The Malad Chamber of Tax Consultants

MNW/I75/2018-20 **Total Pages 16** Price ₹ 5/-

41 Years

MCTC Bulletin

"Every Passing Minute is Another Chance to Turn it Around"

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Vol. 1, No. 4 ***For members & private circulation only*** October, 2019

President's Communiqué

BE THE CHANGE YOU WANT TO SEE IN THE WORLD.

— Mahatma Gandhi

My Dear Professional Colleagues,

The extension of Tax Audit due date was a great sigh of relief. Such extension was important for maintaining the quality of services rendered consistently over the years. Another moment of pride for the members of MCTC is that an invitation by KES College to attend the talk by HASMUKH ADHIA on "INDIAN ECONOMY- History and future outlook"

I along with Past Presidents Shri Janak Vaghani, Shri Jayprakash Tiwari and Secretary Shri Kishor Thakrar attended the function. We thank college for inviting us to attend the function. We look forward for some joint program in future with college It was a privilege to attend the talk with Past President and office bearers.

The 4th study circle on the topics Transfer Pricing Audit and Income Tax e-assessment was held at such a time that it would be extremely resourceful for the attendees. It wouldn't be incorrect to term it as a successful study circle considering the words of appreciation sent to us. Few of them are pasted on the next page of this bulletin. Words of praises just add to the pressure of outperforming our previous endeavours. We sincerely thank you for this.

Considering that the exams are round the corner, it is my earnest request for all the students to study as hard as possible and stay away from pessimistic thoughts. If one believes in oneself, and is determined to pass then he can be stopped by no one from attaining success. MCTC wishes luck to all the students appearing for the upcoming exams and hopes that all deserving students pass with flying colours.

As we had promised earlier, MCTC will not just focus on academic or intellectual study circles this year, but also organize events which tend to promote social well-being of the members. We are planning to organize Sraswti Sanman Samarambh and Diwali Get Together. Details of the same will be shared soon.

May the auspicious festival of lights, beautifully illuminate every corner of our life and provide us strength to grow in our personal and professional lives with utmost enjoyment.

शुभं करोति कल्याणं आरोग्यम् धनसंपदा ।
शत्रुबुद्धिविनाशाय दीपज्योतिर्नमोऽस्तुते ।।

HAPPY DIWALI &
I WOULD LIKE TO WISH YOU ALL A HAPPY, BLISSFUL & PROSPEROUS NEW YEAR

CA Viresh Shah
President

For Queries & Submission of Forms for Membership/Seminar please contact any of the following Office Bearers:

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Life Membership Fees ₹ 2,500 • Ordinary Membership Fees ₹ 1,000 p.a.

: Forthcoming Events :

14th Dr. Bharat D. Vasani Saraswati Sanman Samarambh and Diwali Get Together	
Day & Date	**Sunday, 24th November 2019**
Time	5.30 p.m. Onward
Topic	14th Dr. Bharat D. Vasani Saraswati Sanman Samarambh and Diwali Get Together
Venue	Surjaba Hall, SNDT College, Malad West, Mumbai-400064
Kindly mark the above date and we request all members to keep taking active part in all activities of the chamber, to attend in large and make it grand success.	
With Regards ≈ TEAM MCTC ≈	

Saraswati Sanman & Diwali Get-Together

Venue	Surjaba Hall, SNDT College, Malad West, Mumbai-400064

Day & Date	Time
Sunday 24th November, 2019	**5:30 p.m. Onwards**

We will award 14th Dr. Bharat D. Vasani Saraswati Sanman Trophies to the children of MCTC member for outstanding performance in passing exams of SSC/HSC with 75% marks & above , to the students who have cleared graduation and post graduation professional exams like CA., C.S., C.W.A., MBBS, MBA, Engineers.

All members are requested to send attached form along with the certified marks sheets to Brijesh M. Cholera at Following address along with following details OR Scan copy of marks sheet & form mail to maladchamber@gmail.com on or before 10th November, 2019.

Form for 14th Dr. Bharat D. Vasani Saraswati Sanman Trophies

Member's Name:-.....

Email ID:- .....

Mob. No.:-.....

Details of Student

FIRST NAME MIDDLE NAME SURNAME

Male/Female:-.....

Age:-.....

Name of Exam Cleared:-.....

Year of Exam:-.....

Percentage:-.....

Name of School/College/Institution:-.....

Send it to Following address or else you can mail to maladchamber@gmail.com with scan copy of marksheet On or Before 10th November, 2019

Brijesh M. Cholera, Shop No. 4, 2nd Floor, The Mall, Station Road, Malad West, Mumbai 400064, Mumbai 400064, Tel: 022-28895161, Mobile: 7039006655 / 9820780070

NOTE:- Application should be complete in all respect and the Form with the marksheet should reach us before the due date.

Comments by member : SANDEEP PARIKH

"Wow another superhit STUDY CIRCLE, AMAZING speakers on both IMPORTANT topics Waiting for next STUDY CIRCLE".

JITENDRA FULIA

"Today's STUDY CIRCLE is superb.
Great update on knowledge
TP AND E-ASSESSMENT both topics are well explained by both young SPEAKERS.
Thank you Ujwalbhal and NEELKANTHBHAI
Congratulations PRESIDENT".

Remarks by MEMBERS after 4th MCTC STUDY CIRCLE

CA NITIN BHUTA

"Kudos to the visionary ideas of president and its team to plan apt sessions at right time for the benefits of all members"

CA KETAN VAJANI

"The Chamber should keep on organising events on the right topic at the right time. It is bound to succeed if this Mantra is followed. Great pick up this year by the President and team. Keep it up"

DIRECT TAXES – LAW UPDATE

Compiled by CA Haresh P. Kenia

I. Return of Income – Section 139(1C) of the Income-tax Act – Exemption from furnishing of Return of Income u/s. 139(1) for Assessment Year 2019-20.

[265 Taxman (St.) 1]

The Central Government *vide* Notification No. S.O.2672(E) (No. 55/2019 [F. No. 225/79/2019-ITA II] dated 26-07-2019 hereby exempts the following class of persons, subject to the conditions specified, from the requirement of furnishing of return of Income u/s. 139(1) of the Income-tax Act from assessment year 2019-20 onwards.

1. Class of Persons

(i) A non-resident, not being a company; or

(ii) A foreign company, who has any income chargeable under the said Act during a previous-year from any investment in an investment fund set up in an International Financial Services Centre (IFSC) located in India.

Explanation:- For the purpose of this paragraph

(a) "investment fund" means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(b) "International Financial Services Centre" shall have the same meaning as assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005).

2. Conditions

In case of class of persons referred to in para 1

(i) Any income-tax due on Income of the said class of persons has been deducted at source and remitted to the Central Government by the investment fund at the tax-rate in force as per provisions of section 194LBB of the said Act; and

(ii) There is no other income during the previous year for which the said class of persons, is otherwise liable to file the tax-return.

3. The exemption from the requirement of furnishing a return of income shall not be available to the said class of persons where a notice under sub-section (1) of section 142 or section 148 or section 153A or section 153C of the said Act has been issued for filing a return of Income for the assessment year specified therein.

4. This notification came into force from the date of its publication in the Official Gazette.

II. Income from Other Sources – Section 56(2) (viib) - CBDT simplifies the process of Assessment in respect of Start-ups [265 Taxman (st.) 3]

The CBDT *vide* press release dated 10-08-2019 simplified the process of assessment in case of start-up entities. The CBDT has decided the following where scrutiny assessment of start-up entities are pending

1. In case of Start-up Companies recognised by DPIIT which have filed Form No. 2 and whose cases are under "limited scrutiny" on the single issue of applicability of section 56(2)(viib), the contention of the assessee will be summarily accepted.

2. In case of Start-up Companies recognised by DPIIT which have filed Form No. 2 and whose cases have been selected under scrutiny to examine multiple issues including the issue of Section 56(2)(viib), this issue will not be pursued during the assessment proceeding and inquiry on other issues will be carried out by the Assessing Officer only after obtaining approval of the supervisory authority.

3. In case of Start-up Companies recognised by the DPIIT, which have not filed Form No. 2, but have been selected for scrutiny, the inquiry in such cases also will be carried out by the Assessing Officer only after obtaining approval of the supervisory authorities. In addition to the above, the Central Government has further decided to relax Para-6 of the DPIIT Notification No. 127(E) dated 19-2-2019 and make it clear that this notification will also be applicable to Start-up Companies where addition under Section 56(2)(viib) has been made and the assessee has been recognised by DPIIT and subsequently filed Form No. 2. The Circular to this effect in F. No.173/149/2019-ITA-1 of CBDT dated 8th August, 2019 has been placed on www.incometaxindia.gov.in.

III. Income from Other Sources–Section 56 of the Income-tax Act – Clarification with respect to valuation of shares of Start-up Companies involving application of section 56(2)(viib) [265 TAXMAN-(St.) 3]

The CBDT noticed that substantial additions are made by the AOs in "Start-up Companies" involving issue of valuation of shares u/s. 56(2)(viib).

The Government *vide* Notification No. G.S.R. 127(E), dated 19-2-2019 issued by the Department for Promotion of Industry and Internal Trade (henceforth referred to as "DPIIT") and Notification No. 13/2019 F. No. 370142/5/2018-TPL(Pt.) dated 5th March, 2019 Issued by the Central Board of Direct Taxes (henceforth referred to as "CBDT"), the Central Government has notified certain class of persons for which the provisions of section 56(2)(viib) will not apply. Para 6 of the notification issued by the DPIIT dated 19-2-2019 states that the notification is applicable only with regard to recognised "Start-up Companies" where no addition u/s. 56(2)(viib) has been made in an assessment order before the date of issue of the notification. This has caused hardship to such companies.

The matter has been examined by the Board. To mitigate such hardships, the Central

Government *vide* Circular No. 173/354/2019 dated 9-8-2018, has decide to relax the Para-6 of the above-referred notification issued by the DPIIT and make it clear that the Notification will be applicable to those Start-up Companies also where addition u/s 56(2)(viib) has been made in an assessment order under the IT Act before 19th February, 2019 provided the assessee had subsequently submitted the declaration in Form-2 that it fulfils the conditions mentioned in Para-4 of the above-referred notification.

IV. Return of Income – Section 139-Clarification in respect of filing-up of ITR Forms for the Assessment Year 2019-20 (265 Taxman-(St.)4)

The Income-tax return (ITR) Forms for the Assessment Year (AY) 2019-20 were notified *vide* notification bearing G.S.R. 279(E), dated the 1st day April, 2019. Subsequently, the instructions for filing ITR Forms were issued and the software utility for e-filing of all the ITR Forms were also released. After notification of the ITR Forms various queries have been raised by the stakeholder in respect of filling-up of the ITR Forms.

The CBDT *vide* Circular No. 18/2019 (F.No.370142/1/2019-TPL (PT-1)], DATED 8-8-2019 issued by clarification by way of FAQs. There are about 19 FAQs. Readers may refer to the above citation for the further details.

V. Section 268 A – Further enhancement of monetary limits for filing of appeals by the department before Income Tax Appellate Tribunal, High Courts and SLPs/Appeals before Supreme Court-Amendment to Circular No. 3 of 2018-Measures for reducing litigation. (265 TAXMAN (St.) 7)

The CBDT, in line with governments objective of reducing litigation, has been deciding monitoring limits for the revenue to file Income Tax Appeals before tax Tribunals, High Courts and Special Leave Petitions (SLPs) / appeals before Supreme Courts from time-to-time.

In 2018, the CBDT had issued Circular No. 3/2018 providing for increased monetary limits, overriding the earlier limits set in this regard. With an aim to further manage litigation, the CBDT has now significantly enhanced the monetary thresholds for filing of Income Tax Appeals *vide* Circular No. 17 of 2019, dated 8-8-2019.

The enhanced monetary limit is as follow :

Sl. No.	Appeals/SLPs in income-tax matters	Monetary Limit (₹)
1.	Before Appellate Tribunal	50,00,000
2.	Before High Court	1,00,00,000
3.	Before Supreme Court	2,00,00,000

Apart from enhancing the monetary limits, the Circular has also clarified that where an appeal is filed against consolidated order (Composite order for more than one Assessment Year), the monetary limits shall be tested individually for every tax year. Further where the consolidation is with respect to different tax payers, the limit shall be tested for each taxpayer, separately.

The aforesaid modification shall come in to effect from date of issue of the circular.

VI. Section 119 of the Income-tax Act, 1961 - Income-Tax Authorities – Instructions to subordinate authorities–Processing of returns with refund claims under section 143(1) beyond the prescribed time limits in non-scrutiny cases. [265 TAXMAN (St.) 9]

The several returns for various assessment year up to the assessment year 2017-18, which were otherwise filed validly u/s. 139 or 142 of the Act could not be processed u/s. 143(1) of the Act due to certain technical issues or for other reasons not attributable to the assessee concerned. Consequently, Intimation regarding processing of such returns could not be sent within the period of one year from the end of the financial year in which such returns were filed as prescribed in the second proviso to the section 143(1) of the Act. This has led to a situation where the taxpayers is unable to get his legitimate refund in accordance with the provision of the Act, although the delay is not attributable to him.

In order to resolve the grievances of such taxpayers, earlier, Board has issued instructions viz., Instruction No. 18/2013, dated 18th December, 2013; Instruction/Order dated 25-10-2016; and Instruction No. 5/2018, dated 21-8-2018 allowing processing of such validly filed time barred returns with refund claims, where the statutory time-frame for sending intimation under sun-section (1) of section 143 had lapsed. *Vide* the Instruction No.5/2018 dated 21-8-2018, time frame was given till 31-3-2019 to process all valid unprocessed returns with refund claims up to assessment year 2016-17, subject to other conditions specified therein.

The representation was made to be CBDT to enable the processing of such returns.

The CBDT by virtue of its power u/s. 119, in order to mitigate genuine hardship being faced by taxpayers, hereby relaxes the time-frame prescribed in second proviso to sub-section (1) of section 143 and directs that all validity filed returns up to assessment year 2017-18 with refund claims, which could not be processed under sub-section (1) of section 143 of the Act and have become time-barred, subject to the exceptions mentioned in para below, can be processed now with prior administrative approval of Pr. CCIT/ CCIT concerned and intimation of such processing under sub-section (1) of section 143 of the Act can be sent to the assessee concerned by 31-12-2019. All subsequent effects under the Act including issue of refund shall also follow as per the prescribed procedures. To ensure adequate safeguards, it has been decided that once administrative approval is accorded by the Pr. CCIT/CCIT, the Pr. CIT/CIT concerned would make a reference to the Pr. DGIT (Systems) to provide necessary enablement to the Assessing Officer on a case-to-case basis.

The relaxation accorded above shall not be applicable to the following returns :

(a) Returns filed for any assessment year prior to assessment year 2017-18, which were under scrutiny and were not processed in view of provisions of sub-section (1D) of section 143 of the Act;

(b) Returns remain unprocessed, where either demand is shown as payable in the return or is likely to arise after processing it;

(c) Returns remain unprocessed for any reason attributable to the assessee.

■■■

ANALYSIS OF RECENT BOMBAY HIGH COURT DECISION IN THE CASE OF BAI MAMUBAI TRUST VS. SUCHITRA (2019) 109 TAXMANN.COM 300 (BOMBAY) AND ITS IMPACT ON LIQUIDATED DAMAGE, NOTICE PAY, CHEQUE RETURN CHARGES, PRE-PAYMENT CHARGES, ETC.

Compiled by CA Bhavin Mehta

Facts of the case: Bai Mamubai Trust (hereinafter referred to as "Trust") had entered into conducting licence agreement with Suchitra (defendant) for its three shops. Trust had filed suit seeking to recover possession of three shops from defendant. Pending determination of subject issue, Bombay High arrived at a *prima facie* finding that defendant had no semblance of right to the suit premises and therefore appointed Court Receiver. The defendant was permitted to remain in possession of the suit premises (shops) as an agent of the Court Receiver under an agency agreement to be executed with Court Receiver, on payment of monthly *ad-hoc* royalty/compensation of ₹ 45,000 till the pendency of the present suit. The Trust raised the concerns regarding applicability of GST on royalty/compensation amounts of ₹ 45,000 to be paid by defendant.

The relevant issues decided in the present case are as under:

a) Whether GST is liable to be paid on services or assistance rendered by Court Receiver?

b) Whether GST is liable to be paid on royalty/compensation, i.e. with respect to monies paid to Court Receiver which are not towards the Court Receiver's fees or remuneration, but paid in course of litigation pursuant to an order of the Court.

In this respect, the *amicus curiae*, Shri V. Sreedharan, Senior Advocate, made very good submission and as narrated in the decision is reproduced below:

(i) Services provided by the Court Receiver is to be treated as "Services by any Court or Tribunal established under any law for the time being in force" within the meaning of Paragraph 2 of Schedule III of the CGST Act and is accordingly, an activity or transaction which shall not be treated as a supply of goods or supply of services.

(ii) If the Court Receiver is in control of an estate or portion thereof of a taxable person owning a business in respect of which GST is payable, such tax, penalty, and interest thereon may be determined and recovered from the Court Receiver under Section 92 of the CGST Act in like manner and to the same extent as it would be determined and recovered from the taxable person as if he were conducting the business himself.

(iii) Section 92 of the CGST Act provides for the collection of GST from the Court Receiver.

The Court Receiver would be convenient point for the revenue to collect its tax being the person who is in direct receipt of the consideration/royalty where such payment itself is liable to be taxed under the provisions of the CGST Act.

(iv) Whilst a transaction which is not in the course or furtherance of 'business' may otherwise attract GST, but the Court Receiver will not be liable to pay tax on such a transaction under Section 92 of the CGST Act. It is submitted that the language of Section 92 of the CGST Act is consciously and considerably narrow than Section 161 of the Income-tax Act, 1961, which is the corresponding section under the Income-tax Act which may require the Court Receiver to pay Income-tax as a representative assessee. The use of specific language in Section 92 of the CGST Act namely 'taxable person owning a business' and 'tax, interest or penalty shall be levied upon and be recoverable from [...] receiver or manager in like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he were conducting the business himself' makes it clear that the legislative intent of Section 92 of the CGST Act is to permit GST to be determined and collected from the Court Receiver provided he is running the business of a taxable person. The running of a business is *sine qua non* to levying and collecting GST from the Court Receiver under Section 92 of the CGST Act as a representative assessee.

(v) Assuming that the Court Receiver is liable to pay GST (as a supplier) by virtue of Section 92 of the CGST Act, the liability can be discharged by an agent of the Court Receiver 'acting as such on behalf of such supplier' within the meaning of Section 2 (105) of the CGST Act (definition of supplier). If this is done, the Court Receiver will not be liable to pay GST again.

(vi) Where a dispute concerns price / payment for an earlier taxable supply, any amount paid under a court's order / decree or an out of court settlement is taxable if, and to the extent that, it is consideration for an earlier supply. In such cases, the making of a 'supply' is not disputed, but the dispute is regarding payment for supplies already made. The order / decree of the court links the payment to the taxable supply and the requisite element of reciprocity between supply and consideration is present.

(vii) If the dispute is settled out of court or compromised without the defendant admitting that the alleged supply took place, the payment made by the defendant may be characterised as an agreed estimate of the true worth of the plaintiff's claim, rather than consideration for an alleged supply, and as such will be outside the scope of VAT / GST. In such cases, compensation may be considered to be repatriation or restitution in respect of loss or damage. Any compensatory payment made would not be consideration for a supply.

(viii) However, a payment made under a court's order or an out of court settlement will attract VAT / GST where it amounts to consideration for one or more taxable supplies effected in terms of the court or terms of settlement.

(ix) As an illustration, where the plaintiff grants future rights (for example rights to exploit copyrighted material in the future) any payment received for such right will be treated as consideration for a new supply and is subject to levy of tax under GST laws. However, the portion of the payment which is related to past infringement will not be taxable as the same will not constitute a consideration for any supply made but it will be in the nature of damages for the alleged wrong.

(x) However, a distinction between future supplies and prospective damages for a continuing wrong should also be noted. In cases where prospective damages are awarded for a continuing wrong, instead of granting an injunction or specific performance, the payment received will not be a consideration for any supplies made but a payment of damages in lieu of the court's refusal to enforce the plaintiff's rights *via* an injunction. The court does not, in such cases, require the plaintiff to make any supply to the defendant, only that the plaintiff accepts the payment in return for non-enforcement of its property rights.

(xi) The method adopted for quantifying the damages i.e., value of goods or services purportedly supplied should not confuse the issue. Citing *Senairam Doongarmall vs. Commissioner of Income-tax [1962] SCR 1 257* it is submitted that it is the quality of the payment and not the method of the payment or its measure that makes it fall within capital or revenue.

(xii) Payment ordered in an action for damages arising out of property damage, illegal trespass, negligence causing loss of profits, wrongful use of trade name, breach of copyright, termination or breach of contract or personal injury is made to compensate loss suffered, and is not a payment towards any supply and hence no GST liability would arise.

(xiii) Liability to pay GST would arise only where the payment received can be linked to a supply. In case of compensatory damages, the payment is for loss suffered and not supply effected. While the process of determining loss suffered may be the value of the consideration receivable if the contract had been performed, such process of computing damages will not alter the character of the payment, namely a compensation for loss suffered. This is premised on the principle that the supply doctrine does not encompass a wrongful unilateral act or any act resulting in payment of damages.

(xiv) A supply must involve enforceable reciprocal obligations. If something has been used, but there was no agreement for its supply between the relevant parties, any payment subsequently received by the aggrieved party is not consideration for supply. The receipt of payment is not premised on the enforcement of reciprocal obligations between parties and cannot be linked to a supply for levying GST. Such a payment is compensatory.

(xv) A payment made by a judgment debtor is in satisfaction of a judgment debt created by an order of court and not for any supply made by the party in whose favour the suit is decided. Whether such payment is towards a supply or is compensation for violation of a legal right is to be seen in the facts of a given case.

(xvi) In the facts of the present suit, there is no agreement or contract for supply by the Plaintiff to the Defendant. Rather, the Plaintiff's grievance is that the Defendant is a trespasser / illegal occupier of the Suit Premises. Whilst the royalty / monthly amount may be calculated in accordance with prevailing rate of market rent, the transaction itself will not constitute a supply, as the reference to prevailing rent is only a means to arrive at the amount of damages.

(xvii) Even the language of Paragraph 5(e) of Schedule II to the CGST Act will not result in the present activity to be a supply. Paragraph 5(e) of Schedule II to the CGST Act provides:

{Emphasis supplied by me}

SCHEDULE II
[See section 7]

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

1. […]

5. Supply of services

The following shall be treated as supply of services, namely:— […]

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and […]"

Thus, an activity will be a supply if it is agreeing to the obligation to:

i. Refrain from an act, or

ii. To tolerate an act or a situation, or

iii. To do an act.

An award of damages for trespass / illegal occupation is not an agreement to the obligation to refrain from an act, to tolerate an act or situation, or to do an act as contemplated by Paragraph 5(e) of Schedule II of CGST Act.

High Court Observations

(i) The services, being charged by a permanent department of the Court, pursuant to orders passed by the Court from time-to-time, are naturally to be considered as "Services by any court or Tribunal established under any law for the time being in force" which is item No. 2 of Schedule III of the CGST Act. Accordingly, the fees or charges paid to the Court Receiver are not liable to GST.

(ii) Section 92 of the CGST Act clearly contemplates that GST may be levied on and collected from the Court Receiver with respect to a business under its control provided that the taxable event of 'supply' for such levy of GST has taken place. The requirement of a 'supply' is essential. The real issue to be determined in the facts of the present case is the effect of payment of royalty by the defendant to the Court Receiver as a condition for remaining in possession of the Suit Premises.

(iii) The Court agrees with amicus curiae that there can be no notional contract of lease or licence which can be said to come into existence between a party to litigation and a department of the Court.

(iv) In the present case, royalty is paid towards damages or compensation or securing any future determination of compensation or damages for a *prima facie* violation of the Plaintiff's legal right in the suit premises. The prima facie finding is that the Defendant has no semblance of right to be in occupation of the Suit Premises. The permission granted to the Defendant to remain in possession subject to payment of royalty is an order to balance the equities of the case. The basis of this payment is the alleged illegal occupation or trespass by the Defendant. Such payment lacks the necessary quality of reciprocity to make it a 'supply'. Hence no GST is payable.

(v) Where no reciprocal relationship exists, and the plaintiff alleges violation of a legal right and seeks damages or compensation from a Court to make good the said violation (incloses possible monetary terms) it cannot be said that a 'supply' has taken place.

(vi) The learned amicus curiae correctly submits that enforceable reciprocal obligations are essential to a supply. The supply doctrine does not contemplate or encompass a wrongful unilateral act or any resulting payment of damages. For example, in a money suit where the plaintiff seeks a money decree for unpaid consideration for letting out the premises to the defendant, the reciprocity of the enforceable obligations is present. The plaintiff in such a situation has permitted the defendant to occupy the premises for consideration which is not paid. The monies are payable as consideration towards an earlier taxable supply. However, in a suit, where the cause of action involves illegal occupation of immovable property or trespass (either by a party who was never authorised to occupy the premises or by a party whose authorisation to occupy the premises is determined) the plaintiff's claim is one in damages.

(vii) Damages may arise in an action in tort, or one in breach of contract as they both entail civil wrongs. Damages represent the compensation or restitution for the loss caused to the plaintiff for the violation of a legal right. It may even be the closest monetary alternative to a remedy in specific performance. The term 'Damages' may be used to include payments towards contractual obligations which are performed yet unpaid for, but the law of damages is not restricted to ordering that what ought to have been done or ought to have been paid under contract. The law recognises and awards damages between persons who do not have privity, if there is a violation of a legal right resulting in a civil wrong which must be remedied.

(viii) The term *'mesne profits'* is 'used for damages for trespass, a wrongful act relating to immovable property and the said wrongful act forms one of the torts affecting realty i.e., immovable property. The enlarged scope of this term is meant to claim profit from one whose possession did not originate in trespass but is nevertheless wrong, as for example when the tenant or occupier of a property is dispossessed legally and decree of possession has been passed in favour of the landlord, still the tenant/occupier holds over the property for a specified period before handing over the possession to the rightful owner. Though the tenant had a rightful possession when he entered the immovable property but it is the decree of possession which makes his possession wrongful.

(ix) The amicus curiae submits that as held in *Senairam Doongarmall vs. Commissioner of Income Tax (supra)* it is the quality of the payment and not the method used to determine its measure that determines its character namely whether it is 'consideration' or damages. The method of computation is not material.

(x) The High Court came to conclusion that although the measure for quantifying a payment of royalty to the Court Receiver may be determined by looking at consideration payable under a contract or arising out of a business relationship, the royalty may still be in the nature of payments towards a potential award of damages or *mesne profits*, and therefore not liable to attract GST for reasons separately stated.

(xi) Although the quantification of royalty towards a claim of damages involves ascertaining the market rent payable with respect to the property alleged to be illegally occupied, the compensation liable to be paid does not acquire the character of consideration so as to make the transaction a supply.

(xii) The payment of royalty as compensation for unauthorised occupation of the suit premises is to remedy the violation of a legal right, and not as payment of consideration for a supply. The Court Receiver is merely the officer of the court to whom the payment is made.

(xiii) There may be instances where payments received by the Court Receiver may attract GST. For instance:

(a) Where the Court Receiver is appointed to run the business of a partnership firm in dissolution, the business of the firm under the control of receivership may generate taxable revenues.

(b) Where the Court authorises the Court Receiver to let out the suit property on leave and license, the license fees paid may attract GST.

(c) Where the Court Receiver collects rents or profits from occupants of properties under receivership, the same will be liable to payment of GST.

(d) Consideration received for assignment, licence or permitted use of intellectual property.

These instances are illustrative of the cases where the GST laws may apply. In such cases, GST may be collected from the Court Receiver as a representative assessee under Section 92 and as such the Court Receiver may be required to obtain registration under the relevant GST laws.

Impact of the decision under GST

Any compensation received from supplier for breach of trust would not be considered as supply. For levy of GST requirement of 'Supply' is essential. Compensation received for breach of contract and not for fulfilment of contract, which is not a supply. The damage, loss or injury, being the substance of the dispute cannot in itself be characterized as a supply made by the aggrieved party. The learned amicus curiae in the above decision aptly explained that liability to pay GST would arise only where the payment received can be linked to a supply. In case of compensatory damages, the payment is for loss suffered and not supply effected. He nicely explained the declared services as contemplated by Paragraph 5(e) of Schedule II of CGST Act, namely, "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act". An award of breach of contract is not an agreement to the obligation to refrain from an act, to tolerate an act or situation, or to do an act. Applicability of GST on compensation received in respect of Liquidated damage, Notice Pay, Cheque return charges and Pre-payment charges is analysed below:

1. **Liquidated damage:** Compensation is received for non-adherence of terms of contract. Compensation is for loss suffered and not for supply effected. In case of liquidated damages due to delay in completion of contract, the obligation is to complete the contract in time and not otherwise. The receipt of payment is not premised on the enforcement of reciprocal obligations between parties and cannot be linked to a supply of levying GST. No notional contract can be said to come into existence due to non-adherence of terms of contract. In other words, liquidated damage is the result of violation of the contract between the parties and does not create a separate contract. Liquidated damages is not liable to levy of GST. It is immaterial whether damage amount is decided or agreed upon by the parties to the contract or by a third party.

2. **Notice Pay:** Notice pay may be considered as variation in the salary. Deduction or recovery of amount towards non-service during notice period is for breaking the contract and not for creating the contract. Penalty is breach of contract and not for fulfilment of contract. The supply doctrine does not contemplate or encompass a wrongful unilateral act or any resulting payment of damages. Non-service during notice period is unilateral act and which results into payment of damages in the form of 'Notice Pay'. Notice pay may be considered as variation in the salary. Further, Entry 1 of schedule III of the Act provides "services by an employee to the employer in the course of or in relation to his employment" shall be treated neither as a supply of goods nor a supply of service. Employment continues till notice pay is received. Therefore, Notice Pay would not be liable to levy of GST.

3. **Cheque return charges:** Damages may arise in an action in tort, or one in breach of contract as they both entail civil wrongs. Damages represent the compensation or restitution for the loss caused to the plaintiff for the violation of a legal right. It may even be the closest monetary alternative to a remedy in specific performance. The term 'Damages' may be used to include payments towards contractual obligations which are performed yet unpaid for, but the law of damages is not restricted to ordering that what ought to have been done or ought to have been paid under contract. Cheque return charges are for putting the banker into inconvenience. In as much as no service stands provided by the bank to their customers and for which purpose no consideration was ever received by bank and therefore it can be derived that the cheque return charges recovered by the bank cannot be held to be the consideration for providing banking and financial service. Cheque return charge is collected for wrongful act of the customer. Cheque return charge is penalty. It is immaterial whether penal amount is decided agreed upon by the parties to the contract or by third party. GST is not leviable on cheque return charges.

4. **Pre-payment charges:** Permitting foreclosure of loan or prepayment is not part of lending and thus not a supply. The prepayment charges, charged by lender from borrower are in nature of liquidated damages to recover the loss suffered by them, for the reason that this amount could not have been lent against the interest to other borrowers. Prepayment charges are not recovered for performing any specific activities relating to closure of the loan, but are recovered for breach of the terms of the agreement and in order to compensate the future loss of interest and therefore cannot be treated as value of taxable service. It is

for the damages recovered by the lender. Here again prepayment charge is collected for wrongful act of the borrower. GST is not payable on damages.

Similarly, minimum balance violation charges, commitment charges (non-utilisation of sanctioned funds) collected by banks would not be liable to GST. Surrender charges collected by insurance companies would also not be liable to levy of GST.

■■■

JUDICIAL JUDGMENTS

Compiled by CA Rupal Shah

Oxcia Enterprises (P.) Ltd. vs. DCIT, ITAT Jodhpur Bench, [2019] 109 taxmann.com 19, 6 May 2019

Requirement of deduction of tax at source for property sale u/s. 94-IA.

Facts of the case

The Company purchased property for ₹ 60.12 lakh. The property purchased was owned by ARK and SK (Joint owners). The sale was executed on behalf of the joint owners by VK who held Power of Attorney of the joint owners. The Company deducted TDS at the rate of 1 per cent of the sale consideration under PAN of VK.

As per AO, TDS should have been deducted in the name of the actual owners and not in the name of the Power of Attorney holder. Also, since the Company failed to quote PAN of the owners, AO applied provisions of Section 206AA and raised demand for no PAN cases at the rate of 20% along with applicable interest.

On appeal CIT(A) upheld the demand.

On second appeal ITAT observed as follows:

By virtue of section 46 of the Transfer of Property Act which prescribed that where immovable property is transferred for a consideration by persons having distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally.

Since there is no contract to the contrary pointed out by the revenue, in this case consideration for each transferor comes to ₹ 30.06 lakh each, which is below the prescribed limit of ₹ 50 lakh given by the statute as aforesaid and, therefore, in the light of the same, the provisions of section 194-IA are not applicable in the instant case.

Assessee's appeal is allowed and addition is directed to be deleted.

M. K. Agrotech (P.) Ltd. vs. ACIT, Karnataka HC, [2019] 109 taxmann.com 337 (Karnataka), 29 November 2018

40A(3) disallowance for payment by uncrossed demand drafts.

Facts of the case

The assessee was a company engaged in the manufacturing of refined oils, solvent oils and de-mealed meals.

During the assessment, AO disallowed ₹ 5.31 crore stating that payments were made to suppliers by demand drafts which were not crossed. Hence 20% of such payments was added back to the total income.

On assessee's appeal, CIT(A) upheld the payments to three parties amounting to ₹ 1.37 crore. On second appeal, ITAT bench dismissed it.

On further appeal by assessee High Court observed as follows

As per S. 40A(3) any payment in excess of ₹ 20,000 would have to be made by crossed cheque or crossed bank drafts. On failure to do so, the said payment would be disallowed.

In the payments made to the aforesaid three accounts, the drafts were not crossed. The assessee is also not in compliance of Rule 6DD which allows cash payments in certain circumstances subject to fulfilment of conditions therein.

Letters have been issued by the Bankers which would indicate that the payments made to the suppliers are credited to their respective bank accounts. The main purpose of crossing a demand draft is to ensure that the

payment is cleared by means of an account, i.e., the payment is deposited in the Bank Account of the person in whose favour the demand draft has been drawn, which is satisfied here.

The appeal is allowed and deletions by CIT(A) upheld.

■■■

STUDENTS' CORNER

IS PHILANTHROPY HYPOCRITICAL TODAY?

Compiled by Neel Randeria

Hypocrisy is the practice of engaging in the same behaviour or activity, for which one criticizes another. In simple terms, a person is a hypocrite if he does not act in accordance with what he preaches.

Philanthropy refers to an action done to better the humanity. It is often confused with charity. Charity eliminates the suffering caused by a social problem but philanthropy eliminates the social problem itself. If we give water to people living in deserts for a week, its charity. But, if we build an efficient water supply channel for them, its philanthropy.

Thus, the topic keeps a lucid question in front- Is philanthropy hypocritical today? The answer to which is not at all lucid and requires detailed study of facts, statistics and cases; some of which are put forward.

Firstly, let us discuss the difference between ancient philanthropy and modern philanthropy. The ancient one involved rich businessmen donating towards any social cause. Whereas, modern one not only involves financial assistance, but also utilization of time and talent of these individuals. As we know, the more we invest, the more return we expect. Similarly, the more a philanthropist gets involved, the more output he expects. These output may vary. It does not mean that ancient philanthropy was full of integrity, but the possibility of hypocrisy involved in philanthropy is quite high due to this.

Keeping aside the feeling of altruism derived from such philanthropic activities, which other factors motivate HNIs to donate such huge chunks of their wealth?

1. Tax benefits

If we spend money on philanthropy, most countries do give tax deductions. Yes, there are people who donate for such cause. In India, people are always ready to contribute for a noble cause (if they give an 80G certificate). Here's a thought- if a company is not efficiently using the funds for donation, then they should not donate. Because, if they would have paid taxes on such income, it would be in government treasury and at least the government would have passed on the benefits to the poor.

2. Indirect profits

Yes, anything is possible in today's dynamic and competitive world. A software making company starts a foundation whose objective is to uplift the quality of education world- wide. They donate computers to several schools. Each computer uses the software which is sold by the parent company. Thus, more the donation, more is the sales of software.

3. Goodwill

People who are ranked regularly in the list of richest people in the world, have a DMU for money. (DMU for money? It is not believable but it is true to a certain extent) Creating a brand image is essential in the modern world. People and organizations donate to maintain an image in the eyes of their customers and society.

4. Against Democracy

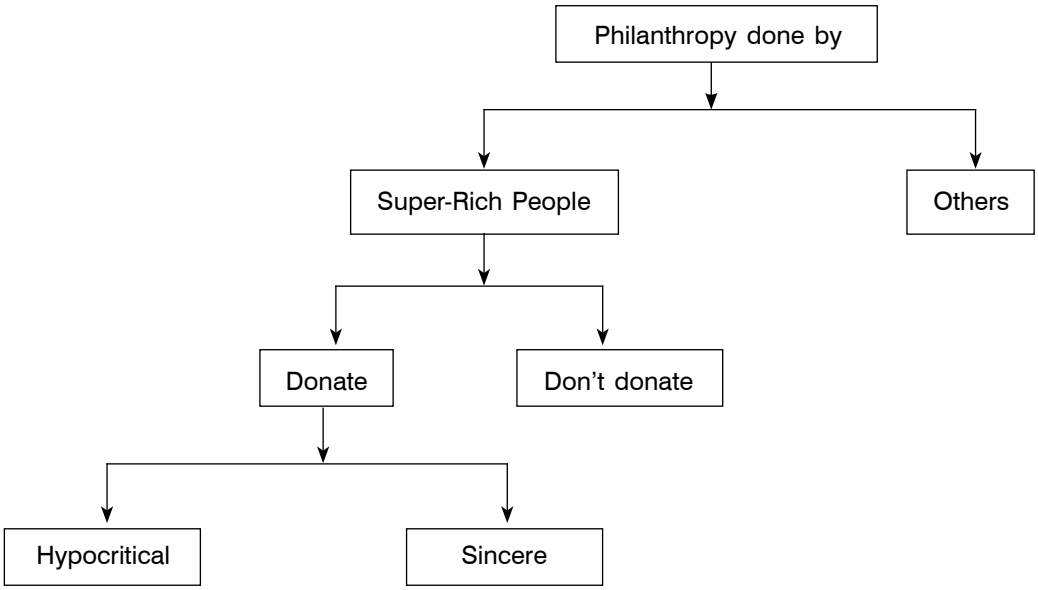
Rob Reich, an American political scientist has written a wonderful statement in his latest book regarding philanthropy, "Big philanthropy is an exercise of power, and in democracy any form of concentrated power deserves scrutiny, not gratitude". His view point regarding this topic is that from the democratic standpoint, it is immature to feel grateful for such donations, rather it should be scrutinized and investigated. And in his defence, more than 90% foundations in US have no website. They are neither transparent nor accountable. How is this plutocracy accepted with gratitude in a democracy?

5. Compensation

Philanthropy is nowadays even used to cover-up the pot holes dug in the past. Former US President Theodore Roosevelt in response to the Rockefeller Foundation case stated that, "There is no amount of charity in spending such a fortune that can compensate in any way for the misconduct in acquiring that fortune".

The above points clearly state that philanthropy is hypocritical. But, it is not until we consider the justifications of the other side.

The question still persists- Is philanthropy hypocritical today? A detailed study of this topic leaves us at a conclusion that philanthropy is hypocritical if we look at it from a certain mindset. And it seems to involve earnest sincerity if looked from such a perspective. But, to have an objective conclusion-



Philanthropy is for all and is done by all. But we always focus on philanthropic activities of super rich and not of others. This is inappropriate. If a middle class father donates 10 dollars to a church for fulfilling his son's dream to achieve 1st rank in class 10; why isn't he termed hypocritical? Just the way filthy rich people donate with ulterior motives, the father's donation is not completely aimed towards love for mankind. Another point of discussion is- whether the super-rich people who donate, are donating out of integrity or not? This is for people to judge. This judgement is based on their process of thinking. But, why can't we have an objective answer to this question? The reason being-

1. There is a small gap between philanthropy involving hypocrisy and philanthropy involving integrity. This gap can be filled by transparency. If the super-rich provides details of his philanthropic activities, there will be less possibility of people misjudging his intentions. The details include where the money is spent and how is it helping the needy?
2. Also, a change in the behaviour of people is imperative. Whenever a wealthy guy donates, the first reaction is all teary-eyed and gratitude. This is fine, but it should not just gather gratitude but should also intrigue people about the donation's aim and impact. If we just shower gratitude, it would encourage them to employ the funds inefficiently, which otherwise lie in the nation's treasury.

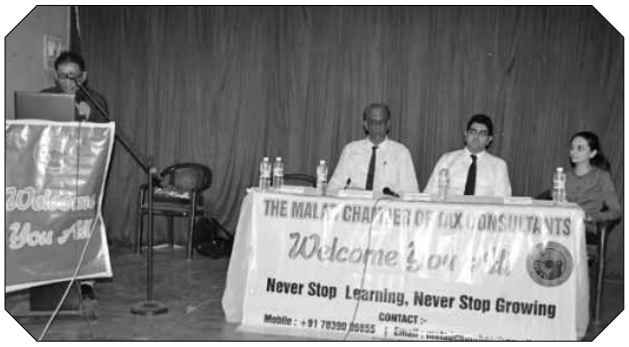
As per me, philanthropy is not hypocritical. It needs advancements though. The concept coined by Kaufman – Effective Altruism should be implemented as soon as possible to comprehend how philanthropy can play an instrumental role in solving all global issues. It may sound superficial but in my defence I would like to present the statistics quoted by Beth Barnes-

If the richest 10% give just 10% of their income to charity, we would collect $4 Trillion USD. And solving global poverty issue requires $175 billion a year for 2 decades. Thus, we could solve global poverty issue by spending less than 5% of what we have collected. Think.

■■■

4th Study Circle Meeting

MCTC 4th Study Circle CA Ujwal Thakrar on TP Audit



Glimpse of 4th MCTC Study Circle

MCTC 4th Study Circle on E-Assessment by Adv. Neelkanth Khandelwal

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Printed by Kishor Dwarkadas Vanjara published by Kishor Dwarkadas Vanjara, on behalf of The Malad Chamber of Tax Consultants, and Printed at Finesse Graphics & Prints Pvt. Ltd., 309, Parvati Industrial Premises, Sun Mill Compound, Lower Parel, Mumbai-400 013. Tel. Nos.: 2496 1685/2496 1605 Fax No.: 24962297 and published at The Malad Chamber of Tax Consultants B/6, Star Manor Apartment, 1st Floor, Anand Road Extn., Malad (W), Mumbai-400 064. Adm. Off. Tel. 022-2889 5161

• **Editor : Shri Kishor Vanjara**

Associate Editor of MCTC Bulletin : Shri Brijesh M. Cholera

Posted at Malad ND (W) Post Office, Mumbai-400 064

Date of Publishing 3rd Week of Every Month
Date of Posting : 20th & 21st October, 2019

To

If undelivered, please return to :

The Malad Chamber of Tax Consultants,
B/6, Star Manor Apartment, 1st Floor,
Anand Road Extn., Malad (W),
Mumbai-400 064