



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'.

## RECENT CASE LAWS

### Faceless assessment order set aside - Tax Officer (TO) directed to facilitate receipt of taxpayer's submission on portal

*Magick Woods Exports Private Limited (W.P. No.10693 of 2021 & WMP Nos.11326 and 11327 of 2021)*

#### SUMMARY OF THE CASE

- The Madras High Court has set aside an assessment order passed under the Faceless Assessment Scheme on the grounds that the same was passed without considering taxpayer's request for adjournment.
- The TO had issued a show cause notice accompanied by a draft assessment order, in response to which the taxpayer had sought an adjournment to collate materials necessary to substantiate its stand before the TO. The TO passed the final order without taking note of taxpayer's adjournment request.
- The High Court set aside the assessment order and directed the taxpayer to comply with the directions in show cause notice. The High Court also directed the TO for facilitating receipt of taxpayer's reply by enabling the portal to receive objections and to hear the taxpayer and complete the assessment proceedings in accordance with the law.

### Technical assistance for air traffic flow management not Fees for Technical Services (FTS)

*Airports Authority of India (ITA no. ITA No. 5162 & 5163/Del/2012)*

#### SUMMARY OF THE CASE

- The taxpayer had entered into a memorandum of agreement with the Federal Aviation Administration, USA (FAA), wherein the FAA was to provide technical assistance to the taxpayer. This was by way of providing its personnel and meeting the Air Traffic Flow Management (ATFM) requirements and assisting the taxpayer in connection with ATFM by developing detailed quantitative requirements, a detailed ATFM system architecture and a draft ATFM implementation plan.
- The TO treated the amount paid as FTS by holding that FAA did not enjoy sovereign immunity from being taxed in India and that the transaction satisfied 'make available' test under Article 12 of the India-US Double Tax Avoidance Agreement (DTAA).
- The Income-tax Appellate Tribunal (ITAT) analyzed various examples provided in the Protocol to India-US DTAA and observed that the concept of make available requires that the fruits of the services should remain available to the service recipient in some concrete shape such as technical knowledge, experience, skills, etc.
- The ITAT noted that the technical assistance provided by FAA was neither a licensed product nor exclusive patent of FAA and the ATFM technology per se has not been made available to the taxpayer for any perpetual use. The ITAT observed that it was a case of assistance and technical cooperation between FAA and the taxpayer sans any commercial interest by the rendering party.
- The ITAT relied on the ruling of High Court of Delhi in case of **(Guy Carpenter & Co. Ltd. (ITA 202/2012 dated April 23, 2012))** to examine the make available clause and to determine the applicability in the instant case. The ITAT based on the manner of transacting, agreements, services provided and reimbursement received, held that the make available clause contained in Article 12 of the India-US DTAA has not been satisfied and hence the payment made by taxpayer could not be regarded as FTS.
- Further, with respect to taxpayer's contention that the payments are in the nature of reimbursement only, the ITAT perused the agreement and noted that the payments are on a cost to cost basis which do not involve any element of profit, and accordingly, the reimbursement would not be liable to withholding. The ITAT placed its reliance on the Calcutta High Court ruling in case of **Dunlop Rubber Company (142 ITR 493)** wherein it was held that reimbursement by the very definition does not include income element and hence provisions of withholding are not attracted. It also relied on the decision of the jurisdictional High Court in the case of **Industrial Engineering**



**Projects (202 ITR 1014)**, wherein it was held that reimbursement of expenses cannot be regarded as revenue receipt and hence, no tax is deductible.

**Authority for Advance Ruling (AAR) rejects application over transaction being prima facie meant for tax avoidance and suppression of material facts**

*Capex Com Ltd (A.A.R. No. 1373 & 1374 of 2012)*

**SUMMARY OF THE CASE**

- Taxpayer and Capex Communications Ltd (CCLM) both Mauritian companies held 6.19% and 15.85% in an Indian company, Vortex Capital Limited (VCL). The taxpayer and CCLM sold their stake in VCL to Aura Atlantic Sec. Ltd. (AASL), a non-resident company resulting in capital gains which was subject to withholding tax. The withholding tax was deposited by AASL under protest.
- The taxpayer and CCLM sought to apply for an advance ruling to ascertain whether the taxpayer and CCLM is chargeable to tax in India on gains arising from transfer of VCL shares.
- Prior to this application, AASL had filed an application before AAR in relation to its withholding liability on acquisition of shares of VCL. Subsequently, the taxpayer and CCLM had applied before AAR to join the said proceedings as Interveners. The said application was dismissed as withdrawn. Thereafter, the taxpayer and CCLM filed an application before the AAR.
- AAR accepted TO's contention that the taxpayer did not disclose the fact that they were intervenors in AASL's application before AAR. AAR rejected the argument of taxpayer that non-disclosure of this fact was an inadvertent error and does not cause any prejudice to the TO. The AAR held that it is not relevant whether TO is affected or not, what is pertinent is the conduct of the taxpayer. The AAR further held that if the argument of taxpayer is accepted, then any taxpayer can disclose whatever it deems fit and take a chance to secure a ruling before any authority. Also, if and when discovered the taxpayer could prefer the plea of inadvertent error, which would create chaos and lead to a mockery of the judicial process.
- The AAR remarked that material facts were omitted due to the fear that if all facts are brought on record, application may be rejected at the initial stage itself.
- The AAR also noted that issues in both applications were similar and though earlier application was filed by AASL, it was for the benefit of the taxpayer and thus, the decision in AASL application is binding on the taxpayer's transaction.
- The AAR rejected the application under clause (iii) of first proviso to Section 245R(2) of the Income-tax Act, 1961 (IT Act) by holding that the following events served as a pointer towards prime facie tax avoidance:
  - investment for acquisition of VCL shares were not made by the taxpayer and CCLM but the funds were routed through them;
  - loans were raised by pledging these shares for benefit of Capex group;
  - when shares were sold, consideration immediately moved out from accounts of the taxpayer to lenders on the directions of executives of Capex group;
  - shares were bought, pledged, sold by Capex group and the entities merely lent their name to seek treaty benefits; and
  - shares in VCL have been acquired by CCLM by voluntary liquidation of another Indian company and the sole purpose was to transfer the situs of ownership of 15.85% VCL shares owned by Capex group to Mauritius to avoid capital gains tax in India.
- In view of the above, the AAR dismissed application on taxability of capital gains on sale of Indian company shares by Mauritian residents on the grounds that the (i) the transaction, prima facie has been entered for tax avoidance,

(ii) suppression of material facts while filing application, (iii) application preferred on same issue earlier by the transacting party (AASL) where applicant participated as an intervenor.

### TO directed to apply beneficial rate prescribed in DTAA over DDT rate

*Indian Oil Petronas Pvt. Ltd (I.T.A. Nos. 1884 & 1885/Kol/2019)*

#### SUMMARY OF THE CASE

- The taxpayer raised an additional ground regarding tax payable under Section 115-O of the IT Act at the rate prescribed under the India-Malaysia DTAA with respect to the dividend paid by the taxpayer to a tax resident of Malaysia.
- The ITAT referred to Section 2(37A) of the IT Act defining 'rates in force' as the rates specified in the IT Act or rates specified in DTAA, whichever is beneficial. Further, it stated that dividend income should be chargeable to tax in the hands of the shareholders under Section 4 of the IT Act. For administrative convenience, however, the incidence of tax is shifted to the company paying dividend income and as such the rate of tax to be paid on such dividend income would be governed by the tax rate specified in the DTAA (being more beneficial) and not as per the rate specified in Section 115-O of the IT Act.
- The ITAT concluded that the rate of tax payable on dividend distributed to non-resident shareholders would depend upon the relevant Article of the DTAA and laid down the following conditions:
  - dividend should be paid to the non-resident shareholder;
  - dividend constitutes income in the hands of the non-resident shareholder;
  - non-resident shareholder is the beneficial owner of the dividend;
  - non-resident shareholder should not have a PE in India.
- The ITAT relied on the ruling of *Giesecke & Devrient (India) Pvt. Ltd. (ITA No. 7075/Del/2017)*, wherein it was held that DTAA rate on dividend tax would prevail over DDT rate and remitted the matter to the TO for fresh adjudication in accordance with the law.

### Taxability of share buy-back covered by Section 46A, not eligible for exclusion under Section 47(iv)

*PQR Gmbh (A.A.R. No. 1195 of 2011)*

#### SUMMARY OF THE CASE

- The taxpayer is a company incorporated under the laws of Germany and has a wholly owned subsidiary (WOS) in India. WOS proposed to buy-back its shares from the taxpayer, as it was in possession of surplus funds and did not have any immediate expansion plans.
- An important issue which was raised before the AAR was the claim of exemption under Section 47(iv) of the IT Act i.e. transfer of capital asset from a holding company to its subsidiary.
- The AAR held that capital gains in the hands of the taxpayer on buy-back of shares by its WOS is taxable under Section 46A of the IT Act and not covered by exclusion under Section 47(iv) of the IT Act. The principles enunciated by the AAR are as under:
  - Section 47 of the IT Act is on the subject, "Transactions not regarded as transfer" and starts with, 'Nothing contained in Section 45 shall apply to the following transfers'. This means that the transactions that come under Section 47 are transfers but by a deeming fiction they are not to be regarded as transfer for the purposes of Section 45 of the IT Act.
  - The only thing which is apparent from the IT Act is that buy-back of shares by means of special provision i.e., Section 46A is taxable in the hands of the shareholder;

- Were this provision to be subject to Section 45 and 47 of the IT Act, the legislature would have expressly provided the same in the Section itself. If one reads that such buy-back would be subject to Section 47(iv) also, there would be no capital gains to be collected from such transactions. If exemption under Section 47(iv) is to be read into section 46A, the stated objective of garnering tax from such transaction would not be achieved;
- When companies buy-back their own shares from existing shareholders, the rights that the shares represent are extinguished with the destruction of the shares and there is no capital asset remaining with the transferee company. Therefore, there is no further capital gains tax that can be imposed as the capital asset itself ceases to exist after the buy-back, thus making Sections 47A and Section 49 of the IT Act redundant;
- The AAR relied on the ruling of **RST In re, (AAR 1067 of 2011)**, wherein it was held that Section 46A of the IT Act would be applicable in case of buyback of shares and Section 46A is not subjected to Section 47 which at best only overrides Section 45 of the IT Act.

### No withholding obligation on indirect transfer prior to amendment citing doctrine of impossibility

*WNS Capital Investment Limited, Mauritius (ITA No. 3851/Mum/18)*

#### SUMMARY OF THE CASE

- The taxpayer, a Mauritian company and a fully owned subsidiary of WNS Mauritius which is ultimately held by WNS Jersey, purchased 100% shares of Aviva Global Services Singapore Pte. Ltd (**AGSPL**) from Aviva International Holdings Ltd UK (**AIH-UK**). AIH-UK's two Indian subsidiaries were absorbed by WNS Global Service Pvt. Ltd. (Indian subsidiary of the parent company of taxpayer) pursuant to a court approved scheme of amalgamation. The transaction relates to Assessment Year 2009-10.
- The TO contended that the predominant purpose of taxpayer purchasing shares of AGSPL was the underlying assets, by way of shareholdings in the Indian subsidiaries of AIH-UK which attracts taxability as capital gains and the obligation to withhold taxes on such income.
- The TO concluded that taxpayer defaulted in not withholding taxes from payments made to AIH-UK and accordingly, raised demand under Section 201(1) and Section 201(1A), read with Section 195(2) of the IT Act and also levied interest on account of delay in realization of these withholding taxes (from the date on which the taxes ought to have been withheld till the date on which taxes were actually realized).
- The Commissioner of Income-tax (Appeals) (CIT(A)) noted that AIH-UK in whose hands capital gains on the sale of shares in question was taxable, claimed to have paid the tax and accordingly, deleted the demand under Section 201(1) to that extent. Further, the CIT(A) relied upon Bombay High Court ruling in **NGC Network (India) Pvt. Ltd. (ITA NO. 397/2015 dated January 29, 2018 of Mumbai High Court)** which held the doctrine of impossibility and concluded that withholding could not be contemplated by taxpayer at the time of share purchase and interest under Section 201(1A) could not be charged as interest need be given same treatment as given to the principal sum.
- The ITAT noted that amendments inserted by Finance Act, 2012 with retrospective effect from April 1, 1962 aimed at regulating the conduct of a person over withholding tax liability and the question was whether such legislative amendment could be retrospective in nature.
- The ITAT noted that the question becomes relevant in light of the factual position that while the transaction for the purchase of shares in question took place on July 11, 2008, Explanation 2 to Section 195 of the IT Act was introduced in 2012 vide Finance Act, 2012.
- The ITAT placed reliance on the decision of the recent Supreme Court decision in case of **Engineering Analysis Centre of Excellence (125 taxmann.com 42 [SC])** and observed that when a law is nowhere even on the horizon, leave aside the statute, it is wholly impossible for any person to perform the obligations imposed by such a law.

The ITAT held that the taxpayer could not be faulted for not withholding tax, as the relevant legal provisions were not even in existence when the transaction was undertaken.

- Further, the ITAT remarked that the issue is entirely tax neutral as AIH-UK had already paid tax on capital gains and independent proceedings for the same is pending for adjudication before a coordinate bench.

### **Treaty benefits allowed on shipping income of taxpayer incorporated, controlled & managed in UAE**

*Interworld Shipping Agency LLC (ITA No. 7805/Mum/19)*

#### **SUMMARY OF THE CASE**

- The taxpayer is a tax resident of UAE and was engaged in rendering services like ship chartering, freight forwarding, sea cargo services, shipping line agents. Taxpayer earned freight income which is taxable under Section 44B of the IT Act. However, the taxpayer availed the benefit of the India-UAE DTAA and claimed relief under Section 90 of the IT Act, which was denied by the TO.
- The ITAT rejected TO's contention that since 80% of profits of taxpayer were to go to a Greek National, the taxpayer could not be said to be 'controlled and managed' from UAE under Article 4(1) of the India-UAE DTAA.
- The ITAT remarked that as for the Greek gentleman nothing really turns on his being a national of a country other than UAE, because UAE is a major financial center in which not only a large number of foreigners work but also from where a large number of foreigners conduct their business. Further, it held that when a person lives in a country for 300 days, it would be reasonable to assume that he would be running a business from that country.
- The ITAT observed that the requirement of presence in UAE for 183 days, for residence status under the Indo UAE tax treaty is for individuals and not for the directors of the companies which claim the residence status. As for the companies, the only test for residence of UAE is that it should be incorporated and wholly managed and controlled in the UAE. The ITAT noted that the taxpayer had its office in UAE, it was in business there since 2000, it had expatriate employees who had been given a work permit to work in UAE, which was the main driving force of the company and its director was an expatriate resident in the UAE.
- Further, on dealing with Limitation of Benefits clause under Article 29, the ITAT rejected TO's allegation that the taxpayer was created solely for availing treaty benefits and held that when an entity was established in 2000 and the relevance of the India-UAE DTAA came into play only in 2015, it cannot be said that the main purpose of creation of such an entity was to obtain the benefits of India-UAE DTAA.
- In view of the above, the ITAT held that the taxpayer is a resident of the UAE in terms of Article 4(1)(b) of the India-UAE DTAA and that the Limitation of Benefits provisions under Article 29 cannot be pressed into service in this case and the taxpayer was eligible for treaty protection in respect of its income earned in India.



## NOTIFICATION/CIRCULARS

### Central Board of Direct Taxes (CBDT) notifies threshold for significant economic presence in India

- Significant economic presence of non-resident constituting business connection in India was introduced under the IT Act with effect from April 1, 2021
- The threshold for significant economic presence is now notified as under:
  - Transaction in respect of any goods, services or property carried out by a non-resident with any person in India, if aggregate payment exceeds INR 20 million; or
  - Systematic and continuous soliciting of business activities or engaging in interaction with 300k users in India
- The aforesaid amendment shall be applicable with effect from April 1, 2022

### CBDT notifies extension of statutory timelines

- In view of the severe pandemic, the CBDT has provided relaxation for the following income-tax compliances

Particulars	Erstwhile due date	Revised due date
<b>Appeal to CIT(A)</b>	April 1, 2021 or later	May 31, 2021
<b>Objection before Dispute Resolution Panel</b>	April 1, 2021 or later	May 31, 2021
<b>Return of income in response to notice under reassessment proceedings</b>	April 1, 2021 or later	May 31, 2021
<b>Belated and revised return of income for Financial Year (FY) 2019-20</b>	March 31, 2021	May 31, 2021
<b>Furnishing Statement of Financial Transactions for FY 2020-21</b>	May 31, 2021	June 30, 2021
<b>Filing withholding tax return for quarter ending March 2021</b>	May 31, 2021	June 30, 2021
<b>Statement of income paid/ credited by an investment fund to its unit holder for FY 2020-21</b>	June 15, 2021 & June 30, 2021	June 30, 2021 & July 15, 2021
<b>Furnishing return of income for FY 2020-21</b>	July 31/ October 31/ November 30, 2021	September 30/November 30/ December 31, 2021
<b>Furnishing tax audit report for FY 2020-21</b>	September 30, 2021	October 31, 2021
<b>Furnishing transfer pricing report</b>	October 31, 2021	November 30, 2021
<b>Belated and revised return of income for FY 2020-21</b>	December 31, 2021	January 31, 2022

# INDIRECT TAXATION



## RECENT CASE LAWS

### Imposition of IGST on import oxygen concentrators for personal use

*Ministry of Finance (Department of Revenue), Government of India v. Gurchanran Singh [TS-226-SC-2021-CUST]*

#### FACTS OF THE CASE

- The Petitioner, an 85-year-old senior citizen, had tested positive for coronavirus on April 4, 2021. Petitioner's nephew who is located in New York, United States of America, gifted an oxygen concentrator to him, free of cost and for personal use which was shipped from USA to India.
- The Central Government, in the wake of coronavirus, raging through the country, as a special measure issued few notifications granting exemption from Basic Customs Duty and Integrated Goods and Services Tax (IGST) on the import of oxygen concentrators.
- The Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce and Industry (DGFT) amended Para 2.25 of the Foreign Trade Policy and issued Notification No. 4/2015-2020 dated April 30, 2021 (valid up to July 31, 2021) whereby the oxygen concentrators were exempted from levy of Customs duty/BCD, unconditionally, when received as a gift for personal use.
- For levy of IGST, Notification No. 30/2021 Customs dated May 1, 2021 (valid up to June 30, 2021) was issued wherein IGST rate was reduced from 28% to 12% on import of oxygen concentrators, made by individuals for personal use and received as gift. Further, Notification No. 4/2021 Customs dated May 3, 2021 (valid up to June 30, 2021) was issued to grant complete exemption of IGST on import of oxygen concentrators if imported by any State Government or an entity appointed by the State Government (**canalizing agency**), after fulfilling certain conditions mentioned therein.
- The Petitioner filed a writ petition before the Delhi High Court challenging the aforesaid IGST notifications by invoking provisions of Article 14 and Article 21 of the Constitution of India, 1950, asserting that the said notifications are irrational and discriminatory in nature as there is no intelligible differentia in classifying the import of oxygen concentrators into two categories i.e. by the State and its agencies and (ii) by an individual, for personal use, by way of gift. The Petitioner also asserted that the right to life encompasses several second-generation rights including the right to health, which stand compromised because of the aforementioned impugned notifications.

#### JUDGEMENT

- The High Court in its judgment dated May 21, 2021 *inter-alia* held that condition to notification 4/2021 which exempts imposition of IGST on those oxygen concentrators that are imported for COVID relief through a canalizing agency creates a manifestly arbitrary and unreasonable distinction between two identically placed users i.e. the state and individuals. The exclusion of individuals from the benefits granted vide the Notification dated May 3, 2021 only because they choose to receive the oxygen concentrators as a gift, *albeit* directly, without going through a canalizing agency is an artificial, unreasonable and substantially unsustainable distinction and therefore issued in violation of Article 14 of the Constitution of India.
- The Court further held that although tax is an exaction that ordinarily does not recognize equity, it must bend to the will of equity in times of calamity. The Government could not discharge its onus by adverting to facts and figures which would have persuaded the Court to hold that levy and collection of IGST, on individuals, who are similarly placed would ensure to the good of the public at large in the battle against coronavirus.
- The High Court quashed notification 30/2021 dated May 1, 2021 by holding that individual who obtain imported concentrator as a gift cannot be equated with those who import the same for commercial use. The High Court saved the notification no. 4/2021 and held that similarly placed persons should furnish a letter of undertaking, to the office designated by State, undertaking that the oxygen concentrator would not be put to commercial use.

- By making such observations, the High Court held that imposition of IGST on oxygen concentrators which are imported by individuals and are received by them as gifts [i.e. free of cost] for personal use, is unconstitutional.
- The aforesaid decision was challenged by the Government before the Supreme Court. The Attorney General submitted during the GST council meeting held on May 28, 2021, a decision was taken to constitute a group of ministers to scrutinize the need for 'further relief to Covid-19 related individual items immediately' and they will submit a report on the same by June 6, 2021. It was submitted that judgment of High Court trenches upon a pure issue of policy. Noting that the SLP raises 'arguable questions', the Supreme Court was pleased to issue notice and was pleased to stay the operation of judgement of Delhi High Court till next date of hearing.

### **Pre-show cause notice consultation is a mandatory pre-requisite for issuance of SCN**

*M/s Omaxe New Chandigarh Developers Pvt Ltd v. UOI & Ors. [2021 (4) TMI 365- Delhi High Court]*

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

- Additional Director General of Goods and Services Tax Intelligence (**DGGI**) conducted an investigation on the record maintained by petitioner during the Service Tax regime. During the said investigation statements of the office bearers of Petitioner were recorded and show cause notice demanding Service Tax was raised under the provisions of Finance Act, 1994.
- The Petitioner challenged the SCN on the ground that the same has been issued in teeth of binding instruction provided by the Central Board of Excise & Customs (now known as 'Central Board of Indirect Taxes and Customs'), (**CBEC**) vide [Instruction No. 1080/09/DLA/MISC/15/757](#) dated December 21, 2015 and [Master Circular No. 1053/02/2017-CX issued under F. No. 96/1/2017-CX.I](#) dated March 10, 2017 was not followed inasmuch as a pre-show cause notice consultation was not held before issuance of SCN.
- The Petitioner relied upon paragraph 5 of the Master Circular dated March 10, 2017 and contended that instruction dated December 21, 2015 is applicable to them and the respondents were mandatorily required to hold pre-show cause notice consultation with them prior to initiation of proceedings under Finance Act, 1994. The respondents relied upon the statements given by the officials of the Petitioner before the Senior Intelligence Officer under Section 14 of the Central Excise Act, 1944 (as made applicable to Service Tax matters under Section 84 of the Finance Act, 1994) and contended that mandatory requirement of a pre-show cause notice consultation is complied with.
- Decision of Delhi High Court in matter of '*Amadeus India Pvt Ltd vs. Principal Commissioner of Central Excise, Service Tax And Central Tax Commissionerate*' reported in 2019 SCC Online Del 8437 was relied upon wherein in similar circumstance the High Court was pleased to set aside the impugned SCN and relegated the parties to the pre consultation stage.

#### **JUDGEMENT**

- The High Court by placing reliance on judgment of *Amadeus India Pvt Ltd (Supra)* held that consultative process entails discussion and deliberation and the same cannot be compared to recording of statements by investigation officer as the same is a one-way dialogue and thus the said statements cannot constitute pre-show cause notice consultation as envisaged under Paragraph 5 of the Master Circular dated March 10, 2017.
- The High Court accordingly issued directions to the respondents to (i) serve appropriate communication on the Petitioner for holding pre-show cause notice consultation, (ii) to grant personal hearing, (iii) allow Petitioner to make submissions and (iv) to pass an order to conclude whether or not impugned SCN should be revived or a fresh show cause notice in consonance with the decision that would be rendered by the Supreme Court in SLP (Civil) Diary No. 35886/2019 in '*Amadeus India Pvt Ltd*'.



### Transportation costs not includible in the valuation of remnant aviation turbine fuel at the time of import

*M/s Jet Airways (India) Limited v. Commr. of Customs (I) (Airport), Mumbai [Customs Appeal No. 86898 of 2017; Tribunal, Large Bench (Mumbai)]*

#### FACTS OF THE CASE

- The Appellant operates international flights from and to India. Where an international flight, upon its return, adopts a domestic route, the aviation turbine fuel (ATF) that is left over in the tank is required to be cleared as an import and the Appellant discharges customs duty on the price of the remnant of ATF.
- The Department raised a demand on the premise that cost of transportation of the remnant ATF at 20% of its FOB value should be added to the value of the remnant ATF for levy of customs duty in line with rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007).

#### JUDGEMENT

- The Tribunal primarily observed that since the ATF is actually required to fly the aircraft and is a consumable for the Appellant, it cannot be held to be “transported through the aircraft”.
- In any event, it is observed that for the provisions of rule 10(2) of the CVR, 2007 to be attracted, such liability in respect of the cost of transportation should fall within the confines of section 14(1) of the Customs Act, 1962. In this regard, reliance has been placed on the decision of the Supreme Court in **Wipro Ltd v. Assistant Collector of Customs [2015 (319) E.L.T. 177 (S.C.)]** which holds that it is only the actual cost ‘paid’ or ‘payable’ that can be added to the transaction value, as is provided for in section 14(1) of the Customs Act, 1962.
- Additionally, the Tribunal has noted that rule 10(2) of the CVR, 2007 contemplates a situation where the ‘cost of transportation is not ascertainable’. In the facts of the present case, it is not that the cost incurred is not ascertainable, but that there is no cost incurred i.e. it is ‘nil’, particularly in terms of section 14(1) of the Customs Act, 1962.
- In such circumstances, the Tribunal has set aside the addition of 20% of FOB value of the ATF as cost of transportation for assessment and upheld prior decisions of the Tribunal in **Inter Globe Aviation Limited [2017 (9) TMI 926- CESTAT New Delhi]**, **National Aviation Company of India [2018 (8) TMI 1300- CESTAT Bangalore]**, **Air India Limited [2018 (4) TMI 785- CESTAT New Delhi]** and **Jet Airways (India) Ltd. and Interglobe Aviation Ltd., Spicejet Ltd. [2018 (11) TMI 1476- CESTAT Chennai]**.

### Procedural error in claim of transitional ITC may be overlooked since GST law at a nascent stage

*M/s. Carlstahl Craftsman Enterprises Pvt. Ltd. v. UoI [W.P. No.11119 of 2020; Madras HC]*

#### FACTS OF THE CASE

- The Petitioner, registered under the erstwhile tax regime, has filed Form GST TRAN-1 for transitioning balance ITC available to it under the VAT regime. However, the Petitioner has inadvertently indicated a lower amount to be transitioned than the total balance ITC available to it.
- In the course of rectification, the Petitioner was faced with another error in reporting. Therefore, an application for rectification of the claim was filed by the Petitioner in March 2019 which came to be rejected by the Department.

#### JUDGEMENT

- The Department argued that in the matter at hand, various opportunities were granted for rectification of errors in filing of Form GST TRAN-1 and that the time therefor had been extended up to March 31, 2021. Thus, there was no justification to the Petitioner’s case.



- The High Court rejected the contention of the Department and observed that the error made by the Petitioner was inadvertent and constituted a human error, which is not disputed by the Department. Since the GST law is still at a nascent stage, the Single Judge Bench held that a rigid view ought not to be taken in matters of procedure.
- The High Court also noted that since such issue only pertained to availment and not utilization of ITC, the Petitioner may be permitted to transition the ITC since utilization would be a matter of assessment before the appropriate officer.

### Larger Bench settles the dispute between coordinate bench on the issue of eligibility of input tax credit on insurance service

*M/s Dharti Dredging And Infrastructure Ltd v. Commissioner of Central Tax, Secunderabad-GST [2021 (4) TMI 853-CESTAT Hyderabad]*

#### FACTS OF THE CASE

- The Appellant had availed CENVAT credit on Service Tax paid on insurance premium in respect of “workmen compensation insurance policy”. The said policy was taken as a statutory obligation stipulated under Workmen Compensation Act, 1923 which prescribes a liability for compensation (to be paid to the employee) upon the employer in the event of personal injury to a workman by accident arising out of and in the course of employment.
- The period in dispute was post April 1, 2011, hence amended definition of ‘input service’ under Rule 2(l) of CENVAT Credit Rules, 2004 (**CCR, 2004**) was applicable, wherein few services are specifically excluded from the ambit of ‘input service’, viz. life insurance, health insurance services primarily used for personal use or consumption of any employee.
- The Department raised a demand on the Appellant based on allegation that the insurance being specifically excluded from the definition of ‘input service’ under CCR, 2004, no CENVAT credit of Service Tax paid on “workmen compensation insurance policy” is admissible to the Appellant.

#### JUDGEMENT

- This matter was referred to larger bench by Order dated September 6, 2018 to resolve the conflict between the decisions of coordinate bench in the cases of **Hydus Technologies India Pvt Ltd v. CCE., Cus & ST, Hyderabad-II**, [2017 (2) TMI 538 CESTAT Hyderabad] and **Ganesan Builders Ltd v. CST, Chennai-II** [2017 (7) TMI 720- CESTAT Chennai]. In ‘Hydus Technologies’, the Hyderabad Tribunal allowed the CENVAT Credit on group gratuity insurance, employee deposit linked insurance, employee health insurance, etc., holding that these were legal responsibilities of the employer under various labour legislations and the benefit bestowed by the legislation cannot be taken away by another field of law. In contrast to the aforesaid decision, in ‘Ganesan Builders’ the Chennai Tribunal held that any obligation under any other law cannot be the ground to allow the credit inasmuch as the legislation is within its right to amend the definition of input service and to include or exclude any of the services from its ambit.
- The Hon’ble Tribunal observed that decision of Chennai Tribunal in the case of ‘Ganesan Builders’ has been overruled by the Madras High Court [2018 (10) TMI 269- Madras high Court]. The High Court provided three important factors to determine whether the input tax credit on insurance policies is eligible or otherwise viz. (a) nature of policy, (b) the beneficiary of policy and (c) the statute under which the policy is required to be availed. Basis these three factors the High Court observed that ‘Workmen Compensation Act, 1923’ is a beneficial legislation to protect the unorganized sector of workmen. The Hon’ble bench also observed that the insurance policies were taken as a statutory requirement under the labor law and the policy does not name any particular employee, but it has categorized the employees based on their vocation/skill. Basis the aforesaid observations the Hon’ble bench held that it is a statutory requirement to obtain policies for the employees and thus the same are not used for personal use or consumption of employee and it being a statutory requirement it is employer specific (as employer is shown as ‘insured’ in the policy) and not employees specific.

- Placing reliance on the Madras High Court judgment, the Hon'ble Tribunal held that the case of the Appellant is identical to the case of '*Ganesan Builders*' inasmuch as the policy in question pertains to workmen compensation scheme. The Hon'ble Tribunal referred to the insurance policies and held that the Appellant is 'insurer' and not the individual employees which means the benefit of the policy goes to the Appellant. It is also held that under Workmen Compensation Act, 1923, if the Appellant had not taken insurance for its employees, it would be still liable to pay compensation to the employees and as such the insurance policy cover the liability of the Appellant against any potential claim and not for personal use or consumption of the employees.
- In view thereof, the Hon'ble Tribunal held that the insurance policy in dispute is not falling under the ambit of exclusion clause of the definition of 'input service' under CCR, 2004 and the view expressed by Hyderabad Tribunal in the case of '*Hydus Technologies*' lays down correct position in law.

### High Court allows filing of TRAN-1 From electronically/manually by June 30, 2021

*M/s Super India Paper Products Benlon India Ltd & Ors. v. UOI & Ors. [2021 (6) TMI 108- Delhi High Court]*

#### FACTS OF THE CASE

- The issue of transition of CENVAT credit from erstwhile indirect tax regime to present Goods and Services Tax (GST) system by virtue of filing of 'From TRAN-1' has been dealt by Hon'ble Delhi High Court on several occasions, prior. Recently, a batch of Writ Petitions with three issues regarding TRAN-1 viz. (i) evidence of attempting to file TRAN-1 is provided (ii) no proof of attempt of filing TRAN-1 and (iii) TRAN-1 was filed in time but unable to revise/rectify the return, have been disposed of by a common order.

#### JUDGEMENT

- The Hon'ble High Court made a note that the transitionary mechanism was not smooth and easy for numerous taxpayers. Also, technical glitches and shortcomings in the online system prevented from filing the TRAN-1 Form. Although Government took cognizance of the said complaints and redressal mechanism to address the IT-related glitches was set up, the said benefit was confined only to specific class of cases where taxpayer could prove their attempt of filing of TRAN-1 (screenshots, correspondence etc.) before the Nodal Officer.
- The Hon'ble High Court also took note of the fact that the Hon'ble Supreme Court has stayed the operation of Hon'ble Delhi High Court judgment in the case of '*Brand Equity Treaties Limited v. UOI & Ors.*' [2020 SCC Online Del 1698 Pending SLP (C) No. 7425-7428/2020] and since the facts arising in the present batch of petitions were different, proceeded deciding the same, pending challenge in *Brand Equity*. The Hon'ble High Court also took note of the fact that the Finance Act, 2020 brought an amendment to Section 140 of the Central Goods and Services Tax Act, 2017, with retrospective effect from July 1, 2017, by inserting the words 'within such time', to cure the defect of Rule 117 of the Central Goods and Services Tax Rules, 2017 which provided time limit for filing of TRAN-01.
- The Hon'ble High Court bifurcated the writ petitions in three different batches viz. (i) Where taxpayer have evidence of attempt to file TRAN-1 Form, (ii) Where taxpayer do not have any proof of attempt to file TRAN-1 Form and (iii) Where taxpayers submitted TRAN-1 Form within the prescribed time period but their grievance stems from their inability to revise/rectify the TRAN-1 Form filed by them.
- While dealing in the first batch of cases the Hon'ble High Court observed that all the Petitioners have genuinely attempted to file TRAN-1 Form within time and also taken care to preserve some evidence in support of their contention. The Hon'ble High Court relied upon and followed the judgment in the case of ***SRC Aviation (P) Ltd v. UOI & Ors.*** [MANU/DE/4345/2019] wherein after recording the fact that petitioner placed a copy of the screenshot evidencing that it was unable to file the TRAN-1 Form on the GST Portal, allowed it to file the TRAN-1 Form electronically or manually. The Hon'ble High Court also followed the judgment in the case of ***Triveni Needles Pvt Ltd V. UOI & Ors.*** [(2020) 77 GST 550 (Del)] and held that in the said case of *Triveni Needles*, this Court extended the benefit to the taxpayer who did not have any electronic record to prove the attempt of filing TRAN-

1, and thus granted the same benefit to the petitioners of this batch who are held to be on much better footing than that of the *Triveni Needles*.

- In so far as second batch of cases were concerned the Hon'ble High Court placed reliance on the judgment in the case of *Triveni Needles (supra)* and extended the benefit to all the petitioners in the said batch. Further, in one of the petition wherein the petitioner although claimed certain part of CENVAT credit, it missed out on a component of credit due to inadvertent clerical errors. The Hon'ble High Court by placing reliance on the judgment in the case of ***National Internet Exchange of India v. UOI & Ors.*** [MANU/DE/0242/2021] allowed the petition to claim remaining credit.
- In respect to third batch of cases the Hon'ble High Court held that there is no effective mechanism provided for the revision/rectification of TRAN-1 Form. The Hon'ble High Court observed that it is not in dispute that the petitioners filed TRAN-1 Form within the prescribed time, however, they were precluded from claiming transitional credit on account of inadvertent error or omissions on their part and based on the said observation the Hon'ble High Court held that genuine mistake should not result in petitioners losing out on their accumulated credit which is protected by Article 300A of the Constitution of India. The Hon'ble High Court also noted that similar relief was granted in several decisions and placed reliance on the judgment in the case of ***Blue Bird Pure pvt Ltd v. UOI & Ors.*** [2019 (29) GSTL 660 (Del)].
- Having held so, the Hon'ble High Court allowed all the petitions in the first, second and third batch and directed Respondents to either re-open the online portal so as to enable the petitioners to file TRAN-1 Form electronically, or to accept manual filing of TRAN-1, on or before June 30, 2021.

## RECENT ADVANCE RULING

### Activities undertaken by LO in India amount to 'supply' under GST law and LO liable to obtain registration

*In re: Dubai Chamber of Commerce and Industry [Order No. GST-ARA-35/2019-20/B-14, MH AAR]*

#### FACTS OF THE CASE

- The Applicant is a liaison office (LO) in India representing Dubai Chamber of Commerce and Industry, UAE (DCCI UAE) under the ambit of RBI norms. It receives a certain sum from DCCI UAE for its operations, including liaison between the India and UAE offices, representing DCCI UAE at various events, organizing interactions for Indian stakeholders and connecting Indian businesses to those in Dubai and vice versa, and such sum is in excess of its operating costs.
- It is the Applicant's case that since the activities undertaken by it as an LO do not amount to a 'supply' as defined under section 7 of the CGST Act, it is not liable to obtain registration under GST law.

#### JUDGEMENT

- The AAR has taken particular note of the Applicant's submission with regard to 'connecting Indian businesses to those in Dubai' and has analyzed the same in terms of the definition of 'intermediary' section 2(13) of the IGST Act. Since these businesses would likely be engaged in the sale of goods or provision of services, the AAR notes that by connecting such businesses, it would be acting in the capacity of an intermediary under GST law.
- In furtherance of this, the Order delves into the detailed business of DCCI UAE which offers extensive services for facilitation of trade and notes that since the same are undertaken in furtherance of business, DCCI UAE cannot be termed as a 'non-profit organization'. Accordingly, the AAR notes that the activities undertaken by the Applicant would also not amount to those of a non-profit.

- In light of the discussion above, the AAR has held that the Applicant is engaged in the supply of intermediary services and is liable to obtain registration and pay tax thereon. Correspondingly, the decisions in **M/s Habufa Meubelen [Rajasthan AAR]** and **M/s Takko Holding GmbH [Tamil Nadu AAR]** have been distinguished on facts.

## NOTIFICATION/CIRCULARS

S. No.	Reference	Particulars
1.	<b>Notification No. 08/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Allows for reduction in rates of interest in respect of GSTR-3B for March and April 2021 or the quarter ending March 2021, as the case may be, on a staggered basis as under -               <ol style="list-style-type: none"> <li>For taxpayers with aggregate turnover more than INR 5 Cr., 9% p.a. for 15 days from the due date and 18% p.a. thereafter</li> <li>For taxpayers with aggregate turnover equal to or less than INR 5 Cr. and composition taxpayers, nil for the first 15 days from the due date, 9% p.a. for the next 15 days and 18% p.a. thereafter</li> </ol> </li> </ul>
2.	<b>Notification No. 09/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Waives late fee payable for the months of March and April 2021 for the quarter ending March 2021, as the case may be, as under –               <ol style="list-style-type: none"> <li>For taxpayers with aggregate turnover more than INR 5 Cr., waiver for 15 days from due date</li> <li>For taxpayers with aggregate turnover equal to or less than INR 5 Cr., waiver for 30 days from due date</li> </ol> </li> </ul>
3.	<b>Notification No. 12/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Extends the due date for furnishing Form GSTR-1 April 2021 to May 26, 2021</li> </ul>
4.	<b>Notification No. 13/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Amends the CGST Rules to allow for reconciliation of ITC in line with Rule 36(4) of the CGST Rules to be done cumulatively for April and May 2021 in the return for May 2021</li> </ul>
5.	<b>Notification No. 14/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Extends the time limit for compliances under the CGST Act falling between April 15, 2021 to May 30, 2021 up to May 31, 2021, except provisions pertaining to –               <ol style="list-style-type: none"> <li>Time &amp; value of supply;</li> <li>Registration and registration liability;</li> <li>Tax invoices, return filing (except by TDS deductors, ISDs and non-resident taxable persons), late fee and interest;</li> <li>Arrest, penalties, liability, detention &amp; seizure;</li> <li>Inspection provisions pertaining to e-way bills.</li> </ol> </li> <li>Extends time limit for procedures under verification of application for registration under Rule 9 falling between May 1, 2021 to May 31, 2021 up to June 15, 2021</li> </ul>
6.	<b>Notification No. 15/2021 – Central Tax dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Allows for extension of period to file application for revocation of cancellation of registration beyond the period of 30 days at the discretion of the Addl./Jt. Commissioner or Commissioner</li> <li>In the event of filing a fresh refund application, allows for exclusion of period between the filing of the previous refund application and the date of communication of deficiencies therein while computing time-limit under Section 54 of the CGST Act</li> </ul>

S. No.	Reference	Particulars
		<ul style="list-style-type: none"> <li>Allows for withdrawn of refund application by the taxpayer at any point prior to issuance of the provisional/final sanction order or withhold order or order of rejection</li> </ul>
7.	<b>Circular No. 148/04/2021-GST dated May 18, 2021</b>	<ul style="list-style-type: none"> <li>Implements an SOP for extension of time limit for revocation of cancellation of registration by requesting for the same, through letter or e-mail to the proper officer along with the grounds on which such extension is sought</li> <li>The request is to be forwarded to the Addl./ Jt. Commissioner or the Commissioner, as the case may be, who shall either accept the same or reject it, along with grounds for such rejection</li> </ul>
8.	<b>Notification No. 30/2021-Customs dated May 1, 2021</b>	<ul style="list-style-type: none"> <li>Reduces IGST on imports of oxygen concentrators imported for personal use from 28% to 12%</li> </ul>
9.	<b>Ad hoc Exemption Order No. 4/2021-Customs dated May 3, 2021 r/w Ad hoc Exemption Order No. 5/2021-Customs dated May 31, 2021</b>	<ul style="list-style-type: none"> <li>Exempts certain goods (such as oxygen, oxygen concentrators, oxygen cylinders, ventilators, vaccines, Remdesivir, etc.) imported by State Governments or authorised entities on a free-of-cost basis and for free distribution in India for the purpose of Covid relief, from IGST in addition to previous exemptions from customs duty or health cess as the case may be, subject to fulfilment of certain conditions</li> <li>This exemption is in force up to August 31, 2021 and also applicable to any goods pending clearance as on the date of the Order</li> </ul>
10.	<b>Notification No. 31/2021-Customs dated May 31, 2021</b>	<ul style="list-style-type: none"> <li>Exempts imports of Amphotericin B (required to treat mucormycosis due to black fungus infection) from customs duty and health cess</li> <li>Extends previous exemptions granted to imports of Covid-related goods (such as oxygen, oxygen concentrators, oxygen cylinders, ventilators, vaccines, etc.) up to August 31, 2021</li> </ul>
11.	<b>Notification No.32/2021-Customs dated May 31, 2021</b>	<ul style="list-style-type: none"> <li>Exempts certain goods (such as oxygen, oxygen concentrators, oxygen cylinders, ventilators, vaccines, Remdesivir, etc.) donated to the Central Government or State Government or other recommended entity for free distribution from IGST in addition to previous exemptions from customs duty or health cess, as the case may be, subject to fulfilment of certain conditions</li> <li>This exemption is in force up to August 31, 2021 and also applicable to any goods pending clearance as on the date of the Order</li> </ul>
12.	<b>Circular No. 9/2021-Customs dated May 8, 2021</b>	<ul style="list-style-type: none"> <li>Allows facility to furnish an undertaking in place of a bond to expedite customs clearance of goods &amp; facilitate trade up to June 30, 2021, provided that the bond is duly furnished by July 15, 2021</li> </ul>
13.	<b>Circular No. 10/2021-Customs dated May 17, 2021</b>	<ul style="list-style-type: none"> <li>Summarises the changes brought about <i>vide</i> the Customs (Import of Goods at Concessional Rate of Duty) Amendment Rules, 2021 w.e.f. February 2, 2021</li> </ul>
14.	<b>Circular No. 11/2021-Customs dated May 24, 2021</b>	<ul style="list-style-type: none"> <li>Extends validity of AEO certificates expiring between April 1, 2021 to May 31, 2021 up to June 30, 2021, where the entity is found eligible for continuation under the AEO Programme</li> </ul>
15.	<b>Instruction No. 10/2021-Customs dated May 13, 2021</b>	<ul style="list-style-type: none"> <li>Provides instructions for a special drive from May 15, 2021 to May</li> </ul>



S. No.	Reference	Particulars
		31, 2021 for processing of all refund and drawback claims that are pending as on May 14, 2021
16.	Trade Notice No. 3/2021-22 dated May 10, 2021	<ul style="list-style-type: none"> <li>Introduces a new online module for filing of electronic, paperless applications for export authorizations for restricted items w.e.f. May 17, 2021</li> </ul>
17.	Trade Notice No. 4/2021-22 dated May 10, 2021	<ul style="list-style-type: none"> <li>Extends validity of RCMC expiring on or before March 31, 2021 up to September 30, 2021</li> </ul>
18.	Trade Notice No. 5/2021-22 dated May 19, 2021	<ul style="list-style-type: none"> <li>Introduces an online module for filing of all applications for relaxations with the EPCG Committee in terms of para 2.58 of the FTP 2015-20</li> </ul>
19.	Trade Notice No. 6/2021-22 dated May 25, 2021	<ul style="list-style-type: none"> <li>Provides for mandatory recording of transfer of DFIA scrips on an online module</li> <li>Discontinues issuance of paper copies of DFIA scrips for EDI Ports from June 7, 2021, although Security Paper copies of DFIA Scrips would continue to be issued for Non-EDI Ports and issues related instructions</li> </ul>

We hope you have enjoyed reading this update. For further information please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or connect with our authors:

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