



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



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DIRECT TAXATION

A close-up photograph of a computer keyboard. A finger is pressing a yellow key labeled 'taxes'. Other visible keys include 'return', 'option', 'alt', 'delete', and 'com'. The keyboard is white with black text on the keys.

taxes

RECENT CASE LAWS

Biocon Ltd (ITA no. 653 of 2013) (Karnataka HC)

Karnataka High Court affirms Special Bench's Biocon ruling allowing Employee Stock Option Plan (ESOP) discount under Section 37

FACTS OF THE CASE

- The taxpayer claimed discount on issue of ESOPs i.e. difference between the grant price and market price of the shares on the date of grant of options as an allowable deduction under Section 37 of the Income tax Act, 1961 (IT Act).
- The Tax Officer (TO) rejected the claim on the ground that the taxpayer had not actually incurred any expenditure and the said expenditure was contingent in nature. The order of TO was upheld by the CIT(A). Special bench of Income tax Appellate Tribunal (ITAT) was constituted and the same ruled in favour of the taxpayer.
- Aggrieved the TO is in appeal before the High Court (HC) of Karnataka.

JUDGEMENT

- HC held that the expression 'expenditure' will also include a loss and therefore issuance of shares at a discount would be expenditure incurred for the purpose of Section 37(1) of the IT Act. HC affirmed ITAT's reliance on Supreme Court (SC) rulings in case of **Bharat Earth Movers (112 Taxman 61)** and **Rotork Controls India P Ltd (180 Taxman 422)**, to hold that discount on issue of ESOPs was not a contingent liability but an ascertained liability and incurring of the expenditure by the taxpayer entitles him for deduction under Section 37(1).
- Further, the HC rejected TO's reliance on SC judgment in case of **Infosys Technologies Ltd (166 Taxman 204)** on account of difference in Assessment Year (AY) in the aforesaid judgment vis-a-vis AY under appeal and absence of provisions of Section 17(2)(iiia) in those AY's.
- Relying on SC judgment in case of **Radhasoami Satsang (193 ITR 321)**, HC held that the TO was not permitted to take a different stand from that taken for AY 2009-10 onwards wherein ESOP expenses were allowed as a deduction. Thus, HC dismissed the appeal filed by the TO.

Smit Singapore Pte Ltd (ITA no. 7055/Mum/2017) (Mumbai ITAT)

Time charter receipts for vessel and crew not 'royalty' under India-Singapore Double Taxation Avoidance Agreement

FACTS OF THE CASE

- The taxpayer, a Singapore-based company, was engaged in the business of salvage, wreck removal, environmental protection, and consultancy. During the year under consideration, the taxpayer had time chartered its vessel along with crew to M/s Leighton India Contractors Pvt. Ltd. (Leighton) for providing services of exploration and extraction of minerals to ONGC.
- The taxpayer declared Nil income, on the basis that, since the vessel was used in connection with prospecting, extraction or production of mineral oils, revenue generated therein would be covered within the ambit of Section 44BB of the IT Act. However, since taxpayer did not exceed threshold of 183 days for constituting a permanent establishment (PE) in India, it claimed non-taxability under Article 5 of India -Singapore Double Taxation Avoidance Agreement (DTAA).
- However, the TO, ignored the submission of the taxpayer and held that:
 - Income from time charter of the vessel was in the nature of 'royalty' under clause (iva) of Explanation 2 to Section 9(1)(vi) and Article 12(3)(b) of the India Singapore DTAA;
 - Since income was not offered to tax under the presumptive scheme under Section 44BB, the taxpayer could not claim that its receipts were covered by the exclusion provided in clause (iva) of Explanation 2 to Section 9(1)(vi) of the IT Act; and

- Receipt of mobilization fee and reimbursement of expenses from Leighton was intrinsically linked with the receipts from the time charter of the vessel and thus, held it taxable as royalty.
- The draft order was upheld by DRP. Aggrieved by the final order, the taxpayer is now in appeal before the ITAT.

JUDGEMENT

- ITAT found substantial force in the claim of taxpayer (non-taxability under the IT Act) that the nature of agreement with Leighton was for providing of time charter services, and not for hiring of any equipment. As such, it had not parted with the 'use' or 'right to use' of the said vessel to the charterer. Since the taxpayer could not dislodge the TO's claim that as per Explanation 5 to Section 9(i)(vi), the 'use' or 'right to use' of the vessel is independent of possession/control/ direct use by charterer, ITAT proceeded to examine taxability under the India Singapore DTAA in view of Delhi HC ruling in **Asia Satellite Telecommunications Co. Ltd (332 ITR 340)**.
- As regards taxability under the India Singapore DTAA, ITAT observed that the control of the equipment throughout had remained with the taxpayer and the entire operation, navigation and management of the vessel was in the exclusive control and command of the taxpayer, as Leighton was only concerned with the services and had no control over the vessel or its crew members.
- ITAT thus opined that there was a subtle distinction between the 'use' of an equipment by the taxpayer 'for' the charterer, and the use of the equipment 'by' the charterer. The consideration therein received cannot be brought within the realm of the definition of the term royalty as fortified by the judgment of the Hon'ble High Court of Delhi in the case of **Technip Singapore Pte. Ltd (70 taxman.com 2331)**
- ITAT had factually distinguished TO's reliance on Madras High Court ruling in case of **Poompuhar Shipping Corporation (360 ITR 257)** wherein the charterer (unlike the owner in present case) had the right to use the ship, select the time and decide the route as per its requirement.
- ITAT thus held that the taxpayer had received charges on account of time charter services rendered by its vessel along with the crew to Leighton and not for allowing the latter the use or right to use of industrial, commercial, or scientific equipment, the same therein cannot be treated as 'royalty' within the meaning of Article 12(3)(b) of the India-Singapore DTAA.
- ITAT held that since consideration received on time charter services does not fall under the definition of royalty under the DTAA, mobilization fee received, and reimbursement would also not be taxable.

Smt. Sunita S Bathija (ITA no. 668/Bang/2017) (Bangalore ITAT) *Transfer of shops through share transaction, not colourable device; Not amenable to Section 50C*

FACTS OF THE CASE

- The taxpayer, an individual, filed its return of income for AY 2007-08, declaring the total income of INR 1.96 crores. The taxpayer had invested substantial amount of money towards purchase of four shops in a shopping complex by the name Esteem Arcade.
- During the relevant AY, the project was completed, and the taxpayer sold the shares of M/s Esteem Arcade Pvt Ltd (**Company**), having specific interest in demarcated shops. Disregarding taxpayer's submission that Section 50C was not applicable to share transaction, TO computed capital gains considering the guidance value adopted by stamp valuation authorities, pending valuation report from the DVO.
- The CIT(A) held that Section 50C was inapplicable, however held that the real intention of the taxpayer was to adopt a colorable device to avoid tax in guise of transferring shares and based on the DVO report, upheld capital gains computed in accordance with value adopted by DVO. Aggrieved, the taxpayer is now in appeal before the ITAT.

JUDGEMENT

- ITAT noted that the taxpayer had acquired certain shares and placed certain amount of deposits in the Company. Taxpayer was thus entitled to beneficial enjoyment of certain portion of property in the building constructed by the Company, to the extent of shares held by her, which was submitted to be in accordance with scheme of the Company.
- ITAT noted that land on which the Company constructed the building, was leasehold land and not freehold land. In the lease agreement it was also agreed that Company would be constructing a superstructure and the same would be utilized in accordance with the scheme of the Company, and that, the Company had no rights to sell the superstructure. ITAT also noted that, certain portions of area would belong to the said Company until the expiry of lease period, and hence, there could not be any absolute transfer of properties.
- ITAT relied on Karnataka HC ruling in case of **Bhoruka Engineering Inds Ltd (36 taxmann.com 82)** wherein it was held that merely because they were able to avoid payment of tax, it cannot be said to be a colorable device or a sham transaction or an unreal transaction.
- ITAT observed that the Company had no rights to sell the superstructure but was permitted only to sublet or sublease or assign or nominate any portions thereof falling to its share to one or more parties. Perusing the scheme of allotment, ITAT stated that there was an embargo on the taxpayer to sell their units as it emanates from the scheme adopted by the Company. It further noted that the scheme of the Company under which the taxpayer could only transfer the shares and or deposits held in the Company, was not disputed/ doubted by the TO.
- ITAT noted that there was nothing on record to substantiate the allegation of intention to avoid tax in the guise of transfer of shares. ITAT thus held that once CIT(A) rejected application of Section 50C, he cannot rely on DVO report to hold that taxpayer adopted a colorable device to avoid tax.

Tata Teleservices Limited [W. P. (C) 4790/2018 & CM Appl. 24395/2018) (Delhi HC)

HC rejects TO's plea for withholding taxpayer's refund against anticipated demand

FACTS OF THE CASE

- The taxpayer had filed writ petitions challenging orders issued by the TO whereby the penalty demand for AYs 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 were sought to be stayed upon payment of 20% of the said demand amount. The taxpayer had also sought to restrain the TO from initiating recovery of any demand of penalty imposed on the taxpayer for the relevant AYs.
- The taxpayer had been granted stay by the HC upon payment of INR 10 crores in two equal installments, which was duly paid by the taxpayer.
- During the pendency of the present proceedings and subsequent to the order granting stay of demand by the HC, entire penalty amounts for AYs 2009-10, 2010-11 and 2011-12 had been dropped and consequential appeal effect orders had been passed.
- The only pending matters which remained before the CIT(A) were the appeals for AY 2006-07, 2007-08 and 2008-09 and the total cumulative penalty amount for these years was INR 8,55,17,078/- and 20% of the same worked out to be INR 1,71,03,416/- only.
- The taxpayer emphasized that in view of the aforesaid development, the balance amount i.e. INR 8,28,96,584/- should be refunded to the taxpayer. However, the TO denied the claim of the taxpayer.

JUDGEMENT

- The TO argued that the appeals on merit (quantum) are pending before the ITAT and if the same is decided in favour of the TO, then the demand would once again arise.

- Having heard both the parties, the HC opined that even if the present writ petition(s) are dismissed at this stage, the maximum amount that the taxpayer can be directed to deposit pursuant to the impugned orders and circulars issued by the CBDT would be 20% of the remaining demand which can only be INR 1,71,03,416/-.
- Accordingly, the HC held that there is no reasonable ground for the TO in holding the excess amount i.e. INR 8,28,96,584/- and the HC directed the said amount to be released to the taxpayer within four weeks.

**Tata Chemicals Limited [ITA no. 2273,2274,3350,3554,3548/Mum/2013]
(Mumbai ITAT)**

Reassessment order passed on non-existent entity quashed by relying on Maruti Suzuki SC ruling

FACTS OF THE CASE

- Hind Lever Chemicals Ltd (**HLCL**) was amalgamated with Tata Chemicals Ltd (**TCL**) and thereafter the TO had initiated re-assessment proceedings on the amalgamating company.
- The taxpayer had raised an additional ground before the ITAT stating that the re-assessment proceedings as well as the re-assessment order has been passed on the amalgamating company i.e. a non-existent entity. Accordingly, the taxpayer argued that the entire re-assessment proceedings are illegal and bad in law.

JUDGEMENT

- The ITAT noted that on the date of issuance of notice under Section 148 in the name of HLCL (amalgamating company), the said company had ceased to exist due its amalgamation with TCL.
- The ITAT remarked that merely because the taxpayer had participated in the re-assessment proceedings after pointing out the actual fact of amalgamation before erstwhile TO, the illegal assessment framed by a non-jurisdictional AO cannot be sustainable in the eyes of law.
- The ITAT relied on the SC ruling in the case of **Maruti Suzuki (416 ITR 613)** and co-ordinate bench's ruling in taxpayer's group company's case.
- In view of the aforesaid observations, the ITAT held that notice under Section 148 of the IT Act was issued in the name of HLCL (non-existent entity) and accordingly, re-assessment order framed thereon deserves to be quashed as void ab initio.

Dr. Vithal V. Kamat [TS-585-ITAT-2020(Mum)]

Sum received by partner on retirement from firm held non-taxable capital receipt

FACTS OF THE CASE

- The taxpayer is an individual and is engaged in the business of hotel consultancy. During the course of assessment proceedings, the TO noticed that the taxpayer has credited a sum under the head 'Exempt income and receipt' in its capital account and accordingly called upon the taxpayer to furnish details of the said amount.
- The taxpayer submitted that he had retired from the partnership in terms of deed of admission and retirement wherein he relinquished his rights, title and interest in the partnership properties and the said sum was received by him by way of retirement in full and final settlement of his account with the firm.
- The TO brushed aside the submissions of the taxpayer and came to the conclusion that the money received by the taxpayer from the partnership concern after reducing payment to the club members was consideration on account of transfer of right, title and interest in the properties and as such held that the same to be taxable under Section 45(1) of the IT Act. The TO also noted that other partners sold their share in the land and the amount was offered by the respective partners as long-term capital gains.
- Accordingly, the TO held that amount received by the taxpayer is a consideration for giving up the development and possession right over the plot of land and hence, the same is taxable under Section 45(1) of the IT Act and ultimately added the same to the income of the taxpayer under the head "long term capital gains".

- The CIT(A) ruled in favor of the taxpayer by holding that the property of plot of land was not owned by the taxpayer but by the partnership firm and accordingly, deleted the addition made by the TO.
- Aggrieved by the order of CIT(A), the taxpayer has appealed before the ITAT.

JUDGEMENT

- The ITAT relied upon the SC ruling in the case of **Mohanbhai Pamabhai (165 ITR 166)** and holds that “any money received by the partner upon retirement from the partnership firm as his share in the assets of the partnership concern is not a consideration for transfer of his interest in the partnership to the continuing partners and there is no transfer within the meaning of section 2(47) of the Act”.
- The ITAT also relied upon the SC ruling in the case of **Tribhuvandas G.Patel Vs. CIT (115 ITR 95)** to hold that “any amount paid to the partner upon his retirement towards his share in assets is not a transfer within the meaning of section 47(ii) of the Act and not liable to capital gain”.
- Further, the ITAT also found merit in the taxpayer’s alternative plea based on SC ruling in the case of **B.C. Srinivasa Setty (128 ITR 294)** and held that that “if the computational provision of capital gain as provided under section 48 of the Act breaks down then the charging provision as provided under section 45 of the Act would also fail”.
- In view of the above, the ITAT held that the case of taxpayer is squarely covered by the decisions of the Hon’ble Supreme Court and in view of the ratio laid down in the said decisions, the ITAT dismissed the appeal of the TO by upholding the order of CIT(A).

Gujarat Gas Trading Company Ltd [TS-594-ITAT-2020(Ahd)-TP] (Ahmedabad ITAT)

Deletes Transfer pricing (TP)-adjustment on commission; Taxpayer’s transaction with associate enterprise (AE) “negotiation services”, not “deemed AE-purchases”

FACTS OF THE CASE

- The Taxpayer was engaged in the business of trading in natural gas. During the year, the taxpayer has entered into international transactions with its Associate Enterprise (AE) for payment of corporate guarantee commission.
- The AE had negotiated the transaction with Cairn Energy Group for purchase of natural gas from its Laxmi Gas field which was transferred to Gujarat Gas Company Limited and then subsequently transferred to the taxpayer.
- The payment of commission to AE was benchmarked by using Comparable Uncontrolled Price (CUP) method as the most appropriate method and US Natural Gas wellhead price as CUP
- The TO benchmarked the transaction with CUP on monthly basis as against the average USD 3.9975 per GigaJoule benchmarked by the taxpayer. The purchase price of the gas was calculated at USD 3.9414 per GigaJoule which included the commission of 1% paid to the AE.
- The TO held that the AE was engaged in negotiating the purchase price of the gas from Cairn Energy and therefore the transaction was covered in the second limb of the definition of deemed international transaction. However, the taxpayer submitted that there was no agreement between the AE and Cairn Group in relation to the gas supplied to the taxpayer and the agreement was with the Indian entity of the AE. Further, it was submitted that the AE had only rendered negotiation services with Cairn Group and there was no prior agreement between the third party and the AE, therefore, the application of the provisions of section 92B(2) was not justified.
- In respect of commission payment, it was submitted that benchmarking should be taken for the transaction for entire year as the agreement was made on a long-term basis. However, the TO rejected the contention of the taxpayer to aggregate all the transactions and evaluate them on an annual basis as a comparable price for benchmarking. Consequently, the TO made adjustment to the ALP determined by the taxpayer.

- The CIT(A) ruled in favor of the taxpayer by ruling that the provisions of Section 92B(2) of the IT Act are not applicable, since the provisions clearly specifies that there should be a prior agreement in relation to the relevant transaction between such other person and the AE. It had been an undisputed fact that there was no such agreement between the AE and the Cairn group.
- Aggrieved by the order of the CIT(A), the TO has appealed before the ITAT.

JUDGEMENT

- The ITAT noted that Gujarat Gas company Ltd. wanted to purchase gas on a long-term basis for its expansion plant, therefore, the AE had nominated Gujarat Gas company Ltd. to enter into long-term gas supply with Cairn. It was noted that the said contract was assigned by Gujarat Gas Company Ltd to the taxpayer.
- The ITAT remarked that since the taxpayer would be the beneficiary of a long-term agreement, it had paid commission to the AE for carrying out negotiation with Cairn. Further, the AE had also extended guarantee for the performance of the contract, and therefore the taxpayer had paid annual commission equivalent to 1% of the guaranteed amount equivalent to the comparative rate of 1% quoted by ICICI Limited.
- It was observed by the ITAT that the average price of natural gas in the international market was at USD 3.9975 per Giga Joule whereas the price paid as per the agreement by the taxpayer was at USD 3.9414 per Giga Joule including 1% commission paid to its AE.
- The ITAT remarked that the AE had no agreement with Cairn for the purchase of gas and it has provided only negotiation services. Further, the taxpayer has purchased gas from Cairn and from other non-related operators on the same price and thus, it cannot be said that taxpayer has not made transaction according to arm's length principles.
- In the light of the above, the ITAT did not find any infirmity in the decision of the CIT(A) and accordingly, dismissed the ground of the TO.

Madras Bar Association (Writ Petition no. 804 of 2020) (SC)

Upholds constitutional validity of Tribunal Rules, 2020 with modifications

FACTS OF THE CASE

- The Petitioner had filed a Writ Petition raising following issues that the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020 (**2020 Rules**) are unconstitutional as:
 - The Search-cum-Selection Committees provided for in the 2020 Rules did not conform to the principles of judicial dominance;
 - Appointment of persons without judicial experience to the posts of Judicial Members/ Presiding Officer/ Chairpersons was in contravention to the earlier judgments of the SC;
 - The term of office of the Members for four years was contrary to the earlier decisions of the SC;
 - Advocates were not being made eligible for appointment to most of the Tribunals;
 - Administrative control of the executive in matters relating to appointments and conditions of service was violative of the principles of separation of powers and independence of judiciary and demonstrates non-application of mind.

JUDGEMENT

- The moot issue before the SC was with regard to the constitutional validity of **2020 Rules** and the SC held as under:

National Tribunals Commission

- That, this judgment is to be read as a sequel, and together with the decision of the Constitution Bench *in Rojer Mathew v. South Indian Bank Limited [Civil Appeal No. 8588 of 2019, (dated November 13, 2019)]*
- The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals, in an appropriate manner.
- Further, to stop the dependence of the Tribunals on their parent departments for routing their requirements and to ensure speedy administrative decision making. As an interregnum measure directed constitution of a separate 'Tribunals Wing' under the Ministry of Finance, to take up, deal with and finalize requirements of all the Tribunals till the National Tribunals Commission is established.

Search-cum-Selection Committees

- The Chief Justice of India or his nominee will have a casting vote in the search committee. The committee will also comprise of Secretary to Ministry of Law and Justice and Secretary to Government of India from a department other than the parent or sponsoring department nominated by the cabinet secretary. The Secretary of the sponsoring department shall be member secretary without vote.
- Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.
- With respect to matters of disciplinary action, the recommendations made by Search and Selection committee shall be final.

Term of Office

- Opined that the term of 4 years as envisaged in Rule 9(1) and (2) of the 2020 Rules had "*No rationale except that four years is more than three years prescribed in the 2017 Rules*". Thus, directs the modification of the tenure in Rules 9(1) and 9(2) of the 2020 Rules as five years in respect of Chairman or Chairperson, Vice Chairman or Vice-Chairperson and the members.
- Also directed the Government to amend Rule 9 (1) of the 2020 Rules by making the term of Chairman, Chairperson or President as five years or till they attain 70 years, whichever is earlier and other members dealt with in Rule 9(2) as five years or till they attain 67 years, whichever is earlier.

House Rent Allowance

- The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals.
- If providing housing was not possible, the Central Government shall increase the house rent allowance from INR 75,000/- to INR 1,25,000/- for members of the tribunal and to INR 1,50,000/- for President & Vice-President w.e.f. January 1, 2021.

Advocates as Judicial Members

- Advocates with experience of 10 years will be eligible for appointment as judicial members in tribunals.

Eligibility of Members of Indian Legal Service

- Members of Indian Legal Service will also be eligible for appointment as judicial members provided, they fulfill the same criteria as advocates.

Time limit for appointment

- Appointments to tribunals shall be made within 3 months from the date on which the process is complete and recommendations are made by the search committee.

Application of 2020 Rules

- The 2020 Rules shall have prospective effect and will be applicable only from February 12, 2020.
- Appointments made prior to 2017 Rules and appointments made during pendency of Rojer Mathew judgment (*supra*) shall be governed by respective statutes.
- Chairpersons, Vice-Chairpersons, and members of tribunals appointed prior to February 12, 2020 shall be governed by parent statute and rules as per which they were appointed.
- The 2020 Rules shall be applicable with the modifications laid down in the judgment to those who were appointed after February 12, 2020.
- When reserving the matter for judgment, the SC had extended the tenures of chairpersons, vice-chairpersons, and members of tribunals till December 31, 2020.

NOTIFICATION/ CIRCULARS**GST return related information to be part of Annual Information Report (AIR) contained in Form No. 26AS**

- The Central Board of Direct Taxes (**CBDT**) has authorized the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) to upload GST return related information, which is in his possession, in the Annual Information Statement in Form 26AS within 3 months from end of the month in which information is received.
- The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall specify the procedures, formats and standards, for the purposes of uploading of Annual Information Statement in Form No. 26AS containing the information referred above.

NEWS**CBDT to validate Institute of Chartered Accountants of India (ICAI) generated Unique Document Identification Number (UDIN) for uploading Tax Audit Report**

- In line with the ongoing initiatives of the Income-tax department for integrating with other Government agencies and bodies, the Income-tax e-filing portal has completed its integration with the ICAI portal for validation of UDIN generated from ICAI portal by the Chartered Accountants (**CAs**) for documents certified/attested by them.
- With this system level integration, UDIN provided for the audit reports/certificates submitted by the CAs in the e-filing portal shall be validated online with the ICAI which will help in weeding out fake or incorrect Tax Audit Reports not duly authenticated with the ICAI
- A grace period of 15 calendar days from the date of submission of audit report/ certificate in e-filing portal is awarded to CAs unable to generate UDIN within the date of submission.

INDIRECT TAXATION



RECENT CASE LAWS

M/s Shri Shyam Baba Edible Oils vs. The Chief Commissioner and another

Mode prescribed for communicating the show-cause notice/order is by way of uploading the same on the GST portal

FACTS OF THE CASE

- The Petitioner had received a Show Cause Notice (**SCN**) demanding tax by email. In this regard, the Petitioner challenged the validity of the SCN stating that the same was never been communicated to the Petitioner who is an individual registered under GST Act.

JUDGEMENT

- The Petitioner referred to the provision of Rule 142(1) of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**) which statutorily obliges the Authorities to communicate SCN/Order by uploading the same on the GST portal.
- The Hon'ble High Court analyzed the provisions of Rule 142 of CGST Rules and held that the only mode prescribed for communicating the SCN/Order is by way of uploading the same on the GST portal. In the present case, as the statutory procedure prescribed for communicating SCN/Order under Rule 142(1) of CGST Rules has not been followed by the Authorities, the demand raised by the Authorities shall be struck down.

RECENT APPELLATE ADVANCE RULINGS

M/s IZ Kartex named after P.G. KOROBKOV LTD

The Entity located outside India is held as the supplier of service as it is primarily the entity who has entered into a contract with the recipient and not the branch located in India which was established merely for resolving the payment channel

FACTS OF THE CASE

- The Appellant, a local branch of a Russian business entity (**Foreign Company**), has entered into a Repairs & Maintenance Contract (**MARC**) for machinery and equipment with Bharat Coking Coal Ltd (**BCCL**), which is located in India. The purpose of the establishing the said branch was to resolve the issue in the payment channel.
- In the present AAR, the issue was with respect to liability to pay GST under reverse charge basis in terms of Notification No. 10/2017 – Integrated Tax (Rate) dated June 28, 2017 on the services rendered by the Appellant to BCCL. Accordingly, the Appellant sought advance ruling to specify the person who is liable to pay tax in the aforesaid circumstances.
- The Advance Ruling Authorities of West Bengal (**WBAAR**) vide its Ruling No. 04/WBAAR/2020-21 dated June 29, 2020 held that supply of service to BCCL in terms of MARC is not an import of service as both the parties are located in India and Notification No. 10/2017 -Integrated Tax (Rate) is not applicable. Thus, the Appellant, being the domestic MARC holder is liable to pay tax.
- Aggrieved by the said Ruling, the Appellant preferred an appeal before the Appellate Authority.

RULING

- The Appellant stated that WBAAR ignored the fact that the services under MARC are supplied by the Appellant who is primarily based in Russia and that conditions specified in Section 2(11) of the IGST Act [i.e. place of supply to be in India, supplier of service to be located outside India and the recipient of service to be located in India] for a transaction to be classifiable as 'import of service' stand satisfied. The Appellant further reiterated that the Branch Office in India was created only to facilitate and support the Russian company and no separate contract was entered between IZ Kartex India and BCCL.

- Appellate Authority for Advance Ruling (**AAAR**) observed that the foreign company is raising invoices on BCCL against supply of services which makes it amply clear that the said services are being provided by the supplier located outside India. The AAAR also stated that various terms of the agreement substantiate that the entire control of the activities would rest with the foreign entity- which had entered into an agreement with BCCL.
- Further, the AAAR also referred to the definition of “fixed establishment” which means a place which is other than a registered place of business and is characterised by a sufficient degree of permanence in terms of human and technical resources to supply/ receive/ use services for its own needs. It was inferred that the domestic entity IZ-Kartex is registered with the GST authorities and does not have a sufficient degree of perpetuity since the service which is ultimately supplied by the foreign entity cannot be termed as a fixed establishment.
- Accordingly, it was held that the parameters which require any transaction to qualify as an import of service viz i) supplier of service should be located outside India ii) recipient of service should be located in India and iii) service should be provided in India stand fulfilled and thus, supply of service by the Appellant to BCCL qualifies as import of service. Therefore, GST is payable on such import of service by BCCL under reverse charge mechanism in terms of Notification No. 10/2017 - Integrated Tax (Rate).

RECENT ANTI-PROFITEERING ORDER

M/s Procter & Gamble (P&G) and Gillette India

Anti profiteering to the extent of reduced rate

FACTS OF THE CASE

- M/s Procter & Gamble Home Products Private Limited, M/s Procter & Gamble Hygiene and Health Care Limited and Gillette India Limited (**P&G Group**) are engaged in the business of selling of fast-moving consumer goods which attracts GST at the rate of 28%. The GST rate on the said products has been reduced to 18% with effect from November 15, 2017.
- An investigation was carried out by the Director General of Anti-Profiteering (**DGAP**) on P&G group. The Authorities observed that the Company has not passed on the benefit of reduction in the rate of GST on the products sold by them and also stated that the base prices of its goods had been increased after the rate of tax was reduced.

RULING

- The Company informed DGAP that the base prices were increased due to increase in the cost of production. This argument of the Respondent has not been accepted by DGAP as increase in the prices of the raw materials had not happened overnight to coincide with the GST rate reduction.
- The Respondents had also claimed that the benefit of GST rate reduction has been passed on to its customer by extending consumer promotion schemes. In this regard, DGAP stated that the provisions contained in Section 171 of the CGST Act, 2017 did not provide for any other means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit except by way of commensurate reduction in the prices. Accordingly, DGAP has given a report to NAA without considering the arguments provided by the Respondents.
- Thereafter, NAA held that only reduction in price is acceptable to authorities in terms of the benefit of tax reduction to be passed on in respect of every supply made. Supplying additional quantities of products or other sales promotion schemes would not be construed to be in compliance with the provisions. However, it was directed that since the consumers cannot be identified, half of the profiteering amount of INR 241.5 crores along with an interest at 18% has to be deposited in the Central Consumer Welfare Fund and remaining to the welfare fund of 33 states and Union territories.

NOTIFICATIONS/CIRCULARS

No	Reference	Particulars
1	Circular No 51/2020 Customs dated November 20, 2020	<ul style="list-style-type: none"> ▪ It has been clarified that containers which satisfy following conditions are eligible for duty exemption <ul style="list-style-type: none"> – They are durable; – They are capable of being re-used multiple times; – They are capable of being identified at the time of re-export; – They satisfy all the other stipulated conditions in the Notification No. 104/94- Cus. dated March 16, 1994. ▪ The procedure to be followed for durable containers which do not conform to standard marine container dimensions but which are intended for temporary import and eventual re-export is as under: <ul style="list-style-type: none"> – When temporary containers are imported – It shall be declared as separate item in the bill of entry and exemption from payment of Custom duties as per Notification 104/94-Cus. can be claimed subject to furnishing the bond for re-export. – When empty containers are moved out of India- Empty containers shall be furnished as a separate item in shipping bill. – When Containers are imported laden with import cargo - Such containers shall be declared as separate item in bill of entry. Customs duty would be paid on the imported cargo but the containers would be eligible for Customs duty exemptions as per Notification No 104/94- Cus. subject to fulfilment of conditions therein. – When the containers are exported with export cargo- The durable containers shall be declared as separate item in the shipping bill. Further, stuffing would not be relevant as long as unique identifier for the container is verifiable at any time of export. ▪ Conditions for bond- Continuity re-export bond and security (if applicable) shall be furnished by importer for durable containers for re-export within stipulated period including facility of partially crediting bond after export are available in customs automated system.
2	Notification 89/2020 Central Tax dated November 29, 2020	<p>CBIC waives the penalty payable by a registered person u/s 125 of central Goods and Services Tax Act, 2017 (CGST Act) for non-compliance of provisions of dynamic QR code for B2C invoices between the period from December 1, 2020 to March 31, 2021, subject to the condition that said person complies with the provisions with effect from April 1, 2021.</p>

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