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

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President's Communiqué

My Dear Professional Colleagues,

The flagship event of MCTC was a grand success with 600+ attendees enhancing their understanding about the Budget 2020. Having received extremely kind words from audience with mixed age group about the Public Meeting, I would take this opportunity to thank every single person involved in making the Public Meeting such a great success. Also, the Budget book which is an analytical study of Finance Bill 2020, in its 22nd year of publication, received an overwhelming response. It got sold out in less than 24 hours. On the insistence of various members, we have also circulated the e-book of the same to every member ensuring that maximum people could benefit from it. Lastly, I congratulate each member of MCTC for showering their blessing and unstoppable support which is a pre-requisite for such success.

In this year's budget, an interesting scheme is proposed namely – Vivad Se Vishwas. Many members showed enthusiasm in understanding this proposal in detail. Considering this, MCTC is planning to conduct a half day seminar wherein speakers would share their valuable insight on this matter. Also, we are planning to conduct a study circle to throw light on few recent new amendments in GST. The details of both would be shared as soon as possible.

Recently, results of CA Foundation, Intermediate and Final were declared. I congratulate every student who passed the exam. They have cleared an academic exam but life awaits with many more challenges. I wish them all the very best for their future endeavours. To those who couldn't clear this time, I'd insist them to stop worrying and start preparing again. Cribbing over the past won't do any good. I hope this time you'd pass with flying colours, but just keep on working hard. Because I strongly believe in what Zig Ziglar had quoted – It's not how far you fall, but how high you bounce that counts.

The feast of sweets and fiesta of colours is round the corner. Holi, the festival of colours is approaching and I urge everyone to have a gala time with their near and dear ones. Throw a bucket of kind words on your family and make Holi 2020, a memorable one.

May God paint the canvas of your life with the colours of Joy, Love, Happiness, Success and Prosperity.

HAPPY HOLI

Thank you!

CA Viresh Shah
President

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Export of services under GST and analysis of some issues in relation to export of services

Compiled by CA Bhavin Mehta

GST is a tax on supply of goods or services or both. Section 5 of the IGST Act, 2017, deals with levy and collection of IGST on inter-State supply of goods or services or both. In terms of section 7(5) supply of goods or services when the supplier is located in India and the place of supply is outside India is treated as Inter-State supply. Similarly supply of goods or services to or by a Special Economic Zone developer or a Special Economic Zone unit is treated as inter-State Supply. However special provision is carved out in IGST Act in respect of export of goods or services and supply of goods or services to a Special Economic Zone developer or a Special Economic Zone unit, which is considered as Zero Rated Supply. Zero rate supply does not mean it is exempt supply but tax payable is zero per cent against LUT and claim refund of unutilised input tax credit. Section 16 of the IGST Act prescribes "zero rated supply", as under:

16(1) "Zero rated supply" means any of the following supplies of goods or services or both namely:-

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely: -

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilized input tax credit: or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Service Tax Act or the rules made thereunder.

It can be observed from above that person exporting goods or services has option either to export goods or services with payment of tax or against letter of undertaking. Payment of GST on exports can be made through input tax credit and thereafter refund of same amount can be claimed. In case of export of goods, shipping bill itself will be treated as refund application. They will directly get the refund into their bank account. Service exporter is required to make separate refund application in Form GST RFD-01 with set of documents with jurisdictional GST officer.

Definition of "export of goods" and "export of services" is provided in section 2 of the IGST Act, which is reproduced below:

(5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;

(6) "export of services" means the supply of any service when, -

(i) the supplier of service is located in India;

(ii) the recipient of service is located in India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with *Explanation 1* in section 8;

Supply of service in Nepal and Bhutan against payment in Indian rupees is exempted from levy of GST (ITC would not be available).

Issues in relation to export of services are discussed below:

Issue 1: In case of service exports, where export proceeds is not received within a period of one year, whether exporter would be liable to levy of GST?

Comments: Export of Service is defined in section 2(6), wherein the payment for such service should be received by the supplier of service in convertible foreign exchange. The section does not stipulate time period of when the export proceeds should be received. As per section 16 (1) export of services qualifies as "zero rated supply", where again no time period is stipulated for receipt of consideration against export of service.

Section 16(3) pertains to claiming of refund of ITC where goods or services are exported under LUT. The relevant condition in respect of refund of ITC under LUT is prescribed in Rule 96A wherein time limit of one year is stipulated. Rule 96A cannot independently put the condition of one year time limit and disallow the exports without having support from the section. To that extent Rule 96A has to read down.

It may be noted that on receipt of export proceeds, specified service exporter is entitled to incentive under SEIS. Certificate/scrip issued under SEIS is marketable and attract NIL rate of GST. On sale of SEIS scrip, proportionate amount of ITC would be required to be reversed.

Issue 2: M/s. XYZ University Placement Services, India, entered into contractual arrangement with a reputed university located in USA for sourcing of students from India, XYZ have to providing following services:

(i) Promote and market the courses offered by USA University in India;

(ii) Provide market intelligence about the latest education trend in India;

(iii) Make understand the advantages of the courses to prospective students in India;

(iv) To take test of the prospective student and eligible students are entitled to admission in the University in USA.

Upon admission of student in USA, XYZ is entitled to fixed commission based on fees received by the university. Whether commission received by XYZ would qualify as export of services?

Comments: "Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account. In the present facts, M/s. XYZ is doing more than marketing, it pushes student to take admission. It also provide market intelligence about the latest educational trend in India, conducting test of students. It is a composite set of activities, which cannot be classified on the basis of a component activity as promotion and marketing of service alone. The activities carried out by M/s. XYZ forms composite task and are integrally connected and not separable. The customer is interested in enjoying the effect of these together and therefore the whole composite arrangement is to be given a single taxable treatment.

It may be noted that intermediary service cannot be of future supply.

Therefore, it can be derived that M/s. XYZ is providing main service to foreign university and accordingly place of supply of service shall be location of recipient of service in terms of subsection (2) of Section 13 of IGST Act, 2017.

Issue 3: In terms of section 13(8) of IGST Act, the place of supply of service of intermediary services shall be location of provider of service. Therefore, where location of supplier is in India and location of recipient of service is outside India, such service would be liable to levy of GST. In such situation whether IGST would be leviable or CGST + SGST would be leviable?

Comments: Section 8(2) of IGST Act – "Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply". The provision of section 12 will apply when both location of supplier of services and the location of recipient of services is in India. As per section 2(14) the "location of recipient of services means where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment".

On conjoint reading of section 12 and section 2(14), it becomes clear that where recipient is located outside India and the location of the supplier and the place of supply of services are in same State or same Union territory, provision of section 12 will not be applicable and the transaction would be treated as intra-State supply. Therefore, in such case, where the supply of services is not treated as export of services, than the transaction would be considered as intra-state supply and accordingly be leviable to CGST + SGST.

Issue 4: What is the remedy available where supplier has wrongly paid IGST instead of CGST+SGST?

Comments: Section 19(1) of IGST Act provides "a registered person who has paid integrated tax on a supply considered by him to be an inter-state supply, but which is subsequently held to be an intra-state supply, shall be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed".

On reading the above it appears the registered person has no option but to apply for refund of tax paid mistakenly under one head instead of another. However, on perusal of Rule 92 of CGST, which is also applicable to IGST, provides for adjustment of refund against any outstanding demand under the Act, and order giving details of the adjustment shall be issued in Part A of FORM GST RFD -7. In this respect decision of Kerala High Court in the case of *Saji S. vs. Commr. of State of GST, Thirvananthpuram - 2018 (19) G.S.T.L. 385 (Ker.)* be referred.

■■■

Judicial Judgments

Compiled by CA Rupal Shah

Uday Gopal Bhaskarwar vs. ACIT Pune, ITAT Pune SMC Bench, [2020] 113 taxmann.com 378, 20 January 2020

Clubbing of F&O Loss in husband income where funds to invest were initially provided by Husband to Wife.

Facts of the case:

Assessee's wife started a F&O Business during the year on 18 September, 2013. The funds required for this purpose were given by assessee as gift to his wife. Wife incurred a loss of 31.56 lakh in the first year, which was clubbed in assessee's return in terms of provisions of Section 64(1)(vi).

During assessment, AO took recourse to *Explanation 3* of the section which provides that only that part of the business loss incurred by the assessee's wife could be set off against the assessee's income which bears

the proportion of amount of investment out of gift on the first day of previous year to the total investment in the business as on the first day of previous year

He allowed only ₹ 9.72 lakh of loss, calculated by multiplying ₹ 31,56,429 (loss incurred by wife from the business) with ₹ 25.00 lakh (gifts made by the assessee to wife up to 18-09-2013) as divided by ₹ 81,13,648/- (opening capital as on 01-04-2013 as increased by gift of ₹ 25.00 lakh given by the assessee up to 18.9.2013)

On further appeal CIT (A) rejected the assessee's plea.

On appeal to the Tribunal, it was observed:

In case of newly set up business, the previous year shall be the period beginning with the date of setting up of the business and ending with said financial year. Thus, in the instant case, the amount of assets received by wife as invested in business and total investments in the business including assets received from assessee will be same. Therefore, going by the explanation 3 read in conjunction with section 64(1)(iv), the entire amount of loss resulting is liable to clubbed in hands of assessee.

The appeal is decided in favour of the assessee.

Ravi Jalan vs. ITO, Kolkata, ITAT Kolkata Bench 'C', [2020] 113 taxmann.com 414, 15 January 2020

Tax treatment of money and shares received on transfer of proprietorship business to a Private Limited

Facts of the case:

The assessee was running a business of trading in gold under the name and style of M/s. Ravi Jalan. During the relevant assessment year, assessee transferred all assets and liabilities of his proprietorship business to a private limited company. He declared that assets and liabilities were transferred at cost of acquisition. Since the full value of consideration and cost of acquisition is the same, no capital gains accrue in view of Section 47(xiv) of the Act.

AO alternatively held that consideration received is "Income from other sources", and by invoking the provisions of Section 56(2)(vii)(c) of the Act. A sum of ₹ 1,24,54,080/- was brought to tax.

On first appeal, CIT(A) upheld the additions made by AO.

The Tribunal observed that:

In the decision of the Kolkata Bench of the Tribunal in the case of *M/s. Aravali Polymers LLP vs. JCIT,* order dt. 27.06.2014, it was held that, the value of the assets taken-over as per the agreement would be the sale price and the value of the assets appearing in the books of the erstwhile entity would be the cost of acquisition and the difference would be either capital gain or capital loss.

In the present case, as the value of assets taken over by way of agreement and the value of these assets in the balance sheet of the assessee company being the same, there is no capital gains earned by the assessee.

Also, when the assessee has been allotted certain shares as consideration for property transfer, then the question taxing of value of those shares by invoking Section 56(2)(vii)(c) of the Act, does not arise.

The additions were deleted, and matter decided in favour of assessee.

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STUDENTS' CORNER

Should personal data of individuals be treated as a National Asset?

Compiled by Harsh Joshi

The news around China establishing a surveillance system in order to determine an individual's social credit score brings our every Orwellian nightmare to reality. This however, stirs up the issue of whether personal data should be considered as a national asset by the governments worldwide.

In order to bring coherence to the underlying issue, it would be prudent to first define 'national asset'. A national asset is something that is held by the Government as a trustee; the rights of such an asset being enjoyed by the citizens collectively. Thus, it would be in everyone's interest to exercise data rights collectively just as we have been exercising our rights to other common access resources. The governments interact with personal data in various capacities. As regulators, they would strike a balance between acting cautiously and boldly, and as policymakers, they would frame robust anti-trust laws required to curb abusive power. Also, governments would be able to collect, process and maintain data on a large scale and thus, can implement Big Data in various sectors such as Healthcare, Education and Agriculture.

Various regulations addressing the concerns on privacy, security and Big Data ethics, such as the GDPR (General Data Protection Regulation in the EU), The Data Protection Act (UK) have been implemented. As regards with India, as per the Draft on National E-commerce policy, people are rightful owners of their data. Their personal information belongs to them and any processor (Entity that processes data on behalf of the individual) is a mere custodian of the data. The Personal Data Protection Bill clearly states that 'Right to Privacy is a fundamental right'.

Opponents of the above premise often refute the idea of using data as a national asset. They are of the opinion that the government functioning in such a manner is possible, only in a utopian society. We have witnessed many instances where the governments or their agents have grossly violated privacy rights of individuals. One such instance being, where the world's largest ID database – Aadhaar, with more than 119 crore enrollments, was leaked and was made available for as little as Rs. 500 online. These instances when taken in context with the failure of democracies to maintain basic freedom and privacy rights, paint a horrendous picture of the future. There is no doubt about it that the rising dominance of data raises privacy concerns and the critics are actually quite right about it.

However, these concerns will not cease to exist upon not treating personal data as a national asset. The big tech companies have been collecting and processing data involving SPDI (Sensitive Personal Data Information). The instances mentioned above involve data leaks and spying, and many such related acts have been committed by corporations also (Remember the data leak at Yahoo! affecting over 1 billion accounts). With the government stepping in as a regulator, many such violations can be prevented as the proposed fines for violations are quite hefty.

For these reasons, considering personal data as a national asset would not only bring the greater good but also prevent data colonialism by big tech corporations. However the policymakers need to ensure that the Data Regulation Authorities should not be overpowered to prevent any misuse of power or authority. This can be ensured by appointing Data Auditors, Algorithmists and Data Protection Officers. Dealing with Data, Ethics and Technology altogether, will be no less dangerous than traversing in deep waters for the future governments.

■■■

PUBLIC MEETING ON UNION BUDGET 2020

Saraswati Pooja

Memento to Speaker CA Manish Chokshi by Past President

Before Budget Meeting

Budget Book to CA Vimal Punamiya, Speaker by
CA Viresh Shah, President, MCTC

Bouquets to Adv. Bharat Raichandani, Speaker by
CA Viresh Shah, President, MCTC

Participants at meeting

ATTENTION

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