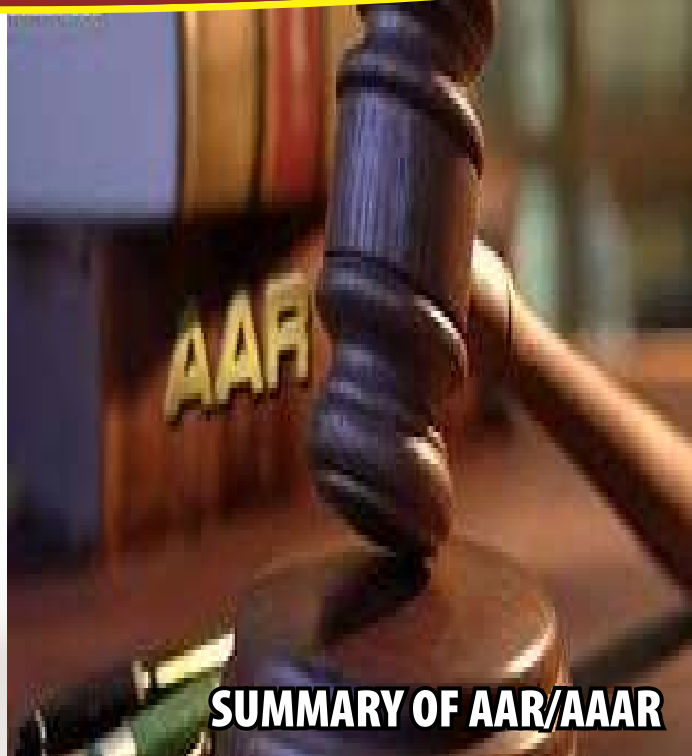


THE MONTHLY MAGAZINE FROM CASC

GST UPDATES



SUMMARY OF AAR/AAAR

RECENT JUDGEMENTS



CONNECTING FACTORS



VOLUME-4

ISSUE-4

APRIL 2025



CASC BULLETIN

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24.04.2025 (Thursday)	AI In Audit	CA.Rekha Uma Shiv

The meetings will be held at CASC at 6.30 p.m. and will be preceded by fellowship over High Tea at 6.00 p.m

**CASC Annual Members are requested to renew their
subscription for 2025 - 2026**

Dear Professional Colleagues,

A new financial year is not just a change in dates but a renewed opportunity to strategize, comply, and grow. Let discipline be our ledger, integrity our balance sheet, and excellence our profit.

Are you Ready for ISD - GST?

The concept of Input Service Distributor (ISD) under GST has undergone significant changes, with mandatory registration coming into effect from April 1, 2025. This move aims to streamline the distribution of input tax credit (ITC) across multiple locations of an entity and enhance compliance efficiency. With ISD registration becoming mandatory from April 1, 2025, businesses must assess their ITC distribution process and comply with the updated provisions. This change will bring more transparency and accuracy in ITC allocation, benefiting multi-location enterprises in managing their tax credits efficiently. Previously, ISD registration was optional for businesses. However, with effect from April 1, 2025, entities distributing ITC across different GST-registered locations must compulsorily obtain ISD registration. This regulatory update aims to curb ITC misuse and ensure proper credit allocation.

New Compliance Requirement: Six-Monthly Return for Companies under MSME Act

The Ministry of Micro, Small & Medium Enterprises (MSME), India, has introduced a crucial compliance requirement for companies registered under corporate laws. As part of the government's ongoing efforts to ensure better financial reporting and transparency, companies classified under the MSME Act must now submit a six-monthly return detailing their outstanding dues to MSME suppliers. All companies registered under the Companies Act, 2013, that procure goods or services from MSMEs must comply with this mandate. The objective is to monitor delayed payments to MSMEs and strengthen compliance with the MSME Development Act, 2006, which mandates timely payments to micro and small enterprises. The return must be submitted every six months in a prescribed format. Companies must disclose details of outstanding dues beyond 45 days from the date of acceptance or deemed acceptance of goods/services.

With this new compliance requirement, are businesses truly prepared to ensure timely payments to MSMEs, or will this become just another regulatory burden?

CBDT Invites Stakeholder Inputs for Simplification of Income Tax Rules and Forms

In a significant move towards enhancing taxpayer convenience and reducing compliance burdens, the CBDT has launched a dedicated utility on the e-filing portal to seek inputs on the simplification of Income Tax Rules and Forms. This initiative aligns with the government's broader agenda of making tax compliance easier, more transparent, and technology-driven. For tax professionals and chartered accountants, this initiative presents an opportunity to voice concerns about complex tax provisions and suggest reforms that can lead to simplified, efficient, and time-saving tax compliance. The active participation of professionals will ensure that the revised tax forms and rules are more aligned with practical business realities.

Annual Tax Convention 2025

The Hindustan Chamber of Commerce, in association with The Chartered Accountants Study Circle, proudly presents the Annual Tax Convention 2025 on April 18th & 19th at the Madras Management Association Centre, Chennai. This two-day event serves as a premier platform for CFOs, Chartered Accountants, and finance professionals to gain insights into evolving tax laws and compliance frameworks. With expert-led discussions on both Direct and Indirect Taxes, the convention aims to provide a comprehensive

understanding of regulatory changes, practical applications, and strategic tax planning. As taxation continues to evolve in a dynamic business landscape, this initiative fosters informed decision-making and professional excellence. We encourage all finance professionals to participate and benefit from the wealth of knowledge shared by industry experts.

Appeal

We, at Chartered Accountants Study Circle, request members to contribute articles for the bulletin and you may contact the editorial board regarding the same. We have been regularly conducting technical programmes every month. Members are requested to attend the programmes conducted by CASC and are also requested to send their suggestions and / or value additions to the services provided by CASC including this Bulletin. The same can be sent as hard copy to the office of the CASC or emailed to admin@casconline.org or to any of the members of the Management Committee of the CASC. Any member interested in using the CASC platform for addressing our members on technical topics may kindly feel free to contact us by way of email at admin@casconline.org.

For and on behalf of the Editorial Board

Bhuvaneshwari.R.V.

CA. BHUVANESWARI R.V



HINDUSTAN CHAMBER OF COMMERCE

In association with

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

18TH & 19TH APRIL 2025



Dear Sir/Madam,

Greetings.

We have great pleasure in inviting you all for the 2 Days ANNUAL TAX CONVENTION jointly organised by HINDUSTAN CHAMBER OF COMMERCE with THE CHARTERED ACCOUNTANT STUDY CIRCLE. The details of the Dates, Venue & the Sessions are given below:

Dates: 18th April (Friday) & 19th April (Saturday) 2025

Venue: Madras Management Association Centre,
New No: 240 Pathari Road, (Off Anna Salai)
Chennai – 600006

This event is the initiative of the Direct and Indirect Tax Committee of HCC and The Chartered Accountants Study Circle.

The main objective of this Convention is to educate and update the CFOs, Chartered Accountants and Accounts Professionals on the latest laws and compliances.

Please fill the Registration Form and send it to us along with Payment Reference.

We are attaching the Bank details and UPI ID for easy payment.

Looking forward to nominate participants to derive benefits from the experts.

Thanks & Regards,

K.G. CHITRA
Secretary

RSVP: events@hindustanchamber.in /WhatsApp 9150710871
admin@casconline.org

Day 1: 18th April 2025 (Friday)

Time	Session	Speaker
9.00 am	Registration	
9.30 am	Inaugural Session - Hon'ble Mr. Justice C. Saravanan Judge, Madras High Court	
10.30 am	Tea Break	
10.45 am	Valuation Principles under Various Enactments	Mr Vishesh Unni Raghunathan
12.00 noon	Decoding GST Valuation — The Art of Getting It Right	CA J Srinivasan
1.15 pm	Lunch Break	
2.15 pm	Succession Planning	Mr V S Jayakumar, Advocate
3.30 pm	Enforcement Proceedings under Income Tax, GST & Customs – Interplay & Insights.	Mr Ramamoorthy, Advocate
4.45 pm	Tea Break	

Day 2: 19th April 2025 (Saturday)

Time	Session	Speaker
10.30 am	ITC Masterclass — From Mismatch to IMS & ISD: Navigating the New Age Credit Framework	CA Prasanna Krishnan
11.30 am	Tea Break	
11.45 am	TDS on NRI Payments – Issues/ Compliances	Mr S Ramesh
1.00 pm	Lunch Break	
2.00 pm	Block Assessment	Mr T Banusekar
3.00 pm	Tea Break	
3.15 pm	GST Impact on Cross-Border Transactions — Challenges & Strategies	Mr K Vaitheeswaran, Advocate
4.30 pm	Valedictory Session	
5.30 pm	HCC President's Remarks	

Registration Fee: Rs. 2,500/- (incl. GST).**HINDUSTAN CHAMBER OF COMMERCE****Bank details**

Account No : 10640564408
 Type of Account : Current Account
 Name of the Bank : State Bank of India
 Branch IFS Code : SBIN0020243
 MICR Code : 600002358
 PAN : AAACH2185E
 GST No. : 33AAACH2185E1Z0

CHEQUE/DD
 IN FAVOUR OF : Hindustan Chamber of Commerce

SCAN ME

EMAIL: OFFICE@HIDUSTANCHAMBER.IN
 PHONE: +91 9150710871

GLIMPSES FROM THE MONTHLY MEETING HELD ON 13.03.2025

SPEAKER: CA.G.SUBASHINI

TOPIC - REFRESHER ON BANK/AUDIT



- Introduction to CAS 300 for IIS
- Impact on Introduction to Internal Control Systems
- Revised for 2024 and in 2025
- To be introduced for Government Auditors for Right-hand column (2024-25)

GLIMPSES FROM THE MONTHLY MEETING HELD ON 27.03.2025

SPEAKER : CA.H.SARADHA

TOPIC - RECENT DEVELOPMENTS IN GST



GLIMPSES FROM THE JOINT PROGRAMME ON BANK BRANCH AUDIT FOR STUDENTS & STAFF





PRESENT MEMBERS OF THE MANAGEMENT COMMITTEE
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ANNOUNCEMENTS

1. The copies of the material used by the speakers and provided to CASC for distribution, for the regular meetings held twice in a month is available on the website and is freely downloadable.
2. Earlier issues of the bulletin are also available on the website in the "News" column.
The soft copy of this bulletin will be hosted on the website shortly.

READER'S ATTENTION

You may please send your Feedback / Contributions / Queries on Direct Taxes, Indirect Taxes, Company Law, FEMA, Accounting and Auditing Standards, Allied Laws or any other subject of professional interest to admin@casconline.org

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For updates on monthly meetings and professional news.

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RECENT JUDGEMENTS IN VAT / CST / GST

Non-Consideration of Reply: on scrutiny of the petitioner's return, discrepancies were noticed viz., (I) Mismatch between GSTR-3B and GSTR-2A and (ii) Suppression of Inward Supply. In response to the Show Cause Notice later to ASMT 10, the petitioner had filed its reply



CA. V.V. SAMPATHKUMAR

wherein it was submitted that the Input Tax Credit claimed by the petitioner was in fact correct and that the discrepancies are only due to the reversal of excess Input Tax Credit. However, the impugned order proceeds on the premise that the petitioner had not filed any objection nor attended the personal hearing which, according to the petitioner, suffers from non-application of mind. Ld counsel for the respondents would submit that they would redo the assessment after affording the petitioner a reasonable opportunity of hearing. In view thereof this, the impugned order dated 16.08.2024 is set aside with conditions. **M/s. H.K. Enterprises Vs.**

1. The Commercial Tax Officer / The Proper Officer / The State Tax Officer, Arakonam Assessment Circle,. 2.DSTO-2 (FAC)/ DCTO, Arakonam Assessment Circle, 3. The Branch Manager, HDFC Bank Ltd., Arakonam 631 001.W.P. No.1977 of 2025 DATED :28.01.2025

Not a voluntary payment, Section 74: The entire claim against the petitioner had arisen of its own failure to register itself under the GST Act as required under law. Only pursuant to inspection, the petitioner had remitted the tax that he is liable to pay and hence the same cannot be said to be a voluntary payment and has been made only to wriggle out of the penal consequences. This conduct of the petitioner to evade tax will also fall under suppression and fraudulent activities as envisaged u/s 74 of the GST Act. A perusal of the orders in original, as affirmed by the Appellate Authority would clearly indicate that there is a deliberate attempt to evade payment of tax by not registering himself under the Act and also issuing receipts as donation to the Trust. Only after the inspection they have agreed to pay the tax by registering themselves. This conduct cannot be said to be a voluntary conduct. There has been contraventions of provisions of the GST Act for which the petitioner is liable to make good the non-payment and also suffer penal consequences for the same. Both the Original Authority as well as the Appellate Authority have considered the case of the petitioner in its proper perspective and had applied the Provisions of law on the issue in its right perspective which do not call for any interference by this Court and stating so, this Writ Petition is dismissed.

M/s. Annai Angammal Arakkattalai (Pre Mahal), Karur-2. vs. 1. The Joint Commissioner or GST (Appeals), Coimbatore O/o the Commr of GST & CE (Appeals), Coimbatore, Tiruchirappalli-1. The Assistant Commissioner of GST & Central Excise, Karur Division, W.P.(MD)No.28502 of 2022 dated 28.01.2025

Limitation and TN Entry tax: There was no justification in passing the Impugned Entry tax Assessment Orders belated in the year 2021 in respect of the Assessment Years 2003-2004 and 2004-2005. It has to be assumed that the Department has accepted the returns filed by the petitioner for the respective Assessment Years and the assessment was completed under Rule 4(1) of the Entry Tax Rules, 2001. If at all, the respondents should have invoked the machinery u/s 16 of the TNGST Act, 1959 read with Section 10 of the Entry Tax Act, 2001 within a reasonable period prescribed for finalizing the assessment. In other words, the powers could have been invoked within 5 years after deemed assessment under Rule 4(1) of the Entry Tax Rules, 2001 and after the date of filing of returns. The period for finalizing the assessment under the Entry Tax Act, 2001 and Entry Tax Rules, 2001 cannot be left open ended for over a decade. If the respondents were diligent, they could have passed the Impugned Assessment Order. The respondents could have

postponed the recovery, pending decision of the Hon'ble Supreme Court. Writ Petitions are allowed that questioned the limitation. **M/ s. EID Parry India Limited, Vs.1.The Deputy Commissioner (S.T.)- I, Large Taxpayers Unit, Chennai -35. 2.The Commissioner of Commercial Taxes, Chennai - 5. W.P.Nos.16696 and 16702 of 2021dated 24.01.2025**

Reply to SCN not considered: It is submitted by the petitioner that an intimation in ASMT 10 was issued on 20.05.2022. In response, the petitioner filed its reply dated 27.06.2022. Thereafter, a notice in Form DRC 01A was issued on 17.05.2023, followed by a show cause notice in DRC 01 dated 11.07.2023. In response to the show cause notice the petitioner filed its detailed representation / reply dated 18.08.2023. However, the impugned order proceeds to record and extract the reply filed by the petitioner in ASMT-11, dated 27.06.2022, which was made in response to ASMT 10 while treating it as the response made by the petitioner to DRC 01. It is thus submitted that failure to consider the reply dated 18.08.2023, made in response to the show cause notice vitiates the impugned proceedings. Ld counsel for the respondent would submit that they would redo the assessment after affording the petitioner a reasonable opportunity of hearing. The impugned order is set aside.

**M/s.A.K.K.Builders, Vs. The State Tax Officer (FAC),
Sholinganallur Assessment Circle, Chennai-35. W.P. No.2836 of
2025 DATED: 29.01.2025**

Prayer for Appeal: Though the WP is filed challenging the impugned proceedings dated 15.02.2022, after submitting for a brief while, the petitioner seeks liberty of this Court to file an appeal and requests that the appeal may be entertained and heard on merits. Ld counsel for the respondent would submit that the petitioner may be directed to pay 25% of the disputed taxes, which was readily agreed to by the learned counsel for the petitioner. In view thereof, by consent of both sides, this Court granted liberty to the petitioner to file an appeal within a period of 3 weeks from the date of receipt of copy of this order, subject to the condition that the petitioner pays 25% of the disputed taxes within a period of 2 weeks from the date of receipt of copy of this order. In case such appeal is filed, the same shall be entertained without reference to limitation and orders shall be passed on merits after affording the petitioner a reasonable opportunity of hearing **M/s. Antony Peter Christopher, Vs. The Assistant Commissioner of GST & Central Excise, Coimbatore - II Division, W.P. No.1771 of 2025 DATED: 28.01.2025**

WP against notice is Premature: It is submitted by the Ld Additional Government Pleader that the issue raised involves factual enquiry and therefore, the Petitioner ought to have submitted his objections and the judgment of the Hon'ble Supreme Court is relevant, the same ought to have been relied upon by the petitioner and orders will be passed taking into account the said judgment. This Court found merits in the submission of the Ld Additional Government Pleader for the Respondent. This Court is also of the view that the WP filed challenging the notice is premature. It is open to the petitioner to submit his objections and if so advised, place reliance upon the judgment of the Hon'ble Supreme Court in State of West Bengal Vs Calcutta Club Limited (Civil Appeal No.4184 of 2009). If the Petitioner files any objections, appropriate orders shall be passed by the Assessing Authority taking into consideration the objections and dealing with the judgment of the Hon'ble Supreme Court. **M/s.Royal Health and Social Welfare Club Vs. The Assistant Commissioner (ST)(FAC), North-1 Assessment Circle, Tirupur. W.P. Nos.2141 and 2143 of 2025 DATED : 28.01.2025**

Matters Remanded: The Ld counsel for the respondent would submit that show cause notice did not quantify all of the issues resulting in excess demand of Rs.137 Crores which was set out in the impugned order. In response, the Ld counsel for the petitioner

would submit that the mandate of Section 75(7) would be violated inasmuch the tax demanded is in excess of the amount specified in the notice. In view of the peculiar facts, it was suggested by the Court that Rs.2 crores may be paid and the matters be remanded back for a fresh consideration, which was agreed to by both the Ld counsel for the petitioner as well as for the respondents. In view thereof, the matters, subject to the conditions, are remanded back to the assessing officer for a de novo consideration. **M/s.NTT India Private Limited, Vs. 1. Joint Commissioner (ST), Intelligence I, Chennai 6. 2. State Tax Officer, Group VII, Inspection, Intelligence ~I, Chennai 6. 3. The Assistant Commissioner (ST), Valluvarcottam Assessment Circle W.P. No.1323 of 2025 DATED: 27.01.2025**

Opportunity prayed : It was found that the tax payer reply was not supported by relevant documents in support of the explanation of the discrepancies, thus the impugned order was passed confirming the proposal. It is submitted by the petitioner that if the petitioner is provided with an opportunity, he would be able to explain the alleged discrepancy. Also, reliance was placed upon the judgment of this Court in the case of Sree Manoj International Vs. Deputy State Tax Officer in W.P.No.10977 of 2024 dated 25.04.2024, to submit that this court has remanded the matter back in similar

circumstances subject to payment of 10% of the disputed taxes. Same is directed here in this WP also. **M/s.Onkar Bearing Company Vs. The Assistant Commissioner, Broadway Assessment Circle, W.P. No.1551 of 2025 DATED : 27.01.2025**

Rectification Petition: Though the WP is filed challenging the impugned proceedings dated 17.11.2023 and 26.04.2024, against which a rectification petition was also filed on 25.06.2024 and is stated to be still pending. After submitting for a brief while, the Ld counsel for the petitioner would submit that they would confine their prayer to the disposal of the rectification petition filed on 25.06.2024. Ld counsel for the respondent would submit that they would dispose of the rectification petition within a period of 4 weeks after affording the petitioner a reasonable opportunity of hearing, the same was agreed to by the counsel for the petitioner. In view thereof, direction was issued to the respondent to dispose of the rectification petition filed by the petitioner in accordance with law within a period of 4 weeks from the date of receipt of a copy of this order with conditions. **M/s.S.P.S.Thirumana Mandapam Vs. The Assistant Commissioner (ST), Saidapet Assessment Circle, W.P. No.1955 of 2025 DATED :27.01.2025**

(The Author is a Chennai based Chartered Accountant in Practice. He can be reached at vvsampat@yahoo.com)

CASE LAWS - GST

1. GST - REFUND - AMENDED NOTIFICATION NO.14/2022-C.T. IS APPLICABLE RETROSPECTIVELY



CA. VIJAY ANAND

In *Ascent Meditech Ltd. v. UOI* 2025 (93) GSTL 85/(2024) 24 Centax 405 (Guj.), the petitioner is engaged in the business of manufacturing orthopedic soft goods for upper extremity, lower extremity and spine as well as mobility assistive devices for home and hotel use.

The applicable rate of tax on output supplies of the products manufactured by the petitioner is 5% as its majority of goods are classifiable under HSN90211000 whereas, the applicable rate of tax on main inputs used by the petitioner to manufacture its product ranges from 12% to 18%. The petitioner has also availed input services which attracted GST rate of 18%. The petitioner had utilized input tax credit on account of such facts as the rate of tax on the input being more than the rate of tax on the output supply.

The petitioner made an application u/s 54(3) to get the refund of unutilized input tax credit as per the formula prescribed in Rule

89(5). The petitioner was granted refund computed as per the formula under the inverted duty structure for all the applications made prior to 05.07.2022 on the ground that prior to 05.07.2022, by unamended formula, the petitioner was not entitled to include the input services as part of the formula and as the petitioner has made the refund application prior to 05.07.2022, as per the Notification No. 14/2022 dated 05.07.2022 read with Circular dated 10.11.2022, the petitioner was not entitled to the refund as per the amended formula. On a writ petition, the high court observed as under:

1. It is clear that for the inverted rated supply of goods and service instead of “the adjusted total turnover” the words “ITC availed on inputs and input services” has been substituted. The “adjusted total turnover” which is defined in sub-clause (b) as per the sub-rule (4) has been given a go-by. Therefore, numerator and denominator are made in harmony which was not there prior to the amendment which had resulted anomaly in the formula.
2. It is apparent that the amendment made by the Notification No. 14/2022 is clarificatory only as per the decision of the GST Council pursuant to the direction issued by the Hon’ble Apex Court.

-
3. Therefore, impugned Circular No. 181/2022 dated 10.01.2022 which provides the clarification is contrary to the purport of the amendment brought on statute pursuant to the recommendation of the GST Council as per the direction issued by the Hon'ble Apex Court to remove the anomaly in the formula in Rule 89(5).
 4. In *Allied Motors (P.) Ltd. v. CIT* [1997] 91 Taxman 205/224 ITR 677 (SC)/(1997) 3 SCC 472 it was held that a curative or a declaratory amendment would have a retrospective operation.
 5. It is also not disputed by the respondent that the petitioner is entitled to the refund as per sub-section 3(ii) of section 54 of the Act being difference in the GST rates due to inverted rated structure and accordingly, the petitioner was granted refund though petitioner has filed refund applications pursuant to the deficiency memo issued repeatedly.
 6. The aforesaid analogy would be applicable in the facts of the case irrespective of the notification issued by the CBIC pursuant to the decision taken by the GST Council as per the direction issued by the Hon'ble Supreme Court. The petitioner cannot be denied the refund as per the provision of 54(3) of the Act only because the petitioner has been granted the refund prior to

05.07.2022 as it would create a discrimination resulting into inequality between the assesses who have been granted refund prior to 05.07.2022 and the assesses who have applied for refund after 05.07.2022.

7. The impugned circular is therefore contrary to the provisions of the Act as it cannot be said that the refund applications filed after 05.07.2022 would only be entitled to the benefit of the amended Rule 89(5) of the Act.
8. As per the provisions of section 54(1) read with section 54(3) of the Act if the assessee has made refund application within the prescribed period of two years, then the assessee would be entitled to the refund as per the amended formula which has been notified w.e.f. 05.07.2022.
9. In the facts of the case the petitioner has made rectification applications for refund as per new amended formula within two years. Moreover, as per the decisions in *Shree Renuka Sugars Ltd. v. State of Gujarat* 2023 (78) G.S.T.L. 324/(2023) 8 Centax 235 (Guj.) and *Pee Gee Fabrics (P.) Ltd. v. Union of India* 2024 (80) G.S.T.L. 287/(2023) 11 Centax 330 (Guj.), there is no embargo on preferring second refund application if the petitioner is entitled to the same within the period of two years.

Hence, the impugned order was quashed and set aside and Circular No. 181/22 dated 10.11.2022 insofar as it clarified that the amendment was not clarificatory in nature was also quashed and set aside and it was held that the Notification No. 14/2022 is applicable retrospectively as the amendment brought in Rule 89(5) of the Rules is curative and clarificatory in nature and the same would be applicable retrospectively to the refund or rectification applications filed within two years as per the time period prescribed under section 54(1) of the Act.

2. GST - APPELLATE AUTHORITY FOR ADVANCE RULING **- ADDITIONAL SURCHARGE ON ELECTRICITY SUPPLY** **- EXEMPT**

In RE: Chamundeswari Electricity Supply Corporation Ltd. 2025 (93) GSTL 105/(2024) 25 Centax 301 (App. AAR. - GST - Kar), the appellant is a public sector company of Government of Karnataka engaged in the distribution of electricity and supply of electric power in the districts of Mysore, Mandya, Kodagu, Chamarajanagar and Hassan. The appellant is supplying electricity for housing, irrigation and also for all kinds of commercial and non-commercial purposes, the cliental comprising of individuals, farmers, organisations, hospitals,

government organisations, commercial establishments, industries etc. and some of the leading industries and companies located in the said area. To meet the huge energy demand and universal supply obligation, it purchases power from central and state generating stations, private power generators which also include generators from non-conventional sources like wind, solar, mini hydel. besides Telangana State Power Generation Corporation Ltd, M/s Damodar Valley Corporation Ltd., short-term and medium term generators. The retail tariff is determined by the Karnataka Electricity Regulatory Commission, (KEREC) as per the Electricity Act, 2003.

The activity of appellant involves both supply of goods and services. The appellant is not charging GST on the value of supply of electrical energy in terms of exemption under Sl. No. 104 of Notification No.2/2017 CT(R). Another main activity of the corporation is “distribution of electricity”. The appellant is not charging GST on distribution of electricity as exemption is granted vide Sl. No. 25 of Notification No. 12/2017 CT(R). The appellant is charging GST on support services such as application fee, registration fee, fee for LT/Temporary application supply of electricity, HT/LT meter testing charges, re-connection fee,

augmentation charges, fees for testing of installations/ inspection of installations, fee collected for issuing NOC, facilitation fee towards solar roof top system, name transfer fee, service line charges, ledger abstract, tender application, additional loads, load reduction, disconnection, re-connection, development charges, calibration charges, penalty recovered from supplier bills, meter burnt out cost, meter testing charges, re-sealing charges, one time maintenance cost from new layouts, line shifting charges etc.

The appellant entered into Power Supply Agreement (PSA) with M/s. JK Tyre Ltd., M/s. Wipro Ltd., M/s. ITC Ltd., etc to supply power. In view of Government policy to encourage private power suppliers especially generators of green energy/renewable energy by way of hydel power, solar, wind mill etc. and sell them in open market, open access is provided in the Electricity Act and the Regulations issued from time to time, to such Industries or companies to buy power from private generators notwithstanding that they have entered into PSA with the appellant. This mode is called in the trade as “open access” and customers as “Open Access Consumers” (“OA Consumers”). In order to comply with the obligations created in PSA, the

Appellant enters into back-to-back Power Purchase Agreements (PPA) with private and state owned energy generators to purchase power as back up for seamless supply of electricity assured to such OA Consumers and therefore, in terms of the PPA, the Appellant has to pay Charges on the agreed units of the electricity supplied every month to its said generators.

The purchase/sale tariff, as the case may be, of electrical energy includes two components i.e., capacity charges (fixed charges) and energy charges (Variable) and both are exempt from tax being towards Supply of electricity. It is pertinent to note that both the fixed Charges and variable charges paid by the Appellant on energy purchased under the PPA are part of its variable charges levied by the Appellant on the OA Consumer while OA consumer buys electricity from the Appellant and same is directly linked to number of units of the Appellant's electricity consumed by the OA Consumer. In the present transaction, the purchase cost is nothing but the fixed cost to the Appellant.

The collection of Additional Surcharge, the subject matter of the appeal, being charged on OA Consumer comes to picture when OA Consumers opt to buy electricity from third party private generators by invoking open access clause. The private

generators, who have agreed to supply power to OA Consumers, since they do not have permanent infrastructure to transmit the power from their generating site to the premises of OA Consumers, enter into separate agreements with various distribution utilities like the Appellant and its counterparts, to use their respective infrastructures on payment of Wheeling Charges. When OA Consumer pays the electricity charges to its third party and not to the Appellant for the said energy purchased/consumed. even then the Appellant has to pay monthly fixed cost to its third-party generators as per the obligation created in the PPA. Since the Appellant is not raising invoices on OA consumer for the variable charges to the extent of units it purchases from the third party generators during open access period, the amount paid by the Appellant to its third party generators as per the obligation created under the PPA will be fixed cost to it and same gets stranded at the end of the Appellant.

On an application seeking advance ruling, the authority ruled as under:

- (i) Chamundeshwari Electricity Supply Corporation Limited cannot be considered either as “Governmental Authority” or “Local Authority”.

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- (ii) The applicant is not exempted from filing of Annual Returns in Form GSTR9 and Form GSTR9C under the second proviso to section 44.
 - (iii) The applicant is eligible to claim input tax credit on the inward supply of goods and services which are capitalized in the books of accounts if they are used or intended to be used in the course or furtherance of business.
 - (iv) The applicant is eligible to claim input tax credit on the inward supply of services against output taxable supplies of support and auxiliary services and other supply of taxable goods subject to section 17(2) rw rule 42.
 - (v) The applicant is eligible to claim input tax credit (on inputs, input services and capital goods) proportionately on the taxable output supply of support services and goods (scrap etc.) subject to section 17(2) of the CGST Act read with rules 42 and 43.
 - (vi) The applicant is eligible to claim taxes paid under RCM, as input tax credit, subject to section 17(2) rw rules 42 and 43.
 - (vii) Additional Surcharge collected from Open Access Consumer as per sub-section (4) of Section 42 of the Electricity Act, 2003, clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National

Electricity Policy and clause 11(vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act.

(viii) The “Wheeling and Banking Charges” collected by the Applicant is exempted from the payment of GST.

Aggrieved by this order an appeal was preferred before the appellate authority which observed as under:-

1. The appellant enters into back-to-back Power Purchase Agreements with private and state-owned energy generators to purchase power. However, Government policy allows such customers to purchase electricity in the open market from private power suppliers. This led to a situation where the appellant is saddled with the stranded cost.
2. The Advance Ruling Authority held that the consideration received towards additional surcharge is nothing but charge levied for tolerating an act which is supply under Section 7(1) of the CGST Act and is taxable under GST Act.
3. The collection of Additional Surcharge is not towards any independent activity but is incidental levy to the main activity of Supply and distribution of electricity for which they have

entered into Power Supply Agreements with their customers The Additional Surcharge is collected to compensate the “Fixed Charges” which is stranded in the hands of the Appellant. This additional surcharge is a part of “Tariff” fixed by KERC and levied as per various provisions enacted by Central and State Governments.

4. As per Regulation 11(vii) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2004, in the case of a new open access customer (i.e. if the open access customer was not a consumer of the licensee), no such additional surcharge is payable. The Appellant is not authorized to collect Additional Surcharge from OA Consumers, who were not their consumers, *i.e.* to whom they had not supplied electricity. Therefore, the Additional Surcharge is nothing but the amount attributable to “Fixed Charges” for supply and distribution of electricity, to OA customers.
5. Thus, such consideration is towards ancillary arrangement to the main agreement and essentially towards supply and distribution of electricity. Thus, additional surcharge is also part of the consideration received by the appellant from their customers towards supply and distribution of electricity.

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6. The additional surcharge levied under Electricity Act from their customers who opted for sourcing electricity from open access, over and above the consideration charged towards supply and distribution of electricity should form part of taxable value, determined in terms of Section 15 of the CGST Act, 2017.
 7. The supply of electricity as goods and / or distribution of electricity as service are covered under exemption either in terms of entry No. 104 of Notification No. 02/2017-CT(R) dated 28.06.2017 applicable to goods and /or entry No.25 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 applicable to services.
 8. Further, in a similar issue, the AAAR, Uttarakhand *vide* Ruling Order No.07/18-19/29.03.2019, has agreed with the Ruling of AAR, Uttarakhand which has held that Additional Surcharge is exempted from payment of GST.

Hence, the appellate authority ruled as under:

- (i) The ruling given Authority for Advance Ruling to the extent of holding that “additional surcharge collected from Open Access Consumer as per sub section (4) of Section 42 of the Electricity

Act, 2003, Clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act”.

- (ii) Additional Surcharge collected by the appellant should form part of the taxable value collected towards supply and distribution of electricity and accordingly exempt from payment of GST.

3. GST - OMISSION OF DIN IN SCN - DEMAND SET ASIDE

In *Khaja Peer Shaik v. AC(ST) 2025(93) GSTL 226/(2024) 25 Centax 306 (A.P)*, the petitioner was served with an assessment order dated 05.06.2024 passed by the adjudicating authority for the period 2017-18, 2018-19, 2019-20 and 2020-21, which was challenged by the petitioner, on various grounds, including the ground that the said proceedings did not contain a DIN number before the high court which observed as under:-

1. The question of the effect of non-inclusion of DIN number on proceedings, under GST, came to be considered by the Hon'ble Supreme Court in the case of *Pradeep Goyal v. Union of India 2022 (63) G.S.T.L. 286 (S.C.)* which held that an order, which does not contain a DIN number would be non-est and invalid.

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2. In *Cluster Enterprises v. Deputy Assistant Commissioner (ST)- 2 2024 (88) G.S.T.L. 179/(2024) 20 Centax 523 (A.P.)*, it was held on the basis of the Circular No.128/47/2019-GST, dated 23.12.2019, that non-mention of a DIN number would mitigate against the validity of such proceedings. Furthermore, in *Sai Manikanta Electrical Contractors v. Deputy Commissioner 2024 (88) G.S.T.L. 303/(2024) 20 Centax 236 (A.P.)*, it was also held that non-mention of a DIN number would require the order to be set aside.
 3. In view of the aforesaid, the non-mention of a DIN number in the order, which was uploaded in the portal, requires the impugned order to be set aside.

Hence, the writ petition was allowed setting aside the impugned proceedings with liberty to the adjudicating authority to conduct fresh assessment, after giving notice to the petitioner and assigning a DIN number to the said order. Needless to say, the period from the date of filing of the writ petition to the date of disposal of the same shall be excluded for the purpose of calculating the limitation available for passing the assessment order.

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SUMMARY OF AAR/AAAR

Inclusion of value of goods supplied on high sea sale basis in value of works contract services



CA. AMAN GOYAL & CA. VENKADATHRI RAJARAMAN

In the case of M/s. Technimont Private Limited (referred to as “applicant”) (Order No.GUJ/GAAAR/APPEAL/2025/11 dated February 28, 2025) – Gujarat Appellate Authority for Advance Ruling

Facts of the case

- The applicant has entered into a turnkey contract with Indian Oil Corporation Limited for executing EPC works in relation to Acrylic Acid Unit (90 KTA) and Butyl Acrylate Unit (150 KTA) at Vadodara.
- The contract with IOCL identifies two separate set of supplies for the turnkey project, works contract for EPC work, supply of imported materials for the project.
- The contract is of a divisible nature where the supply of EPC services and the imported goods are intended to be treated separately

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- During the course of importation, before the goods reach the customs frontiers of India, the applicant enters into a High Sea Sale agreement with IOCL, transferring the ownership of the goods at the price agreed in the contract
 - The applicant raises an invoice with respect to such goods sold on high sea sales basis. IOCL files the bill of entry as the importer and discharges the customs duty and IGST by clearing the goods.
 - The applicant treats the high sea sale transaction as an independent supply of goods distinct from the works contract supplies under the agreement

Question before AAAR

- Whether the transaction of sale of goods by the applicant to IOCL on high sea sale basis would be covered under Entry No. 8(b) of Schedule III of the CGST Act and shall be excluded from the value of work contract service for charging GST?
- Whether the transaction of sale of goods on high seas sale basis by the Applicant to IOCL would be treated as works contract and whether the applicant is liable to charge GST on the goods sold on high seas sale basis to IOCL? If yes, what will be the applicable rate of tax on such goods supplied?

Interpretation of law by the applicant

- Supply of imported goods on high sea sale basis is not a part of works contract services. Sale of goods on high sea basis is a distinct element in the contract and is separately identifiable from the rest of the EPC work.
- Once the supplies are held to be distinct, the consideration of one supply cannot be added to the value of another separate distinct supply for the purpose of GST;
- Even if it is held that the contract is indivisible, since the supply of goods on high sea sale basis would form part of interstate trade or commerce no GST can be levied on the same component as an intra state supply of works contract services
- Since supply of goods on high sea sale basis does not constitute a taxable supply, it cannot form part of the composite supply of works contract services

Interpretation of law by the department

- The contract was a lump sum turnkey EPC contract and could not be divided into separate parts.

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- The value of goods supplied on High Sea Sale basis should be included in the transaction value for GST calculation as the applicant was contractually bound to supply both goods and services.

Observations and Ruling of AAR

- In terms of Schedule III, read with section 7 (2) of the CGST Act, 2017, supply on High Sea Sale basis, is treated as neither a supply of goods nor a supply of services.
- The EPC contract encompasses both the supply of goods and services. In terms of the contract, the applicant is liable to provide the goods [supplied on high sea basis]
- The contract was a lump sum turnkey EPC contract and could not be divided into separate parts.
- In terms of section 15 of the CGST Act, 2017, the value of such imported goods invariably forms an integral part of the transaction value and the value of imported goods supplied on high sea sale basis should be included in the value of works contract services.

Taxability of canteen services provided to contractual workers and eligibility of ITC in this regard

In the case of M/s. Troikaa Pharmaceuticals Limited ((referred to as “applicant”) (Order No. GUJ/GAAAR/APPEAL/2025/07 dated February 28, 2025) - Gujarat Appellate Authority for Advance Ruling

Facts of the case

- The applicant is engaged in the manufacture, sale & distribution of pharma products. The applicant provides subsidized canteen facilities to its employees & contractual workers
- The applicant recovers 50% of the amount from the employees.

Question before AAAR

- Whether GST shall be applicable on the amount recovered by the company from employees or contractual workers, when provision of third-party canteen service is obligatory under section 46 of the Factories Act, 1948?
- Whether input tax credit of GST paid on food bill of the Canteen Service Provider shall be available, since providing this canteen facility is mandatory as per the Section 46 of the Factories Act, 1948?

Interpretation of law by the department

- In terms of the circular No. 172/4/2022-GST dated 6.7.2022, the benefit provided by employer to its employees in terms of contractual agreement is not a supply. ITC of the GST paid on canteen charges is available to the applicant on the goods supplied to the employees of the applicant as it is mandatory to provide canteen facility u/s 46 of the Factories Act, 1948.
- The contractual workers do not form part of employees as they are not on the pay roll of the applicant. Contractual workers do not pass the test of employer-employee relationship and hence are not covered under the ambit of entry 1, Schedule III of the CGST Act, 2017
- GST is applicable on amounts recovered from contractual workers for canteen services, as they do not form part of the employee-employer relationship under GST.
- There is no mandate that the applicant is required to provide canteen facility to the contractual worker. ITC is not available for canteen services provided to contractual workers, as providing these services is not obligatory under the CLRA

Interpretation of law by the applicant

- GST should not be applicable on amounts recovered from contractual workers for canteen services, as they are under legal obligation to provide these services under the Factories Act, 1948 and the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA).
- The applicant is the principal employer of the contractual employees. If the contractor does not provide the canteen facility it is to be provided by the applicant being the principal employer in terms of section 2(g) of CLRA.
- In terms of section 2(1) of the Factories Act, 1948, a worker includes a contractual worker. The main and primary responsibility for depositing provident fund is with the appellant & therefore there is an employer-employee relationship.
- The contractual workers are huge in numbers and all of them are working in the factory premises of the appellant. Though there is no formal employer-employee relationship, the appellant as principal employer will still be responsible for all workers directly or indirectly employed by the appellant

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- ITC should be available for canteen services provided to contractual workers, as they are considered employees under the relevant laws.

Observations and Ruling of AAR

- GST is applicable on canteen charges for contractual workers, as they do not have an employer-employee relationship. The appellant did not provide evidence that the contractor failed to fulfill statutory obligations, which would shift the responsibility to the principal employer.
- ITC is not available for canteen services provided to contractual workers, as providing these services is not obligatory under the CLRA

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CONNECTING FACTORS TO RESIDENCE UNDER ARTICLE 4(1)

1. Introduction



CA.K.PRASANNA

Determining the residential status of the taxpayer is one of the main determinants for invoking taxation provisions, more so with regard to determining the same in the context of tax treaties. It is the main key that provides access to tax treaties. As per Article 1, one of the fundamental qualifications for invoking a tax treaty is that the tax entity should be a resident of one or both contracting states. Article 3 usually defines the term 'person', and Article 4 deals with the resident. A person's residential status is determined based on the contracting states' domestic laws that enforce the taxation. If a person is a resident of two contracting states, then the treaty may provide for residence determination using tiebreaker tests.

In cross-border scenarios, a non-resident is required to provide its tax residency certificate ('TRC')¹ issued by tax authorities to invoke the beneficial provisions under the tax treaty. While the

¹ Section 90(4) of the Income-tax Act, 1961

TRC is sufficient proof to substantiate Residency or not, it is a matter of sub-judice before the Hon'ble Supreme Court, and the scope of this article is not on that. Instead, the article intends to focus on the factors connected with the person's residency as envisioned in Article 4.

2. Connecting Factors to Residency

Article 4 (1) of the Organisation for Economic Co-operation and Development (OECD) Model Convention, 2017 reads as follows:

"1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein".

The first sentence of Paragraph 1 of Article 4 requires the person to satisfy the requirement of residence with a liability to pay tax in a contracting state, and such liability to tax is on account

of connecting factors like domicile, residence, place of management, or any other similar criteria. In other words, a mere residence in a contracting state is not sufficient to be entitled to the benefits of the convention; such residence is qualified with liability to pay tax on account of one of the connecting factors with the country. The scope of the second sentence is discussed in the subsequent section of this article.

The above parameters have to be satisfied on a cumulative basis, and if any of the aspects are missing, then the person may not be regarded as a resident and, consequently, not entitled to a treaty.

2.1 Liable to tax

In India, the term ‘liable to tax’ was a subject matter of judicial interpretation over the year, and the Indian Apex Court in **UOI vs. Azadi Bachao Andolan**² had laid out the principles for interpreting the term. The Supreme Court of Canada in **Crown Forest Industries Ltd vs. Canada**³ interpreted the term ‘liable to tax’ as being subjected to as comprehensive a tax liability as is imposed by state”.

²(2003) 263 ITR 706

³[1995] 2 SCR 802 - Para 40

The OECD MC commentary suggests that *“the domestic laws of the various States impose a comprehensive liability to tax – “full tax liability” – based on the taxpayers’ personal attachment to the State concerned (the “State of residence”)*⁴.

Therefore, how a country levies taxation through its domestic law and its coverage must be critical for determining residency. More will be discussed later in this article.

2.2 Domicile

The commentary to Article 4 of the OECD MC, 2017 merely states that the term ‘domicile’ is usually taken in private law legislation⁵. There is no specific definition is provided to this term. If one were to trace the origin, one has to refer the Double Tax Convention, 1923 report by the League of Nations. The economist reports discussed the concept of economic allegiance and its four elements: origin of wealth, situs of the wealth, enforcement of the rights to wealth, and residence or domicile.

...The report⁶ further suggests that by residence in this sense we mean not mere temporary residence but permanent residence, or what in some

⁴Para 3 of Commentary to Article 4 of OECD MC, 2017

⁵Para 3 of Commentary to Article 4 of OECD MC, 2017

⁶Accessed from - <https://digital.nls.uk/league-of-nations/archive/190273783>

countries is called habitual residence. This, however, is not necessarily the same thing as domicile. Domicile, in English-speaking countries, is an inference from the facts, supplemented by the intention of the taxpayer. A man's domicile is usually the place where he chooses to exercise his political rights, such as voting, and where he is summoned to discharge his political obligations like jury service.....The domicile may be in one State according to one legal system and in a different State according to other legal system, so that taxpayeer would be subject to simultaneous taxation in both states.....It is clear, therefore, that, in order to avoid double taxation, domicile or habitual residence must everywhere be interpreted alike for the purposes of taxation.....In this memorandum, however, we use the term "domicile" in the sense of permanent or habitual residence".

Prof. Michael Dirkis⁷ explained that the current meaning of domicile and residence in Article 4(1) refers to the definition of domicile and residence picked up from domestic law by Art. 4(1) before applying a tiebreaker test. He reinforced his position by referencing the commentary of OECD MC in 2008.

As regards the term 'Fiscal Domicile', the 1925 Experts found it particularly difficult to conclude 'fiscal domicile', as they had

⁷Residence of Individual under Treaty and EU Law - Chapter 6 by Michael Dirkis

to consider the civil law in each country, private international law, and tax law⁸. To illustrate,

- (a) UK - perceive domicile based on⁹ (i) being born in the UK, (ii) living most of your life in the UK or (iii) living in the UK permanently;
- (b) China - Domicile is generally defined¹⁰ as habitual residence in China on account of domiciliary registration, family ties, and economic interests.
- (c) Australia - The person's domicile¹¹ is in Australia (unless their permanent place of abode is outside of Australia);
- (d) Switzerland - A "domicile" is defined¹² as the place where a person lives with the intention of staying permanently.

⁸Double Taxation and League of Nations - Sunita Jogarajan

⁹<https://www.gov.uk/government/publications/residence-domicile-and-remittance-basis-rules-uk-tax-liability/guidance-note-for-residence-domicile-and-the-remittance-basis-rdr1#how-does-domicile-affect-your-uk-income-tax-and-capital-gains-tax-liability>

¹⁰<https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/China-Residency.pdf>

¹¹<https://web.archive.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Australia-Residency.pdf>

¹²<https://web.archive.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Switzerland-Residency.pdf>

To date, no measures have been taken to define a universal term that could be employed across the Globe, and it has been left to the wisdom of respective countries to define or interpret the term.

2.3 Residence

Again, the term residence is determined based on the domestic law of a particular country. The law of determination of residence is not uniform across countries. Prof. Michael Dirkis, in his study *supra*), has noted three broad categories of residency tests. A connection to a jurisdiction is found through the tests based upon:

- i. Individual facts and circumstances tests (domicile, reside, home (permanent/habitual), ordinary resident, center of vital family or economic interests, and place of abode);
- ii. An arbitrary number of days (183 days)
- iii. Specific criteria (citizenship, immigration status, and engagement in government service or other related activity)

Therefore, the aspects of residency must be determined based on the domestic law of a particular state.

2.4 Any other Criteria of a similar nature

The phrase, with a similar nature affixed to any other criteria, emphasizes that whatever criteria a state domestic law may employ must be akin to the characteristics of domicile, residence, etc., that give rise to full liability to taxation.

Klaus Vogel on Double Taxation Conventions (fifth edition)¹³ suggests two possibilities exist for interpreting the term ‘of a similar nature’. (i) Functional interpretation – any domestic feature triggering unlimited tax liability is sufficient, and (ii) territorial understanding requires both unlimited liability and a territorial connection between the taxpayer and State concerned, and the authors have subscribed to the territorial view.

3. **Second Sentence to Article 4(1)**

The second sentence was added to OECD MC in 1977 to exclude the definition of resident as any person who is liable to tax in that State only with respect to income from sources in that State. It is implemented as an exception to the first sentence of 4(1) of OECD/UN, it will be triggered where the conditions of the first sentence are met. The 1977 commentary¹⁴ states as follows:

¹³AT M.No.61 to Article 4 by Ismer/K.Blank

¹⁴Para 8 of OECD MC as it existed in 1977

“.....It also covers cases where a person is deemed, according to the taxation laws of a State, to be a resident of that State and on account thereof is fully liable to tax therein (e.g. diplomats or other persons in government service). In accordance with the provisions of the second sentence of paragraph 1, however, a person is not to be considered a “resident of a contracting State” in the sense of the Convention if, although not domiciled in that State, he is considered to be a resident according to the domestic laws but is subject only to a taxation limited to the income from sources in that State or to capital situated in that State. That situation exists in some States in relation to individuals, e.g. in the case of foreign diplomatic and consular staff serving in their territory....”

The second sentence was originally designed for diplomats who are given a wide range of tax benefits under the Vienna Convention on Diplomatic Relations, 1961¹⁵ (‘VCDR’) r.w. Article 28 of Model Convention from the host state taxation. The placement of this para in 4(1) was based on several deliberations¹⁶. The practice of contracting states is in favour of granting treaty entitlement to diplomats¹⁷.

¹⁵Articles 34 and 49 of VCDR

¹⁶Van Raad K 63 BIT 188 (2009)

¹⁷AT M.No.62 to Article 4 by Ismer/K.Blank

Therefore, the scope of the second paragraph is to exclude persons confined to taxation of income or capital only with regard to source, if income or capital situated therein, respectively. Therefore, a mere source taxation is not sufficient to prove residency¹⁸.

In **Chiron Behring GmbH & Co**¹⁹, the **Bombay High Court** allowed treaty benefits to a German Partnership by observing that it was liable to tax under the German Trade Tax. The person's definition under Article 3(1)(d) includes other entities treated as taxable units, and as per Article 2(3)(a), the term 'tax' also includes German trade tax.

This ruling does not address whether the partnership is liable to the trade tax in Germany because of its domicile, residence, place of management, or any other similar criteria, which is critical under Article 4(1) to qualify as a resident.

4. Manner of Taxation by certain countries and its qualification

4.1 Not Ordinarily Resident (RNOR)

In India, a person could be regarded as not an ordinary resident by virtue of Section 6(1) r.w.s 6(6)²⁰ of the Income-tax Act, 1961

¹⁸VAN Gennep, C 31 ET 142 (1991)

¹⁹[2013] 29 taxmann.com 199 (Bombay)

²⁰Section 6(1A) has been dealt separately

(‘Act’). With respect to RNOR, the scope of total income under Section 5 provides that income accruing or arising outside India is not taxable. Therefore, the extent of income sourced from India is subject to taxability. An RNOR is not subject to full/comprehensive taxation. Accordingly, from an Indian treaty perspective, the RNOR may be hit by the second sentence of 4(1) and may not be regarded as a Resident from a tax treaty perspective.

It is critical to note that an RNOR still may not be subject to full taxation even if the first proviso to Section 5(1) applies to him. This is due to the fact that the first proviso applies only to the extent of income accrued outside India concerning businesses controlled or professions set up in India. Hence, it is arguable that income accrued outside India other than this may not be subject to taxation in India.

4.2 Citizenship/Nationality Taxation

India had recently introduced citizenship-based taxation concerning the stateless person provided under Section 6(1A) of the Act, and by virtue of Section 6(6), the Indian citizen is treated as RNOR. Therefore, only income sourced from India is taxable. Therefore, this will be hit by the second sentence of Art. 4(1).

The United States of America (USA) taxes its Citizens on a worldwide income. Citizens of the US are taxed irrespective of whether they are residents of the US by virtue of their physical presence. Here, the nationality of the US is a connecting factor for taxation. The question arises as to whether such citizenship-based full taxation satisfies the connecting factor. From a literal reading perspective, the taxability of citizens does not satisfy the requirement of territorial function discussed in par 2.4. The nationality often referred to as the prototype of a personal or legal but not territorial link to a state. From a US perspective, the US Model Convention specifically provides for citizenship based taxation as a connecting factor for residency²¹, and if not for the specific mention, the citizenship based taxation may fail to satisfy the the connecting factor²². The relevant extracts of US Model Convention is provided below:

*“For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, **citizenship**, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that Contracting State and any political subdivision or local authority thereof.....”*

²¹Also refer Article 4(1) of India-USA DTAA

²²Rust, A., in: Maisto (ed.) Residence of Individuals under Tax Treaties and EC Law (2010) at 89.

4.3 Territorial Based Taxation

Territorial taxation means that individuals and businesses are only taxed on income earned within a specific country and not on income earned from foreign sources. Hong Kong is a classic example of territorial taxation, where tax is levied on income arising from Hong Kong²³. There was a fear that the second sentence's scope would exclude all residents of countries adopting a territorial principle in their taxation. The OECD²⁴ had clarified that the second sentence has to be interpreted in light of the object and purpose, and hence, it should not be interpreted to exclude resident of countries adopting a territorial principle in their taxation, and this is not intended as well. If the country does not consider them as a resident, then Hong Kong has no purpose to enter into tax treaties with other countries.

4.4 Remittance Based Taxation

The OECD Commentary to Article 1²⁵ is stated as follows:

“Another example of a tax regime with respect to which treaty benefits might be specifically restricted is that of remittance based taxation. Under

²³<https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/tax/deloitte-cn-tax-hk-tax-investment-guide-2024-en-240918.pdf>

²⁴Para 8.3 of Article 4 to OECD MC, 2017

²⁵Para 8.3 of Article 4 to OECD MC, 2017

the domestic law of some States, persons who qualify as residents but who do not have what is considered to be a permanent link with the State (sometimes referred to as domicile) are only taxed on income derived from sources outside the State to the extent that this income is effectively repatriated, or remitted, thereto. Such persons are not, therefore, subject to potential double taxation to the extent that foreign income is not remitted to their State of residence and it may be considered inappropriate to give them the benefit of the provisions of the Convention on such income.....”

In the UK, a resident individual who is a non-domiciled nor ordinary resident may elect to be taxed on income arising outside the UK on a remittance basis, and similar regimes exist in Japan and Singapore in certain circumstances. While they in principle, satisfy ‘domicile or residence’ under Art. 4(1), the question arises whether they are liable to tax on a comprehensive basis as their foreign income is taxed on a remittance basis. Prof. Michael Dirkis has observed that the answer will depend on the view adopted by the particular states in relation to words ‘liable to tax’. If they satisfy the requirement of Art.4(1) and they are taxable on some foreign sourced income, they may not be hit by Art 4(1) second sentence.

5. Treaty Analysis

On analysis of treaties entered into by India, various connecting factors and terminology used is tabulated below:

#	Connecting Factors	Treaty Partner of India
1	Citizenship	USA
2	Place of Incorporation or Place of Management (both)	USA, Belarus, Chile, Columbia, Estonia, Hungary, Indonesia, Iran, Kazakhstan, Kenya, Latvia, Lithuania, Uruguay, Sri Lanka, Swiss Confederation, Thailand, UK, Ukraine, Vietnam
3	No connecting factors	Australia, Belgium, Greece, Italy, Japan, Singapore, Slovak Republic, Swiss Confederation
4	Nationality (N), Registration (R)	Bulgaria (N), Iran (R), Romania (R), Russia (R)
5	Head or Main Office	Bulgaria, China, Japan, Republic of Korea, Turkey
6	Second Sentence to Art.4(1) not provided	China, France, Ireland, Israel, Mauritius, Mongolia, Netherlands, Oman, Russia, Singapore, Slovak Republic, Trinidad and Tobago, Egypt, Uzbekistan, Vietnam, Zambia
7	Ordinarily Resides	Hong Kong, Namibia, South Africa
8	Stay for No of days	Hong Kong, UAE
9	Place of Effective Management	Namibia, South Africa

6. Conclusion

The determination of tax residency under Article 4 is a nuanced process influenced by domestic laws and various connecting factors such as domicile, residence, and place of management. The interpretation of 'liable to tax' differs across jurisdictions, impacting treaty eligibility, especially in citizenship-based, territorial, and remittance-based taxation cases. India's tax treaties incorporate diverse residency criteria, emphasizing the need for careful analysis to ensure compliance and benefit from treaty provisions. Understanding these factors is essential for individuals and businesses navigating cross-border taxation and mitigating the risk of double taxation.

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The Chartered Accountants Study Circle (Regd.)

During the middle of 1978 a handful of young chartered accountants, based on MADRAS (as it then was) met periodically to discuss matters of professional relevance and significance and to widen the knowledge exposure and skills. From a limited role of discussions on tax laws and corporate laws, we have become full fledged treasure-house of talent mobilization. More than two third of our speakers / Chief guests have made their first ever public Speech under our banner.

The organization is proud that many of its members have become men of great eminence including three of its members being occupants of coveted position of the President of the Institute of Chartered Accountants of India and a number of members have been serving in the Regional and Central Councils of ICAI, ICSI, Chambers of Commerce and other Bodies. The members of CASC are interspersed in the society and more particularly in practice and in the industry.

The membership of CASC is in the form of Life, Corporate and Annual Membership.

The Composition of the members includes lawyers, company secretaries, consultants and members of the other allied and related professions. Besides our regular meetings, the CASC organizes with regularity, workshop, refresher courses, seminars and group discussions on all professional related subjects and topics in its self owned fully Air-Conditioned Premises at central location in Chennai with the state of the art infrastructure.

Every Year, scholarship are granted to meritorious students of the CA Course through the various endowments created by members and their families.

The residential Conference conducted by CASC, an annual feature is awaited eagerly by all the members. The programmes are conducted in exotic places at affordable rates coupled with good learning experience are booked well in advance.

Our monthly publication, the CASC bulletin contains thought provoking articles, exchange of problems and solution and digest of recent discussions, notifications and circulars.

Our Other Regular Publications are "Cenvat - Demystified", "User Guide to TNVAT", "Corporate Audit Check List", "Anti Dumping Measures in the WTO frame work" 'A Handy Booklet on Bank Branch Audit', and "Guide to Tax Audit".

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Book

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