The Malad Chamber of Tax Consultants

MNW/I75/2021-23 **Total Pages 16** Price ₹ 5/-

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Vol. 1, No. 12 ***For members & private circulation only*** June, 2022

President's Communiqué

Dear Members

As my term as President nears its end, I wholeheartedly thank all the members for their overwhelming support throughout the year. It was a great learning experience and I will be forever grateful to the Chamber for keeping faith in me and giving me the opportunity to serve the members.

I have tried my level best to keep up with the expectations of the Chamber and am very grateful to my Committee and Managing Committee members for helping me organise events throughout the year in a flawless manner. A big thank you to all the Past Presidents too for their valuable guidance and support.

I am overwhelmed by the confidence reposed in me. The success of all the activities of the Chamber has been possible by the team work of all the office bearers, Committee Members, the Guidance by the Seniors & Past Presidents & whole hearted participation by the members in our programs & endeavours. My regards to all the Compliers of the Bulletin CA Haresh Kenia, CA Bhavin Mehta, CA Rupal Shah, Adv Jaideep Sonpal, CA Neel Randeria and student Harsh Joshi for their contribution to the monthly Bulletin, their timely law updates & insightful notes. I am also thankful to our Editor Shri Kishor Vanjara, the printer of the Bulletin Finesse Graphics & the postal Department who have made it possible for reaching the message of the chamber to all the members.

We conducted the sixth Study Circle meeting this month. CA Monarch Bhatt guided the attendees on the very important topic of search, seizure and arrest under GST on 04th June 2022. We have also planned seventh study circle meeting on 18th June 2022 wherein CA Nitin Bhuta will enlighten the attendees on the common mistakes made in determining total income while filing income tax returns.

I request you all to attend the 43rd Annual General Meeting scheduled to be held on 03rd July, 2022 on Zoom Platform.

As I end my last message as President, I again thank each one and all of you for giving me this opportunity and supporting me throughout the year.

I hereby wish the Chamber and the incoming President grand success.

Regards

CA Jignesh Savla
President

Do you know? **Removal of eyes for eye donation does not produce any disfigurement of the face.**

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DIRECT TAX CASE LAWS

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

Suraj Bhan Oil (P.) Ltd vs. DCIT

Citation: [2022] 138 taxmann.com 19, Madhya Pradesh HC, 18 February 2021

Difference in stock value as per books of accounts and as per stock statement submitted to Bank – Added as income

Facts:

Assessee was engaged in manufacturing and trading of edible oils and grains. During assessment AO found that value of stock shown by assessee in stock statement as on 28-3-2005 submitted to bank was far in excess compared to value of stock shown in audit report for period ending 31-3-2005 and there was difference of ₹ 2.71 crores. Despite giving reasonable opportunity, assessee could not reconcile difference or explain reasons therefor, Thus, AO treated difference amount as unexplained investment in stock from undisclosed sources and added same to total income of assessee under section 69B.

Before CIT(A), the said addition was deleted as assessee produced stock register as on 28 March 2005 which was matching with stock statement sent to the Bank.

On second appeal ITAT held that assessee was bound to explain difference either before Assessing Officer or before Commissioner (Appeals) or before Tribunal and same was not done - It taking view that excess stock represented income of assessee from undisclosed sources, set aside order of Commissioner (Appeals) and upheld order of Assessing Officer.

On further appeal before the High Court.

Held

In set aside assessment, despite opportunity afforded to the assessee, it could not produce the details of purchase, processing and sale between 28-3-2005 to 31-3-2005. In absence of documentary evidence in that behalf, the stock details given to the Bank as on 28 March 2005 were found to be actual, in contrast to the stock valued in the audit report for the period ending 31 March 2005 and, therefore, the difference between the two i.e. ₹ 2,71,47,665/- has again been added to the income of assessee under section 69B of the Act.

The court observed that the practice as followed by Industrialists declaring larger than actual quantity of stock to the Bank for the purpose of getting higher loans or over-draft facility, in fact, is not recognized as conforming to the fiscal discipline by Courts, Authorities and Tribunals. Such a tendency tantamount to commercial immorality for obtaining unjustified gains in the form of higher credit facility or loans etc. by showing incorrect statement of stock position to the Bank. In any case, the burden lies upon the assessee to reconcile the difference of stock position presented to the bank with the stock position mentioned in the books of accounts/audit report.

Consequently, this Court upheld the order of AO and that of the ITAT taking the view that the excess stock represented the income of the assessee from undisclosed sources.

Cases referred to:

Dhansiram Agarwalla v. CIT [1993] 201 ITR 192 (Gau.),

Ramanlal Kacharulal Tejmal v. CIT [1983] 12 Taxman 130/[1984] 146 ITR 368 (Bom.),

Pooranlal Rajkumar v. CIT [IT Reference No. 117 of 1980, dated 22-8-1989],

CIT v. A. Yunuskunju [1991] (189 ITR 672, Ker.),

CIT v. South India Rubber Products [1987] 34 Taxman 60/166 ITR 687 (Ker.),

Coimbatore Spg. & Wvg. Co. Ltd. v. CIT [1974] 95 ITR 375 (Mad.)

DCIT vs. Brahmos Aerospace (Thiruvananthpuram) Ltd.

Citation: [2022] 137 taxmann.com 340, ITAT Cochin, 23 February 2022

Carry forward of loss – whether along with return, audited accounts are also essential

Facts:

The assessee was engaged in the business of Manufacturing of Engineering goods. It filed its return of income for the year under consideration declaring loss of ₹ 2.96 crores within prescribed time viz. 31-10-2002 under section 139(3) read with section 139(1). However, while filing aforesaid return of income with revenue, the assessee admittedly enclosed provisional financial statements along with its return of income as accounts were not audited by that time.

During assessment, audited financial were submitted. Thus, AO initiated proceedings against the assessee for infringement of provisions of section 44AB, for not getting tax-audit done within the prescribed time.

However, AO while completing the assessment vide assessment order accepted the returned loss but the loss cannot be allowed to be carried forward on the ground that the same was arrived provisionally without audit. Before CIT(A), the order was passed in favour of Assessee. However, ITAT restored the matter to the AO and directed to the complete the assessment and ascertain loss based on the audited accounts.

The Assessing Officer while giving effect to the Tribunals order did not allow the carry forward of business loss as the assessee had not filed the revised return of income. However, loss on account of depreciation was allowed.

On first appeal, the CIT (Appeals) held that the assessee had filed return of income in time and hence the assessee would be eligible to carry forward business loss also.

On second appeal before the Hon'ble ITAT.

Held:

Unless there is specific/express provision which stipulates that if audit is not done within prescribed time, loss shall not be allowed to be carried forward, scope of statute cannot be expanded.

Explanation to section 139(9) clearly stipulates that tax-audit report as well as audited accounts are to be accompanied with return of income, otherwise return will be defective return. However, where assessee had not got its statutory audit under Companies Act done within prescribed time, or had not got its tax audit done under provisions of section 44AB, there were penal provisions provided under statute for non-compliances.

Section 80 only stipulates that return of income is to be filed within prescribed time, which assessee had complied with. Therefore, where assessee had filed its return of income within prescribed time, although audited financial statements could not be filed along with return of income as accounts were not audited by that time, there was no justification for denying carry forward of business loss for year under consideration based on non-filing of audited financial statements keeping in view applicable and relevant provisions of Act for computing such loss.

The appeal of the assessee is allowed.

DIRECT TAXES - Law Update

Haresh P. Kenia

1. CBDT eases Compliance of TDS / TCS

CBDT Circular No – 10 dated 17.05.2022

The Central Board of Direct Taxes (CBDT) issued a Circular No. 10/2022 dated 17th May 2022 to modify the earlier Circular No. 11/2021 dated 21.06.2021 subsequent to amendments made in section 206AB (for TDS) and section 206CCA (for TCS) of the Income-tax Act, 1961 by the Finance Act, 2022.

- CBDT has issued a circular dated 21.06.2021 prescribing the rules to follow to use the functionality developed to ease compliance for tax deductors /collectors as mandated under Section 206AB and Section 206CCA of the Income-tax Act, 1961. This circular stated that a person will become a specified person for default in two years. In order to ease compliance burden, the Income-tax Department came out with functionality "Compliance Check for Sections 206AB & 206CCA", which was made available through reporting portal of the Income- tax Department. It enabled the tax deductor or the collector to feed the single PAN (PAN search) or multiple PANs (bulk search) of the deductee or collectee. The functionality then gave a response if such deductee or collectee was a specified person.
- This circular dated 17.05.2022 stated that now a person can become a specified person for default in one year instead of the earlier provision of default in two years. Accordingly the logic of the functionality has been amended. The new logic for the current financial year is as under:

  1. A list of specified persons is prepared as on the start of the financial year 2022-23, taking previous year 2020-21 as the relevant previous year. List contains names of the taxpayers who did not file return of income for the assessment year 2021-22 and have aggregate of TDS and TCS of fifty thousand rupees or more in the previous year 2020-21.
  2. During the financial year 2022-23, no new names are added in the list of specified persons. This is a taxpayer friendly measure to reduce the burden on tax deductor and collector of checking PANs of non-specified person more than once during the financial year.
  3. If any specified person files a valid return of income (filed & verified) for the assessment year 2021-22 during the financial year 2022-23, his name would be removed from the list of specified persons. This would be done on the date of filing of the valid return of income during the financial year 2022-23.
  4. If any specified person files a valid return of income (filed & verified) for the assessment year 2022-23, his name would be removed from the list of specified persons. This would be done on the due date for filing of the return of income for AY 2022-23 or on the date of actual tiling of valid return (filed & verified), whichever is later.
  5. If the aggregate of TDS and TCS, in the case of a specified person, in the previous year 2021-22 is less than fifty thousand rupees, his name would be removed from the list of specified persons. This would he done on the first due dale under sub-section (1) of section 139 of the Act falling in the financial year 2022-23. For the financial year 2022-23 this due date is 31st July 2022.
  6. Belated and revised TCS & TDS returns of the relevant financial year filed during the financial year 2022-23 would also be considered for removing persons from the list of specified persons on a regular basis.

- CBDT Circular clarifies that the deductor or the collector may check the PAN in the functionality at the beginning of the financial year and then he is not required to check the PAN of non-specified person during that financial year. The list of specified person would be drawn afresh at the start of each financial year and the above process as mention in para 3 to 6 above would have to be repeated. For example, at the beginning of the financial year 2023-24 a fresh list would be prepared with previous year 2021-22 as the relevant previous year. Then, no name would be added to the list of specified persons during the financial year and only name would be removed based on the logic given above.
- The circular further stated that as per the provisos of Section 206AB & 206CCA, the specified person shall not include a non-resident who does not have a permanent establishment (PE) in India. In this regard, it is clarified that Tax Deductors & Collectors are expected to carry out necessary due diligence in respect of non-residents about the applicability of section 206AB and section 206CCA on them.
- CBDT reiterated that this functionality has been developed to ease compliance for tax deductors/collectors and asking the deductee/collectee to produce evidences of their filing of return of income will defeat the purpose of this taxpayer friendly measure.

Readers may refer to complete text of Circular.

2. Guidelines for Compulsory Selection of Returns for Complete Scrutiny during Financial Year 2022-23

CIRCULAR F. NO. 225/81/2022/ITA-II, dated 11-5-2022 gives parameters for compulsory selection of returns for Complete Scrutiny during Financial Year 2022-23 and procedure for compulsory selection in such cases, which are as under;-

- ✓ Cases pertaining to survey u/s 133A of the Income-tax Act, 1961 (Act)
- ✓ Cases pertaining to Search and Seizure
- ✓ Cases in which notices u/s 142(1) of the Act, calling for return, have been issued & no return, have been furnished.
- ✓ Cases in which notices u/s 148 of the Act have been issued
- ✓ Cases related to registration/ approval under various sections of the Act, such as 12A, 35(l)(ii)/ (iia)/ (iii), 10(23C), etc.
- ✓ Cases involving addition in an earlier assessment year(s) on a recurring issue of law or fact and/or law and fact
- ✓ Cases related to specific information regarding tax-evasion
- It is clarified that where return has been furnished in response to notice u/s 142(1) of the Act and such notice u/s 142(1) of the Act was issued due to the information contained in NMS Cycle/SFT information/information received from Directorate of I&CI, such return will not be taken up for compulsory scrutiny. Selection of such cases for scrutiny will be done through CASS cycle.
- The cases shall be selected for compulsory scrutiny by the International Taxation and Central Circle charges following the above prescribed parameters and procedure with prior administrative approval of Pr. CIT/Pr.DIT/CIT/DIT concerned.
- The cases which are selected for compulsory scrutiny by the International Taxation and Central Circle charges following the above prescribed parameters and procedure, shall, as earlier, continue to be handled by these charges.
- As per the amendments brought by Finance Act, 2021, the time limit for service of notice u/s 143(2) of the Act has been reduced to three months from end of the Financial Year in which the return is filed. Therefore, selection of cases and transfer of cases, wherein assessments have to be completed in faceless manner, to NaFAC shall be completed positively by

31-5-2022. In cases selected for compulsory scrutiny, service of notice u/s 143(2) of the Act shall be completed by 30-6-2022.

Readers may refer to complete text of Circular.

3. Updated return of income

NOTIFICATION G.S.R. 325 (E) [NO. 48/2022/F. NO. 370142/18/2022-TPL (PART-1)] , DATED 29-4-2022.

The Central Board of Direct Taxes, in exercise of the powers conferred by section 139 (8A) of the Act, hereby gives Income-tax (Eleventh Amendment) Rules, 2022. It inserts Rule 12AC and new form–ITR-U.

Rule 12AC prescribes form ITR -U for return of income to be furnished under section 139(8A) from assessment year 2020-21 and subsequent assessment years. It also gives format of form ITR-U being "INDIAN INCOME TAX UPDATED RETURN [For persons to update income within twenty-four months from the end of the relevant assessment year]".

4. Mandatory Quoting of PAN under section 139A and Rule 114

NOTIFICATION G.S.R. 346(E) [NO. 53/2022/F.NO. 370142/49/2020-TPL] , DATED 10-5-2022

CBDT vide Notification No. 53/2022 dated 10.05.2022 in G.S.R. 346(E) through Income-tax (Fifteenth Amendment) Rules, 2022 amends Rule 114 of the Income-tax Rules, 1962 and inserts new Rule 114BA and Rule 114BB for the purpose of notifying transactions for which it will be mandatorily required to quote PAN as per the provisions of section 139A(1)(vii) and section 139(6A) of the Income-tax Act, 1961.

It shall come into force from 26th May, 2022 i.e after the expiry of 15 days from its publication in the Official Gazette.

- Rule 114 is amended to apply for PAN if any person intends to undertake any prescribed transactions as per clause (vii) of section 139A. A new clause (vii) is inserted in rule 114(3) to prescribe that any person intending to enter into any transaction prescribed under clause (vii) of sub-section (1) of section 139A shall at least 7 days before the date of the transaction apply for allotment of PAN in the prescribed form and manner.
- The Board has prescribed transactions under clause (vii) of sub-section (1) of section 139A and for this purpose, a new Rule 114BA is inserted in the Rules. The following transactions have been notified or prescribed under section 139A(1)(vii) by rule 114BA-

  A. Deposit of aggregate cash of ₹ 20 Lakh or more in a financial year in one or more accounts of the person maintained with a bank, co-operative bank or a Post Office. All the cash deposits into all the bank accounts of the person in a financial year will be aggregated to calculate the threshold limit of ₹ 20 Lakh.

  B. Withdrawal of aggregate cash of ₹ 20 Lakh or more in a financial year in one or more accounts of the person maintained with a bank, co-operative bank or a Post Office. All the cash withdrawals from all the bank accounts of the person in a financial year will be aggregated to calculate the threshold limit of ₹ 20 Lakh.

  C. Opening of a current account or cash credit account by a person with a bank, co-operative bank or a Post Office.

  ✓ Section 139(6A) of the Act provides for mandatory quoting of PAN or Aadhaar number in the prescribed transactions and authentication of such PAN or Aadhaar number in the prescribed manner. A new rule 114BB is inserted to prescribe the person who shall ensure that the PAN is quoted in the documents pertaining to these transactions and the same is authenticated as per the provisions of section 139(6A). Rule 114BB shall come into force from 10th July, 2022 i.e. after the expiry of 60 days from publication of this notification in the Official Gazette

In case cash is deposited or withdrawn from a bank account or a co-operative bank account for ₹ 20 Lakh or more or in case of opening a current account or cash credit account with a bank account or a co-operative bank account, then the notified person is the bank or the co-operative bank which shall ensure that PAN is quoted in the documents and is authenticated.

In case cash is deposited or withdrawn from a post office account for ₹ 20 Lakh or more or in case of opening a current account or cash credit account with the Post Office, then the notified person is the Post Master General which shall ensure that PAN is quoted in the documents and is authenticated.

5. CBDT Issues Instruction to AO on Issue of Notices under section 148A after Supreme Court Decision on Section 148 Notices

INSTRUCTION NO. 1/2022 [F.NO. 279/MISC/M-51/2022-ITJ], DATED 11-5-2022

CBDT has issued Instruction No. 1 dated 11.05.2022 to the Assessing Officers in issuing Notices under section 148A in respect of Notices already issued under section 148 in-between the period 01-04-2021 and 30-06-2021 subsequent to the decision of Hon'ble Supreme Court validating the notices so issued and directed that such notices shall be deemed to be notices issued under section 148A of the Income-tax Act, 1961.

The Board has issued an SOP to be followed by the AOs for implementing the decision of the Supreme Court in a uniform manner while issuing new notices under amended section 148. The instructions are summarized as under

- ✓ The judgment shall apply to all the reassessment notices whether challenged or not by the assessee.
- ✓ In para 6.3 of the Instruction, the Board has interpreted the judgment in a manner that the decision of the Supreme Court read with the time extension provided by TOLA, 2020 allows the reassessment notices issued between 01.04.2021 and 30.06.2021 to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act shall apply. The Board has reiterated the direction of the Court that all the defences under section 149 shall be available to the assessee and all the rights are available to the AOs under the new law
- ✓ Fresh notices under section 148 can be issued under section 149(1)(a) of the new law as they are within the period of three years from the end of the relevant assessment year
- ✓ Fresh notices for AY 2013-14, AY 2014-15 and AY 2015-16 can be issued if the case falls under section 149(1)(b) of the new law
- ✓ Separate instruction shall be issued in respect of AY 2013-14, AY 2014-15 and AY 2015-16 where the alleged income escaped is less than ₹ 50 Lakh.
- ✓ By 2nd June, 2022 the AO shall provide all the information and material relied upon for issuance of the notices under erstwhile section 148 between 01.04.2021 and 30.06.2021
- ✓ The period of two weeks, within which the assessee to has file a reply, shall be counted from the date of last communication of information and materials.
- ✓ After receiving the reply, the AO shall pass an order under section 148A(d) of the Act or not within one month from the end of the month in which the reply is received from the assessee or within one month from the end of the month in which time or extended time limit to furnish reply expires.
- ✓ If it is a fit case for issuance of notice under section 148, then the same along with the order under section 148A(d) shall be served on the assessee after obtaining the approval under section 151.

■■■

GST ADVANCE RULING

Compiled by Jaideep P. Sonpal, Advocate
Writer is regular contributor to **www.taxconsult.online**

Recent GST updates

1) Waiver for composition dealers:

Notification No. 7/2022 - Central Tax dated 26-May-2022. Waiver of late fee for 2 months for delayed filing of GSTR-4 for FY 2021-22. Provided also that the late fee payable for delay in furnishing of FORM GSTR-4 for the Financial Year 2021-22 under section 47 of the said Act shall stand waived for the period from the 1st day of May, 2022 till the 30th day of June, 2022.

GST Advance Rulings

1) No GST is payable on the Services by way of training or coaching in recreational activities relating to arts or culture, or sports by charitable entities registered under section 12AA of the Income-tax Act - Applicant's Name: Navi Mumbai Sports Association

The Maharashtra Authority of Advance Ruling (AAR) consisting of Rajib Magoo and T.R. Ramnani has ruled that GST is not payable on fees collected towards training in respect of football, basketball, athletics, cricket, swimming, karate, and dance. The AAR observed that football, basketball, athletics, cricket, swimming, and karate are sports, and "dance" would be covered under arts. However, physical fitness cannot be considered as sport, art, or culture. Further, the term "summer coaching" is a general term which cannot cover sports, arts, or culture. The association, M/s Navy Mumbai Sports Association, has constructed an international sports complex on land allotted by M/s CIDCO to it. The main aim and object of the association is to encourage and foster sports, cultural and social activities. It also provides health and sports education. The applicant association is regulated and managed by an elected body, i.e., the managing committee, which looks into the affairs of the association and makes policy decisions that aim at the promotion of sports, fellowship, and fitness for individuals, families, schools, institutions, and corporate bodies.

Conclusion: The applicant has sought an advance ruling on the issue of whether the amount collected by the applicant in respect of entrance/admission fees, which forms part of the corpus fund, annual subscription fees, and annual maintenance fees from its members is liable to GST The amount/fees collected towards rendering training/coaching in recreational and sports activities is exempt from payment of GST under entry no.80 of notification 12/2017-CTR dated June 28, 2017. As per Entry 80 of the notification 12/2017-CTR dated June 28, 2017 no GST is payable on the Services by way of training or coaching in recreational activities relating to arts or culture, or sports by charitable entities registered under section 12AA of the Income-tax Act.

2) GST not applicable on Lease Income form residential property: Kasturi & Sons Ltd. – 2022 (6) TMI 193 - AAR, Maharashtra

The Applicant proposes to let out his residential property on Leave and License Basis to M/s. LIC of India for residential purpose of their staff members and the Ruling is sought on the applicability of Sl. No.12 of the Notification No. 12/2017-CT (Rate) on the said service. The AAR, following the West Bengal AAR's Ruling in the case of M/s Borbheta Estate Pvt Ltd., has given a Ruling that since dwelling units are being used for residence, irrespective of whether they are let out to individuals or a commercial entity, service provided by the applicant is exempt under Sl. No. 12 of the Exemption Notification No. 12/2017-CT (Rate) dated 28.06.2017.

3) Applicability of GST on Sale of Used Cars - Recent Gujarat AAR Ruling- Applicant M/s. Dishman Carbogen Amcis Limited, Ahmedabad

One issue with vast repercussions is the GST on sale of Used Cars. This is one of the routine transactions in almost all the business houses. The issue was before the Gujarat Authority for Advance Ruling. In this case, the applicant, M/s Dishman Carbogen Ameis Limited of Ahmedabad purchased new SUV car for ₹ 80 Lakhs on 16-02-2018 for use in business but did not avail ITC as restricted under Sec 17(5) of CGST Act 2017. Now they intend to sell the car for ₹ 55 lakhs after eligible depreciation and charge GST. On being represented before AAR the Gujarat Authority for Advance Ruling, Ahmedabad 380 009 in GUJ/GAAR/R/2022/34 dated 01-06-2022 has given ruling that the value

for such sale shall be the difference between the actual sale value and the depreciated value as per IT Act and the same shall be liable for GST @ 9% + 9%.

GST High Court Decisions

1) Input Tax Credit (ITC) cannot be denied on genuine transactions with suppliers whose GST registration was cancelled after the transaction- Sanchita Kundu & Anr. vs Assistant Commissioner of State Tax -(Calcutta High Court) -

The petitioners contended that all the purchasers in question, invoices-wise, were available on the GST portal on form GSTR-2A, which is a matter of record. Court observed that petitioners are helpless if at some point of time after the transactions were over, if the respondents finds on enquiries that the aforesaid suppliers were fake and bogus and on this basis petitioners could not be penalised unless the department establish with concrete materials that the transactions in question were the outcome of any collusion between the petitioners and the suppliers in question. It cannot be said that there was any failure on the part of the petitioners in compliance with any obligation required under the statute before entering into the transactions in question and that there was no verification of the genuineness of the suppliers in question by the petitioner during the relevant period.

2) Provisional attachment of Bank Accounts- Sree Meenakshi Industries - 2022 (5) TMI 1418 – Madras HC

A search under Section 67 of the GST Act was conducted at the premises of the petitioner. The Authorities said to have unearthed incriminating documents or accounts, which reveals some tax evasion on the part of the petitioner. During the pendency of assessment proceedings the respondent Authority has attached the bank account of the petitioner by invoking Section 83 of the GST Act. There was no basis, the respondent invoked Section 83 to go for a provisional attachment and tangible material available before him have not been even indicated in the order of provisional attachment. Provisional attachment order set aside. It is open to the respondent to complete the assessment at the earliest.

3) Commissioner not empowered to allow interest payment in instalments in respect of amount due as per self-assessed returns: Orissa HC in P.K. Ores (P.) Ltd. vs. Commissioner of Sales Tax - [2022] 24

During the scrutiny of self-assessed returns furnished by the petitioner, the GST Officer noticed that the petitioner has filed the returns belatedly. The demand of payment of interest was raised and it requested before the Commissioner to allow payment of interest in instalments under Section 80 of GST Act. The request to pay interest in instalments was rejected and it filed writ petition against the same. The Honorable High Court observed that interest payable under Section 50(1) is compensatory and not penal in nature. The levy of interest arising out of statutory consequence is different from the levy of interest which is dependent on the discretion of the assessing officer as non-payment of tax in case of self-assessment would attract automatic levy of interest. Therefore, it was held that the Commissioner was justified in rejecting prayer to deposit interest on instalment basis as Commissioner is not empowered to allow payment in instalment in respect of amount due as per self-assessed returns furnished.

4. Penalty imposed through rectification order can't be levied without providing opportunity of hearing being an additional liability: (Andhra Pradesh HC) In Spy Agro Industries Ltd. vs. Union of India - [2022] 139 taxmann.com 69 (Andhra Pradesh)

The petitioner didn't file GST returns and it was directed to file returns but it didn't file returns. The best judgment assessment order was passed by the department for failure to file returns. However, another para relating to penalty was subsequently inserted in assessment order by order of rectification. It filed writ petition to quash rectification order imposing penalty. The Honorable High Court observed that the penalty imposed in rectification order was an additional liability as no penalty was imposed in assessment order. However, the opportunity of hearing was not provided while imposing penalty and the impugned order substantially affected the petitioner by imposing penalty which was not a part of demand in assessment order. Therefore, such order passed without providing opportunity of hearing was not sustainable and liable to be set aside.

■■■

BRIEF ANALYSIS OF SUPREME COURT DECISION ON LEVY OF GST ON OCEAN FREIGHT ON IMPORTER OF GOODS IMPORTED ON CIF BASIS – UOI & ANR. vs. MOHIT MINERALS PVT. LTD. [2022] 138 TAXMANN.COM 331 (SC) (19.05.2022)

Compiled by CA Bhavin Mehta

I have tried to briefly summarize the 153 pages decision of three members Bench of Hon'ble Supreme Court in *UOI v. Mohit Minerals (Supra)* penned by Hon'ble Justice Dr. Dhananjaya Y. Chandrachud. I have offered by comments at few places. Due to space constraint, the submissions made by learned ASG for UOI and Respondents learned Counsels on Charging Section, Recipient, Composite contract, dual levy, inter-state supply, place of supply, aspect theory, consideration, extra-territoriality and power of GST Council, is not covered in this article. If anyone is interested in reading full article they may write to me at bhavin@bsmehta.com

FACTS:

1. The respondents (Assessee) import non-coking coal from Indonesia, South Africa and the U.S. by ocean transport on a 'Cost-Insurance-Freight' (CIF) basis which is supplied to domestic industries. The goods are transported from a place outside India, up-to the customs station in India. The respondent pays customs duties on the import of coal, which includes the value of ocean freight. In the case of a CIF contract, the freight invoice is issued by the foreign shipping line to the foreign exporter, without the involvement of the importer.

2. Entry 9 of Notification 8/2017, effective from 1 July 2017, levied an integrated tax at the rate of 5 per cent on the supply of specified services, including transportation of goods, in a vessel from a place outside India up to the customs station of clearance in India.

3. The appeal before Supreme Court has arisen out of Gujarat High Court decision in ***Mohit Minerals Pvt. Ltd. vs. UOI reported in 2020 (33) G.S.T.L. 321 (Guj.).*** The Division Bench of Hon'ble Gujarat High Court held that Notification No.8/2017 and Notification No.10/2017 are unconstitutional for exceeding the powers conferred by the IGST Act and the CGST Act.

4. Submission for Union of India was made by ASG, Mr. N. Venkataraman, and on behalf of the respondents, the submissions were made, by senior counsels Mr. V. Sridharan, Mr. Harish Salve, Mr. Arvind Datar and Mr. Vikram Nankani, and Advocates Mr. Uchit Sheth, Mr. Rajesh Kumar Gautam, Dr. C. Manickam, Mr. Rajat Mittal and Mr. Abhishek Rastogi. The submission made by learned ASG in respect of Constitutionality and my comments on the same is given below. It appears no arguments or rebuttal is made from the respondents' side in this respect.

Constitutionality arguments by ASG

(a) Under Article 286(2), Parliament is empowered to formulate inter alia the principles for determining when a supply of goods or services takes place in any of the ways mentioned in Article 286(1), which includes imports.

(b) Article 269A enables the Union Government to levy GST on inter-state supplies. The explanation to Article 269A(1) creates a deeming fiction that a supply of goods or services in the course of imports is to be considered as a supply of goods or services or both in the course of interstate trade.

(c) Article 269A(5) enables Parliament to formulate the principles for determining the place of supply and when a supply of goods and services or both takes place in the course of inter-State trade or commerce. This constitutional mandate finds legislative effect in the IGST Act.

(d) As contemplated in Article 286(2) read with Article 269A(1), the IGST Act enacts provisions relating to the levy and collection of integrated tax (Section 5(1)), export of goods [Section 2(5)], export of services [Section 2(6)], import of goods [Section 2(10)], import of services [Section 2(11)], location of recipient of services [Section 2(14)] and location of supplier of services [Section 2(15)].

(E) In terms of Article 269A(5), the IGST Act contemplates provisions for determining the nature of inter-State supply (Section 7), supplies in territorial waters (Section 9), place of supply of goods imported into or exported out of India (Section 11), place of supply of services where the location of supplier and recipient is in India (Section 12) and place of supply of services where the location of supplier and recipient is outside India (Section 13).

My comments: Article 286 of the Constitution of India is reproduced below:

"286. Restriction as to imposition of tax on sale or purchase of goods –

(1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place –

(a) outside the State; or

(b) in the course of the import of the goods or services or both into or export of the goods or services or both out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1)."

(a) Article 286(2) provides delegated power to parliament to determine the principles for supply of goods or services or both can be considered outside the State. Such delegated power to formulate the provision for supply of goods or services shall be in consonance with Article 286(1). Article 286(2) does not have independent power to determine whether the supply has taken outside the State or not. The principles for determining the place of supply shall be in accordance with Article 286(1). Article 286(2) empowers the parliament to prescribe the mechanism to determine place of supply of goods or services or both in accordance with Article 286(1), which is procedural and directory, and cannot affect the substantive provision contained in Article 286(1).

(b) While formulating the provisions determining the place of supply, the parliament cannot go beyond Article 286(1) to create any fiction with respect of supply of goods or service or both outside the State (taxable territory). In other words, the provision cannot consider the supply of goods or services made outside the State as intra-state or inter-state, otherwise, Article 286(1) would be reduced to a mere redundancy. If the entry doesn't empower parliament to levy tax, parliament does not have power to artificially formulate the provision which would alter the entry. Just because Article 286(2) empowers parliament to formulate the provision of supply, they cannot determine, the transaction which is normally understood as exports, as inter-state or intra-state supply.

(c) Article 265 of the Constitution provides "No tax shall be levied or collected except by authority of law". Article 366(28) defines Taxation and Tax reads "taxation includes the imposition of any tax or impost whether general or local or special and 'tax' shall be construed accordingly". Any compulsory exaction of money by Government amounts to imposition of tax which is not permissible except by or under the authority of a law. In broad sense artificially treating service provided outside India as deemed to have provided in India is also imposition of tax, which is not permissible in view of the specific entry in the constitution, namely, Article 286(1), providing no law of state shall impose, or authorize the imposition of, a tax on the supply of goods or of services or both, where such supply takes place outside the State.

(d) Article 246A empowers the parliament to make laws with respect to GST where the supply of goods or services or both takes place in the course inter State trade or commerce and not on supply outside the taxable territory. If the intention of the Constituent Assembly was to consider the the service by a person located in non-taxable territory to a person located in non-taxable territory as deemed to have provided in taxable territory, the constitution provision should have provided for it. The doctrine of classification is a judicial formula for determining whether legislative or executive action in question is arbitrary and, therefore, constitutes denial of equality. In fact, the concept of reasonableness and non-arbitrariness pervades the whole constitutional scheme.

Analysis in brief by Hon'ble Justice Dr. Dhananjaya Y. Chandrachud

Role of GST Council

1. Article 246A entrusts Parliament and State legislatures the power to legislate on the goods and services tax. The power of the States is however subject to the conferment of an exclusive domain to Parliament to levy the goods and services tax where the supply of goods or services takes place in the course of interstate trade and commerce. Article 246A vests Parliament and the State Legislatures with a unique, simultaneous law-making power on GST. It is in this context that the role of the GST Council gains significance. The recommendations of the GST Council are not based on a unanimous decision but on a three-fourth majority of the members present and voting, where the Union's vote counts as one-third, while the States' votes have a weightage of two-thirds of the total votes cast. Article 246A treats the Centre and States as equal units by conferring a simultaneous power of enacting law on GST. Article 279A in constituting the GST Council envisions that neither the Centre nor the States can act independent of the other.

2. The recommendation of the GST Council made under Article 279A is non-qualified. That is, there is no explanation on the value of such a recommendation. Yet the notion that the recommendations of the GST Council transform into legislation in and of themselves under Article 246A would be farfetched. If the GST Council was intended to be a decision-making authority whose recommendations transform to legislation, such a qualification would have been included in Articles 246A or 279A. Neither does Article 279A begin with a non-obstante clause nor does Article 246A provide that the legislative power is 'subject to' Article 279A. If the GST Council were intended to be a constitutional body whose recommendations transform into legislation without any intervening act, there would have been an express provision in Article 246A. The use of the phrase 'recommendations to the Union or States' indicates that the GST Council is a recommendatory body aiding the Government in enacting legislation on GST.

Statutory provisions

1. The essential legislative functions with respect to the GST law are the levy of tax, subject matter of tax, taxable person, rate of taxation and value for the purpose of taxation. The principles governing these essential aspects of taxation find place in the IGST Act: Section 5(1) identifies the subject matter of taxation as inter-State supplies of goods, services or both; Section 2(107) of the CGST Act identifies a taxable person; Section 5(1) provides a maximum cap of 40% as the rate of taxation; and Section 5(1) stipulates that the value of taxation be determined under Section 15 of the CGST Act.

2. It has been alleged by the respondent that only Section 5(1) is a charging provision and Sections 5(3) and 5(4) cannot independently create a charge. Section 5(3) and Section 5(4) of the IGST Act are inextricably linked with Section 5(1) of the IGST Act which is the charging provision. In CIT v. B C Srinivas Setty, a three-judge Bench of Supreme Court has held that the machinery provisions of an Act and the charging sections are inextricably linked.

3. The respondents have alleged that the importer cannot be validly termed as a taxable person. However, this argument has to fail on a close reading of the impugned notifications alongside Sections 2(107) and 24 of the CGST Act. Section 24(iii) of the CGST Act mandates persons required to pay tax under reverse charge to be compulsorily registered under the CGST Act. Section 2(107) of the CGST Act defines a "taxable person" to mean a person who is registered or liable to be registered under Section 24 of the CGST Act. Neither Section 2(107) nor Section 24 of the CGST Act qualify the imposition of reverse charge on a "recipient of service" and broadly impose it on "the persons who are required to pay tax under reverse charge". Since the impugned notification 10/2017 identifies the importer as the recipient liable to pay tax on a reverse charge basis under Section 5(3) of the IGST Act, the argument of the failure to identify a specific person who is liable to pay tax does not stand.

4. The respondents have urged that the determination of the value of supply has to be specified only through rules, and not by notification. However, this would be an unduly restrictive interpretation.

Parliament has provided the basic framework and delegated legislation provides necessary supplements to create a workable mechanism. The impugned notification 8/2017 cannot be struck down for excessive delegation when it prescribes 10 per cent of the CIF value as the mechanism for imposing tax on a reverse charge basis.

5. Section 13(9) of the IGST Act appears to create a deeming fiction, where in case of supply of services of transportation of goods by a supplier located outside India, the place of supply would be the place of destination of such goods. The supplier, the foreign shipping line, in this case would be a non-taxable person. However, its services in a CIF contract for transport of goods would enter Indian taxable territory as the destination of such goods. The place of supply of shipping service by a foreign shipping line would thus be India.

My Comments: No doubt the place of supply of goods imported into India shall be destination of the goods in terms of section 11 of the IGST Act. However, in the present facts, the issue is about place of supply of shipping service. The provision contained in Section 13 of IGST Act is applicable where either the location of the supplier or location of recipient is outside India. In other words, the provision of section 13 would not be applicable where both the supplier and recipient are located outside India. In the present case, it appears, while examining each of the provisions pertaining to the 'recipient' the Hon'ble Supreme Court has given go by to the Contract Act and has considered that recipient of service can be third party, like importer, irrespective of the privity of contract entered into between supplier and recipient, i.e. Shipping Line and Exporter, respectively. The Hon'ble Court has considered importer as beneficiary.

6. The respondents have argued that the ocean freight transaction cannot be considered as "supply" since Section 7(1)(b) of the CGST act requires the import of service for a "consideration". The Hon'ble Court referred to definition of "consideration" in Section 2(31) and observed that the definition is inclusive and includes payment made or to be made, in money or any other form, for the inducement of supply of goods or services to be made by the recipient or by any other person. Thus, in the case of goods imported on a CIF basis, the fact that consideration is paid by the foreign exporter to the foreign shipping line would not stand in the way of it being considered as a "supply of service" under Section 7(4) of the IGST Act which is made for a consideration, thereby constituting "supply of service" in the course of inter-state trade or commerce that can be subject to IGST under Section 5(1) of the IGST Act.

My Comments: The Hon'ble Court has noted that consideration paid by third party for supply of service would be sufficient discharge of the obligation. If this ratio is applied to redevelopment projects pertaining to construction of rehab area as well as saleable area, wherein consideration flows from prospective buyers, the discharge of tax liability on the consideration received from prospective buyer is sufficient discharge of tax on rehab area.

7. With regard to extra-territorial ground made by respondents, the Hon'ble Court observed that the impugned levy on the supply of transportation service by the shipping line to the foreign exporter to import goods into India has a two-fold connection: first, the destination of the goods is India and thus, a clear territorial nexus is established with the event occurring outside the territory; and second, the services are rendered for the benefit of the Indian importer. Thus, the transaction does have a nexus with the territory of India. As stated above, the IGST Act under Section 13(9) recognises the place of supply of services as the destination of goods when the supplier is located outside India. Since the destination of goods is India, the statute itself is broad enough to cover a taxable event that has extra-territorial aspects, which bears a nexus to India.

My Comments: In the present facts, though the destination of goods is India, however, the issue of territorial nexus is with regard to shipping service rendered by Shipping Line to Exporter, where both of them are located outside India. It is necessary to understand the concept of 'service'. Encyclopaedia Britannica in its article on 'service marketing' has explained that services are inseparable from their production because they are typically produced and consumed simultaneously. In other words, the production and consumption of service being simultaneous, recipient of service and consumer of service is no different person. Therefore, in the present case, the benefit of service accrues to the exporter of goods.

8. The Hon'ble Court has considered 'importer' as recipient of transportation services on the ground that in the CIF contracts, the consideration for shipping is factored into the price of shipment of goods. The Hon'ble Court opined that ultimate benefactor of shipping service is also importer in India who will finally receive the goods in India. On the beneficiary principle the Hon'ble Court has determined importer as "recipient" of transportation service.

   My Comments: Going by the benefactor principle, different aspect of goods or services in respect of goods delivered in India, importer would be considered as "recipient" of such goods or services, though the Indian importer is not privy to the contract between the foreign exporter and foreign vendors (including shipping line and Insurance Company). This principle is very difficult to digest.

Composite Supply and Issues of Double Taxation

1. In the CIF contract the foreign exporter sells the goods to the Indian importer and the cost of insurance and freight are the responsibility of the foreign exporter. The Indian importer is liable to pay IGST on the transaction value of goods under section 5(1) of the IGST Act read with section 3(7) and 3(8) of the Customs Tariff Act. Although this transaction involves the provision of services such as insurance and freight it falls under the ambit of 'composite supply'. The Hon'ble Court observed that such transactions are termed as "composite supply" under the CGST Act.

2. Section 2(30) of the CGST Act clearly provides that a transaction may have two or more taxable supplies, where one of them is a principal supply. The illustration to Section 2(30) further clarifies that a transaction such as the CIF contract for supply of goods reflects a composite supply under the CGST Act, where the principal supply is the supply of goods. Section 8 of the CGST Act provides that the tax liability on a composite supply which comprises of two or more supplies, will only be levied on the 'principal supply'. In a CIF transaction, the principal supply, according to Section 2(30), is supply of goods. Thus, the tax would be levied as if the transaction was one of supply of goods.

3. The provisions of composite supply in the CGST Act play a specific role in the levy of GST. The idea of introducing 'composite supply' was to ensure that various elements of a transaction are not dissected and the levy is imposed on the bundle of supplies altogether. This finds specific mention in the illustration provided under Section 2(30) of CGST Act, where the principal supply is that of goods. Thus, the intent of the Parliament was that a transaction which includes different aspects of supply of goods or services and which is naturally bundled together must be taxed as a composite supply.

4. On the submission by UOI that import of goods and shipping service are separate standalone agreements and trying to seek tax on import of goods as well as on shipping services considering two different legs of the transaction. The Hon'ble Court observed that it would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. The supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is payable under Section 5(1) of the IGST Act read with Section 20 of the IGST Act, Section 8 and Section 2(30) of the CGST Act. The Hon'ble Could held that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation. The Hon'ble Court observed that under Section 7(3) of the CGST Act, the Central Government has the power to notify an import of goods as an import of services and vice-versa".

5. The Appeal filed by the revenue was dismissed on the ground of composite supply and levy of tax on shipping service would amount to double taxation.

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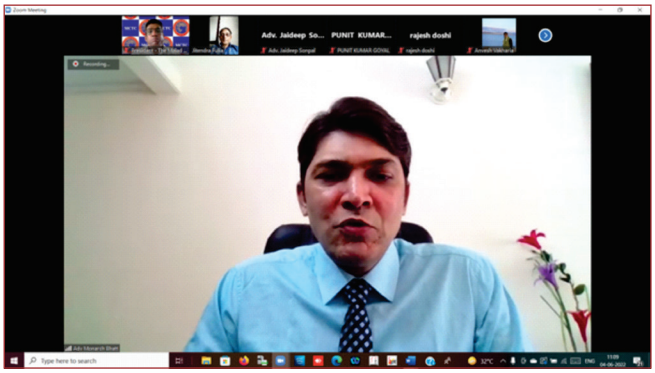

CA Monarch Bhatt addressing the attendees

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

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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 June, 2022

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