



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



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DIRECT TAXATION



RECENT CASE LAWS

International Air Transport Association (Canada) (ITA no. 587/Mum/2016)

Accredited Training Centres not Dependency agency permanent establishment (DAPE) of International Air Transport Association under India-Canada Double Taxation Avoidance Agreement (DTAA)

FACTS OF THE CASE

- Return of income (**ROI**) filed by the taxpayer, a tax resident of Canada, for Assessment Year (**AY**) 2012-13 was selected for scrutiny proceedings under Section 143(2) of the Income tax Act, 1961 (**IT Act**). Assessment was completed under Section 143(3) read with Section 144C(1) of the IT Act assessing additional income on account of the following:
 - Provision of e-services;
 - Provision of consulting services;
 - Sale of distance learning materials; and
 - Others
- The additions were upheld by the Dispute Resolution Panel (**DRP**) with the direction to the Tax Officer (**TO**) to attribute 40% of the gross revenue earned from sale of distance learning materials, membership dues and Billing Settlement Pan (**BSP**) Link services and IATA Clearing House (**ICH**) facilities as income attributable to the Indian branch (IATA Branch) of the taxpayer in India.
- Further, income from sale of publications (**DGR**), application fee for sale of DGR manuals and provisions of advertising space on websites and publications and annual fee from Accredited Training Centre (**ATC**) were held taxable as royalty.
- Assessment was framed based on the direction of the DRP. Aggrieved, both the TO as well as the taxpayer are now in appeal before the Income Tax Appellate Tribunal (**ITAT**).

JUDGEMENT

- ITAT noted that the taxpayer had allowed students to avail various distance learning courses pertaining to the aviation sector. The students would approach the ATC for the distance learning courses of the taxpayer. The concerned ATC would procure the study material for the said course from the taxpayer and provide the same to the student who would thereafter make the payment for the same to the ATC. One-time ATC network access/ authorization and branch fee (registration fee to access the syllabus) was offered to tax as 'royalty'.
- ITAT noted that:
 - ATCs were independent third-party organizations that were not exclusively providing courses designed by the taxpayer; and
 - The aforesaid transaction between the ATCs and the students was on an independent basis.
 - ATCs are independent agents, acting in the ordinary course of business.
- ITA held as under:

Sr. No.	Particulars	Ratio
1	Sale of distance learning course	Since, the lower authorities could not demonstrate that the transaction between the taxpayer and ATC was not undertaken at arm's length price, ATCs, being an independent agent within the meaning of Article 5(5) of the India-Canada DTAA, could not have been held to be DAPE of the taxpayer in India and therefore addition was deleted (40% of

		revenue from sale of distance learning course).
2	ATC fees	ITAT relied on Delhi ITAT decision in case of <i>Hughes Escort Communication Ltd (31 CCH 128)</i> and held that consideration received by the taxpayer was simply towards sale of training materials/ books, which does not involve transfer of intellectual property, and also does not contain any undivulged technical information which is not available in public domain. Thus, the same cannot fall within the definition of royalty under Article 12(3) of the India-Canada DTAA.
3	Sale of physical publications	<ul style="list-style-type: none"> ▪ Relying on Madhya Pradesh High Court (HC) judgement in case of <i>HEG Ltd (263 ITR 230)</i>, ITAT held that consideration received by the taxpayer on sale of DGR manuals cannot be brought within the definition of royalty as provided under Article 12(3) of the India-Canada DTAA. ▪ The ITAT remarked that sale of DGR manual did not involve any transfer of intellectual property and did not contain any undivulged technical information which is not available in the public domain. ▪ Relying on Delhi HC judgement in case of <i>Infrasoft Ltd (220 Taxman 273)</i>, ITAT held that consideration received by the taxpayer towards sale of DGR manuals cannot even be attributed to the 'use' or 'right to use' the copyright.
4	Provisions of advertising space	<ul style="list-style-type: none"> ▪ The taxpayer provided advertising space to its customers either on its website that was located outside India, or in its publications/manuals that were published by it outside India. Consideration for rendering such services was also received directly in a bank account outside India. ▪ Relying on Mumbai ITAT decision in case of <i>Yahoo India (P) Ltd (140 TTJ 195)</i> ITAT held that as no use or right to use any copyright, patent, trademark, design or model, plan was granted to the customers by the taxpayers in the course of providing advertising space to them in its publications/manuals or website. The consideration received in lieu thereof cannot be brought within the meaning of the definition of the term royalty as provided in Article 12(3) of the India-Canada DTAA.
5	BSP link charges	<ul style="list-style-type: none"> ▪ The taxpayer had merely acted as a facilitator in recovering BSP link charges from the airlines and agents and had remitted the same to a Spanish entity without any mark-up. Accordingly, the collection of BSP charges by the taxpayer from the airlines would not constitute 'business income', similar to the stand taken by DRP for AY 2016-17 in taxpayer's own case. ▪ The matter is remitted to the lower authorities for proper adjudication.
	Fees for ICH facility	<ul style="list-style-type: none"> ▪ ICH facility (enabling the world airlines and industry suppliers to settle their passenger, cargo and miscellaneous/non-transportation billings amongst each other) rendered outside India, with receipt of fees for the same outside India would not result in attribution to the Indian branch as no services were performed by Indian branch (in compliance with the RBI mandate providing permission for rendering only BSP services). The decision of Supreme court (SC) in case of <i>Ishikawajima Harima Heavy Industries Co. Ltd (288 ITR 408)</i> was relied on. ▪ The matter is remitted to the lower authorities for proper adjudication.
	Membership Fees	<ul style="list-style-type: none"> ▪ The ITAT relied on the judgement of Supreme court in case of <i>Ishikawajima Harima Heavy Industries Co. Ltd (supra)</i> and affirmed the argument of the taxpayer that since the collection of membership dues by the taxpayer was carried out directly outside India, therefore the same cannot be attributed to the Branch Office in India and hence no profits can be deemed to be taxed in India.

FEES FOR TECHNICAL SERVICES

Expeditors International of Washington Inc (ITA no. 1705/ Del/2016)

US Co.'s receipts from Logistic support cost-allocation, Global Management charges reimbursement, not fees for technical services (FTS)

SUMMARY OF THE CASE

- The TO assessed income from International Freight Logistic Services and reimbursement of Global Account Management (**GAM**) expenses as FTS taxable under Section 9(1)(vii) of the IT Act. The aforesaid order was confirmed by DRP.
- ITAT stated that the support services were purely logistic support for transport of goods and were very much of a general service in nature and do not require any managerial/technical or consultancy expertise.
- As regards GAM charges/expenses, ITAT observed that the actual group cost was allocated to respective countries benefited to these services in proportion to the revenue in that country and are incurred outside India. ITAT, further noted that these expenses, not having any income element embedded in them, are then reimbursed on actual basis.
- Relying on co-ordinate bench ruling in taxpayer's own case for AY 2010-11 viz **ITA no. 1740/Del/2015**, ITAT held that receipts by taxpayer on account of support services as well as GAM charges cannot be treated as FTS under Section 9(1)(vii) of the IT Act or under Article 12 of India-US DTAA.

Nalco Company, USA (ITA no. 1217/ Kol/2017)

Extended revisionary powers inapplicable to tax Nalco USA's income from Service Fee

SUMMARY OF THE CASE

- Commissioner of Income Tax (**CIT**), taking recourse to explanation 2 to Section 263(1) stated that the TO had without making enquiries or verification accepted the taxpayer's claim that the head quarter service fee received from its Indian counterpart (**NWIL**) was business profit and not in the nature of royalty or FTS.
- Kolkata ITAT observed that CIT can revise an assessment order on the point constituting foundation of the revision, if non-discussion of such an issue in the assessment order is because of either non enquiry by the TO or non-application of mind by the TO after making due inquiry or adopting a view which is legally untenable.
- ITAT held that even though the CIT was rightfully entitled to take recourse to the explanation, it is clear that none of the four clauses of the Explanation 2 applies to the case under consideration since,
 - The TO made all relevant enquires and verification;
 - Though the order was passed allowing relief, it was not without inquiring into the claim;
 - There was no violation of any order, direction or instruction issued by the Central Board of Direct tax (**CBDT**); and
 - Rulings cited by CIT were not of jurisdictional HC and the SC ruling of **GVK Industries Ltd (371 ITR 453)** was an absolute mismatch of head quarter service fee received by the taxpayer under consideration. Thus, clause (a) to (d) is not satisfied in the taxpayer's case.
- The sequitur is that the revisionary power, even under the enlarged scope of the Explanation 2, was not legally exercisable. Thus, ITAT, without delving into merits of the case, quashed revision order passed under Section 263 in case of taxpayer (a US tax-resident) for AY 2011-12.

Aircom International Ltd (AAR No. 1329 of 2012)

Management & IT support services received from UK, except 'direct technical advice, support', not FTS / Royalty

SUMMARY OF THE CASE

- The taxpayer, a non-resident company incorporated in England and Wales, had entered into a Management Service Agreement (**MSA**) with its subsidiaries including Aircom International India Private Limited (**Aircom India**), a wholly owned subsidiary company, with a view to rationalize and standardize business conducted by Aircom India.
- The taxpayer has sought a ruling as to the characterisation of this income as royalty, FTS or business income and requirement of withholding of tax on the same.
- The Authority for Advance Ruling (**AAR**) ruled that taxpayer's income from rendering management support services, and IT support services except direct technical advice, support and management including implementation services, to its Indian subsidiary was neither FTS nor royalty under Article 13 of India-UK DTAA.
- The AAR observed that under the MSA various services were rendered. Out of these services only direct technical advice, support and management including implementation services provided under IT services segment, meets the requirement of 'make available' under Article 13 of the DTAA. Advice was not in respect of any outage on the Aircom network or troubleshooting of malfunctions in the IT Infrastructure – rather - it was in respect of the specific technical problem faced by the clients of the Indian subsidiary. These problems were flagged by the taxpayer for resolution and the solution of which was provided through the employees of Indian subsidiary. Therefore, this service was not only technical in nature but was also made available.
- Further, with respect to the other services such as training for launch of a new software program, legal and financial services, contract management/negotiations, financial management etc. the AAR held that consultancy services which are advisory in nature and which merely involve discussion and advice of a routine nature or exchange of information, do not fulfil the requirement of 'make available'.
- On examining the taxability under Article 13(4)(a)/(b) (for services effectively connected with royalty payments), the AAR held that the services under MSA were not in relation to the enjoyment of the right / property for which royalty was received by the taxpayer and thus would not be covered under Article 13(4)(a)/(b) of India-UK DTAA. The AAR rejected TO's contention of taxability of consideration paid by Indian subsidiary as 'royalty' as these services were not intended to supply any knowledge or information or any nature whatsoever, concerning industrial, commercial or scientific experience.
- Thus, payments made by Aircom India to the taxpayer would suffer withholding tax under Section 195 only in respect of component of 'direct technical advice, support and management including implementation' service as per the applicable rate.
- Finally, the AAR remarked that mere stay of an employee does not establish that he has rendered services all the time. In order to attract service Permanent Establishment (**PE**) provisions there has to be concrete evidence to establish that the service was rendered through an employee for 30 days or more. In absence of such, AAR held no service PE was created. As no business was carried out in India and in the absence of any PE, the payment for the services rendered under MSA cannot be considered as business income.

CAPITAL GAINS/RECEIPTS

Shri Shailendra Bhandari ITA No.6528/M/2018 (Mumbai ITAT)

Compensation received upon cancellation of Letter of Intent (LoI), assessable as 'capital gains,' not 'Income from Other Sources' (IFOS)

SUMMARY OF THE CASE

- Mumbai ITAT held that LOI is as good as an agreement to sell in all respects. It rejected the TO's contention that LoI issued by the builder for the purpose of allotment of a flat which is not in existence on the date of execution of LoI as well as on the date of cancellation of the said LoI is not an agreement.
- ITAT remarked that provisions of Maharashtra Ownership Flats Act, 1963 (**MOFA**) cannot regulate the taxability of any income in the form of long-term capital gain/loss which may arise from the cancellation of any LoI which is not registered. ITAT thus upheld taxpayer's claim of capital loss.
- Relying on the judgements of **Vijay Flexible Containers (48 Taxman 86)** and **Ashwin S Bhalekar (ITA no. 6822/M/2016)** ITAT directed TO to allow the claim of the taxpayer on account of long term capital loss made on cancellation of a booked flat by accepting the taxpayer's treatment of the compensation received from builder on cancellation of LoI as a part of the sale consideration for AY 2015-16.

Raminder Singh (ITA No 1270/CHD/2019)

LoI, neither land nor building, Section 50C not invocable

SUMMARY OF THE CASE

- Taxpayer, an Individual had purchased land in AY 2005-06, which was compulsorily acquired by GMADA. In lieu of this acquisition, the taxpayer was, by virtue of land pooling scheme of GMADA allotted three residential plots measuring 500 sq yards, 300 sq yards and 200 yards and one site of SCF in Sector 88-89, Mohali by way of LoI.
- During AY 2015-16, the taxpayer sold all the three residential plots and computed long term capital gains (**LTCG**) after claiming deduction under Section 54F of the IT Act.
- The TO computed the value of the plots at INR 2.50 crores, as per Section 50C, as against INR 1.14 crores shown by the taxpayer, on the basis of information called for under Section 133(6) of the IT Act from the Estate Officer GMADA. Since GMADA had acquired 5000 sq. yards of land and had given 3 residential plots in return, which measured 1000 sq. yards in all, the TO had apportioned the cost of original 5000 sq.yard land over 1000 sq.yard and further allowed deduction under Section 54F to the extent originally claimed by the taxpayer. The capital gain chargeable to tax was accordingly computed at INR 1.54 crores.
- On appeal, CIT(A) rejected the taxpayer's claim that Section 50C was not applicable to the present transaction of transfer of LoI. Aggrieved, the taxpayer filed an appeal before the Chandigarh ITAT. The ITAT held that since section 50C is a deeming provision, its applicable only in a situation specifically provided therein i.e. on transfer of land/building.
- The ITAT held that:
 - LoI did not confer ownership of specific developed plot of land.
 - LoI were issued expressing intent to hand over the developed plots on completion, since the development of the plots was pending. Hence, it was held that LoI cannot be equated with land or allotment of land and is only a right to possess the plot.
 - LoI is only a right to possess a plot of land and not land itself and therefore the provisions of Section 50C does not get attracted.

Dabur Invest Corp (ITA No. 8058/Del/2018)

Option money received by Dabur from Aviva Joint Venture (JV) Partner against 'right of first refusal,' 'capital receipt'

SUMMARY OF THE CASE

- The Delhi ITAT held that option price received annually by the taxpayer from its British JV partner Commercial Union International Holdings Ltd. (**CUIH**) as a minimum guarantee for mandatory first sale of shares upon relaxation of Foreign Direct Investment (**FDI**) norms in the insurance sector, amounts to capital receipt.
- A JV agreement was entered into between M/s Commercial Union International Holdings Ltd. (**JV partner**), a foreign company and the taxpayer, a partnership firm, in 2001 to co-promote a JV company proposed to be established in India for the purpose of setting up and carrying on the business of insurance, pension and long-term savings.
- The taxpayer subscribed to 74% of the total paid up equity capital of JV company and the JV partner subscribed to the remaining 26%, which was the maximum foreign investment permitted in the insurance sector at that time. As per the JV agreement, in the event the government increases the maximum foreign investment limit in the insurance sector, the JV partner shall have the right to purchase stake from the taxpayer up to such increased limit. As per the JV agreement, the JV partner was required to pay a refundable option price annually to the taxpayer against the right of stake purchase equal to 20% of the investment made by the taxpayer in JV company.
- The taxpayer treated the option money as capital receipt whereas the TO sought to tax it in the year of receipt as a revenue receipt. The ITAT extensively distinguished Mumbai ITAT ruling in case of **Mahindra Telecommunications Investment Private Limited (69 taxmann.com 431)** which was heavily relied upon by the TO.
- The ITAT observed from the JV agreement that:
 - Option price is linked to transfer of taxpayer's shares, which in turn is pegged to market value;
 - Option price is merely an advance against the purchase of shares by CUIH at later date, and
 - The taxpayer is required to repay the option price in certain circumstances until the sale of shares by the taxpayer termed as 'triggering event'.
- The ITAT remarked that option price is not an income, but a liability for the taxpayer until the triggering event. ITAT rejected TO's contention that option price received is revenue in nature since it is received annually and utilized for investment in income earning securities. The ITAT held that neither the frequency of receipt, the manner in which it is dealt with in the books of account, nor how the money is utilized determines its character for tax purpose. It classified the option price as advance capital receipt supplements by referring to JV's dividend policy which prohibits adjustment of dividend received by taxpayer against option price.
- The ITAT rejected TO's contention that market value does not affect the amount received by taxpayer (subscription price + option price) and that when market value is higher than the option price, the taxpayer was entitled to retain the surplus as option price was a minimum guarantee.
- The ITAT applied principle of consistency (since no issues were raised by the TO in treatment of the item upto AY 2011-12) and held that option money received by the taxpayer was a capital receipt which requires an adjustment only at the time of transfer of the shares by the taxpayer to CUIH while working out resultant capital gain.

PRESUMPTIVE BASIS OF TAXATION

Technip France SAS (AAR No. 1413 of 2012)

Offshore services-taxable, being intrinsically connected with setting-up of a plant in India

SUMMARY OF THE CASE

- The taxpayer, a company incorporated under the laws of France, was engaged in an Engineering, Procurement and Construction (**EPC**) contract. ONGC Petro Additions Limited (**OPAL**) desired to setup a Plant in Gujarat on a lump-sum turnkey basis. Towards this, they invited bids for designing, engineering and construction of the Plant at site. The bid of the taxpayer was accepted, and an application was filed before AAR to determine whether any part of the offshore work was liable to tax in India under the provisions of the IT Act and/or India-France DTAA.
- As per the terms of contract it was agreed between the parties that the taxpayer shall undertake offshore scope of work and its wholly owned Indian subsidiary Technip KT India Limited (**TIL**) would undertake the onshore activities. The AAR observed that the employees of TIL were involved in the project from the very beginning (i.e. involvement in the bidding process) and these employees not only had a secured right to use their office space but they were carrying on the business of the taxpayer. The AAR thus held that the taxpayer had a fixed place PE in India from the effective date of the contract.
- The AAR ruled that the income arising to the taxpayer from offshore supply of equipment in connection with the OPAL contract was not taxable in India since the sale was completed outside India and there was no accrual or deemed accrual in India.
- However, the consideration received for the alleged offshore services (i.e., engineering design services in relation to the construction, erection, installation, commissioning and testing of the plant in India), and offshore advisory services, were held taxable in India as business income under Article 7 of India-France DTAA since services were inextricably connected with the setting up of the Plant and were rendered through a PE in India.

SeaBird Exploration FZ LLC (AAR. No. 1284 &1285 of 2012)

Hiring of vessels between non-residents (NRs) to execute ONGC contract, taxable under Section 44BB

SUMMARY OF THE CASE

- The AAR held that vessel hiring payments made by a UAE-based taxpayer to Cyprus-based vessel providing companies (**VPC**) for global usage of seismic survey vessels under bare boat charter (**BBC**) agreements, which in relation to providing offshore seismic data acquisition and processing services to ONGC and other oil companies in India, is deemed to accrue/arise in India and was taxable under Section 44BB of the IT Act.
- The AAR noted that the vessels hired are essentially research ships which are used for marine acquisition of seismic data and are in the nature of scientific equipment, thus the consideration for use or right to use such scientific equipment would amount to royalty. This is except if it is found that such scientific equipment was covered under the provisions of Section 44BB of the IT Act.
- The AAR stated that the explanation to Section 44BB clarifies that 'plant' includes any scientific apparatus or equipment used for the purpose of said business. Therefore, the payment made for supply of plant and machinery on hire use is squarely covered under the provision of section 44BB(2)(a) of the IT Act. Since the receipt was found to be covered under the provision of Section 44BB of the IT Act, it cannot partake the character of royalty in view of specific exclusion under clause (iva) of Explanation 2, to section 9(1)(vi) of the IT Act.
- The AAR dismissed taxpayer's contention that since all taxable events had taken place outside India (i.e. signing, delivery and payment), there was no nexus with the taxable territory in India and the transaction

was not eligible to tax. It further stated that the business activity of the seismic vessel (i.e. the source of income) can only be at the place where it is utilized for marine acquisition of seismic data. If the accrual of business income of seismic vessels was decided on the basis of place of delivery of vessels it may result into an anomalous situation.

- AAR ruled that since, the business activity in the nature as described under Section 44BB of the IT Act was carried out by the VPCs through the seismic vessels, the place where the vessels are deployed for operation would be deemed to be the source of such business income.
- Perusing the terms of contract between ONGC and the taxpayer, AAR opined that the source of the business income of the VPCs was embedded in the contract awarded by ONGC to the taxpayer. The payment made by the taxpayer to VPCs was in connection with the utilization of the vehicles in the Mumbai High Field. Thus, there was no doubt about the accrual of income of the VPCs through their business connection in India and also about the territorial nexus of the income generated by them. Thus, relying on **Wavefield Inseis Asa (187 Taxman 62) (AAR)**, the AAR held that the place where the vessels are deployed for operation would be deemed to be the source of such business income.
- Relying AAR's ruling in taxpayer's own case (92 taxmann.com 328), AAR held that seismic vessels of the VPCs, through which taxpayer carries on its business, constitutes fixed place PE and thus income arising from PE located in India shall be liable to tax in India as business income.

BUSINESS INCOME/EXPENDITURE

Reliance Infrastructure Ltd (ITA Nos 3590 & 3592/Mum/2019)

Reliance Infra's interest on external commercial borrowing (ECB) utilized for investment in Reliance Communication Ltd (RCL) through Mauritius Protected Cell Co., allowable

SUMMARY OF THE CASE

- The taxpayer had raised funds by way of ECB which were partly invested into Reliance Infra Projects International Limited (**RIPL**) (sister concern) and balance were retained abroad.
- The TO alleged that the taxpayer had made indirect investment in RCL through Mauritius protected investment vehicle Pluri Cell E (who issued yield management certificates linked to RCL shares) and accordingly disallowed proportionate interest. It held the same not to be related to be incurred for the purpose of business of the taxpayer.
- CIT(A) relying on the co-ordinate bench ruling in case of **Reliance Natural Resources Ltd (ITA No. 1000/Mum/2016)** wherein it was held that once income from investment has been offered to tax, the TO cannot turn his back and claim that the expenditure on borrowing is not allowable as business expense, decided the issue in favour of the taxpayer.
- Following the co-ordinate bench decision in the taxpayer's own case, the ITAT upheld the order of CIT(A) and held that interest on ECB utilized by the taxpayer for making an investment in sister concern was an allowable business expenditure as income from such investment was offered to tax.

Sai Mirra Innopharm Private Limited (ITA No. 3454/ Chny/ 2019)

Compensation from Dr. Reddy's for pre-closure of contract manufacturing agreement, not taxable under Section 28(va)(a)

SUMMARY OF THE CASE

- During the course of reassessment proceedings, the TO held that compensation received from Dr. Reddy Laboratories Ltd (**Dr. RDL**) towards pre-closure of manufacturing agreement directly relates to the business activity of the taxpayer and hence should be taxable under Section 28(va)(a) as non-compete fees as against capital receipts treated by the taxpayer.

- The order of the TO was upheld by the CIT(A). ITAT held that compensation received for termination of any agreement can be taxed under Section 28(ii)(e) of the IT Act from AY 2019-20 onwards and since AY under consideration was AY 2007-08 the aforesaid section has no applicability.
- ITAT observed that the taxpayer possessed only the infrastructure for manufacturing and selling pharmaceuticals products, but not technical know-how which was supplied by Dr. RDL. Since, the taxpayer was not owning any know-how, patent, copyright, trademark, license or any other business or commercial right for manufacturing of drugs, the amount paid for termination of contract cannot be brought to tax as non-compete fees.
- The ITAT held that compensation received by the taxpayer was towards loss of source of income and for relinquishing his right to sue as per the terms of contract, and thus the same cannot be brought to tax under Section 28(va)(a).
- Relying on the Supreme Court judgement in case of **Parle Soft Drinks (Bangalore) P. Ltd (97 taxmann.com 136)** which had upheld the order of Bombay HC, ITAT held that compensation received for pre-closure of contract was in the nature of capital receipt, not taxable under Section 28(va)(a).

Godhra Expressways Private Ltd (ITA No. 2123 & 2124/Hyd./2018)

Holds concessionaire rights eligible for claiming depreciation as intangible asset

SUMMARY OF THE CASE

- The Hyderabad ITAT rejected the disallowance of depreciation claimed by taxpayer on the rights acquired via a concessionaire agreement entered with the National Highway Authority of India (NHAI) to collect toll.
- The taxpayer entered into a concessionaire agreement with NHAI to build, transfer, design, finance, operate and transfer the highway and claimed depreciation on the expenditure incurred on the project. The ITAT rejected TO's only reason for disallowance which is **Circular No. 9/2014 dated April 23, 2014** restricting amortization of expenditure over the toll concession period, in case of concessionaire holding taxpayers.
- The ITAT observed that the concession agreement resulted in the NHAI granting concessionary rights to reconstruct, operate and maintain the corresponding national highway project. Accordingly, ITAT held that taxpayer's stand qua its claim was that it has been holding the concessionaire rights in the nature of license to collect road toll of an intangible asset under Section 32(1).
- The ITAT rejected TO's contention that taxpayer was neither the owner of the road project, nor acquired any commercial or business rights for its exclusive usage to claim depreciation. ITAT remarked that taxpayer's right to collect toll would form an exclusive right in the nature of license eligible to be treated as an intangible asset.
- The ITAT also distinguished Bombay HC ruling in **North Karnataka Expressways Ltd (372 ITR 145)** which followed SC ruling in **Mysore Minerals Ltd (239 ITR 775)** as it dealt with taxpayer's self-proclaimed beneficial ownership on the concerned road project while in the current case, the taxpayer has raised depreciation claim on its license to collect toll held as an intangible asset only.

TRANSFER PRICING

Roca Bathroom Products Private Limited (W.P.Nos. 919, 922, 1068 and 1070 of 2020 and WMP Nos. 1102, 1104, 1273 and 1274 of 2020)

Holds notices issued by DRP, 4 years after ITAT's direction, time-barred under Section 153

SUMMARY OF THE CASE

- The HC rejected TO's submission that DRP is a complete code in itself and overriding provision of Section 144C(13) excludes the time limits prescribed under Section 153 and that absence of time-limit for disposal of objections by DRP is a lacuna which requires a statutory amendment.

- The HC accepted the taxpayer's submission that time limits for issuance of notices by DRP expired as envisaged under Section 153(2A) (i.e order of fresh assessment pursuant to ITAT's direction shall be passed within 1 year from the end of the financial year in which the order giving direction is received the TO) for AY 2009-10 and under amended Section 153(3) (ie order of fresh assessment pursuant to ITAT's direction shall be passed within 9 months from the end of the financial year in which the order giving direction is received the TO) for AY 2010-11.
- Relying on Bombay HC judgement in case of ***Lion Bridge technologies Pvt Ltd (260 Taxman 273)*** and ***Nokia India Private Limited (298 CTR 334)*** HC quashed the notices issued by DRP, after four years of passing of directions by ITAT, for factual re-examination of taxpayer's transactions.

NOTIFICATION/ CIRCULARS

- CBDT has further extended due date for filing declaration under the Vivad Se Vishwas Scheme to February 28, 2021.
- Section 138(1) of the IT Act facilitates exchange of information about tax evaders by the Income-tax Department with other tax authorities or enforcement authorities. The CBDT vide **notification no. [F. No. 225/02/2021-ITA-II] dated February 11, 2021** notified 'Chief Executive Officer, Centre for e-Governance, Government of Karnataka' for the purpose of sharing of information.
- CBDT releases Multilateral Instrument (MLI) synthesised text for India- France DTAA.

NEWS

- SC has commenced hearing in software royalty taxation matter.
- Mumbai ITAT in case of ***Asian Paints Ltd (ITA no. 2754/Mum/2014)*** directed the TO to examine taxpayer's claim of applicability of beneficial rate of tax as per the applicable DTAA to the DDT paid under Section 115-O of the IT Act. Separately, remits the issue of taxability of royalty income received from its subsidiary in Egyp keeping in view Article 13 of the India-Egypt DTAA.
- CBDT's circular enhancing monetary limits not applicable for pending appeals for which hearing was concluded – ***Dorf Ketal Chemicals India Pvt Ltd (123 taxmann.com 313)***.

INDIRECT TAXATION



RECENT CASE LAWS

M/s Jaiprakash Associated Limited

Parallel proceedings by State and Union for recovery of interest

FACTS OF THE CASE

- The Petitioner vide the writ petition had challenged the show cause notice (**SCN**) issued by the Joint Director, Directorate of General of GST Intelligence (**DGGI**). It is the case of the Petitioner that the State Tax Officer, State Goods and Services Tax Department (**SGST**) had initiated proceedings against the Petitioner for recovery of interest on delayed payment under the State GST Act, vide orders dated May 25, 2019.
- The Petitioners had filed appeals before the orders dated May 25, 2019, before the Joint Commissioner State Tax (Appeals). Thereafter, the DGGI issued the SCN dated 21.7.2020 under the Central Goods and Services Tax Act, 2017 (**CGST Act**) for recovery of interest for the same period.
- It is the case of the Petitioner that by virtue of Section 6(2)(b) of the CGST Act, where one proper officer under the SGST Act has initiated any proceedings on a subject matter, no parallel proceedings shall be initiated by another proper officer under the CGST Act on the same subject matter. As a result, the DGGI cannot initiate parallel proceedings under Section 6(2)(b) of CGST Act.

JUDGEMENT

- The Hon'ble High Court held that it would be open for the Petitioners to file reply to the SCN raising the aforesaid objections. It directed the DGGI to first deal with and decide the aforesaid objections raised before proceeding with the merits.

M/s Vantage International Management Company

Inclusion of free of cost supplies in the value of taxable services for the levy of Service tax

FACTS OF THE CASE

- The Appellant was registered under the erstwhile Service tax regime and were engaged in providing mining services to M/s. Oil and Natural Gas Corporation Limited (**ONGC**) for performing drilling operations on oil wells during the period December 2010 to December 2015. The services provided by the Appellant were classified under "Mining of Mineral, Oil or Gas Service" and appropriate Service tax was discharged on the said amount.
- In terms of the aforesaid contractual arrangement, the recipient i.e. ONGC was required to provide diesel to the Appellant on free of cost basis for the purpose of provision of services. The Department had proposed to include the cost of diesel in the consideration payable for the taxable services by the Appellant in terms of Section 67 of the Finance Act, 1994. As a result, the Department had demanded Service tax attributable to such inclusion of free of cost supplies in the transaction value along with interest and penalty.

JUDGEMENT

- The Hon'ble Tribunal held that the present issue was no longer res-integra, in view of the decision of the Hon'ble Supreme Court in the case of **Commissioner of Service Tax v. Bhayana Builders (P) Ltd., [2018 (3) SCC 782 (SC)]**.
- It was held that in terms of Section 67 of the Finance Act, the amount charged by the supplier from the recipient for provision of services would only be included in the taxable value. It was held that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount'. This is simply because no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. As a result, the demand was set aside, and the appeal of the Appellant was allowed.

M/s Jodhpur Vidyut Vitram Nigam Limited
Levy of GST on supplies which are ancillary to the supply of electricity

FACTS OF THE CASE

- The Petitioner is a public sector undertaking which is engaged in the business of distribution and supply of electricity in Rajasthan. The Petitioner is not liable to pay GST on transmission or distribution of electricity in terms of Sl. No. 25 of Notification No. 12/2017-Central Tax (Rate) dated June 28, 2017 (**12/2017**).
- The Petitioner vide the writ petition has challenged the vires of Clause 4(1) of Circular dated March 1, 2018, which clarifies that certain services provided by DISCOMS (such as rental charges for metering equipment, application fees for releasing connection, testing fees for meters/transformers, labour charges for shifting of meters or service lines) are taxable under GST.

JUDGEMENT

- The Hon'ble High Court placed reliance on the decision of Gujarat High Court in **Torrent Power Ltd. v. Union of India, [2019-VIL-18-GUJ]**, and held that the services provided by the Petitioner are in the nature of composite supply. The principal supply being the supply or distribution of electricity, and other services (such as rental charges for metering equipment, application fees for releasing connection, testing fees for meters/transformers, etc.) are naturally bundled and provided in consonance with the principal supply.
- In case of composite supply, the entire transaction is leviable to GST at the rate applicable to the principal supply. It was held that since the principal supply i.e. distribution of electricity was exempt, the ancillary supplies would also not attract GST.
- It was held that bifurcating certain services from the entire bundle of services and treating them as taxable as per the Circular dated 1.3.2018 is not only arbitrary and unreasonable but also violative of provisions of Section 8 of the CGST Act. Therefore, the Hon'ble High Court struck down Clause 4.1 of the said Circular.

M/s Neptune Plastics
Carry forward of CENVAT Credit in GST TRAN-1

FACTS OF THE CASE

- The Petitioner had certain CENVAT Credit lying in balance on July 8, 2017, when GST was introduced in the State of Jammu and Kashmir. The Petitioner instead of carrying forward the said credit in their GST TRAN-1, availed the same in their GSTR-3B.
- The Petitioner had requested the Department to carry forward such credit in their TRAN-1, however, the Department did not consider such request as the non-filing of TRAN-1 was not due to technical glitches. As a result, the Petitioner had filed a writ before the Hon'ble High Court for submission of TRAN-1 for carry forward of credit.

JUDGEMENT

- The Hon'ble High Court observed that the Department had not disputed the eligibility or correctness of the CENVAT Credit of the Petitioner. Reliance was placed on the decision of **Adfert Technologies Pvt. Ltd. v. Union of India, [2019-VIL-537-P&H]**, and it was held that the petitioner cannot be deprived of the benefit of claiming the credit lying in their account, only on the basis of procedural or technical wrangles that one form TRAN-1 was not filled by the petitioner, particularly when the petitioner has reflected the said credit in its return GSTR-3B.
- In light of the above, the Department was directed to allow the Petitioner to submit their TRAN-1 either electronically or manually for carry forward of the balance CENVAT Credit.

Shri Pijush Banik v/s. Union of India & ors

Provisional assessment of perishable goods held up for verification under CAROTAR Rules, 2020

FACTS OF THE CASE

- The Assessee is an exporter/importer through the Land Custom Stations in Tripura and carries on business under name and style of M/s Jagannath Trading, Agartala. Assessee had imported soybean oil measuring 97,600 litres in 6100 cartons from Bangladesh through the Agartala Land Customs Station. At the time of entry, through the Land Customs Station along with Bill of Entry, the Assessee had submitted all other requisite import documents.
- The goods were directed to be warehoused without assessing the duty under Section 17 of the Customs Act, 1962 by the Revenue. Revenue initiated a verification regarding the Certificate of Origin produced by the petitioner for availing the concessional rate of customs duty.
- Petitioner vide the writ petition had challenged the principles of natural justice, claiming that reassessment could not have been denied for an indefinite period for such freely importable goods, particularly when the goods were of perishable nature.

JUDGEMENT

- The Hon'ble High Court found it apparent that when the verification was initiated, no record was available with Revenue nor any communication was made to Assessee that verification was being under Rule 6(1)(a) or Rule 6(1)(b) or Rule 6 (4)(c) of CAROTAR 2020 and hence, there was no reference to security (Bank Guarantee).
- It considers Assessee's contention that under CAROTAR, mere production of Certificate of Origin (as was treated sufficient under the Rules of 2006) is not adequate. It is required that the importer should possess information in support of the Certificate of Origin under Rule 4 of the CAROTAR, 2020, and that it has met all the required criteria of CAROTAR, 2020;
- Further, on the basis of communication between parties, it observes that the verification is on mis-declaration and the Assessee was not afforded any opportunity to meet the purported deficiency for which the clearance has been refused, whilst caveating that "No observation on the legality or regularity of the process of verification on merit is called for at this stage, considering that the verification is still inconclusive".
- The Hon'ble High Court thus directs release of goods on obtaining an indemnity bond, to be submitted by the assessee binding it to deposit the duty/differential duty.

M/s Seahorse Ship Agencies Pvt. Ltd vs. Union of India & Ors.

Refund of Dual Payment under Customs Act due to system failure

FACTS OF THE CASE

- The Petitioner is a shipping agent seeking an intervention from the Court, in order to obtain a refund for a payment made twice by them for certain 'light dues', to the Director General of Lighthouses and Lightships (DGLL).
- The agent contended that they made an online payment on the first attempt, but the web portal failed to generate a receipt and so the petitioner believed that the first payment made was not successful. The Petitioner manually paid the amount in the second attempt believing that the first online payment was not successful. On the following day, the Petitioner received a receipt confirming the online payment.
- The Petitioner had made duplicate payments in 2016 but efforts to recover the same were made in 2018 and so the DGLL refused to refund the amount, as it was beyond the period of limitation. Hence, the Petitioner filed a writ petition to recover the amount paid twice by them.

JUDGEMENT

- The Hon'ble High Court stated that *"Excess payment can occur when payment of Light Dues is made disproportionately disregarding the tonnage of the ship."*
- It held that the petitioner's payment was only a *dual or duplicate payment*, a result of the web portal's failure to generate a receipt when the payment was paid online. Therefore, it could not be subject to the limitation for applying for the recovery of excess payments.

RECENT APPELLATE ADVANCE RULINGS

M/s Meera Tubes Private Limited

Whether activity performed qualifies as manufacture or job for the purpose of GST

FACTS OF THE CASE

- The Applicant is engaged in fabricating tanks for Indian Oil Corporation Limited (**IOCL**). For the said specified service, IOCL has supplied steel plates on free of cost (**FOC**) basis. The Applicant also self-procures items and consumables in order to fabricate the tanks. The Applicant has classified the outward supply as that of goods (**steel tanks**) under HSN 7309 and charged GST @ 18%.
- The Applicant has sought the ruling on whether the activity performed by them is in the nature of supply of goods manufactured by them, or whether the activity falls under the ambit of job work. Job work services are classified under SAC 9988 and attract GST @18% upto September 30, 2019 and thereafter @12% w.e.f. October 1, 2019.

RULING

- The Hon'ble Authority for Advance Ruling (**AAR**) held that the activities performed by the Applicant on the steel plates supplied by IOCL on FOC, would amount to manufacture of goods. It was observed that the items and consumables supplied by the applicant for the activity, were quite substantial.
- It was held that the entire inputs were not provided by IOCL and the applicant procured substantial inputs for the said activity. Hence, the same would not qualify as job work services. There is a distinction with regard to manufacture and job work services under the GST Act. Hence, where the treatment or process performed by a person results in a distinct commodity, it would qualify as manufacture and would result in supply of goods and not job work services.
- It was held that a steel tank supplied by the applicant is a distinct commodity in name, character and use. The activity or process performed by the applicant on the steel plates provided by IOCL on FOC basis, results in a new commodity coming into existence. Hence, the same would qualify as manufacture, resulting in supply of goods being classified under HSN 7309, attract GST @ 18%.

M/s Dr. H B Govardhan

Levy of GST on health care and business promotion services

FACTS OF THE CASE

- The Applicant is a proprietary concern, registered under the provisions of the Goods and Services Tax Act, 2017. The applicant would provide two types of services, first, consultation services in diagnosis and treatment of illness to hospitals, laboratories and biobank companies and second, promotional services such as organizing collaborative projects between foreign company and clinical trial centres in India and business development activities for the foreign company.
- The Appellant made an application before Authority for Advance Ruling (**AAR**) to seek clarification on the applicability of GST on the supply of aforesaid services.

RULING

- In relation to the first supply i.e. consultation services in diagnosis and treatment of illness, it was held that the same would qualify as 'healthcare services' in terms of Paragraph 2(zg) read with Sl. No. 74 of Notification No. 12/2017. Further, the applicant was considered as a clinical establishment, as it is a place established to carry out diagnostic or investigative or treatment services of diseases. Hence, the said supply of services were exempt from the levy of GST as Notification No. 12/2017.
- In relation to the second supply i.e. business promotion services, it was held that such services are being provided by the applicant on behalf of the foreign company, as its agent and not on its own account. It was held that the applicant was acting as an intermediary for the foreign company, and hence, the aforesaid services would qualify as intermediary services.
- In the above context, it was held that the place of supply in case of intermediary services, is the location of the supplier, which in the present case was India. Since the place of supply was in India, such business promotion services would not qualify as export of services and would attract GST @ 18%, in terms of Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017.

NOTIFICATIONS/CIRCULARS

No	Reference	Particulars
1	Circular No. 03/2021-Customs dated February 03, 2021	<p>The said Circular was issued w.r.t systemic improvements regarding modification in the Bond (B-17) execution processs. The Circular clarifies the following:</p> <ul style="list-style-type: none"> ▪ CBIC clarifies that in case of B-17 bond (a single all-purpose bond) for EOU/STP/EHTPs in the capacity of Proprietorship or Partnership firm, surety cannot be given by Proprietor/Partner himself. ▪ Considering improper execution of B-17 Bond, resulting in loss of Government revenue, surety must be given by an independent legal entity other than the Proprietor/Partner of the concerned Proprietorship/Partnership EOU firm. ▪ Reference was made to clarification vide Circular No. 66/98- Customs dated September 15, 1998 to state that "A sole Proprietorship firm is not a legal entity, distinct from its proprietor. Hence, question of Proprietor himself standing as surety for his own Proprietorship firm does not arise." Circular nowhere recognizes a Proprietor standing as surety for his/her own Proprietorship EOU firm. ▪ Field formations to review all B-17 bonds executed in their respective jurisdictions.
2	Trade Notice No. 40/2020-21 dated February 04, 2021	<ul style="list-style-type: none"> ▪ DGFT as a part of IT revamp, introduces online module e-TRQ System for processing applications for the Tariff Rate Quota (TRQ) Scheme. ▪ It states that w.e.f February 08, 2021 onwards, all applicants seeking TRQ for imports are required to submit their application under 'e-Tariff Rate Quota' in the Import Management System, through importer's dashboard on the DGFT website; No paper copies of the TRQ Import license will be issued by DGFT w.e.f. February 8, 2021; Also, TRQ applications, which have already been submitted for FY 2021-22 and are yet to be processed, shall be migrated to the new system, for which no action is required by the applicant.

No	Reference	Particulars
3	Notification No. 58/2015-2020 dated February 12, 2021	<ul style="list-style-type: none"> ▪ The following amendments of Importer-Exporter Code (IEC) related provisions under Chapter-1 and Chapter-2 of Foreign Trade Policy, 2015-2020 have been made: <ul style="list-style-type: none"> – 1.11 e-IEC (Electronic-Importer Exporter Code) - IEC is mandatory for export/import from/to India as detailed in paragraph 2.05 of this Policy. DGFT issues Importer Exporter Code in electronic form (eIEC). Application for issuance of e-IEC can be made directly on the DGFT web portal (https://www.dgft.gov.in). – 2.05 Importer-Exporter Code (IEC)/(eIEC) - Application process for IEC and updation in IEC is completely online and IEC can be generated by the applicant as per the procedure detailed in the Handbook of Procedure. ▪ The following sub-paragraphs are inserted under para 2.05 of Chapter-2 of Foreign Trade Policy, 2015-2020 as under: <ul style="list-style-type: none"> – 2.05(d) - An IEC holder has to ensure that details in its IEC is updated electronically every year, during April-June period. In cases where there are no changes in IEC details, same also needs to be confirmed online. – 2.05(e) - An IEC shall be de-activated, if it is not updated within the prescribed time. An IEC so de-activated may be activated, on its successful updation. This would however be without prejudice to any other action taken for violation of any other provisions of the FTP. – 2.05(f) - An IEC may be also be flagged for scrutiny. IEC holder(s) are required to ensure that any risks flagged by the system are timely addressed; failing which the IEC shall be deactivated.



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