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tax scout

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Main Stories

Dear Readers,

We are delighted to present the latest issue of Tax Scout, our quarterly update on the recent developments in direct and indirect tax laws for the three months ending December 31, 2024.

Our cover story provides a detailed overview of the anti-abuse provisions contained in the tax treaties, analysing the various intricacies, while also discussing the recent judgments and developments at the global level.

This version of the Tax Scout also deals with other important developments and judicial precedents in taxation for this quarter.

We hope you find the newsletter informative and insightful. Please do send us your comments and feedback at cam.publications@cyrilshroff.com.

Regards,
CYRIL SHROFF

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Anti-abuse provisions in DTAAs

DTAAs are bilateral treaties between two countries designed to prevent the same income from being taxed twice, i.e: in the source country and in the country of residence of the taxpayer. These agreements aim to facilitate cross-border trade and investment by reducing tax barriers and providing clarity and certainty on tax matters.

However, with the rise in globalisation facilitating the movement of capital and investments, it has provided opportunities for not only legitimate treaty benefits, but also enabled unscrupulous entities to engage in treaty abuse practices and claim unintended tax benefits. The complexity involved in executing such unlawful activities significantly complicates the job of lawmakers. Certain entities and individuals often engage in 'treaty shopping' or exploit loopholes in DTAAs to artificially route investments through jurisdictions that offer favourable tax treatments.

To counteract these challenges, countries have been increasingly incorporating anti-abuse measures, such as place of effective management (**POEM**), limitation of benefits (**LOB**) and principal purpose test (**PPT**), etc., into their tax treaties to ensure the benefits are reserved for intended beneficiaries only.

The POEM provision ensures that the concerned person is regarded as the tax resident of such jurisdiction from where its effective decision takes place and not from where it was intended to take place. The LOB provision consists of a series of objective tests designed to determine whether an entity qualifies for treaty benefits. These tests are based on attributes such as legal structure, ownership, and activities of the entity, ensuring a tangible link between the entity and its jurisdiction of residence. The PPT rule is a subjective anti-abuse provision designed to deny treaty benefits if it is reasonable to conclude, based on all relevant facts and circumstances, that obtaining such benefits was one of the principal purposes of a given arrangement or transaction.

These anti-abuse provisions have been incorporated over time, both at a bilateral and multilateral level. The OECD's Base Erosion and Profit Shifting (**BEPS**) project introduced a more stringent approach to the tax treaty framework, which was aimed at curbing tax avoidance. BEPS Action Plan 6 specifically provided new anti-abuse provisions to be integrated into both existing and future tax treaties.

Anti-abuse provisions at a multilateral level: A core BEPS concern

Treaty abuse, particularly in the form of treaty shopping, is a significant driver of BEPS-related concerns. This practice undermines the integrity and intent of tax treaties for several reasons:

- **Distortion of Bilateral Concessions:** Treaty benefits negotiated between two jurisdictions are exploited by tax residents of other jurisdictions, thereby disrupting the balance of mutual concessions.
- **Inadequate taxation or double Non-Taxation:** Income may either escape taxation altogether because of double non-taxation or face insufficient taxation, contrary to the intentions of the contracting states.
- **Disincentives for Treaty Formation:** The jurisdiction of the ultimate income beneficiary may find it less beneficial to enter into a tax treaty with the source jurisdiction, as residents of a third jurisdiction can indirectly access treaty benefits without providing reciprocal advantages.

The BEPS Action Plan 6 final report emphasised on global commitment to establish a minimum level of protection against treaty shopping. This entailed including an explicit statement of the shared intent to eliminate double taxation without fostering opportunities for tax evasion, avoidance, or treaty-shopping arrangements, thereby discouraging double non-taxation, too, in tax treaties. The report also specified that tax treaties should have any of the following rules in place as a de minimis threshold to curb treaty abuse:

i. PPT rule only;

ii. PPT supplemented with either a simplified or a detailed LOB provision; or

iii. Detailed LOB provision, supplemented by a mutually negotiated mechanism to deal with conduit arrangements, not already dealt with in tax treaties.

This flexible framework allowed countries to tailor their implementation while adhering to the overarching objective of curbing treaty abuse. India opted to adopt the PPT rule as well as the simplified LOB provision.

In addition to proposing the minimum threshold to be adopted by contracting states, the OECD also suggested Multilateral Instruments (**MLI**), which can enable jurisdictions to swiftly implement certain treaty-based recommendations from the BEPS package, including some of the minimum standards once the MLI is ratified. MLI contains both a PPT rule and a simplified LOB clause. However, MLI has not yet been ratified by every treaty partner and, therefore, India had to negotiate LOB and PPT clauses with the relevant contracting states separately, wherever considered appropriate.

In this rapidly evolving international environment, it has become important for MNCs to reassess their corporate structures, in line with the incorporation and amendment of LOB and PPT clauses. It is also important for India, as an OECD member, to renegotiate its tax treaties in a way that prevents both tax avoidance and encourages foreign investments simultaneously.

The purpose of this article is to enumerate the framework and the challenges that will crop up for multinational entities in navigating this complex and evolving landscape of anti-abuse provisions.

LOB provision

The LOB clause has already been incorporated into several tax treaties as an essential anti-abuse measure. For instance, the India-US DTAA contains a comprehensive LOB provision to prevent treaty shopping and ensure that benefits are granted only to entities with genuine economic ties to their country of residence. Similarly, the India-Mauritius and the India-Singapore DTAAs incorporated LOB clauses in 2017, which put restrictions on Mauritius and Singaporean entities from claiming capital gains exemption under their respective DTAAs. The OECD has also suggested a simplified LOB provision that could form a part of the MLI if the treaty partner countries concur.

Analysis of the India-US LOB clause

The India-US DTAA includes an LOB clause with three primary tests:

1. **Ownership/ Base Erosion Test:** At least 50% of the beneficial ownership must remain with residents of the contracting states or US citizens, and income should not substantially flow to residents of non-treaty states.

2. **Active Trade Test:** If the “Ownership” or “Base Erosion” test is not fulfilled, then the entity must actively conduct trade or business in the resident state, with income being derived through such trade or business.

3. **Stock Exchange Test:** If the aforementioned tests are not fulfilled, an entity can still qualify if its principal class of shares is substantially and regularly traded on the stock exchanges of the concerned country.

Analysis of the India-Mauritius LOB clause

The India-Mauritius DTAA targets treaty abuse by limiting the benefit arising to a tax resident from exemption of capital gains available under the DTAA.

1. **Primary Purpose Rule:** Treaty benefits are denied if the primary purpose of an arrangement is to exploit capital gains exemptions.

2. **Shell/Conduit Company Rule:** Companies with minimal operations or expenditures below INR 27,00,000 (or equivalent) are deemed shell entities and denied capital gains exemption.

3. **Exemption for Non-Shell Entities:** Companies listed on recognised stock exchanges or meeting expenditure thresholds are exempted from the applicability of this LOB provision.

The India-US LOB clause is highly structured, relying on ownership, business activity, and transparency requirements, while the India-Mauritius clause emphasises on specified objective criteria through expenditure thresholds, etc. The former offers comprehensive safeguards, but is qualitative in nature, while the latter provides for specific quantitative parameters that would be easier to investigate and also avoid any potential mis-interpretations considering the extent of litigations, especially concerning the entitlement of Mauritius based tax residents to claim treaty benefits.

The simplified LOB clause proposed under the OECD MLI is similar to the India-US LOB clause. According to the simplified LOB clause, an entity must first qualify to receive treaty benefits. If this condition is not met, then an active/ substantive business test condition must be met. The parameters for this are more objectively defined than the India-US LOB clause. If not an active or a substantive business test, then an equivalent beneficiary test is proposed if the entity owns a certain percentage of the beneficial interest of the transaction. Therefore, the simplified LOB clause broadly resembles the parameters defined in the India-US LOB clause. India proposes to adopt this with all treaty partners that have signed the MLI. However, countries like the US have not yet signed the MLI and countries like Mauritius have not agreed to negotiate the India-Mauritius DTAA terms basis the MLI. Therefore, the simplified LOB clause will be applicable to OECD countries that have agreed to adopt the MLI with India, otherwise, treaty-specific LOB clauses like the ones enumerated above will continue to apply. Most countries, such as France, Netherlands, Singapore, the UK, Luxembourg, Australia, New Zealand, and Sweden, have not opted for the LOB clause since it is not mandatory. India may also enter into bilateral negotiations with treaty partners to determine the wording and extent of the LOB clause.

The LOB clause for multinational entities is important because it informs them how they should structure their organisations to meet the threshold and activity requirements provided for in the clause. Ever since the incorporation of the LOB clause in Singapore and Mauritius, many entities have had to restructure their businesses or have been disqualified from availing the capital gains exemption. The simplified LOB clause also provides for many quantitative tests that organisations must ensure they are meeting, going forward.

Since LOB clause insertion is not a new development, there is existing jurisprudence on the interpretation of these clauses by the Indian judiciary, specifically in the context of Singapore and Mauritius treaties.

How has the Indian judiciary interpreted the LOB clause?

Prior to the introduction of the LOB clause in the India-Mauritius DTAA, a tax residency certificate (**TRC**) was considered sufficient proof of residency of a company in Mauritius as well as it's eligibility to claim treaty benefits. In *Azadi Bachao Andolan*,[1] the SC upheld the validity of the India-Mauritius tax treaty, confirming that a TRC was sufficient to claim treaty benefits, despite allegations of treaty shopping. The SC emphasised that the interpretation of a tax treaty must adhere strictly to its express provisions and intent and that in the absence of specific anti-abuse clauses, the provisions of the treaty as they stand must be respected.

The Hon'ble Delhi HC in its recent ruling in *Tiger Global*[2] has clarified India's judicial stance on Mauritius' LOB provisions and the grandfathering of this provision under the tax treaty. The Delhi HC emphasised that LOB provisions in tax treaties, such as the India-Mauritius tax treaty, play a definitive role in determining eligibility for treaty benefits and preventing abuse. These provisions represent mutually agreed upon objective standards between the contracting states, precluding domestic tax authorities from applying subjective or extraneous criteria to deny treaty benefits. The HC stated that the Revenue cannot arbitrarily challenge the validity of a transaction or deny treaty benefits without meeting exacting standards of proof. To do so, the Revenue must conclusively demonstrate that the transaction in question is a sham, constitutes a colourable device, involves fraud or illegality, or violates the treaty's object and purpose.

The ruling highlighted that the incorporation of LOB clause signals an intent by the contracting states to limit the role of domestic laws in the interpretation of tax treaties. The Revenue cannot impose additional requirements or barriers beyond what the treaty explicitly mandates. Doing so would effectively subordinate treaty provisions to domestic tax legislation, which is impermissible under international law. The Delhi HC further observed that the LOB and the TRC provisions collectively address treaty abuse concerns. Thus, unless there is clear evidence of fraud, illegality, or contravention of the treaty's purpose, denying treaty benefits would be unjustified. This interpretation reinforces the primacy of the negotiated treaty framework over unilateral domestic measures, ensuring legal certainty for cross-border transactions.

The Delhi HC upheld the grandfathering provisions under Article 13(3A) of the India-Mauritius tax treaty, which exempts capital gains from shares acquired before April 1, 2017, in one contracting state to the tax resident of the other contracting state from taxation. It noted that Article 13(3B), which prescribed differential tax rates for subsequent periods, did not extend to such grandfathered transactions, reinforcing the treaty's intent

[1] Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1
[2] Tiger Global International III Holdings [TS-6078-HC-2024(Delhi)-O]

to shield pre-2017 investments. The judgement thus reaffirmed that tax treaties, bolstered by LOB clauses and TRCs, take precedence over conflicting domestic tax provisions, ensuring certainty and protection for legitimate cross-border investments.

Similarly for Singapore, the Delhi HC's ruling in *Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd vs ACIT*[3] emphatically reaffirmed that Indian tax authorities cannot read additional conditions into the India-Singapore DTAA beyond its express provisions. This case is pending before the SC and currently the HC order has been stayed.

Therefore, apart from a few stray rulings of the AAR and the ITAT,[4] the HC and the SC have interpreted the LOB provision as an objective test that determines whether an entity can claim treaty benefits or not. If the LOB is applied, then the Courts have held that no extraneous or subjective measure can be used to assess an entity's eligibility for tax benefits under the DTAA.

So far, the implementation of the LOB clause has been effective in curbing treaty abuse. It has also been a blessing to the taxpayer as it enumerates certain well-defined standards that companies must adhere to. However, at the OECD level and the domestic level, the LOB is not considered sufficient to address tax avoidance.

PPT Rule

The OECD's PPT clause provides that:

> *A benefit under a treaty shall not be granted if it is reasonable to conclude, considering all relevant facts and circumstances, that obtaining the benefit was one of the principal purposes of any arrangement or transaction, unless granting the benefit is consistent with the object and purpose of the relevant provisions of the treaty.*

The PPT is a key feature of the MLI and is automatically applied to treaties between countries that have adopted the MLI, unless a specific protest has been made by either of the contracting parties. This means that the PPT rule is part of India's tax treaties with those treaty partners that have agreed to the MLI. For countries like Mauritius, which have not signed the MLI, India is negotiating the inclusion of a separate PPT clause through bilateral discussions. These negotiations aim to ensure that India's tax treaties, such as the India-Mauritius DTAA, adhere to the OECD's standards for preventing treaty abuse and tax avoidance. Even if the MLI has not been adopted, to comply with the BEPS Action Plan 6, the introduction of a PPT rule is mandatory.

The PPT operates as a general override clause, which grants it precedence over all treaty provisions. This means that even if a taxpayer satisfies the LOB criteria and qualifies for treaty benefits, the PPT can deny those benefits if it determines that obtaining the benefits was one of the principal purposes of the arrangement. This precedence reflects a policy choice to address treaty abuse comprehensively, ensuring that loopholes or narrowly scoped provisions cannot undermine anti-abuse objectives.

The PPT also supplements the LOB clause by addressing arrangements that may not ordinarily get captured by the latter. The PPT acts as a catch-all provision to prevent treaty abuse.

However, the standard for "one of the principal purposes" under the PPT raises significant concerns due to its low treaty abuse threshold. According to this standard, if a taxpayer engages in a transaction with two equally important objectives — one being tax-driven to obtain a treaty benefit, and the other being a legitimate commercial reason, such as expanding a business — the taxpayer may lose treaty benefits. This is because obtaining treaty benefits is considered one of the principal purposes. The low bar suggested by this formulation for treaty abuse could undermine the very intent of tax treaties, which are designed to foster cross-border trade and investment by eliminating double taxation.

The PPT clause is yet to be adjudicated on and its incorporation into the more contentious treaties like the India-Mauritius DTAA is still pending. The PPT rule raises alarm for taxpayers and multinational corporations because of the discretionary wording and scope of the provision. However, with the incorporation of the PPT rule, we are yet to see the judiciary navigate this discretionary power.

There is no clarity or direction on how multinational entities should structure their transactions in light of the PPT clause, as there are no specific quantitative tests that need to be adhered to. The interpretation and scope of the PPT clause is a matter that is pending adjudication by the Indian Courts and till the judiciary brings out certain standards into this provision, there is a lacuna on how multinational entities should interpret the PPT clause and move forward in their operations.

The anti-abuse provisions incorporated in the treaty must also be read with the domestic provisions in Indian law.

[3] Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd [TS-41-HC-2023(DEL)]
[4] AB Mauritius In Re, (2018) 402 ITR 311 (AAR)

How does domestic GAAR interact with these anti-abuse provisions?

The General Anti-Avoidance Rules (**GAAR**) were introduced to combat harmful tax practices and aggressive tax planning using complex structures. GAAR provisions define an "impermissible avoidance arrangement" as any arrangement where the main purpose is to obtain a tax benefit and such an arrangement (a) has resulted in the misuse of the Income-tax Act's provisions, either directly or indirectly, or (b) lacks or is judged to lack commercial substance in whole or in part, or (c) was made using any means or method that is typically not used for legitimate/ bona fide purposes, or (d) creates rights and obligations not normally created between parties dealing at arm's length. The GAAR is a domestic overarching anti-abuse provision that applies to all domestic and international transactions.

The PPT and GAAR overlap in scope, but differ in application and interpretation. The PPT is applied when one of the principal purposes of an arrangement is to obtain treaty benefits, while GAAR requires that the *main* purpose of the arrangement is to secure tax benefits. GAAR includes a deeming provision that presumes that the entire arrangement is aimed at obtaining tax benefits if any step or part of it has that purpose, unless the taxpayer proves otherwise. PPT, on the other hand, includes exceptions when the treaty's object aligns with granting such benefits.

Different countries have a differing approach in prioritising domestic GAAR over treaty provisions. In India, treaty provisions prevail if more beneficial, except when GAAR applies, allowing authorities to deny treaty benefits under GAAR, irrespective of PPT applicability. The CBDT clarified that GAAR and treaty anti-abuse provisions coexist and may apply concurrently, depending on case-specific facts. This creates uncertainty for taxpayers, with the practical interpretation of these provisions evolving over time. Further, considering that GAAR has also had limited adjudication, there is no reference point for determining how these anti-abuse provisions will interact with each other moving forward.

Conclusion

The evolution of anti-abuse provisions in tax treaties is exemplified by the India-Mauritius DTAA. Initially, the treaty's preamble focused on facilitating mutual trade and investment, reflecting a simple intent to foster economic ties. Over time, as treaty abuse and tax avoidance practices like treaty shopping became global concerns, provisions like the LOB clause were introduced to curb misuse. In 2024, the preamble itself has been amended to reflect a more robust anti-abuse stance, and the PPT

is being incorporated in line with the global standards outlined in the MLI.

With such drastic developments and the fact that the PPT and GAAR provisions have not been tested, it is valid to have concerns regarding their implementation and whether they will clamp down on mutual trade and investment.

This shift also represents a global trend towards heightened scrutiny of cross-border arrangements and a more aggressive stance against treaty abuse. MNCs must ensure that they comply with the LOB provisions of their specific treaties to be eligible for treaty benefits. Considering LOB clauses are fairly objective, this is a necessary and implementable step that companies must take.

The introduction of broader anti-abuse tools like the PPT and domestic GAAR adds another layer of complexity. These provisions operate with subjective criteria and grant significant discretion to tax authorities, making the outcome of disputes less predictable. Courts have yet to adjudicate the PPT extensively, leaving its practical application uncertain. As such, MNCs must carefully structure their transactions to withstand potential scrutiny under both specific treaty-based rules and overarching anti-abuse provisions.

The ongoing transformation of international tax treaties underscores the need for MNCs to prioritise compliance and adapt their strategies to align with the evolving landscape.

Further, there are valid concerns that implementing the PPT clause will hamper genuine international transactions that have been undertaken for tax planning rather than tax avoidance. Considering certainty is the bedrock of tax law, we are yet to see how these anti-abuse provisions play out. Meanwhile, both countries and companies should tread with caution!

CASE LAW UPDATES - DIRECT TAX

INTERNATIONAL TAX

Guarantee charges received by a foreign company from its Indian subsidiaries is not in the nature of 'interest'

Introduction

In ***Johnson Matthey Public Ltd. Company***,[1] the SC affirmed the Delhi HC's decision, wherein it was held that the guarantee charges received by a non-resident taxpayer from its Indian subsidiaries, for acting as guarantor with respect to credit facilities extended to the said Indian subsidiaries, should not be characterised as 'interest', but should be taxable as 'other income'.

Facts

Johnson Matthey Public Ltd. Company (**Assessee**), a UK resident, entered into an intra group agreement with its Indian subsidiaries, pursuant to which it extended guarantees to various overseas branches of foreign banks, in relation to credit facilities extended to its Indian subsidiaries. The Assessee received 'guarantee fee' from the Indian subsidiaries in lieu of the same.

In its return of income, the Assessee characterised the 'guarantee fee' amount as interest, thus, taxable under Article 12 of the India-UK DTAA. The IRA argued that 'guarantee fee' did not meet the definition of interest and should be taxed as 'other income' arising in India, under Article 23 of the India-UK DTAA. The ITAT also upheld the decision of the lower authorities and held that payments made under an independent contract of payment of 'guarantee fee' would not be covered within the ambit of 'interest' The ITAT further noted that since the subsidiaries actually availed the loans in India, which resulted in the 'guarantee fee' to the Assessee, the income should be regarded as having accrued to the Assessee in India. On appeal, the Delhi HC upheld the ITAT's decision. Aggrieved, the Assessee had preferred an appeal before the SC.

Issue

A. Whether the income derived from 'guarantee fee' can be said to arise or accrue in India?

B. Whether the 'guarantee fee' received by the Assessee from its Indian subsidiaries can be categorised as 'interest' under Article 12 of the India-UK DTAA?

Arguments

At the outset, the Assessee argued that the 'guarantee fee' did not accrue in India, since the risk would ultimately be borne by the Assessee outside India. It was argued that any coercive measures would be taken by financial institutions against the assets of the Assessee situated overseas, in the event the Indian subsidiaries were to default. For the same, the Assessee placed its reliance on ***Capgemini S.A. v. ADIT (International Taxation)***[2], wherein it was held that guarantee commission received by the French company did not accrue in India, since the guarantee was given by a French company to a French Bank, in France. Hence, the Assessee argued that the 'guarantee fee' was in the nature of interest under the India-UK DTAA, and, therefore, taxable at the concessional rate of 15%.

[1] Johnson Matthey Public Ltd. Company v. Commissioner of Income-tax, International Taxation, [2024] 167 taxmann.com 395 (SC).
[2] [2016] 72 taxmann.com 58/160 ITD 13 (Mum.).

On the other hand, the IRA argued that the income had accrued in India to the Assessee because in terms of Section 5(2) of the IT Act, it was received as a consequence and corollary to the loans availed by its Indian subsidiaries. The IRA placed reliance on the decision of the Hon'ble SC in ***E. D. Sassoon***[3], wherein it was clarified that accrual of income was not concerned with the actual receipt of income. The IRA further argued that 'guarantee fee' was not in the nature of interest, since no underlying debt was owed by the Indian subsidiaries to the Assessee, and the fee was levied by the Assessee for its service of providing guarantees.

Decision

The SC affirmed the Delhi HC decision, without giving any further analysis. With respect to the accrual of income in India, the Delhi HC, relying on a few landmark judgments of the Supreme Court[4], held that the expressions 'accrue' and 'arise' could be interpreted to mean a periodical monetary return being received. It was noted that once the right to receive income exists, it can be said to have 'arisen' or 'accrued', irrespective of whether it has been 'received' or not. Applying the aforesaid ratio to the facts, it was noted that the 'guarantee fee' received by the Assessee was inextricably connected to the extension of services by the Assessee in India to its Indian subsidiaries, i.e., offering guarantees. The Delhi HC had also observed that only the Indian subsidiaries and the Assessee were parties to the intra group agreement for guarantee, and the obligation to pay was incurred in India, periodically, in respect of services utilised in India. In view of the same, it was concluded that the 'guarantee fee 'accrued'' in India. By affirming the Delhi HC's decision, the SC has also approved the logic!

With respect to whether 'guarantee fee' qualifies as 'interest', the Delhi HC had held that the receipts were not in the nature of 'interest', since the 'guarantee fee' was neither received by the Assessee in respect of any debt owed by the Indian subsidiaries, nor was it derived from claims that the Assessee had against its Indian subsidiaries. The Delhi HC had observed that the Assessee was neither a party to the loan agreements (between the Indian subsidiaries and the lenders), nor was it privy to the contract. Therefore, since the Indian subsidiaries did not owe any debt to the Assessee, the 'guarantee fee' could not be said to be 'income derived from a debt or claim' or 'in respect of any moneys borrowed or debt incurred', as per the definition of 'interest' under Article 12 of the India-UK DTAA and Section 2(28A) of the IT Act, respectively. The SC appears to have endorsed this view.

Significant Takeaways

The SC judgment, affirming the Delhi HC's decision, conclusively settles the long-standing controversy regarding the character and taxability of guarantee fees payable in India. The consequence of this decision is that guarantee charges received by a non-resident company would be taxable in India as 'other income' under the respective DTAA and under the head 'income from other sources' under the IT Act, especially in the absence of the non-resident granting any loans to the Indian payor entity. The judgement is in line with the Rajasthan High Court's decision in ***Mansinghka Bros (P) Ltd. v. CIT*** [5], where it was held that the place of accrual of income is the place where right to receive that income arises, with the corresponding liability to make payment of the same there.

It is interesting to note that the Delhi HC has kept the issue of whether guarantee charges would constitute business income and fall within the ambit of Article 7 of the India-UK DTAA open, to be addressed in an appropriate case. This point will assume significance in cases where the applicable DTAA does not contain any provision for taxability of 'other income'.

> **"Guarantee charges payable to a non-lender should not be taxed as 'interest'."**

[3] E.D.Sassoon & Co. Ltd. v. CIT, (1954) 1 SCC 992.
[4] ED Sassoon & Co Ltd. v. CIT, [1954] 26 ITR 27 (SC); Seth Pushalal Mansinghka (P) Ltd. v. CIT, [1967] 66 ITR 159 (SC); M.K. Brothers Private Limited v. CIT, [1972] 86 ITR 38 (SC).
[5] [1984] 147 ITR 361 (Raj).

Make available clause is not satisfied under Article 12(4) of the India-US DTAA on sale of copyrighted article

Introduction

In ***DigiCert Inc v ACIT,*** the Delhi ITAT[6] held that technical support services provided in consequent to the sale of copyrighted article do not satisfy the requirements of a "make available" clause.

Facts

DigiCert Inc (**Assessee**) is a US-based company providing digital security. It had granted limited rights to Indian entities to distribute its copyrighted software. The software licenses were non-exclusive, non-transferable, and non-sublicensable and did not provide any modification rights to such entities.

The AO characterised such income as FTS, which was upheld by the DRP. Aggrieved, the Assessee approached the Delhi ITAT.

Issue

Whether income earned by the Assessee from licensing of software was taxable as FTS under the provisions of the India-US DTAA?

Arguments

The Assessee submitted that the income was not chargeable to tax under the India-US DTAA as it did not qualify as royalty or FTS. The software was sold as a copyrighted article, not as a transfer of copyright or provision of technical services. Further, only Level 1 customer support was provided to Indian customers, while Level 2 support was handled by the India associated entities of the licensor. This did not satisfy the make available clause as contemplated under Article 12(4) of the DTAA.

On the other hand, it was contended by the IRA that the licensing income qualified as FTS because technical support was provided, enabling Indian users to operate the software. They also highlighted a contract with an entity, which included provisions for technical support services.

Decision

The ITAT noted that the Assessee only sold a copyrighted article and not the copyright itself. The licensing rights granted were restrictive and did not allow any software modification. It relied on the Hon'ble Apex Court's decision in ***Engineering Analysis Centre of Excellence Private Limited,***[7] to hold that the transaction was a mere sale of software.

The ITAT held that there was no evidence to show that the Assessee's services satisfied the "make available" requirement. It held that merely assisting with technical issues or reporting bugs to the development team did not constitute transfer of technical knowledge or skills.

The ITAT further clarified that Level 1 services (basic customer queries) were provided by the Assessee, while Level 2 services were handled by the Indian AE of the licensor. It further noted that the contract with another entity for the provision of technical support services, as pointed out by the IRA, consisted negligible receipts and were not sufficient to classify the overall income as FTS.

Hence, it was held that income of the Assessee was not taxable as FTS under the provisions of the India-US DTAA.

Significant Takeaways

This ITAT decision reinforces the SC's view in *Engineering Analysis (supra)* regarding the sale of copyrighted articles. It reiterates that restricted software licenses granting no rights to modify or sublicense the software do not constitute royalty under the India-US DTAA. It also reiterates that technical support services consisting of assisting with bug fixes or customer queries without enabling users to independently utilise the technical knowledge does not meet the requirement of 'make available' provision to classify them as FTS.

This structured decision emphasises the need for careful analysis of licensing agreements and technical services under the DTAA provisions to determine taxability of the fees payable.

> **"Sale of copyrighted articles, along with technical support services does not meet the "make available" requirement under the FTS provision under the India-US DTAA."**

6 TS-851-ITAT-2024(DEL).
7 432 ITR 471.

Broken period interest is allowable as deduction

Introduction

In ***Bank of India v ACIT***,[8] the Bombay HC held that allowing broken period interest (**BPI**) as deduction is no longer *res integra*, as per the principles laid down by the SC, and hence, should be allowed.

Facts

Bank of India (**Assessee**) filed a writ petition before the Bombay HC against the assessment proceedings initiated against it under Section 148 of the IT Act in relation to the BPI on purchase of securities.

The brief facts of the case are that on September 28, 2021, the NFAC had passed an order making certain addition to the income of the Assessee. The final assessment order had deleted the addition relating to BPI on hold to maturity (**HTM**) securities that was there in the draft assessment order.

On August 1, 2024, after almost three years of such assessment order, the Assessee received a show cause notice recording that income relating to BPI on purchase of HTM securities had escaped assessment in the final assessment order.

The Assessee raised objections to such additions, citing favourable orders in its own cases as well as catena of other cases. However, such objections were rejected on the ground that the matter of BPI was res integra and pending before the SC.

Issue

Whether the Assessee is entitled to BPI deduction on purchase of HTM securities?

Arguments

The Petitioner submitted that the BPI issue is no longer res integra and has now been settled by the SC in ***Bank of Rajasthan Ltd v CIT***[9] and ***CIT v Citibank NA***,[10] and also by the Bombay HC in ***American Express International Banking Corporation v CIT***[11] and recently in ***HDFC v DCIT***.[12]

It was further submitted that the notice issued is without jurisdiction and is liable to be quashed on application of principles as laid down in ***PCIT v Hexaware Technologies***[13], as the jurisdictional AO cannot reopen assessment in the instant case.

The IRA did not dispute the legal position in relation to BPI.

[8] Bank of India v Assistant Commissioner of Income-tax,) Circle – 2(1)(1), Mumbai and Ors, WP No 4946 of 2024 (Bom).
[9] (2024) 167 taxmann.com 430 (SC).
[10] Civil Appeal No. 1549 of 2006 (SC).
[11] (2002) 258 ITR 601 (Bom.).
[12] Income Tax Appeal No. 58 of 2006 dated November 13, 2024 (Bom).
[13] SLP (C) No. 21188 of 2024.

Decision

The Bombay HC agreed with the legal position as submitted by the Petitioner and referred to the judgement in the case of ***HDFC v DCIT***. The HC also held the following:

It held that when banks purchase securities as stock in trade, the purchase price also includes component of interest for the broken period or BPI. The banks claim deduction for this BPI as a business expense.[14] In ***Vijaya Bank Ltd v ACIT***, the SC had held that BPI is part of the purchase consideration and is already debited to the Profit & Loss Account and therefore, the question of deduction does not arise.

Subsequently, however, the SC has distinguished the above case and has settled in a number of rulings that since securities are held as stock in trade, and the interest accruing thereon is assessable as business income, BPI paid by the banks should be allowed as deduction in the nature of a business expense.

The Bombay HC frowned upon the practice of certain IRA authorities. Despite an adverse decision by itself in ***PCIT v Hexaware Technologies***, which clearly laid down that the JAO would not have the jurisdiction to initiate proceedings under Section 148 and 148A of the IT Act and the IRA would be required to use the faceless mechanism. Thus, in the present case, the notice was issued without any jurisdiction.

It further observed that even though the case is pending before the SC, no stay has been granted against the applicability and operation of the judgement. In such a scenario, the decision of the jurisdictional HC in *Hexaware Technologies* must be followed. It held that till such decision is set aside, it shall be binding on the IRA and it expressed its displeasure for the lack of constitutional propriety shown by the IRA. The HC directed the PCIT to circulate this order to all JAOs and also directed for this order to be forwarded to the CBDT.

Significant Takeaways

This case puts to rest two significant issues. It strictly clarifies that the position regarding BPI is well settled in a catena of judgements and the same shall be allowed as deduction. This precedent shall have implications on all such future litigations on BPI.

Further, it reprimands AOs for not following the jurisdictional decision of the Bombay HC, restricting the jurisdiction of JAOs merely because it is pending before the SC, and leading to multiple disputes and litigation. In this judgement, it strictly lays down and directs AOs to follow the decision of the Bombay HC until a stay is granted on the same by the SC.

“Broken period interest is allowable as a business expense deduction.”

14 (1991) 187 ITR 541 (SC).

It is beyond AO's power to accept time-barred revised return claims

Introduction

In ***M/s Shriram Investments v CIT***,[15] the SC held that the AO cannot consider a claim if the revised returns were filed after the prescribed date.

Facts

M/s Shriram Investments (**Assessee**) filed its return of income for AY 1989-90 and subsequently filed a revised return on October 31, 1990. The Assessee paid the necessary taxes and received an intimation of income based on the return and revised return of income. However, after tax payment, the Assessee filed another revised return on October 29, 1991, to claim a deduction of deferred revenue expenditure (**Revised Return**). The AO did not consider the revised return. The Assessee preferred an appeal against this.

On appeal, the CIT(A) held that the revised return was filed after the prescribed timeline under Section 139(5) of the IT Act and hence, was barred by limitation. Aggrieved, the Assessee preferred an appeal before the ITAT, where the appeal was partly allowed and the case was remanded back to the AO, directing the AO to consider the revised return.

The IRA preferred an appeal to the Hon'ble Madras HC. The HC set aside the ITAT's order on the ground that the revised return was time-barred, and the claim of the Assessee cannot be considered. Aggrieved, the Assessee approached the SC.

Issue

Whether the AO has the power to consider a claim in a time-barred return?

Arguments

The Assessee, relying on ***Wipro Finance Ltd v CIT***,[16] submitted that the ITAT did not direct the AO to consider the revised return, but rightly directed the AO to consider the Assessee's claim of deduction of deferred revenue expenditure. It was further submitted that the Assessee was entitled under Section 139(5) of the IT Act to make a claim during the assessment proceedings, which was omitted in the return of income.

The IRA relied on ***Goetzge (India) Ltd v CIT***[17] and ***PCIT v Wipro Ltd***[18] to contend that there was no provision that gave an AO the jurisdiction or power to consider the Assessee's claim for deduction as the revised return in which the claim was made was time-barred under law.

Decision

The SC upheld the Madras HC's decision and held that the AO had no jurisdiction to consider a claim made in a revised return, filed after the time prescribed under Section 139(5) of the IT Act. It

[15] M/s Shriram Investments v The Commissioner of Income Tax III Chennai, CA No. 6274 of 2013 (SC).
[16] 2022 (137) taxmann.com 230 (SC).
[17] (2006) 157 Taxman 1 (SC).
[18] (2022) 446 ITR 1.

noted that Section 139(5) of the IT Act prescribes the time limit within which a revised return of income may be filed in case of any mistake or omission in the original return of income. If the revised return of income is not filed within this time limit, the AO cannot consider the same.

The SC distinguished the case of ***Wipro Finance Ltd v CIT***, and observed that the cited case dealt with ITAT's power under Section 254 of the IT Act to entertain a fresh claim and not the AO's power to consider a new claim, as per a revised return filed under Section 139. Moreover, in the case cited above, the ITAT had recorded a no objection given by the IRA to allow the assessee to bring in a fresh claim.

The SC also referred to ***Goetzge (India) Ltd v CIT*** and ***PCIT v Wipro Ltd,*** and reiterated that the AO cannot consider a claim made by the assessee unless it complies with the provisions of the IT Act. Hence, a claim made in a return barred by limitation under Section 139(5) cannot be entertained by the AO.

Basis the above, the SC observed that in the instant case, the ITAT did not exercise its power under Section 254 to consider a fresh claim under the time-barred revised return, rather it directed the AO to consider the same. However, such a direction shall be invalid as the AO has no such jurisdiction to consider claims that were filed under time-barred returns.

Significant Takeaways

Even though this decision pertains to AY 1989-90, it is still relevant as it strictly emphasises on the deadlines prescribed under Section 139(5) of the IT Act and clarifies that the AO does not have the jurisdiction to accept any taxpayer claims on returns of income filed after the statutory timelines. This judgement also clarifies the difference in powers and jurisdictions of the AO and ITAT to accept time-barred claims.

This judgement shall preclude assesses from making unnecessary delays and encourage them to file correct and timely returns. This SC judgement shall also have significant implications on future litigations in relation to disputes regarding time-barred returns of income as well as claims filed by the taxpayers.

> **“ Assessing Officer cannot accept income tax returns filed after the statutory time limits prescribed. ”**

JAO, FAO have concurrent jurisdiction; Procedural errors shall not vitiate faceless assessments

Introduction

In ***Mark Studio India Pvt Ltd v ITO***,[19] the Madras HC held that the JAO and FAO have concurrent jurisdiction as far as assessment, re-assessment or re-computation in terms of the provisions of Section 147 of the IT Act is concerned. However, the authority to issue notices under Section 148 of the IT Act lies exclusively with the JAO.

Facts

A writ petition was filed by Mark Studio India Pvt Ltd (Assessee) to quash the orders issued under Section 148A and the consequential notices issued under Section 148 of the IT Act on the ground that the notice issued under Section 148 by the JAO, for making assessment under Section 147 of the IT Act, E-Assessment of Income Escaping Assessment Scheme, 2022, and Faceless Jurisdiction of Income-tax Authorities Scheme, 2022 (Scheme), was without jurisdiction.

Issue

Whether JAO has jurisdiction to issue notice under faceless assessments?

Arguments

The Assessee submitted that post the introduction of the Scheme to conduct assessments under Section 147 in a faceless manner, the JAO has no role to play in the process and the notice under Section 148 should also be issued in a faceless manner. It was further submitted that the name of the JAO was mentioned in the notice, which was not as per the Scheme.

The Assessee also referred to proviso to Section 151A(2) of the IT Act to contend that the guidelines dated May 24, 2023, to determine jurisdiction of JAO and FAO, is beyond the scope of the section as it provides that "no direction shall be issued after the 31st day of March, 2022".

The IRA, on the other hand, strongly contended that the Scheme as well as Section 144B provisions explicitly provide that the JAO has jurisdiction to issue orders and notices under Section 148A and 148, respectively, under the process.

It was submitted that the process would still be faceless as the cases under the Scheme were selected by DIT (Systems) through Automated Allocation System, based on the risk management strategy and was forwarded to the JAO based on the PAN card jurisdiction and the said JAO has no role to play in case selection. Further, the notice was also sent to the registered email ID of the Assessee through the ITBA web portal.

After such a process is carried out, Section 144B prescribes that the JAO collect the reply and upload it on the ITBA, along with relevant documents, pursuant to which the DIT (Systems) would forward the case to the NFAC for issuance of notice under Section 143(2) or 142(1) of the IT Act and commencement of faceless proceedings would begin. Hence, the process would be carried out in a faceless manner.

Decision

Madras HC analysed the provisions of Section 144B of the IT Act and held that post its introduction, assessment, reassessment or re-computation under Section 143(3), 144 or 147 of the IT Act shall be made in a faceless manner.

It agreed with the submissions and held that the NFAC can only send a notice under Sections 143(2) or 142(1) of the IT Act. However, a notice under the above sections can be sent in cases where returns have been filed or no return has been filed by the assessee, after a receipt of notice under Section 148 of the IT Act. It further noted that Section 151A provides for prior approval from authorities for issuance of notice under Section 148 by the FAO.

The Board under Section 144B had issued guidelines for implementing the IT Act and clarified the jurisdictions of JAO and FAO by specifying that the JAO may issue a notice under Section 148 and then upload the relevant documents received from the assessee, pursuant to which it may be accessed by the NFAC. The NFAC shall assume jurisdiction from thereon.

The Madras HC also clarified that as per Section 151A, the Central Government may modify, alter or adapt the Scheme and is not restricted to issuing guidelines under Section 144B.

The Madras HC also discussed the meaning of the term "faceless manner". It noted that Section 144B of the IT Act defines faceless assessment to mean "assessment proceedings conducted electronically in an 'e-Proceeding' facility through the assessee's registered account in the designated portal". Hence, faceless manner means, sending notice electronically by way of

[19] Mark Studio India Pvt Ltd v ITO WP Nos 25223 & 25227 of 2024 (Mad).

"e-proceedings" to the assessee's registered account through the ITBA portal.

In the instant case, the notice under Section 148 was sent in an electronic manner. Hence, the notice was sent in a faceless manner, duly complying with the conditions of the IT Act and the Scheme.

As far as the contention of the Assessee regarding the name of the JAO being mentioned in the notice is concerned, the Madras HC agreed that the JAO's name should not have been mentioned. However, it held that it was merely a procedural error, which by itself should not vitiate the entire proceedings.

The Madras HC also distinguished the Bombay HC's decision relied on by the Assessee in ***Hexaware Technologies Ltd v ACIT***[20].

Accordingly, it was held that the JAO and the FAO shall have concurrent jurisdiction for assessment, re-assessment or re-computation under Section 147 of the IT Act.

Significant Takeaways

This judgement serves as yet another precedent that clarifies the jurisdictional issues involving various authorities such as the JAO and the FAO. While the SC is yet to take a view in *Hexaware Technologies*, this judgement has sufficiently harmonised the views of the previous precedents and clarified the jurisdictional issues between the JAO and FAO.

> **"JAO and FAO have concurrent jurisdictions under the faceless assessment scheme."**

[20] 2024 SCC OnLine Bom 1249.

Advance received in lieu of Annual Maintenance Contract is taxable in the year of receipt as such consideration received is non-refundable

Introduction

In ***CIT v M/s Johnson Lifts Pvt Ltd***,[21] the Hon'ble Madras HC recently held that when advance amount is received on account of an Annual Maintenance Contract (**AMC**), the same shall be construed as revenue of the recipient at the time of receipt and shall be taxable in the year of receipt as the advance is non-refundable and there is no uncertainty regarding the consideration in the AMC.

Facts

M/s Johnson Lifts Pvt Ltd (**Assessee**) treated the AMC amounts received from its customers for maintenance of its installed lifts as "income received in advance", i.e., as a current liability in its books of account and did not offer such income as taxable income for AY 2009-10. The AO, as affirmed by the CIT(A), did not agree with this treatment and had added the advance amount to the taxable income.

However, on appeal, the jurisdictional ITAT had ruled in favour of the Assessee, by observing that the Assessee follows the accrual basis of accounting, where the Assessee is bound to follow the matching principle of revenue and expenditure and record income and expenditure at the time they are earned/ incurred (and not when they are received or paid). Accordingly, the ITAT held that as the Assessee had taken advance for providing services over a particular period, it had rightly shown the advance for the unexpired period as liability.

Aggrieved, the IRA approached the Hon'ble Madras HC.

Issue

Under what circumstances is Section 276B of the IT Act, which deals with imprisonment on failure to pay the TDS, applicable?

What conditions must be met to prosecute a director for an offence under Section 278B of the IT Act?

Arguments

The IRA contended that under mercantile system of accounting, all the amount received was liable for taxation in the year of receipt. It submitted that the ITAT ought to have decided in favour of the IRA by considering the various clauses of the AMC, which did not have any provision of termination of contract or refund of the advance amount.

It further submitted that the ITAT had failed to note that the Assessee had already debited the expenditure in relation to the annual maintenance charges and had not provided any quantification of liability. It also submitted that the Assessee had paid sales tax and value added tax on the entire amount received under the AMC.

The Assessee relied on ***CIT v Coral Electronics (P) Limited***[22] to submit that the advance amount received should be treated as a current liability and the AO and CIT(A) had wrongly distinguished the same.

Decision

The Madras HC observed that as per company law, a company must maintain its books of accounts to present a true and fair position of its financial position. For this, a company may adopt either a cash system or a mercantile system of accounting, recognised under Section 145 of the IT Act. However, if the AO is of the opinion that the system of accounting leads to distortion of profits, he may substitute it and complete the assessment for the relevant accounting year using its best judgement.

The HC further stressed on application of Accounting Standard 9 (**AS9**) that discusses revenue recognition. It was observed that if accounting standards were adopted properly, the accounting income for payment of income tax would be available.

AS9 provides that revenue should be "measured by the charges made to customers or clients for goods supplied and services rendered to them and by the charges and rewards arising from the use of resources by them." It states that the amount of revenue arising from a transaction is usually determined under an agreement between the parties involved in the transaction.

[21] The Commissioner of Income Tax, Chennai v M/s Johnson Lifts Pvt Ltd, TCA No 54 of 2015 (Mad HC).
[22] 274 ITR 336 (Mad).

Hence, if the amount is received, the Assessee cannot stagger the recognition of income to a future date, merely because services shall be provided in the future.

Further, it was noted that para 12 of the AS 9 provides that "performance of services" should be regarded as being achieved "when no significant uncertainty exists regarding the amount of consideration that will be derived from rendering the service."

In the instant case, it was noted that given the business model of the Assessee, it has monopoly in providing maintenance services for its installed lifts. This would mean that it is highly unlikely that any customer would terminate the AMC. Further, there is no provision for refund of the advance in case of termination or in any other case. Thus, there is no uncertainty regarding the advance received.

The Madras HC distinguished the application of ***CIT v Coral Electronics (P) Limited*** by noting that the case did not discuss Section 145 of the IT Act and the accounting standards. Further, the case was factually distinguishable from the instant case because in the *Coral Electronics (supra)*, it was required to refund the advance amount.

Significant takeaway

It is pertinent to note that this judgement does not merely state that all advance amounts in connection with AMCs shall be taxable as revenue in the year of receipt. It discusses the application of accounting standards based on the nature of the contract and the surrounding circumstances. If as per the terms of a contract, it can be concluded that refund of an amount received is unlikely, then it shall be considered as revenue of the recipient and shall be taxable in the year of receipt, even though it relates to future services. Alternatively, it may be possible for the Assessee to make a provision for the expenses expected to be incurred till the expiry of the AMC, along with legitimate supporting documents.

" Non-refundable advance amount of consideration received shall be offered to tax as revenue in the year of its receipt. "

Receipt of co-marketing agreement resulting in surrender of patent & trademarks could be construed as capital receipts

Introduction

The Hon'ble Telangana HC, in ***Satiofi Healthcare***,[23] held that the payments received pursuant to a co-marketing agreement, for the surrender of certain rights, which resulted in the impairment of profit making apparatus of the taxpayer, should be treated as capital receipt.

Facts

Satiofi Healthcare (**Assessee**), engaged in the manufacturing and sale of Hepatitis-B vaccines under the trade name "*Shanvac-B*," entered into a co-marketing agreement (**Agreement**) with Pfizer Ltd. (**Pfizer**). As per the provisions of the Agreement, Pfizer was responsible for the promotion, marketing and sale of vaccines manufactured by the Assessee. Pursuant to the Agreement, the Assessee received a certain sum of money, which was recorded as capital receipt in its income tax return for the relevant period (**Payment**). However, the AO issued a notice under Section 148 of the IT Act and held that the Payment received by the Assessee was in the nature of revenue receipt and the Assessee ought to have paid taxes on the Payment.

Aggrieved by the AO's order, the Assessee unsuccessfully appealed before the CIT (Appeals). However, on further appeal to the ITAT, the ITAT accepted the Assessee's arguments and noted that the Payment received by the Assessee was paid in lieu of transfer of capital assets, waiver of rights of enduring nature, and acceptance of restrictive covenants. Thus, the ITAT held that the Payment was a capital receipt and could not be taxed as revenue receipt.

Aggrieved, the IRA appealed against the ITAT order before the Telangana HC.

Issue

Whether Payment received, pursuant to a co-marketing agreement, by the Assessee was in nature of a capital receipt and, therefore, not liable to be taxed under the IT Act?

Arguments

The IRA contended that the Agreement, pursuant to which the Payment was made to the Assessee, neither resulted in the relinquishment of any enduring benefit or trading right nor did it provide for any transfer of capital asset. Hence, the IRA argued that the Payment was not in nature of a capital receipt. The IRA further argued that the Agreement obligated the Assessee to provide vaccine in bulk quantities, as part of its ordinary course of business. Hence, the Payment should be treated as revenue receipts in the hands of the Assessee.

The Assessee, however, contended that as per the Agreement, it received the Payment for the transfer of technical knowledge and relinquishing its rights to any new vaccine, which may be developed by it in relation to Hepatitis-B. The Assessee also added that it had entered into a non-compete arrangement under the Agreement, which would result in loss of a profit-making apparatus. It was clarified that the Agreement clearly segregated payments for vaccines (stock-in-trade) and payments for surrendering rights under the restrictive covenants. Thus, it was contended that the Payment was in the nature of a capital receipt and should not be brought to tax under the IT Act.

The Assessee further relied on established legal principles and judgments, including the cases of ***Kettlewell Bullen & Co***.,[24] ***Shiv Raj Gupta***,[25] and ***Guffic Chem***,[26] and emphasised that the payments for restrictive covenants that result in the loss of a source of income should be treated as capital receipts.

Decision

On perusal of the Agreement, the Telangana HC noted that the Assessee had not only granted the right to market and sell the patented product under the brand name of "PFIZER", but had also relinquished its right to promote, market, distribute or sell any new product, as Pfizer had been granted the option to become the exclusive co-marketer of the future products. Further, the Agreement also obligated the Assessee to share all technical information, registration, progress of development, etc., of new products with Pfizer. Hence, the Payment received by the Assessee constituted a capital receipt and was not taxable.

The HC also observed that the Payment was not merely for operational collaboration, but also for negative or restrictive

23 Satiofi Healthcare (TS-848-HC-2024 (TEL)) / Income Tax Tribunal Appeal No.138 Of 2007 (Telangana High Court).
24 Kettlewell Bullen and Company Limited v. Commissioner of Income Tax, (1964) 53 ITR 261 (Supreme Court).
25 Shiv Raj Gupta v. Commissioner of Income Tax, Delhi-IV, (2021) 11 SCC 58 (Supreme Court).
26 Guffic Chem Pvt Ltd v. Commissioner of Income Tax, Belgaum & Anr, (2011) 332 ITR 602 (Supreme Court).

covenants that prevented the Assessee from working on any other similar medicines to cure Hepatitis B. The receipt of such consideration was in lieu of the rights that were relinquished under the Agreement, which impaired the profit-making apparatus of the company.

The HC relied upon the principles established in ***Kettlewell Bullen and Co***., wherein the Hon'ble SC had held that compensation impairing a business's trading structure constitutes a capital receipt. The reliance on authoritative precedents like ***Gillanders Arbuthnot & Co. Ltd.*** and ***Shiv Raj Gupta*** further supported the conclusion that payments tied to restrictive covenants, impairing business capabilities should be regarded as capital receipts and should not be liable to income tax in India.

Key Takeaways

The taxation of payments received towards negative covenants, which hamper the profit-making apparatus has been a contentious issue under the IT Act. The judicial precedents have highlighted that the language used in the agreements should be decisive and such conclusion should be decided on a case-to-case basis, to ascertain whether such payments should be regarded as "capital receipt" or "revenue receipt" for the purposes of the IT Act.

While this judgement is related to the income earned in AY 2000-01, it is pertinent to note that the Finance Act, 2002, has introduced a new Section 28(va) of the IT Act, which classifies payments received towards restrictive covenants in relation to any business or profession, or relinquishment of rights that are likely to assist in the manufacture or processing of goods or provision for services shall still be regarded as "business income". However, an exception was inserted via proviso clause (i) clarifying that, if such payment was chargeable to tax under the head "capital gains", it would not be taxed as business income under Section 28(va). Therefore, it is crucial for the taxpayer to critically analyse Section 28(va) of the IT Act to determine if any sum received towards negative covenant qualifies to be a revenue receipt, as such payments would be subjected to TDS under Section 194J of the IT Act. Therefore, it is necessary for the payer to assess the tax implications on such payments by carefully interpreting the statutory amendments and judicial precedents.

> **"Surrender of the rights resulting in impairment of profit-making apparatus of the company is a capital receipt."**

Bombay HC holds there is no deemed registration of charitable organisation, where the application is not disposed within the prescribed time

Introduction

The Bombay HC allowed the IRA appeal in ***Dr. Kasliwal Medical Care & Research Foundation***[27] and held that even if the application for registration is not disposed off within the prescribed time period, the same shall not be construed as deemed registration of the charitable organisation under Section 12AA of the IT Act.

Facts

Dr. Kasliwal Medical Care & Research Foundation, Solapur (**Assessee**), is a public trust running a paediatric hospital in Pune. It had filed an application on February 6, 2006, in Form 10A, requesting registration under Section 12A of the IT Act. As per the provisions of Section 12AA(2) of the IT Act, the application should be disposed of within six months from the end of the month in which the application is received. However, an order was passed on September 15, 2006, i.e. fifteen days after the prescribed time, refusing registration to the Assessee.

The Assessee filed an appeal before the ITAT, which allowed the appeal by referring to an earlier decision of the special bench of Delhi ITAT[28], and held that the rejection was done post the prescribed time period of six months from the end of the relevant month, which is not possible and hence, held that the registration was deemed to have been granted automatically on expiry of the specified time period. ITAT directed the CIT to grant the registration from April 1, 2005.

Aggrieved, the IRA filed an appeal before the Bombay HC.

Issue

Whether registration under Section 12AA(2) of the IT Act is deemed to be automatically granted upon expiry of prescribed time period of six months from the end of the month in which the application is received by the Commissioner?

Arguments

The IRA argued that the ITAT had failed to take into account the content and wording of Section 12AA(2) of the IT Act, as the section does not provide for deemed registration. The IRA submitted that when the legislature has refrained from expressly providing a deemed provision, it would be incorrect to include any deeming fiction. Reliance was placed on the decision of the full bench of the Allahabad HC in ***Muzafar Nagar Development Authority***[29], wherein it was held that the provision does not provide for such a legal fiction. The said case was then followed by the Allahabad HC in ***Harshit Foundation, Sehmalpur***[30], which while holding in favour of the IRA also rejected the earlier judgement of the division bench of Allahabad HC in ***Society for Promotion of Education, Adventure Sport and Conservation of Environment***[31] that had recognised deemed registration.

It was also submitted that since the appeal in *Harshit Foundation (supra)* was dismissed by the Hon'ble SC, the decision that there cannot be a deemed registration had attained finality.

On the other hand, the Assessee argued that in *Society for Promotion of Education, Adventure Sport and Conservation of Environment (supra)*, the SC, in an earlier decision, had confirmed the order of the Allahabad HC, which had decided in the favour of the charitable organisation, holding that if an application is not responded to within six months, it would be considered as deemed registered. Being a prior judgement, the Assessee argued that this judgment against the IRA should be a binding one and not the later one (Harshit Foundation), favouring the IRA.

The Assessee also argued that where there are two diametrically opposite SC views, i.e. *Harshit Foundation* and *Society for Promotion of Education*, the prior one should be made applicable. Alternatively, the Assessee prayed that the HC can also follow a decision that seems more correct. Reliance was placed on various case laws in support of these arguments.

The Assessee also relied on judgments of other HCs[32] on this matter, which followed the decision of the *Society for Promotion of Education*.

[27] The Commissioner of Income Tax-IV, Pune v Dr. Kasliwal Medical Care & Research Foundation [TS-783-HC-2024 (Bombay)]
[28] Bhagwad Swarup Shri Shri Devraha Baba Memorial Shri Hari Parmarth Dham Trust [2007] 17 SOT 281 (SB)(Del)
[29] Commissioner, Income Tax vs. Muzafar Nagar Development Authority [AIR 2015 Allahabad 76]
[30] Commissioner of Income Tax vs Harshit Foundation Sehmalpur [2022] 139 taxmann.com 55 (Allahabad)
[31] Society for Promotion of Education, Adventure Sport and Conservation of Environment vs Commissioner of Income Tax (2015) 372 ITR 222 (Allahabad)
[32] Commissioner of Income Tax vs TBI Education Trust [(2018) 7 TMI 1737 (Kerala)], Commissioner of Income Tax vs. Gettwell Health and Education Samiti [(2019) 419 ITR 353 (Rajasthan)], Sahitya Sadawart Samiti vs Commissioner of Income Tax [(2017) 396 ITR 46 (Rajasthan)], Director of Income Tax vs. St Ann's Education Society [(2020) 425 ITR 642 (Karnataka)]

Decision

The HC noted the various decisions that have discussed the course of action in case the HC faces two diametrically opposite decisions of the Hon'ble SC and whether it should accept the prior or the latter decision.

The HC also observed that the SLP filed by *Harshit Foundation, Sehlampur (supra)*, had been rejected by the SC citing its agreement with the decision of the full bench of the Allahabad HC in *Muzafar Nagar Development Authority (supra)*, which had already held that there cannot be a deemed registration on the expiry of the prescribed time period.

Basis the above, the HC noted that there are no mutually irreconcilable decisions in the instant case and held that Section 12AA(2) of the IT Act does not recognise any deeming fiction regarding automatic registration of a charitable organisation if the order is not passed within the prescribed time of six months. The legislature has carefully not provided for any deeming fiction and hence the same should be regarded.

Significant Takeaways

Section 12AA(2) of the IT Act prescribes that an order granting or refusing registration to a charitable organisation should be passed before the expiry of six months from the end of the month in which the application is filed before the Commissioner or Chief Commissioner of Income Tax. Having said that, the consequences of not processing such an application have not been provided in the legislature.

Whether delay in processing should automatically lead to deemed registration of the charitable organisation or not is an issue that has divided the judiciary. Some decisions have been held in favour of the IRA[33], while others have been held in favour of the charitable organisation[34].

However, any delay in passing such an order should not be an impediment as the tax officers need their own time in processing applications. Further, public interest is not being hampered in case of such delay and the order once passed, is applicable from the day on which registration was sought.

While it is generally advised to follow the timelines as given in the IT Act, the judiciary has generally taken a lenient view and considered the same as a directory principle and not a mandatory provision, and has agreed to provide extensions to charitable organisations as well as the IRA in genuine cases of delay, unless the delay leads to hampering the 'principles of natural justice'.

> **"No automatic registration of a charitable organisation if the application is not disposed within the prescribed time."**

[33] Commissioner of Income-tax, (Exemptions) v. Addor Foundation [2020] 117 taxmann.com 359 (Gujarat), Commissioner of Income-tax-I, Salem v. Sheela Christian Charitable Trust [2013] 32 taxmann.com 242 (Madras)

[34] Commissioner of Income Tax vs TBI Education Trust [(2018) 7 TMI 1737 (Kerala)], Commissioner of Income Tax vs. Gettwell Health and Education Samiti [(2019) 419 ITR 353 (Rajasthan)], Sahitya Sadawart Samiti vs Commissioner of Income Tax [(2017) 396 ITR 46 (Rajasthan)], Director of Income Tax vs. St Ann's Education Society [(2020) 425 ITR 642 (Karnataka)].

CASE LAW UPDATES - INDIRECT TAX

ROUTINE

Applicability of GST on expenses related to seconded employees

Introduction

A division bench of the Hon'ble Delhi HC in ***Metal One Corporation India Pvt. Ltd.* (Petitioner)**[35] confirmed that no GST is applicable where no invoice has been raised for seconded employees, the value of services is nil.

Facts

The Petitioner entered into individual employment contracts with the employees of its parent company, Metal One Corporation, Japan, who thereby became employees of the Petitioner. These seconded employees were engaged by the Petitioner for a limited duration before being repatriated to the parent company overseas. The parent company did not charge any amount from the Petitioner and accordingly, no invoice was raised.

The IRA issued SCN seeking GST on the salaries or fees paid to these seconded employees. The SCN was predicated on the Supreme Court's ruling in ***CCE & Service Tax v. Northern Operating Systems (P) Ltd.,***[36] which held that secondment of employees to an Indian entity could qualify as "manpower supply" service provided by the foreign group company, rendering it subject to service tax. Aggrieved, Metal One India filed a writ petition before the Delhi High Court.

Issue

Whether GST is payable on expenses related to seconded employees as supply of manpower service by the overseas group company to the Indian subsidiaries when no invoice is raised by the overseas group company on its Indian affiliate? as a tax?

Arguments

The IRA contended that the classification of taxpayers engaged in constructing immovable properties for leasing or renting, on par with those constructing immovable properties for sale, is justified. This classification is based on an intelligible differentia, namely, the creation of immovable property, which has a rational connection to the objectives of GST. The break in the tax chain resulting from such transactions provides the rationale for denying ITC.

They further argued that the availability of ITC is not a fundamental or constitutional right, but a statutory right. In the absence of statutory provisions granting ITC, a court cannot issue a mandamus directing its availability.

IRA argued that only Parliament possesses the authority to make any policy decisions and create classifications, particularly in tax legislations. The principle of equality does not preclude Parliament from classifying or treating a property, credit, profession, or event different for taxation purposes.

On the other hand, the Respondent contended that clauses (c) and (d) of sub-section (5) of Section 17 are in violation of Articles 14, 19(1)(g), and 300A of the Constitution of India. They argued that Section 17(5)(d) breaches Article 14 by equating taxpayers

[35] Metal One Corporation India Private Limited v. UOI, 2024 SCC OnLine Del 7499, W.P.(C) 14945/2023 & CM APPL. 59655/2023.

[36] C.C., C.E. & S.T. – Bangalore (Adjudication) etc. v. M/s Northern Operating Systems Pvt. Ltd. [Civil Appeal No. 2289-2293 of 2021].

engaged in the business of constructing immovable properties for renting, leasing, or letting out with those constructing immovable properties for sale, thereby denying ITC on expenditures incurred in constructing such immovable properties.

The IRA further contended that the term "plant or machinery" should be interpreted as "plant and machinery," as it is common to interchange "and" with "or" and vice versa in legal and statutory interpretations. While taxes on goods cannot be extended to immovable property, taxes on services can apply to the use of immovable properties for providing services. It was emphasised that, in the context of sales tax or VAT, the consistent judicial interpretation has been that such taxes apply to the sale of goods, not immovable properties. Consequently, malls, hotels, office buildings, and similar structures, being immovable properties, should not be subject to GST.

The Respondent also contended that the term "plant or machinery" is not defined under the CGST Act, and the explanation of "plant and machinery" provided in Section 17 does not apply to the term "plant or machinery". Given that the legislature deliberately used distinct terms in clauses (c) and (d) of Section 17(5), different interpretations must be ascribed to these expressions. The Respondents also asserted that the functionality or essentiality test should determine whether an item qualifies as a "plant". A plant is a tool or an apparatus employed by a business for its operations, encompassing movable and immovable goods and property, but excluding stock in trade. Structures like buildings or warehouses should be considered "plants" under Section 17(5)(d) if they function as essential tools for conducting business. However, if they merely serve as a setting for business activity, they would not qualify as "plants".

The Respondent also submitted that the phrase "on its own account", used in Section 17(5)(d), should be interpreted purposively rather than narrowly. The phrase should be understood to mean construction for personal use, rather than for commercial purposes. ITC should be disallowed only when goods and services are utilised for constructing immovable properties for personal use, such as office or factory buildings, where no subsequent GST is payable on sales, breaking the chain of taxability. Conversely, when the immovable property is used for further taxable supplies, such as renting or providing hotel accommodation, it should fall outside the scope of "on its own account".

The Respondent also contended that renting, leasing, or letting out immovable property constitutes a supply of service. Clause 2 of Schedule II to the CGST Act specifies that leasing or renting any building, including commercial, industrial, or residential complexes for business purposes, constitutes a supply of service. Clause 5(a) of Schedule II to the CGST Act confirms that renting an immovable property is a supply of service. Accordingly, ITC accrued from constructing immovable properties should be allowed to be offset against these taxable supplies.

Decision

The Delhi HC relied on Circular No. 210/4/2024-GST6 of the CBIC (**CBIC Circular**), which sought to clarify that if a related domestic entity does not issue an invoice for services provided by its foreign affiliate, the value of such services would be considered nil. This nil value will be subject to treatment as the market value under the second proviso to Rule 28 of the CGST Rules. The HC determined that if the value of services is considered nil, no further GST implications would occur.

The HC emphasised that IRA is bound by the aforesaid circular and the HC cannot comment on the correctness of its position. The HC did not comment whether the CBIC Circular was consistent with the statutory provisions or contrary to the intent of the second proviso to Rule 28 of CGST Rules.

The court emphasised on the fact that since no invoice was generated, and in light of the clear terms of the CBIC Circular, the value of the service rendered would have to be treated as 'nil'.

Significant Takeaway

Even though the CBIC Circular has clarified the issue of taxability, the possibility of its rescindment cannot be ruled out. The IRA could review this position and accordingly the CBIC may withdraw or revise the Circular to ensure that the IRA's interests are not compromised.

For now, taxpayers may leverage the CBIC Circular, provided their case falls in the circumstances elucidated in the same. However, it is important for them to ensure that their internal documentation is robust enough to satisfy the IRA's requirements, if and when they are required to present their perspective.

> **"In the absence of invoice, the value of the service rendered would have to be treated as 'nil'."**

Availability of ITC in relation to a building would depend on functionality test

Introduction

The landmark SC decision in ***Safari Retreats Private Ltd.***[37] serves as a significant development for taxpayers concerning the availability of ITC on construction costs. The SC has meticulously examined the definitions and interpretations of "plant and machinery" as well as "plant or machinery" to evaluate taxpayers' eligibility to claim ITC.

Facts

Safari Retreats Private Ltd. (**Respondent**) builds shopping malls to lease the premises to various tenants. The construction process requires substantial quantities of raw material, inputs, and services, including cement, sand, steel, aluminium, wires, plywood, paint, lifts, escalators, air-conditioning systems, electrical equipment, transformers, building automation systems, as well as consultancy, architectural, legal, engineering, and other professional services. The Respondent also employed a specialised team of international designers for mall construction. All goods and services utilised in the construction were subject to GST.

The Respondent's activity of leasing units within the mall attracted GST on rental income, categorised as supply of services under the CGST Act. The Respondent sought to offset the accumulated ITC against the GST payable on its rental income. However, upon approaching the relevant authorities, the Respondent was advised to deposit the GST on rent without offsetting ITC due to restrictions under Section 17(5)(d) of the CGST Act.

Subsequently, the Respondent filed a writ petition before the Orissa HC, seeking a declaration that Section 17(5)(d) of the CGST Act and the corresponding provisions of the Orissa SGST Act were inapplicable to constructing immovable property intended for leasing. Alternatively, the respondent sought a declaration that if Section 17(5)(d) were found applicable, it should be deemed violative of Articles 14 and 19(1)(g) of the Constitution of India. In its judgment dated April 17, 2019, the HC ruled that Section 17(5)(d) of the CGST Act must be interpreted in a manner that aligns with the fundamental objective of ITC, which is to benefit the taxpayer. The Court held that requiring the respondent to pay GST on rental income from the mall, without allowing ITC on GST paid for constructing the mall would defeat the purpose of the GST legislations. The narrow interpretation of Section 17(5)(d) by the tax authorities was deemed contrary to the Act's intent. Aggrieved, the IRA challenged the decision before the SC.

Issue

1. Whether Section 17(5)(c) and (d) of the CGST Act, which deals with restriction on availment of credit, pertaining to works contract services or any other goods or services when supplied for construction of an immovable property (other than plant and machinery), is unconstitutional?
2. Does the definition of "plant and machinery" provided in the explanation to Section 17 of the CGST Act extend to the term "plant or machinery" as used in clause (d) of sub-section (5) of Section 17?
3. If the explanation is found inapplicable to "plant or machinery," how should the term "plant" be interpreted?

Arguments

The IRA contended that the classification of taxpayers engaged in constructing immovable properties for leasing or renting, on par with those constructing immovable properties for sale, is justified. This classification is based on an intelligible differentia, namely, the creation of immovable property, which has a rational connection to the objectives of GST. The break in the tax chain resulting from such transactions provides the rationale for denying ITC.

They further argued that the availability of ITC is not a fundamental or constitutional right but a statutory right. In the absence of statutory provisions granting ITC, a court cannot issue a mandamus directing its availability.

IRA argued that only Parliament possesses the authority to make any policy decisions and create classifications particularly in tax legislations. The principle of equality does not preclude the Parliament to classify or treat a property, credit, professions, or events different for taxation purposes.

On the other hand, the Respondent contended that clauses (c) and (d) of sub-section (5) of Section 17 are in violation of Articles 14, 19(1)(g), and 300A of the Constitution of India. They argued that Section 17(5)(d) breaches Article 14 by equating taxpayers engaged in the business of constructing immovable properties for renting, leasing, or letting out with those constructing immovable properties for sale, thereby denying ITC for expenditures incurred in constructing such immovable properties.

[37] Chief Commissioner of Central Goods and Service Tax & Ors. vs Safari Retreats Private Ltd. & Ors. - 2024 (10) TMI 286 - SUPREME COURT.

The IRA further contended that the term "plant or machinery" should be interpreted as "plant and machinery," as it is common to interchange "and" with "or" and vice versa in legal and statutory interpretations. While taxes on goods cannot be extended to immovable property, taxes on services can apply to the use of immovable properties for providing services. It was emphasized that, in the context of sales tax or VAT, the consistent judicial interpretation has been that such taxes apply to the sale of goods, not immovable properties. Consequently, malls, hotels, office buildings, and similar structures, being immovable properties, should not be subject to GST.

The Respondent also contended that the term "plant or machinery" is not defined under the CGST Act, and the explanation of "plant and machinery" provided in Section 17 does not apply to the term "plant or machinery." Given that the legislature deliberately used distinct terms in clauses (c) and (d) of Section 17(5), different interpretations must be ascribed to these expressions. The Respondents also asserted that the functionality or essentiality test should determine whether an item qualifies as a "plant." A plant is a tool or an apparatus employed by a business for its operations, encompassing movable and immovable goods and property but excluding stock in trade. Structures like buildings or warehouses should be considered "plants" under Section 17(5)(d) if they function as essential tools for conducting business. However, if they merely serve as a setting for business activities, they would not qualify as "plants."

The Respondent also submitted that the phrase "on its own account" used in Section 17(5)(d) should be interpreted purposively rather than narrowly. The phrase should be understood to mean construction for personal use, rather than for commercial purposes. ITC should be disallowed only when goods and services are utilized for constructing immovable properties for personal use, such as office or factory buildings, where no subsequent GST is payable on sales, breaking the chain of taxability. Conversely, when the immovable property is used for further taxable supplies, such as renting or providing hotel accommodation, it should fall outside the scope of "on its own account."

The Respondent also contended that renting, leasing, or letting out immovable property constitutes a supply of service. Clause 2 of Schedule II to the CGST Act specifies that leasing or renting any building, including commercial, industrial, or residential complexes for business purposes, constitutes a supply of service. Clause 5(a) of Schedule II to the CGST Act confirms that renting immovable property is a supply of service. Accordingly, ITC accrued from constructing immovable properties should be allowed to offset against these taxable supplies.

Decision

The Hon'ble SC set aside the judgment of the High Court of Orissa and remanded the matter with a direction to determine whether the shopping mall in question satisfies the functionality test to qualify as a "plant" under clause (d) of Section 17(5) of the CGST Act.

The SC after a detailed analysis concluded that the term "plant or machinery" should not be interpreted as having the same meaning as "plant and machinery", as defined in the explanation to Section 17. The legislature intentionally used a distinct expression, and a different interpretation must be applied. The word "plant" in "plant or machinery" must be interpreted, using the functionality test, which examines whether the building is essential for conducting the registered person's business activities. The classification of a mall, warehouse, or other buildings (excluding hotels or cinema theatres) as a "plant" under Section 17(5)(d) depends on factual analysis. This classification requires an examination of the business of the registered person and the role the building plays in that business. If constructing the building is essential for supplying services, such as renting, leasing, or other activities covered under clauses (2) and (5) of Schedule II of the CGST Act, the building may qualify as a "plant". In such cases, the building would be excluded from the restriction imposed by clause (d) of Section 17(5). The determination of whether a building qualifies as a "plant" should be made on a case-by-case basis, using the functionality test, as outlined in the Court's reasoning.

The SC also upheld the vires of clauses (c) and (d) of Section 17(5) of the CGST Act, as the Government has the power to make executive decisions and disallow ITC for particular categories.

Significant Takeaways

The Safari Retreats' judgment has provided significant relief to not only real estate developers, but also stakeholders in industries engaged in constructing ports, jetties, warehouses, and other infrastructure projects. While the SC upheld the constitutional validity of Sections 17(5)(c) and 17(5)(d) of the CGST Act, it explicitly rejected the IRA's arguments regarding the interpretation of the term "plant or machinery". The ruling offers a beacon of hope, suggesting that buildings such as malls may be classified as "plant", with eligibility for ITC to be determined on a case-by-case basis, using the functionality test.

Although the judgement primarily pertains to malls, its application to other sectors, such as ports, airports, factories, and warehouses, remains untested and open to interpretation by the relevant authorities. Additionally, several unresolved

questions require clarity, including whether ITC on works contract services will be available under Section 17(5)(d) for buildings constructed for leasing purposes.

However, recently, the GST Council, during its 55th meeting in Jaisalmer, proposed a retrospective amendment to replace the phrase "plant or machinery" with "plant and machinery" in the GST law to restrict ITC. An amendment to the effect will overturn the SC's decision in the present case. The actual impact would depend on how the amendment is introduced. There is a high possibility that the taxpayers may challenge such retrospective amendment.

> **"The expression "plant or machinery" used in Section 17(5)(d) cannot be given the same meaning as the expression "plant and machinery", defined by the explanation to Section 17."**

Telecom Towers are movable property and the taxpayer can avail CENVAT Credit for it

Introduction

In ***M/s Bharti Airtel Ltd.*** (**Appellant**),[38] the SC allowed the Appellant to avail CENVAT Credit on mobile towers and peripherals such as prefabricated buildings (**PFBs**) procured by it and installed at various locations in India. Hence, the credit was eligible to be availed for the purpose of discharging service tax on their output services.

Facts

The Appellant is a telecommunication service provider, and operates its transmission network through cell towers, base transceiver station (**BTS**), along with accompanying network equipment and structures like PFBs, electricity generating sets, battery back-up and stabilisers for uninterrupted power supply at various locations to ensure seamless telecom services to its subscribers. At these sites, certain equipment were mounted on towers, while others were housed in prefabricated shelters to shield them from the environment. The adjudicating officer denied the taxpayer's claim for CENVAT Credit, leading to the present dispute.

The Bombay High Court, in ***Bharti Airtel Limited v. The Commissioner of Central Excise, Pune*** (Central Excise Appeal Nos. 73 of 2012 and 119 of 2012), ruled against mobile service providers (**MSPs**), holding that they were not entitled to claim CENVAT Credit for Telecom Towers, thereby supporting the IRA's stance. In contrast, the Delhi High Court, in ***Vodafone Mobile Services Limited v. CST, Delhi*** (2019 [(27) G.S.T.L. 481 (Del.)]), ruled in favour of MSPs, allowing CENVAT Credit benefit.

These contradictory rulings were challenged by the aggrieved parties before the SC. In the instant case, the Appellant approached the SC.

Issue

Whether MSPs, who pay excise duties on goods procured for the erection of Telecom Towers, are entitled to avail CENVAT Credit?

Arguments

The Appellant contended that Rule 3(1) of the CCR enables a provider of taxable service to claim CENVAT credit on duties paid on any "capital goods" or "input" received in the premises of the service provider. Towers and their parts qualified as "capital goods" and "inputs", making them eligible for CENVAT credit against the output services provided by them. The Appellant further contended that there was no interruption in the credit chain between the availability and utilisation of CENVAT Credit. The Telecom Towers were purchased in completely knocked down (**CKD**) condition and not merely as angles, channels, beams, or bars. It was also argued that there was no loss of identity of the goods, nor did a new entity with a distinct character, name, or use emerge. The assembled towers and goods retained their original identity and continued to be movable property.

On the other hand, the IRA argued that Telecom Towers and parts, once installed, become immovable property as they are fixed to the earth. Consequently, they cannot be regarded as "goods" and, therefore, cannot qualify as "capital goods". In this regard, the IRA also contended that Telecom Towers in CKD/ semi-knocked-down (**SKD**) condition are classifiable under Chapter Heading 7308 of the CET Act. However, Chapter Heading 7308 was not specifically included in the definition of inputs or capital goods for the purposes of the CCR. Since towers are not listed as "capital goods" under CCR, duties paid on their parts were not eligible for CENVAT Credit. The IRA also argued that availment of CENVAT Credit for inputs was allowed only to manufacturers and not service providers.

Decision

The SC analysed Rule 3(1) of the CCR and held that it permits a provider of taxable services to claim credit for duties paid on "capital goods" or "inputs" received at their premises. Accordingly, if Telecom Towers, which include PFBs and other parts, qualify as either "capital goods" or "inputs" received at the premises of the mobile service provider, the provider would be entitled to claim CENVAT credit. The SC referred to the definition of goods under multiple legislations. It also highlighted that to determine whether a property is movable or immovable, several principles and tests have been evolved in the past. The determination cannot be made using a single test, but will involve an assessment of various criteria, including:

- *Nature of Annexation:* The extent and manner of attachment to the ground.
- *Object of Annexation:* Whether the attachment enhances the land's value or facilitates the item's use?

[38] M/S Bharti Airtel Ltd. v. the Commissioner of Central Excise, Pune, 2024 (11) TMI 1042 - SUPREME COURT.

- *Intention of the Parties:* The purpose of the attachment, whether permanent or temporary.
- *Functionality Test:* Whether the attachment improves the operational efficiency of the item?
- Permanency Test: Whether the item can be dismantled and relocated without damage?
- Marketability Test: Whether the item, even when affixed, can be removed and sold in the market?

Basis the above, the SC emphasised that mere attachment of certain items to the earth does not automatically render them immovable property. If such attachment is not intended to be permanent, but serves to support goods and enhance their functionality and durability, and if these goods can be dismantled without damage or alteration to their nature, allowing them to be marketed and sold, they cannot be classified as immovable property.

Applying these principles, the Court observed that Telecom Towers cannot be relocated without dismantling. However, Telecom Towers can be purchased in a CKD or SKD condition and can subsequently be assembled and installed at the site. If relocation is required, these towers can be dismantled, returned to CKD or SKD condition, and reassembled at a new site without sustaining any damage.

The Court concluded that while relocation might involve dismantling, the essential mobility and marketability of the towers are preserved. Consequently, Telecom Towers retain characteristics of movable property despite being temporarily affixed to the ground. Therefore, it was held that Telecom Towers and PFBs exhibit the characteristics of a movable property.

The SC then analysed the utility of various components, including BTS equipment, diesel generators, and associated apparatus that provide an alternative and uninterrupted power supply to the antenna and BTS. The PFBs accommodate electric cables and other equipment necessary for the functioning of the antenna, BTS, and the generator. By supporting and enhancing the efficiency of the mobile antenna and BTS, the components of Telecom Towers serve as accessories to these components. As such, they qualify as "capital goods". Hence, the SC concluded that the Appellant was eligible for CENVAT credit benefits.

Significant Takeaways

The judgement in *Bharti Airtel* has significant impact on availability of ITC in the current GST regime as well. GST legislation provides for restriction on availment of credit pertaining to works contract services or any other goods or services when supplied for the construction of an immovable property (other than plant and machinery). The term plant and machinery excluded telecom towers from its ambit. Hence, there was ambiguity regarding the eligibility of ITC even under the GST regime. This decision is likely to significantly impact entitlement of ITC in the current GST regime since telecom companies may now explore the opportunity to avail ITC for prior periods as well, since the SC has made is clear that telecom towers are moveable properties.

More recently, the Delhi HC has held that telecommunication towers would not fall within the ambit of Section 17(5)(d) of the CGST Act by relying on the SC's verdict in Bharti Airtel. The HC affirmed that the IRA's plea to categorise telecommunication towers as immovable property is wholly unsustainable. The HC stated that the mere fact of exclusion of telecommunication towers cannot lead to the conclusion that the statute considered telecommunication towers to be immovable property and hence, their claim of ITC should be allowed.

This decision is expected to play a significant role in planning of indirect tax implications of telecommunication service players and other interested parties who are engaged in similar, but unrelated businesses.

> **"MSPs are entitled to claim ITC on telecommunication towers."**

DRI has the power to issue SCN

Introduction

The larger bench of the SC has reversed its earlier decision, affirming the jurisdiction of the Directorate of Revenue Intelligence (**DRI**) to issue show cause notices (**SCNs**) under Section 28 of the Customs Act for recovery of short payment of customs duty.[39]

Facts

The SC in ***Canon India***, *vide* its judgement dated March 9, 2021, dealt with the authority of DRI officers to issue SCN under Section 28 of the Customs Act for recovery of short payment of customs duty. The SC held that a DRI officer does not have the authority to initiate proceedings through SCN issuances, since such an officer was not the person to clear the goods initially. The SC followed the reasoning established in Sayed Ali's case,[40] wherein the SC emphasised that only customs officers who conducted the original assessment under Section 17 could initiate SCN proceedings under Section 28. The SC further noted that the use of the definite article 'the' in the phrase "the proper officer" was intended to specify the officer who performed the initial assessment, thereby restricting SCN authority to the same officer. Additionally, the SC held that Notification No. 40/2012, dated July 6, 2011, which designated DRI officers as proper officers, was issued under Section 2(34) of the Customs Act, rather than Section 6 of the Customs Act and thus did not confer jurisdiction upon DRI officers to issue SCNs under Section 28 of the Customs Act.

Aggrieved, IRA filed a review petition. Further, to address the deficiencies identified in the judgement, amendments were introduced through the Finance Act, 2022. These amendments sought to validate past actions and rectify the issues highlighted in the 2021 ruling. Specifically, the amendments revised Sections 2(34) and 5 of the Customs Act to empower the CBIC to allocate functions to officers. Section 3 of the Customs Act was amended to include DRI officers, and a new Section 110AA was introduced, stipulating that cases must be transferred to the officer responsible for the original decision, following an investigation. Additionally, Section 97 of the Finance Act, 2022, retroactively provided that the amended Sections 2, 3, and 5 would be deemed effective at all material times as though they had been in force from the outset.

Issue

i) Whether DRI officers have the power to issue SCN under Section 28 of the Customs Act for recovery of short payment of customs duty?

ii) Whether the enactment of Section 28(11) through the Validation Act of 2011, which retroactively validates showcause notices issued under Section 28 from July 6, 2011, is discriminatory and arbitrary for failing to address the deficiencies highlighted in Sayed Ali, thereby violating Article 14 of the Constitution of India?

iii) Whether Section 97 of the Finance Act, 2022, which retroactively validates showcause notices, effective from April 1, 2023, is manifestly arbitrary and, therefore, in contravention of Article 14 of the Constitution of India?

Arguments

The IRA argued that the SC judgment warrants review as it incorrectly proceeded on the presumption that DRI officers are not customs officers and, therefore, require authorisation under Section 6 of the Customs Act to be assigned functions of a proper officer. Referring to Sections 3, 4, and 5 of the Customs Act, it was asserted that DRI officers fall within the category of 'class of officers' and as 'officers of customs' under the Customs Act. Consequently, CBC is authorised to assign powers and responsibilities to DRI officers in a manner consistent with other classes of customs officers.

IRA further contended that the judgment in *Sayed Ali* contains significant errors as the decision imposes a requirement that only a customs officer authorised to perform assessment or reassessment under Section 17 of the Customs Act can be designated as a proper officer under Section 28 of the Customs Act for issuing demands related to short levy, non-levy, or erroneous refunds. This restriction excludes other officers from being assigned the functions of a proper officer under Section 28.

The amendments introduced through the Finance Act, 2022, were characterised as surplus and precautionary measures *(ex abundanti cautela)* with a clarificatory intent. Under the new provisions, post-investigation cases conducted by the DRI are now required to be transferred to jurisdictional customs authorities for issuing show-cause notices. It was argued that this procedural change does not undermine the validity of

[39] Commissioner of Customs v. M/S Canon India Pvt. Ltd., 2024 (11) TMI 391 - SC (LB).
[40] Commissioner of Customs v. Sayed Ali, 2011 (2) TMI 5 (SC).

earlier notices issued by the DRI, especially in the absence of any constitutional or statutory restrictions.

On the other hand, the Respondents contended that the conclusions in *Sayed Ali* were legally sound and do not warrant any interference. It was emphasised that the scope of review is strictly limited and cannot serve as an opportunity for re-litigation. IRA under the guise of a review petition, is attempting to re-argue the case.

It was argued that different sections of the Customs Act deal with different powers. For instance, Section 17 of the Customs Act governs assessment and reassessment, Section 46 mandates the filing of bills of entry, and Section 47 permits the clearance of goods for home consumption, following an assessment under Section 17 of the Customs Act, whereas Section 28 of the Customs Act provides power to issue notice in case of short levy, underpayment, or erroneous refunds of customs duty. Given the interdependence of these statutory provisions, the same proper officer must handle all these functions to ensure procedural consistency. Assigning these functions to different officers would create inefficiency and confusion.

The Respondents finally argued that while all proper officers are officers of customs, not all officers of customs qualify as proper officers. The mere delegation of powers or assignment of functions under Sections 17 and 28 of the Customs Act does not suffice. Among the authorised proper officers, only the officer who performed the original assessment under Section 17 should exercise jurisdiction under Section 28. While concurrent empowerment may exist, concurrent exercise of authority would lead to administrative chaos and inconsistency.

Decision

The SC reaffirmed the DRI's jurisdiction to issue SCN and upheld the validity of the amendment made by the Finance Act, 2022, pertaining to the DRI. The SC emphasised that Sections 17 and 28 of the Customs Act serve separate purposes and are not inherently interlinked. Section 17 of the Customs Act pertains to the assessment of duty at the time of import or export, while Section 28 of the Customs Act allows designated officers to recover unpaid or short-paid duties through SCNs. The recovery process under Section 28 of the Customs Act does not require involvement of the same officer who conducted the original assessment. The SC rejected the interpretation in *Sayed Ali* and the 2021 *Canon India* decision, which suggested a necessary linkage between these sections, declaring that such a view does not represent the correct position of law.

The SC clarified that "the proper officer" denotes any officer appointed under the Customs Act to perform the specific function of issuing SCNs for duty recovery under Section 28 of the Customs Act. It does not confer exclusive jurisdiction on the officer involved in initial assessments.

The SC highlighted that *Sayed Ali* relied on the pre-2011 version of Section 17 of the Customs Act, which required customs officers to perform all assessments. However, the Finance Act, 2011, introduced a self-assessment regime, effective from April 8, 2011. Under this system, importers conduct initial assessments, and customs officers intervene only in cases of reassessment. Consequently, the SC held that Canon India's reliance on *Sayed Ali* was misplaced for cases arising after the introduction of the self-assessment regime.

The SC undertook a detailed analysis of the Customs Act provisions defining and assigning roles to customs officers. It held that DRI officers, as part of the customs framework, derive their authority from Sections 2(34) and 5 of the Customs Act, which allow assignment of functions under the Customs Act. Notifications issued under Section 2(34) of the Customs Act, empowered DRI officers to issue SCNs.

The SC upheld the constitutionality of Section 28(11), introduced by the Customs (Amendment and Validation) Act, 2011, to address jurisdictional issues highlighted in *Sayed Ali*. This provision retroactively validated actions taken by DRI officers before September 16, 2011.

Similarly, with respect to Section 97 of the Customs Act, which validated SCNs issued by DRI officers post-Canon India (2021), the SC stated that it adhered to the principles of equality under Article 14. It held that Section 97 met the standards for validating legislation and effectively addressed procedural concerns.

Significant Takeaways

SC has finally settled the long-drawn litigation on the legality of the actions of DRI officers, and various other wings of officers as proper officers and their authority to issue SCNs for demanding residual duty. Therefore, importers who have received notices from such officers would have to litigate their respective cases on the concerned issue and not on DRI power to issue SCN.

The SC further issued directions on how the following categories of cases would be dealt with:

Sr.No.	Type of case	Way forward
1	Where SCNs are directly challenged before the HCs through writs and are still under consideration.	The HC shall resolve such writ petitions in accordance with the current decision and remit the SCNs for adjudication by the appropriate officers under Section 28 of the Customs Act.
2	Where writ petitions have been concluded by the respective HC, and appeals have been filed against those orders, which are currently pending before the SC.	The SC shall resolve such matters in line with the current decision and remit the SCNs for adjudication by the appropriate officers under Section 28 of the Customs Act.
3	Where OIO issued by the adjudicating authority has been contested in the HCs basis jurisdiction.	The HC shall provide the respective taxpayers with eight weeks' time to file the appropriate appeal before the CESTAT.
4	Where writ petitions have been resolved by the HC, and appeals have been filed against those decisions, which are still pending.	These matters shall be resolved in line with the current decision, and the SC shall allow the respective taxpayers eight weeks to file the appropriate appeals before the CESTAT.
5	Where the orders of the CESTAT have been appealed to the SC or the respective HCs on the ground of jurisdiction.	The SC or the respective HC shall resolve such appeals or writ petitions in accordance with the current decision and remand the SCNs to the CESTAT for a merit-based hearing.
6	Where appeals against the OIO involving jurisdictional issues are pending before the CESTAT.	They shall now be determined by the CESTAT in line with the observations made by the SC in the present decision.

In conclusion, the decision establishes a precedent that will guide future interpretations of "proper officer" classifications, with potential implications for similar statutory provisions in other regulatory frameworks.

> **"Those officers of DRI who were designated as "the proper officer" for the purpose of Section 28 were competent to issue show cause notices under Section 28."**

Guidelines on conditions for condoning delay in claims for refund and carry forward of loss and set off

The CBDT issued Circular No. 11 of 2024, dated October 1, 2024, authorising Income tax authorities to admit applications for condoning delay in filing returns, claiming refund and carry forward of loss and set off under Section 119(2)(b) of the IT Act (**Circular**).[41] The Circular contains comprehensive guidelines, conditions and procedures to be followed for condoning.

The circular specifies the jurisdiction to accept/ reject such applications as follows:

- PCITs and CITs shall have the power to deal with applications if the amount of claim is not more than INR 1 crore for any one assessment year;
- CCITs shall have the power to deal with applications if the amount of claim exceeds INR 1 crore, but is not more than INR 3 crore for any one assessment year; and
- PCCITs shall have the power to deal with applications if the amount of claim exceeds INR 3 crore for any one assessment year.

The Circular states that no condoning application shall be entertained beyond five years from the end of the AY for which such application is made. It further states that in case of a refund claim arising out of a Court order, the period for which such proceedings were pending before the Court shall be ignored for the purpose of calculating this period of five years, provided that the application for condoning is filed within six months from the Court order or that financial year, whichever is later.

It also provides that all such applications for condoning delay should be disposed of, as far as possible, within six months from the end of the month in which such application was made.

The Circular prescribes that while considering an application, the relevant authority must ensure that there is reasonable cause and genuine hardship that prevented the assessee from filing the return within the due date. The relevant authority may also direct the JAO to make necessary inquiries, in accordance with the Act, to ensure that the application is examined on merits and as per law.

CBDT exempts RBI from TCS requirement

The CBDT, *vide* Notification No. 115/2024, dated October 16, 2024, has exempted the RBI from collecting tax at source, on payments received by it under Section 206C(1F) of the IT Act.[42] Section 206C(1F) mandates TCS collection on sale of motor vehicles worth over INR 10 lakh. Post publication of this notification in the Official Gazette, the RBI shall be exempt from collecting TCS under this section.

CBDT sets tolerance range for arm's length price

The CBDT, *vide* Notification No. 116/2024, dated October 18, 2024, has set tolerance thresholds for variation between arm's length price determined under Section 92C of the IT Act and the price at which an international transaction or specified domestic transaction was undertaken for AY 2024-25.[43] It prescribes that the actual price at which such transactions have been undertaken shall be deemed to be the arm's length price if the

41 CBDT Circular No. 11/2024 dated 01.10.2024 [F No. 312/63/2023-OT].
42 CBDT Notification No. 115/2024 dated 16.10.2024 [F. No. 370142/21/2024-TPL].

variation between them does not exceed, (i) 1% of such actual price, in case of wholesale trading; and (ii) 3% of such actual price in all other cases.

CBDT introduces Safe Harbour Rules for foreign companies engaged diamond mining business

The CBDT, *vide* Notification No. 124/2024, dated November 29, 2024, has introduced safe harbour rules for foreign companies engaged in diamond mining and selling of raw diamonds business in any notified special zone.[44]

The CBDT notified new rules, i.e., Rule 10TI, 10TIA, 10TIB and 10TIC, by way of the Income-tax (Tenth Amendment) Rules, 2024, for introducing provisions in relation to the same.

An eligible business may exercise the option of safe harbour if the income declared by it is in accordance with the circumstances as specified under Rule 10TIA. The circumstances under the Rule provide that the income of the eligible business chargeable to tax under the head PGBP shall be 4% or more of the gross receipts from such business.

Once an eligible business has exercised the safe harbour option, there shall be the following implications under Rule 10TIA:

i) Deductions under Section 30 to 38 shall be deemed to be fully allowed and no further claims shall be permitted;

ii) The written down value of assets of the business shall be shown in its books and it shall be deemed that depreciation on it has been claimed;

iii) Set off of unabsorbed depreciation and carried forward business losses shall be disallowed; and

iv) Set off of losses from other businesses or other heads of income against business profits shall also be disallowed.

Further, Rule 10TIC states that the assessee availing the safe harbour option shall not be entitled to invoke mutual agreement procedures under the relevant DTAA or Section 90 of the IT Act.

43 CBDT Notification No. 116/2024 dated 18.10.2024 [F. No. 500/1/2014-APA-II].
44 CBDT Notification No. 124/2024 dated 29.11.2024 [F. No. 370142/13/2024-TPL(Part)].

REGULATORY INDIRECT TAX UPDATES

Employees of SEZ units can work from home till December 2027

In order to promote hybrid working, Rule 43A of the SEZ Rules, 2006 was amended by the Ministry of Commerce & Industry to allow following employees of SEZ unit to work from home or from any place outside the SEZ unit until December 31, 2027:[45]

a. employees of Information Technology Units and Information Technology enabled services;

b. employees, who are temporarily incapacitated;

c. employees, who are travelling; and

d. employees, who are working offsite.

There has been no change in conditions and the same would continue as applicable till now.

Implementation of automation in the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022

The CBIC, *vide* Circular No. 13/2024-Custom dated September 4, 2024, has notified the implementation of the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022 (**IGCR Rules**).[46] This was done due to multiple representation being received from regarding difficulties being faced by taxpayer and also to digitalise such as registration, generation of IIN details and the submission of Bond details, to reduce the delay in clearance of goods.

From September 1, 2024, registration on the ICEGATE portal must be done along with obtaining the IIN for filing the bill of entry to claim exemption on their imports. It is an attempt to ease the procedures and lessen the time frame for these procedures.

Clarifications on the applicability of concessional duty under IGCR Rules in certain instances

The CBIC *vide* Public Notice No. 19 / 2024 dated December 4, 2024 clarified that MOOWR units may take the benefit of IGCR exemption along with duty deferment under MOOWR simultaneously.[47] However, there would not be any relaxation in the conditions required to be fulfilled.

Further, there is a possibility that a person availing IGCR benefit may procure an intermediate product from a vendor who availing MOOWR benefit on import of raw material. W.r.t the same it was clarified that the phrase "for use in manufacture of cellular mobile phones" is intended to mean that the component should be used in manufacturing process for cellular mobile phones. It does not imply that components should be imported by producer of cellular mobile phones. Hence, the goods being imported by the intermediate goods manufacturer who is MOOWR unit for further supplying after some manufacturing/ value addition to the final manufacturer of cellular mobile phones are duly eligible for the benefit under IGCR.

[45] Instruction No. 85 dated 02.08.2024 [F.No. D. 12/21/2010-SEZ (Pt)].
[46] CBIC Circular No. 13/2024-Custom dated 4.09.2024 [F.No. 450/28/2016-Cus-IV].
[47] CBIC Public Notice No. 19 / 2024 dated 04.12.2024.

Last date notified to claim waiver of interest and penalties under Section 128A of the CGST Act

Vide Notification No. 21/2024–Central Tax dated October 8, 2024, the CBIC notified the date upto which payment for the tax payable as per the notice, or statement, or the order must be made to avail the benefit of the waiver of interest and penalties pertaining to the period from July 01, 2017 to March 31, 2020.[48]

The benefit is available to following registered person for any tax has not been paid or short paid or erroneously refunded, or where ITC has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax:

a) notice or statement is pending for adjudication ;

b) appeal is pending before the appellate authority or the revisional authority; and

c) appeal is pending before the appellate tribunal.

In such case, the last date to comply is March 1, 2025.

However, in all other cases when notice is issued on account of fraud or any wilfull-misstatement or suppression of facts, and subsequently proven that there was no fraud or any wilfull-misstatement or suppression of facts, then the time period is date ending on completion of six months from the date of issuance of the order.

Clarification on various issues pertaining to GST treatment of vouchers

The CBIC *vide* Circular No. 243/37/2024-GST dated December 31, 2024 issued clarification on the treatment of vouchers within the GST framework, as follows:[49]

- Where the voucher is covered as a pre-paid instrument recognized by the RBI and is used as a consideration to settle an obligation, then it is neither considered as goods nor services. Therefore, no GST is payable.
- Where voucher is not covered as a pre-paid instrument recognized by RBI, the voucher can be considered as an actionable claim and is neither a supply of goods nor as a supply of services. Therefore, no GST is payable.
- Where vouchers are distributed through the distributors/ sub-distributors/ dealers on Principal-to-Principal basis, it is pure trading of vouchers and does not constitute either supply of goods or supply of services. Therefore, no GST is payable.
- Where vouchers are distributed using distributors/ sub-distributors/ agents on commission/ fee basis, then GST is chargeable on such commission/fee..
- Service fee for additional services such as advertisement, co-branding, etc. would be liable to GST at the applicable rate in the hands of the said service provider.
- In case of unredeemed vouchers, there is no underlying supply of goods and/or services by the customer. Therefore, no GST is payable.

Clarification on place of supply of Online Services supplied by the suppliers of services to unregistered recipients

The CBIC *vide* Circular No. 242/36/2024-GST dated December 31, 2024 clarified that all suppliers engaged in supply of services to unregistered recipients over digital or electronic network, must mandatorily record the name of the State of the recipient on the tax invoice, irrespective of the value of supply of such services, and to declare place of supply of the said services as the location of the recipient (based on the name of State of the recipient) in their details of outward supplies.[50]

The name of the State of the recipient so recorded shall be the place of supply of the said services.

Clarifications regarding applicability of GST on certain services

Vide Circular No. 234/28/2024-GST dated October 11, 2024 the CBIC clarified applicability of GST on the following services:[51]

- GST is applicable on affiliation services provided by universities to their constituent colleges.
- GST is applicable on services of affiliation, provided to schools by Central or State educational boards or councils, or other similar bodies.
- Approved flying training courses conducted by Flying Training Organization approved by DGCA, wherein the DGCA mandates the requirement of a completion certificate are exempted.

48 CBIC Notification No. 21/2024–Central Tax dated 08.10.2024.
49 CBIC Circular No. 243/37/2024-GST dated 31.12.2024 [F. No. CBIC-20001/14/2024-GST].
50 CBIC Circular No. 242/36/2024-GST dated 31.12.2024 [F. No. CBIC-20001/14/2024-GST].
51 CBIC Circular No. 234/28/2024-GST dated dated 11.10.2024 [F. No. CBIC-190354/149/2024-TO(TRU-II)-CBEC].

- Ancillary or incidental services provided by goods transport agencies in the course of transportation of goods by road, such as loading/unloading, packing/unpacking, transshipment, temporary warehousing etc. will be treated as composite supply of transport of goods.
- Preferential location charges paid along with the consideration for the construction services of residential /commercial/industrial complex forms part of composite supply.

Clarification on availability of ITC under Section 16(2)(b) of the CGST Act in respect of goods which have been delivered by the supplier at his place of business under Ex-Works Contract

The CBIC *vide* Circular No. 241/35/2024-GST clarified whether ITC may be available to the dealer before the vehicles are physically received by them at their business premises under provisions Section 16(2)(b) of the CGST Act.[52] It said that as per explanation to Section 16(2)(b) of CGST Act, the dealer can be considered to have "received" goods at the time of handing over of the goods by the supplier to the transporter, at his factory gate, for their onward transmission to the dealer. Therefore, ITC may be availed by the dealer on the receipt of the goods from the supplier at the supplier's factory gate or business premises.

Clarification in respect of input tax credit availed by electronic commerce operators where services specified under Section 9(5) of Central Goods and Services Tax Act, 2017 are supplied through their platform

The CBIC *vide* Circular No. 240/34/2024-GST clarified regarding the requirement of reversal of ITC, if any, in respect of supply of services, other than restaurant services, under section 9(5) of CGST Act.[53] It said that that electronic commerce operator, who is liable to pay tax under section 9(5) of the CGST Act in respect of specified services, may not to reverse the ITC on his inputs and input services proportionately under Section 17(1) or section 17(2) of CGST Act to the extent of supplies made under Section 9(5) of the CGST Act. Further, full tax liability for Section 9(5) of the CGST Act must be paid through electronic cash ledger.

These set of clarifications have brought the much needed predictability in various sectors.

Key Proposals in the 55th GST Council Meeting

The 55th meeting of the GST Council convened on December 21, 2024, in Jaisalmer, Rajasthan. During this session, the Council, among other matters, made key recommendations concerning changes in GST tax rates, relief measures for individuals, initiatives to facilitate trade, and steps to streamline GST compliance processes.

The key proposed changes and clarification which are yet to be implemented are as follows:

<u>Clarifications/Exemptions for Services</u>:

- **Sponsorship services provided by body corporates**: It was recommended to bring sponsorship services supplied by body corporates under the forward charge mechanism which is currently under reverse charge mechanism.
- **Contribution to the Motor Vehicle Accident Fund**: It was proposed to exempt GST on contributions made by general insurance companies from third-party motor vehicle premiums collected by them to the Motor Vehicle Accident Fund, constituted under Section 164B of the Motor Vehicles Act, 1988. This fund provides compensation and cashless treatment to victims of road accidents, including hit-and-run cases.
- **Accommodation, food, and beverage service**: It was recommended to bring uniformity for this sector. The terminology 'value of supply' of units of accommodation made in the preceding financial year would be determining criteria. GST @18% with ITC if the 'value of supply' exceeded Rs. 7,500 for any unit of accommodation in the preceding financial year, and 5% without ITC otherwise. An option would be given to hotel to give a declaration regarding value at the beginning of the financial year.
- **Service by way of renting of any immovable property other than residential dwelling**: It was proposed to exempt the levy of GST under the reverse charge mechanism for taxpayers registered under the composition levy scheme who receive services by way of renting any immovable property (other than residential dwellings) from unregistered persons.
- **Services by payment aggregator**: GST exemption is available on services provided by an acquiring bank to any person for the settlement of amounts up to ₹2,000 in a single transaction, conducted through credit cards, debit cards,

[52] CBIC Circular No. 241/35/2024-GST dated 31.12.2024 [F. No. CBIC-20001/14/2024-GST].
[53] CBIC Circular No. 240/34/2024-GST DATED 31.12.2024 [F. No. CBIC-20001/14/2024-GST].

charge cards, or other payment card services. The Reserve Bank of India regulated payment aggregators would also be eligible for exemption. However, this exemption does not extend to payment gateway services and other fintech services that do not involve fund settlement.

- **Penal charges for non-compliance with loan terms**: It was proposed to clarify that no GST will be payable on penal charges levied and collected by banks and non-banking financial companies (NBFCs) from borrowers for non-compliance with loan terms.

Rate change for Goods:

- GST on Fortified Rice Kernel classifiable under 1904 reduced to 5%.
- Gene Therapy exempted from GST.
- IGST exemption extended to systems, sub-systems, equipment, parts, sub-parts, tools, test equipment, software meant for assembly/manufacture of LRSAM system.
- Compensation Cess on supplies to merchant exporters reduced to 0.1%
- Imports of all equipment and consumable samples by Inspection Team of the International Atomic Energy Agency (IAEA) to be exempted subject to certain conditions.
- Concessional rate of 5% GST extended on food inputs of food preparations under HSN 19 or 21 that are supplied for food preparations intended for free distribution to economically weaker sections under a government program subject to the existing conditions
- GST on the sale of all old and used vehicles, including EVs, increased from 12% to 18%. However, no GST is applicable in sale between unregistered persons.
- It was proposed to amend the definition of the term "pre-packaged and labelled" to include all commodities intended for retail sale and containing no more than 25 kilograms or 25 liters. These goods must either be pre-packed as defined under the Legal Metrology Act or have a securely affixed label bearing the required declarations under the Legal Metrology Act, 2009, and the rules framed thereunder.

Measures pertaining to law and procedure:

- **Amendment in Section 17(5)(d) of the CGST Act**: The Council has proposed amending Section 17(5)(d) of the CGST Act, 2017, to replace the phrase "plant or machinery" with "plant and machinery," with retrospective effect from July 1, 2017. This amendment aims to ensure that the phrase in Section 17(5)(d) is interpreted consistently with the Explanation provided under Section 17 of the CGST Act. The said change would nullify SC ruling in Safari Retreat matter.
- **Reduction in pre-deposit amount for filing an appeal involving only penalty demands**: It was recommended to reduce the pre-deposit requirement from 25% to 10% for appeals filed before the Appellate Authority in cases where the order pertains solely to a demand for penalty and does not involve a tax demand.
- **Amendment to the definition of "local authority" under Section 2(69) of the CGST Act**: It was proposed to insert an Explanation under clause (c) of Section 2(69) of the CGST Act to define the terms "Local Fund" and "Municipal Fund" as used in the said clause.
- **Provision for granting Temporary Identification Numbers to persons not otherwise liable for registration**: It was recommended to insert a new Rule 16A in the CGST Rules to establish a provision for generating Temporary Identification Numbers for individuals not required to register under the CGST Act but obligated to make payments.
- **Track & Trace Mechanism**: Section 148A to be inserted into the CGST Act, 2017 to empower the government to enforce the track and trace mechanism for specified evasion-prone commodities based on a unique identification marking which will be affixed to the goods or their packages.

Other Recommendations:

- The GST Council reviewed the procedural rules proposed for the internal functioning of the Goods and Services Tax Appellate Tribunal, which will be notified following examination by the Law Committee.
- The Council recommended extending the timeline for the Group of Ministers on the restructuring of GST Compensation until June 30, 2025.

The 55th GST Council Meeting presented a range of significant proposals aimed at refining the GST framework to enhance clarity, promote uniformity, and simplify compliance for stakeholders. Key recommendations included rationalizing GST rates on goods and services, issuing clarification on vouchers, availability of ITC for ex-work supply, place of supply for online services, etc. Proposed changes and clarification, including the introduction of a track-and-trace mechanism and revised pre-deposit requirements for penalty appeals, underscore the Council's focus on strengthening enforcement mechanisms while ensuring procedural efficiency. These recommendations, upon implementation, are expected to advance the goals of a more equitable and robust GST regime.

GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
AO	Learned Assessing Officer
AY	Assessment Year
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes
CCIT	Learned Chief Commissioner of Income Tax
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Service Tax Appellate Tribunal
CGST	Central Goods and Service Tax
CGST Act	Central Goods and Service Tax Act, 2017
CGST Rules	Central Goods and Service Tax Rules, 2017
Customs Act	Customs Act, 1962
CT Act	Customs Tariff Act, 1975
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeal)
CVD	Countervailing Duty
DGFT	Directorate General of Foreign Trade
DRP	Dispute Resolution Panel
DDT	Dividend Distribution Tax
DTAA	Double Taxation Avoidance Agreement
EPCG	Export Promotion Capital Goods
ESOP	Employee Stock Options
FA	Finance Act
FAO	Faceless Assessment Officer
FMV	Fair Market Value
FTP	Foreign Trade Policy
FTS	Fees for technical services
FY	Financial Year
GST	Goods and Services Tax
HC	Hon'ble High Court
HUF	Hindu Undivided Family

GLOSSARY

ABBREVIATION	MEANING
IBC	Insolvency and Bankruptcy Code, 2016
IGST	Integrated Goods and Services Tax
IGST Act	Integrated Goods and Services Tax Act, 2017
INR	Indian Rupees
IRA	Indian Revenue Authorities
IT Act	Income-tax Act, 1961
ITAT	Hon'ble Income Tax Appellate Tribunal
ITC	Input Tax Credit
ITO	Income Tax Officer
IT Rules	Income-tax Rules, 1962
Ltd.	Limited
LLC	Limited Liability Company
JAO	Jurisdictional Assessing Officer
MAT	Minimum Alternate Tax
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
NCD	Non-convertible Debenture
NFAC	National Faceless Assessment Centre
OECD	Organisation for Economic Co-operation and Development
PAN	Permanent Account Number
PCIT	Learned Principal Commissioner of Income Tax
PCCIT	Learned Principal Chief Commissioner of Income Tax
PE	Permanent Establishment
Pvt.	Private
RBI	Reserve Bank of India
SAD	Special Additional Duty
SC	Hon'ble Supreme Court
SCN	Show-cause Notice
SEBI	Security Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Services Tax

GLOSSARY

ABBREVIATION	MEANING
SGST Act	State Goods and Services Tax Act, 2017
SLP	Special Leave Petition
TDS	Tax Deducted at Source
US	United States
UTGST	Union Territory Goods and Services Tax
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VAT Tribunal	Hon’ble VAT Tribunal

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ahead of the curve

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