase orders from the Indian customers in respect of certain IT monitoring software products of the AE as per agreed price (for which the taxpayer was acting as a distributor for distribution keys of such software).
- ITAT realized that the determining factor was not reimbursement of expenses, rather the fact that 15% of purchase amount cannot be accepted as cost to AE because it depends on the realization of sale price.
- ITAT held that arrangement of the taxpayer with its AE was for purchase of computer software at an agreed price i.e. sale price to the Indian customers minus margin of the taxpayer equal to 15% of cost as specified in letter dated January 3, 2009. ITAT thus upheld that the taxpayer though acting as a distributor, was actually making purchases of the software from its AE and was liable to deduct tax under Section 195 of the IT Act.

### **Shri Mallikarjun H. Meti (ITA no. 1562/Bang/2019) (Bangalore ITAT)**

*TO's allegation of concealment 'and' inaccurate particulars furnishing - 'specific'; Upholds penalty*

#### **FACTS OF THE CASE**

- The impugned appeal was filed against the order of the CIT(A) wherein the taxpayer had argued before the ITAT that the notice issued under Section 274 read with Section 271 was bad in law and thus, relying on Hon'ble Karnataka High Court (HC) decision in case of **Manjunatha Cotton and Ginning Factory (359 ITR 565)** penalty should not be imposed under Section 271(1)(c) of the IT Act.

#### **JUDGEMENT**

- The ITAT rejected the taxpayer's reliance on the decision of Manjunatha Cotton and Ginning Factory (*supra*) and held that there was no ambiguity in the notice issued by the TO. It held that the taxpayer was guilty of both defaults i.e. concealment and furnishing inaccurate particulars of income.
- ITAT examined the applicability of the ruling relied by the taxpayer i.e. Manjunatha Cotton and Ginning Factory ruling and noted that two conditions need to be satisfied
  - Notice under Section 274 of the IT Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income; and
  - The taxpayer should know the grounds which it has to meet specifically in order to ensure that principle of nature justice is followed.

- ITAT observed that although the assessment order and the ultimate penalty order was only regarding concealment of income, the penalty **notice** clearly stated that the taxpayer had concealed the income and furnished inaccurate particulars of such income.
- ITAT held that judgment of Manjunatha Cotton and Ginning Factory ruling (supra) was not applicable in the presence case since the TO had followed principle of natural justice by requesting the taxpayer to explain both the allegations i.e. concealment as well as inaccurate particulars of income. Accordingly, the order of CIT(A) was upheld by the ITAT.

### **Bengal Tiger Line Pte Ltd (IT (TP) A. no. 11/Chny/2020) (Chennai ITAT)**

*Honours 'sovereign right' to tax shipping income by resident state; Rejects LOB invocation*

#### **FACTS OF THE CASE**

- The taxpayer, a company resident of Singapore was engaged in the business of operations of ship in international traffic. During AY 2015-16, the taxpayer computed shipping income from vessels operated in India under Section 172 and claimed exemption under Article 8 of India-Singapore DTAA.
- The TO assessed the income under Section 44B restricting the benefit of Article 8 by applying specific restrictions provided under Article 24 of DTAA on the premise that income is exempt under Singapore tax laws. On application before DRP, directions were issued concluding that the taxpayer was not entitled to Article 8 benefit subject to limitation under Article 24. Consequent to DRP direction, the TO taxed shipping income earned in India under Section 44B of the IT and held that the taxpayer did not qualify for tax exemption in India as per the provisions of Article 24 of India Singapore DTAA and therefore, relief claimed by the taxpayer under DTAA is incorrect.
- Aggrieved the taxpayer is in appeal before the ITAT.

#### **JUDGEMENT**

- ITAT remarked that the TO was under the misconception of the provisions of India-Singapore DTAA, because Article 8 of India-Singapore DTAA clearly specified that only the resident country has the right of taxation of freight income earned from operation of ships in international traffic. ITAT observed that Article 8 was not an exemption provision but an enabling provision which provided an exclusive right of taxation to the residence country.
- ITAT thus remarked that by entering into DTAA, India has given up its right to tax shipping income of a non-resident in India. ITAT thus held, any income arising from non-resident shipping company which was a tax resident of Singapore was liable to tax only in Singapore and not in India.
- ITAT thus held that exclusive right of taxation in one Contracting State was not the same as the specific exemption being available in other Contracting State. ITAT thus remarked that India has no jurisdiction for taxing any income which are covered by Article 8.
- On the applicability of Article 24 (first condition) on merits, ITAT held that the shipping income earned in India was neither exempt nor taxed at a reduced rate as per Article 8 of DTAA which was a condition precedent for applicability of Article 24. Likewise, on second condition in Article 24 which requires taxation on 'receipt' basis in Singapore, ITAT remarked that once the income is taxable in the country of residence on 'accrual' basis, the second condition prescribed under Article 24 of India Singapore DTAA was not satisfied.
- ITAT cited plethora of cases and letters issued by Inland Revenue Authority, Singapore in this regard. ITAT remarked that the two sovereign nations have entered into a bilateral agreement and specifically agreed on the taxing rights of particular streams of income. It said that the provisions of such agreement should be merely given effect to and as such the action of the TO to claim taxing right over the said income which was not provided in the DTAA is ultravires the power of the TO and will amount to dishonoring the bilateral agreement between two sovereign nations.
- ITAT held that the TO has incorrectly relied on Singapore tax laws exempting shipping income from operations in India, in Singapore, without realizing that the DTAA between the two countries came into existence post insertion of the relevant provisions, after thoroughly examining the said provisions. ITAT noted that when two nations have entered into

a bilateral agreement and specifically agreed on the taxing rights of particular streams of income, the provisions of such agreement should be merely given effect.

- ITAT noted that the object of a treaty as discussed in the Vienna convention was avoidance of double taxation which was achieved through the credit mechanism where exclusive taxation right was provided to one country and concluded that once the country of resident had exclusive rights to tax a particular income by way of separate Article, then limiting or denying such benefit was contrary to the purpose and object of DTAA.
- ITAT noted that the taxpayer received DIT relief certificate for non-deduction of tax at source from the TO holding that Article 8 of India Singapore DTAA was applicable to the taxpayer and income from operation in international traffic will not be taxable in India; ITAT held that any contrary view contended by the TO during assessment would be taken as violation of doctrine of promissory estoppel. ITAT thus directed the TO to follow rule of consistency unless there is change in fact or law while taking a different view.
- ITAT relied on co-ordinate bench Ruling in taxpayer's own case, wherein, the Court while dealing with India -Cyprus DTAA on similar facts of the case, held that income earned by non-resident from shipping operations in India was not taxable in India. ITAT thus, dismissed TO's contention of denying benefit of exemption claimed by the taxpayer by invoking Article 24 of DTAA, even though, the conditions stipulated under Article 24 were not satisfied.

### **Noida Cyber Park Pvt Ltd (ITA no. 165/Del/2020) (Delhi ITAT)**

*Leasehold rights not 'capital assets' for Section 50C invocation; Deletes addition of INR 241 crores*

#### **FACTS OF THE CASE**

- During the subject AY, the taxpayer computed capital gains on sale of a part of its building in Tower C and D of the Logix Cyber Park located at Noida to six different parties. The TO however noted that the sale consideration received was less than the stamp duty valuation of the property and thus, recomputed the capital gains by invoking provisions of Section 50C of the IT Act.
- The taxpayer contented before the TO that that value adopted by the Stamp Valuation Authority could not be taken as the full value of the consideration in terms of Section 50C(1) of the IT Act inasmuch as the value adopted by the stamp valuation authority exceeded the fair market value of the property. The TO referred the matter to Departmental Valuation Officer (**DVO**). Since, the report of the DVO was not available at the time of completion of assessment, the TO rejected the argument of the taxpayer, and, instead, he treated the value assessed by the stamp valuation authority as the full value of consideration, for the purposes of computing capital gains. Accordingly, the difference between the consideration stated in the sale deeds and the value adopted by the stamp valuation authority for payment of stamp duty was added to the returned income.
- On appeal before CIT(A), the order of the TO was upheld and the report of DVO was treated as unmerited. Aggrieved, the taxpayer is now in appeal before the ITAT.

#### **JUDGEMENT**

- The moot question raised before the ITAT was with respect to applicability of provisions of Section 50C of the IT Act.
- The ITAT accepted the taxpayer's submission that Section 50C was not applicable since the 'capital asset' in question did not fall within the purview of Section 50C(1) of the IT Act. ITAT noted that Section 50C(1) covers a capital asset being 'land or building or both' whereas in the instant case, 'what is transacted is merely leasehold rights in land and building, which is a distinct 'Capital Asset'.
- ITAT opined that the expression 'land or building' in its coverage is quite distinct from the expression 'any right in land or building'. The legislature, in its wisdom, has used the expression 'land or building or both' in Section 50C(1) of the IT Act, and not the expression 'any right in land or building'. Relying on a plethora of decisions, ITAT thus held the present transaction of six properties in question did not warrant invoking of Section 50C(1) of the IT Act as the property in question was not of the nature covered by Section 50C(1) of the IT Act.



## Chittharanjan A. Dasannacharya ( ITA no. 153 of 2014) (Karnataka HC)

*Capital gains, not salary, arises from cashless exercise of stock option by consultant*

### FACTS OF THE CASE

- Chittharanjan A. Dasannacharya (**the taxpayer**) is a software engineer who was employed with an Indian Company between 1995-1998. He was deputed to a US company as an independent consultant between 1995-1998 and thereafter, as an employee between 2001-2004.
- While on deputation, the taxpayer was granted the right to purchase stock of the US company. The taxpayer was given an option of cashless exercise of stock options which is an irrevocable direction to the broker to sell the underlying shares and deliver the sale proceeds after deducting the exercise price. In AY 2006-07, the taxpayer exercised his right under cashless exercise and received certain consideration. The taxpayer treated such income as long-term capital gain.
- The TO split the income into two parts and taxed the said income as under:
  - Difference between market value of shares and exercise price as 'Income from salary'
  - Difference between sale price and market value of shares as 'short term capital gains'
  - Claim for deduction under Section 54F was disallowed.
- Aggrieved taxpayer approached the CIT(A). Subsequently, the taxpayer and the tax authorities simultaneously approached the ITAT. The ITAT ruled that the taxpayer be treated as an employee of the US Company and the income be regarded as income from salaries. Thereafter, the taxpayer approached the HC

### JUDGEMENT

- The HC noted that pursual of a communication between the taxpayer and the US Company, suggests that the taxpayer was an independent consultant and was not an employee of the US Company. Thus, no employer employee relationship existed between the US Company and the taxpayer. Accordingly, such income cannot be treated as income from salary.
- The HC dismissed ITAT's reliance on ITAT's decision in case of Sumit Bhattacharya and also mentioned that at the time of exercise of option in 1996, Section 17(2)(iia) of the IT Act was not there in statute.
- Relying on the Supreme Court's decision in case of **Dhun Dadabhoy Kapadia and Hari Brothers**, the HC ruled that the right to subscribe to shares was treated as capital asset under Section 2(14) of the IT Act. Thus, by ruling in favor of the taxpayer, the HC ruled that cashless exercise of option therefore was a transfer of capital asset by way of relinquishment/ extinguishment of right to capital asset in terms of Section 2(47) of the IT Act.

## Bhaval Synthetics (India) Ltd (ITA. No. 1043/JP/2019) (Jaipur ITAT)

*Notice under Section 143(2) not mandatory for best judgement reassessment accepting returned income*

### FACTS OF THE CASE

- Bhaval Synthetics (India) Ltd (**the taxpayer**) was assessed at a loss for AY 2013-14. The assessment was reopened and a notice under Section 148 of the IT Act was issued. Against the said notice, no return was initially filed. Subsequently, the taxpayer filed a return of income in response to notice under Section 142(1) of the ITA after the expiry of 30 days.
- The TO proceeded to pass the best judgement assessment as per the return of income. The taxpayer filed an appeal before the CIT(A) by contending that the reassessment was without jurisdiction, invalid and bad in law since no notice was served under Section 143(2) of the IT Act before passing the reassessment order. The TO proceeded with the reassessment and passed the order.
- Aggrieved taxpayer filed an appeal before the CIT(A) and subsequently before the ITAT.

### JUDGEMENT

- The ITAT observed that the return of income though filed belatedly should be taken cognizance of as it still shall qualify as return filed under Section 139 or furnished under Section 142(1) of the IT Act. The ITAT further pointed out that the

need to issue notice under Section 143(2) of the IT Act arises only when certain explanation is required on a matter from the taxpayer's side.

- The ITAT by reproducing the tax-officer's observations noted that no prejudice was caused to the taxpayer. The ITAT rejected the reliance of the taxpayer on the decision of Rajasthan HC in case of **Kamla Devi Sharma** where issuance of notice under Section 143(2) was required because of the additions done by the TO.
- The ITAT concluded that where the re-assessment order has been passed under Section 147 of the IT Act accepting the returned income, there is no infirmity in the order so passed in the absence of notice under Section 143(2) of the IT Act as there is no legal necessity as so envisaged.

### **Bacardi India Pvt. Ltd. (ITA No. 1970/Del/2017) (Delhi ITAT)**

*Bacardi, a manufacturer not distributor, deletes advertisement and market promotion (AMP)-adjustment citing no benefit to AE*

#### FACTS OF THE CASE

- Bacardi Limited is a Bermuda based holding company while the operations are controlled by Bacardi International Ltd. The taxpayer assessee "Bacardi India Pvt. Ltd. (**the taxpayer**)" is an AE by virtue of common capital and control. The taxpayer manufactures products bearing the Bacardi brand name from its manufacturing facility in Karnataka.
- The TPO observed that the taxpayer incurred certain amount of expenditure towards AMP expenditure. This amounts to 26.19% of the total sales whereas the comparables' AMP was only 2.61%. After excluding selling expenses analyzing the net AMP expenses, the TPO used cost plus method for benchmarking this transaction and after adding a mark-up equal to the taxpayer's gross profit margin of 31.39%, made a TP adjustment on substantive basis.
- The tax authorities determined the adjustment as per comparable uncontrolled price (**CUP**) method. The TP adjustment on protective basis made by TPO was accepted by the DRP. The main contention of the taxpayer is that the AMP expenditure does not constitute an international transaction. On this issue, the Id. DRP held it constitutes an international transaction based on the interpretation of provisions of Sections 92B(1) and 92F(v) of the IT Act. The DRP relied on the judgment of **Sony Ericsson (374 ITR 118)**, **Yum Restaurant India Pvt. Ltd. and LG Electronics India Pvt. Ltd., v CIT TII 2015 (Del) (SB)**.
- Aggrieved taxpayer preferred an appeal before the ITAT.

#### JUDGEMENT

- The ITAT adjudicated on TP-adjustment in respect of AMP expenditure, interest on FCDs and royalty payments for the taxpayer. The ITAT deleted the AMP-adjustment, rejected the bright line test (**BLT**) by following jurisdictional HC's ruling in Sony Ericsson Mobile Communications India Pvt Ltd wherein it was held that BLT could not be applied for either determining existence of an international transaction involving AMP expenses or for determining arm's length price (**ALP**) of such transaction.
- Considering the fact that the taxpayer is not engaged in distribution and marketing of branded products but selling its own manufactured goods to the extent of 95% and paying royalty to AE which proves that AMP has not helped the parent company in anyway. The ITAT held that AMP expenses cannot be regarded as an international transaction under Section 92B of the IT Act since it was a function performed by taxpayer.
- The ITAT explained the basic purpose of introducing various provisions of Chapter X was prevention of tax evasion in transactions undertaken between an Indian entity and its overseas AE and noted that the payment under the head AMP expenditure was made to third parties which were located in India. It followed jurisdictional HC ruling in **Bausch & Lomb Eyecare (India) Pvt Ltd** and opined that a perceived/notional indirect benefit to the AE, due to incurring of certain expenditure by a taxpayer in India, is not covered by the TP provisions.
- Relying on aforesaid rulings, ITAT also observed that it was held that existence of an international transaction will have to be established de hors BLT and that the burden is on tax authorities to show the existence. Further, stating that the

objective of Chapter X is to make adjustments to the price of an international transaction in which AEs involved may seek to shift from one jurisdiction to another, ITAT held that an assumed price cannot form the reason for making an ALP adjustment. Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either.

- Separately, ITAT rejected tax authority's denial to allow Royalty payment deduction on the premise that the royalty was waived off in the earlier years and hence, would not give any perpetual right to taxpayer. The ITAT observed that the tax authorities could not bring anything on record as to why the royalty is not payable when the taxpayer is manufacturing with the technical know-how from the AE and an agreement stipulates payment of royalty.

## NOTIFICATION/ CIRCULARS

### The Central Board of Direct tax (CBDT) notified Abu Dhabi based sovereign wealth fund (SWF) for the purpose of exemption under Section 10(23FE)

- CBDT notified SWF, namely, the MIC Redwood 1 RSC Limited, Abu Dhabi, United Arab Emirates, as the specified person for the purposes of Section 10(23FE) in respect of the investment made by it in India 'on or after the date of publication of this notification in the Official Gazette but on or before the 31st day of March, 2024', subject to fulfilment of conditions.
- The CBDT also notified the audit report to be filed by the SWF for claiming exemption under Section 10(23FE).

### CBDT condoned delay in filing of audit report for Section 10(23C) entities from AY's 2016-17 onwards

- CBDT issued circular under Section 119(2) for condoning delay in filing of audit report in Form 10BB applicable to entities claiming exemption under Section 10(23C). The CBDT condoned delay in filing of audit report for AY 2016-17 and AY 2017-18.
- The circular also empowered the Commissioner of Income tax (CIT) to condone delay of upto 365 days for AY 2018-19 onward.

## NEWS

- Press release and PPT of [Atmanirbhar Bharat Package 3.0](#) announced by Finance Minister (FM).
- With a view of reducing hardships faced by the home buyers and developers, the FM in her Press briefing unveiling [Atmanirbhar Bharat Package 3.0](#) announced the increase of tolerance limit under Section 43CA and Section 56(2)(x) of the IT Act to 20%.
- Consequent upon diversion of posts of CIT(A) to newly created National Appellate Faceless Centre (NFAC), Delhi and its four Regional Faceless Appellate Centre (RFACs), the CBDT announced transfer and postings of certain officers in the grade of CITs to CIT(Appeal Units). Also announced transfers, postings and local changes of over 250 officers in the grade of CIT other than Appeal Units.

# | INDIRECT TAXATION





## RECENT CASE LAWS

### M/s Maansarovar Motors Private Limited

*Interest for delayed payment of GST shall be charged on net cash tax liability w.e.f. July 1, 2017*

#### FACTS OF THE CASE

- The Petitioners are registered under the Central Goods and Services Tax Act, 2017 (**CGST Act**) and have filed the GST return after the due date. Section 50 of the CGST Act states that every person who is liable to pay tax in terms of the CGST Act shall remit the tax either in cash or by way of adjustment of credit available in the Input Tax Credit (**ITC**) register. In cases of delay in such remittance, interest is liable to be paid for the period of delay. However, the proviso has been inserted *vide* Finance Act, 2019 which states that interest is payable on the GST paid through cash ledger. The said proviso has been made effective from September 1, 2020.
- The Authorities have proceeded to demand interest on the entire amount of GST liability – which was paid after the due date. The Petitioner has challenged that the interest shall be payable only on the cash component of the tax liability which was paid after the due date.
- Briefly, this batch of writ petitions revolves around the interpretation of Section 50 of CGST Act and effective date of proviso which states that interest shall be payable only on GST paid through utilizing cash ledger.

#### JUDGEMENT

- While pronouncing the judgment, reference was made to the GST Council meeting held on March 14, 2020 which recommended that interest is payable on net cash tax liability with effect from July 1, 2017. In continuation of the same, on March 14, 2020, the Council issued a press release wherein, under the head 'Measures for trade facilitation', it was categorically stipulated that interest for delay in payment of GST would be charged only on net cash tax liability with effect from July 1, 2017.
- In line with the above, **Circular F. No. CEBC/20/1/8/2019-GST dated September 18, 2020** has been issued wherein the instructions have been issued to the Authorities that for the period 01.07.2017 to 31.08.2020, interest shall be recovered only on the net cash tax liability. However, the Authorities have still demanded interest on the entire GST liability.
- Given the above, the Hon'ble High Court held that the Centre, the State and the CBIC are in agreement that the operation of the proviso of Section 50 should only be retrospective and the interpretation to the contrary by the authorities would be clearly misplaced. Accordingly, it was directed to the appropriate authority to compute the interest liability for delayed remittances of cash and refund the balance amount collected from the petitioner, if any.

### M/s Sun Dye Chem

*Absence of enabling provisions cannot restrict Appellants from availing credit*

#### FACTS OF THE CASE

- The Appellant is a partnership firm and is regularly filing GST returns by paying the tax liability after setting off ITC. Monthly returns were filed for the period August to December 2017 in Form GSTR-3B which were accompanied by Form GSTR-1 - which reflects the output liabilities i.e. CGST, SGST and IGST.
- There was an inadvertent error while filing Form GSTR-1 with regard to the tax liability on outward supplies. Intra-state sales had been erroneously reported as inter-state sales, as a result the CGST and SGST credit was reflected in the IGST column of the customer.
- The said mistake was noticed in August 2019 and accordingly, the Appellant submitted a request for amendment of Form GSTR-1 - which was rejected on August 12, 2019 on the ground that there was no provision to grant the amendment in GSTR-1 after expiry of the prescribed extended time limit [i.e. March 31, 2019]. Thus, the Appellant was unable to correct the error. Hence, preferred the writ petition.

#### JUDGEMENT



- The Hon'ble High Court stated that if the modus operandi of GSTR-2A and GSTR-1A (i.e. matching concept) as provided in the CGST Act would have been notified, mismatch between the details of credit in the Appellant's and the supplier's returns would have been noticed and could have been rectified in timely manner. Further, it was also mentioned that the said error was neither deliberate nor intended to gain any benefit.
- Given this, the Hon'ble High Court held that the Appellant should not be prejudiced from availing credit that they are otherwise legitimately entitled to in absence of an enabling provision for rectification of error. Thus, the Hon'ble High Court allowed the Appellant to re-submit GSTR-1 with the correct distribution of credit between IGST, SGST and CGST and directs the revenue Authorities to take the same on file and enable the auto-population of the correct details on the GST portal.

## RECENT ADVANCE RULING

### M/s Dream Road Technologies Private Limited

*Input tax credit on motor vehicles leased to customers*

#### FACTS OF THE CASE

- The Appellant is engaged in the business of providing motor vehicles on operating lease to its customers. In this regard, the Appellant purchases motor vehicles for the purpose of leasing and does not claim depreciation on the GST paid on purchase of such vehicles.
- The Appellant made an application before Authority for Advance Ruling (**AAR**) to seek clarification on admissibility of ITC on purchase of said motor vehicles in terms of Section 16 read with Section 17(5) of the CGST Act.

#### RULING

- AAR observed that in terms of Section 17(5) of the CGST Act, ITC is not available in respect of motor-vehicles for transportation of persons having seating capacity of not more than 13 persons (including driver) except when they are used for making specified taxable supplies namely (a) further supply of such motor-vehicles, (b) transportation of passengers or (c) imparting training for driving of such motor-vehicles.
- Definition of 'outward supply' as given in Section 2(83) also includes lease and hence, "further supply of such motor vehicle" shall also include leasing of motor vehicle.
- Appellant is engaged in supply of motor vehicles on monthly lease rent to its customers - which qualifies as supply and attracts GST. Thus, the Appellant is eligible to avail ITC of GST paid on motor vehicles subject to fulfilment of conditions as laid down under the CGST Act.

## RECENT ANTI-PROFITEERING ORDERS

### M/s Avanti Patel & DGAP Vs. M/s Starbucks Coffee

*Anti profiteering to the extent of reduced rate*

#### FACTS OF THE CASE

- Starbucks Coffee is engaged in selling coffee, tea, iced beverages and food items through its restaurants. It has approximately 132 stores across India.
- An investigation was carried out by the Director General of Anti-Profiteering (**DGAP**) on Starbucks Coffee based on a complaint filed by a consumer. The consumer has alleged that the Company did not reduce the price commensurately after the GST rate on restaurant services was reduced from 18% to 5% from November 15, 2017. The complainant had filed copies of invoices with respect to coffee consumed prior to and after the change in GST rate.

#### RULING

- The Company informed DGAP that the base price of its one of its products i.e. 'short cappuccino' was raised from INR 155 to INR 170 with effect from November 15, 2017. The Company argued that the base price has been increased and tax has been reduced. Thus, effective inclusive price charged to consumer remains the same.
- The Company also stated that price increase was a part of a regular bi-annual price increase in October but did so in November 2017 as it was upgrading its information technology system due to GST implementation. The Company further argued that it followed a policy of revising prices twice a year by 7-8%.
- The National Anti-Profiteering Authority (NAA) rejected the Company's arguments and held that no benefit of tax rate reduction was passed on to consumers as the Company raised the pre-rate reduction base prices to nullify the GST rate cut. NAA stated the Company has not only collected excess base prices from consumers, but also compelled them to pay additional GST on these excess base price which they should not have paid.
- Accordingly, NAA confirmed profiteering allegation against Starbucks Coffee for the period November 15, 2017 to June 30, 2018 for not passing benefit of tax-rate reduction to buyers. It was held that the Respondent had defeated the objective of both the Central and State governments and the ITC should have been passed on to the recipient by way of commensurate reduction in prices. However, it was directed that since the consumers cannot be identified, the profiteering amount has to be deposited in the Consumer Welfare Fund of the Centre and states.

## NOTIFICATIONS/CIRCULARS

No	Reference	Particulars
1	<b>Notification No 81/ 2020 - Central Tax dated November 10, 2020</b>	<p>Following amendment made in Section 39 of the CGST Act <b>vide</b> Finance (No. 2) Act, 2019 has been made effective from November 10, 2020:</p> <ul style="list-style-type: none"> <li>▪ Composition taxpayers may furnish annual return along with quarterly payment with effect from the date as may be notified.</li> <li>▪ Taxpayers as may be notified shall have an option to file quarterly returns and monthly payment.</li> </ul>
2	<b>Notification No 82/ 2020 - Central Tax dated November 10, 2020</b>	<ul style="list-style-type: none"> <li>▪ A registered person, who has opted for Quarterly Return and Monthly Payment (QRMP) Scheme shall have the facility to furnish details of outward supplies for first and second month of quarter [up to cumulative value of INR 50 lakhs in each month] using Invoice Furnishing Facility (IFF) up to 13<sup>th</sup> day of succeeding month <b>with effect from January 1, 2020.</b></li> <li>▪ The details of outward supplies of goods or services or both furnished using the IFF shall include the details of B2B supplies, debit and credit notes issued during the month for such invoices issued previously.</li> <li>▪ Registered persons opting for QRMP Scheme shall file GSTR-3B quarterly and pay monthly GST liabilities using GST PMT 06 by 25<sup>th</sup> day of the month succeeding such month. While generating the challan, taxpayers should select "Monthly payment for quarterly taxpayer" as reason for generating the challan.</li> </ul>
3	<b>Notification No 83/ 2020 - Central Tax dated November 10, 2020</b>	Time limit for quarterly filing of Form GSTR-1 is extended from 11th day to 13th day of succeeding quarter with effect from January 1, 2021.
4	<b>Notification No 84/ 2020 - Central Tax dated November 10, 2020</b>	<ul style="list-style-type: none"> <li>▪ Registered persons having aggregate turnover up to INR 5 Crore in the preceding financial year, shall have an option to opt for QRMP Scheme i.e. to furnish return on a quarterly basis from January 2021 onwards and pay tax due on monthly basis.</li> </ul>

No	Reference	Particulars
		<ul style="list-style-type: none"> <li>Further, once the option has been exercised, they shall continue to furnish the return as per selected option for future tax periods unless they revise the option.</li> <li>Registered person shall have an option to change the default option electronically, on common portal from December 5, 2020 to January 31, 2021.</li> </ul>
5	Notification No 85/ 2020 - Central Tax dated November 10, 2020	<p>A registered person who has furnished return for complete tax period and who have opted to furnish return on a quarterly basis shall be eligible for payment of tax by making a deposit under electronic cash ledger equivalent to:</p> <ul style="list-style-type: none"> <li>Returns are furnished quarterly – 35% of tax liability paid by debiting Electronic cash ledger in the return for preceding quarter,</li> <li>Returns are furnished monthly – 100% of tax Liability paid by debiting electronic cash ledger for last month of immediately preceding quarter.</li> <li>The above payment method is known as <b>Fixed Sum Method</b>.</li> <li>No such amount is required to be deposited, if <ul style="list-style-type: none"> <li>Balance in electronic cash ledger or credit ledger is adequate for tax liability for said month or where there is a nil tax liability, for the first month of the quarter</li> <li>Balance in electronic cash and credit ledger is adequate for cumulative tax liability for first two months of the quarter or where tax liability is nil for second month of the quarter.</li> </ul> </li> </ul> <p>The said Notification is effective from January 1, 2021</p>
6	Notification No 86/ 2020 - Central Tax dated November 10, 2020	Rescinds Notification No. 76/2020- Central Tax dated October 15, 2020 which provided various dates for furnishing Form GSTR-3B on various dates.
7	Notification No 87/ 2020 - Central Tax dated November 10, 2020	Extension of time period for furnishing declaration in Form GST ITC -04 [statement containing details of goods dispatched to a job worker or received from a Job worker] for the period July to September 2020 to November 30, 2020.
8	Notification No 88/ 2020 - Central Tax dated November 10, 2020	Provisions of e-invoicing are applicable for the registered persons having turnover of INR 100 crore or above with effect from January 1, 2021.
9	Circular No. 143/13/2020 - GST dated November 10, 2020	<p>Clarifications are provided with respect to the above-mentioned Notifications. Additionally, the said circular clarifies following in relation to QRMP Scheme:</p> <p><b>Interest</b></p> <ul style="list-style-type: none"> <li>No interest would be payable if the registered person has opted for QRMP scheme and making payment of tax by Fixed Sum Method.</li> <li>However, if payment of tax is not done by due date, interest would be payable at the applicable rate i.e. from due date of furnishing <b>FORM GST PMT-06</b> till the date of making such payment.</li> <li>Further, in case FORM GSTR-3B for the quarter is furnished beyond the due date, interest would be payable as per the provisions of Section 50 of the CGST Act for the tax liability net of ITC for the first two months of the quarter as per self-assessment method.</li> </ul> <p><b>Late fees</b></p> <ul style="list-style-type: none"> <li>Late fee would be applicable for delay in furnishing of the said quarterly</li> </ul>

No	Reference	Particulars
		return / details of outward supply in Form GSTR-1. However, no late fee is applicable for delay in payment of tax in first two months of the quarter.
<b>10</b>	<b>Trade Notice No 34/2020-21</b>	Licence amendment services would not be available from November 20 to November 30, 2020 due to migration of AA/EPCG/DFIA online modules to the new IT environment from December 1, 2020.

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