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Corporate Update

September | 2024

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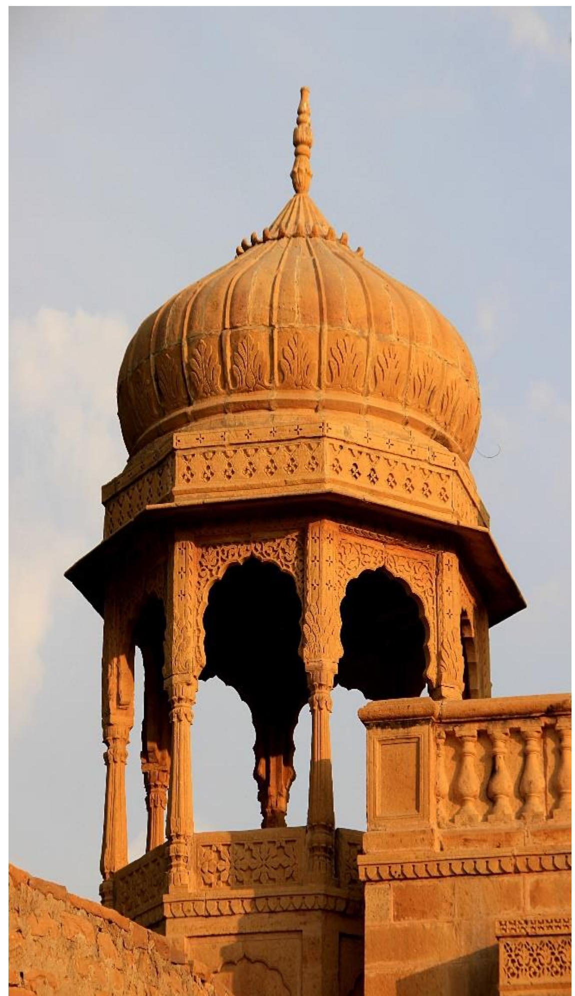

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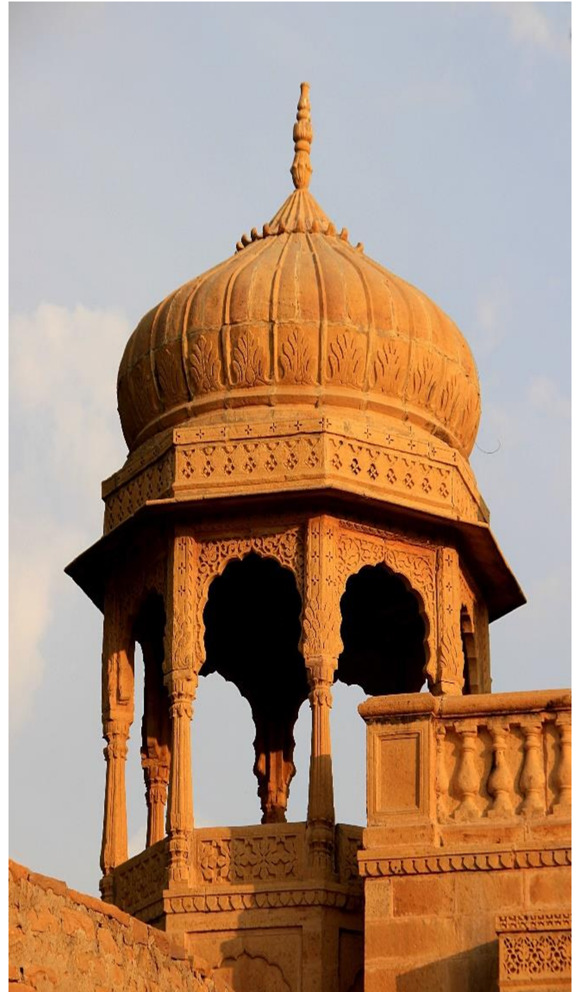

FOREWORD

Dear Reader,

This update contains summary of important judgements on international taxation and domestic taxation recently pronounced as well as important changes under GST Regulations as notified. It also contains a detailed Note on regulatory changes under Foreign Exchange Management Act, 1999.

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DIRECT TAXES

INTERNATIONAL TAXATION

Delhi High Court affirms eligibility of treaty benefits to Tiger Global in Flipkart Exit Deal

Tiger Global International III Holdings v AAR [2024] 165 taxmann.com 850 (Del)

In a significant decision, the High Court of Delhi has held that a Mauritian company shall be eligible for capital gains exemption under the tax treaty between India and Mauritius ('tax treaty'), wherein, investments made prior to April 1, 2017 are grandfathered. While holding so, the High Court overturned the ruling of the Authority for Advance Ruling (AAR), which had denied treaty benefits to certain Mauritian companies, on the premise that such companies lacked economic substance.

Brief Facts and decision of lower forums

Tiger Global International III Holdings, Mauritius as well as certain Mauritian entities (collectively referred to as taxpayers) operated as pooling vehicles for investments. Such entities held a Category – 1 Global Business License in Mauritius and had aggregated funds from more than 500 investors spread across various jurisdictions. These entities acquired the shares of Flipkart, Singapore during the period 2011 to 2015. The shares held by the taxpayers drew their value from the downstream investments in Flipkart India Private Limited. Thereafter, in pursuance of a takeover scheme with Walmart, the taxpayers sold their stake to Fit Holdings SARL, Luxembourg in 2018.

The taxpayers filed an application before the lower tax authorities, seeking a nil withholding tax rate, on account of the capital gain exemption under Article 13 of the tax treaty in respect of investments made prior to April 1, 2017.

The application was unsuccessful as the tax authorities denied treaty benefits to the taxpayers. Thereafter, the taxpayers approached the AAR and met with a similar fate. The AAR held that the entire arrangement was a preordained transaction which was created for tax avoidance purposes.

Decision of the High Court

Before the Hon'ble Delhi High Court, the arguments of both sides primarily hinged upon the following aspects:

- Commercial substance in the arrangement entered into by the taxpayers;
- The sacrosanctity of tax residency certificate as a proof of residence
- Applicability of general anti-avoidance rules and treaty override;
- Power of the revenue to lift the corporate veil;
- Applicability of treaty provisions on indirect transfer;
- Legitimacy of treaty shopping etc.

While deciding the issue, the High Court conducted a comprehensive analysis of earlier judicial pronouncements in *Azadi Bachao Andolan*, *Vodafone Holdings International BV* etc., report of the Shome Committee as well as authoritative texts of leading experts in the field of international tax law. The key observations of the High Court are summarized hereunder:

1. The economic substance of the taxpayers cannot be doubted, inasmuch as the same had registered as Category

I GBL and had aggregated funds from numerous investors spread across various jurisdictions. Furthermore, the quantum of investments, the period of holding and the expenditure incurred by such entities would dispel any assumption of lack of economic substance.

The High Court also played down the relevance of factors such as the oversight / supervisory role of holding companies, commonality of members of the Board of Directors etc. Adverse inferences can be drawn only in situations where there is a complete 'takeover' by the holding company in a manner that a subsidiary is deprived of administrative power.

2. On the legitimacy of treaty shopping, the High Court clarified that merely having an investment vehicle or a subsidiary in a tax friendly jurisdiction does not give rise to an adverse presumption of tax abuse. This aspect ought to be weighed in the context of the underlying objective of tax treaties, which are aimed at aiding global commerce, transcending trade barriers etc. Thus, investments routed through the popular Mauritius route (which accounts for a significant share of foreign direct investment) cannot be viewed with circumspect.

   Resorting to 'substance over form' and 'piercing of corporate veil' would be narrowly confined to situations where structures are designed to obtain illegitimate gains, perpetuate fraud, abuse the underlying objective of the tax treaty etc. Such aspersions would require a high standard of proof and the onus would lie squarely on the tax authorities.

3. The amendments to Article 13 and Article 27A (Limitation of Benefits) of the tax treaty were introduced only in 2016, much after the introduction of the provisions of General Anti Avoidance Rule (Chapter X-A) under the Indian domestic tax law. The contracting states (i.e. India and Mauritius) chose to incorporate grandfathering provisions in the tax treaty in respect of investments made prior to April 1, 2017. This demonstrates the conscious position of the contracting states not to deny treaty benefits to gains arising out of investments made prior to April 1, 2017.

   Therefore, it would be impermissible for the Indian tax authorities to invoke GAAR provisions to deny tax treaty benefits in such cases. It was also held that similar grandfathering provisions under Rule 10U(1)(d) (Rules framed under GAAR provisions) fortify the position that such investments were intended to be excluded from the tax net.

   The Hon'ble Court also held that the sanctity of bilateral conventions should not be subverted by unilateral amendments. In any case, where a tax treaty adopts a Limitation of Benefit clause, the same shall be determinative of claims of treaty abuse. In the instant case, the Court noted that the taxpayers had satisfied the necessary expenditure threshold stated under Article 27A. Upon satisfaction of such condition, a negative legal fiction applies, in terms of which, such entities would be deemed not to be sham or conduit entities.

4. The High Court held that the Tax Residence Certificate (TRC) issued by the Mauritian authorities was sacrosanct, especially in view of circular number 789

dated April 13, 2000. The said circular clarifies that a TRC shall be regarded as sufficient evidence for residence as well as beneficial ownership. This position draws support from the roll back of the amendment proposed by the Finance Bill, 2013 which diluted the sufficiency of TRC as a proof of residency.

The revenue had premised the argument of beneficial ownership on an incorrect fact. Nevertheless, the High Court did affirm the 'forwarding theory' of understanding beneficial ownership. In terms of the same, a conduit would have beneficial ownership if it was entitled to avail income itself and was not contractually obliged to 'forward' that income to any other entity.

Conclusion

Based on these pertinent observations, the High Court held that the investments made by the taxpayers stood grandfathered and therefore, not liable to capital gains tax.

Here, it is worth mentioning that the India and Mauritius have signed a protocol on March 7, 2024 to meet the minimum standards set under the Base Erosion and Profit Sharing (BEPS) project. The protocol, which is yet to be ratified, shall introduce a revised preamble and Principal Purpose Test to counter treaty abuse.

Also, on the issue of taxation of indirect transfers (sale of shares held outside India) qua tax treaties, the High Court seems to have rested its decision on the applicability of grandfathering provisions to the facts of the case. It is noteworthy that the Andhra Pradesh High Court in *Sanofi Pasteur SA* held that the residual provisions of the Articles dealing with capital gains tax do not grant the source state (India) any right to tax, gains from indirect transfers, irrespective of existence of grandfathering provisions.

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Interest paid under a loan agreement guaranteed by Hermes-Deckung is exempt from Indian Tax, under the India-Germany tax treaty

[Moser Baer India Ltd [TS-697-HC-2024(DEL)]

The Delhi High Court has held that interest paid by an Indian company to a foreign bank under a loan agreement which was guaranteed by Hermes-Deckung is not taxable under Article 11(3)(b) of the Double Taxation Avoidance Agreement between India and Germany ('DTAA'). As such, the Indian payer was not liable to withhold tax on the same under Section 195 of the Act.

The taxpayer entered into a loan agreement with a consortium of German banks for financing and extending of credit facilities to the extent of 85% of the exports contract value. The agreement placed an obligation upon the taxpayer to repay the lenders and the lender's claim was guaranteed by Hermes-Deckung on behalf of Non-Resident lenders. While remitting interest payments under the loan agreement to the German Banks, the taxpayer did not withhold any tax, considering the interest to be exempt from taxation in India based on Article 11(3)(b) of the DTAA. The loan agreement placed a corresponding obligation on the tax payer to repay the lenders and it was the lenders' claims which were guaranteed by Hermes-Deckung.

The tax officer however asserted that clause 3(b) of Article 11 of the DTAA would be inapplicable in this case since the payment of interest was essentially in the nature of consideration of an insurance facility granted to the tax payer. Accordingly, interest payment was liable for tax deduction in terms of section 195 of the Act.

The tax officer's view was upheld by both the CIT(A) and the Tax Tribunal. The matter travelled to the High Court of Delhi, which made the following observations:

- While interpreting paragraph 3(b) of Article 11 it was observed that such Article clearly exempted all interest payments from Indian tax liabilities, provided it could be characterized as interest paid in consideration of a loan duly guaranteed by Hermes-Deckung.

- The High Court also took note of the similar provisions under DTAAs between India and other countries. It was observed that such provision under other DTAAs also use the terms "guaranteed" or "insured" in addition to "loan made," unlike the provision in clause 3(b) of Article 11 of the DTAA, which is only confined to interest on loans guaranteed by Hermes-Deckung.

- Considering the obligations undertaken by Hermes-Deckung under Article 14 of the Loan Agreement, the High Court concluded that the payment could only be characterized as interest paid in consideration of a loan and did not possess the characteristics of insurance.

- In reaching this conclusion, the Court relied on the definition of 'Insurance' under Law Lexicons and observed that insurance is concerned with indemnifying against risk, loss or liability that may arise on account of a specified contingency.

- Considering the loan agreement vis. a vis. the meaning of insurance, it was stated that the impugned agreement was not intended to provide risk coverage to the taxpayer for a default event or any other contingency typical of an insurance contract. Instead, it focused solely on the appellant's ability to repay the loans and adhere to the repayment conditions outlined in the agreement.

- The mere fact that the export transactions were subject to a Hermes-Deckung guarantee provided to the lenders, would not detract from the liability being construed as interest per se or justify the same being recharacterized as insurance.

In view of the aforesaid, it was held by the High Court that the interest payment by the tax payer under the loan agreement would be exempt from Indian tax liabilities under Article 11(3)(b) of the DTAA.

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DOMESTIC TAXATION

Expenditure incurred after receipt of letter of award but before the date of

commencement of the project is also allowable as a deduction

DCIT v. Montecarlo Construction Ltd. (TS-721-ITAT-2024) (Ahd. ITAT)

Recently, the Ahmedabad Bench of Tax Tribunal ('Tax Tribunal') has held that expenditure incurred for a project after receipt of the letter of award but before the date of commencement of the project is allowable as a deduction under Section 37(1) of the Income-tax Act, 1961 in the year in which such expenditure is incurred.

Brief facts of the case are that the Assessee is a domestic private limited company, engaged in the business of development of infrastructure facilities namely roads, bridges, irrigation facilities etc. The National Highway Authority of India (NHAI) had awarded the Assessee a project for four laning of Singhara to Binjhal section of highway in Odisha State, India by letter of award dated March 29, 2017. The appointed date (i.e., the date of commencement of the project) for such project was September 28, 2018.

In the return filed for Assessment Year (AY) 2018-19, the Assessee had claimed deduction of certain expenditure of approx. INR 373 million, which had been incurred after the date of letter of award but before the appointed date, to avoid any losses on delay in completion of such project. Further, as the assessee had not received any income for such project in AY 2018-19, it did not recognize any revenue for such project.

The tax officer disallowed the aforesaid claim of expenditure as the Assessee had not recognized any income of the project in return filed for AY 2018-19 and held that deduction for such expenditure is allowed in the year in which corresponding income is offered to tax. On appeal before Commissioner (Appeals), the aforesaid disallowance made by the tax officer was deleted and it was held that such expenditure had been voluntarily expended for smooth functioning of the business and was an allowable deduction in the year in which such expenditure had been incurred.

In appeal before the Tax Tribunal, the Tribunal observed that the business of the Assessee had commenced in earlier years and the Assessee was already undertaking various projects and thus, the expenditure claimed by the Assessee was in relation to the business operation of the Assessee. Accordingly, the Tribunal held that the expenditure incurred by the Assessee is neither a capital expenditure nor is prohibited under Section 37 of Income-tax Act, 1961 and ought to be allowed as a deduction in year in which it has been incurred. Further, the Tribunal held that deduction of expenditure incurred cannot be denied on the ground that no revenue had been recognized. Also, the allowability of expenditure is to be seen in light of the existence of commercial expediency behind incurring such expenditure.

Thus, the Tribunal allowed the Assessee deduction of expenditure incurred between date of letter of award and appointed date under Section 37 of the Income-tax Act, 1961 as it had been incurred in relation to the business of the Assessee and was not in the nature of capital expenditure.

Another issue raised before the Tribunal was on disallowance of deduction claimed under Section 35AD in respect of expenditure incurred by the Assessee for Gorakhpur Road project. The contract for such a project had been awarded to a Joint Venture (JV) of the Assessee with a separate entity i.e., Backbone Enterprises Ltd namely,

Montecarlo Ltd - Backbone Enterprises Ltd. Gorakhpur JV.

Brief facts are that the aforesaid JV had been formed for acquiring contracts from Government of India (Government) and for leveraging numerous benefits such as local expertise, experience, pooling of resources, increase qualification criteria, share risks, costs and technology etc. Further, the JV had not carried out any work for the aforesaid project and the Assessee had executed the entire project and thus, claimed deduction under Section 35AD. The Assessee raised bills on the JV for the work performed and thereafter, the JV raised bills on the Government. Any payment received by the JV from the Government was transferred to the Assessee.

The Tax Officer had disallowed deduction under Section 35AD claimed by the Assessee alleging that the project had been awarded to the JV and thus, the Assessee was not eligible to claim deduction under Section 35AD. The Commissioner (Appeals) had deleted the aforesaid disallowance made by the Tax Officer.

On appeal before the Tax Tribunal, the Tribunal observed that the JV had been formed merely as a nominal pass-through entity and did not execute the project by itself. The entire work for the project had been effectively carried out by the Assessee and the JV had not claimed any deduction under Section 35AD of Income-tax Act, 1961. Further, the Tribunal placing reliance on certain judicial pronouncements held that deduction under Section 35AD cannot be denied to the Assessee on the ground that the project had not been awarded to the Assessee.

Thus, the Tribunal allowed deduction under Section 35AD to the Assessee and the Appeal filed by the Assessee was allowed.

MPCO's Critical Comments:

1) ***The Tribunal seems to have followed in Para 19 of its judgment the principle of Resjudicata and the Rule of Consistency. Generally, in Tax matters, the principle of Resjudicata does not apply. But, however, the courts have applied the Rule of Consistency, a derivative of Principle of Resjudicata, based on principle of natural justice and keeping in view not to reopen the same questions in subsequent years of assessment.***

2) ***It is felt that the Revenue may appeal against this judgment, in view of the legal submissions made by it before the Tribunal. As the judgment was rendered on September 27, 2024 the Revenue will have ample time before it for filing an appeal.***

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Ex-Gratia compensation made to an employee without being under an obligation on the employer falls outside the scope of section 17(3) (i) of the Income-tax Act, 1961 (the Act)

Ashok Raghunathrao Kulkarni [2024 165 taxmann.com 680 (Pune Tribunal)]

ITAT Pune held that since ex-gratia compensation was voluntary in nature without being an obligation on the part of the employer to pay further amount in terms of any service rule, it would not amount as compensation in terms of section 17(3)(i) of the Act.

On the facts of the case, due to United States Food and Drug Administration ('USFDA') norms, the plant of Pfizer Healthcare India Private Limited, Aurangabad ('company') had been closed down and on account of loss of Income/ service and the company had given certain payments to its permanent employees, depending on the balance years of the service left on their service records.

During the year, the assessee received compensation and other dues which included Ex-Gratia, incentives, EL encashment, Notice Pay, etc. The assessee has shown these amounts as salary received in advance and claimed tax relief u/s 89 of the Act, in the tax return as filed for the assessment year 2019-20 on the understanding that the payments were voluntary in nature as the employer was not under the obligation to compensate the Individuals.

The Tax return filed by the assessee was selected for compulsory scrutiny on the issue of Refund claim and Relief claimed u/s 89 (Arrears of Salary or Advance Salary).

During the course of the assessment proceedings, the Assessing officer (AO) noted that the advance amounts also included the amount of Ex Gratia, in respect of which the assessee had claimed the tax relief u/s 89. The AO disallowed such tax relief and treated receipt as an additional payment. During the course of the proceedings before the AO, the Assessee withdrew the claim made u/s 89 of the Act and requested the AO to consider the receipts as Capital receipts as they were received in lieu of premature retirement, loss of employment and permanent loss of source of Income. The AO disregarded all the claims made by the Assessee and held the receipt of Ex Gratia, chargeable to tax as Profits in lieu of Salary u/s 17(3) of the Act.

The CIT(A)/ NFAC did not agree with the contention of the assessee and upheld the action of the AO.

On appeal before, ITAT, the Hon'ble ITAT relying on the judgement of Hon'ble Calcutta High Court in the case of CIT V. Ajit Kumar Bose, and various decisions relied on by the assessee held that the payment of Ex-Gratia compensation received by the assessee was voluntary in nature without there being any obligation on the part of the employer to pay further amounts to the assessee. Therefore, the Tribunal held that such payments would not amount to compensation in terms of section 17(3)(i) of the Act, hence directed the AO to delete the addition.

The appeal filed by the assessee was allowed.

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Central Board of Direct Taxes (CBDT) authorizes income tax authorities to admit applications for claim of refund/ carry forward and set off of losses on condonation of delay in filing return of income

Filing of tax return within the prescribed due date is necessary to claim carry forward of losses. Further, the refunds due to taxpayer can be claimed only through filing of tax return. Once the statutory time limit under section 139 to file a return expires, no tax return can be filed to make a claim for refund or carry forward and set off of losses.

However, the CBDT is vested with a power under section 119 to condone delay in filing tax return to avoid genuine hardship. The CBDT has issued circulars from time to time to provide guidelines on the same and prescribing the monetary limits of claim for delegating power to condone the delay in filing the return and claim for exemption, deduction or refund.

The CBDT has now issued Circular No.11/2024 dated October 1, 2024 in supersession of all earlier Instructions/Circulars/ Guidelines to deal with the applications for condonation of delay in filing returns claiming refund and returns claiming carry forward of loss and set off thereof under section 119(2)(b). The circular contains comprehensive guidelines on the conditions and procedure to be followed for deciding the aforesaid matters.

The powers of acceptance/ rejection of such applications/ claims will be as under:

Amount of claim for any one assessment year	Authority
Not more than Rs.1 crore [ie less than Rs. 10 million]	The Principal Commissioners of Income Tax/ Commissioner of Income Tax (Pr.CsIT/CsIT)
Exceeding Rs.1 crore but less than Rs.3 crore [ie exceeding Rs. 10 million but less than Rs. 30 million]	The Chief Commissioners of Income Tax (CCsIT)
Exceeding Rs.3 crore [ie exceeding Rs. 30 million]	The Principal Chief Commissioners of Income Tax (Pr.CCsIT)

Now, all the powers of condonation of delay have been delegated by the CBDT to the Income Tax Authorities and henceforth, no application will need to be filed to the CBDT for the condonation of delay.

The delegation of above powers shall also cover all such applications/ claims of condonation of delay under section 119(2)(b) of the Act which are pending as on the date of issue of the captioned Circular.

It is also provided that the Commissioner of Income-tax, Central Processing Centre (CPC), Bengaluru shall be vested with the powers for acceptance/rejection of petitions under section 119(2)(b) of the Act seeking condonation of delay in verifying the return of income by sending the ITR-V to centralized processing Cell (CPC), Bengaluru within the prescribed time limit.

No condonation application shall be entertained beyond 5 years from the end of the assessment year for which the

application claim is made. This limit is applicable to all the authorities having powers to condone the delay and is applicable for applications filed on or after October 1, 2024. If the refund claim has arisen consequent to a Court order, the period for which any such proceedings were pending before any Court of Law shall be ignored while calculating the said period of 5 years, provided such application is filed within 6 months from the end of the month in which the Court order was issued or the end of the financial year whichever is later.

The power of acceptance/rejection of the application within the monetary limits delegated to the authorities shall be subject to the conditions that assessee was prevented by reasonable cause from filing the return of income within the due date and that the case is of genuine hardship on merits.

Also, the authority dealing with the case shall be empowered to direct the jurisdictional AO to make necessary inquiries in accordance with the provisions of the Act.

A condonation application should be disposed-off within 6 months from the end of the month in which the application is received by the competent authority.

The CBDT has reserved the power to examine any grievance arising out of an order passed or not passed by the authorities mentioned in the table above and issue suitable direction to them for proper implementation of this Circular.

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INDIRECT TAXES

GOODS & SERVICES TAX

Supreme Court unlocks ITC w.r.t. Immovable Property

Chief Commissioner of CGST & Ors vs M/s Safari Retreats Pvt Ltd & Ors., [2024 SCC Online SC 2691]

Hon'ble Supreme Court recently in the above judgment delivered the most awaited decision on availability of input tax credit (ITC) on the goods/services/works contract services consumed and used during the construction of certain immovable property.

By virtue of this judgment, the Supreme Court disposed of the objections taken by the assessees to Section 17(5)(c) and 17(5)(d) of the CGST Act, 2017, which contained certain restrictions for availing of Input Tax Credit under CGST Act, 2017.

The assessee in these batch matters have claimed a number of alternative reliefs, as under:

a. Section 17(5)(c) and 17(5)(d) of the Act must be read down so as to permit the assessees to avail of Input Tax Credit (ITC) as claimed by them;
b. The assesses contended that due to the restrictions imposed by Section 17(5)(c) and Section 17(5)(d) of the Act, they are unable to avail the ITC.
c. These two Sections are violative of Article 14, 19(1)(g) and 300A of the Constitutions of India.

Before considering the details of the above judgment, it is considered relevant to know the provisions as contained in Sections 17(5)(c) and 17(5)(d) of the Act.

Section 17(5)(c) provides as under:
works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

Section 17(5)(d) provides as under:
goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

The assessee claimed that in the supply of goods and services/works contracts, resulting in creation of immovable property, they are required to pay GST on the various input components but they are denied ITC when the building that is constructed using the taxable inputs is let out on which GST is payable.

The Supreme Court considered the various attacks mounted by the assessees in regard to the denial of ITC to them by virtue of the restrictions as contained in Sections 17(5)(c) and 17(5)(d) of the Act. In this regard, the SC considered the judgment of the Orissa HC relating to the claims of ITC of one of the assessees.

In this Note, we would, therefore, be analysing the SC judgment and the relevant Orissa HC judgment.

A. Brief Facts:

- M/s Safari Retreats Private Limited (" the company" / "Safari") is engaged in the construction of a shopping mall for the purpose of letting out premises in the malls to different tenants. The goods and services procured for construction of the mall are taxable under the CGST Act. It has accumulated ITC of more than Rs. 34 crores on goods or services procured for construction of the shopping mall.

  Since, the letting out of units in the shopping mall attracts GST on rent received by the company, therefore, the company was desirous of availing the Input Tax Credit (ITC) accumulated against the rental income received by it upon letting out the mall premises. However, the same was disallowed by the concerned authorities because of the exception carved out by Section 17(5)(d) pf the Act.

- The Company filed a writ petition before the High Court of Orissa challenging the denial of ITC based on Section 17(5)(d) of the CGST Act, which states that ITC is not available for goods and services received for the construction of an immovable property on one's own account. The petitioners argued that this provision should not apply to properties intended for letting out, as it leads to double taxation and breaks the tax chain, which is contrary to the objectives of the GST regime.

  A prayer in the alternative was made that even if the restriction of ITC under Section 17(5)(d) is applicable to the construction of immovable property intended for letting out, then Section 17(5)(d) is violative of Articles 14 and 19 (1)(g) of the Constitution of India, and that the said provisions must be read down so as to allow the assessees to avail of the ITC.

B. Judgement of High Court of Orissa:

- Hon'ble Orissa High Court held that the narrow interpretation of Section 17(5)(d) by the revenue authorities frustrates the objective of the GST Act. It is noted that the provision should be read down to exclude properties intended for letting out from its ambit. The court emphasized that the purpose of ITC is to prevent the cascading effect of taxes and to reduce the cost burden on the final consumer.

- In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST.

- The court granted the petitioners' prayer to the extent of reading down Section 17(5)(d) to allow ITC for properties intended for letting out. However, it did not declare the provision ultra vires. The writ petition was allowed to this extent.

C. Issues Involved:

The Department appealed to the Supreme Court against the judgment of the Orissa High Court.

The questions of law for consideration before The Hon'ble Supreme Court were:

i. Constitutional validity of Section 17(5)(c), Section 17(5)(d) and Section 16(4) of CGST Act;

ii. Whether the definition of "Plant and machinery" given in explanation to Section 17 applies to the expression "plant or machinery" as mentioned in Section 17(5)(d);

iii. What is the meaning of the word "Plant" as used in Section 17(5)(d)?

D. Findings of Supreme Court

- **Constitutional Validity of Clause (c) and (d) of Section 17(5):** Hon'ble Supreme Court upheld the constitutional validity of Section 17(5)(c) and Section 17(5)(d) of CGST Act and observed that its plain interpretation does not lead to any ambiguity or discrimination. Thus, the Hon'ble Supreme Court differed from the High Court and refused to read down the provisions of Clause (c) and (d).

- **"Plant and machinery" [Clause (c)] v/s "Plant or Machinery" [Clause (d)]:** Basis above, the Court further held that Clause (c) and (d) do not altogether exclude every class of immovable property from the applicability of ITC. The Court went on to hold that the term "Plant and Machinery" used in Clause (c) is distinct from the term "Plant or Machinery" used in Clause (d). While the Explanation to Section 17 defines "Plant and Machinery", which specifically excludes land and building, the term "Plant or Machinery" has not been defined in the Act.

  The Court, thus, held that the exclusion of works contract services used for construction services under Section 17(5)(c) does not *per se* defeat the object of the Act and hence, ITC of the same is not admissible.

However, as a major relief, the Court held that the expression ***"Immovable Property other than Plant or Machinery"*** as provided in Clause (d) provides that there could be a "Plant" that is an "Immovable property", which is not defined in the Act and hence, its ordinary meaning in commercial terms will have to be attached to it.

- **Interpretation of term "Plant" vide Functionality Test:** The Court held that to give plain interpretation to clause (d), the word "Plant" will have to be interpreted by taking recourse to "Functionality Test". As per Functionality test, if it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirement, it will qualify to be treated as a plant as laid down in Section 17(5)(d) of the Act and, therefore, would be eligible for the ITC.

  In other words, if the building serves as an essential tool of trade with which business is carried on and does not merely serve as a set-up in which business is carried on, it will qualify as "Plant".

The SC laid down the following ratio:

a. ***The expression "plant or machinery" used in Section 17(5)(d) cannot be given the same meaning as the expression "plant and machinery" defined by the explanation to Section 17;***

b. ***The question whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression "plant or machinery" used in Section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business. If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5). Functionality test will have to be applied to decide to each case whether a building is a plant.***

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Key changes notified by CBIC to give effect to the recommendations made in the 54th GST Council Meeting

Changes in GST rates of Goods:

- **Extruded or expanded products, savoury or salted:** GST rate has been reduced on extruded or expanded products, savoury or salted (other than un-fried or un-cooked snack pellets manufactured through process of extrusion) covered under HSN 19059030 from 18% to 12%.

- **Car seats:** GST rate has been increased from 18% to 28% on supply of car seats covered under HSN 94012000.

  [Notification No. 05/2024- Integrated Tax (Rate) dated October 8, 2024 – applicable w.e.f. October 10, 2024]

Changes in Reverse Charge Mechanism:

- **RCM on Supply of Metal scrap:** The supply of scrap of Metal by an unregistered supplier to a registered recipient would be subject to GST under Reverse charge mechanism (RCM).

  [Notification No. 06/2024- Integrated Tax (Rate) dated October 8, 2024 - applicable w.e.f. October 10, 2024]

- **RCM on Renting of Commercial property:** It has been notified that if an unregistered person lets out a property (other than residential dwelling) to a registered person, the said registered person would now be required to pay GST under RCM.
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  [Notification No. 09/2024- Integrated Tax (Rate) dated October 8, 2024 - applicable w.e.f. October 10, 2024]

Changes in GST rates of Services:

- **Research & Development (R&D) Services:** Exemption has been granted on supply of R&D services by a Government Entity, a Research Association, University, College or other Institution, notified under clauses (ii) or (iii) of sub-section (1) of section 35 of the Income Tax Act, 1961, against consideration received in the form of Grants.

  [Notification No. 08/2024- Integrated Tax (Rate) dated October 8, 2024 - applicable w.e.f. October 10, 2024]

Circular, Notification and Other Changes

Clarification in respect of advertising services provided to foreign client

Foreign Client enters into a comprehensive agreement with the Indian advertisement company encompassing all the issues related to advertising services ranging from media planning to procuring media space, etc. for displaying/printing of advertisement.

It has been clarified that since, the advertising company is rendering services to the foreign client on **principal-to-principal basis,** therefore it does not fulfil the criteria of "intermediary" under Section 2(13) of the IGST Act. Thus, **the same cannot be considered as "intermediary"** and accordingly, **the place of supply in the instant matter cannot be linked with the location of supplier of services in terms of section 13(8)(b) of the IGST Act.**

Consequently, the place of supply of such services shall be location of the said foreign client i.e. outside India as per Section 13(2) of IGST Act and the said service can be considered to be "Export of Services", subject to the fulfilment of conditions mentioned in Section 2(6) of IGST Act.

[Circular No. 230/24/2024-GST dated September 10, 2024]

Clarification on Availability of Input Tax Credit in respect of demo vehicle

Demo Vehicles used by authorised dealers for providing trial run and for demonstrating features of the vehicle to the potential buyers.

As per dealership norms, these vehicles may be required to be held by the authorized dealers as demo vehicle for certain mandatory period and may, thereafter, be sold by the dealer at **a written down value and applicable tax is payable at that point of time**.

Since, these vehicles promote sale of similar type of motor vehicles, they can be considered to be used for making '**further supply of such motor vehicles**. Accordingly, input tax credit in respect of demo vehicles is not blocked under Section 17(5)(a) of CGST Act.

Further, it has been clarified that, ITC shall also be available in case where the said demo vehicles have been capitalised in books of accounts. However, proportionate ITC shall have to be reversed in case of sale of such demo vehicles before 5 years from the date of invoice.

However, if authorised dealer is merely providing marketing and/or facilitation services to the manufacturer and is not making the supply of motor vehicles on his own account. Therefore, the said demo vehicle cannot be said to be used by authorised dealer for making further supply of such motor vehicles.

Accordingly, in such cases, ITC in respect of such demo vehicle would be blocked under Section 17(5)(a)(A) of CGST Act.

[Circular No.231/24/2024-GST, dated September 10, 2024]

Clarification on Place of supply of data hosting services provided by service providers located in India to cloud computing services providers located outside India

The cloud computing service providers enter into a contract with data hosting service providers to use their data centres for hosting cloud computing services.

It has been clarified that data hosting service provider provides data hosting services to the cloud computing service provider on **principal-to-principal basis** on his own account and is not acting as a broker or agent for facilitating supply of service between cloud computing service providers and their end users/consumers. **Thus, the said services cannot be considered as intermediary services and hence, the place of supply of the same cannot be determined as per Section 13(8)(b) of IGST Act**

Accordingly, the place of supply of such services provided to **overseas cloud computing entity** shall be location of the said overseas entity i.e. outside India as per Section 13(2) of IGST Act and the said services can be considered as **"Export of Services"**, subject to the fulfilment of the other conditions mentioned in section 2(6) of IGST Act.

[Circular No. 232/26/2024-GST, dated September 10, 2024]

Coming into force of various provisions as contained in the Finance (No.2) Act, 2024 in respect of GST provisions

The Government of India has notified the coming into effect of the said provisions as under:

a. The provisions of Sections 118, 142, 148 and 150 shall come into force with effect from September 27, 2024;
b. The provisions of Sections 114 to 117, 119 to 141, 143 to 147, 149 and 151 to

157 shall come into force with effect from November 1, 2024.

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REGULATORY

FOREIGN EXCHANGE MANAGEMENT ACT

Substitution of the Foreign Exchange Compounding Rules, 2024

The Government of India has recently notified Foreign Exchange (Compounding Proceedings) Rules, 2024 **("New Rules")** in supersession of the Foreign Exchange (Compounding Proceedings) Rules, 2000 **("Erstwhile Rules")**. The Reserve Bank of India **("RBI")** has also issued Directions - Compounding of Contraventions under FEMA, 1999 **('Directions')** and has updated the Frequently Asked Questions in this regard.

While most of the provisions have remained the same, the key changes introduced vide the New Rules and Directions are enumerated below:

a. *Enhanced monetary thresholds for contraventions compoundable by RBI Officers*

The monetary limits for determining the powers of RBI officers to compound any contravention under FEMA have been enhanced. The new Rules, prescribe the following limits:

Rank of RBI Officer	Amount of sum involved in such contravention	
	Under Erstwhile Rules	Under New Rules
An officer not below the rank of the Assistant General Manager	Upto INR 10 Lakhs	Upto INR 60 Lakhs
An officer not below the rank of the Deputy General Manager	Upto INR 40 Lakhs	Upto INR 2.5 Crores
An officer not below the rank of the General Manager	Upto INR 1 Crore	Upto INR 5 Crores
An officer not below the rank of the Chief General Manager	Above INR 1 Crore	Above INR 5 Crores

The monetary limits determining the powers of compounding authorities of the Directorate of Enforcement (ED) to compound the contraventions under Section 3(a) of FEMA however continues to remain unchanged.

b. *Increase in application fees*

The compounding application filing fee has been increased from the earlier INR 5,000/- to INR 10,000/- plus applicable GST.

c. *Mode of payment of application fee and compounding amount*

Earlier the payment of compounding application fee and compounding amount as levied by the authority were required to be paid only by way of demand draft. However, under the New

Rules, such payments have been allowed through demand draft or National Electronic Fund Transfer (NEFT), or Real Time Gross Settlement (RTGS), or such other permissible electronic or online modes of payment, in favour of the compounding authority.

d. *Non-Compoundable Cases*

Under Rule 9 of the New Rules, the cases which cannot be compounded have been specifically listed out as below:

1) where the amount involved is not quantifiable; or
2) where the provisions of section 37A of the Act are applicable; or
3) where the Directorate of Enforcement is of the view that the proceeding relates to a serious contravention suspected of money-laundering, terror financing or affecting the sovereignty and integrity of the nation, the compounding authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13; or
4) where the Adjudicating Authority has already passed an order imposing penalty under section 13 of the Act; or
5) where the compounding authority is of the view that the contravention involved requires further investigation by the Directorate of Enforcement to ascertain the amount of contravention under section 13 of the Act.

e. *Powers of Compounding Authority*

Apart from the powers to call for further information, records or any other documents conferred upon the compounding authority under Erstwhile Rules, New Rules also empower the authority to require the applicant to take any necessary actions with respect to transactions involved in the contravention.

f. *Revision in compounding application format*

Certain changes in compounding application form and accompanying annexures have been introduced in the new Rules keeping in mind, the introduction of electronic payment facility for payment of compounding fees etc.

g. *Option for online filing of compounding application*

Earlier, the application for compounding any contravention was submitted physically in the prescribed form to RBI, Exchange Control Department, Central Office, Mumbai.

Vide the Directions, RBI has introduced a new online platform "PRAVAAH Portal" providing an option to the applicant to submit the compounding application, along with the relevant documents, through this online RBI portal.

h. *Pending Proceedings*

Any compounding application pending before the compounding authority, on the date of commencement of the New Rules shall be governed by the Erstwhile Rules superseded herein

(Source: Notification No. G.S.R. 566 (E) dated September 12, 2024 issued by the Department of Economic Affairs, A.P. (DIR Series) Circular. No.17/2024-25 dated October 1, 2024 issued by Reserve Bank of India and Frequently Asked Questions on Compounding of Contraventions under FEMA, 1999 updated as on October 1, 2024)

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