MNW/I75/2021-23

The Malad Chamber of Tax Consultants

43rd YEAR

MCTC Bulletin

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

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Regd. Office : B/6, Star Manor Apartment, 1st Floor, Anand Road Extn., Malad (W), Mumbai 400 064. **Mobile : 7039006655**
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Vol. 1, No. 5 | *For members & private circulation only* | November, 2022

President's Communiqué

Dear Members,

After the short break for Diwali Celebrations, as we are back to their routine life, I am reminded of an article written by Steve Jobs. He asked oneself to consider one question every day that "If today were the last day of my life, would I want to be doing the same what I am about to do today".

This makes me to look at what I am doing. Our lives are such as if we are in a race. At the start of the race, there are hundreds who start with you in the wee hours of the morning, all looking bright, fit and eager to compete. Some start fast, some start slow, some decide to keep pace with friends and run along while others decide to sprint past all to complete their run with a new high. As you proceed in the marathon, you realise that you are amidst people all running towards one goal "the finish line" but yet you are alone, trying to complete your run, achieve your target and fulfil your dream. The person next to you could be a stranger whom you may want to turn into a competitor or a friend who runs along with you.

The journey may have its ups and downs, towards the end fatigue may set in and the last stretch could be the most challenging. The temptation to give up could be high or the determination to reach the "The Finish Line" could be higher. The choices are only ours… it's your Race of Life - a Marathon to Finish.

The question is, is this what I wanted to do at the end?. I realised that I need to tune myself towards my ultimate goal first and take the necessary step today itself accordingly so that there are no regrets at the end. Each one of us should find some time from the mindless race to introspect and check the direction and if necessary reset the same for the ultimate goal to avoid regrets and be happier at the end.

Chambers Activities

The Chamber invites "suggestions for important issues faced by us requiring amendments" as a part of our submission for Pre-Budget Memorandum for Budget 2023. The format is attached elsewhere in the bulletin. Members are requested to send their issues and suggestions by 30th November 2022.

I urge members to contribute to chambers activities by writing articles for the benefit of members or lead study circle meetings in the area of your expertise for benefit of members.

Goodbye for Now till we meet next month.

Regards

CA Ujwal Thakrar
President

Request: Members please send your Mobile No. & Email ID to update list of life members
Please send message on 7039006655 or email to maladchamber@gmail.com

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

Name	Designation	Contact Nos.	E-mail
CA Ujwal Thakrar	*President*	9819946379	ujwalthakrar@gmail.com
CA Khyati Vasani	*Vice President*	9833288584	khyativasani@yahoo.com
Adv. Jaideep Sonpal	*Hon. Treasurer*	9892005352	sonpalconsultants@gmail.com
Shri Jitendra Fulia	*Hon. Secretary*	9820997205	jitendradfulia@rediffmail.com
Shri Rajen Vora	*Hon. Secretary*	9819807824	vora.rajen@gmail.com

Life Membership Fees ₹ 2,500

The Malad Chamber of Tax Consultants

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Admin Office: C/o. Brijesh Cholera : Shop No. 4, 2nd Floor, The Mall, Station Road, Malad (W), Mumbai-400 064

MEMBERSHIP FORM

Date:..... /..... /.....

To,

The Hon. Joint Secretaries,
The Malad Chamber of Tax Consultants, Mumbai.

Dear Sirs,

Being eligible to practice under the Direct and/or Indirect Taxes Laws, I hereby apply for admission as a member of *The Malad Chamber of Tax Consultants* with the following particulars:

1. NAME OF MEMBER MR/MRS/MISS: .....
2. FATHER'S / HUSBAND'S NAME: .....
3. QUALIFICATIONS: .....
4. MEMBERSHIP NO., if any (with name of the association): .....
5. PERSONAL DATA: .....

   DATE OF BIRTH:...../...../..... BLOOD GROUP:.....

   SPOUSE'S NAME: ..... SPOUSE'S DATE OF BIRTH...../...../.....

   MARRIAGE ANNIVERSARY:...../...../.....

   PROFESSION: ☐ ADVOCATE ☐ CA ☐ ITP ☐ ICWAI ☐ ICSI ☐ GSTP/STP
6. OFFICE NAME:.....

   OFFICE ADDRESS: .....

   PIN CODE: ..... STATE:..... TEL. NO: ..... FAX NO: .....

   MOBILE NO: ..... EMAIL ID: .....
7. RESIDENTIAL ADDRESS: .....

   PIN CODE: ..... STATE: .....

   TEL. NO: ..... FAX NO: ..... MOBILE NO: .....
8. COMMUNICATION TO BE SENT TO:OFFICE ☐ RESIDENCE ☐

The amount of ₹ 2,500/- by Cheque/Draft No. ..... dated ..... /...../..... drawn on .....

.....

9. Bank Detail for Online Payment

   Beneficiary Name: The Malad Chamber of Tax Consultants.

   Bank Name: HDFC Bank Ltd. – Marve Road, Malad West Branch, Account No. 00471000136285;
   IFS Code: HDFC0000047.
10. Kindly register on this google form link also for faster processing of membership - https://bit.ly/mctc-e-regn

UNDERTAKING

I, do hereby declare that whatever stated herein above is true to the best of my knowledge and belief. I also undertake to abide by the Rules, Regulation and Constitution of the Association, as amended from time to time.

.....
(Signature)

The Malad Chamber of Tax Consultants

Regd. Office: B/6, Star Manor Apartment, 1st Floor, Anand Road Extn.,
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FOR OFFICE USE ONLY FOR MEMBERSHIP APPLICATION

Issued Acknowledgement Slip No..... Dated..... / ..... / .....

Accepted by the Managing Committee in the Meeting held on...../ ..... / .....

Cheque No. ..... Dated ..... / ..... / ..... for ₹ 2,500/- Bank

NOTES

1. Please attach educational qualification certificate for eligibility to practice taxlaws.
2. Please write / type in CAPITAL LETTERS.
3. Cheques should be drawn in favour of "The Malad Chamber of Tax Consultants".
4. Outstation remittance should be by Demand Draft payable at Mumbaionly.
5. Please tick (✓) whereverapplicable.
6. The form should be completed in allaspects.
7. The membership application is subject to acceptance by the Managing Council.

For Query and Submission of forms for Membership please contact any of the following office bearers.

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Please send the completed application form to the following address:

The Malad Chamber of Tax Consultants

C/o. Brijesh Cholera & Co.
Chartered Accountants
Shop No. 4, 2nd Floor,
The Mall, Station Road,
Malad (West), Mumbai-400097

Life-Membership Benefits

THE MALAD CHAMBER OF TAX CONSULTANTS

SINCE 1978

Benefits of MCTC Membership:

- Life Membership subscription
- Access to knowledgeable and insightful Study Circle meetings on Direct Tax, Indirect Tax and Allied Laws
- Access to joint workshops on various topics held with WIRC, GSTPAM, CTC, and other associations.
- Access to RRC, IRRC, Sports tournaments and other social and cultural events.
- Access to monthly Bulletins having insights about various case laws and regular events of MCTC.
- Networking Opportunities with like minded members

Life Membership Fees : Rs. 2,500/-

Scan the QR Code to download Membership Form

Adv. Rinav Khakhar | CA Pratik Satyuga
Convenors
Membership & Public Relation Committee

Bank Account Details:
HDFC Bank Ltd - Marve Road, Malad West Branch,
Account No. - 00471000136285 | IFS Code: - HDFC0000047

CA Ujwal Thakrar
President
MCTC

Contact us: maladchamber@gmail.com | www.mctc.in

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2. NAME OF INTRODUCED MEMBER MR /MRS /MISS: .....
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.....
(Signature)

PRE-BUDGET MEMORANDUM 2023

INVITATION FOR SUGGESTIONS

The Malad Chamber invites "suggestions for important amendments" as a part of its submission for Pre-Budget Memorandum 2023.

We request members to E-Mail your suggestions as per attached format at maladchamber@gmail.com by 30th November 2022 to incorporate in our Memorandum.

FORMAT FOR SUGGESTIONS

FOR PRE-BUDGET MEMORANDUM 2023

*From.....

*Contact Details : Mobile No. ..... *Tele.....

*E Mail ID. .....

1. DIRECT TAX

Sr. No.	Section	Existing Provision	Proposed Suggestions	Reasons

2. INDIRECT TAX

Sr. No.	Section	Existing Provision	Proposed Suggestions	Reasons

Follow us on Facebook : www.facebook.com/themaladchamberoftaxconsultants/
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Website : www.mctc.in

DIRECT TAXES - Law Update

Haresh P. Kenia

- **EXTENSION OF DUE DATE FOR FURNISHING RETURN OF INCOME FOR ASSESSMENT YEAR 2022-23**

  The Central Board of Direct Taxes vide CIRCULAR NO. 20/2022 [F.NO. 225/49/2021/ITA-II], dated 26-10-2022, has extended the due date of furnishing of Return of Income under sub-section (1) of Section 139 of the Income-tax Act, 1961 for the Assessment Year 2022-23, for the category of assessee for whom the due date is 31st October, 2022, to 7th November, 2022.

- **EXTENSION OF DUE DATE OF FILING OF FORM 26Q FOR SECOND QUARTER OF FINANCIAL YEAR 2022-23**

  The Central Board of Direct Taxes, vide CIRCULAR NO. 21/2022 [F.NO. 275/25/2022-IT (B)] dated 27.10.2022 , in exercise of its powers under section 119 of the Income-tax Act, 1961, On consideration of difficulties arising in timely filing of TDS statement in Form 26Q on account of revision of its format and consequent up dation required for its filing, hereby extends the due date of filing of Form 26Q for the second quarter of financial year 2022-23 from 31st of October, 2022 to 30th of November, 2022.

- **EXPLANATORY NOTES TO THE PROVISIONS OF THE FINANCE ACT, 2022**

  The CBDT vide Circular no 23 /2022 dated 03.11.2022 has released the explanatory notes to the provisions of the Finance Act, 2022. These explanatory notes describe the substance of the provisions/amendments made by the Finance Act, 2022 relating to Income tax

- **CBDT Order for Condonation of Delay in Filing of Form No. 10A**

  CBDT vide Circular No. 22/2022 dated 01.11.2022 condones delay in filing Form No.10A for which the extended due date was 31.03.2022 up to 25th November, 2022 for Trusts and NGOs in respect of certain provisions of section 12AB/ section 10(23C)/ section 80G/ section 35 of the Income-tax Act, 1961

  The Circular states that on consideration of difficulties reported by the taxpayers and other stakeholders in the electronic filing of Form No. 10A, the Board in the exercise of its powers under

  Section 119 of the Act extends the due date for filing Form No. 10A required to be filed on or before 25.11.2022 and also condones the delay in filing of such forms which were filed after 31.03.2022.

  With this Circular, the extension to the due date is given to furnish an application to file re-registration or re-approval under section 12AB or section 80G or section 35 or section 10(23C) in Form No. 10A is given till 25.11.2022 and also condones the delay in filing the application for re-registration or re-approval in Form No. 10A which were filed after 31.03.2022 but are being filed within 25.11.2022..

- **CBDT RELEASES DRAFT COMMON INCOME TAX RETURN FORM FOR PUBLIC CONSULTATION PRESS RELEASE, dated 1-11-2022**

  At present, taxpayers are required to furnish their Income-tax Returns in ITR-1 to ITR-7 depending upon the type of person and nature of income. The current ITRs are in the form of designated forms wherein the taxpayer is mandatorily required to go through all the schedules, irrespective of the fact whether that particular schedule is applicable or not, which increases the time taken to file the ITRs.

  The proposed draft ITR takes a relook at the return filing system in tandem with international best practices. It proposes to introduce a common ITR by merging all the existing returns of income except ITR-7. However, the current ITR-1 and ITR-4 will continue. This will give an option to such taxpayers to file the return either in the existing form (ITR-1 or ITR-4), or the proposed common ITR, at their convenience. The scheme of the proposed common ITR is as follows:—

  1. Basic information (comprising parts A to E), Schedule for computation of total income (Schedule TI), Schedule for computation of tax (schedule TTI), Details of bank accounts, and a schedule for the tax payments (schedule TXP) is applicable for all taxpayers.
  2. The ITR is customized for taxpayers with applicable schedules based on certain questions answered by the taxpayers (wizard questions).
  3. The questions have been designed in such a manner and order that if the answer to any question is 'no', the other questions linked to this question will not be shown to the taxpayer.

4. Instructions have been added to assist the filing of the return containing the directions regarding the applicable schedules.

5. The proposed ITR has been designed in such a manner that each row contains one distinct value only. This will simplify the return filing process.

6. The utility for the ITR will be rolled out in such a manner that only applicable fields of the schedule will be visible and wherever necessary, the set of fields will appear more than once.

As evident from the above, the taxpayer will be required to answer questions which apply to it and fill the schedules linked to those questions where the answer has been given as 'yes'. This will increase ease of compliance. Once the common ITR Form is notified, after taking into account the inputs received from stakeholders, the online utility will be released by the Income-tax Department.

The draft common ITR, based on the above scheme, has been uploaded on www.incometaxindia.gov.in for inputs from stakeholders and general public https://incometaxindia.gov.in/news/common-itr.pdf. A sample ITR illustrating step by step approach for filing the ITR and two customised sample ITRs for firm and company have also been provided for illustration. The inputs on the draft ITR form may be sent electronically at the email address dirtpl4[at] nic [dot] in with a copy to dirtpl1[at]nic[dot]in, ***latest by 15th December, 2022.***

■■■

DIRECT TAX CASE LAWS

Compiled by CA Rupal Shah
(Partner at RHDB & Co LLP)

Abbasbhai A. Upletawala vs. ITO.

Citation: ITA No. 5332/MUM/2015, ITAT Mumbai, 21 October 2022

Capital gains on immovable assets sold as a recovery of unrecoverable debts by liquidation of collateral security.

Facts:

Assessee was a director of a company ASCL and assessee had given a land owned by it as collateral security as guarantor to a bank against loan taken by ASCL. Since ASCL was not regular in paying the debts, Bank recalled credit facilities given to ASCL and invoked personal guarantee given by assessee. The said Land of the assessee which was offered as collateral security by assessee to SBI was assigned to ARCIL for further sale to recover security. Consequently, land was sold by ARCIL to a company named ADPL.

As per assessee, under section 45, "any profits or gains arising from the transfer of a capital asset effected in the previous year shall…….be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place".

What is important therefore is the year in which the transfer takes place vis-à-vis the assessee as that is the year of transfer in which the taxability arises so far as the assessee is concerned and accordingly the tax should also be levied in that year. The transfer from assessee to ARC via SBI took place at an earlier stage and thereafter ARC is selling the property as the owner of the property to the end buyer.

Thus, as far as the assessee is concerned he can be brough to tax in the year in which property was transferred from assessee to ARC via SBI and not when ARC is selling property to end buyer, because at that time ARC was the legal owner of the property and not assessee.

Held:

It is also not clear as to what is the date on which the transfer took place from the assessee to the State Bank of India, and what is the documentation or court/ DRT orders in this regard. This aspect of the matter has simply not been examined; thus the matter was remanded back to CIT(A) for fresh adjudication.

The Tribunal observed an important point for protection of interests of the Revenue that, With the increasing number of cases in which recovery measures are enforced by selling properties, held by bankers and ARCs as collateral securities, it is time that the Government seriously considers protecting its legitimate interests by ensuring some mechanism to ensure that the tax liability on the capital gains is duly recovered from the borrower whose property is sold, and when it is not possible to do so on account of the borrower's genuine financial difficulties, from the person who receives the proceeds of the sale of securitized assets.

Rajendra R. Singh vs. ACIT.

Citation: [2022] 143 taxmann.com 34, Bombay HC, 26 July 2022

Recovery of dues from Director for non-payment of dues by the Company.

Facts:

The assessee was the chairman and managing director of a company.

The Assessing Officer served on the assessee a notice under section 179 informing that in the case of the company certain demand was outstanding for the assessment year 2010-11 since long and the same had not been paid by the company so far.

The assessee in response to show cause notice submitted that jurisdiction under section 179 could be assumed as against a director of a private company and not against a public company.

The Assessing Officer rejected the objections and contentions raised by the assessee and passed an order under section 179 dated 13-2-2018 holding the assessee liable to pay the demand with interest.

The Commissioner vide order dated 12-2-2019 rejected the revision petition filed by the assessee in a summary fashion. Thereafter the assessee filed a writ petition.

Held:

Before the jurisdiction is assumed and exercised under section 179 against the director, the Assessing Officer must feel satisfied that

a) tax was due from the private limited company, and

b) the tax dues cannot be recovered from such a company.

Also, Power under section 179 can be exercised against the directors upon satisfaction of certain conditions only if the tax dues cannot be recovered from the private company. To justify that the tax dues cannot be recovered, the Assessing Officer has to enumerate the steps taken towards recovery of tax dues from the company.

A reading of the show cause notice clearly suggests that there was no satisfaction recorded that the tax cannot be recovered. It needs to be understood that recovery procedure under section 179 against the directors is not to be resorted to casually and only because it is convenient to do so for affecting recovery of tax dues.

Thus, the impugned order order of AO and revisionary order passed under section 264 deserved to be quashed. The AO should approach the recovery from Directors aftresh after the attached property of the Company is liquidated and recovery as much possible is completed.

■■■

ANALYSIS OF GUJARAT HIGH COURT DECISION IN RESPECT OF VALIDITY OF DEEMING FICTION PROVIDING ABATEMENT OF 1/3rd OF TOTAL AMOUNT TOWARDS VALUE OF LAND NOTIFICATION NO.11/2017-CTR

MUNJAAL MANISHBHAI BHATT vs. UOI [2022] 138 taxmann.com 117 (Gujarat)

Compiled by CA Bhavin Mehta

As usual Gujarat High Court continues to delivers the decisive judgments. In the judgment under discussion, the Hon'ble Gujarat High Court held that the deeming fiction of 1/3rd land deduction provided in *paragraph 2 of Notification No.11/2017-CTR dated 28.06.2017* is not sustainable in cases where the value of land is available. The Hon'ble High Court held that the paragraph 2 needs to be struck down. In this article the author has analyzed the Gujarat High Court decision and has offered his comments at the end.

The writ petition was filed by the applicant who had entered into an agreement for purchase of a plot of land. The agreement also encompassed construction of bungalow on the said plot by the seller/developer. The agreement provides for separate and distinct consideration for the sale of land and for construction of bungalow on the land. The seller/developer raised the invoice on the applicant, wherein on the entire consideration payable towards land as well as construction of bungalow, GST @ (9% CGST + 9% SGST) after deducting 1/3rd of the value of land was

charged in the invoice. The writ applicant has claimed that entire value of land has not been excluded for the purpose of computing tax liability under the GST ActS.

The brief submission made on behalf of the writ applicants is narrated below.

Submission by Senior Counsel Shri M. R. Bhatt

11 Section 9(1) of the GST Act is the charging Section which imposes tax on supply of the goods and services. The scope of "supply" is defined in section 7. By virtue of section 7(2) of the GST Act, the transactions specified in the Schedule III to the GST Act are excluded from the purview of supply. Sale of land in included in the Entry No.5 of the Schedule III to the GST Act. Thus, sale of land is neither supply of goods nor services. Though there is a separate and identifiable value of land, only 1/3rd amount of the total amount is given towards abatement by deeming fiction. *The imposition of tax on consideration received towards the sale of land by virtue of delegated legislation is therefore ultra vires sections 7 and 9, respectively, of the GST Act.*

12 Separate consideration is fixed and agreed towards the price of land and towards the cost of construction. The agreement is severable and the entire amount of consideration relating to land is outside the scope and purview of GST Act. The delegated legislation cannot travel beyond the scope of the parent legislation.

Submission by learned Counsel Shri Uchit Sheth

1. The learned counsel narrated at length the legislative history of tax on goods and services in the construction contracts which has culminated into incorporation of the GST Act. It was contended that the Entry 5 of the Schedule III to the GST Act which provides for exclusion of land and building has a historical perspective. It was held by the Supreme Court in the case of ***Larsen & Toubro Ltd. [2013] 38 taxmann.com 98*** that *sale in the course of execution of works contract would commence only from the stage when the contract is entered into during the course of construction.* It was further observed that the sale of a fully constructed property would also not attract levy of tax. Hence, the sale of land and fully constructed building has been excluded even from the purview of tax under the GST Acts. What is taxable under the GST Acts is supply of goods or services to a recipient. For something done by the developer prior to execution of contract with prospective buyer, such activity is not a supply at all as defined under section 7 of the GST Acts and thus there is no charge of tax on such activity. The sale of any land, whether developed or not, would not be exigible to tax under the GST Acts and the tax liability has to be restricted to construction undertaken pursuant to the contract with the prospective buyer.

2. It was held by the Supreme Court in the ***Gannon Dunkerley's case 1993 taxmann.com 815*** that tax is to be imposed on the actual taxable value of the works contract and the Government could prescribe fixed percentage only for cases where actual value was not ascertainable. It was further observed by the Supreme Court that even the fixed percentage was to be prescribed depending on the type of works contract and that it should not appreciably differ from the actual value. The impugned notification prescribing fixed percentage deduction of 1/3rd without giving option for deducting the actual value of land as well as without taking into consideration the different variants of contracts as also the size of land vis-à-vis the consideration is contrary to the said judgement of the Supreme Court in the case of *Gannon Dunkerley's case (supra).*

3. With respect to service element of construction contract, the learned counsel contended the judgement of the Delhi High Court in the case of ***Suresh Kumar Bansal (2016) 70 taxmann.com 55*** clearly held that there need to be a specific statutory provision excluding the value of the land from the taxable value of the works contract and mere abatement by way of notification is not sufficient. Such dictum has even been complied with by the Government by way of retrospective amendment of the Service tax valuation rules so as to provide for specific deduction for consideration charged for land. It is only in the event of such actual value not being available that the alternative methods of fixed percentage deduction were to be adopted.

4. It was emphatically submitted that the GST Acts have been enacted with a view to merge and consolidate earlier laws relating to indirect taxes. This is expressly stated in the Statement of Objects and Reasons in enacting the GST Acts. Moreover, while enacting the impugned notification, the GST Council has specifically referred to the judgement of the Supreme Court in the context of works contract in the case of Larsen & Toubro Ltd. (supra). It is clearly held that when the actual value can be ascertained then fictional value cannot be taken into consideration.

5. The deeming fiction is ex-facie discriminatory in as much as persons like the writ applicant who are getting a bungalow constructed on the 10-20% of the land get the same deduction as a buyer of a flat unit in a multistoried building who merely gets an undivided share in the land and the major portion of the agreement value is towards construction cost. The deeming fiction introduced in the notification is without any valid basis, completely arbitrary, discriminatory and therefore violating article 14 of the Constitution of India.

6. Reliance was placed on the judgement of the Supreme Court in the case of ***Wipro Ltd. v. Asstt. Collector of Customs (2015) 58 taxmann.com 123.*** In this case the Rule provided for adding 1% of the FOB value of goods towards loading, unloading and handling charges even though the actual value of such charges was ascertainable. Moreover, such adhoc addition was prescribed without taking into account the different factual eventualities. Such rule was held to be ultra-vires the provisions of the Customs Act, 1961 as well as arbitrary, irrational and violating Article 14 of the Constitution of India.

7. The primary principle of valuation as contained in section 15(1) of the GST Acts is to consider the actual price paid or payable in respect of the transaction. Even when such actual price is not ascertainable, detailed valuation rules are provided in the Central Goods and Services Tax Rules, 2017. The sale of land being neither supply of goods nor services, its value cannot be prescribed under section 15(5). Moreover, section 15 (5) provides that the value of deemed supplies shall be determined in such manner as may be "prescribed". The term "Prescribed" is defined under section 2 (87) as follows: "2 (87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council;" It was therefore argued that prescription of value even for the purpose of section 15 (5) can only be by way of Rules and not by Notification.

8. It was urged that it is well established that the measure of tax must have a nexus with the subject matter of tax. Reference was made to the judgement of the Supreme Court in the case of State of Rajasthan v. Rajasthan Chemists Association [2006] 155 Taxman 20 wherein it was observed that tax cannot be imposed on a value unconnected with the subject of tax. It was argued that the impugned notification leads to a consequence whereby tax is imposed on land which is never sought to be taxed by the statute. It was therefore contended that the impugned notification is ultra-vires the provisions of the GST Acts as well as arbitrary and violating Article 14 of the Constitution of India.

Submission made by Senior Counsel Shri Tushar Hemani with respect writ application challenging the advance ruling orders.

1. Once a particular consideration was agreed for the sale of land between two parties, it was not open for the taxing authorities to rewrite the terms of the agreement. Relied on Supreme Court decision in the case of ***Mangalore Ganesh Beedi Works v. CIT [2015] 62 taxmann.com 400/378 ITR 640,*** wherein it was observed that the taxing authorities do not have the power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them and that the commercial expediency of the contract was to be adjudged by the contracting parties as to its terms.

2. It was urged that developed land would also be included within the meaning of the term "land". In this regard reliance was placed on the definition of the term "land" contained in section 3(a) of the Land Acquisition Act, 1894 wherein land is defined to include the "benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

The brief submission made on behalf of the department by Additional Solicitor General of India, Shri Devang Vyas

1. The levy of CGST shall be on the value as determined under sec. 15 of the Act. Section 15(5) of the CGST Act, 2017 provides that notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed. Thus, Government has express power to determine the deemed value of such supply on recommendation of the GST Council.

2. The contention that determination of value of the supply by subordinate legislation, even though, actual price paid/payable in respect of the construction service is available, is ultra vires section 15 of the CGST Act does not hold ground. Also, contention that deemed value of land to be deducted for the purpose of arriving at the value of the construction service is beyond the scope of delegation under section 9(1) of the CGST Act, 2017 has no legal basis at all.

3. It was submitted that the Central Government is empowered to decide the rate with conditions as applicable, in public interest on the basis of recommendation of GST council and GST council is well within its power to recommend such reduction with restrictions as applicable. Government is empowered to levy tax, prescribed conditions/ restrictions. It enjoys wide latitude in classification for taxation and is allowed to pick and choose rates of taxation. The concerned notifications have been issued in the pursuance of the recommendation of the GST Council. Therefore, question of impugned entry in the Notification being ultra vires section 7(2), section 9(1), section 15 of the CGST Act, 2017 and article I4 and 246A of the Constitution of India does not arise at all.

4. The impugned Notification has been issued in exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and

section 148, respectively, wherein Serial No. 3 notifies the rate of tax on the intrastate supply of services with respect to construction services

5. It was contended that the nature of transaction is a transaction concerning the land, construction of the bungalow (to be constructed only by the developer) and the development of various amenities, facilities, common areas etc. which the writ applicant shall have a right to use along with the other occupiers of the aforesaid scheme to the exclusion of others. None of these components of the transaction can be separated and are integral part of the transaction. It was contended that the concerned transaction is for sale of a developed piece of land and not of a plain land and therefore, it is subjected to many conditions, limitations, prohibitions and restrictions unlike a transaction of sale of land.

6. It was submitted that the deeming fiction is used only to ascertain the value of supply to be taxed and in order to consider the land portion in the supply, apart from construction and other development services, the GST Council recommended the method/formula (1/3rd land value) to arrive at such calculation of value of supply. The consideration as provided in the booking agreement with respect to the land and construction are decided inter se the parties and the same might not reflect the actual value of the land involved.

7. If the contention of the writ applicant is accepted that the value of the land must be taken as one being declared in the agreement, then it may lead to absurd results wherein in an attempt to save tax, the developer and buyer may mutually decide that 99% of the total consideration would be the value of land and the balance would be construction. This may lead to huge losses to the public exchequer and against the basic concept of tax.

8. It was further argued that the inequities cannot render a provision susceptible to challenge to its legality/ constitutionality. With respect to applications challenging the advance ruling orders, it was argued that writ application under article 226 of the Constitution of India is not maintainable against such orders under the advance ruling appellate orders.

The Hon'ble Gujarat High Court observations – penned by Justice Ms. Nisha M. Thakore

1. Paragraph 2 of the notification which is the epicentre of the entire controversy and the validity of which is under challenge reads as under:

   "2. In case of supply of service specified in column (3), in item (i), (ia), (ib), (ic), (id), (ie) and (if) against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.

   Explanation.—For the purposes of this paragraph and paragraph 2A below, "total amount" means the sum total of,-

   (a) consideration charged for aforesaid service; and

   (b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease.".

   It is the validity of such mandatory deeming fiction sought to be imposed by way of delegated legislation which is being tested by this Court vis-à-vis the provisions of the CGST Act as well as the Constitution of India.

2. While earlier VAT and Service Tax were imposed on tripartite agreements, such taxes were sought to be consolidated under the CGST Act with a specific exclusion of land element. In other words the construction which was carried out by the developer in accordance with the agreement with the prospective buyer, which was earlier taxable under the Vat/service tax law is now sought to be taxed under the CGST Act and therefore deduction, is given for sale of land.

3. Even otherwise "supply" under section 7 of the CGST Act includes supply of goods or services made or agreed to be made for a consideration. Thus the factum of supply would be initiated only once the agreement is entered into between the supplier and recipient and such agreement is for consideration. This is in consonance with the observation of the Supreme Court in the case of the Larsen & Toubro Ltd. (supra) that there cannot be a sale in respect of construction undertaken prior to agreement with the buyer. Thus, the legislative intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. There is no intention to impose tax on supply of land in any form and it is for this reason that it is provided in the Schedule III to the GST Acts that the supply of land will be neither supply of goods nor supply of services.

4. If the statutory provisions are interpreted from this perspective then the difference sought to be drawn by the learned A.S.G. between developed and undeveloped land pales into insignificance. As such, when the entry in the Schedule III says "sale of land" then it can be land in any form. In any case the charge of tax is on supply of goods or services made or agreed to be made for a consideration and therefore even in a case of a tripartite agreement for sale of land and building, the imposition of tax can only be on the construction activity which is undertaken by the supplier at the behest of the proposed buyer. Thus, if a tripartite agreement is entered into after the land is already developed by the developer, then such development activity was not undertaken for the prospective buyer and therefore there is no question of imposition of GST on the developed land.

5. In the present case what is sought to be argued by the revenue is that the exclusion of sale of land will not be available since the land is a developed piece of land. It is difficult for us to accept such argument as at the point of time when the buyer entered into the picture, the land was already developed. Thus, even without going to Schedule III, the only service which is supplied by the supplier to the recipient is the construction undertaken for the buyer and it is such supply alone which can be taxed. Hence the fact that the land is not a plain parcel of land but a developed land cannot be a ground for imposing tax on the sale of such land.

6. The argument of A.S.G. is not supported by the impugned notification itself. It is not as if deduction is not granted if land is not developed. Deduction is granted for any transfer of land. A.S.G. has also not contended that the deduction of 1/3rd as stipulated in the notification is not available to the writ applicants. Thus "sale of land" under Schedule III to the GST Acts covers sale of developed land even as per the impugned notification. Hence the only question which is to be determined is whether such artificial deeming fiction of 1/3rd deduction is ultra-vires the provisions of the CGST Act or the Constitution. When the tax is imposable under the charging section on the supply of construction service to the recipient, the question is whether for determining the quantum of such tax, a flat deduction can be stipulated by delegated legislation?

7. Ordinarily the value of supply of goods or services or both should be the value which is the price actually paid or payable for the said supply of goods. Sub-sections (2) and (3) of section 15 provide for certain inclusions and exclusions from value of supply which are not relevant for the present issue. There is specific consideration agreed for sale of land and for construction of bungalow. There is no averment in the affidavit in reply filed by the Respondents that such bifurcation is not acceptable. If that be so and if specific value of land and value of construction service is available, then can the notification provide for a fixed deduction towards land?

8. The answer has to be in the negative. When the statutory provision requires valuation in accordance with the actual price paid and payable for the service and where such actual price is available, then tax has to be imposed on such actual value. Deeming fiction can be applied only where actual value is not ascertainable.

9. Such proposition is squarely supported by the judgement of the Supreme Court in the 2nd Gannon Dunkerley's case. At that point of time only the goods element of the construction contract was taxable and therefore deduction was required to be given for labour element. In this context it was held and observed that if actual labour value was available then the same was to be deducted and if in case actual value was not ascertainable then deeming fiction could be applied which was required to be approximate to the actual value.

10. Even in the case of the 1st Larsen & Toubro case (supra), one of the points for consideration before the Supreme Court was whether a rule in the Maharashtra Value Added Tax Rules capping the value of land at 70% of the agreement value was permissible or not. Such rule was read down by the Supreme Court.

11. The Hon'ble Court observed that we are also supported by the judgement of the Supreme Court in the case of Wipro Ltd. (supra) wherein, in the context of valuation under the Customs Act, 1961 it was held that where actual amount of loading/ unloading charges is available, it was not permissible for the rule making authority to prescribe a flat rate of 1% addition to value.

12. Thus, mandatory application of deeming fiction of 1/3rd of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the CGST Act and therefore ultra-vires the statutory provisions.

13. Apart from being contrary to the statutory provisions contained in the CGST Act, one of the most glaring features of the impugned deeming fiction is its arbitrariness in as much as the same is uniformly applied irrespective of the size of the plot of land and construction therein. Moreover there is no distinction made even between a flat and bungalow. While a flat would have number of floors and the transfer would only be undivided share in land,

the same deduction which is available on supply of flats is made available on supply of bungalows without any regard to the vast different factual aspects.

14. Such deeming fiction which leads to arbitrary and discriminatory consequences could be clearly said to be violative of Article 14 of the Constitution of India which guarantees equality to all and also frowns upon arbitrariness in law.

15. The arbitrary deeming fiction by way of delegated legislation has led to a situation whereby the measure of tax imposed has no nexus with the charge of tax which is on supply of construction service. It is well established that the measure of tax should have nexus with the charge of tax. Reference was made to the judgement of the Supreme Court in the case of ***Rajasthan Chemists Association (2006) 155 taxmann.com 20,*** wherein the dictum of the Supreme Court in the case of ***Govind Saran Ganga Saran v. CST AIR 1985 SC 1041*** was followed.

16. The prescription under section 15(5) of the CGST Act has to be by rules and not by notification. Be that as it may, wherever a delegated legislation is challenged as being ultra-vires the provisions of the CGST Act as well as violating article 14 of the Constitution of India, the same cannot be defended merely on the ground that the Government had competence to issue such delegated piece of legislation. Even if it is presumed that the Government had the competence to fix a deemed value for supplies, if the deeming fiction is found to be arbitrary and contrary to the scheme of the statute, then it can be definitely held to be ultra-vires. The Hon'ble Court held that they are fortified in their view by the judgement of the Apex Court in the case of *Wipro Ltd. (supra).*

17. In respect of contention of A.S.G. that the valuation cannot be determined on the basis of the value fixed into agreement, the Hon'ble Court rejected the said contention and observed that in the present case the values as mentioned in the agreement are not challenged in the affidavit in reply and therefore such contention is not applicable. Even otherwise, the possibility of obtaining indirect consideration cannot be ruled out for any supply transaction. If in a given case it is found that the value of construction service which is declared by the supplier is not the correct value in as much as other consideration has been indirectly received, then section 15(4) of the CGST Act will apply.

18. When it was held by the Delhi High Court in the case of Suresh Kumar Bansal (supra) that since the valuation rules in service tax did not provide for deduction for land value, tax was not quantifiable and hence not leviable, the service tax valuation rules were retrospectively amended to provide for deduction of land. Deduction at fixed percentage was made applicable only where the actual value was not ascertainable. When such workable mechanism for deduction of land was already in force under the service tax regime, the same ought to have been continued. Instead, the Government has chosen to fix a standard rate of deduction without any regard to different possible factual scenarios which is completely arbitrary and violating Article 14 of the Constitution of India.

19. On the emphasis by A.S.G. on entry 5(b) of Schedule II to the GST Acts, the Court observed that it has been clarified by the Parliament that Schedule II to the GST Acts is not meant to define or expand the scope of supply but only to clarify whether a transaction will be supply of goods or service if such transaction qualifies as supply. Such clarification is required since there are different tax rates for goods and services.

20. **Conclusion:** In the result, the impugned Paragraph 2 of the Notification No. 11/2017-Central Tax (Rate) dated 28-6-2017 and identical notification under the Gujarat Goods and Services Tax Act, 2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.

21. While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

22. The objection with regard to maintainability of writ application against appellate advance ruling orders, the Hon'ble Court summarily overruled considering the fact that the challenge to such orders is incidental to the challenge of the impugned Notification No.11/2017-CTR.

My Comments

1. The rate of tax applicable to item (i), (ia), (ib), (ic), (id), (ie) and (if) under serial no.3 of Notification No.11/2017-CTR varies from 1.5% (CGST + SGST), 7.5% (CGST + SGST) to 18% (CGST + SGST). The arbitrary deduction of 1/3rd of the total amount is held by the Hon'ble Gujarat High Court as arbitrary and ultra vires the provision of law. The Hon'ble Court held that the paragraph 2 of said notification needs to be struck down or the same can be saved by reading it down. It means the taxpayer has option to claim actual land deduction, wherever actual value of land is available from the total contract amount, and pay the tax @ 1.5%, 7.5% or 18%, as applicable to them, on the balance amount.

2. The Hon'ble Court referred to ***Wipro Ltd (supra),*** wherein, in the context of valuation under the Customs Act, 1961 it was held that where the actual amount of loading/unloading charges is available, it was not permissible for the rule making authority to prescribe a flat rate of 1% addition to value. It may, however, be noted that in most of the cases, actual land value may not be available from the agreement of flat, apartment, or office. The Hon'ble Court observed the deeming fiction can be applied only ***where actual value is not ascertainable.*** The Hon'ble Supreme Court in 2nd Gannon Dunkerley's case (supra) held that ***in case actual value was not ascertainable then deeming fiction could be applied which was required to be approximate to the actual value.*** This means where the actual value is not ascertainable then only the deeming fiction can be applied. The value of land can be ascertained by taking external aids. In the sale of flat, office, etc., it is possible to ascertain the land value either through stamp duty ready reckoner value or through cost plus method on goods and services involved in the construction of flat, office, etc. It may not be necessary that agreement has to stipulate the land value.

3. The Hon'ble Court rightly pointed out "what is sought to be taxed by the legislation". There is no dispute that the GST is levied on supply of goods or services or both. The Hon'ble Court referred to the Supreme Court decision in the 2nd Gannon Dunkerley's case (supra), wherein it was held that expenses pertaining to labour element of the contract and profit thereon was required to be excluded for determining sale value of goods involved in the works contract. While earlier VAT and Service Tax were imposed on the construction carried out by developer for prospective buyer, such taxes are consolidated under the Goods and Service Tax with a specific exclusion of land element. The Supreme Court in Larsen and Toubro (supra) held that the supply would be initiated only once the agreement is entered into between supplier and recipient for consideration. The legislative intent is clear not to impose tax on supply of land in any form and it is for this reason that it is provided in the Schedule III to the GST Acts.

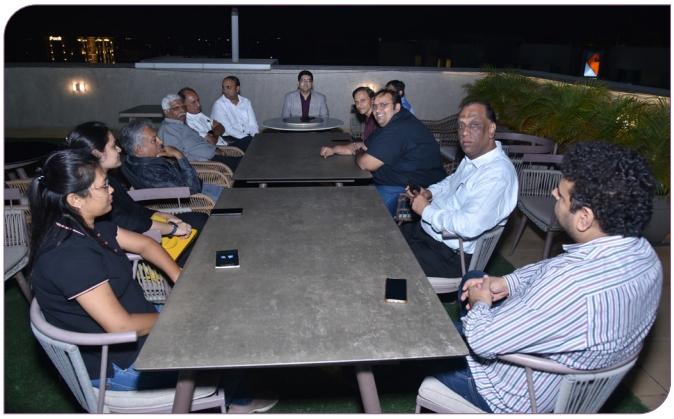
4. The tax is imposable under the charging section on the supply of construction service to the recipient. Therefore, the quantum of tax on the basis of flat deduction towards value of land should not be permitted. The Hon'ble Court referred to Larsen and Toubro's case (supra), wherein, the Supreme Court held that capping the value of land at 70% of the agreement value is not permissible. In the opinion of author, it would be reasonable for the taxpayer to adopt any reasonable method to determine the value of land. Allocation of composite price over distinct activities on some reasonable basis has been accepted by the courts in various situations.

5. In ***Dasaprakash Bottling Co. vs. CIT, (1986) 159 ITR 690 (Mad),*** there was a sale of business as a going concern. The Income Tax Officer worked out under section 41(2) and assessed the balance as capital gains. The assessee claimed that the balance related to goodwill. The Tribunal accepted this contention and estimated value attributable to goodwill taking into account past losses and expected future profits. The High Court upheld the approach of the Tribunal in the given circumstances.

6. In ***Philips' Gloeilempenfabrieken (N.V.) vs. CIT, (1988) 172 ITR 541 (Cal),*** there was a collaboration agreement between the non-resident and the Indian company for supply of know-how and information necessary for setting up a plant. Though a lump sum price was paid, 50% of the amount was held to be towards royalty for supply of know-how and the balance 50% for fees for technical services. The High Court held that for estimating the amounts allocable for these two distinct services, it need not be mathematically accurate. However, it should be based on some material and on reasonable assumptions.

7. In the premises of above, in the opinion of author, the mandatory application of deeming fiction of 1/3rd of total agreement value towards land, where land value is ascertainable, either through stamp duty ready reckoner of land value or cost plus method on supply of goods and services, is not permissible. The taxpayer may discharge the GST @ 1.5%, 7.5% or 18%, as applicable to them, after deducting the ascertained land value, on the agreement value.

2ND MCM AND PRESIDENT'S PARTY HELD ON 12TH NOV 2022



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