THE MONTHLY MAGAZINE FROM CASC

GST UPDATES

RECENT JUDGMENTS

VOLUME-3 ISSUE-11 NOVEMBER 2024

CASC BULLETIN

INDEX

Date	Topic	Speaker
14.11.2024 (Thursday)	Key issues in filing Forms GSTR-9 and GSTR-9C	CA. Ganesh Prabhu Balakumar
28.11.2024 (Thursday)	Peer Review - Compliance & Reporting	CA. P. Arumugaraj

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 2024 - 2025

EDITORIAL

BRICS Summit 2024!!

The 16th BRICS Summit 2024 being the first meeting after the inclusion of new members, Egypt, Ethiopia, Iran, and the United Arab Emirates which held in Kasan, Russia in October 2024 has assumed global significance, as it represents 60% of the global population and approximately 30% of the world's GDP. India has played a pivotal and proactive role in this summit envisioning for more united, prosperous and multipolar world. BRICS now spearheads addressing international challenges in socio and economic development and inclusion, especially, pushing BRICS Payment system, as an alternate to SWIFT for settling international transaction using block chain technology. This would definitely revolutionize/ disrupt the global trade, financial markets, international banking system and also the dominance of US Dollar. This would definitely create newer opportunities for professionals for development of new infrastructure for banking systems using block chain technologies and new systems/ methods to benchmark all other currencies against BRICS new payment systems for cross border trade and settlements.

Revamp of IT E-filing Portal 3.0

The CBDT has announced that it has set to launch a revamped e-filing portal, ITR E-Filing Portal 3.0, with significant improvements aimed at making tax filing more user friendly, easier for taxpayers and enable faster tax refunds. While the intention is laudable, the effectiveness of the revamp in the portal would largely depend on its capabilities to handle large scale users and successful migration of the taxpayer's data. CBDT has also sought the comments/ feedback from the public and stakeholders on the present system's strengths and weaknesses and identifying areas for improvement in IEC 3.0 before November 30, 2024. Let us hope that the present issues, like technical glitches, server failures while uploading returns especially towards deadlines, downloading past tax returns or forms, and payment issues will be resolved in the upgraded system. Otherwise, the need for extending deadlines at the last time due to glitches could be avoided like the recent extension for filing of tax returns alone for tax audit cases from 31st October 2024 to 15th November 2024.

New Form 12BAA introduced for TDS/TCS credit

With a few to enable all salaried employees to avail credit for taxes deducted/ collected on various other income streams like interest, dividend, rent, or certain payments made in foreign currency or in the name of their minor child, a new form 12BAA has been introduced, w.e.f 1st October 2024. Now, the salaried employees must provide those details of TDS/ TCS arising from other transactions with their employer, who shall take such TDS/ TCS into account while deducting the TDS from their employees. This would definitely reduce the burden of employees to file tax returns and claim refund credit for TCS, which hitherto could not be considered by their employees, who deducting the TDS under section 192 of the Act. The quarterly return in Form 24Q has also been amending to capture those details of TCS/ TDS declared by the employees in Form 12BAA. This is indeed a welcome move in a right direction, which would also reduce the burden of CPC to process the refund claims made by the salaried taxpayers and improve its efficiency.

New Guidelines for Compounding of Offences introduced

With the increase in the number of prosecution notices issued by the Income-tax department to various taxpayers in recent times, and the taxpayers are opting for compounding of offences to avoid prosecution, the new guidelines for compounding issued by CBDT is definitely a boon. It aims at simplifying the process, enabling compliance and applies to all pending applications and fresh ones. The key enabling features are removing the limit on number on occasions in filing applications, time limit of 36 months to file compounding applications, allowing to file fresh application upon curing the defects, dispensing with the condition that main accused to file compounding in the case of Companies/ HUF, allowing compounding application upon payment of compounding charges by the main accused and/or any of the co-accused, rationalising compounding charges, single interest rate of 1.5% per month etc., This move has come with the view to mobilise faster collections through compounding charges and to reduce litigations on prosecution.

CASC - 25th ARC

The brochure of our **25th ARC,** which is going to be held at "**Hotel Regent Inn Ranip**" **Ahmedabad** from **23rd to 26th January 2024** have been circulated earlier is appended to this Bulletin again. The rates given in the brochure are applicable only for first 100 registrations. The registrations will be closed by end of November 2024, therefore we urge our members to register for the program and make the payments immediately. Those who have already registered and paid the first instalment are kindly requested to make the second instalment before the end of November 2024.

Safari Retreats – A Huge Impact On Leasing

The *Safari Retreats Pvt. Ltd. v. Chief Commissioner of Central Goods and Services Tax* (2023) judgment by the Supreme Court of India was significant for its interpretation of GST law regarding Input Tax Credit (ITC) in real estate. In this case, Safari Retreats Pvt. Ltd., a real estate developer, sought clarification on whether GST paid on goods and services used for the construction of a commercial property could be set off against the GST liability arising from renting out the property.The Supreme Court ruled that Input Tax Credit

(ITC) was not allowable on construction services for buildings intended for commercial leasing. The court chose a literal interpretation, following the Act's restrictive language rather than expanding the scope of ITC based on business logic. This means developers cannot claim credit for GST on construction costs even if they incur GST liability on rent income. This decision has raised calls for a re-evaluation of GST law, especially concerning ITC. Many experts feel that denying ITC contradicts GST's fundamental objective of reducing the tax burden through seamless credits. A more business-friendly approach could help developers, encourage investment, and improve cash flow.

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 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

Balaji V

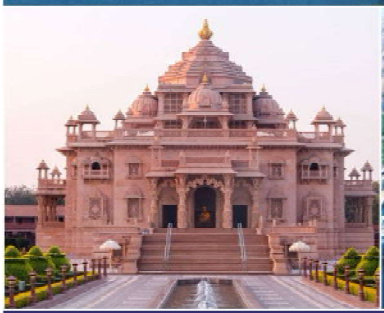
Balaji V

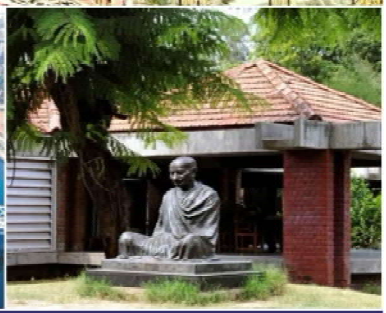
Member Editorial Board

GLIMPSES FROM THE MONTHLY MEETING held on 24. 10.2024 by CA. RANJANI SHRINIVASAN on "Key Aspects in Transfer Pricing - Form 3CEB"

Organised by

25th Annual Residential Conference at Hotel Regent Inn Ranip, Ahmedabad 23rd to 26th January 2025





THE CHARTERED ACCOUNTANTS STUDY CIRCLE

Prince Arcade, 2-L, Rear Block, 2nd Floor, 22-A, Cathedral Road (Next to Stella Maris College)
Chennai - 600 086. Phone : 28114283 Website : www.casconline.org

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

Prince Arcade, 2-L, Rear Block, 2nd Floor, 22-A, Cathedral Road (Next to Stella Maris College)
Chennai - 600 086. Phone : 28114283 Website : www.casconline.org

Dear Professional Colleagues

Greetings from CA Study Circle,

WE ARE BACK with our Edutaining sessions in our Unique style and Bonding ourself with our fellow members alongwith their family in our 25th Annual Residential Conference. For a Change we are travelling long to the Western Part of the Country and have arranged the programme at Ahmedabad and we have finalized our annual conference back to January month on 23rd to 26th January 2025.

Venue is the REGENT INN RANIP, Ahmedabad

We will be launching our travel by air once again, after our Jaipur Trip. We will be leaving by the afternoon of 23rd January, Thursday and will be reaching the Venue by Late afternoon on the same day. The programme starts with Lunch followed by our inaugural session and Group Discussion for the technical subjects of the conference. We will be having intervening sessions on the rest of the days.

The accompanying spouses and children are facilitated with suitable programme during the engaging time of delegates in serious discussions.

There will be group sightseeing programme for the entire team together for Statue of Unity, Akshardam Temple, Sabarmathi River View and Ashram, etc.

We will be leaving the venue by 3.30 p.m. Post Lunch on 26th January 2025 and after a local sight seeing trip, will be departing by Late Evening Flight to reach back to Chennai well in time for the next day routines.

We have organized Three Technical Sessions as follows :

- **Case Studies on Direct Taxes – CA Dhinal Shah, Ahmedabad (Group Discussion followed by presentation by speaker)**
- **Case Studies on Indirect Taxes – CA. K. Sivarajan, Partner, PWC, Chennai (Group Discussion followed by presentation by Speaker)**
- **Presentation on Auditing & Accounting Standards-Recent Developments by Ca Himanshu Krishnadwala, Mumbai.**
- **Presentation on Information Technology – CA. Ameet Patel, Mumbai**

We are also organizing an interesting but General Topic which will enable participation for spouses and their family members.

We look forward to your support by enrolling yourselves with family for the programme.

For further information please feel free to contact.

- **CA. R. Ravi : 9381008327** **CA. R. Sundararajan : 9444393420**
- **CA. V. Thulasidharan : 9884029712** **CA. K.R. Sathyanarayanan : 9840118712**

Best Regards
R. Sundararajan
Conference Coordinator, CASC

DELEGATE / PARTICIPATION FEES - ALL INCLUSIVE RATES

PARTICULARS	REGISTRATION FEE (Includes Travel by Flight bothways)
FOR DELEGATES (MEMBERS)	Rs.47,000/-
FOR DELEGATES (NON - MEMBERS) (will be enrolled as Annual member)	Rs.48,000/-
Accompanying Spouse, Adults & Children above 12 years	Rs.44,000/-
FOR CHILDREN (BETWEEN 5 TO 12)	Rs.36,000/- (On room sharing with Parents)
FOR CHILDREN (LESS THAN 5 YEARS)	Rs.21,000/- (For tickets and travel only)

Person	Payment in favour of Travel Optionz	Payment in favour of CASC	Total
Delegates	Rs.42,000/-	Rs.5,000/-	Rs.47,000/-
Delegates - New members	Rs.42,000/-	Rs.6,000/-	Rs.48,000/-
Accompanying persons	Rs.42,000/-	Rs.2,000/-	Rs.44,000/-
Children 5 -12 years	Rs.34,000/-	Rs.2,000/-	Rs.36,000/-
Children < 5 years	Rs.20,000/-	Rs.1,000/-	Rs.21,000/-

The payment may be made in two Equal instalments at the time of registration and balance on or before 30th November 2024 :

BANK DETAILS : (For Online Payment)
Account Name : **TRAVEL OPTIONZ HOLIDAYS PRIVATE LIMITED**
Bank Name : **HDFC BANK LIMITED**
Account Number : **50200021121664**
IFS Code : **HDFC0000323**
Account Type : **CURRENT**

BANK DETAILS :
Account Name : **THE CHARTERED ACCOUNTANTS STUDY CIRCLE**
Bank Name : **CANARA BANK, Gopalapuram**
Account Number : **0930101004830**
IFS Code : **CNRB0000930**
Account Type : **SAVINGS**

TERMS AND CONDITIONS :

- Registration will be restricted to **100 persons** on first come first booked basis based on Enrolment Forms Received. Subsequent registrations may be accepted subject to availability of rooms at the resort.
- Subsequent registrations will taken up on the basis of revised Flight Ticket Cost after the first **100 persons** are registered, which will be communicated.
- The Enrolment Form duly filled up along with requisite payment shall reach the CASC Office by **31st August 2024**. Enrolment form without payment will not be considered and the same shall be taken as rejected.
- Request for cancellation is not entertained.
- The registered delegate can opt for substitution and the same may be allowed only with the prior permission of the management committee and with the Name Change charges leviable by Airlines.
- Delegate fee include all cost including accommodation from entry into the Hotel till exit, including food during the travel, if any.
- Decision of the conference committee will be final in respect of allocation of rooms or room partners and / or in the matter of substitution and / or any other matter without assigning any reason there for.

CA. SIVARAJAN KALYANARAMAN
Partner, Price Waterhouse & Co LLP

Mobile : +91 90030 67700
Email : k.sivarajan@pwc.com

☆ Sivarajan, is a Partner in Tax and Regulatory Services with Price Waterhouse & Co LLP, India. He specializes on Indirect Tax laws (GST, Customs and Foreign Trade Policy, Special Economic Zones). He has 25 years of experience in advising clients across industries engaged in manufacturing, infrastructure development and services sector.

☆ He drives the firm's Tax Controversy and Dispute Resolution practice and the Center of Excellence on Indirect Tax laws. He represents clients before Tax Authorities including Advance Ruling authorities, Appellate Commissioners and Tax Tribunals. He also advises clients on the litigation strategy and options, including writ remedies before the Indian Courts, and briefs counsels.

☆ He is a member of the Expert committees in leading Chambers of Commerce and Professional bodies. He has presented several papers at International and Indian seminars and conferences.

☆ He is a qualified Chartered Accountant, Cost Accountant and a Graduate in Commerce and Law.

Mr. AMEET N PATEL

- Partner at Manohar Chowdhry and Associates - Taxation of Financial Services, International Taxation, Representation & Litigation.
- Past President of Bombay Chartered Accountants' Society (BCAS)
- Taxation Committee Chairman of BCAS
- Member of Taxation & Finance Panel at Maharashtra Region, CII
- Independent Director of LIC Housing Finance Ltd. and SBM Bank (India) Ltd

Mr. DHINAL SHAH

- Founder at Dhinal Shah and associates, a Lawyer and a Chartered accountant with experience of more than 30 years
- He was a partner with EY India from 2008-2021.
- He also contributes to academics by giving lectures and writing articles on various professional topics at various forums including IIM.
- He is also the governing council member of TIE Ahmedabad

Mr. HIMANSHU KISHNADWALA

- Mr. Himanshu Kishnadwala is a Practicing Chartered Accountant with more than 18 years of experience in the field of Accounting, Taxation and Corporate Affairs
- He is also a member of ICAEW, UK
- He was the president of Bombay Chartered Accountants' Society (BCAS)

PRESENT MEMBERS OF THE MANAGEMENT COMMITTEE OF THE CHARTERED ACCOUNTANTS STUDY CIRCLE IN ALPHABETICAL ORDER

S.No.	Name	Email ID	Mobile No.
1	CA. Akshunn Daga G	caakshunndaga@gmail.com	8695234818
2	CA. Balaji V	balaji.venkat@gmail.com	9003067900
3	CA. Bhuvaneswari R V	ca.bhuvaneswari@gmail.com	9894314621
4	CA. C. Madasamy	cmsamyca@yahoo.co.in	9841113526
5	CA. Manikandan S	smanik85@yahoo.com	9884756461
6	CA. Praveen T Venkatesulu	rtrpraveen89@gmail.com	9884525023
7	CA. C.S. Ramesh Babu	fca.ramesh@gmail.com	9840134257
8	CA. Thulasidaran V	vthulasi97@gmail.com	9884029712
9	CA. Uttamchand Jain	uttamchallani@gmail.com	9840123097

DISCLAIMER

The contents of this Monthly Bulletin are solely for informational purpose. It neither constitutes professional advice nor a formal recommendation. While due care has been taken in assimilating the write-ups of all the authors. Neither the respective authors nor the Chartered Accountants Study Circle accepts any liabilities for any loss or damage of any kind. No part of this Monthly Bulletin should be distributed or copied (except for personal, non-commercial use) without express written permission of Chartered Accountants Study Circle.

COPYRIGHT NOTICE

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***

For Further Details contact :
"The Chartered Accountants Study Circle"
"Prince Arcade", 2-L, Rear Block, 2nd Floor, 22-A, Cathedral Road,
Chennai - 600 086. Phone 91-44-28114283

Log on to our Website : **www.casconline.org**
For updates on monthly meetings and professional news.
Please email your suggestions / feedback to admin@casconline.org

RECENT JUDGEMENTS IN VAT / CST / GST

CA. V.V. SAMPATHKUMAR

Blocked credit: The petitioners purchased four motor cars for the usage of passenger service. They mistakenly claimed Input Tax Credit (ITC) on these purchases, which was not permissible under the relevant provision of law, as the vehicles were intended for personal use rather than for business purposes. On realising the same, they voluntarily reversed the wrongly availed ITC in their March 2023 return, before the closing of the financial year. However, the first respondent passed the assessment order, after issuing pre-show cause notice and show cause notice. According to the petitioner, they did not aware of the said notices served through "view additional notices and orders "portal and hence, they were unable to file their reply to the same and hence, an opportunity be provided to them to substantiate their claim. Considering the facts and circumstances of the case, this court in order to provide an opportunity to the petitioner, set aside the order passed by the first respondent with conditions.

M/s.Maasha Garments, Vs 1. The Assistant Commissioner (ST), Bazaar Road Assessment Circle, Tirupur-641 608. 2.Goods and Services Tax Network, New Delhi ~ 110 003. W.P.No.24948 of 2024 Dated: 30.08.2024

Input Tax Credit: The dispute relates to the belated availing of the tax credit under Section 16 of the respective Goods and Service Tax Act. The Parliament has come to the rescue of the assesseess by inserting Section 16(5) and 16(6) of the Central Goods and Service Tax Act, 2017. Similar amendments are expected to be passed in Tamil Nadu Goods and Service Tax Act, 2017. Stating so, the impugned order is set aside and the case is remitted back to the respondents to pass orders afresh in light of the amendments made to Section 16 and similar amendments in the Central Goods and Service Tax Act, 2017 and Tamil Nadu Goods and Service Tax Act, 2017. **M/s.Jai Cable Vision Vs. 1. The Union of India 2. Central Board of Indirect Taxes and Customs 3. State of Tamil Nadu 4. Commissioner of Commercial Taxes 5. The Commissioner Under Secretary to Government of India CBIC 6. State Tax Officer, Avadi Assessment Circle W.P.No.9490 of 2024 DATED: 30.08.2024**

Alternate Remedy: The issue raised in the present petitions is with regard to the eligibility of the petitioner to avail the Input Tax Credit for the purchase of a Tipper Truck. The said dispute has to be decided on facts and as contended by the learned Government Advocate appearing for the respondent, the alternate remedy is very much available to the petitioner to present their case. In such case, if the petitioner is not satisfied with the said impugned assessment order, they can very well avail the alternate remedy by filing an appeal before the concerned Appellate Authority. Therefore, this Court is not inclined to entertain these petitions.

M/s.Annai Earth Movers, Vs. The Assistant Commissioner (ST)(FAC), Kodungaiyur Assessment Circle, Chennai 600 003. W.P.Nos.24677 & 16442 of 2024 Dated : 29.08.2024

ITC reversal, TNVAT Act 2006: The Court held that as far as demand u/s 19(2)(v) of the TNVAT Act, 2006 is concerned, the issue is squarely covered in favour of the petitioner in terms of the State of TN and another vs. M/s. Everest Industries Limited which decision also affirmed by the Division Bench of this Court in the above matter in TCA.No.21 of 2024. Therefore, the respondent is directed to drop the demand as far as issue arising out of Section

19(2)(v) of the TNVAT Act, 2006 is concerned, without prejudice to its right to revive the issue in the light of final order to be passed by the Hon'ble Supreme Court in SLP(C)no.5815/2023. As far as challenge to the demand on account of mismatch is concerned, it is submitted that the impugned demand which confirmed the proposed notice dated 14.09.2021 has failed to take note of the Circular issued by the Principal Secretary/ Commissioner of Commercial Taxes in Circular No.5/2021 LQ10/12521/2016 dated 24.02.2021 and hence the matter is remitted back with conditions. This writ petition is allowed by way of remand.

M/s. Sri Manjulakshmi Spinners vs. The Assistant Commissioner (ST), Palladam 2 Assessment Circle, Tiruppur. W.P.No.26955 of 2021 DATED: 29.08.2024

Delay: The appeal filed by the petitioner against the impugned order was dismissed on 27.09.2023 solely on the ground that there is no provision under the Act to consider the delay petition. According to the petitioner, the delay was due to the inability to file the APLO1 form on the GST portal, which is the portal used for filing appeals and was pursing with the second respondent for the uploading of the order on the Common GST portal, as well as

dealing with issues related to part payment of the pre-deposit. The reason provided for non-filing of the appeal within the prescribed time, in the considered opinion of this Court, appears to be genuine and having regard to the submissions made by the learned counsel on both sides, this Court, in the interest of justice, condoned the delay in filing the appeal with conditions. **M/s.Proodle Hospitality Services Pvt. Ltd., Vs.1.The Commissioner of GST and Central Excise (Appeals-II), Chennai-40. 2.The Additional Commissioner of GST & Central Excise, Chennai South Commissionerate, Chennai-35. W.P.No.18110 of 2024 Dated: 28.08.2024**

Interest and penalty: It is not disputed that the petitioner has already paid the entire tax demand, and is only seeking an opportunity to file the reply to the show cause notice and personal hearing with respect to imposition of interest and the penalty, which the petitioner claims that they are not liable to pay. Even otherwise, as per the decision taken in the 53rd GST Council Meeting, the time is extended up to 31st March 2025. By applying the proposed amendment to Section 128(A) of the Act, the petitioner is not liable to pay any amount, since the enough amount is available

in the ITC. Considering the entire conspectus of the matter, this Court set aside the impugned order dated 19.07.2021 passed by the respondent, with directions. **M/s.New Tea Exports Private Limited, Coimbatore 641 029. Vs The Assistant Commissioner (ST) Thudiyalur Assessment Circle, Coimbatore. W.P.Nos.16735 & 16737 of 2023 Dated: 23.08.2024**

GST registration: In this WP relating to cancellation of GST registration, this Court feels that the petitioner might continue their business illegally, if the GST Registration of the petitioner is delayed or denied, in which case, the Revenue of the Department would get affected ultimately. Therefore, since the petitioner came forward by realizing the importance of GST Registration and also undertook to comply with all the conditions imposed by this Court, this Court is inclined to appreciate the efforts taken by the petitioner. **M/s.Shri Sairam Arts Vs 1.The Appellate Authority/The Addl Commissioner of GST (Appeals II),Chennai 40. 2.The Superintendent of GST & CE, Saligramam, Zone-V, Range-I, Vadapalani Division/ Range, Chennai-South Commissionerate. W.P.No.34656 of 2023 Dated : 23.08.2024**

GST Transition Credit: As a condition for entertaining the appeal u/s 51of the TNVAT Act, 2006, an amount of Rs.6,25,000/- was pre-deposited. There is no dispute that the petitioner was indeed entitled to refund of amount pre-deposited pursuant to the order of the Appellate Deputy Commissioner dated 18.10.2013 pursuant to which, a fresh revised Assessment Order was also passed on 24.07.2015. At best, the respondents could have appropriated the balance tax liability due of Rs.3,902.00/ ~ from and out of the amount pre-deposited u/s 51 of the TNVAT Act, 2006, while filing appeal against the Assessment Order dated 21.10.2010. Although the petitioner may have wrongly followed the procedure by transitioning the amount later to GST implementation, the issue is revenue neutral as admittedly the CT Department was duty bound to refund the amount that was pre-deposited as condition for filing appeal before the Appellate Deputy Commissioner against the Assessment Order dated 21.10.2010 pursuant to the revised Assessment Order dated 24.07.2015 dropping the demand substantially. Under these circumstances, the impugned order dated 26.10.2021 passed by the first respondent affirming the order dated 22.10.2020 of the second

respondent, relating to transition of credit in GST, is quashed with consequential relief. **Tvl.SAS Agencies Vs.1.The Deputy Commissioner (ST), GST-Appeal, Chennai-I, Chennai – 6. 2.The Assistant Commissioner (ST), Saligramam Assessment Circle, Chennai – 99 W.P.No.1325 of 2022 DATED: 22.08.2024**

Opportunity is Granted: Owing to the failure on the part of the petitioner to produce required documents before the Adjudicating Authority concerned, has resulted in the impugned order. The Hon'ble Court stated and held that considering the fact that petitioner is in possession of required documents, particularly, the copy of invoices, and is ready to produce the same, if an opportunity is granted, this Court has to consider the request of the petitioner, since, only in the absence of documents, the Adjudicating Authority has passed the order dated 28.12.2023, based on which, the impugned order came to be passed against the petitioner, and in order to render justice, this Court is inclined to consider the request of the petitioner, since justice has to be meted out, and failure to do so, would amount to denial of justice. The impugned order dated 30.12.2023, which was

passed by the first respondent based on the proceedings of the second respondent dated 28.12.2023 is set aside and the matter is remanded to the Authority concerned for fresh consideration with conditions. **Mr. Robinson Jeypaul, Vs. 1. The Commercial Taxes Officer, Thiruvottiyur, Avadi, Tiruvallur. 2. The Assistant Commissioner (ST), Thiruvottiyur Assessment Circle Station, Chennai – 600 003. W.P.No.18804 of 2024 DATED: 22.08.2024**

Omission to report in 3B: The petitioner submitted they imported goods from China during the months of July, August, September and October 2017 under valid Bill of Entries by paying IGST amounting to Rs.80,70,105/-. And also availed Input Tax Credit for the aforementioned IGST amount as reflected in the Form in its GSTR-2A returns for the relevant period. However, due to an inadvertent omission, while filing the GSTR-3B returns for the months of July, August, September and October 2017, the petitioner failed to reflect the IGST details amounting to Rs.85,70,105/- as reflected in GSTR-2A. Consequent to this Omission, the AO /PO respondent-initiated proceedings and issued Form GST DRC-01 for which the petitioner submitted a reply elucidating the

circumstances of the inadvertent omission by providing all relevant details pertaining to IGST payment and ITC availment. Without considering the same, the impugned Order came to be passed. The Ld Spl GP appearing for the respondents submitted that as the petitioner failed to reflect the IGST details in GSTR-2A rectification application, the impugned Order came to be passed and if the petitioner furnish relevant particulars, the same will be considered by the authorities. Considering the submissions made by the petitioner as well as the respondent, this Court is inclined to set aside the impugned Order and while setting aside the impugned Order, this Court issued specific directions to re do the process. **M/s.Natural Products Export Corporation Ltd.,Tiruvallur – 600 124. Vs 1. Government of Tamilnadu 2. The JC [ST], Poonamallee Jurisdiction, Kancheepuram – 631 500. 3. The AC [ST], Poonamallee Jurisdiction, Kancheepuram – 631 501. W.P.No.22017 of 2024 DATED : 21.08.2024**

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

CASC CHENNAI, MEMBERSHIP FEE

Corporate Membership	**Rs.**
Corporate Annual Membership	3,000.00
Corporate Life Membership (20 Years)	20,000.00
Individual Membership	
Annual Membership	750.00
Life Membership	7,500.00

CASC - HALL RENT

HALL RENT FOR 2 HOURS	1,000.00
HALL RENT FOR 2-4 HOURS	1,500.00
HALL RENT FOR FULL DAY	2,500.00
LCD RENT FOR 2 HOURS	600.00
LCD RENT FOR 2-4 HOURS	800.00
LCD RENT FOR FULL DAY	1,200.00

CASC BULLETIN - ADVERTISEMENT TARIFF - PER MONTH

Full Page Back Cover	2,500.00
Full Page Inside Cover	2,000.00
Half Page Back Cover	1,500.00
Half Page Inside Cover	1,250.00
Full Page Inside	1,200.00
Half Page Inside	750.00
Strip Advertisement Inside	500.00

Minimum 6 months advertisement is required.

If advertisement is 12 months or above, special discount of 15% is available

The above amounts are Exclusive of Government Levies like GST. Applicable taxes will be added

Your demand draft / cheque at par should be drawn in the name of **"The Chartered Accountants Study Circle"** payable at Chennai.

Kindly contact admin@casconline.org for the Clarifications and or queries.

CASE LAWS - GST

1. GST – NOTICES AND ORDERS UPLOADED IN THE PORTAL UNDER THE CATEGORY OF 'ADDITIONAL NOTICES AND ORDERS' WHICH ARE NOT EASILY ACCESSIBLE AND WERE REQUIRED TO BE PLACED UNDER HEADING OF 'NOTICES AND ORDERS' – OIO SET ASIDE

CA. VIJAY ANAND

In Neeraj Kumar v. Proper Officer SGST, Ward-19, Zone-2, 2024(88) GSTL 3/ (2024) 21 Centax 23 (Del.), the petitioner is the sole proprietor of a concern which is registered with the GST Authorities. A SCN was uploaded on the portal in the category of 'Additional Notices and Orders' which were not easily accessible when the same were required to be placed under the heading of 'Notices and Orders'.

On a writ petition, the tribunal observed as under:

1. The issue involved in the present petition is covered by earlier decisions of this Court, including in ACE Cardiopathy Solutions (P.) Ltd. v. Union of India [2024] 163 taxmann.com 17 (Delhi) /[Neutral Citation No.2024: DHC:4108-DB wherein the Court had rejected the contention that uploading of a notice under the heading 'Additional Notices' would be sufficient service in terms of Section 169 of the CGST Act.

2. The GST Authorities have since addressed the issue and have redesigned the portal to ensure that 'View Notices' tab and 'View Additional Notices' tab was placed under one heading.

3. However, it is not disputed that the impugned SCN was issued before the GST portal was re-designed.

In view of the above, the present petition is allowed and the impugned order was set aside and the matter was remanded to the adjudicating authority for consideration afresh wherein the petitioner was at liberty to file a response to the impugned SCN within a period of two weeks and thereafter the concerned authority shall

adjudicate the impugned SCN after considering the petitioner's response and after affording the petitioner an opportunity to be heard.

2. GST – REFUND APPLICATION REJECTED WITHOUT ANY REASON USING STANDARD TEMPLATE – NOT SUSTAINABLE

In Sanjeev Suresh Desai v. UOI 2024(88) GSTL 103/ (2024) 20 Centax 140 (Bom.), the petitioner is an individual undertaking heating, ventilation, air conditioning and clearnroom projects for hospitals, pharmaceuticals companies, IVF laboratories, biotech laboratories etc. Petitioner had supplied goods to one Export Oriented Unit, viz., Apothecon Pharmaceuticals Pvt. Ltd., and on the supply, petitioner had charged IGST at the rate of 18% and discharged the IGST liability as well. Thereafter, the assessee filed refund claims which were rejected by an order without giving any reasons and also without application of mind.

On a writ petition, the high court observed as under:

1. The impugned order does not disclose why the refund application has been rejected and that the same appears to be from a template used and though the amount of refund being allowed is Nil, the officer has not bothered to even delete the paragraph that the amount is to be paid to the bank account specified by applicant in his application when the officer had deleted the other portions.

2. Therefore, there has been even non application of mind by respondent and on these grounds alone, the impugned order should be set aside.

3. As regards the second order, the officer had recorded that there has been a delay of 25 days and also recorded the cause that was being shown by petitioner for the delay.

4. This officer could not be blamed as he did not have the power to condone this delay but the high court has.

5. The court's judicial conscience does not permit to reject this cause shown as bogus particularly in view of the fact that petitioner was an individual and the GST regime was at a nascent stage.

6. Moreover, in both the orders impugned in the petitions there is no whisper about the merits of the application.

Hence, both the orders were set aside and the matters were remanded back to the adjudicating authorities for denovo consideration. Petitioner shall be permitted to submit the deficient documents and the adjudicating authorities dispose off the refund applications after giving the assessee opportunities for personal hearing.

3. GST – ASSESSING OFFICER IN WEST BENGAL RELIED ON ADVANCE RULING AUTHORITY DECISION OF GOA TO DENY THE BENEFIT OF EXEMPTION FROM ISSUANCE OF POLLUTION UNDER CONTROL CERTIFICATE FOR VEHICLES - NOT SUSTAINABLE

In Sarkar Diesel v. DC-ST,Krishnagar Charge 2024(88) GSTL 226/(2024) 20 Centax 465 (Cal.), the assessee was issued a Show Cause Notice alleging that the activity of issuance of pollution under the control certificate for the

vehicle issued by the applicant therein is not covered under SAC 9991 and is covered under residue entry and hence should be taxed at 18% which was also sustained by the First Appellate Authority. On a writ petition, the high court observed as under:-

1. The issue which falls for consideration is whether the appellant authority namely Joint Commissioner of State Tax, Berhampore Circle had considered all the issues which have been raised by the appellant in their appeal petition.

2. The only exercise done by the appellate authority is to interfere with the order passed by the Deputy Commissioner of State Tax, Krishnanagar on the ground that penalty could not have been imposed u/s 74 and the penalty should have been imposed under Section 73 since there was no allegation of any fraud, willful mis-statement or suppression.

3. However, the Appellate Authority has not adverted to any of the other grounds which have been canvassed by the appellant/ Registered Tax Payer.

4. The appellant after disposal of the appeal, has been furnished with a declaration by the Indian Oil Corporation Limited that they have availed GTA services from the appellant for varying periods i.e. from the year 2017-18, 2018-19 and 2019-20 and this declaration was furnished to the appellant/ writ petitioner only on 4.8.2023. Therefore, the appellant could not have produced these documents before the authorities or even the appellate authority.

5. Considering the fact that this declaration has been issued by the Indian Oil Corporation Ltd., the appellant would be entitled to take advantage of the same for as the declaration clearly mentions that the GST liability on Reverse Charge Mechanism (RCM) has been discharged by the Indian Oil Corporation Limited on the services availed from the appellant/writ petitioner.

6. Therefore, the matter should go back to the original authority for readjudication of the matter considering the subsequent developments.

7. W.r.t reliance by the Assessing Officer of a decision of the Advance Ruling Authority, Goa wherein it was held that the activity of issuance of pollution under the control certificate for the vehicle issued by the applicant therein is not covered under SAC 9991 and is covered under residue entry and hence should be taxed at 18%, it was observed that the Advance Ruling rendered in Goa cannot be made automatically applicable to the appellant/ Assessee who is registered tax payer in the State of West Bengal and that the Advance Ruling may bind the Department at Goa but cannot bind a third party tax payer, and bind only the applicant who went before the Advance Ruling Authority for a decision.

8. Therefore, the Original Authority while readjudicating the matter should not place any reliance on the Advance Ruling rendered by the Authority at Goa.

Hence, the impugned order was set aside and the matter was remanded back to the Assessing Officer to readjudicate, after affording the assessee an

opportunity of personal hearing uninfluenced by its earlier order nor by placing any reliance on the decision of the Advance Ruling Authority at Goa by exercising power u/s 73 and not u/s 74.

4. IGST REFUND - GRANTING OF REFUND BASED ON NET REALISED VALUE INSTEAD OF INVOICE VALUE - NOT SUSTAINABLE

In AU Finja Jewels v. AC, CGST & C. EX, Navi Mumbai 2024(88) GSTL 290/(2024) 20 Centax 245 (Bom.), the petitioner is a jewellery processor and manufacturer jewellery and in the course of his business, imports gold and exports gold jewellery in accordance with the Foreign Trade Policy of the Government of India. The petitioner has been regularly filing returns and claiming refund in respect of Input Tax Credit (ITC) on export of goods and services which they have made of IGST at the time of import of gold.

For the period June 2018 to September 2018, the petitioner filed on 27th July 2020 a refund claim application in Form GST-

RFD-01 on the GST portal claiming a refund of Rs.21,00,000/- for which the adjudicating authority granted only a sum of Rs. 88,295/-, relying upon instructions contained in Board Circular No.37/11/ 2018-GST dated 15th March 2018 which directs that lower of the export invoice and value declared in the shipping bills must be considered for the purpose of determining the export turnover. On a writ petition, the high court observed as under:

1. The adjudicating authority has taken USD 6479.39 as the value of the goods declared in the GST Invoice because according to him that is what is net realised by petitioner. There is nothing in the rules to indicate nor the rules mention anywhere that it is only the net realisation value which has to be considered.

2. The rule states the value of the goods declared in the GST Invoice.

3. The value in the GST Invoice as declared by petitioner is FOB value of USD 224846.75. Revenue's submission that that the Invoice says "less gold

supplied by party free of cost USD.219017.61 and, therefore, USD 224846.75 cannot be considered as the FOB value of the goods and that the FOB value ought to be USD 6479.39 cannot sustain as the Invoice only says that FOB value is USD 224846.75 and advance in the form of gold supplied free of cost is USD 219017.61 and the balance payable by the buyer is USD 6479.39.

4. Therefore, the value of the goods that has to be considered for refund would be USD 224846.75 and if there is a discrepancy in the value in the corresponding shipping bill, the lower of the two values should be sanctioned as refund.

5. By way of illustration, let us take an example of a person going to a jewellery shop and ordering jewellery worth Rs.5,00,000/-. While placing the order, the customer takes few broken rings and chains and gives it to the jeweller and the jeweller uses those gold pieces while making the jewellery worth Rs.5,00,000/-. In the invoice that the jeweller would raise for Rs.5,00,000/-, he will

certainly show the advance by way of broken gold pieces received by him and the value thereof will certainly be given. If the value of the broken jewellery is Rs.3,00,000/-, the jeweller will say net amount payable Rs.2,00,000/-.

6. It cannot be stated that the value of the gold jewellery sold was only Rs.2,00,000/-. The invoice has to be read to mean that the value of the gold sold is Rs.5,00,000/-, Rs.3,00,000/- received as advance in the form of gold, the balance payable is Rs.2,00,000/-.

7. In the instant case, respondent no.1 has taken Rs.2,00,000/- as the value of the jewellery sold which is not correct.

In view of the above, the impugned order was quashed the matter was remanded back to the adjudicating authority to process the refund application in accordance with law after applying the formula mentioned above.

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

SUMMARY OF AAR/AAAR

Applicability of RCM under section 9(5) in respect of transportation services provided through subscription-based model

CA. AMAN GOYAL

In the case of Re: M/s. Natural Language Technology Research (referred to as "applicant") (Order No. 11/WBAAR/2024-25 dated September 10, 2024) – West Bengal Authority for Advance Ruling

Facts of the case:-

1. The applicant has developed a mobile application named "Yatri Sathi Mobile App." The primary purpose of the App is to facilitate the process of connecting customers to the drivers of West Bengal. The app contains a "driver side" and a "customer side."

2. The driver-side App is designed for use by drivers to offer transportation services by means of four wheeler or two wheeler vehicles. On the other hand,

the Customer-side App is intended for customers to connect with drivers for their transportation needs.

3. The applicant's role is limited to providing a platform for drivers and customers to connect, without exercising any control or influence over the actual driving services provided. The drivers operate independently, and the Applicant does not supervise, manage, or oversee the manner in which the services are rendered. Consequently, any issues arising from the performance of the drivers, such as service quality or conduct, fall outside the applicant's purview and responsibility.

4. The applicant charges a flat subscription fee from drivers for each ride facilitated through the platform regardless of the total fare charged by the driver. There is no trip-based commission involved.

5. All payments for the services provided by the drivers are made directly by the customers to the drivers. The applicant does not receive or process these payments, nor does the applicant assume any

responsibility for the financial transactions between the customers and the drivers and also does not have access to or knowledge of the payment methods used by the customers to compensate the drivers.

Question before AAR:-

(i) Whether the applicant falls under the purview of the E-commerce Operator as defined in sec 2 (45) of the GST Act?

(ii) Whether the applicant shall be deemed to be the service provider u/s 9 (5) of the GST Act read with notification no. 17/2021-Central tax(rate) dated 18th November 2021 for the Driver services provided by the Driver to the Customer connected by "Yatri Sathi Mobile App"?

(iii) Whether the applicant shall be liable to collect and pay GST on the services supplied by the Drivers (person who subscribed the app) to the Customers (person who subscribed the app) connected through the App considering the Applicant as service provider u/s 9(5) of the GST Act read with notification no. 17/2021-Central Tax (Rate) dated 18th November 2021?

Interpretation of law by the applicant:-

1. The app serves only as a digital platform facilitating the connection between the driver and the customers. The applicant explicitly disclaims responsibility for the services provided by the drivers, payment processes, or fare determination.

2. The platform operated by the applicant merely facilitates the sharing of information between drivers and customers, allowing them to connect for transportation services. However, it does not involve the supply of goods or services over an electronic network. Consequently, the applicant would not qualify to be an "e-commerce operator" in terms of section 2(45) of the CGST Act, 2017.

3. The term "through" in the context of section 9 (5) of the CGST Act, typically implies a level of involvement or facilitation by the e-commerce operator that is substantial enough to consider the service as being provided via the operator's platform.

4. The term generally implies that the operator is not merely a passive intermediary but plays an active role in facilitating the transaction. This includes significant involvement in the processes of booking, payment handling, and ensuring service delivery. For an operator to be deemed to be supplying services "through" its platform, there must be evidence of an integrated role in the transaction process, beyond just connecting the service provider and the customer.

5. The applicant's platform being only a facilitator between drivers and customers and not being engaged in or control the actual provision of transportation services, the Applicant's platform cannot be categorized as an electronic commerce operator as defined under section 2 (45) of the GST Act and that the services should not be considered as being supplied "through" the applicant's platform.

Interpretation of law by the Department:-

The app is designed as a ride-hailing software as a service (SaaS) platform, also categorized as a Mobility as a

service (MaaS) solution in order to facilitate the business transaction of supply of services. The ownership, management and ongoing operation of such mobile app rest solely on the Applicant. Consequently, the applicant would be covered within the purview of e-commerce operator under section 2(45) of CGST Act, 2017.

The functionality of the app is governed by the GPS or GPRS system so that the driver and the rider can precisely be located in terms of their geographical location/position. The interpretation of "Radio taxi" squarely matches with the nature of services provided by the applicant. As such in any kind of services of like nature, the positioning of the cab and the customer and connecting them are the most essential part of such service. The applicant shall be liable to collect and pay GST on the services supplied by it as ECO.

Observations & Ruling of the Authority:-

The applicant is not responsible for non-payment of fare by the customer to the driver and also has no responsibility and liability for losses suffered by the customer due to refusal by driver or breakdown of vehicle and has no responsibility or liability to customer related to

any ride or services provided by the driver. The applicant is not a privy to the contract between the driver and the customer.

The applicant is the owner of a digital platform namely the Yatri Sathi App and is engaged in the supply of services to drivers by way of allowing the drivers to use the digital platform against a consideration. The applicant thus fits into the definition and qualifies to be an Electronic Commerce Operator in terms of section 2(45) of the CGST Act.

Even though the applicant qualifies to be an electronic commerce operator, the supply of services is not made through him as such supply is independent in nature. The applicant, though qualifies the definition of being an e-commerce operator, does not satisfy the conditions of section 9(5) of the CGST Act for discharging the tax liability by an electronic commerce operator and hence, is not the person liable for discharge of tax liability under section 9(5) of the CGST Act.

Taxability and ITC eligibility in respect of canteen services provided to employees

In the case of Re: M/s. Alleima India Private Limited (referred to as "applicant")(GUJ/GAAR/

R/2024/17 dated July 02, 2024) – Gujarat Authority for Advance Ruling

Facts of the case:-

The applicant engaged in the business of manufacturing and selling of stainless-steel pipes and tubes has employed more than 300 employees and are also registered under the Factories Act, 1948.

The applicant has engaged a canteen service provider [CSP] for preparing and supplying food to their employees. The applicant recovers Rs. 104/- on monthly basis from each employee in respect of the food being prepared and supplied by the CSP. In terms of section 46 of the Factories Act, 1948, since the applicant has employed more than 300 employees, they are mandated to provide canteen for their employees.

The details of food consumed by every employee is maintained by the applicant.

Question before AAR

(i) Whether the deduction of a nominal amount by the Applicant from the salary of the employees who are availing the facility of food provided in the factory premises would be considered as a "Supply of Service" by the Applicant under the provisions of Section 7 of

Central Goods and Service Tax Act, 2017 and Gujarat Goods and Service Tax Act, 2017?

(ii) In case answer to above is yes whether GST is applicable on the nominal amount to be deducted from the salaries of employees?

(iii) Whether ITC to the extent of cost borne by the applicant is available, to the Applicant on GST charged by the Canteen Service Provider for providing the catering services?

Interpretation of law by the applicant:-

Deduction of the nominal amount from employees will become taxable under GST only if such amount qualifies as 'consideration' towards supply.

In terms of Schedule-III, services by an employee to employer in the course of or in relation to his employment, is not treated as a supply of goods/services. Any consideration by the employer to the employee on account of the activities undertaken under the contract of employment is out of the scope of GST.

In terms of circular no. 172/04/ 2022-GST dated 6.7.22, it is clarified that any perquisite provided to employees as part of employment contract is not subject to tax under GST.

The applicant provides canteen facility in terms of contractual agreement entered between the employer and employee; that the contractual agreement specifically provides for availment of benefits and allowances which includes canteen services to employees.

Deduction of employees' salary towards food availed by employee would constitute a transaction in money between applicant & its employees & would not attain the character of 'consideration.' There is no reciprocity/quid-pro-quo between applicant and its employees.

Unless there is evidence that applicant had intention of undertaking business & earning profit in relation to provision of canteen facilities, it cannot be construed to be in the course of furtherance of business;

The CSP provides the services to the applicant in the preparation of food and maintenance of canteen premises, for the applicant's employees. Such services are provided in pursuance of applicant's obligation to provide such facilities to its employees in the capacity of an occupier of the factory under the Factories Act. ITC on food & beverages, etc., covered u/s 17 (5), would not be restricted provided it is obligatory for an employer to provide the same to its employees under the law.

Observations & Ruling of the Authority:-

In terms of circular No. 172/04/ 2022-GST, it is clarified that perquisites provided by the 'employer' to the 'employee' in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.

The deduction of nominal amount made by the applicant from the salary of the employees who are availing the facility of food provided in the factory premises would not be considered as a Supply' under the provisions of section 7 of the CGST Act, 2017.

Input Tax Credit will be available to the applicant in respect of food and beverages as canteen facility is obligatorily to be provided under the Factories Act, 1948, read with Gujarat Factories Rules, 1963 as far as provision of canteen service employees working at the factory is concerned. ITC on GST charged by the canteen service provider will be available only to the extent of cost borne by the applicant. ITC to the extent embedded in the cost of goods recovered from employees shall not be eligible.

(The Author is a chennai based Chartered Accountant. He can be reached at aman.goyal@pwc.com)

ESOP - TAXABILITY OF COMPENSATION FOR DIMINUTION IN THE VALUE OF OPTIONS

CA. K. PRASANNA

Background

An Employee Stock Ownership Plan ('ESOP') is a program that provides a company's workforce with an ownership interest in the company. Through an ESOP, employees are given shares of stock, typically at no upfront cost, as part of the compensation package. An ESOP's primary goals are to align employees' interests with those of shareholders, boost employee motivation and retention strategy, and potentially offer tax advantages for the company. By fostering a sense of ownership, ESOPs can drive productivity and engagement, ultimately benefiting employees and the company's long-term success. Over the years, the variant of ESOPs has been prevalent globally for compensating employees.[1]

[1] Stock Appreciation Right; Phantom Stocks; Employee Stock Purchase Scheme; Restricted Stock Units etc.,

The taxation of ESOP gained significant attention with the ruling of the Apex Court in Infosys Technologies[2], which mooted a separate amendment under perquisite taxation. Due to multiple amendments, the point of taxation saw a paradigm shift over the years.[3] With the abolition of fringe benefit taxation, the taxation of ESOPs for employees once again rolled back to two points of taxation (taxation of salary on allotment of shares and taxation of capital gain on sale of shares).

While the law is clear[4], in case the shares are allotted under the ESOP plan/scheme, the fair market value of the shares[5] on the date of exercise, reduced by the exercise price is taxable as perquisite in the hands of the employee. There is controversy surrounding a case where the allotment event is disrupted, and the employer compensates the employee for the loss in value of options held by the employee. The characterization of compensation paid by the employer to offset the loss in value of options held by the employee is a vexed question, i.e., whether the same is taxable as salaries or capital gains or

[2] CITATION
[3] Two Points taxation, Capital Gains and Fringe Benefit Taxation
[4] Section 17(2)(vi) r.w Rule 3
[5] As prescribed under Rule 3

income from other sources or a capital receipt.

The above issue came up before the Hon'ble Delhi and Madras High Court in the case of Sanjay Baweja[6] and Nishithkumar Mukeshkumar Mehta[7] respectively.

Facts of the Case

Flipkart Internet Private Limited ('FIPL') is a wholly-owned subsidiary ('WOS') of Flipkart Marketplace Private Limited ('FMPL'), which is WOS of Flipkart Pvt. Ltd Singapore ('FPS').

In 2012, FPS floated an ESOP scheme wherein certain options were granted to the Petitioner with a vesting schedule. In 2022, FPS announced its disinvestment in its WOS PhonePe, due to which the value of FPS options diminished[8] significantly. In 2023, FPS communicated to option holders that, as part of a one-time measure, it had decided to compensate them with a payment of USD 43.67 / option. The compensation was determined based on the option's value before and after the disinvestment of PhonePe

[6] (2024) 163 taxmann.com 116 (Del)
[7] W.P.No.26506 of 2023
[8] Due to buyback and payment of dividends to FPS shareholders

business. As part of this, the taxpayers received compensation for the options held.

In Sanjay Baweja's case, the taxpayer is an ex-employee of FIPL, and the vested options are pending exercise. In Nishithkumar's case, the taxpayer is a current employee of FIPL, and part of the options are vested and unexercised, and the balance is unvested.

In both cases, the taxpayers were communicated that FPS would be deducting taxes on the compensation, treating it as salary[9]. The taxpayers filed for a nil withholding certificate under Section 197 of the Act, treating the compensation as a capital receipt as it is not in connection with employment. The Ld. AO treated the compensation paid by FPS as salary and capital gains in the case of Sanjay Baweja[10] and Nisithkumar Mukeshkumar Mehta[11], respectively.

[9] Para 5 of Madras High Court's ruling.

[10] The Compensation is taxable under 17(2)(vi) as it encompasses compensation directly or indirectly

[11] The AO held that the asset transferred by the petitioner was the relinquishment of the right to sue or litigate, hence subject to capital gains.

Court's Analysis/observation

(a) Sanjay Baweja's case

- The determination of a particular receipt is a capital or revenue depends on the factual scenario[12].

- The quality of the payment determines its character and not the payment. Whether a particular receipt is taxable or not is determined by the charging section, and revenue cannot tax a payment based on the nature determined by the deductor[13] . The proposition was supported by the ruling of the **Hon'ble Apex Court** in **Empire Jute Co. Ltd vs. CIT**[14].

- Section 17(2)(vi) of the Income-tax Act, 1961 ('the Act') provides for the determination of the value of specified security received by an employee on transfer/ allotment, directly or indirectly by the employer. A literal reading of the provision describes that value depends on the employee's exercise of option[15]. Since the stock

[12] Para 19 of the ruling and CIT vs. Saurashtra Cement Ltd (2010) 11 SCC 84
[13] Para 24 of the ruling
[14] (1980) 4 SCC 25
[15] Para 25 of the ruling

options are merely held by petition and have not been exercised to date, they cannot constitute income under 17(2)(vi) of the Act.

- The payment is not linked to the employment or business of the Petitioner, and it is a one-time voluntary payment due to disinvestment and not arising out of any statutory or contractual obligation[16].

(b) Nisithkumar's case

- ESOP is a right in relation to capital assets i.e, right to receive capital assets (shares) subject to the terms and conditions of the scheme[17]. Explanation 1 to Section 2(14) is not attracted as the Petitioner has no rights in relation to the Indian Company where he was employed;

- The case laws[18] relied on to support the proposition that compensation received was capital receipt is not applicable as the case laws were in the context of compensation for loss of profit-making apparatus or sterilization thereof[19];

[16] Para 27 of the ruling
[17] Para 22 of the ruling
[18] Kettlewell Bullen & Co Ltd vs. CIT (1964) 53 ITR 621; Godrej & Co Bombay vs. CIT (1970) 1 SCR 527
[19] Para 26 of the ruling

- ESOPs are contractual rights that may qualify as actionable claims (albeit not as defined in the Transfer of Property Act, 1882) or chosen in action in certain circumstances. ESOPs are not a source of revenue or profit-making apparatus for the holder as these cannot be monetized until shares are allotted[20];

- The compensation was not paid for the relinquishment of ESOPs (vested or unvested) or for the right to receive shares. ESOP does not fall under the ambit of the expression' property of any kind held by an assessee' and hence not capital assets[21];

- The plain language indicates that clause (vi) to Section 17(2) takes within its fold and treats as a perquisite the benefit extended to the employee or any other person from and out of the grant of specified securities at concessional rates or free of cost[22];

- Explanation (a) to sub-section (vi) explains the scope of "specified security"

[20] Para 27 of the ruling
[21] Para 29 of the ruling
[22] Para 35 of the ruling

by using the expression "includes the securities offered under such plan or scheme". Interestingly, the phrase 'includes the securities allotted under such plan or scheme' is not used[23].

- The term "specified security", in the context of ESOPs, is not confined to **allotted shares** but includes **securities offered** to the holder of ESOPs. The use of 'includes' instead of 'means' also indicates that the phrase "securities offered under such plan or scheme" is not intended to be exhaustive[24];

- The expression "value of any specified security" transferred directly or indirectly by the employer free of cost or at concessional rate to the assessee" in clause (vi) is wide enough to encompass the discretionary compensation paid to ESOP holders to compensate for the potential or actual diminution in value thereof[25];

Specific observations on the Court's Ruling

- The Delhi High Court did not deal with characterizing the compensation received

[23] ibid
[24] ibid
[25] Para 37 of the ruling

as capital vs revenue receipt. Instead, its observations were only confined to the extent that the receipt does not fall under 17(2)(vi) of the Act.

- The Madras High Court's interpretation of that clause (vi) covers discretionary compensation for diminution in value of options is, in my humble view, erroneous. Further, while interpreting the term' specified security', the Court ignored the requirement of clause (vi), i.e., the shares must be allotted or transferred to trigger a charge for perquisite taxation. The Court's interpretation is misplaced, and it does not appreciate that the explanation intended to explain the meaning of the term used in the clause should not be so construed as to widen the ambit of the section[26]. The Hon'ble High Court completely overlooked this aspect.

- The Hon'ble High Court inferred the shares allotted and securities offered are two different aspects. Hence, compensation is covered as perquisite. This interpretation will lead to an unintended consequence,

[26] Bihta Co-op Development and Cane Marketing Union Ltd vs. Bank of Bihar, AIR 1967 SC 389; Sesh Nath vs. Baidyabati Sherophuli Co-op Bank Ltd (2021) 7 SCC 313

where any options offered as part of the ESOP scheme/ plan could be covered by the issue of options even before the allotment or transfer of the shares, which was not the intended point of taxation.

- Further, the perquisite valuation under clause (vi) was specifically provided under Rule 3(7), and there can be no other manner of valuation unless expressly provided. Hence, the High Court's observation that compensation is a perquisite under clause (vi) based on compensation paid is also erroneous.

Other critical aspects

(i) Is 'option' a 'capital asset'?

Section 17(2)(vi) r.w. explanation, the term 'option' means a right but not an obligation granted to an employee to apply for the specified security or sweat equity shares at a predetermined price.

Section 2(14) of the Act defines the term' capital asset' to mean property of any kind held by an assessee, whether or not connected with his business or profession. The Supreme Court in Ahmed G.H. Ariff[27] has held the

[27] Ahmed G. H. Ariff & Others vs. CWT (1970) 76 ITR 471

term 'property' means every conceivable interest that a man can hold and enjoy. Although an option is a right to receive shares upon exercise, whether it constitutes a property to be regarded as a capital asset. The issue permeates further depending on the nature of the options i.e., vested or unvested.

As per Webster's dictionary[28], the word 'enjoy' means "to have the use or benefit of". In Corpus Juris Secumdum[29], the word "enjoyment" has been described as a return meaning the exercise of a right, possession, use and occupation. In the context of the Estate Duty Act of 1953[30], it was held[31] that "The words' enjoyment' and 'enjoy', as used in statutes relating to estate and gift taxes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estate."

Now, applying the principles of 'hold and enjoy,' in the case of 'unvested options,' it only

[28] Second college edition page 464
[29] Volume 30, page 708,
[30] Section 10 of Estate Duty Act, 1953
[31] Balkishan Muchhal v. CED, (1974) 94 ITR 243 (MP)

remains a right to receive shares as per the vesting date. Typically, the ESOP scheme provides condition(s)[32] that should be satisfied by the employees (vesting conditions). Until the vesting conditions, the right can be equated only to an expectation or promise and cannot be treated as an asset.

In the case of vested options, the vesting conditions are satisfied, and the employee can exercise the options. The vested option may not be regarded as a 'right in securities' as per Section 2(h) of the Securities Contract Regulation Act because the wording connotes **the existence of securities in which there is a right, but an option is only a right to securities.**

In vested options, the rights have been vested irrevocably, entitling the employee to acquire shares per the scheme or plan. At this stage, the employee cannot transfer the options (unless bought back by the employer) except to exercise them. Further, the economic benefit will materialize only when the shares are allotted. However, an unfettered

[32] Assuming conditions related to the future services to be rendered by the employee

right is associated with the options once the vesting conditions are satisfied, and hence vested options may possibly regarded as 'capital assets'.

(ii) Is voluntary compensation towards diminution in the value of options assessable as capital gains?

Regarding unvested options, it is clear that they cannot be regarded as capital assets; hence, the compensation received cannot be regarded as capital gains. Regarding vested options, the compensation is only for the diminution in the value of the asset and for the transfer of the asset. The no of options remains the same except for the potential value. Hence, applying the principles of the Hon'ble Special Bench in Benett Coleman (majority ruling rendered in the context of capital reduction with no consideration[33]), can the taxpayers argue that the compensation for the reduction in value without altering the rights (no of options) cannot be subject to capital gains?.

[33] Para 26 of Majority Ruling - By the reduction, the assessee's rights had not been extinguished because it continued to hold the same percentage in the holding as it did before the reduction

Further, the compensation cannot be regarded as an 'extinguishment of rights therein'. In the instant case, the asset being the option remains the same, and its potential value has decreased. This cannot be equated with an extinguishment of the right. In the absence of satisfying the definition of 'capital asset' and 'transfer', the compensation cannot be regarded as capital gains.

(iii) ESOP offered by the Group Company

In Nishithkumar's case, there are instances[34] The Petitioner emphasized that he is an employee of an Indian entity, and Ultimate Parent issued the ESOPs. This is also one reason the Petitioner contends the options are capital assets. While it is unclear from the judgment whether this fact contends to argue that ESOPs issued by Ultimate Parent (not being an employer), therefore, fall short of an employer-employee relationship, thereby cannot partake the character of 'salary.'

The Companies Act, 2013, or Exchange Control Regulations, does permit the

[34] Para 2, 7, and 17 of the ruling

issue of shares between group entities. Even from a practical standpoint, a Group company issues ESOPs on behalf of another group entity. The AAR in the case of Petition No. 15 of 1998[35] has held that the stock scheme devised by the holding company will be taxable as perquisite in the hands of employees of the Indian subsidiary. Further, Section 15(b)[36] supports the provision of salary on behalf of the employer. Therefore, in my view, ESOP issued by a Group company could be regarded as 'Perquisite' and taxable as 'Salary.'

(iv) Does compensation fall under any other category of perquisite?

Section 17(2) defines the term 'perquisite', with several categories of perquisite (moneray and non monetary). Most of the clauses are specific categories of perquisite, and the residual category, i.e., clause (viii), provides for notification of 'any other fringe benefit or amenity'. The compensation for the diminution in value of

[35] In re [1999] 235 ITR 565 (AAR)

[36] Any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due to before it became due to him

ESOP does not fall under specific categories. Hence, it pertains to evaluating the residuary category and whether it is covered as a perquisite. The Rule 3(7)(ix) provides as follows:

"(ix) The value of any other benefit or amenity, service, right or privilege provided by the employer shall be determined on the basis of cost to the employer under an arms-length transaction as reduced by the employee's contribution, if any:"

The cost of compensation paid by an employer for diminution in value of options should satisfy the following requirements to trigger taxability:

(i) Cost of compensation is the cost to the employer under arm-length transactions

(ii) Compensation is a benefit provided by the employer

While the employer incurs no cost on the issuance of options, they incur at the time of payment of compensation; the question is whether it is under arm's length transactions. A question may further arise whether this can be equated to the arm's length price defined under Section 92F. From a practical standpoint,

the price paid to employees (not a related/associated person) could be an arm's length transaction.

As regards benefits[37] provided by an employer, the expression 'benefit' means[38] *'advantage; profit, fruit; privilege'*. The Gujarat High Court in Smt. Kamalini Gautam Sarabhai[39] case observed as follows:

"The dictionary meaning of the word 'benefit' is advantage or profit or anything contributing to improvement of condition. If a person derives any advantage, it can be said that he has benefited. If he gains something either monetarily or otherwise, it can be said that he has benefited".

In the instant situation, could compensation for loss in diminution in value of options be regarded as a 'benefit', or can the employee argue that the compensation is for offsetting the loss? Hence, it is not a benefit or an advantage the employer provides.

[37] In my view, the term 'benefit' in this clause should not be confined only to nonmonetary benefits, and it could include monetary benefits as well.
[38] Black's Law Dictionary, Revised Fourth Edition
[39] CIT v. Smt. Kamalini Gautam Sarabhai, (1993) 114 CTR 244 (Guj) - rendered in the context of 2(24)(iv) of the Act

Unvested options have no benefits unless the conditions attached to the options are satisfied. The loss in value of shares on an allotment is not even a notional loss. Regarding vested options, the right to shares is manifested, and the potential value of shares is indeed reduced. Looking from another perspective, the employer did make good on the expected loss that the employee may suffer had the shares been allotted if the event had not led to a diminution and the value of the perquisite had been higher. Therefore, it is arguable that the employer has indeed provided a benefit or advantage by restoring the value in the hands of employee.

(v) Other income

Section 56(2)(x)(a) provided for receipt of money without consideration[40] is chargeable to be taxed as income from other sources. If the compensation is not regarded as a benefit under 17(2)(viii), then the residual category of other sources may be required to be evaluated. Here, the argument of whether diminution in the value of options could be considered to relieve taxation from this

[40] In excess of INR 50,000

clause is also critical. If it is not regarded as consideration, then a trigger of taxation may arise. Hence, one has to take careful consideration and the courts have also gone on this aspect.

Conclusion

In the case of ESOPs, the law intends to tax any benefit accrued to the employees up to the date of exercise of shares as a perquisite. Therefore, can an intervening event jeopardize the position? While one Court has not commented on the characterization, another gave its interpretation of the clause and provided expanded meaning. In my, the answer lies in the charge that the section is purported to be created. While, in hindsight or logic, one can conclude that it could be a salary as compensation, a finer reading could lead to different interpretations, and it depends on the situation. While I have laid out my thoughts, one has to wait for other courts'[41] interpretation of the given situation and see whether the road to taxation leads.

(The Author is a Chennai based Chartered Accountant and he can be reached at prasskrish88@gmail.com)

[41] A similar issue is pending before Karnataka High Court

DEMYSTIFYING INTRA - GROUP SERVICES IN TRANSFER PRICING

Nithya Srinivasan & Nitya Joseph

Introduction

The international transaction of Intra-group service ('IGS') has been and continues to be one of the most litigated transactions in the transfer pricing landscape. Issues regarding arm's length pricing and benefits derived from such transactions are constantly under the scanner of transfer pricing officers ('TPO'). IGS are frequently undertaken by most MNE groups and payments towards the same are generally categorised as 'Management charges' by taxpayers despite covering multiple services. There is no specific guidance in India on considerations for IGS unlike other jurisdictions, hence the OECD Transfer Pricing Guidelines ('OECD guidelines'), UN guidance and judicial precedents are relied upon by taxpayers and authorities.

In this article, we seek to explore when an IGS has been rendered, how the same is remunerated in accordance with the arm's length principle, documentation requirements, global practices,

as well as local and global jurisprudence covering this issue.

What are intra-group services?

Every entity requires various services in connection with the operations of its business. While independent entities may acquire these from a specialised service provider or perform the service in-house, an MNE group in need of a service may opt to acquire the same from one or more members in the same MNE group (i.e. intra-group). This centralization of activities is carried out to ensure consistency and achieve economies of scale and the services are usually performed by the headquarters or by a regional hub. Examples of such services include IT, accounting, payroll, legal, HR services.

The OECD guidelines emphasize that in any IGS, two important issues need to be addressed-One, whether IGS have actually been rendered and second, to determine whether the charge for such IGS is in accordance with the arm's length principle.

Determining whether IGS have been rendered

The determination that IGS have been actually rendered by related parties, is the first critical step as it lays the

foundation for transfer pricing analysis. Further during the course of transfer pricing audits, benchmarking these services alone would not be sufficient, and detailed analysis will have to be undertaken to demonstrate that services have been rendered.

Need-Benefit Test

It is imperative to understand whether services availed from related parties are required by the recipient i.e. necessity of the services for operations as well as the benefit derived from the services. This is analyzed by understanding whether the activity performed by related parties provide an economic or commercial value to enhance or maintain an entity's business position. Under the arm's length principle an activity can be ascertained to be an IGS only when an independent party would be willing to pay for such services or perform the same by itself. The benefit test has been adopted by multiple countries and is routinely applied by Indian tax authorities while scrutinising IGS.

Non-chargeable activities

Not all activities performed by MNE Group members can be considered as IGS as third

parties would not be willing to pay for these activities. Hence, one would need to carefully evaluate nature of activities before categorizing them as IGS. Certain non-chargeable activities are noted below:

- **Shareholder activities**

These are activities performed by one of the MNE Group members (typically the parent or a regional holding company) solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. As per the OECD guidelines, examples include costs relating to the juridical structure of the parent company (such as meetings of shareholders of the parent, issuing of shares in the parent company), costs relating to reporting requirements of the parent company (including financial reporting and audit of the parent company, consolidation of reports) etc. It is critical to evaluate activities on a case-to-case basis. Eg: Whether management services rendered could be classified as shareholder services or whether the same would be a chargeable service.

- **Duplication**

This refers to situations where services rendered by a service

provider to a group member duplicate the activities being performed by the service recipient in-house or services availed from third parties. At arm's length, an independent entity would not consider availing services where it would duplicate the existing services availed or already being performed in-house. IGS need to be different, additional, or complementary to the activities performed in-house. Hence, mapping of the services with the departmental chart of the service recipient and differentiating the services provided by HQ with the inhouse personnel is very critical.

- **Incidental Benefits**

These are services performed by the parent or a regional hub to some of the group members which incidentally provides benefits to other group members. Any benefits from passive association (benefit merely on account of association with the Group without any specific activity being performed) would also be an incidental benefit. For example, higher credit rating due to association with a particular Group.

Determining an arm's length charge

Post ascertaining the IGS, the next step would be to determine whether the charges for the services are at arm's length. Broadly there are two methods of charging viz., Direct-Charge method and Indirect-Charge method.

Direct-Charge Method

Under this method, the arrangements made for charging for IGS can be readily identified, and Group members are charged for specific services. The direct-charge method would be most reliable as the basis for the payment can be clearly identified. However, this may not be practically possible since MNEs may not record the time spent or costs incurred separately for each service recipient, or services rendered to Group members may not be rendered to third parties.

Indirect-charge Method

This method is more commonly used wherein cost allocation and apportionment methods are used as a basis for calculating an arm's length charge. Charging for IGS has to be supported by a foreseeable benefit for the recipients. Selection of reasonable allocation keys for costs allocation is a key point. Some allocation keys generally used

are number of users, heat tickets (for IT fees), headcount for payroll etc.

Cost pool and Profit mark-up

Service providers would need to calculate a cost pool annually including all the costs incurred in delivering the services. This includes both direct and indirect costs including a relevant portion of operating expenses. The above pool can broadly be categorized into costs that can be directly identified to the respective related party and costs which have been incurred for more than one related parties. For the costs incurred for various related parties, the costs can be allocated based on an appropriate allocation key. The apportioned costs plus the costs directly incurred for the respective related parties will be the cost base on which the arm' length mark-up will have to be computed. To determine the profit mark-up to be applied, one can undertake independent benchmarking using Global databases from a service provider perspective.

To decide whether an arm's length mark-up on costs is necessary, the value addition of the service provider needs to be evaluated. In many business circumstances between two independent parties, there

might be some activities that would be undertaken/ certain costs incurred by the service provider solely on account of administrative convenience. These pass-through costs are usually recovered by the service provider on a cost-to-cost basis from the service recipient, without mark-up being charged.

More often than not, focus is more on mark-up charged on IGS, leaving behind big picture i.e., cost base/cost pool. Determining accurate cost base is essential to arrive at an arm's length cross-charge, and accordingly, directly identifiable costs, pass through costs, etc., ought to be clearly identified for cost pool.

Simplified approach for low value-adding IGS ('LVAS')

The OECD guidelines have provided a simplified approach for low value-adding activities which aims to reduce efforts of taxpayers in meeting benefit tests and demonstrating arm's length charges as well as the efforts of tax authorities while performing review of IGS. This approach allocates the cost incurred in providing services to the respective service recipients and applies the prescribed mark-up.

For availing the simplified approach, the IGS should be low value-adding in nature. The OECD guidelines define LVAS as services performed by one/ more members of the MNE Group on behalf of other members which:

a) are of a supportive nature,

b) are not part of the core business of the MNE Group,

c) do not require the use of unique and valuable intangibles and do not result in creation of such intangibles, and

d) do not involve the assumption of significant risks by the service provider or give rise to creation of significant risks for service provider.

Further the OECD Guidelines provide a list of activities that are excluded under the simplified approach like services constituting the core business of the MNE Group, research and development services, sales, marketing and distribution activities, services of corporate senior management etc.

In addition, the OECD Guidelines also provide an illustrative list of LVAS which include Accounting and

auditing services, Human resources activities, Information technology services etc. While these may be the principal activity of the service provider, they should not relate to the core business of the Group.

Documentation

Maintaining proper documentation is critical for substantiating IGS payments before the tax authorities. Tax authorities generally request evidence to prove receipt, necessity and benefits derived from such services.

Some of the documentation that can be maintained include:

- Intercompany agreements
- Workings for cost allocation, basis for allocation keys
- Description of services and benefits derived. Clear identification of category of services (Technical or LVAS) to be done. In spite of receiving varied services from Group members, taxpayers customarily term them as 'Management charges', without emphasising the technicality of services, which might mislead tax authorities to categorise them as LVAS. Instead, one may look at adopting apt nomenclature,

eg: production support, technical support, marketing support etc., thereby demarcating from LVAS.

- Differentiation of services availed from different Group members to substantiate mark-up charged (eg: one Group member may charge mark-up on allocated costs while the other does not)

- Details of similar service availed from third parties in the past, to substantiate need for the service

- Copies of agreements entered by the Group members with third party service providers (eg: for IT licenses cost recharge), details of software applications to which access is provided, details of heat tickets raised in case of IT helpdesk services

- Email correspondences, minutes of meetings/calls, travel details etc.

The above data should be sourced on a contemporaneous basis to handle litigation seamlessly.

Global practices

Several countries have laid down specific guidelines for IGS which follow the OECD/UN guidance. The LVAS simplified

approach has been adopted by the EU countries, New Zealand, UAE, Korea, Saudi Arabia etc. Some countries also have additional/different requirements in connection with IGS.

Singapore taxpayers can choose to apply 5% cost mark-up for a list of routine support services as an alternative to performing detailed transfer pricing analysis. Taxpayers are exempt from preparing TP documentation for these transactions. In addition, in the case of any services carried out by taxpayers which do not fall under the list of routine support services, Singapore taxpayers can opt for the OECD simplified approach provided the required conditions are met. Further, in the case of cost-pooling contracts where the costs of routine support services are shared among Group members, 0% mark-up on costs is acceptable.

Similarly, in the US, the IRS has prescribed the Services Cost Method ('SCM') which is a specified transfer pricing method under which certain LVAS can be charged out at cost at the election of the taxpayer in certain circumstances.

In countries like China, regulatory requirements may restrict deductibility of IGS

charge. For fees paid by subsidiaries that receive IGS, the following six tests should be used to determine the arm's length nature of services: benefit test, necessity test, duplication test, value creation test, remuneration test and authenticity test.

Issues under assessment/Local jurisprudence

Considering the very terminology of IGS, it becomes an easy target for tax authorities to impose transfer pricing adjustments. Tax authorities generally adopt an aggressive approach and the issues raised include:

- Disregarding the evidence submitted by taxpayers and imposing adjustments on the ground that need-benefit test not satisfied
- Determining Arm's Length Price ('ALP') as Nil under CUP method stating no independent party would pay for such services
- Not permitting aggregation of services under TNMM

There are multiple cases of the Tribunal both in favour of taxpayers and Revenue. Majority of cases pertaining to IGS at the ITAT level are remanded back to the lower authorities for verifying

the need-benefit test documentation. Some of the principles which emanate from judicial precedents in favour of taxpayers are:

- TPO cannot question commercial expediency and does not have the authority to disallow an expenditure based on whether benefit received
- TPO can only determine the ALP by selecting comparables in accordance with the 6 prescribed methods and not on an ad-hoc basis
- Receiving the same services on gratuitous basis in the earlier years does not mean that ALP of these services is 'nil'.

One of the important judgements was in the case of Cushman and Wakefield (India) (P.) Ltd. (Delhi High Court - ITA No. 475 of 2012) wherein it was held TPO's authority is to conduct a transfer pricing analysis to determine ALP and not to determine whether there is a service or not from which assessee benefits. Therefore, TPO cannot determine ALP of payments made to related parties as nil taking a view that assessee did not derive any benefit from services received.

In the case of Frigoglass India (ITA 1906/(DEL)/2015), the TPO preferred to apply CUP as against TNMM adopted by the Assessee. The Hon'ble Delhi ITAT held that where no comparable transactions had been brought on record by the Assessing Officer or even by the DRP or Revenue during the ITAT appeal, the approach of the Revenue could not be accepted.

In the matter of Avery Dennison (ITA nos. 4869 & 4934/(DEL)/2014), the ITAT rejected Nil ALP determined by TPO / CIT(A) in respect of some of the services on the contention that no benefit was derived by assessee. ITAT accepted ALP determined by assessee by aggregating transactions under TNMM, observing that assessee was predominantly a manufacturer and that services received by assessee from its related parties were intrinsically linked to core business operations.

Options available

The Indian Safe Harbour rules cover payments towards LVAS received, with a threshold of INR 10 crores and where the mark-up on cost does not exceed 5%. Indian taxpayers may resort to Safe harbour rules to ring-fence transactions from tax litigation where certificate of

cost pool workings is required and the process of a need benefit test documentation is eliminated. In the Union Budget for 2024-25, the Finance Minister had mentioned that the scope of safe harbour rules would be expanded and revised to make it more attractive. One would need to wait to see whether there would be any increase in the threshold or whether the threshold could be revised to a financial ratio like percentage of IGS costs to total costs of the service recipient.

Considering the protracted litigation process in India, many taxpayers also opt for alternate dispute mechanisms like Advance Pricing Agreement or Mutual Agreement Procedure.

Global jurisprudence

Global case laws also emphasise the importance of robust documentation in defending IGS charges. In one of the cases adjudicated by the French Administrative Court of Appeal (France vs. SMAP, March 2021, Administrative Court of Appeal, Case No. 19VE01161), the court had ruled that the sums paid by the taxpayer to its Group company termed as IGS constituted pure generosity granted in an interest other than that of the taxpayer's company.

Further no documents had been produced to establish the reality of services rendered by the Group company.

In a judgement by Supreme Administrative Court of the Czech Republic (Czech Republic vs STOCK Plzeò-Božkov, s. r. o., May 2023, Supreme Administrative Court, Case No 10 Afs 93/2021 – 69), the taxpayer (STOCK) had deducted costs for production consultancy services and internal support services allegedly received from related parties. The tax authorities disallowed deduction of the costs for tax purposes on the basis that the evidence provided regarding the nature and pricing of the services was insufficient. The Court ruled in favour of STOCK in relation to the production consultancy services stating that the tax authority's requirement that the company document each individual 'piece of advice' and quantify the benefits in minute detail was unreasonable. According to the Court, it was sufficient to explain how the production services were provided and what benefits the company derived from them. However, in the same case, the court also agreed with the tax authorities on the internal

support services. The documents, witness statements and e-mails provided by STOCK were not sufficient to prove that the services had been received.

Conclusion

IGS of all types are routinely undertaken by MNEs. Hence, a proactive approach of pricing the IGS as per the arm's length principle and maintaining strong documentation will contribute greatly to justifying these transactions before the tax authorities. In recent times, technology tools also play an important role in efficient collation and maintenance of supporting documentation (emails, contracts etc.) on a contemporaneous basis. Further, they can aid in automation of the cost pool allocation process to ensure costs are allocated among Group members accurately.

(The authors are part of VSTN Consultancy Private Limited, Transfer Pricing boutique firm and can be reached at snithya@vstnconsultancy.com and nityajoseph@vstnconsultancy.com)

ABOUT OURSELVES

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 - Demysified", "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".

Published by :
THE CHARTERED ACCOUNTANTS STUDY CIRCLE
2-L, Prince Arcade, 22-A, Cathedral Road, Chennai - 600086
✆ : 044 2811 4283 : 90031 03420 : admin@casconline.org

Book
Designed by
T. Babu (GB Designs)