

THE MONTHLY MAGAZINE FROM CASC

GST UPDATES

GST
Goods and Service Tax

AAR/AAAR

**HAPPY
NEW YEAR
2025**

JUSTICE

LAW

RECENT JUDGEMENTS

FISCALLY TRANSPARENT ENTITIES



VOLUME-4

ISSUE-1

JANUARY 2025



CASC BULLETIN

INDEX

Subject	Author	Page No.
Recent Judgments in VAT / CST / GST	CA. V.V. Sampathkumar	20
Case Laws - GST	CA. Vijay Anand	27
Summary of AAR/AAAR	CA. Aman Goyal	55
Understanding the Swiss Government's Removal of the MFN Clause in the India-Switzerland DTAA and Its Implications	Eshaan Singal	62
Treaty Entitlement For Fiscally Transparent Entities	CA. K. Prasanna	72
Strategic Deliberation of Apa Feasibility : Specific Business Scenarios	Nitya Srinivasan CA. E. Rajesh	82

Date	Topic	Speaker
09.01.2025 (Thursday)	Strategies for Adhering to Reverse Charge Regulations	CA. K. Vasudev Joshi
30.01.2025 (Thursday)	Landmark Rulings in 2024	CA. V. Vivek

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

“Our aim may be as high as the endless sky, but we should have a resolve in our minds to walk ahead, hand-in-hand, for victory will be ours.” “

– Dr. Atal Bihari Vajpayee, Bharat Ratna

Dear Professional Colleagues,

2025 New Year, Pongal and Republic day Greetings!!!

We, at Chartered Accountants Study Circle, wish all our members and their family and colleagues a very Happy, Healthy and Prosperous New Year and Pongal 2025 and 76th Republic Day. May this New Year and Pongal bring more great opportunities, Success, happiness, Prosperity, Peace and Glory!!!

CASC – 25th Annual Residential Conference

This year, your much awaiting **25th Annual Residential Conference (ARC)** is going to be held at **“Hotel Regent Inn Ranip” Ahmedabad** from **23rd to 26th January 2025** for the CASC members and their accompanying spouses and children. So far, 90 registrations received for the ARC programs. All arrangements are underway to enrich your **LOVELY KNOWLEDGE (KANTHI MATHI)** and flow with the experience at the banks of **“SABARMATI”** with family and other delegates.

CASC - Annual Day Celebrations

CASC celebrated its **46th Annual Day** on **27th December 2024** at “**Hotel Palmgrove**”, Chennai, with its members. The celebrations begun with Welcome Address, Lighting of Kuthuvillaku and Cake cutting by the Founder Members of CASC, Key note address by one of the founder members, **CA. R Bupathy** and Special Address by **CA. T R Chandrasekaran** on “**Industry Expectations from CAs/ CA Firms**” and presentation by **DSP Mutual Funds**, sponsor of the event on “**Navigating Market Cycles**” followed by Dinner. Total of **50** members attended the function and graced the occasion.

Direct Taxes Vivad Se Viswas Scheme 2024 (DTVSV 2.0) - Extended

The CBDT has extended the timelines for the taxpayers to avail the tax benefits under the DTVSV 2.0 scheme from 31st December 2024 to 31st January 2025. This is a welcome move, as it would be ample time for the taxpayers to avail the scheme in consultation with their tax professionals, who are busy with the GST Annual Returns, group consolidation and other year end deadlines. Further, the taxpayers who are on vacation, who would now stand benefitted. While the DTVSV 2020 was a great success, the traction for DTVSV 2.0 is yet to gain momentum, even though the taxpayers are getting reminders by mail and messages to avail the DTVSV 2.0 scheme. The CBDT

ought to have made some special concessions, for cases where the additions are made under sections 68 & 69A to D and taxed at 60% under section 115BBE of the Act, for them to avail DTVSV 2.0 scheme. Further, to increase the tax collection and reduce litigation, the CBDT could have included all taxpayers, where demands are outstanding to settle the dues, as one-time amnesty scheme.

CBDT extended timelines to revise Return for Resident Individuals -due to glitch in claiming Rebate u/s 87A for AY 2024-25

The CBDT has extended the timelines to file revised/ belated return for the AY 2024-25 from 31st December 2024 to 15th January 2025. The CBDT has extended the timelines based on the interim order direction of the Hon'ble Bombay High Court in a Public Interest Litigation (PIL) filed by THE CHAMBER OF TAX CONSULTANTS. The reason for such PIL is that the disabling of claiming rebate u/ s 87A of the Act for individuals in the ITR utilities rolled out in the IT portal on 05th July 2024. It is worthwhile to note from the data issued by the Finance Ministry in the Rajya Sabha recently that for the AY 2024-25 only 6.68% of the Indian population filed their returns, which is 8.09 Crores in number. Out of which, 4.90 Crore people have filed NIL returns and only 3.09 Crores people have paid taxes. There is no data about how many taxpayers, who have paid taxes on account of non-complaining of Rebate under section

87A of the Act due to mistake in the ITR Utility. Instead of CBDT extending the time lines, it could have suo-motu directed the CPC to direct relief all taxpayers who are eligible for rebate under section 87A of the Act while processing the return, which would resolve the issue and taxpayers need not have to incur costs in revising their returns.

GST Council - Tax Relief for Intermediaries

In the 55th GST Council meeting, held recently has provided a much need relief for Intermediaries like brokers, agents, and online bidding platforms providing services to overseas entities. Currently such services were liable to GST at 18%. The GST Council fitment committee after deliberations, have decided to classify such services by intermediaries as exports, liable to zero-rated tax under GST and suggested to remove Section 13(8)(b) under IGST . Currently, such services attract an 18% GST under the Central GST Act. This step could significantly reduce financial strain on Indian intermediaries and enhance their competitiveness globally by putting them on par with their international counterparts and highlights the Council's effort to create a more equitable tax environment for service providers in India. This proposal came in the light of show-cause notices (SCNs) of INR 3,357 Crore issued to these intermediaries, which would eventually get dropped once the amendment comes into effect.

New Direct Tax Code- Is it early? Are we ready?

There are some news publications which state that the Central Government would unveil the Direct Tax Code 2025, in the upcoming Union Budget to be presented on 1st February 2025. It is expected that the Direct Tax Code (DTC) will completely revamp the income tax laws, which will result in easing of legal hurdles and reducing the litigation burden for individuals, industry and the government. The experts believe that the new DTC is likely to revolutionise India's taxation framework, by simplifying tax laws, reducing compliance burdens, aligning with modern economic realities and provide significant relief for middle-class taxpayers by streamlining tax structures and tax filing process. While the intention is good, to transpire it into action, it would be better for the Government to share the draft DTC for public comments and also can have Committee to consider it and provide recommendation before implementation for achieving the government's objective to simplify laws and easy of doing business in India. If not, are we ready to embrace it personally and also professionally geared up to advice our clients.

However, based on the latest information the PM's Office had meeting with professional forums and good amount of interactions were made with them. During the deliberations, the professional bodies have suggested not to bring new DTC in its present form in this forthcoming budget, since most of the issues in the present Act has been settled. Revamping the entire Act, would only unsettle the settled issues and might not yield the expected result. Let's wait and watch and be ready to embrace whatever it comes.

CPE hours Compliance Mandatory from 2024 –Penal Consequences to follow – Time Extension Granted

Members are now mandatorily required to complete the minimum CPE hours on a yearly basis from the Calendar Year (CY) 2024. Members who have failed to comply with CPE hours requirements for the Calendar Year 2024 must face the penal consequences:

- **Level I (Jan to June) 2025:** Such members **would get this SIX months extension to achieve compliance by fulfilling twice the shortfall**
- **Phase II (July to Dec) 2025:** Non-compliant members are **classified and displayed in the CPE Portal** and they must again fulfil **twice the shortfall** to regain compliance.
- **Phase III (Jan to June) 2026:** Persistent non-compliance may lead **to disclosure in the Multipurpose Empanelment Form for members holding a COP** and **SIX** months are provided for compliance.
- **Level IV (July to Dec) 2026:** Continued non-compliance may result in the issuance of a **Provisional Peer Review Certificate, with a final certificate contingent on compliance within an additional SIX months period.**
- **Non-compliance After Dec 2026:** The CPE Committee may refer **the matter to Disciplinary Directorate for action** against such members for violating the guidelines. Further the **Issuance of**

Good Standing Certificate to such member shall be deferred at all levels until such member complies with CPE hours requirement

However, *ICAI has extended the time lines to comply with the CPE hours requirements for the CY 2024 from 31st December 2024 to 28th February 2025* for the benefit of Members at large and to avoid any hardship due to non-compliance. Members should avail this one time opportunity to avoid any penal consequences.

Now the penal consequences for non-compliance of CPE hours requirement is effective from 1st January 2025, it is imperative that each member/ CA firms to have proper systems in place to monitor the compliance of CPE Hours of their own or its partners in future to avoid the repercussions of non-compliance by spending more time in attending CPE programs.

Madras HC – SOP for Hearings to streamline cases

One of the Judges of the Hon'ble Madras High Court has introduced a Standard Operating Procedure (SOP) with an objective to expedite disposal of cases and curtailing the wastage of Court's time during early hours. The key highlights of the SOP guidelines are:

- a) No mentioning urgent motions before the Court, it must made be through Registry and fit cases will be taken up in the next day;

-
- b) Early hearing cases to be mentioned in a dedicated register placed in the Courtroom which will be considered and scheduled for hearing primarily on **Thursdays and Fridays**.
 - c) No mentioning of early adjournments, adjournments can be taken only if the matter reaches;
 - d) Lawyers to co-ordinate effectively with the Court Officer and share case papers in advance, and no adjournments will be granted for **“non-receipt of case papers”**.

This is a laudable initiative, which would definitely be WIN- WIN situation ensuring smooth and effective disposal of cases by the Court, whereby wastage of Court’s precious time gets avoided. However, its effectiveness largely depends on its implementation, which is turn hinges on how lawyers objectively and diligently follow this SOP. Let’s hope that this SOP marks a good initiative for effective system and functioning of the Court which benefits the litigants (i.e. Public) at large. If it is successfully implemented, this should be norm for all the courts across India to improve the efficiency of delivering justice in our Legal System.

One Day Seminar on GST

CASC had conducted a One Day seminar on **“GST Annual Returns and Reconciliation Statement”** on Tuesday, 12th December 2024, for CA Students, Professionals and Staff at **“Maharashtra Building Trust”**, Vepery, Chennai, jointly with The Society of Auditors, Chennai and Association of Auditors, Chennai. Eminent Speakers

like **CA. V. Shankara Narayanan, CA. Ganesh Prabhu Balakumar and CA. Monica Challani** conducted the training program over three sessions. It was a grand success with over **170** delegates attending the program and was well received by them. CASC would continue to conduct such training programs on various relevant topics for the member's and student's benefits, with the able support from our members and students.

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

GLIMPSES FROM 46th ANNUAL DAY CELEBRATIONS

1. Lighting of Kuthuvillaku by Founders Members with MC Members



2. Cake Cutting by Founder Members with MC Members





3. Key Note Address by Founder Member, CA. R. Bupathy



4. Welcoming and Honouring our Special Guest by our Present and Past MC Members



5. Special Address by CA. T.R. Chandrasekaran on "Industry Expectations from CAs/CA Firms"



6. Presentation by Mr. Naresh, DSP Mutual Funds, Sponsor on "Navigating Market Cycles",



7. Members Photo



GLIMPSES FROM ONE DAY SEMINAR ON GST

1. Welcome Address & Speaker's Introduction by Program Organisers



2. Presentation by Eminent Speakers on GST

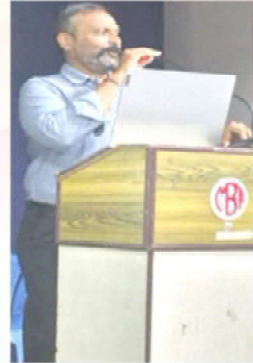
CA. Ganesh Prabhu Balakumar



CA. Monica Challani



CA. V Shankaranarayanan



3. Special Honour to Speakers by Organizers



4. Participants who attended the program



GLIMPSES FROM THE OUR MONTHLY MEETING HELD ON 16-12-2024

Speaker : CA. SURAJ NAHAR Topic : Vivad Se Vishwas Scheme 2024



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ANNOUNCEMENTS

1. The copies of the material used by the speakers and provided to CASC for distribution, for the regular meetings held twice in a month is available on the website and is freely downloadable.
2. Earlier issues of the bulletin are also available on the website in the “News” column.

The soft copy of this bulletin will be hosted on the website shortly.

READER'S ATTENTION

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

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RECENT JUDGEMENTS IN VAT / CST / GST



CA. V.V. SAMPATHKUMAR

Registration Suspension of GST: It is the right of the petitioner to carry on the business and it is the bounden duty of the respondent to provide the GST registration in the manner known to law. Even, if the petitioner company indulged in allegedly obtaining Section 29(2)(e) registration by means of fraud or not conducting the business from declared place in violation of provisions of the Act, the respondent can very well initiate legal action by invoking civil and penal provisions by way of civil and criminal cases. Instead of doing so, the respondent has outrightly cancelled the GST registration of the petitioner. It is the fundamental right of the petitioner to trade and carry on the business in the country and the State can impose reasonable restrictions. However, in the present case, the respondent without resorting to take legal action invoking penal provisions, suspended the GST registration of the petitioner and deprived the petitioner from carrying on the business, which amounts to violation of fundamental right of the petitioner and prevented the petitioner, which, cannot be sustained. **M/s. A.V.Traders Vs. The Commercial Tax Officer, Thiruvallikeni Assessment Circle, Chennai South-I, W.P.No.31285 of 2024 Dated: 29.10.2024.**

Reply not Submitted: It is clear that despite the time being granted to the Petitioner as requested by them, the Petitioner has not chosen to file its reply and hence impugned assessment order came to be passed. Petitioner submit that impugned order came to be passed without affording an opportunity of hearing and therefore prays to set aside the same. Therefore, this Court has not accepted the submission made by the learned counsel for the Petitioner. This Writ Petition stands dismissed, with liberty to the Petitioner to file an Appeal, challenging the impugned order before the Appellate authority, within a period of thirty days from the receipt of the copy of this order. **M/s. Sri Balaji Pharma Surgicals Vs. The State Tax Officer, Dharmapuri Assessment Circle, W.P.No.29409 of 2024 Dated: 14.10.2024**

Personal Hearing: No opportunity of personal hearing was provided to the Petitioner prior to the passing of impugned order. Hence, this Court is of the view that the impugned orders are passed in violation of principles of natural justice and it is just and necessary to provide an opportunity to the Petitioner to establish their case on merits. **M/s. Sky Moon Sea Foods Vs. AC(ST)(FAC), Chintadripet Assessment Circle W.P.No.32061 of 2024 Dated: 28.10.2024**

GST registration cancellation: GST registration of the petitioner was cancelled. According to the petitioner, since their turn over had never crossed a sum of Rs.20,00,000/ -, they are under the impression that they are not required to file their returns. Under these circumstances, the GST Registration of the petitioner was cancelled for non-filing of returns for 6 months. The reason provided for non-compliance with the relevant provisions of the Act within the prescribed time, in the considered opinion of the Hon'ble Court, appears to be genuine. This Court revoked the impugned order cancelling the GST registration of the petitioner, subject to the fulfillment of the conditions. **M/s.AVR Traders Vs. The Superintendent of GST and Central Excise, Villupuram I Assessment Circle, W.P.No.30731 of 2024 Dated: 24.10.2024**

Condonation of Delay: Due to the demise of the petitioner's father, they preferred an appeal against the said assessment order with a delay of 44 days. In such case, the reason provided for non-filing of appeal within the prescribed time appears to be genuine. Therefore, being satisfied with the reasons assigned by the petitioner and also considering the submission made by the petitioner, this Court has condoned the delay. **M/s.. Nithya Cotton Mills Vs.1.The Deputy Commissioner (ST)(GST)(Appeal), Erode and Salem, Erode 638 001. 2.The State Tax Officer, Tiruppur Assessment Circle, W.P.No.30500 of 2024 Dated : 18.10.2024**

GST Refund : In the present case, according to the learned Senior standing counsel appearing for the Respondent as per the Notification No.13/ 2022 dated 05.07.2022, the last date for filing the refund claim for the period 2019-20 is 29.02.2024, but the learned counsel for the Petitioner submitted that the effect of the above mentioned notification is that the period from 01.03.2020 to 28.02.2022 shall be excluded, which means that the 2 years exclusion period shall be added to the original time-limit of 31.03.2022 which stands extended to 31.03.2024. It appears that due to some confusion whether the limitation ends on 29.02.2024 or 31.03.2024, the Petitioner filed the rectification application with a delay of 7 days. Considering the submissions made by the learned counsel for the Petitioner as well as the Respondent and in view of the settled proposition of law that when substantial justice is pitted against technical consideration, credence should be given to the substantial justice, this Court has condoned the delay of 7 in filing the refund application before the Respondent. **M/s.Trisula Engineering and Trading Private Limited, Vs. Assistant Commissioner, Cuddalore GST & C.Ex. Division, Cuddalore 607001 W.P.No.28614 of 2024 Dated : 17.10.2024**

GST not paid and claim of ITC: In the absence of material evidences with regard to the remittance of tax amount by the supplier, the respondent had rightly arrived at the conclusion to

reverse the ITC availed by the petitioner and passed the impugned order dated 23.04.2024. In such case, the Hon'ble Court also does not find any merits in the present petition. Therefore, this Court dismissed this petition by granting liberty to the petitioner to file an appeal against the impugned order. Stating so, this writ petition is dismissed. The petitioner is granted liberty to file their appeal before the concerned Appellate Authority within a period of 30 days from the date of receipt of copy of this order. **Tvl.Green Star Traders Vs. Commercial Tax Officer, Room No.224, Farnpet, Chennai-35. W.P.No.29741 of 2024 Dated: 15.10.2024**

Order without giving findings: It is a bounded duty of the respondent to pass final assessment order after hearing the petitioner vide personal hearing and after considering the reply filed by the petitioner. If the respondent is intend to reject the reply filed by the petitioner, they have to state as to why they are rejecting the reply and provide a due consideration with regard to the submission made by the petitioner. However, in this case, no reason has been stated with regard to the rejection of reply filed by the petitioner. Therefore, it is clear that the impugned order came to be passed by the respondent in violation of principles of natural justice and the same is set aside with conditions. **Tvl.Coira Mediaa Enterprises Vs. The Deputy State Tax Officer-2, Pollachi (West), Assessment Circle, W.P.No.30091 of 2024 Dated : 15.10.2024**

order u/s 74 when Notice u/s 73: It is an admitted fact that though the notice in Form DRC-01 was issued under Section 73 of the GST Act, the impugned order was passed under Section 74 of the GST Act. As contended by the petitioner, if at all if there is an intention to pass any assessment order under Section 74 of the GST Act, the respondent is supposed to have issued a notice by fulfilling the conditions narrated under Section 74 of the GST Act. In this case, it is apparent that no such notice was issued under Section 74 of the GST Act. When such being the case, no order can be passed by the respondent under Section 74 of the GST Act and hence, the impugned order passed by the respondent is not only in violation of principles of natural justice but also against the provision of law. **Tvl.Rajaa Offset Vs. The State Tax Officer (FAC), Mannargudi Assessment Circle, W.P.No.30189 of 2024 Dated: 15.10.2024**

Refund of GST: Initially, the petitioner has made application well within time, i.e. on 22.02.2018, claiming refund of the tax under Section 54 of CGST Act, 2017 followed a reminder letter dated 29.03.2019, but the respondent has not processed the same, but after a lapse of more than one year, they issued a Deficiency Memo on 12.04.2019 calling upon the petitioner to rectify certain deficiencies mentioned therein. According to the petitioner, they had not received the said Deficiency Memo and they came to know only when they received a letter dated 26.5.2023 from the respondent.

Therefore, since the petitioner has made the application claiming refund of the tax within the time, which was not processed by the respondent more than a year, the Hon'ble Court was of the view that it would be appropriate to direct the respondent to process the application without insisting limitation aspect and pass orders therein and issued directions. **M/s.Regal Engineers & Contractors Pvt Ltd Vs Assistant Commissioner of CGST & CE, Pallavaram Division, Chennai-18. W.P.No.29256 of 2024 Dated : 14.10.2024**

Rectification: This writ petition has been filed by the petitioner to consider the rectification application filed by the petitioner under Section 161 of the GST Act on 03.05.2024 for the Assessment Year 2017~2018. Considering the submissions made by the learned counsel appearing for the Petitioner as well as the Respondent, this Court directs the 1st Respondent to pass orders on the rectification petition filed by the Petitioner on 03.05.2024, on merits and in accordance with law, after affording an opportunity of hearing to the Petitioner, within a period of three months from the date of receipt of a copy of this order. **Tvl.Ganesh Constructions Vs.1. The Deputy State Tax Officer, Ayanavaram Assessment Circle 2. The CGM, BSNL, Chennai Telephones, Chennai-10. W.P.No.29351 of 2024 Dated: 14.10.2024**

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

CASE LAWS - GST

1. **GST - ITC BLOCKED CREDIT U/S 17 (c) and (d) CONSTITUTIONAL VALIDITY - ITC ON CONSTRUCTION OF MALL/ WAREHOUSE / BUILDING OTHER THAN HOTEL OR CENEMA THEATRE - ELIGIBILITY AS "PLANT AND MACHINERY" MATTER REMANDED**



CA. VIJAY ANAND

In CCGST v. Safari Retreats Pvt. Ltd. 2024(90) GSTL 3/ (2024) 23 Centax 62 (S.C), the assessee was engaged in the construction of a shopping mall for the purpose of letting out premises in the malls to different tenants, which attracts GST. The assessee was desirous of availing ITC accumulated against the rental income received by it upon letting out the mall premises and were advised to deposit GST on rent without deducting ITC because of the exception carved out by Section 17(5)(d) by the department.

On a writ petition before the High Court of Orissa, it was held that in view of the decision of this Court in the case of Eicher Motors Ltd. v. Union of India 1999 (106) ELT 3 (SC.), Section 17(5)(d) was required to be read down as the very purpose of

ITC is to benefit the assessee and that if the assessee is required to pay GST on the rental income from the mall, it is entitled to ITC on the GST paid on the construction of the mall and that the narrow interpretation given by the Department to Section 17(5)(d) would frustrate the very object of the Act.

On an appeal, the Supreme Court observed as under:

1. On a reading of sub-section (1) of Section 16, it is apparent that only a registered person, as defined in Section 2(94) can avail of ITC. A person who is registered under Section 25 of the CGST Act becomes a registered person. The availability of ITC is subject to such conditions and restrictions as may be prescribed.
2. The word “prescribed” is defined to mean prescribed by the rules made under the CGST Act. Therefore, the entitlement to ITC is subject to conditions and restrictions as may be provided in the Rules framed under the CGST Act. ITC has to be availed in the manner laid down by Section 49. Sub-section (2) of Section 49 and other sub-sections deal with how ITC can be availed.
3. Under sub-section (1) of Section 16, a registered person is entitled to take credit of the input tax charged on any supply of goods or services or both to him, which are used or intended to be used in the course of or in furtherance of his business.

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4. Input tax is defined by Section 2(62). In relation to a registered person, it means Central, State, Integrated or Union Territory tax charged on the supply of goods or services or both made to him. It includes the tax payable by him on a reverse charge basis under sub-sections (3) and (4) of Section 9.
 5. Further conditions for the use of ITC are prescribed by sub-section (2) of Section 16.
 6. Sub-section (3) of Section 16 is of some relevance as it provides that if a registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income Tax Act, 1961, he is disentitled to ITC on the said tax component.
 7. In short, a registered person will not be entitled to ITC on the tax component of the cost of capital goods and plant and machinery if he claims depreciation on the said tax component under the Income Tax Act. The object is that a registered person does not take advantage of both depreciation and ITC.
 8. Finance Act, 2022, substituted the words “due date of furnishing return under Section 39 for the month of September” with “thirtieth day of November” with effect from 1st October 2022.

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9. Under Section 39(1), every registered person other than an Input Service Distributor is required to furnish for every calendar month or part thereof a return of inward and outward supplies of goods or services or both, ITC availed, tax payable, tax paid, etc.
 10. The meaning of sub-section (4) of Section 16 as amended is that a registered person can avail of ITC in respect of any invoice or debit note for the supply of goods or services before 30th day of November following the end of the financial year to which such invoice or debit note pertains, or furnishing of annual return, whichever is earlier.
 11. Section 17(5) begins with a non-obstante clause. A non-obstante clause is a device used by the legislature that is usually employed to give an overriding effect to certain provisions over some contrary provisions that may be found in the same or some other enactments. Such a clause is used to indicate that the said provision should prevail despite anything to the contrary in the provisions mentioned in the non-obstante clause.
 12. In view of the non-obstante clause used at the beginning of sub-section (5), it seeks to override both sub-section (1) of Section 16 and sub-section (1) of Section 18. As noted earlier, sub-section

(1) of Section 16 lays down the eligibility and conditions for taking ITC. Subsection (1) of Section 18 deals with the availability of ITC in special circumstances.

13. Therefore, in the cases covered by subsection (5), ITC is not available. In a sense, sub-section (5) of Section 17 carves out an exception to the provisions of subsection (1) of Sections 16 and 18, which confer the benefit of ITC.
14. Thus, in the case of works contract services supplied for the construction of immovable property, the benefit of ITC is not available. However, there are exceptions to clause (c). First is when goods or services, or both, are received by a taxable person for the construction of “plant and machinery”, as defined in the explanation to Section 17. The second exception is where the works contract service supplied for the construction of immovable property is an input service for further supply of the works contract.
15. There is hardly a similarity between clauses (c) and (d) of Section 17(5) except for the fact that both clauses apply as an exception to sub-section (1) of Section 16 excepting the fact that both apply to the construction of an immovable property.

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16. Clause (c) uses the expression “plant and machinery”, which is specifically defined in the explanation. Clause (d) uses an expression of “plant or machinery”, which is not specifically defined.
 17. In view of clause (a) of sub-section (1) of Section 7, a supply of services such as sale, transfer, licence, rental or lease made for consideration is a supply.
 18. Whether the activities or transactions covered by sub-section (1) of Section 7 constitute a supply has to be considered in light of Schedule II. Schedule II has a title: “Activities or transactions to be treated as supply of goods or supply of services”. The activities/ transactions incorporated in Schedule II are treated as a supply of service. Clause 5(b) of Schedule II has to be read with the provisions of Schedule III, which has a title: “Activities or transactions which shall be treated neither as a supply of goods nor a supply of services”. Clause (5) of Schedule III.
 19. If there is a complex, building or civil structure constructed which is intended for sale to a buyer, wholly or partly, construction becomes a supply of service only if consideration for sale is received before the issuance of a completion certificate or after its first occupation, whichever is earlier.

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20. Thus, if the consideration for sale is paid after the competition certificate is issued or its first occupation, whichever is earlier, the sale transaction will not amount to the supply of service. However, no such distinction has been made in the case of lease, tenancy, or licence concerning land or letting of buildings.
21. Even if the entire consideration for lease, tenancy or a licence to occupy land or a lease of a building is paid after the issuance of the completion certificate or its first occupation, whichever is earlier, it continues to be a supply of service.
22. It is also necessary to bear in mind the philosophy of the GST regime, which is discussed in the case of *UOI v. Mohit Minerals Pvt. Ltd.* — 2022 (61) G.S.T.L. 257 (S.C.) wherein it was held that the philosophy of the GST is to incorporate a consumption and destination-based test. The emphasis is on taxing supplies of goods and services. If one applies the well-settled principles on the interpretation of taxing statutes, as discussed in the earlier part of this judgment, there is no scope to give any meaning to clause (c) of Section 17(5) other than its plain and natural meaning.
23. The expression “plant and machinery” has been specifically defined in the explanation of Section 17. Works contract service

has been defined under the CGST Act. One cannot add anything to clause (c) or subtract anything from clause (c). ITC is a creation of legislature. Therefore, it can exclude specific categories of goods or services from ITC. Exclusion of the category of works contracts by clause (c) will not, per se. defeat the object of the CGST Act.

24. Explanation to Section 17 defines “plant and machinery” used in Chapter V and Chapter VI but the expression “plant or machinery” is found only in Section 17(5)(d). If the legislature intended to give the expression “plant or machinery” the same meaning as “plant and machinery” as defined in the explanation, the legislature would not have specifically used the expression “plant or machinery” in Section 17(5)(d). The legislature has made this distinction consciously.
25. Therefore, the expression “plant and machinery” and “plant or machinery” cannot be given the same meaning. It may also be noted here that the expression ‘plant or machinery’ is used in dealing with a peculiar case of goods or services being received by a taxable person for the construction of an immovable property on his own account, even when such goods or services or both are used in the course of furtherance of business.

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26. Now, the question which arises is what meaning should be given to the expression “plant or machinery”. When the legislature uses the expression “plant and machinery,” only a plant will not be covered by the definition unless there is an element of machinery or vice versa. This expression cannot be read as “plant or machinery”. That is so clear from the explanation in Section 17, which says that plant and machinery means apparatus, equipment and machinery fixed to the earth by foundation or structural support that are used for making outward supply of goods or services or both.
27. The expression includes such foundation and structural support fixed to the earth. However, the definition excludes land, buildings or any other civil structure.
28. The expression “plant or machinery” has a different connotation. It can be either a plant or machinery. Section 17(5)(d) deals with the construction of an immovable property. The very fact that the expression “immovable property other than “plants or machinery” is used shows that there could be a plant that is an immovable property. As the word ‘plant’ has not been defined under the CGST Act or the rules framed thereunder, its ordinary meaning in commercial terms will have to be attached to it.

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29. The next decision in the line is in the case of CIT Vs. Anand Theatres (2000) 110 Taxman 338 (SC) where the issue was whether a building which is used as a hotel or a cinema theatre can be considered as apparatus or a tool for running a business so that it can be termed as a plant and depreciation can be allowed on the same under the Income Tax Act, 1961 and the court dealt with Section 32, which provided for granting depreciation to buildings, machinery, and plants. This Court extensively referred to its earlier decision in the case of CIT Vs. Taj Mahal Hotel (1971) 3 SCC 550 and other decisions of this Court and High Courts to view whether a building used for running a hotel or cinema business could be held to be a plant.
30. This Court has laid down the functionality test. This Court held that whether a building is a plant is a question of fact. This Court held that if it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance.
31. The word 'plant' used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of "plant and machinery", which excludes land, buildings or any other civil structures. Therefore, in a given

case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression “plant or machinery”.. To give a plain interpretation to clause (d) of Section 17(5), the word “plant” will have to be interpreted by taking recourse to the functionality test.

32. Under the CGST Act, as observed earlier, renting or leasing immovable property is deemed to be a supply of service, and it can be taxed as output supply. Therefore, if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant.
33. In the main appeal, which is the subject matter of this group, the High Court has not decided whether the mall in question will satisfy the functionality test of being a plant. The reason is that the High Court has done the exercise of reading down the provision. Each mall is different. Therefore, in each case, fact-finding enquiry is contemplated.
34. Thus, in the facts of the case, the matter would have to be remanded back to the High Court to decide whether, on facts, the mall in question satisfies the functionality test so that it can

be termed as a plant within the meaning of bracketed portion in Section 17(5)(d).

35. The same applies to warehouses or other buildings except hotels and cinema theatres. A developer may construct a mall predominantly to sell the premises therein after obtaining an occupation certificate. Therefore, it will be out of the purview of clause 5(b) of Schedule II. Each case will have to be tested on merits as the question whether an immovable property or a building is a plant is a factual question to be decided.
36. Essentially, the challenge to constitutional validity is that, in the present case, the provisions do not meet the test of reasonable classification, which is a part of Article 14 of the Constitution of India. To satisfy the test, there must be an intelligible differentia forming the basis of the classification, and the differentia should have a rational nexus with the object of legislation. The Union of India rightly contends that immovable property and immovable goods for the purpose of GST constitute a class by themselves. Clauses (c) and (d) of Section 17(5) apply only to this class of cases. The right of ITC is conferred only by the Statute; therefore, unless there is a statutory provision, ITC cannot be enforced. It is a creation of a statute, and thus, no one can claim ITC as a matter of right

unless it is expressly provided in the statute. It cannot be disputed that the legislature can always carve out exceptions to the entitlement of ITC under Section 16 of the CGST Act.

37. Therefore, the cases covered by clauses (c) and (d) of Section 17(5) are entirely distinct from the other cases. This appears to be done to ensure the object of not encroaching upon the State's legislative powers under Entry 49 of List II.
38. Therefore, it is not possible to accept the submission that the difference is not intelligible and has no nexus to the object sought to be achieved. Moreover, to decide why transactions covered by clauses (c) and (d) are separately classified, the Court will have to go into complex questions involving fiscal adjustments of diverse elements. The Court has no experience or expertise to embark upon the said exercise.
39. The argument that the classification is underinclusive and creates discrimination is baffling as equals are not being treated as unequals. The test of vice of discrimination in taxing law is less rigorous. Ultimately, the legislature was dealing with a complex economic problem. By no stretch of the imagination, clauses (c) and (d) of Section 17(5) can be said to be discriminatory. No amount of verbose and lengthy arguments will help the assesseees prove the discrimination.

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40. Hence, the plea that clauses (c) and (d) of Section 17(5) are unconstitutional cannot sustain.
41. Though, violation of Articles 19(1)(g) and 300A has been alleged, it is not elaborated by the assesseees how such a violation is made out.
42. While dealing with a taxing statute, it can always be said that, ideally, a particular provision ought not to have been incorporated or ought to have been incorporated with a modification. Even if this can be said, per se, the particular provision does not become unconstitutional. The Court cannot impose its views on the legislature.
43. As the constitutional validity of clauses (c) and (d) of Section 17(5) were upheld, its plain interpretation does not lead to any ambiguity, the question of reading down the provisions does not arise.

Hence, the court concluded as under:-

- a) The challenge to the constitutional validity of clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act is not established;

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- b) The expression “plant or machinery” used in Section 17(5)(d) cannot be given the same meaning as the expression “plant and machinery” defined by the explanation to Section 17;
 - c) The question whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression “plant or machinery” used in Section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business.
 - d) If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5) to sub-section (1) of Section 16.
 - e) Functionality test will have to be applied to decide whether a building is a plant.
 - f) Therefore, by using the functionality test, in each case, on facts, in the light of what we have held earlier, it will have to be decided whether the construction of an immovable property is a “plant” for the purposes of clause (d) of Section 17(5).

2. **GST – EXTENSION OF DUE DATE FOR PASSING ORDER U/S 73 WITHOUT RECOMMENDATION OF THE GST COUNCIL – NOT TENABLE**

In *Barkataki Print and Media Services v. UOI*, 2024(90) GSTL 162/ (2024) 22 Centax 479 (Gau), the petitioners have challenged their respective Order-in-Original passed under Section 73(9) on the ground that the Notification No.9/ 2023-CT dated 31.03.2023 and the Notification No.56/ 2023-CT dated 28.12.2023 by which the period for passing of the order under Section 73(10) of the Central Act was extended in exercise of the powers u/ s 168A was ultra vires the Central Act along with the imposition under the State Act on the ground that there is no Notification issued under Section 168A of the State Act extending the period for passing order under Section 73(10) of the State Act. The high court observed as under:

1. The Orders-in-Original which are challenged in the instant batch of writ petitions are orders passed in respect to the Financial Year 2018-19 and 2019-20 have been passed on or after 01.04.2024. Under such circumstances, the challenge so made to the Notification No.9/ 2023-CT as well as the pari materia notification issued by the State Government dated 06.09.2024 has no relevance.

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2. The question which therefore arises is as to whether the Notification No.56/ 2023-CT dated 28.12.2023, is ultra vires the provisions of Section 168A of the Central Act?
 3. For the Government to exercise the powers u/ s 168A to extend the time limit specified or prescribed or notified, it can be made on the recommendation of the GST Council by way of a notification in respect to acts which could not be completed or complied with due to force majeure.
 4. The challenge to the Notification No.56/ 2023-CT is on account of absence of recommendation by the GST Council and existence of force majeure as defined in the Explanation to Section 168A of the Central Act.
 5. There is no denial to the fact that the Notification No.56/ 2023-CT was issued without the recommendation of the GST Council. The use of the phrase “on the recommendation of the Council” in Section 168A prima facie suggests that the power to be exercised under Section 168A by the Government is when a recommendation is made by the GST Council.
 6. The question therefore arises as to whether the recommendation of the GST Council is sine qua non for exercise of the power under Section 168A by the Government.

7. In the Black's Law Dictionary, 11th Edition, the term "recommendation" is defined as –

"A specific piece of advice about what to do, esp. when given officially.

A suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious."

8. Both the Central Act as well as the State Act do not define the term "recommendation". Under such circumstances, it would be necessary to understand the impact of the word "recommendation" in the context of the provisions of the Constitution as well as the Central Act and State Act. Article 246A confers both upon the Parliament and the State Legislature simultaneous power to legislate on Goods and Service Tax which can be exercised notwithstanding anything contained in Articles 246 and 254 which is not subject to Article 279A except to the extent that in respect to the Goods and Service Tax to be levied on petroleum, crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

9. The power can be exercised under Article 246A from the date recommended by the GST Council. The power to make recommendation to the Union and the States is mentioned in

Article 279A(4) which shall be guided by the need for a harmonized structure of Goods and Service Tax and for development of a harmonized national market for Goods and Service Tax in terms with Article 279A(6).

10. Therefore, it is apparent that the object behind the insertion of the Article 246A and Article 279A and overriding Article 254 is to promote fiscal federalism and cooperative federalism.
11. Under such circumstances, the recommendations to be made by the GST Council if required as per the provisions of the Central Act or the State Act has to be construed to be a sine qua non for exercise of power by the Union or the State Government.
12. In other words, wherever the provisions of the Central Act or the State Act stipulates that an act is required to be done on the recommendation of the GST Council, the act can be done only when there is a recommendation.
13. Relying on the decision in V.M. Kurian v. State of Kerala (2001) 4 SCC 215, the meaning of the word “recommend” would also be applicable to the interpretation of Section 168A to mean “giving of a favourable report opposed to an infavourable one” by the GST Council for exercise of power under Article 168A.

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14. Another ground of challenge to the Notification No.56/ 2023-CT is that as there was no element of force majeure, the question of exercising the power under Section 168A did not arise. In the previous segment of this judgment, this Court had dealt with the Explanation to Section 168A. The Explanation to Section 168A deals with various types of natural calamities, war, epidemic to come within the ambit of force majeure.
 15. It is pertinent to mention that the recommendation to be made by the GST Council have also to be based upon the existence of force majeure conditions. In the 49th Meeting of the GST Council, it was clearly recorded that there shall be no further extension beyond the three months in the interest of the tax payers.
 16. Notification No.56/ 2023-CT was issued without the recommendation and that natural corollary thereof is that the GST Council had no occasion to consider existence of force majeure inasmuch as the same was never placed before the GST Council before issuance of the same. Therefore, the Notification No.56/ 2023-CT if construed from that angle also would be a notification issued without the force majeure condition being not considered in accordance with law.
 17. Under such circumstances, Notification No.56/ 20123-CT is to be held ultra vires the Central Act and the same is not legally

sustainable in law. Accordingly, the same is set aside and quashed.

18. It is also very pertinent to mention that the State of Assam have not issued any pari materia notification for the period on or after 01.04.2024 for the Financial Year 2018-19 and for the period on or after 01.07.2024 for the Financial Year 2019-20.

Hence, the petitions were allowed and the impugned Orders-in-Original which have been passed under Section 73(9) both under the Central Act as well as State Act were held as passed beyond the time period prescribed under Section 73(10) of both the Central Act or the State Act.

3. **GST – ADVANCE RULING - SUPPLY OF FUEL - FREE OF COST - NOT TO BE INCLUDED**

In New *Jai Hind Transport Service v. UOI* 2024(90) GSTL 242/ (2024) 23 Centax 76(Uttarkhand), the petitioner filed an application seeking advance ruling as to the following question

“Whether the value of free diesel filled by service recipient under the accepted terms of contractual agreement in the fleet(s) placed by GTA service provider will subject to the charge of GST by adding this free value diesel in the value of GTA service, under the Central Goods and Services Tax Act, 2017 & Uttarakhand Goods and Service Tax Act, 2017?”

The authority held that the value of diesel filled by service recipient in the vehicle(s) provided by the petitioner, on FOC basis as per the terms of the agreement, will be subject to the charge of GST by adding the free value of diesel to arrive at the transaction value of GTA service and this view was sustained by the appellate authority. On a writ petition, the high court observed as under:

1. In *Commissioner v. Bhayana Builders Private Limited* 2018 (10) GSTL 118 (S.C.) the case before the Supreme Court was assessee / service provider had availed benefit of notifications and paid service tax on 33% of the gross amount which it had charged from the persons for whom construction was carried out, i.e., the service recipients. This did not include the value of such goods / materials which were supplied by the service recipient in the gross value. The Supreme Court held that it was not incumbent on the assessee to include the value of goods / materials supplied free of cost by the service recipient.
2. In *UoI v. Intercontinental Consultants & Technocrats (p.) Ltd.* — 2018 (10) G.S.T.L. 401 (S.C.), the Supreme Court was examining the validity of the expenditure / cost incurred by the service provider in the course of providing taxable services and held that the value of free supplies of diesel and explosives in respect of service of “Site Formation and Clearance Service” cannot be treated as “gross amount charged” and it is not the

consideration for rendering the services. In this backdrop, the value of free supplies of diesel and explosives would not warrant inclusion while arriving at the gross amount charged on the service tax to be paid, and all the appeals filed by the Union of India were dismissed.

3. The Supreme Court in the judgments referred to hereinabove has consistently held that where diesel is filled free of cost (FOC) by the service recipient and is not included in the value of GTA service, then the cost of fuel cannot be added to the payment made by the service recipient to the transporter, and further GST be charged from the transporter.

The Supreme Court in *Jayhind Projects Ltd. v. CST* — (2023) 13 Centax 32 (S.C.) = 2024 (388) E.L.T. 38 (S.C.) has again reiterated and followed the judgment of the Supreme Court in the case of *CST v. Bhayana Builders (P.) Ltd.* — 2018 (10) G.S.T.L. 118 (S.C.) and held that the value of goods / materials supplied free of cost by service provider is not to be included in the gross amount for levy of service tax by the service provider.

4. Hence, as per the consistent view taken by the Supreme Court in the judgments referred to above the cost of fuel cannot be added in the account of the petitioner, who was a transporter, and was governed by the GST rules.

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5. Thus, in the case of the petitioner, as per the agreement, the cost of fuel was to be borne by the service recipient and this cost of this fuel cannot be subjected to charge of GST by adding the value of free diesel in the transaction value of GTA service done by the petitioner. Hence, value of free fuel cannot be added to value of taxable supply under Section 15(1) and Section 15(2)(b) of the CGST Act, 2017.

Hence, the writ petition was allowed and the order passed by the Appellate Authority for Advance Ruling was set aside.

4. **GST - SALE/SUPPLY OF ELECTRICITY TO BANGLADESH POWER DEVELOPMENT BOARD - REFUND OF TAX ON ACCOUNT OF EXPORT OF ELECTRICITY - ALLOWED**

In SEIL Energy India Ltd. v. UOI 2024(90) GSTL 242/ (2024) 22 Centax 134(A.P.), the petitioner generates electrical power and sells the same to their customers. For the period January 2022 to October 2022, the petitioner had been selling/ supplying electricity to M/ s. Bangladesh Power Development Board. The petitioner sought refund of the input tax credits available contending that such supply of electricity would amount to an export sale for these months which were proposed to be rejected on the ground that the petitioner had not filed the bill of shipping for supply of electricity. This issue was raised by way

of a show cause notice by the respondents. By this time, earlier orders of rejection, on the same ground, had been challenged before the high court on the ground that electricity is an intangible and the question of obtaining the bill of shipping for such intangibles cannot arise. During the pendency of these, there was an amendment to Rule 89 of the CGST Rules” substituting the requirement of producing the bill of shipping with the requirement of furnishing the Regional Energy Account (“REA”) maintained by the concerned Regional Load Dispatch Center, as proof of export, even if the bill of shipping is not produced.

Thereafter, the SCN was amended calling upon the petitioner to produce the REA account maintained by the Regional Load Dispatch Center for processing the applications. Consequently, the petitioner produced the said REA account for the periods January 2022 to October 2022. However, the refund applications were rejected holding that (a) Rule 89 of the CGST Rules requires the dealer to place necessary materials such as input tax credit, turnover of zero rated supply of goods, adjusted total turnover, etc. for the “relevant period”, (b) the relevant period would be the month for which the refund is sought (c) the petitioner, while applying for refund for the month of January 2022 was filing the REA for the month of December 2021 and so on. On a writ petition, the high court observed as under:

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1. Section 12 (2) of the CGST Act provides for fixing the time of supply on either of two eventualities. The time of supply can be fixed on the date when the invoice for such supply is prepared and sent by the supplier or on the date on which the payment for such supply is made by the person receiving such goods. However, the legislature has also stipulated that the earlier of these two eventualities would be treated as the time of supply for the purpose of assessment of tax.
 2. A perusal of Section 12(2) makes it clear that the time of continuous supply of goods is not relevant and it is only the point of time when the invoice is raised or price is paid, whichever is earlier, that would be relevant for determining the point of tax in time and consequently, the period of supply of goods for which an invoice is raised should be taken into account, rather than the point of time at which the invoice has been raised, should be taken as the “relevant period”.
 3. In such circumstances, furnishing of the REA for the preceding month, while making an application for refund in the succeeding month would be in accord with the said provisions of the Act and Rules.

Hence, the writ petitions were allowed and the impugned orders rejecting the refund were set aside with a direction to the

adjudicating authority to consider the applications of the petitioner for grant of refund, if everything else is in accord with the requirements, by permitting the petitioner to produce the REA of the previous month as the proof of export for the refund applications made in the succeeding month.

5. GST – CONSTRUCTION SERVICES PROVIDED TO STATE GOVERNMENT AND APPROVED WHEN THE RATE WAS @ 12% - STATE GOVERNMENT OBLIGED TO PAY ADDITIONAL 6% WHEN THE RATE WAS INCREASED TO 18%

In *Jee Constructions v. State of Madhya Pradesh* 2024(90) GSTL 354/ (2024) 23 Centax 111(M.P.), the petitioner has been awarded several works vide agreements executed with a Public Enterprise of the State Government which was subject to GST @ 12%. Thereafter, vide Notification No.15/ 2021 CT(R) dated 18.11.2021, the rate of GST has been enhanced from 12% to 18% (9% CGST & 9% SGST) w.e.f. from 01.01.2022. Despite the increase in rate, the customer were paying the running bills with 12% GST and the petitioner is paying 18% GST. The petitioner submitted a representation to the customer to pay the arrears of GST i.e. @ 6% for the invoices issued on or after 01.01.2022. Thereafter, on a writ petition, the high court observed as under:

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1. The respondents have objected to the maintainability of writ petition in view of the availability of alternative remedy under the Arbitration Act.
 2. No disputed question of facts are involved in this case consequent to which the petitioner cannot be relegated to the Dispute Resolution Form as provided under the agreement.
 3. State GST Department, which is a respondent, has acknowledged the increase in the rate of GST from 12% to 18% and same is liable to be paid by respondent No.2 which is a Government Entity.

In view of the above, the respondent was directed to pay the difference of GST amount to the petitioner @ 6% from 01.01.2022 to 30.09.2022 with a period of three months failing which the petitioner shall be entitled for interest @ 6% per annum from the date of entitlement.

Hence, the writ petition was accordingly disposed of.

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SUMMARY OF AAR/AAAR

Applicability of healthcare exemption in respect of canteen service provided to hospital



CA. AMAN GOYAL

In the case of Re: Bampada Jana (referred to as “applicant”)(Order No. 14/ WBAAR/ 24-25 dated November 26, 2024) – West Bengal Authority for Advance Ruling

Facts of the case

1. The applicant has entered into a contract for running the in-house kitchen of a hospital.
2. The Hospital has given the applicant the contract to prepare, cook, and deliver meals and special diets to inpatients at specified timings. The contract covers the supply of a regular diet for general ward patients, including morning tea, snacks, breakfast, lunch, evening tea, and dinner.
3. The hospital provides a suitable space for the kitchen, while the applicant is responsible for buying, obtaining, and storing raw materials. The applicant is also responsible for arranging catering appliances like industrial cooking gas cylinders, gas oven, refrigerator, mixer grinder, toaster, sandwich maker, juicer, electric kettle, induction cooker, dish washer, storage cabinet etc.

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4. Further the applicant is responsible for supplying materials, and staff for daily tasks like buying fresh ingredients, cooking, and properly serving meals to all in-patients. The meals should follow the standard diet recommended by medical officers and guidelines from the dietician.

Question before AAR

The applicant raised the question of whether the supply of food to inpatients would be considered as an element of composite supply of healthcare service exempt from GST.

Interpretation of law by the applicant

1. The Applicant relied upon Circular 32/ 06/ 2018 -GST wherein it has been specifically clarified that *food supplied to the in-patient as advised by the doctor/nutritionist is a part of composite supply of healthcare and not separately taxable*. The Circular further clarifies that other supplies of food by a hospital to patients (not admitted) or their attendants or visitors are taxable.
2. In the instant case, the applicant is supplying food to in-patients using the hospital's own kitchen. Since the hospital has provided the primary space for the kitchen, the service is not to be considered as "outsourced" from outside caterers and

consequently no GST shall be leviable on the invoices raised by the applicant to the hospital.

Observations and Ruling of the Authority

1. For in-patients admitted to a hospital, the food provided is part of the healthcare service and is strictly controlled by doctors or nutritionists, leaving no choice for the patient. This food service is not taxed separately, as highlighted in Circular No. 32/ 06/ 2018 GST.
2. In the instant case, the hospital outsources the food service, meaning a separate contractor prepares and supplies the food to in-patients, limiting the contractor's role to merely preparing and delivering the meals.
3. According to the contract, the applicant is responsible for preparing and providing meals to the hospital's in-patients, following the recommendations of the hospital's medical practitioners. The contract specifies that the applicant's role is limited to catering services, ensuring the meals match the standard diets recommended by the medical officers.
4. The hospital contracts the applicant to perform the work, rather than handling it internally. Merely using the hospital's kitchen

space and serving food as recommended does not substantiate the applicant's claim that they are not outsourced by the hospital.

5. There can be no dispute that the applicant is supplying the services to the Hospital who is engaged in providing health care services to the patients. So, it is the hospital and not the applicant who provides health care services.
6. The same has been clarified in the Circular itself wherein it has been stated that health care services provided by the clinical establishments will include food supplied to the patients; but such food may be prepared by the canteens run by the hospitals or may be outsourced by the Hospitals from outdoor caterers. When outsourced, there should be no ambiguity that the suppliers shall charge tax as applicable.

Ruling of AAR

The AAR ruled that food supplied to the in-patients as advised by the doctor/ nutritionists constitutes a part of composite supply of health care services in the hand of the hospital. Supply made by the applicant to the Hospital is a standalone service of supply of food and in no way can be considered as a composite supply of health care services.

Eligibility to avail ITC of IGST paid through TR-6 challan

In the case of M/ s. RV Hydraulic Services (referred to as “applicant”) (Order No. 14/ AP/ GST/ 2024 dated November 28, 2024) – Andhra Pradesh Authority for Advance Ruling

Facts of the case

1. The applicant is engaged in the business of precision cutting, rolling, and bending of steel plates, producing pipes, bucket shells, and other custom-formed components for supply to various industries.
2. The applicant has placed an order from a foreign supplier for purchase of specialized machinery.
3. The machinery was initially imported into India by a related entity of the foreign supplier for exhibition purposes and was showcased at the International Machine Tool and Manufacturing Technology (IMTEX) exhibition.
4. The bill of entry in this regard had been filed by the related entity of the foreign supplier. No customs duty was paid at the time of import, as Notification 08/ 2016 - Customs exempts importers from paying applicable duties for items imported for exhibition purposes, provided they are returned.

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5. After the exhibition, the machine was transferred to the applicant, who then paid the applicable customs duties and IGST via TR-6 challan and obtained a no objection certificate from customs.
 6. The applicant availed the ITC of IGST paid through TR-6 Challan.

Question before AAR

Whether the applicant can claim Input Tax Credit under GST on the payment of IGST for goods purchased, even if the Bill of Entry is not in their name?

Observation and Ruling of AAR

1. In terms of section 16 of the CGST Act, 2017 no registered person shall be entitled to avail ITC unless he is in possession of a tax invoice or debit note or such other taxpaying documents as may be prescribed.
2. In terms of Rule 36(1)(d) of the CGST Rules, 2017 ITC may be availed by a registered person on the basis of a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made there under for the assessment of integrated tax on imports.

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3. The essential documentary requirements and the conditions to claim ITC enumerated under section 16 of CGST act read with Rule 36 apply mutatis mutandis under IGST. In the present scenario the claim for ITC by the applicant must have such essential documentation in their name to establish entitlement.
 4. In the instant case the Bill of Entry was filed in the name of the related entity of the foreign supplier and out of charge has been issued for the aforesaid goods.
 5. The manual TR-6 challan used for IGST payment does not fulfill the documentation requirements outlined in rule 36 of the CGST Rules for claiming ITC. Therefore, the applicant would not be eligible to claim ITC.

Ruling of AAR

The AAR ruled that ITC is not eligible to the applicant.

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UNDERSTANDING THE SWISS GOVERNMENT'S REMOVAL OF THE MFN CLAUSE IN THE INDIA-SWITZERLAND DTAA AND ITS IMPLICATIONS

India's tax treaties play a pivotal role in defining its global economic engagements. These agreements, especially Double Taxation Avoidance Agreements (DTAAs), are crucial in mitigating tax liabilities for businesses operating internationally. However, recent developments, particularly



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Switzerland's decision to remove the Most Favored Nation (MFN) clause from its DTAA with India, have raised significant concerns for Indian businesses, particularly in the financial services, pharmaceuticals, and IT sectors. This article delves into the Swiss government's decision, its underlying reasons, and its broader implications for Indian businesses. It also examines related challenges in India's tax treaty landscape and suggests measures to address these issues.

The Context of the MFN Clause and the DTAA

DTAAs play a critical role in international taxation by ensuring that income earned across borders is not taxed twice — once in the source country where the income is generated and again in the residence country where the taxpayer resides. These agreements promote

cross-border trade and investment by reducing tax liabilities, fostering economic cooperation, and providing tax certainty to businesses and investors.

A key feature of many DTAA's is the MFN Clause, designed to ensure fair and non-discriminatory tax treatment among treaty partners. Under the MFN clause, if one treaty partner agrees to a more favorable tax rate or beneficial terms in a separate treaty with another country, those same benefits must be extended to the first partner. This mechanism prevents treaty partners from being placed at a competitive disadvantage and ensures a level playing field in international business dealings.

The MFN Clause in the India-Switzerland DTAA

India and Switzerland signed a DTAA in 1994 to facilitate cross-border investment and trade while reducing tax liabilities for businesses operating in both countries. The agreement included an MFN clause, which played a pivotal role in shaping the tax treatment of various types of income, particularly dividends.

Previous Tax Framework Under the MFN Clause

Before the recent change, Indian businesses operating in Switzerland benefitted from a reduced withholding tax rate of 5% on dividends. This rate was based on the MFN clause in the India-Switzerland

DTAA, as Switzerland had agreed to similar terms with certain other OECD (Organisation for Economic Co-operation and Development) member countries. Indian companies could claim the same lower tax rate on dividends, enhancing their financial efficiency and improving post-tax profitability.

The reduced 5% tax rate helped Indian companies, particularly in capital-intensive sectors such as financial services, pharmaceuticals, and IT, which have significant operations in Switzerland. Lower tax costs made Switzerland a competitive and attractive destination for Indian businesses looking to expand in Europe or access global financial services.

The Policy Shift: Removal of the MFN Clause

Effective January 1, 2025, the Swiss government's removal of the MFN clause will raise the tax rate on dividends and other income from 5% to 10% for Indian businesses. This effectively doubles the tax burden, making Switzerland a more expensive jurisdiction for Indian companies.

The Catalyst: The Nestlé Case Ruling by India's Supreme Court

The move stems from a landmark judgment by the Indian Supreme Court in the Nestlé case (October 2023). The court ruled that the MFN clause in the India-Switzerland DTAA applied only to

countries that were OECD members as of 1994, the year the treaty was signed. This interpretation excluded newer OECD members such as Colombia and Lithuania, which joined the organization much later. The court also clarified that MFN benefits could not be automatically invoked unless explicitly notified under Section 90 of India's Income Tax Act.

The Indian government's strict legal interpretation left Switzerland with limited options, as it had initially reduced its tax rate on dividends to 5% based on its broader understanding of the MFN clause. Switzerland believed that all OECD member countries, regardless of when they joined, should trigger MFN benefits. Faced with India's restrictive legal stance, Switzerland withdrew the MFN clause, reverting to the original 10% tax rate stipulated in the DTAA.

Switzerland's Response and Its Implications

The removal of the MFN clause has several implications for Indian businesses operating in Switzerland:

- a. **Higher Tax Liabilities:** Indian companies will face a significantly higher tax rate of 10% on dividends, eroding profits and potentially discouraging further investment in Switzerland.

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- b. **Competitive Disadvantage:** Indian firms will be at a disadvantage compared to businesses from countries that still enjoy MFN-based lower tax rates.
 - c. **Restructuring Considerations:** Some Indian companies may consider restructuring their European operations to reduce tax exposure, potentially relocating to countries with more favorable tax treaties.
 - d. **Compliance Complexity:** The increased tax rate could also lead to more complex tax compliance and a higher administrative burden for Indian firms navigating cross-border tax regulations.

The sectors most affected include:

Financial Services: Indian banks and financial institutions operating in Switzerland will face higher tax liabilities, impacting profitability and potentially influencing decisions about continued operations or expansion in the Swiss market.

Pharmaceuticals: Indian pharmaceutical companies, many of which have significant operations in Switzerland due to its advanced research facilities and proximity to European markets, will now encounter increased costs, affecting their global supply chain strategies.

Information Technology: IT firms that rely on Switzerland as a hub for European operations may face reduced margins, prompting a reevaluation of their operating models.

A Broader Look at India's DTAA Challenges

The India-Switzerland DTAA issue is not an isolated incident. India has faced similar challenges with other DTAAs, where interpretation differences and evolving business models have created compliance hurdles and double taxation risks.

India-Australia DTA Disputes

One prominent example is the ongoing disputes related to the India-Australia DTAA. Australian tax authorities often classify payments for software licenses and services as royalties, subjecting them to source taxation. Indian software firms, on the other hand, contend that such payments should be categorized as business income, taxable only in India unless the firm has a permanent establishment (PE) in Australia.

This difference in interpretation has led to significant double taxation issues and increased compliance burdens for Indian firms. Moreover, Australia's domestic laws, which often override treaty provisions, exacerbate these challenges, leaving Indian businesses in a precarious position.

The Need for Modernizing Tax Treaty Frameworks

The Switzerland and Australia cases underscore the need for India to adopt a more consistent and forward-looking approach to its international taxation treaties. With the global economy increasingly digitalized, traditional tax treaty provisions often fall short of addressing modern business realities.

Recommendations for India's Tax Treaty Policy

To enhance global competitiveness and reduce tax uncertainties, India must consider the following steps:

- a. **Clarify and Codify Treaty Interpretations:** India should work towards clearer interpretations of key clauses like the MFN clause. Explicit notifications and detailed guidelines under Section 90 of the Income Tax Act can help prevent disputes like the Nestlé case.
- b. **Negotiate Modernized DTAA's:** India should renegotiate its DTAA's to include provisions that address challenges posed by digital businesses, intellectual property rights, and service-based economies. The inclusion of clauses that prevent the overriding of treaty provisions by domestic laws is critical.

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- c. **Strengthen Dispute Resolution Mechanisms:** Establishing robust mutual agreement procedures (MAPs) and arbitration frameworks can help resolve disputes more efficiently and reduce the risk of double taxation.
 - d. **Engage in Multilateral Initiatives:** India's active participation in global tax reform initiatives, such as the OECD's Base Erosion and Profit Shifting (BEPS) project, can ensure alignment with international best practices and foster mutual trust among treaty partners.
 - e. **Enhance Transparency and Communication:** Proactive communication with treaty partners about India's positions and policies can help avoid misunderstandings and build stronger bilateral relationships.

Conclusion

The Swiss government's decision to remove the MFN clause from its DTAA with India signals a crucial turning point, urging Indian policymakers and businesses to rethink their approach to international taxation. While the immediate consequence is a heavier tax burden on Indian companies operating in Switzerland, the broader takeaway is the pressing need for India to adopt a more dynamic, forward-looking tax treaty framework.

India's current DTAA policies, shaped by historical agreements and evolving legal interpretations, must adapt to the complexities of the modern global economy. The shifting tax landscape, driven by technological advancements, digital commerce, and new business models, requires treaties that are clear, comprehensive, and responsive to future challenges. The Switzerland and Australia cases highlight critical gaps in India's international tax policy, from legal interpretation disputes to outdated treaty provisions.

To remain competitive and reduce tax-related uncertainties, India must proactively strengthen its tax treaty network through the following measures:

Clarify Key Provisions: Establish clear and consistent interpretations of treaty clauses like the MFN provision, ensuring minimal scope for disputes and legal uncertainty.

Modernize Tax Treaties: Update existing treaties to reflect emerging economic realities such as digital services taxation, intellectual property management, and global supply chains.

Strengthen Dispute Resolution Mechanisms: Develop efficient resolution frameworks such as arbitration clauses and mutual agreement procedures to address disputes swiftly and fairly.

Align with Global Tax Standards: Actively participate in global tax initiatives like the OECD's BEPS project to align treaty policies with international best practices.

Enhance Bilateral Engagement: Foster open communication and periodic negotiations with treaty partners to ensure India's tax policies remain equitable, transparent, and conducive to international investment.

By embracing these reforms, India can transform potential tax policy setbacks into opportunities for systemic improvement. A modern, well-defined, and globally integrated tax treaty framework will not only reduce tax uncertainties but also strengthen India's position as a reliable partner in international trade and investment. In a rapidly evolving global economy, where cross-border business operations are becoming the norm, a robust tax policy is essential for fostering economic growth, enhancing investor confidence, and ensuring long-term competitiveness on the world stage.

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TREATY ENTITLEMENT FOR FISCALLY TRANSPARENT ENTITIES

1. Introduction

A Tax Treaty intends to eliminate double taxation of income by agreeing on the distributive rule between a source and residence state. Through this allocation system, the resident and source state share the taxing rights in various income streams. The article on the elimination of double taxation then comes into operation to grant credit for foreign taxes paid on the doubly taxed income by the resident state. The essential requirement for invoking the treaty's provisions is that one must be a person as defined under the tax treaty, and that person should be a tax resident of either of the contracting states.



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Article 3 of a tax treaty defines the term 'person.' Typically, any person who is a taxable unit in a resident state could satisfy the definition of the person under the tax treaty. This issue arises when an entity is transparent for tax purposes under domestic law to fulfill the requirement of the person under the tax treaty.

Recently, the Delhi ITAT, in the case of General Motors Company USA vs. ACIT,¹ dealt with the treaty entitlement of a Single Member Limited Liability Company ('LLC') from the India-USA Tax Treaty perspective.

¹ ITA No. 2359/ Del/ 2022 and ITA No. 2360/ Del/ 2022 dated 05 September 2024

Before we move on to the case, one must understand the concept of LLC and the position of Indian tax authorities concerning fiscally transparent entities, including LLCs.

2. Nature of Limited Liability Company in the US

The enactment of Wyoming legislation in 1977² Paved the way for setting up hybrid entities with limited liability and taxation. The IRS officially recognized the LLC set-up under Wyoming law as a partnership for federal tax. In 1990, many states have passed LLC legislation. In January 1997, new regulations, i.e., “check-the-box,” allowed the eligible taxpayer (business organization) to elect its taxpayer status.

From a US legislation perspective, an LLC is a separate legal entity from its members, capable of doing business, owning assets, incurring liabilities, executing contracts, right to sue. As per US regulations, an LLC with at least two members can elect itself as a corporation or partnership³, and a single-member LLC may elect itself as a corporation or sole proprietor⁴. Once the LLC adopts a check-the-box approach for tax purposes and does not elect to be a corporation, it permits the taxation of its income in the hands of the members (based on their ownership) for US federal tax purposes. In effect, this allows the LLC to be regarded as a fiscally transparent entity for tax purposes, as its income is subjected to tax in the hands of its members.

² WYO STAT. § § 17-15-101 to 136 (1989).

³ If no election is made, then the LLC will be regarded as partnership under the default rule

⁴ Reg. §301.7701-2(a).

3. OECD's Position

The OECD, in Article 1(2), deals with the definition of person, provided that income derived by or through an entity or arrangement that is fiscally transparent (partially or wholly) under the law of either of the contracting states shall be considered income of a resident of the contracting state to the extent income is treated as income in the hands of a resident of that state.

Ideally, this provides for the recognition of a fiscally transparent entity as a person for treaty purposes, provided its income is subject to taxation in the hands of members who are residents of the state in which such entity is situated.

Article 3 (1) of the Multilateral Instruments ('MLI'), which deals with transparent entities, echoes a similar proposition.

4. India's Position on fiscally transparent entities

India's Position is reinforced by the non-OECD member countries' positions on the article and commentary and in the reservation/ notification of the MLI article.

In its Position in Art 1, India has reserved its right not to include para 2 of Article 1 in its tax treaties. Further to para 5 of the Commentary, India disagreed with the OECD's view and expressed that this term includes only income derived by or through entities that are residents of one or both Contracting States.

Even in Article 3, India reserved its right to include in the definition of ‘person’ any entity treated as a taxable unit under the taxation laws in force in either Contracting State.

Regarding MLI, India has reserved its right in entirety to Article 3 of the MLI.

In respect of Single Member LLC, attention is invited to the OECD Report on MAP Peer Review, India (Stage 2)⁵, wherein it was highlighted that *“India’s Competent Authority has verbally and informally in writing stated that it will not provide treaty benefits or grant access to MAP concerning income of fiscally transparent entities that are treated under the peer’s domestic legislation as disregarded from its single resident member. The peer understands the views of India’s competent authority to be that a **single resident member of a fiscally transparent entity does not qualify as a resident under the tax treaty, because such member is not referred to in the precise language of the treaty, which only refers to partnerships wherein one of the partners is a resident in the peer’s state**..... In that regard, the peer’s competent authority requested to solve the matter through an interpretative MAP under Article 25(3) of the tax treaty, but India’s competent authority responded that an amendment of the treaty would be necessary for this case.*

“.....India continues to believe that providing treaty benefits to single member LLCs would amount to expanding the scope of the existing treaty and that cannot be done without building in a suitable amending protocol into the treaty

⁵ Part B - Page 34 - Resident requirements for single resident members of a fiscally transparent entity:

that amends the existing Article 4. It cannot be done through an MoU flowing from the existing Article 27. Furthermore, India noted that it is aware that this peer has similar problems with other jurisdictions as well and it has entered into an amending protocol with one of its treaty partners.....”⁶

5. Determination of Status of ‘Person’

As per Article 1, the tax treaty applies to a person who is a resident of one or both contracting states. Article 3 of the tax treaty defines the term ‘person’. Further, the term ‘company’ is also defined in Article 3⁷. The qualification or status of a person has to be determined in accordance with the resident country and not as per the source country. The **Supreme Court in Technip SA vs. SMS Holding (P) Ltd**⁸ applied the principles of private law to hold that the status of a corporation is to be decided according to the laws of its domicile or incorporation subject to certain exceptions of domestic public policy.

6. Status of LLC

The controversy arose in the case of LLCs because the India-US tax treaty does not explicitly include LLCs in the term ‘person’. The treaty was entered in 1989, and the concept of a single-member LLC became prominent in 1996. Hence, the treaty could not have envisaged the aspect of LLC at the time of negotiations.

⁶ Para 78 of OECD Report on MAP Peer Review

⁷ The term "company" means any body corporate or any entity which is treated as a company or body corporate for tax purposes ; - Article 3(1)(f) of India-USA DTAA

⁸ (2005) 5 SCC 465

As mentioned earlier, the LLC is a separate legal entity under the laws in which it is incorporated. However, for tax purposes, based on its election, it is either disregarded or treated as a body corporate. If the LLC is treated as a body corporate for tax purposes, then it will be regarded as a company (under Article 3(1)(f)), or if it's a partnership, then it is covered under Article 3(1)(e).

The **Delhi ITAT in General Motors** (*supra*) has granted treaty benefits by observing as follows:

The Publication 3402 of the Department of Treasury issued by the IRS provides LLC taxation. An LLC with a single member is treated as a disregarded entity for tax purposes but as a separate entity for employment and excise taxes. Further, instruction to Form 8802 dealing with tax residency certification provides that *in general, under an income tax treaty, an individual or entity is a resident of the United States if the individual or entity is subject to US tax by reason of residence, citizenship, place of incorporation, or other similar criteria.*

In the case of a person not entitled to Form 6166, it is emphasized that fiscally transparently organized in the USA that does not have a US Partner is not entitled to the treaty certification. Once the LLC is disregarded and income is taxable in the hands of its US owners, the LLC satisfies the requirement of 'liable to tax.'

An LLC, having obtained TRC from US authorities, is organized as a body corporate as it fulfills all the requirements of a body corporate in the form of legal recognition of a separate and perpetual existence of entity from its member.

Based on the above, the ITAT concluded that the LLC satisfies the requirements of the resident by virtue of its incorporation and qualifies as a person by virtue of its separate existence from its members. Under the India-US DTAA, the fiscally transparent partnership is regarded as 'liable to tax and those entities whose income is not subject to tax in the US (having non-US Residents as members) are excluded.

While the ITAT regarded the Single-member LLC as a body corporate, the observation is silent on whether it is a body corporate for tax purposes under US federal taxes. From the extract of TRC, the LLC opted to be fiscally transparent; hence, it cannot be a body corporate.

7. Status of Foreign Partnership

Unlike LLC, a conventional partnership⁹ may not be regarded as a separate legal entity unless the laws in which such partnership is located are treated otherwise. While India¹⁰ may regard a partnership as a taxable unit, other countries treat the partnership as a transparent entity. Hence, the status of the partnership needs to be tested from a home country law perspective.

⁹ Not a Limited Liability Partnership

¹⁰ Hungary, Mexico

According to the resident state, if the partnership is a body corporate, it will be regarded as a ‘company’. If not, the partnership may fall under the ‘body of person’.

The **Mumbai ITAT in Linklaters LLP vs. ITO**¹¹, in the context of India-UK, treated the partnership as a person entitled to a treaty by involving article 3(2) and applied the definition of partnership under the Income-tax Act to uphold that the UK partnership is a taxable unit; hence a person for tax treaty purposes. The Hon’ble ITAT went on to apply Article 4 to hold that the partners of the firm are liable to tax in the UK; hence, the UK partnership satisfies the requirement of being liable to tax and is entitled to a tax treaty.

The ITAT has not referred to the status of the partnership from a UK law perspective; rather, it applied the definition of source country to determine whether it is a person under the treaty. It is to be noted that the definition of ‘person’ was modified by protocol¹² to include the term ‘body of person’, and to this extent, Article 4(1)(b) was amended to reflect the partnership aspects.

The **Authority for Advance Ruling (‘AAR’) in Schellenberg Witmer**¹³ has denied the benefit of tax treaty to Swiss partnership. However, the AAR has not evaluated whether the partnership could be regarded as a ‘body of person’, which is very much included as part of a person under Article 3 of India Swiss DTAA.

¹¹ (2011) 40 SOT 51 (Mum)

¹² Notification No. 10/ 2014 [F.No.505/ 3/ 1986-FTD-I], dated 10-2-2014, w.r.e.f. 27-12-2013.

¹³ [2012] 24 taxmann.com 299

In **Chiron Behring GmbH & Co**¹⁴, the **Bombay High Court** allowed treaty benefits to a German Partnership by observing that it was liable to tax under the German Trade Tax. The person's definition under Article 3(1)(d) includes other entities treated as taxable units, and as per Article 2(3)(a), the term 'tax' also includes German trade tax.

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

8. Other aspects

If the partnership or the LLC is not regarded as a body corporate under the tax law, it will not be entitled to a lower rate of taxation on the dividend income under Article 10(2)¹⁵.

9. Treaty Analysis

On analysis of 30+ key treaties, hardly a few treaties cover fiscally transparent entities like partnership and trust¹⁶ under the term 'person' directly. Otherwise, the partnership and trust has to rely on the term 'body of person', 'body corporate', or other entities treated as taxable units in the contracting state's tax laws.

¹⁴ [2013] 29 taxmann.com 199 (Bombay)

¹⁵ India-USA (subject to satisfying the minimum holding %)

¹⁶ LLC is not covered under any treaty

#	Terms Covered	Treaty Partner of India
1	Partnership/ Trust/ Estate	Canada, Hong Kong, Ireland (only trust), Sweden, US
2	Defined as per Respective Tax Laws	Italy
3	BOP and Other Entities (OE) that are treatable as taxable units as per country tax laws	<p>Both BOP and OE are Covered - Australia, Cyprus, Finland, Hungary, Iran, Korea, Netherlands, Portugal, Singapore, Spain, Sweden, Swiss, Thailand, UK, USA</p> <p>Only BOP is covered – Hong Kong, Indonesia, Ireland, Japan, Luxembourg, Saudi Arabia,</p> <p>Only OE is covered– France, Germany, Greece, Mauritius, Russia, UAE</p>
4	Partnership/ Trust/ Estate reference in Residence Article	UK, USA, Sweden (Partnership and Estate only)

10. Conclusion

The treaty entitlement of fiscally transparent is a long-standing battle between the taxpayer and the tax authorities. The Indian tax administration is very categorical in its stand. The benefits are granted only in a situation where the treaty includes the categories of transparent entities and not otherwise. On the other hand, the Tribunals have been liberal in their approach and granting the benefits. As a taxpayer, one must be cautious about applying treaty provisions from the taxability of income or withholding standpoint in the case of fiscally transparent entities. The dust relating to this issue is not settled yet and the time will decide one way or another.

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STRATEGIC DELIBERATION OF APA FEASIBILITY: SPECIFIC BUSINESS SCENARIOS

Introduction

In today's dynamic global trade environment, determining the pricing of cross-border transactions between related parties is both essential and complex for



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multinational enterprises ('MNEs'). Transfer pricing regulations often result in disputes between taxpayers and tax authorities, leading to prolonged litigation and uncertainty.

Organisation for Economic Co-operation and Development (OECD) as part of administrative approaches to avoid and resolve transfer pricing disputes included Advance Pricing Arrangement (Agreement) as a dispute resolution mechanism.

APAs were introduced in India by Central Board of Direct Taxes ('CBDT') through Finance Act 2012 by inserting Section 92CC and Section 92CD in the Income Tax Act, 1961 ('the IT Act') and Rule 10F to 10T and Rule 44GA in Income-tax Rules, 1962 w.e.f July 1, 2012. APA is a formal agreement between a taxpayer and a tax authority that pre-establishes the transfer pricing methodology for related-party transactions, typically involving MNEs, for a defined period – 5 year forward looking and 4 year roll back.

APAs have gained significant global recognition as an effective tool for addressing transfer pricing disputes and ensuring tax certainty.

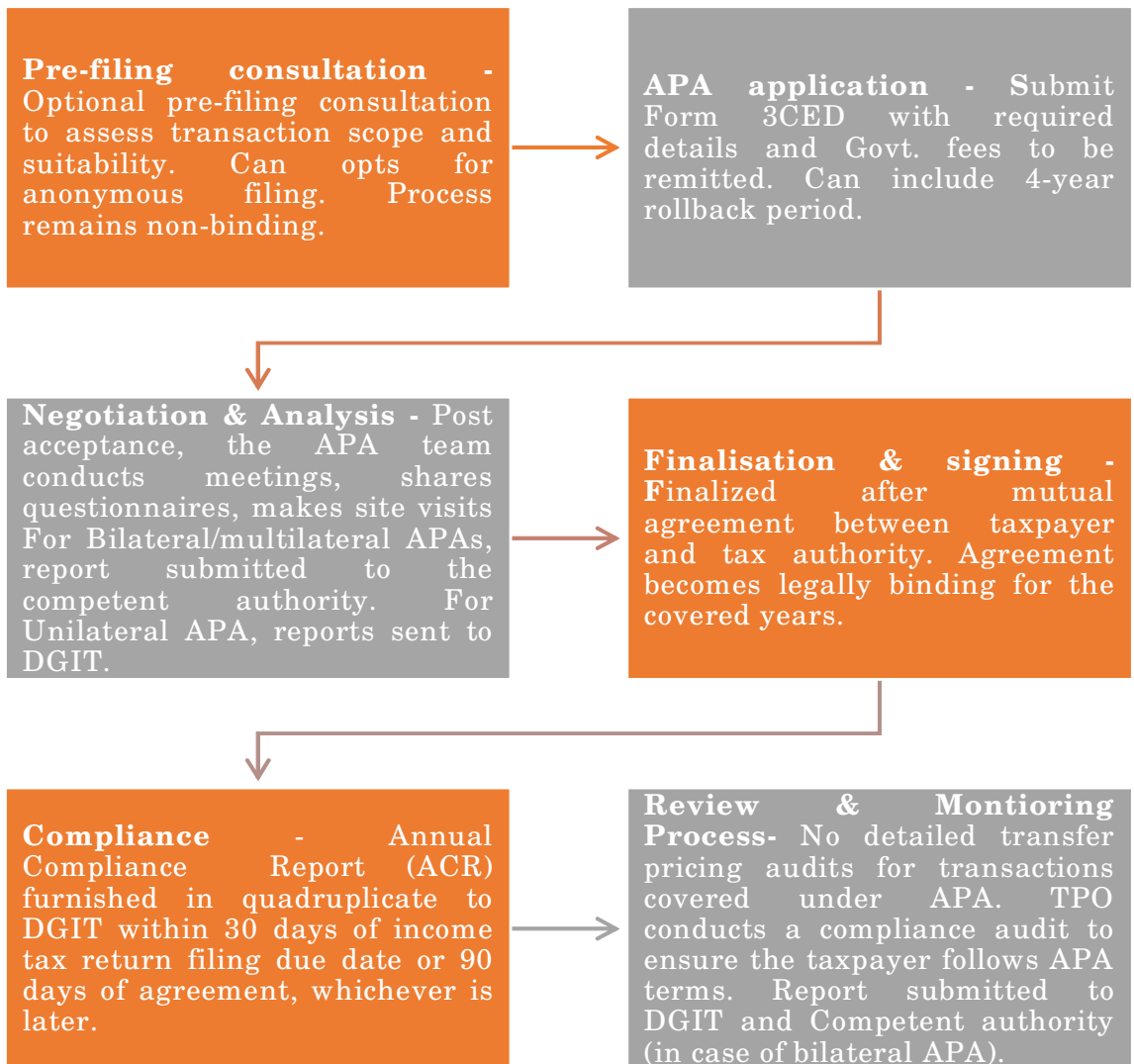
There are several dispute resolution mechanisms available for taxpayers w.r.t. transfer pricing and it is important for the taxpayers to evaluate the features of each of the dispute resolution in light of the facts and circumstances of the transfer pricing litigation / potential litigation of the taxpayer in order to opt for the most effective as well as efficient dispute resolution route for the taxpayer. Among the dispute resolution mechanisms, Taxpayers have opted for the APA more as a defacto approach. Hence, taxpayers at large have flooded the APA program, especially where APA may not be the most efficient for the taxpayer 's business circumstances. This article dwells on various strategic aspects and nuances of APA program which taxpayers will have to critically weigh-in before considering APA as the most appropriate dispute resolution mechanism.

A. Rationale for Introducing APAs:

- **Minimizing Litigation** - Transfer pricing disputes, often centered on the arm's-length principle, are a contentious aspect of international taxation, leading to audits / assessments, and resulting in financial strain for businesses / taxpayers. APAs offer a proactive solution by establishing an upfront agreement on TP methodologies between businesses and tax authorities, fostering mutual clarity and reducing the likelihood of future conflicts. While a unilateral APA offers a dispute resolution for the taxpayer alone, bilateral / multilateral APA provides wholistic and complete dispute resolution for both / all the Group entities for the relevant transaction.
- **Aligning with Global Practices** - The introduction of APAs in India aligns with global tax practices, ensuring consistency and harmonization with international standards.

- **Efficient Tax Administration** - From a tax administration perspective, APAs streamline the compliance process by reducing the need for the usual TP audits under the normal litigation route. This enables tax authorities to devote resources more effectively to focus on other high-risk TP cases.

B. APA process in India:



A. Key Considerations before filing of APA application

Considering the costs & efforts involved, it is imperative that a detailed analysis is undertaken before APA application is filed. The following are some of the key considerations that taxpayers will have to bear in mind w.r.t. various transaction groups:

i) Limited Risk entities:

Transactions entered by limited risk entities including provision of IT / ITeS / EDS services are one of the largest number of service related transactions for which applications have been filed by taxpayers as well as concluded. Some of the key aspects that taxpayers w.r.t. limited risk activities should have in my mind are–

- **Free of Cost Assets (FoC):** During the course of operations, the parent / Group entities might provide certain tools or assets to the taxpayers free of cost. The position taken by the APA authorities is that the total costs should include these free of costs assets, on this cost base mark-up will have to be computed. In certain instances, the costs of these assets are ascertained and included in the cost base, while in most of the cases the APA authorities compute FoC as a percentage of the cost base, translated to a mark-up % and the targeted mark-up is accordingly increased.

Taxpayers have to examine in detail the assets used in its operations, which are provided by the associated enterprises. Thereafter, an analysis will have to be undertaken by the taxpayer to evaluate whether these assets are essential for performance of the services. In an uncontrolled transaction, third party service recipients would provide certain assets to service providers for the purpose of rendering the services. Taxpayers may use a parallel line of argument to defend these FoC, if one opts for the litigation route.

APA authorities usually attribute 2-5% of the cost base as FoC. Where taxpayers can identify actual FoC and if these FoC is uncommon / one-of instances or there is a decreasing trend in provision of these FoC, taxpayers will have to negotiate with the APA authorities w.r.t. non-inclusion of an ad-hoc FoC into the targeted mark-up. FoC is a crucial decision point on the way forward in filing an APA else taxpayer might want to consider if the issue of FoC can be efficiently defended through the normal litigation route itself.

Further the indirect tax implications in connection with FoC, at times, is not considered by taxpayers while undertaking APA cost benefit analysis.

- GST implications: Indirect tax implications have a connection with transfer pricing, more so with regard to APA. Changes in the transfer price of international transactions pursuant to conclusion of the APA is

the base for evaluating indirect tax related impact. Hence even more important for taxpayers to accurately forecast the outcome of an APA in order to be able to ascertain the total costs and take a more informed decision. For example, taxpayer pursuant to APA conclusion is deemed to have accepted FoC and considers the same as part of mark-up, the indirect tax authorities would compute the GST on the FoC. Further interest may also be levied. Where the APA is concluded in 3-4 years after the application, indirect tax outflow would be approximately 28% of the FOC viz., GST of 18% and interest of 6-8%). Indirect tax authorities might also revisit earlier years – from the commencement of GST regime, which can compound the tax outflow. In instances of delay in the conclusion of APA, the indirect taxes might be sunk costs. Since these indirect taxes are actual incremental cash flows and have to be remitted to tax authorities in a short term, taxpayers' existing working capital will be displaced, causing undue burden on the finances of the taxpayers.

Similarly, where pricing for new transactions are finalised pursuant to the APA conclusions, their indirect tax implications will have to be evaluated.

Where the international transactions are predominantly purchases from AEs, changes in the expected margins might result in changes in import prices and consequently customs related implications would have to be factored.

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- **Safe Harbour Rules:** Eligible assessee entering into eligible international transaction can evaluate alternate efficient dispute resolutions such as Safe Harbour, before APA is considered. The outcome of Safe harbour rules is relatively similar to that of APA w.r.t. the agreed mark-up for eligible transactions such as Software development, ITeS and BPO. The key aspect while undertaking a Cost-benefit analysis is to ensure that all the costs are factored. Usually, taxpayers consider only monetary costs or costs only until the APA sign-off. However there are compliance costs involved post APA conclusion on ACR and ACR audit. All this needs to be considered before deciding the APA option. With the analysis of these finer aspects, it may result in cost efficiency for the taxpayer by opting under Safe Harbour if thresholds are met.

Taxpayers undertaking non-routine or complex activities usually opt for APA as a dispute resolution mechanism. In this context, reference to Circular 6/ 2013 can be used as a yardstick for determining whether or not the activities / functions of the taxpayer are non-routine. If the functions / activities are within the framework of Circular 6/ 2013 and within the threshold limits, Safe harbour should be evaluated / considered.

- **Renewal:** During renewal of APA, there is an expectation by the APA authorities to increase the targeted outcome (mark-ups) compared to the previous APA agreement. This is because the APA authorities are of the

view that the taxpayer would have moved up the value chain - that usually arises on account of learning curve from performing the activities over a period of time. This is an important aspect in cases where taxpayers assume that mark-up / terms agreed in the APA can be 'rolled-forward' over the couple of APA cycles.

ii) Royalty:

Payment of royalty has been a long and largely litigated issue in the transfer pricing landscape. Litigation in connection with royalty includes determination of most appropriate method to benchmark the transaction – CUP (Comparable uncontrolled price) vs TNMM (Transactional net margin method), benefit test, restriction of royalty to certain ad-hoc threshold limits by the Transfer pricing officer / Revenue. Taxpayers that are subject to litigation on payment of royalty consider filing APA application. Based on the facts of the taxpayers, APA authorities tend to agree on royalty and generally require adequate profits are earned by the taxpayers. In case of losses, taxpayer should have strong economic rationale to defend payment of royalty, since generally APA authorities impose a covenant that royalty can be paid only if EBIT is positive

In the event of recognising royalty only on the conclusion of APA, taxpayers will also have to take into account the impact of Section 92(3) – elucidated in the ensuing sections.

APA authorities are more open to adoption of non-traditional approaches and hence alternate royalty models such as flexible royalty - variable royalty can be discussed in an APA. However, taxpayer should be judicious in approaching APA authorities on these alternative approaches and consider filing APA for these alternatives only where there is a strong economic rationale. Even where a variable royalty is accepted in an APA, the entire residual profits are not considered as royalty and only a part of such residual profits can be attributed to the parent as incremental royalty. Taxpayer should not consider using non-traditional approach such as variable royalty for repatriating all of the residual profits earned by the taxpayers to the parent / group entities.

Where taxpayers consider introducing payment of royalty on the finalization of APA, taxpayers can consider creating an appropriate provision of royalty for the initial years, so that the taxpayer can claim the deduction w.r.t. royalty for the income offered to tax for the initial years.

iii) Soga Shosha:

Soga Shosha is a general trading / distributing entity, distributing the goods of the parent / group in a jurisdiction. These entities purchase goods from the parent / group based on confirmed orders from third party customers, hence takes flash-title to the goods. Indian tax authorities require that these Soga Shosha entities are compensated on

the entire cost, including the value of goods. While the taxpayers contend that there is no risk assumed in connection with the goods & the taxpayer only takes a flash-title, and therefore compensation on value adding expenses would be appropriate.

Several taxpayers have resorted to a bilateral APA in order to obtain certainty for the group as a whole. Therefore, taxpayers operating on such models can consider filing an APA, where the taxpayer has been subject to protracted litigation on this matter.

iv) General:

Apart from the above issue specific aspects, taxpayers will have to be bear in mind the following while filing an APA application:

- **Existing compliances:** There are several transfer pricing compliances that would have to be undertaken even if the APA has been concluded viz., filing of Form no. 3CEB, TP documentation (with the economic analysis based on the terms agreed as per APA). Hence, taxpayers will have to ensure that these compliance requirements are met in a timely and also factor these costs while evaluating filing an APA application.
- **Secondary Adjustment:** Post the conclusion of the APA, taxpayers are required to give effect to the terms of the APA, such as increased mark-up or reduced payments. One of the key terms / critical assumptions in

the APAs include realization of invoice within the stipulated time-period (usually about 90 days). Secondary adjustment would be initiated for delayed realization. Since realization is usually part of critical assumptions, TPOs scrutinise the same during compliance audit.

- Application of 92(3): Before filing an APA application certain taxpayers earn higher mark-ups as compared to generally accepted / concluded terms in similar APAs. In such cases if the taxpayers file APA application, the APA authorities will not conclude the mark-up that is lower than the existing mark-up earned by the taxpayers. Therefore taxpayer should not consider using APA as an avenue to reduce mark-up and simultaneously obtain tax certainty / buy-in from the APA authorities. This is parallel to Section 92(3) of the Income-tax Act, 1961.

In certain cases, taxpayers file for an APA for introduction of new expense transaction such as royalty or intra-group services, and do not recognise any provision in connection with these new expenses. Instead, taxpayers contemplate on recognising the expenses on finality of the APA. In this situation, even though certainty would have been obtained for these expenses, the taxpayers will not be able to recognise the expenses for initial covered years that have passed by since giving effect to royalty/ IGS transaction would result in reduction in the income of the taxpayer – which is not allowed as per Section 92(3) and as per APA.

Therefore, in order to ensure that the full benefit of the APA is reaped, taxpayers can consider creating a reasonable quantum of provision for these expenses for the initial years, and based on the conclusion of the APA the differential can be reversed, and additional tax can be paid.

- Parallel TP assessment: Filing of APA application does not keep the transfer pricing assessment proceedings – 92CA in abeyance. There are instances where for the covered years transfer pricing assessment proceedings have been initiated and tax demands have been issued. Hence, where taxpayers have been continuously selected for transfer pricing scrutiny or there is a reasonable probability / ground for selection of scrutiny u/ s/ 92CA, taxpayers should ensure that the costs with regard to these assessments is estimated and factored in the cost-benefit analysis.
- Post APA compliances: After the sign-off/ conclusion of APA, there are compliances, which the taxpayer will have to undertake filing of modified returns, filing of annual compliance report (ACR) and APA compliance audit.

ACR has to be filed with the Income tax authorities for each of the covered years and include information such as covered transaction & TP methodology, any changes in the functional analysis (functions performed, assets deployed and risks assumed), critical assumptions as

per the APA agreement and detailed documentation / information substantiating that terms and critical assumptions have been complied with.

Apart from filing of the ACR, the TPO will conduct compliance audit to verify whether the terms and conditions as well as the critical assumptions as per the APA agreement has been complied with by the taxpayer.

Costs of all these activities will have to be factored while evaluating the feasibility of APA.

- **APA Term:** The APA program covers 5 forward looking years and 4 roll back years, totalling to 9 years. In certain cases, taxpayers opt for a shorter term such as 3 years. Usually, taxpayers justify this approach stating presence of uncertainty beyond the 3-year period. In such cases, taxpayers can consider delaying the filing of APA application and file the same where there is reasonable certainty on the international transactions (5 years or beyond).

To put into perspective, taxpayers considering a 3-year period would incur double the costs vis-à-vis a 5-year period. That is there would be three cycles of APA applications filed in 3-year period, while for a 5-year period there would be only two cycles of APA applications being filed.

D. Costs of APA

The below table summarises some of the heads of costs incurred w.r.t. APA:

S No	Costs
1	Government Fees
2	Consultant Fees
3	TP compliance for the covered years (TP documentation) and TP assessment proceedings till conclusion
4	Post APA compliance – Filing of modified returns, ACR and compliance audit.
5	GST – FoC, etc (Interest and GST - Sunk cost)
6	Interest u/ s 234
7	Secondary adjustments

A. Conclusion

APA generally is considered as a panacea of dispute resolution due to its flexibility. APA is indeed ‘the’ dispute resolution where taxpayers can seek to agree with the revenue for application of non-conventional / non-traditional approaches w.r.t. transfer pricing. However, taxpayers should undertake a detailed & wholistic evaluation of various dispute resolution mechanisms and ensure a robust cost-benefit analysis is undertaken to understand if APA is the most appropriate dispute resolution mechanism for facts of the taxpayer.

In Summary, it is best for taxpayers to file APA applications where complex transactions are involved and seek certainty with the revenue, which might not otherwise be agreed by the Transfer pricing officer / Assessing officer, or the taxpayer has been subject to protracted litigation. Through this the Indian APA as a dispute resolution mechanism would become more efficient and provide taxpayers with much needed tax certainty.

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