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MCTC Bulletin

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

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President's Communiqué

In the month of August The Nation did Bhoomi Pujan of Ram Mandir at Ayodhya on 5th August and celebrated 74th Independence day on 15th August 2020.

It is true that we are facing one of the most challenging business environments of all time. Organisations are focused on survival rather than growth. We professionals are guardians of capital and finance, we need to be at the fore front in such situations.

I am pleased to State That the Inaugural Study Circle Meeting under the auspices of Dr. Bharat Vasani was a very good beginning for the year 2020-21 on Zoom platform.

We were fortunate to have Shri P. V. Surte, Advocate High Court as Chief Guest to inaugurate 1st Study Circle Meeting. I thank P. V. Surte Sir, Aditya Surte Sir and All Seniors, Past Presidents, Members for attending the 1st Study Circle on the topic-Recent Controversial advance rulings under GST by CA Shri Aditya Surte.

Moving forward our 2nd virtual study circle was held on zoom platform on 1st August 2020 on recent Announcements pertaining to MSME Lecture by Shri CA Bhavesh Thakkar, the Partner from E & Y. The response from Members was tremendous. This was non traditional session, many questions were deligently answered by the learned faculty, our members felt that this is the new area of practice.

The 3rd virtual study circle meeting is scheduled to be held on 19th August on the Topic Key amendments and requirements under the new Income Tax Return Forms by eminent speaker the details of the 3rd study circle is given on page no 2.

We have also planned 3 Days Virtual Lecture Series on Charitable Trust jointly with GSTPM in the 1st week of September, details of the programme is printed on pg 2.

According to Alvin Toffler: "the illiterate of 21st century will not be those who cannot read and write but those who cannot learn, unlearn and relearn."

Learning is a continuous process and We at MCTC are always focusing on new and relevant topics for updating knowledge of members and students.

Before I conclude i would like to wish you all happy Ganesh Chaturthi and Samvatsari.

Please take care, stay safe and remain healthy.

With warm Regard

Thank You

CA M. D. Prajapti
President

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

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

: Forthcoming Events :

3RD STUDY CIRCLE MEETING				
Sr. No.	**Date**	**Time**	**Topic**	**Speaker**
1.	19th Aug.	06.00 p.m. to 7.30 p.m.	Key amendments and requirements under the new Income Tax Return Forms	CA Avinash Rawani
THREE DAYS JOINT LECTURE SERIES ON CHARITABLE TRUST				
1.	3rd Sept.	5.30 p.m to 7.00 p.m.	Registration of Trust & Procedure at Charity Commissioner	CA Gautam Shah
2.	5th Sept.	11.00 a.m to 12.30 p.m.	Direct Tax Provisions on Charitable Trust	CA Natwar Thakrar
3.	6th Sept.	11.00 a.m to 12.30 p.m.	Indirect Tax Provisions on Charitable Trust	CA Aloke Singh

***Registration Fees:**	₹ 300 +GST For Members
	₹ 450 +GST For Non-Members

Analysis of recent Gujarat High Court decision in the case of *Material Recycling Association of India vs. Union of India & 2 other(s)* in respect of special civil application no. 13238 of 2018 and 13243 of 2018, wherein the petitioner has challenged the Constitutional validity of Section 13(8)(b) of IGST Act. The petitioner has challenged the levy of GST on intermediary service provided to a recipient located outside India.

Compiled by CA Bhavin Mehta

Analysis of recent Gujarat High Court decision in the case of Material Recycling Association of India vs. Union of India & 2 other(s) in respect of special civil application no. 13238 of 2018 and 13243 of 2018, wherein the petitioner has challenged the Constitutional validity of Section 13(8)(b) of IGST Act. The petitioner has challenged the levy of GST on intermediary service provided to a recipient located outside India.

In this article I have briefly narrated the facts of the case, the submissions made by the appellant and in response revenue submissions and finally observation made by the Hon'ble Court, are presented below in tabular format. I have offered my comments at the end.

Facts of the case: The petitioner has filed the writ under Article 226 of the Constitution of India. The members of the petitioner association has acted as an agent for scrap, recycling companies located outside India for facilitating it sale of goods to the customers located in India and also for customer located outside India. The members of association receive commission in convertible foreign exchange upon receipt of sale proceeds by its foreign client from the customers facilitated by them. According to petitioner association, the service provided by them is export of service and is covered by section 16(1) of the IGST Act, which provides for 'zero rated supply'.

Issue: Whether the provision of section 13(8)(b) of IGST Act, 2017 is ultra vires or unconstitutional in any manner?

Submissions and Decision

S. No.	Petitioner's submissions	Revenue submissions
1.	In respect of intermediary services provided to foreign client, though services are rendered outside India, the members of association is subjected to make payment of CGST and SGST in view of provision of section 13(8)(b) of IGST Act. When the service provided to non-resident service recipient, such services is clearly for the benefit of recipient located outside India. Section 13(8)(b) of the IGST Act, suffers from the defect of unreasonableness as it creates a deeming fiction by which the place of supply for a transaction involving a resident supplier of services providing advisory like services to a non-resident shall be deemed to be India, which is a clear export of service, which is contrary to the object of GST law. Relying upon Article 286, it was argued that Parliament has been authorised to formulate the principles for determining when a supply is deemed to have undertaken outside the territory of the State or when it has been undertaken in the course of import/export of such goods for services and has not been empowered to determine the "place of supply". The power vested with the parliament is confined to the scope of clause 1 of Article 286. State has no jurisdiction to impose tax when the supply takes place outside the State. It was therefore submitted that provision under section 13(8)(b) of the IGST Act is ultra vires to Article 286 (1).	Since, the location of supplier is in taxable territorial of India, the place of supply of service would be considered as provided in India in view of section 13(8)(b) of IGST Act and therefore this transaction will not be covered within the definition of export of services, as it is not satisfying one of the condition of place of supply being outside India. Relied upon various AAR rulings. With respect to contention that the levy of tax on export of service is ultra vires Article 265 and Article 286, it was submitted that in pursuance of section 13(8)(b) of IGST Act, the place of supply in case of intermediary services shall be location of the supplier of services and since the location of the supplier is in the taxable territory of India, therefore this transaction will not be covered within the definition of export of services, the question of violation of Article 285 and 286 of the Constitution does not arise. The power of taxation is controlled under Article 265 and that, no tax can be levied, except by authority of law. It was therefore submitted that IGST Act cannot be held to be unconstitutional as taxability of intermediary services comes within the scope and ambit of IGST Act. Therefore, the provisions of intermediary services as per section 13(8)(b) of IGST Act, are not violative of Article 286 of Constitution because, there is no tax if place of supply of intermediary service is outside the taxable territory. Article 246A inserted by 101st Constitutional Amendment gives Parliament exclusive power to make laws with respect to GST. Relied on upon various Supreme Court rulings. In Gujarat Ambuja Cement vs. UOI {2005 (182) ELT 33 (SC)}, it was held that "The point at which the collection of tax is to be made is a question of legislative convenience and part of machinery for realization and recovery of tax. Subject to the legislative competence of Taxing Authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective whatever stages it may be..... It is outside the judicial comprehension to determine whether the Parliament should have specified a common mode for recovery of tax as a convenient administrative measure in respect of particular class. This is ultimately a question of policy, which must be left to legislative wisdom". There is a distinction between the object of tax, the incidence of tax and machinery for the collection of the tax. The place of provision of service of an intermediary being the location of the service provider is purposeful and considered the policy decision of the Government of India, which cannot be said to be unlawful or violating the tenets of the Constitution of India.

S. No.	Petitioner's submissions	Revenue submissions
2.	Section 13(8)(b) of IGST Act is also violative of Article 14 of the Constitution as it renders differential treatment when services supplied within territory of India (section 12(2)(a) – place of supply shall be location of the recipient of service) and when supplied outside the territory of India (section 13(8)(b) – place of supply shall be location of the supplier of service). Different yardsticks prescribed for same set of services when both parties are situated within and outside India. It was pointed out that when the services remained same there does not appears to be any reason as to why intermediary services should be treated differently from the other advisory services like management consultants, lawyers, or portfolio managers. The test prescribed by Article 14 has to be satisfied for any class of legislation (delegated or otherwise) to survive.	The contention of the petitioner that differential treatment is accorded to intermediary service, which is violative to Article 14 of the Constitution, is also not tenable because one service cannot be compared with other service so as to justify the violation of Article 14 of the Constitution. Explained through following illustration 1. (i) A (Supplier of Service) based in New York provides management consultancy services to B located in Mumbai (Recipient of service), the place of supply shall be Mumbai (location of recipient of service) in view of Section 13(2) of IGST Act, 2017 and IGST is payable. (ii) Whereas the same supplier provides intermediary Service to the same recipient, the place of supply shall be New York and Location of supplier of service in view of Section 13(8) of IGST Act, 2017 would be outside India and no tax is payable. Illustration 2. (i) A supplier of service based in Mumbai provides management consultants service to B located in New York, the place of supply shall be New York. (ii) Whereas same supplier provides intermediary service to the same recipient, the place of supply shall be Mumbai. Accordingly, it reveals that no tax is payable for intermediary service and tax is payable for management consultancy service in illustration 1, whereas in Illustration 2 tax is payable for intermediary service and no tax is payable for management consultancy service. The Illustrations shows that equal treatment is given to intermediary service and there is no violation of Article 14 of the Constitution. It was submitted that Article 14 of the constitution deals with equality before law and states. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and it is very much within the powers of the Government to categorize goods and services for the purpose of taxation in such manner as meets the policies and objectives of the Government. The Supreme Court in the case if Delhi Development Authority & Anr {2008 (2) SCC 672} held that a policy decision is subject to the judicial review on the grounds that: (a) If it is unconstitutional, or (b) If it is dehors the provisions of the Act and the regulations; or (c) If the delegate has acted beyond its powers of delegations; or (d) if the executive policy is contrary to the statutory or a larger policy. It was submitted that in the present case, none of the aforesaid conditions is applicable.

S. No.	Petitioner's submissions	Revenue submissions
3.	The pith and substance of the law is to tax supplies made in India and not to tax supplies made outside India.	It was submitted that in pursuance of section 13(8)(b) of the IGST Act, the place of supply in case of intermediary services shall be the location of the supplier of services and since, the location of the supplier is in the taxable territorial of India and therefore the contention of the petitioner is not tenable.
4.	Violates Article 19(1)(g) of the Constitution i.e., the right to carry on business.	The services provided by the members of the petitioner association are not in the nature of export of services as per section 2(6) of IGST Act as the place of supply of intermediary service is the location of service recipient. Therefore, levy of tax on such intermediary service does not infringe the right of the members of the petitioner association from practicing any profession or carrying out any occupation or trade of business and as such does not violate Article 19(1)(g).
5.	GST is destination based consumption tax; accordingly, applicability of GST should be determined based on the country of consumption of service and not on the country of provision of service.	It is submitted that in case of inter-state transaction where supplier or recipient of service is located in taxable and non-taxable territory, by default rule under section 13(2) of the IGST Act, 2017, the place of supply is the location of the service recipient, however, there are exception to this rule and sub-section 13(3) to 13(13) deals with such exceptions because in different situation covered under each of these sub-sections exceptions have been provided to this default place of supply such as place of supply could be location of the supplier or service, place of performance, etc., and such decisions are governed by the revenue considerations and based on catena of judgments of the Apex Court are within the legislative competence as the legislature is free to pick and choose the supply that it intends to tax and the manner in which it intends to tax.
6.	When a person, who supplies goods or services or securities on his own account, then such person would not be covered within the meaning of intermediary as what is to be construed as trading on one's account requires a clear explanation in order to determine what is specifically included within the domain of an intermediary. It was therefore, submitted that such definition of intermediary is vague. Petitioner referred to circular No. 107/26/2019-GST dated 18th July 2019, which was issued to clarify the position of intermediaries who were providing information technology enabled services. The said circular created further confusion because what was to be pursued as "on one's own account" was not clear. It would not be right to deny benefit to petitioner engaged in intermediary services. Decision of Supreme Court in Kartar Singh vs. State of Punjab, reported in (1994) 3 SCC 569 was referred to, wherein it is held that the vague laws offend several important values. It was held that it is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable	It was submitted that the reasoning for prescribing distinct treatment for an intermediary is that an intermediary is a go-between two persons, i.e. main service provider and the service recipient. An intermediary provides service to both the persons, though he may have contractual agreement with only one or both of them, hence, it may not be feasible to prescribe one person as the recipient of intermediary service, and thus general rule cannot be applied. The general rule is not an appropriate proxy for determining the place of supply of service of an agent/intermediary, for example, if an Indian exporter hires a service of an agent located overseas for export of service, such service should not be subject to tax in India as effective use and enjoyment of service would be outside India and relatable to export of service from India but if general rule is applied to such service, the intermediary services availed for the purposes of exports would be taxed whereas intermediary service used for imports of services into India would be outside the tax net which would bring distortion in the tax regime and

S. No.	Petitioner's submissions	Revenue submissions
	opportunity to know what is prohibited, so that he may act accordingly. Section 13(8)(b) of the IGST Act suffers from incurable defect of vagueness and is therefore, liable to be struck down.	therefore, intermediary services are to be accorded distinctive treatment.
7.	Section 13(8)(b) contributes to tax cascading and double taxation contrary to the objectives of GST. The transaction of providing intermediary service would be subject to tax in the Country where the recipient is located as it would be an import of service for such recipient. Thus the transaction would suffer GST in India as well as tax in the Country outside India leading to double taxation on the transaction and would affect the margin of commission earned by members of the association, working as intermediaries.	Extension of export benefits to intermediaries and other entities in the value and supply chain will result in non-exporters being treated at par with exporters which would end up negating the benefits to exporters.
8.	Relied upon recommendation of the Tax Research Unit of Central Board of Indirect Taxes & Customs as per the TRU Office Memorandum dated 17th July 2019 acknowledging the representation made by the petitioner.	Reliance placed by the petitioner upon the Office Memorandum F. No. 354/352 /2018-TRU dated17-07-2019, is based on the suggestions / preliminary views given by TRU and it was not the final decision taken by the Government. The said memorandum has no legal force.
9.	Referring to Notification No.20/2019-IGST dated 9th September 2019, granting exemption for intermediary services when the recipient of service and also seller of goods and recipient of goods are located outside India, the rate of IGST is NIL, therefore, results in distinction between services being rendered on the basis of movement of goods and service transactions. It was therefore submitted that when there is no movement of goods, then, the service provider would be liable to CGST and SGST, which is discriminatory. The exemption is only in respect of recipient of goods with whom intermediary has no privity of contract. In such circumstances, when the recipient of service provides goods outside India, then it would be exempt and no GST is payable, but the goods supplied by the recipient of service who is located outside India to the buyer in India, then intermediary would be subject of CGST and SGST. It was submitted that the exemption that has been carved out by virtue of said notification no. 20/2019 is baseless and calls for differential treatment between the service providers basis of the location of the ultimate recipients of the goods. The object sought to be achieved by such differential treatment is not clear and said notification no. 20/2019 also suffers from effect from being violative of Article 14.	With respect to the contention of the petitioner that there is conflict between Section 13 (2) and 13(8) (b) of IGST Act, 2017 resulting in absurdity in the law, it was submitted that there is no conflict between section 13(2) and13(8)(b) of the IGST Act, 2017 inasmuch as Section 13(2) provides that the place of supply shall be the location of the recipient unless the services falls within the ambit of specific sections from 13(3) to 13(13) of the IGST Act, 2017. However, in pursuance of Section 13(8)(b) of the IGST Act, 2017, the place of supply in case of the Intermediary services shall be the location of the supplier of services and on bare reading, it reveals that both the Sub Sections are clear in nature.

S. No.	Petitioner's submissions	Revenue submissions
10.	Reliance was placed on 139th parliament standing committee report, wherein it was recommended to either notify intermediary service under section 13(13) of IGST Act to prevent double taxation by treating place of effective use as place of supply or amend section 13(8) of the IGST Act, so as to exclude 'intermediary' services and made it subject to the default section 13(2) so that the benefit of export of services would be available. Relied upon the recommendation of TRU office memorandum dated 17th July 2019 acknowledging the representation made by the petitioner. Section 13(8)(b) is not in line with destination based principle as intended by GST legislation.	The 139th report on the impact of GST Act on exports presented before the Parliament on 19 December 2017 noted that service providers rendering services to overseas suppliers of goods earn commission in convertible foreign exchange, IGST is levied on such commission because the Government does not recognize their services as "exports" and such report of the Parliamentary Committee is an advisory in nature. The GST council is a constitutional body with representation of Union and State Governments and the GST Council alone has power to consider such views of the trade/ commerce/parliamentary committees and recommend changes. With respect to destination based tax, the exceptions have been provided in place of supply provisions. This exception are governed by revenue considerations are within legislative competence as the legislature is free to pick and choose the supply that it intends to tax and the manner in which it intends to tax. The departure from the default rule is legally permissible and tenable. There is no violation of Article 14

Gujarat High Court Observation / Decision: Article 246A was introduced providing for special provision with respect to GST. Article 246A begins with non-obstante clause stipulating that notwithstanding anything contained in Articles 246 and 254, the parliament subject to Clause 2, legislature of every State, have power to make laws with respect to GST imposed by the Union or by such State. Clause 2 of Article 246A empowers the parliament, who has exclusive power 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. Thus, the parliament has exclusive power under Article 246A to frame laws for inter State supply of goods or services. In that view of the matter, section 13(8)(b) of the IGST Act is framed by the parliament in consonance with the Article 246A(2) of the Constitution of India is required to be considered. The legislature has thought it fit to consider such intermediary services; the place of supply would be the location of the supplier of the services. Intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both. In such circumstances, revenue have issued Circular No. 20/2019 where exemption is granted from payment of IGST in respect of services provided by intermediary in case goods are supplied in India (it should be outside India). The legislature has thought it fit to consider the place of supply of services as place of person who provides such service in India. Similar situation also existed in service tax regime w.e.f. 1st October 2014.

The contention of the petitioner that it would amount to double taxation is also not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. If the services provided by intermediary is not taxed in India, which is a location of supply of service, then, providing such service by the intermediary located in India would be without payment of any tax and such services would not be liable to tax anywhere. In such circumstances, the contentions raised on behalf of the petitioner are not tenable in view of the Notification No.20/2019 issued by the Government of India, Ministry of Finance whereby Entry no.12AA is inserted to provide Nil rate of tax granting exemption from payment of IGST for service provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory i.e. India. Therefore the respondents have thought it fit to consider granting

exemption to the intermediary services viz. service provider when the movement of goods is outside India. In the premises, the provision of section 13(8)(b) cannot be considered as ultra vires or constitutional in any manner.

It would however, be open for the revenue to consider the representation made by the petitioner so as to redress its grievance in suitable manner and in consonance with the provisions of CGST and IGST Act.

My Comments: It is necessary to understand the concept of 'service'. ***Encyclopaedia Britannica,*** in its article on "services marketing", has explained the nature of service in the following words:

- A service is an act of labour or a performance that does not produce a tangible commodity and does not result in the customer's ownership of anything.
- Services can be distinguished from products because they are intangible, inseparable from the production process, variable, and perishable.
- Services are inseparable from their production because they are typically ***produced and consumed simultaneously.***
- Finally, services are perishable because they cannot be stored.

Production and consumption of service being simultaneously, recipient of service and consumer of service is no different person. Therefore, in the case of intermediary service provided by a person located in India to a person located outside India, service will be produced in India and consumed outside India. The benefit of services rendered to foreign client accrues outside India.

The Apex Court in ***All India Federation of Tax Practitioners - 2007 (7) S.T.R. 625 (S.C.)*** noticed that Economics holds the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs (para 4 of the Judgment). In Paras 6 and 7 the Hon'ble Court held as under:

> "6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.
>
> 7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax."

The service provider undertakes an activity through which he makes value addition to whatever thing he starts with. In absence of value addition through some activity, there cannot be any service. There is no difference between manufacture of marketable excisable goods and providing of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It follows that service tax being a tax on an activity is also destination based value added tax. Therefore, it can be derived that when the service is consumed outside India, the destination of service is outside India.

The Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non-commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. Thus, any services provided to a person located outside taxable territory should be considered as export of service.

However, in terms of section 13(8)(b) of IGST Act, intermediary service provided to a foreign client is deemed to be provided in India. The challenge to the said provision of intermediary service is dismissed. The Hon'ble Gujarat High Court ruled that provision contained in Section 13(8)(b) is intra vires the Constitution of India and valid.

The export-import trade of this country which is of great importance to the nation's economy, the Constituent Assembly may well have thought it necessary to exempt the supplies covered under clause (a) and (b) of Article 286(1).

In the light of above, let us examine Article 286 of the Constitution of India, which 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)."

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.

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.

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 authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place outside the State.

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 intermediary services provided to foreign client 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.

Prior to 101st Amendment to the Constitution, Article 286 provides that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State, (b) in the course of the import of the goods into or export of the goods out of the

territory of India. Therefore, the requirement of tax deduction at source from value of works contract involving supply of goods in course of inter-state trade which makes no provision for deduction and ascertainment of value of goods supplied in the course of inter-state trade during execution of works contract is held invalid and unconstitutional violating Article 286 of the Constitution. In Steel Authority of India Ltd. v. State of Orissa (2000) 3 SCC 200 related to Section 13AA of the Orissa Sales Tax Act, 1947, the Hon'ble Supreme Court while striking down section 13AA of the Orissa Sales Tax Act, observed as follows:

> "There can be no doubt, upon a plain interpretation of Section 13AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purpose of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate under Section 13AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by Section 13AA(1) to deposit towards the contractor's liability to State sales tax four per cent of such amount as he credits or pays to the contractor regardless of the fact that the value of the works contracts includes the value of inter- State sales, outside sales or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import."

In the premises of above, in the opinion of author, intermediary services provided to foreign client being export of service, provision contained in section 13(8)(b) have to be read down.

Judicial Judgments

Compiled by CA Rupal Shah

Savita Kapila vs. ACIT, [2020] 118 taxmann.com 46, Delhi HC, 16 July 2020

Intimation about death of an assessee to Income tax department

Facts of the case:

Information was received by AO that assessee Mr. Moinder Kapila had deposited certain amount in his bank account source of which was not explained. AO thus issued a notice to asseessee u/s. 148 seeking to reopen assessment at his last available address. Due to no response on that notice, a show-cause notice was issued which also did not get any response.

Pursuant to notice u/s. 133(6) to the banks, a telephone number was traced from the KYC records of the banks which belonged to Mrs. Savita Kapila, his daughter. She informed that her father had passed away in December 2018.

Proceedings were transferred to PAN (AWZPK7699E) that belonged to one of the legal heir of the deceased assessee – Ms. Savita Kapila [Petitioner] on 27th December, 2019 and on the same date assessment order was passed in her name and PAN, whereby an addition of ₹ 21 Lakhs was made resulting into demand of ₹ 14 Lakhs.

On Writ petition, the High Court observed as below:

Notice u/s. 148 was never issued to the petitioner during the period of limitation and simply proceedings were transferred to the PAN of the petitioner. Issuance of a notice u/s. 148 of the Act is the foundation for reopening of an assessment. Requirement of issuing notice to a correct person and not to a dead person is not merely procedural but a pre-condition for the notice to be valid in law. Sumit Balkrishna Gupta v. ACIT, Circle 16(2), Mumbai & Ors. [2019] 2 TMI 1209 - Bombay HC. Also, the assumption of jurisdiction qua the Petitioner is barred by limitation as per S. 149(1)(b).

S. 159 applies to a situation where proceedings are initiated/pending against the assessee when he is alive and after his death the legal representative steps into the shoes of the deceased assessee. Since that is not the present factual scenario, S. 159 does not apply.

S. 292BB would not be applicable as the petitioner had merely uploaded the death certificate of the deceased-assessee online and had in fact neither filed a return on behalf of the deceased-assessee nor submitted to the jurisdiction of the AO. Rajender Kumar Sehgal v. ITO 2018 (12) TMI 697 (Delhi).

Thus, in absence of a statutory provision, a duty cannot be cast upon legal representatives to intimate factum of death of assessee to the department.

Clean Wind Power Kurnool Private Limited vs. DCIT, APPL 13961/2020, Delhi HC, 8 July 2020

TDS Refund through TRACES portal

Facts of the case:

The petitioner had deposited ₹ 69.59 Lakhs as TDS out of which it was able to utilise ₹ 19.87 Lakhs and seeked refund of balance ₹ 49.71 Lakhs. The petitioner was unable to claim refund as due to technical glitches on the TRACES portal, ₹ 49.71 Lakhs was displayed against 'Remaining available balance' instead of displaying against 'Maximum refund allowed'.

The tickets raised by the Petitioner were closed without resolving the issue, which is in violation of S. 200A of the Income Tax Act, 1961 read with rule 31A(3A) of the Income Tax Rules and CBDT Circular No. 2/2011 dtd. 27 April 2011.

Consequently, the petitioner filed a Writ application seeking for the respondents to remove technical glitches from TRACES website so the petitioners refund application can be filed or accept the manual application and process the TDS refund.

During writ proceedings before the High Court:

Revenue submitted that in cases of refund of excess TDS deposited by the Assessees, manual scrutiny and verification of the TDS amount utilised was required before issue of the refund. Revenue submitted following procedure for claiming refund of TDS:

CPC-TDS has to introduce systemic changes in the online functionality of refund. Development of this functionality is in progress and will be implemented in due course. However, CPC-TDS has provided temporary arrangements which include following steps:

i. Deductor has to approach jurisdictional TDS Assessing Officer with the grievance.

ii. Jurisdictional TDS Assessing Officer will forward this grievance to CPC-TDS via email on aohelpdesk@tdscpc.gov.in or through post.

iii. CPC-TDS will accordingly guide the Assessing Officer to inform the deductor to tick the option "Refund due to Appeal effect" to place the refund request. By doing so deductor will able to place the refund request will zero amount as well and the refund request will not get rejected by the system. A request number will be generated.

iv. Deductor will inform this request number to the jurisdictional Assessing Officer and jurisdictional TDS Assessing Officer will confirm the same to CPC-TDS by sharing the refund request number. This refund request number is required by CPC-TDS for record purpose for future referencing.

v. This online refund request generated as per the abovementioned point no. iii is further forwarded to TDS Assessing Officer. Assessing Officer will have the right to enhance the refund amount from zero (0) to the amount available in the challan and also upload the relevant documents supporting the genuineness of the facts and reasons for refund.

vi. After approval from the competent Authority refund request will be processed in online manner."

It was concluded by the Courts that the petitioner to follow above procedures within two days and thereafter the department to grant refund within four weeks. Thus, disposing the appeal.

STUDENTS' CORNER

HOW TO EARN INTEREST ON THE LOAN THAT YOU BORROWED?: THE CONCEPT OF NEGATIVE INTEREST RATES

Compiled by Harsh Joshi

How to earn Interest on the Loan that you borrowed? : The concept of Negative Interest Rates

Interest as we know it, in simple words, means the cost of borrowing. For instance, an interest of 10% pa on a Loan amount of Rs 100 means you would have to pay 110 at the end of the year (Rs 10 being the interest component). But an interest of -10% pa means that bank would have to pay you Rs 10 on your loan of Rs 100

Although the very idea of negative interest rate seems absurd as a monetary policy tool but it had been adopted by the European Central Bank in order to combat slow economic growth and low inflation rates in 2014.

So how does this supposed work?

The Central Bank charges the Banks for not putting its money to use (i.e. not lending). This could also be considered as a charge by the Central Bank to hold deposits of Banks. In simple words, depositing money would cause a storage charge and not an interest income. This move would encourage Banks to lend more.

As for the banks, it would charge its customers to hold their money (in the form of deposits) and pay customers for lending money from them (although bank charges and processing fees cause the effective borrowing cost to be zero or a little higher for some banks).

This leads to an increase in spending and investment proving to be an effective monetary tool. Has it ever worked in practice?

The European Central Bank implemented negative interest rates and not only the inflation rates improved but also it lead to a 0.5% increase in economic growth in the Eurozone (i.e. $65B of GDP). Various other nations such as Switzerland, Denmark and Japan have followed the suit other than the Eurozone.

Threat to Negative Interest Rates

Cash can prove to be a real threat to negative interest rates because deposit holders would simply prefer to hold their cash in physical forms rather than pay a storage charge. This practice by bank customers could shrink bank profit margins.

Conclusion

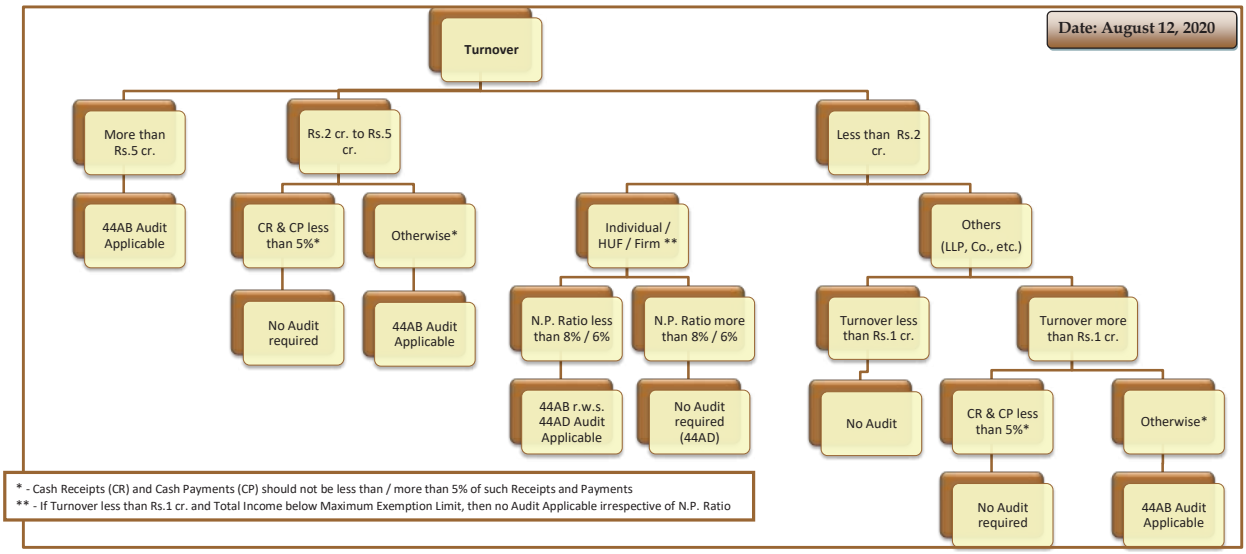
The concept of negative interest rate is unconventional and relatively new, but the very fact that various Asian and European banks are adopting them makes it pragmatic as a monetary tool.

However, many analysts firmly believe that such policies could have adverse consequences and could backfire if policymakers are not sufficiently cautious.

PRESENTATION ON TAX AUDIT APPLICABILITY - A.Y. 2020-21

by Khyati Vasani

Tax Audit Applicability for A.Y. 2020-21 for Business Income (Section 44AB vis-à-vis 44AD of the Income Tax Act, 1961):



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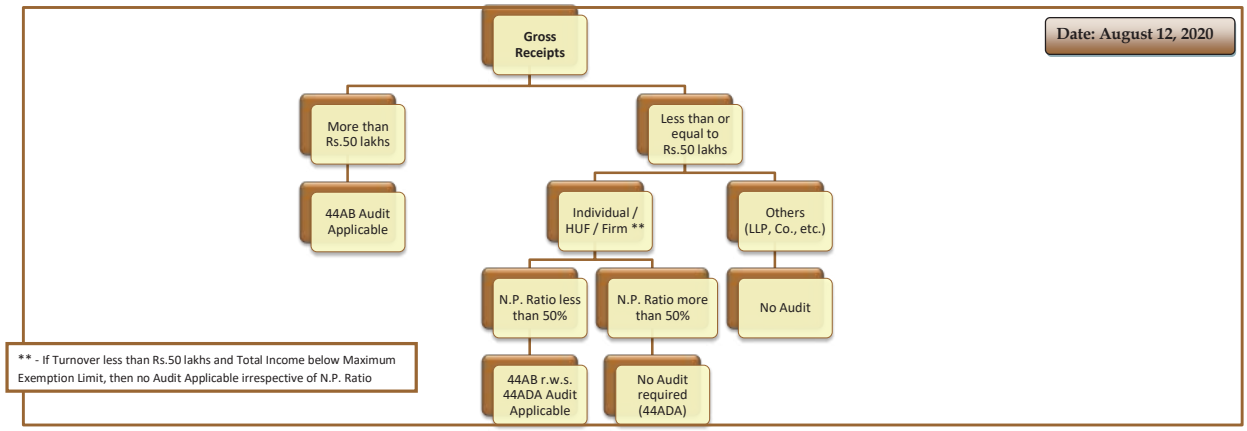
Chartered Accountants

Tax Audit Applicability for A.Y. 2020-21 for Professional Income (Section 44AB vis-à-vis 44ADA of the Income Tax Act, 1961):



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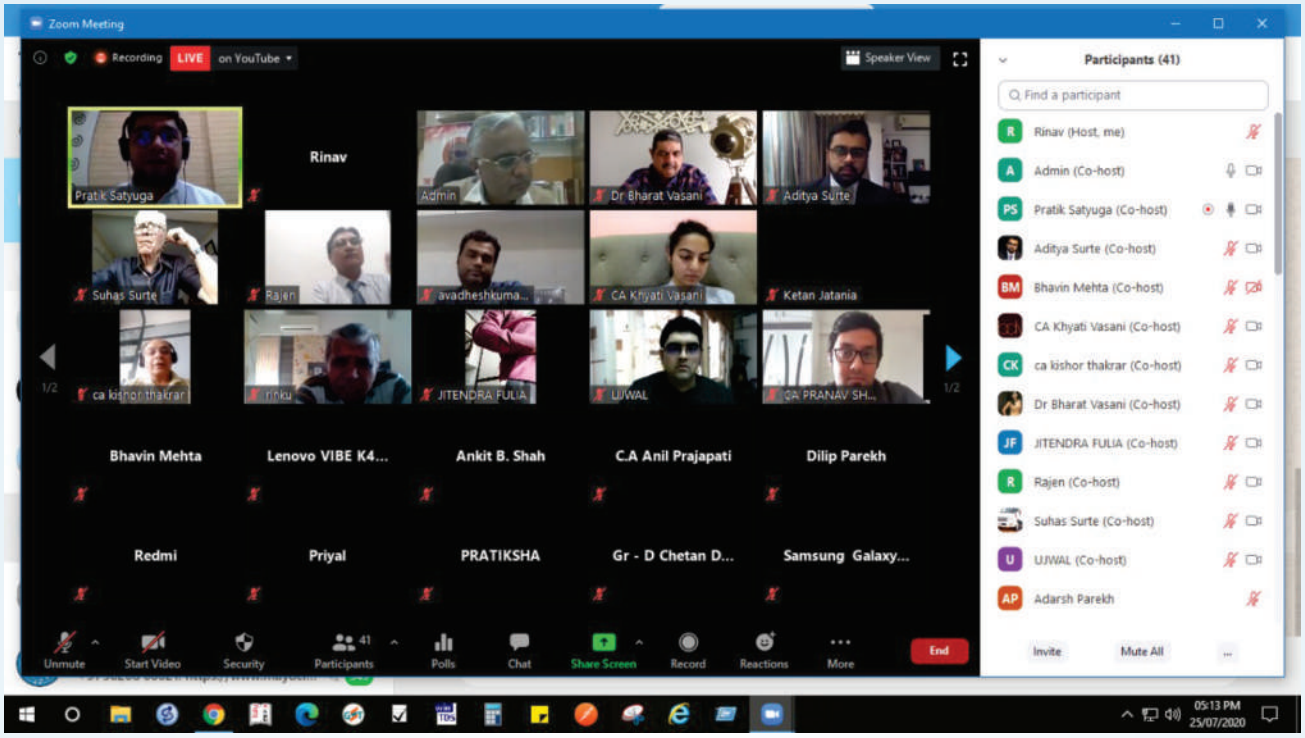

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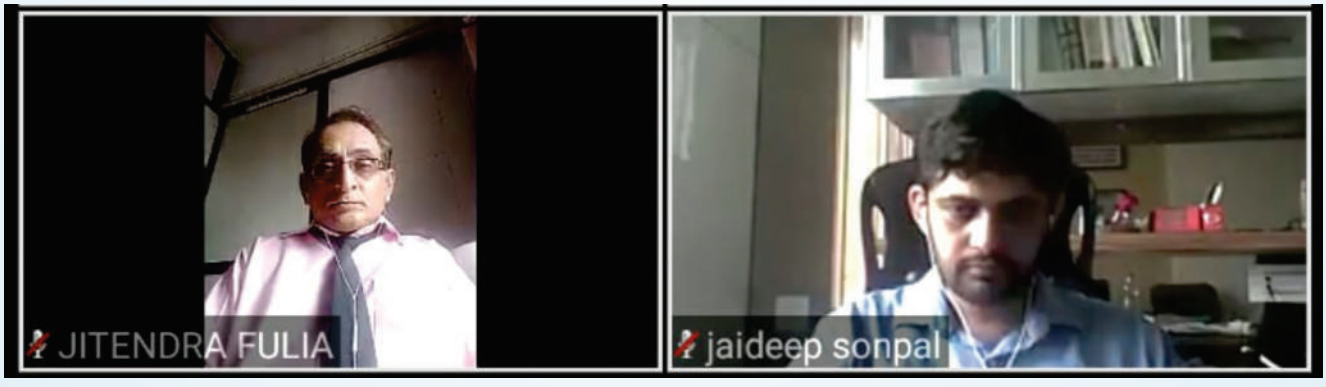

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