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Dear Readers,

Greetings for the season!

Hope all of you are observing the safety measures when moving to offices and out of home. The lockdown was partially lifted but I wish to remind that threat has completely eliminated. I pray that every one of us should be healthy and least effected.

In this edition, we cover the final part of the taxation of gains arising from alienation of shares of Flipkart Singapore by Tiger Global Holdings. We also deal with final part of the recent UK Supreme Court judgment in the matter of Martin Fowler and apply the rationale delivered therein to Indian context. We also deal in this edition, the second part on the GST side which deals with the vires of Rule 117 which prescribes the time limit for availment of transitional credit.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder & Chairman

DIRECT TAXATION

INDIRECT TRANSFERS 2.0 – STUDY ON TAXABILITY OF GAIN ON ALIENATION OF SHARES - TIGER GLOBAL - PART III

Contributed by CA Suresh Babu S & CA Sri Harsha

(This article is final part in a three part article. For the previous part, please refer to our previous edition of our journal).

Opening Remarks:

The acquisition of Flipkart by Walmart has attained considerable attention of media. The deal is to the tune US $ 16 Billion, making Flipkart as most valuable e-commerce marketplace in India. Now that the deal is done, the tax considerations/issues surface, one-after the other, the first being the issue of indirect transfers, which recently came up for consideration in the matter of Tiger Global. In this article, we shall deal with the recent judgment of Authority for Advance Rulings (for brevity 'AAR') in the matter of Tiger Global International II Holdings [1]. After setting out the ruling, taking this as a case study, we shall adventure to list out the favourable and adverse tax positions, position after MLI[2] and GAAR[3].

In this final part, we shall now deal with the position of the arrangement under PPT and GAAR regime. Without any further delay, let us proceed. We recommend reading of the previous part before starting this.

Position post MLI:

As part of BEPS[4] project, the convention on MLI has been ratified and notified by many countries. On becoming the signatory of MLI and notifying a jurisdiction and a simultaneous notification by the other jurisdiction, would trigger the MLI. The role of MLI is to amend the provisions of DTAA as per the options and reservations chosen by each party to the DTAA. India has notified Mauritius for the purposes of MLI. However, as on date, Mauritius has not notified India. Hence, the provisions of DTAA would not get effected by MLI. For the purposes of this article, let us assume that Mauritius has also notified DTAA with India to the Depository. On such an assumption, let us examine, the position of structure as evident in facts on the touchstone of Article 6 and Article 7 of MLI.

Article 6 of MLI vis-à-vis Preamble of I-M DTAA:

Article 6 of MLI springs out from Action 6 of BEPS Package. Article 6 of BEPS Package identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. Treaty shopping and other tax treaty abuse strategies would lead to loss of tax revenues to countries which extend benefits to residents of other jurisdiction, where residents of other jurisdictions are not otherwise eligible to access such treaty benefits, because of the reason that they are not seriously resident of such jurisdictions.

[1] 2020 (6) TMI 159 – Authority for Advance Rulings, New Delhi
[2] Convention on Multilateral Instruments
[3] General Anti-Avoidance Rules
[4] Base Erosion and Profit Shifting

In order to prevent treaty abuse, it is agreed by all the countries that the preamble of the DTAA should be amended to make a clear statement that the tax treaty intends to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. This being a minimum standard, each contracting jurisdiction has to adopt the same.

It is evident that the amended preamble[5] makes it clear that the object and purpose of the treaty intends to eliminate double taxation and without creating opportunities for non-taxation through tax evasion or avoidance including treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions. However, the current preamble[6] does not make any reference to creation of opportunities for non-taxation.

The above distinction is important because, Article 31 of VCLT requires interpretation of treaty in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose. Article 32 of VCLT which deals with supplementary means of interpretation states that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31. Hence, on a combined reading of Article 32 and Article 31, the preamble to DTAA shall definitely be a supplementary means of interpretation.

Seen from such an angle, the terms of treaty has to be interpreted in light of the object and purpose of the treaty, which specifically shouts now that treaty shopping is kind of illegal[7] and not allowed. Hence, now it calls for scrutiny of the structure in terms of the new preamble which specifically does not allow treaty shopping. Hence, there are high chances, post implementation of MLI, qua the amended preamble, these kinds of structures [similar to CGP in Vodafone International Holdings BV (supra) and ShanH in San ofi Pasteur Holdings SA (supra)] may have to pass strong business test to rule them out from conduit structures.

Article 6 of MLI also gives contracting jurisdictions an option to add to the preamble that the intending countries desire to develop their economic relationship and to enhance their co-operation in tax matters. Assuming the same is adopted for I-M Treaty, the structures may state that the treaty has to be interpreted by keeping the expression 'develop their economic relationship' and investing in India may be one of the objects and purposes of the treaty and benefit should be given. However, considering the circumstances post MLI, it would be an aggressive position. Further, the same has to be interpreted keeping in sight the amended Article 13 and new Article 27A of I-M Treaty.

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[5]intending to eliminate double taxation with respect to taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)'

[6]The Government of the Republic of India and the Government of Mauritius, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and for the encouragement of mutual trade and investment.

[7]The Honourable Supreme Court in Azadi Bachao Andolan [2003] 263 ITR 706 has held that in developing countries treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. The countries are able to grant tax concessions exclusively to foreign investors over and above the domestic law provisions. In this respect, it does not differ much from other similar tax incentives such as tax holidays, grants etc.

Article 7 of MLI:

This article can be referred as core article of MLI because it starts with non-obstinate clause. In other words, what other provisions of CTA[8] may state, if the provision of Article 7 when translated into respective articles of CTA, then the benefit of a CTA shall be available only on satisfaction of the provisions contained in respective articles of CTA qua Article 7.

Article 7(1) deals with principal purpose test (PPT). It states that **notwithstanding any provisions of CTA,a benefit under CTA shall not be granted in respect of an item of income or capital it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of relevant provisions of CTA.**

As everyone is aware that India has opted for PPTand simplified limitation of benefits (SLOB) as an interim measure against implementation of detailed limitation of benefits (DLOB) by negotiating with each country. For the purposes of this article, we shall only deal with the test of PPT. The question now, is whether the structures, namely the investment vehicles would pass the test of PPT, especially, when a see-through test is applied would result in tax liability. Now, let us proceed to examine the same.

In other words, assuming that the 'transfer' in Article 13(4) of India-Mauritius DTAA would also cover the indirect transfer and accordingly, the taxing rights vests with Mauritius and such income would not be taxable in India. Such a benefit shall be extended to Tiger Global Holdings only if it can prove that obtaining such a benefit was not one of the principal purposes of any arrangement or transaction. The phrase 'principal purpose' is not defined in MLI. It has to be understood from an example from Action 6 Report:

R Co , a company resident of State R, is in the business of producing electronic devices and its business is expanding rapidly. It is now considering establishing a manufacturing plant in a developing country in order to benefit from lower manufacturing costs. After a preliminary review, possible locations in three different countries are identified. All three countries provide similar economic and political environments. After considering the fact that State S is the only one of these countries with which State R has a tax convention, the decision is made to build the plant in that state.

In this example, whilst the decision to invest in State S is taken in the light of the benefits provided by the State R-State S tax convention, it is clear that the principal purposes for making that investment and building the plant are related to the expansion of RCo's business and the lower manufacturing costs of that country. ***In this example, it cannot reasonably be considered that one of the principal purposes for building the plant is to obtain treaty benefits****. In addition, given thata general objective of tax conventions is to encourage cross-borderinvestment, obtaining the benefits of the State R-State S convention for the investment in the plant built in State S is in accordance with the object and purpose of the provisions of that convention.*

[8]Covered Tax Agreement – when both the contracting jurisdictions notify their DTAA under MLI Convention, the same would be referred as CTA.

From the above example, it can be understood how subjective the PPT is going to be. It should not be lost out of sight, that the said example deals with set-up of manufacturing facility, wherein, in cases of set-up of investment vehicles, there will not be much of reasons to justify incorporation in another country for purpose of investing. Hence, there will be definitely tougher times for investment vehicles to justify their incorporation in a third country and 'better treaty network' may not be enough and the courts may rule that in case of investment vehicles, one of the principal purposes is undoubtedly the treaty benefits, especially in case of liabilities if 'see-through' is applied.

PPT vis-à-vis Columbia Court's decision in Starr International Company Inc:

The United States District Court of Columbia in Starr International Company Inc (for brevity 'Starr') had an occasion to deal with 'primary purpose' test while granting treaty benefits to Starr. Even though the said judgment deals with interpretation of LOB and not PPT provisions, nonetheless, we can understand how the tax department may see the principal purpose test.

The facts of the matter of Starr were that Starr was one of the largest shareholders of insurance giant AIG Inc. Starr was domiciled in Switzerland and when the AIG Inc has declared dividends, they have withheld tax on such pay-outs to Starr and followed up by Starr writing to competent authority to grant treaty benefit under discretionary relief. The competent authority rejected such a discretionary relief to Starr. Against such an order, Starr approached the Court. After examining, the detail history of Starr, right from its incorporation to recent movement to Switzerland has stated that Starr is not eligible for the discretionary relief. The Court noted that Starr has listed four jurisdictions for relocation and put a table for finalisation of the jurisdiction to which Starr intends to relocate. One of the criterions for arriving the decision is 'tax'. Hence, looking at such a table and 'tax' being taken into consideration, the Court stated that one of the primary purposes for Starr to relocate to Switzerland is tax and hence it should not be eligible for discretionary relief. Further, the court stated that the primary question should be not as to why Starr has chosen Switzerland over Ireland, but why Starr chose Switzerland over any other jurisdiction where it might have moved.

Hence, applying the above rationale, the tax authorities may ask, why Mauritius or Cayman Islands or any other tax heaven instead of any other jurisdiction and the investment vehicles should have a better reasons and justifications to substantiate the choice of jurisdiction.

Now, the investment vehicles may alternatively plead that the benefit of CTA may be granted in circumstances that granting such a benefit is in accordance with the object and purpose of relevant provisions of CTA. However, as detailed earlier, this would also be harder.

Position under GAAR:

Assuming that the investment structure gets through the PPT, it has to clear one more hurdle, which is in the form of GAAR before it can claim any benefit. Section 90 of ITA deals with powers of Central Government to enter into an agreement with Government of any country outside India for granting the relief from double taxation.

Section 90(2) states that where Central Government has entered into an agreement with Government of any country outside India for granting the relief or avoidance of double taxation, then, in relation to assessee to whom such an agreement applies, the provisions of ITA shall apply to the extent they are beneficial to him. In other words, a resident of contracting state can choose the provisions of domestic tax law or tax treaty whichever is beneficial to him.

Further, detailing, the investment vehicle can choose the PPT or GAAR[9] whichever is beneficial to him in light of Section 90(2) of ITA. This would have been the possibility if there is no Section 90(2A). Section 90(2A) has been inserted with effective from 1st April 2016 stating that notwithstanding anything contained in Section 90(2), the provisions of GAAR shall apply to the assessee even if such provisions are not beneficial to him.

In light of the specific restriction envisaged vide Section 90(2A), it becomes not possible for the investment structures to only satisfy PPT and leave GAAR. Hence, such resident has to satisfy both PPT and GAAR. The next question would be, whether GAAR is wider than PPT? Let us proceed to examine the same.

GAAR under the ITA states that notwithstanding to anything contained in the ITA, an arrangement entered by assesse may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined accordingly. An impermissible avoidance arrangement[10] means an arrangement, the main purpose of which is to obtain tax benefit and it contains one of the four tainted elements.

When GAAR is juxtaposed with PPT, it is evident that whilst GAAR deals with 'main purpose' of an arrangement is to obtain benefit, PPT deals with 'one of the principal purposes'. Hence, the fight is between 'main purpose' vis-à-vis 'one of the principal purposes'. Hence, it would be evident that PPT is much wider than GAAR and an arrangement or transaction which normally gets through PPT should also normally go through GAAR except the tax authorities in India tend to see it differently. However, the burden of clearing both the tests is necessary.

Concluding Remarks:

The decision of courts on taxability in the hands of Tiger Global Holdings would be an interesting watch. It has to be waited and seen, whether the courts would follow the principals laid down in Vodafone International Holdings BV (supra) and Sanofi Pasteur Holdings SA (supra) or take a stock of recent developments across the globe (particularly the taxation in conduit arrangements) and deliver a different ruling. Whatever the courts may finally deliver, it definitely would be a learning exercise for all of us. Fingers Crossed!

[9] Because GAAR is forming part of domestic tax law

[10] Section 96 of ITA

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DIRECT TAXATION

ROLE OF DEEMING FICTION IN DOMESTIC LEGISLATION VIS-À-VIS TAX TREATY – AN EXPOSITION BY UK SC IN FOWLER'S JUDGMENT-PART II

Contributed by CA Suresh Babu S & CA Sri Harsha

(This article is final part in a two part article. For the previous part, please refer to our previous edition of our journal).

In a recent judgment of Fowler v. Her Majesty's Revenue and Customs[1] , the Supreme Court of United Kingdom had an occasion to deal with the role of deeming fiction in the domestic legislation and their applicability in the context of tax treaties. The said judgment elucidates certain important aspects which would have bearing on the international taxation. In this article, we would detail the facts, the reasonings and conclusions arrived by the Honourable Supreme Court of United Kingdom (UK SC) and also try to apply such principals to the Indian context to see the consequences arising thereof.

In Part I, we have examined the judgment of UK SC in detail. In this part, we shall apply the said rationale enunciated by UK SC to Indian context with help of case study. We recommend reading of the previous part before starting this.

Applying to Indian Scenario:

Under the Indian domestic legislation, there are various deeming fictions and provisions created by the legislature certain results. The deeming fictions when interpreted in the domestic legislation scenario would not present any challenges but when juxtaposed with treaty situation, there would arise certain challenges. Let us proceed to examine certain instances (not exactly the fact pattern in Mr Fowler's matter) and arrive at conclusion by using the rationale delivered by UK SC in the matter of Mr Fowler's verdict.

Case Study:

Issue:

Mr A is an Indian citizen who carries business in United Arab Emirates (UAE) and a resident of UAE for the last couple of years. He visits India occasionally and stays for certain time in India and his stay does not trigger any residency issues in India. During a particular visit, he has purchased a non-agricultural land in India and has paid the consideration through normal banking channels. In subsequent years, the tax authorities have come to know that Mr A has purchased the subject land at a value less than the stamp duty value of such property. Accordingly, the tax authorities proceeded to tax such difference amount in terms of Section 56(2)(x)(b)(B) of Income Tax Act, 1961 (ITA). Can Mr A take a stand that the role of deeming fiction created in domestic legislation cannot made applicable to him since he is covered by the India-UAE DTAA?

[1][2020] UKSC 22 delivered on 20 May 20.

Analysis:

As stated above, since Mr A is a resident of UAE in terms of Article 4(1) of India -UAE DTAA, he would be in a position to access the said treaty. The next question, that would arise is, under which Article of the Treaty, the said income as proposed by tax authorities would fall in. This is important because, each article would have a distributive rule vesting the taxing rights to India or UAE. In order to answer this, the nature of income which is proposed to be assessed by tax authorities in India has to be known.

Part F of ITA deals with chapter 'Income from Other Sources' (IFOS). Section 56 to Section 59 are covered under the said head. By virtue of Section 56(2)(x), a deeming fiction is created to charge income tax under the head IFOS stating that any person who is in receipt from any person any sum of money, immovable property or property other than immovable property in certain circumstances would be treated as his income. There are certain exceptions and the facts in the current case study would not fit therein.

One of the items mentioned in Section 56(2)(x) is the receipt of immovable property for a consideration less than stamp duty value fixed. In the facts of the case study, Mr A has purchased the immovable property less than the stamp duty value fixed for such property. Hence, the tax authorities would proceedto tax on the difference amount (stamp duty value – purchase consideration) as IFOS.

Now, the question, is, whether this particular income which is deemed to be treated as 'other income' or 'income from immovable property', seen in from the perspective of India – UAE DTAA. This is crucial because, if the said deemed income is treated as 'income from immovable property', then India would be having right to tax such income, on the other hand, if the deemed income is treated as 'other income', then the right to tax such income vests with UAE. Let us proceed to analyse the same.

First, let us deal with Article 6, which deals with 'income from immovable property'. Article 6(1) states that income derived by a resident of contracting state from immovable property situated in the other contracting state may be taxed in other state. In other words, the contracting state, where the immovable property is located has a right to tax, which is India in the instant case. Further, Article 6(3) states that provisions of Article 6(1) shall apply to income derived from the direct use, letting, or use in any other form of immovable property. On a plain reading of Article 6, it would be evident that the ambit extends only to incomes which are directly or intimately connected with the immovable property.

However, the question, whether the deemed income (stamp duty value – purchase consideration), would fall under the ambit of 'income from immovable property' or not, has to be examined, to conclude that said deemed income would fall under Article 6(1) read with Article 6(3) and accordingly India has right to tax.

In order to answer this, the meaning of the term 'immovable property' has to be seen. Article 6(2) states that the term 'immovable property' shall have the meaning which it has under the law of the contracting state in which the property in question is situated. The said article further states, in any case, immovable property includes property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and natural resources.

From the above, it is evident that the term 'immovable property' has to be understood from the meaning that it has under the law of the contracting state in which the property in question is situated. Further, the Article 3(2) states that any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that state concerning the taxes to which the agreement applies.

Hence, taking clue from Article 6(2) and Article 3(2), it is required to understand the term 'immovable property' from the provisions of ITA. However, ITA does not define 'immovable property' and the only way left is to understand the same with the help of Article 31 of Vienna Convention on Law of Treaties (VCLT) which states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose.

Applying the same to the given context, the term 'immovable property' has to be given the ordinary meaning and maynot be interpreted that the deeming income by virtue of Section 56(2)(x) will fall into the ambit of 'income from immovable property' despite the source for such deeming income is immovable property. Article 6(2) also states that apart from the definition of 'immovable property' given by the contracting state, the said term also includes the following:

- property accessory to immovable property
- rights to which provisions of general law respecting landed property apply
- usufruct of immovable property
- rights to variable or fixed payments as consideration for working of
- rights to work, mineral deposits, sources and natural resources

The deeming income, which is difference between the consideration actually paid by Mr A and the stamp duty value fixed for such property does not fall under any of the above specifically mentioned items to fall under the ambit of term 'immovable property'.

Article 6(3) also states that provisions of Article 6(1) shall also apply to income derived from direct use, letting or use in any other form of immovable property. It is beyond doubt that the deeming income does not fit in the description of 'direct use or letting'. We also opine that the said income does not fit into the residuary category of 'use in any other form of immovable property', because the phrase 'any other form of immovable property' is qualified by the term 'use', which signifies that it covers only such stream of incomes which by usage of immovable property emanates and not the incomes which are just connected to the immovable property but not arising from the usage.

The Honourable Supreme Court in the matter of PAVL Kulandagan Chettiar[2] had an occasion to deal with the ambit of 'use in any other form of immovable property'. The Court while dealing with taxation of capital gains arising from immovable property stated that the said capital gains would fall under the ambit of phrase 'use in any other form of immovable property'. The facts of PAVL Kulandagan Chettiar were that Indian resident has sold certain immovable property which was situated in Malaysia. The Revenue was of the view that the Article VI of India-Malaysia DTAA deals only with direct use, letting or use in any other form of immovable property and transfer or alienation does not fall under the ambit of 'use in any other

[2] [2004] 267 ITR 654 (SC)

form of immovable property'. The Honourable Supreme Court stated that the capital gains is always treated as income arising out of immovable property though subject to a different kind of treatment and the definition of 'income' used in Article VI, therefore includes capital gains and accordingly capital gains will form part of Article VI [3].

From the above, it can be argued that the 'use in any other form of immovable property', covers any streams of income including the income which arises from sale of such immovable property but should result from use of such immovable property. In other words, the said entry includes only incomes which result from usage of immovable property and not mere connection with the immovable property. However, the above view is not free ambiguity.

In the context of interpretation of Article 6(2), the recent judgment of First Tier Tribunal Tax of United Kingdom in the matter of Royal Bank of Canada[4] (RBC) is quite interesting. The facts in RBC matter was that RBC which is engaged in banking business in Canada has loaned a huge amount to Sulpetro Limited (Sulpetro), a Canadian company, to help fund the exploitation by its group companies of rights to drill for oil, in BuchanField of North Sea. The right to drill the Buchan field were held in the subsidiary of Sulpetro, which was incorporated in Sulpetro UK Limited (SUKL). On grant of license by UK government, Sulpetro entered an 'illustrative agreement' that Sulpetro would incur all the development and exploitation cost in relation to Buchan Field and, in return, Sulpetro would receive the SUKL share of oil won from the Buchan Field. Sulpetro entered into financial difficulties and RBC has appointed a receiver. Sulpetro sold its interest in Buchan Field to BP Petroleum Development Limited (BP) a UK incorporated company under a sale and purchase agreement (SPA).

Vide the SPA, BP agreed, in addition, to make a series of other payments which included the payment (what was described as) royalty to Sulpetro in respect of all production from the Buchan Field, which were payable where the market price per barrel of oil (less certain expenses) exceeded USD $ 20 per barrel. Pursuant to the court order (as a consequence of Sulpetro being gone into receivership), the BP royalty interest was assigned to RBC for almost nil consideration. BP's interest in the Buchan Field were then transferred to Talisman Energy Inc (Talisman). As a result, Talisman took the legal obligation to make payments pursuant to SPA.

The payments made by Talisman to RBC were subject matter of appeal. The HMRC[5] claims that the subject payments though described as royalty, they are actually of the nature of 'right to work' the natural resources and accordingly the said income is taxable in hands of RBC in UK. RBC contended that the nature of income is not 'right to work' and does not fit in the ambit of Article 6(2), since neither Sulpetro nor BP has authority to grant right to work. RBC argued that the subject payment has different colour than the original payment and hence pleaded that the same cannot be seen as falling under Article 6(2) of UK-Canada DTAA. HMRC argued that Article 6(2) will be applicable not only where payments were in exchange for the 'right to work' natural resources, but also where they were considerations for the 'working' of them. There are various other contention by RBC supporting this primary contention, which are not that important for the current deliberation.

[3] The Supreme Court relied on its own judgment in Sevantilal Maneklal Sheth [1968] 65 ITR 503 (SC) which deals with clubbing provisions under the old IT Act and opined use of assets includes income arising from sale of such assets.

[4] [2020] 118 taxmann.com 77 (UKFTT)

[5] Her Majesty Revenue & Customs

The FTT rejected the contention of RBC and stated that given the purpose of the provision of Treaty [Article 6(2)] is clearly to focus on profit derived directly by working the resources or indirectly by letting out the right to do so, there is no reason for limiting the scope of Article 6(2) to cover only payments which are made directly to the owner of the rights in exchange for the grant of a right to exploit them. **The focus must be on the ultimate source of profit and it would be irrational and inconsistent with the apparent purpose of the provision if it were possible to avoid local taxation on that profit simply by interposing an assignment of royalty rights after they had been granted.** Accordingly, the FTT held that the subject payments which were received by RBC were capable to be characterised in the nature of Article 6(2).
Taking the above rationale and applying it to the deeming income (stamp duty value - purchase consideration), the tax authorities may argue that the focus must be on the ultimate source of profit and not the result of the same and may try to tax it under Article 6(2).

However, the facts of the instant case and RBC can be distinguished by stating that in RBC case, it was the right to work the natural resources was the subject matter, whereas in the instant case, the deeming income is the subject matter. The RBC matter was occupied with further exploitation of source/main right of 'right to work', whereas the current case is only occupied with a deeming income which do not relate back to the immovable property (except for the measure).

The Madras ITAT in the matter of A.K.N Govindaswamy Chettiar[6] had an occasion to deal with interpretation of Article 6(2). The facts of the said matter were that the A.K.N Govindaswamy Chettiar was a resident of India and has received compensation for vacating the premises at Kuala Lampur apart from other incomes from Malaysia. The Revenue tried to tax the said income in India, whereas the Tribunal stated the compensation amount received for surrendering the tenancy right is a right in property and accordingly said income would fall under the ambit of Article VI of India-Malaysia DTAA. The Tribunal stated that though there is no specific provision dealing with the said income and though received on capital account, the income still can be treated as income from property to characterise such income from immovable property.

Relying on the above judgment, the tax authorities may argue that when the ambit of Article 6(2) is wide enough to cover the compensation received from surrender of tenancy rights, then why cannot be the deeming income (stamp duty value – purchase consideration) be covered under Article 6(2) thereby the tax should be paid in India.

Further, the tax authorities may also argue that similar provision, deeming the stamp duty value as full value of consideration exists for the seller in terms of Section 50C, then it is beyond doubt that the said income is directly in relation to immovable property. Taking this further, the tax authorities may claim that the same income cannot be said to be not related to immovable property when it is being assessed in the hands of receiver.

However, on a closer reading of the judgments of A.K.N Govindaswamy Chettiar (supra) and PAVL Kulandagan Chettiar (supra), Mr A can argue that in both the cases, the income derived has intimate connection to the immovable property, but whereas in his case, there does not exists any such intimate connection. The connection exists only to the extent of arriving the stamp duty value of immovable property and actual purchase consideration, in other words, to identify the deemed income and does not in any other way connected to the immovable property.

[6] [1993] 044 ITD 138 (ITAT Mad)

Mr A can also argue that the difference between the stamp duty value of immovable property and purchase consideration is deemed to be income on a presumption that cash has been used to discharge the balance consideration. The presumption is based on the reasoning that no one would sell the immovable property for a value lower than the stamp duty value unless he was compensated in other means. Hence, the provision is to eradicate the abuse involved and cannot be said directly related to immovable property. Since the deemed value is assumed to be received, it is inevitable for the legislation to replace the same with actual consideration for the purposes of computation of capital gain in the hands of seller and for that sole reason, it cannot be said that the said income is directly related to immovable property, especially in the hands of the receiver. Assessment has to be done on Mr A based on the nature of receipt in the hands of Mr A but not the nature of receipt in the hands of seller.

We opine that Mr A would have fair chance to succeed in his claim that the said income would not fall under the Article 6 of India-UAE DTAA. Further, he can take the support of Fowler's (supra) verdict and claim that the term 'immovable property' has to be alone taken from the domestic legislation and not the fictions surrounding it. The deeming fiction carved under the domestic law for treating the balance consideration (stamp duty value – purchase consideration) either for seller or buyer [in terms of section 50C or section 56(2)(x)]cannot be used in characterising the income for the purposes of treaty. Hence, Mr A can argue that the said income does not fit under the ambit of Article 6. Let us proceed to examine, whether such income would fall under Article 22.

Article 22(1) of India-UAE DTAA states that items of income of resident of a contracting state, wherever arising, which are not expressly dealt with in the foregoing articles of the agreement, shall be taxable only in that contracting state. In other words, the taxing rights were given to the resident state. Hence, Mr A can argue that since the deeming income (stamp duty value – purchase consideration) is not expressly dealt with in the foregoing articles, the said income would fall under Article 22(1) and accordingly taxable in UAE and not in India.

Hence, there is a fair chance for Mr A to succeed stating that the deemed income falls under Article 22(1) instead of Article 6 and thereby not being subjected to tax in India. However, it would not be a cake walk for Mr A to see his claim wins.

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GST

THE VIRES, RIGHTS AND RETROSPECTIVITY - TRANSITIONAL CREDIT - PART II

Contributed by CA Sri Harsha & CA Manindar

(This article is Part II in a three part series. For the previous part, please refer to our previous edition of our journal)

Introduction:

Claim of credit accumulated in the returns of erstwhile regime under GST[1] regimeby filing TRAN-01 return i.e. transitional credit is subject to vexatious litigation as many of the taxpayers failed to meet the due date prescribed in Rule 117[2] . The reasons for not meeting the due date are due to in efficiency of GST Portal[3] , taxpayers are not vigilant of the time limit or due to confusion and chaos that was prevailing at the time when this new tax was introduced. A large number of writ petitions were filed between various High Courts expressing the inability to meet the due dates mainly due to inefficiency of GST Portal and accordingly requesting the courts to permit the filing of these returns.

Based on various courts directions, Central Government admitted the inefficiency of GST Portal and sub-rule (1A) has been introduced in Rule 117 through which the due date has been extended to those categories of taxpayers who could produce evidence of their attempt to file the TRAN-01 return within due date but were unsuccessful due to technical difficulties of GST Portal. But the plight of those taxpayers who could not gather evidence relating to their attempt to file the TRAN-01 return was not addressed.

In this backdrop, the vires of Rule 117 which imposed the time limit for filing TRAN-01 was challenged on the ground that no such power was conferred under Section 140[4] of CT Act[5] and is taking away the vested right over the accumulated transitional credit of previous regime. The High Courts have taken different stand on this issue and some of them ruled in favour of taxpayers while others were in favour of Revenue. The Finance Act, 2020 made retrospective amendment[6] to read timelines into Section 140 in order to nullify those judgements that were ruled in favour of the taxpayer.

In light of these developments on this issue, an attempt is made in this article to refer to the views expressed by Honourable Supreme Court and various High Courts and the surrounding legal position to understand the vires of Rule 117, the vested right of the credit and the validity of retrospectivity to the said section. Accordingly, the article is themed over the following aspects:

- Role of Delegated Legislation vis-à-vis Rule 117 (Vires)
- Vested Right on Credits (Rights)
- Validity of Retrospective Amendment to Section 140 (Retrospectivity)

[1]Goods and Services Tax
[2]Central Goods and Services Tax Rules, 2017
[3]www.gst.gov.in
[4]Section 140 deals with 'transitional arrangements for input tax credit'
[5]Central Goods and Services Tax Act, 2017
[6]The amendment is made effective vide Notification No. 43 dated 16.05.2020

Though each of the above aspects on its own is capable for debate at extensive lengths, we try to cover them in this single article as each of them are interlinked and capable of influencing the other one. Hence, we request the reader to proceed further with the above disclaimer. With the understanding of the issues involved, we will now proceed to examine each of these aspects by considering the evolved jurisprudence. In the earlier part, we have introduced and framed the issues. In this part, let us proceed to deal with the vires of Rule 117.

Role of Delegated Legislation vis-à-vis rule 117- The Vires:

It is an accepted position that legislature in India have been held to possess wide powers to delegate subject to condition that such delegation cannot be of essential legislative functions which consists determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. Learned Justice GP Singh in his book on 'Interpretation of Statutes' has stated as under:

The Legislature cannot delegate 'uncanalised and uncontrolled power' the power delegated must not be 'unconfined and vagrant, but must be 'canalised within banks that keep it from overflowing'. The 'banks', that set the limits of the power delegated, are to be constructed by the Legislature by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. So, the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the Legislature.

What is permitted, therefore, is the delegation of ancillary or subordinate legislative functions, or what is fictionally called, a power to fill up the details. The Legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. The Legislature's ability to delegate these functions is derived from an implied conferral of that authority for the effective exercise of the legislative power granted by the Constitution on the principle that everything necessary to the exercise of a power is implicit in the grant of power. The limits of this ability to delegate i.e., the inhibition against delegation of essential legislative functions, is also impliedly derived from the provisions of the Constitution which confer the power to make laws on the Legislature. It is reasoned that the Constitution entrusts the duty of law-making to Parliament and the Legislature of States, and thereby impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. Thus, the area of compromise between these two implications determines the permissible limits of delegation. ***The question, whether any particular legislation suffers from excessive delegation, has to be decided by the courts having regard to the subject matter, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted.*** *The courts in this task have been quite generous and liberal, for it is now accepted that having regarding to the complexity of problems which a modern State has to face, delegated legislation is a necessity and has its own advantages.* ***If, on a liberal construction of a given statute, a legislative policy and guidance for its execution are brought out, the statute, even if skeletal, will be upheld and it will not be a valid argument that the Legislature should have made more detailed provisions. But this rule of liberal construction should not be carried by the court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive. It is the duty of the court to strike down without hesitation any arbitrary power conferred on the executive by the***

Legislature. Conferral of unguided discretion which can lead to discrimination is abdication of legislative function.

With the above in mind, we have to proceed to examine, whether prescription of time limit under Rule 117 in order to claim the credit accumulated in previous regime to be transitioned to GST regime suffers from excessive delegation has to be decided based on the scheme, the provisions of the statute and the facts and circumstances in the background of which the statute is enacted. Basis our examination, if it is found that the time limit under Rule 117 is in accordance with the scheme, provisions of the statute and the facts and circumstances, then such rule cannot be said to be suffering from excessive delegation, even if the statute is skeletal and it would not be a valid argument that the legislature should have made more detailed provisions. At the same time, it has to be seen such a liberal construction should not lead to an arbitrary power conferred on executive to be struck down.

In simple words, if the rules framed are in accordance with the scheme, the provisions of the statute, facts and circumstances in the background which the statute is enacted, the courts are bound to take liberal interpretation. On the other hand, if the rules are intended to confer any arbitrary power and achieve what the legislature itself do not wish to achieve/regulate, would be liable to struck down. Before examining, whether Rule 117 is in accordance with the scheme, provisions of the statute, facts and circumstances or confers an arbitrary power on the executive, let us proceed to examine certain judgments, wherein the said issue is dealt.

In the matter of KI Abraham [7] - Supreme Court:

The facts involved therein is the dealer was engaged in trading of coconut oil. During the year in consideration, the dealer has made inter-state sales. For certain portion of inter-state sales, the dealer has submitted C-Forms. For the balance sales, the dealer failed to submit the said forms within the time stipulated in the Rule 6 of Central Sales Tax (Kerala) Rules read with Section 13(4)(e) and Section 8(4) of Central Sales Tax Act, 1956. In absence of such forms, the Revenue has assessed the dealer at higher rate rather than the concessional rate applicable when C-Forms were submitted. The dealer has submitted the said forms and asked the Revenue to consider and revise the assessment. The Sales Tax Officer and the Appellate Assistant Commissioner rejected the stand of dealer requesting assessment at lower rate stating that the dealer has failed to submit the forms within the stipulated time period. The dealer after exhausting all the legal remedies has approached the High Court, wherein the High Court has quashed the assessment proceedings and directed the Sales Tax Officer to assess at lower rates after taking the forms into consideration. The Revenue has preferred an appeal against such a judgment of High Court before the Honourable Supreme Court. The Honourable Supreme Court after referring to the provisions of Section 8(4) read with Section 13(4)(e) stated that the phrase 'in the prescribed manner' occurring in Section 8(4) of the act only ***confers power on rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom they are sold, and to which authority the form is to be furnished. But the phrase 'in the prescribed manner' in Section 8(4) does not take time-element. In other words, the section does not authorise the rule-making authority to prescribe time limit within which the declaration is to be filed by the registered dealer. The view that we have taken is supported by the language of Section 13(4)(g) of the Act which states that State Government may make rules for 'the time within which, the manner in***

[7] AIR 1967 SC 1823

which and the authorities to whom any change in ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished'. This makes it clear that the legislature was conscious of the fact that the expression 'in the manner' would denote only the mode in which an act was to be done, and if any time limit was to be prescribed for the doing the act, specific words such as 'the time within which' were also necessary to be put in the statue'.

Thus, the Supreme Court considered the phrase 'in the prescribed manner' and held that it only indicates the procedural aspects namely the name of the form, the fields that the forms should contain and other similar aspects. Accordingly, the Honourable Supreme Court has held that Rule 6(1) to the extent which it deals with time-limit is ultra-vires and accepted the plea of the dealer on submitting the declarations in the reasonable time.

In the matter of Maharashtra State Board of Secondary and Higher Education and Another[8] - Supreme Court:

In this matter, the Honourable Supreme Court was seized with a question canvassed is whether, under law, a candidate has a right to demand inspection, verification and revaluation of answer books and whether the statutory regulations framed by the Maharashtra State Board of Secondary and Higher Secondary Education governing the subject insofar as they categorically state that there shall be no such right can be said to be ultra vires, unreasonable and void. The question that is relevant for the current context is whether the provision contained in Regulation 104(1) that no revaluation of the answer books or supplement is ultra-vires the regulation making power conferred by Section 36 and also illegal and void on the ground of its being manifestly unreasonable. The Honourable Supreme Court after considering the submissions by both parties stated in Para 14 as ***'In our opinion, this approach made by High Court was not correct or proper because the question whether a particular piece of delegated legislation – whether a rule or regulation or other type of statutory instrument – is in excess of power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the statute conferring the power to make rule, regulation, etc and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the effacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the***

[8](1984) 4 Supreme Court Cases 27

delegate by the statute. Though this legal position is well established by long series of decisions of this Court, we have considered it necessary to reiterate it in view of the manifestly erroneous approach made by High Court to the consideration of the question as to whether the impugned clause (3) of Regulation 104 is ultra vires. Accordingly, the Honourable Supreme Court has held that Regulation 104 is intra-vires the Act and upheld said delegated legislation.

In the matter of Dr Haniraj L Chulani[9] - Supreme Court:

In this matter, the Honourable Supreme Court had an occasion to determine as to whether State Bar Council of Maharashtra & Goa was justified in refusing enrolment of Dr Haniraj L Chulani as an advocate under the Advocates Act, 1961 as he is a medical practitioner who does not want to give up his medical practice but want simultaneously to practice law. Dr Haniraj L Chulani (Doctor) is a medical practitioner since 1970 and during the continuance of his said profession as a medical practitioner, the appellant joined LLB Degree Course and obtained Degree of Bachelor of Laws. Thereafter Dr Haniraj L Chulani has applied to the State Bar Council of Maharashtra & Goa (State Bar Council) for being enrolled as an advocate under Advocates Act, 1961. The Doctor insisted that even though he is a medical practitioner he is entitled to simultaneously carry on the profession as an advocate. The Enrolment Committee rejected his request for being enrolled as an advocate simultaneously with his carrying on his medial practice as a surgeon. The Doctor contended that Rule 1 framed by State Bar Council under Section 28(2) and Section 24(1)(e) of the Advocates Act was ultra vires and illegal. It was submitted that insofar as the said rule prohibits a person who is otherwise qualified to be admitted as an advocate from being enrolled as an advocate if he is carrying on any other profession like medical profession in the present case, it suffers from vice of excessive delegation of legislative power. The Honourable Supreme Court has stated vide Para 16 ***'So far as the question of excessive delegation of legislative power is concerned, we must note at the outset that the Act has been enacted, as seen earlier, with a view to regulate the right of advocates to practice law. The rules framed by the Bar Council of India especially relating to standards of professional conduct and etiquette clearly aim at securing high standards of competence in legal services and seek to strengthen the professional relationships among its members and promote the welfare of the society as whole.. The attack on the impugned rule on the ground of excessive delegation of legislative power will have to be examined in the light of scheme of the Act which has entrusted the power and the duty to elected representatives of the profession constituting the State Bar Councils to lay down the high standards of professional etiquette as expected of the advocates enrolled by it. It is pertinent to note that the Act has entrusted to the Bar Council of India, amongst others, the functions to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils.. The Act also deals with the topic of regulation of professional conduct of advocates from the entry point itself. Vide Para 17 it states that '…Thus, from the pre-entry point to legal profession till the exit point from the legal profession, the Bar Council of India and State Bar Councils monitor the career of legal practitioner. It is the entire scheme of the Act when considered in the light of the nature of the legal profession to which such entry is given which has to be kept in view while considering the submission of the learned Senior Counsel for the appellant that the power given to the State Bar Councils to regulate such entries by framing rules is a piece of excessive delegation of legislative power. It cannot be gainsaid that law is universally described as an honorable profession.*** Vide Para 18, the Supreme Court states ***'The aforesaid***

[9](1996) 3 Supreme Court Cases 342

well established connotations and contours of the requirements of the legal profession themselves supply the necessary guideline from the Bar Councils concerned to frame rules for regulating the entries of persons to profession. As noted earlier, the impugned rule has been framed by Maharashtra State Bar Council in exercise of its rule-making power under Section 24(1)(e) read with Section 28(2) of the Act.. Such rule-making power flows from Section 28(2)(d). Even though the aforesaid rule-making power is couched in wide terms the said power entrusted to the State Bar Council cannot be said to be unfettered or unhedged. The said rule-making power draws its sustenance from the guidelines laid down by the Act itself which entrusts the duty to the State Bar Council concerned to regulate entry to the legal profession which has the aforesaid well established connotations and attributes. The Bar Councils concerned are entrusted by the legislature itself with the aforesaid rule-making power enabling them to determine the requirements of the State Courts concerned where the new entrants have to practice and to lay down appropriate conditions regulation such entries. As the power to make rules is entrusted by legislature to the chosen representatives of the State concerned where the Bar Councils functions and the needs of the litigating public residing in the State in light of the set-up of courts in the States concerned, it cannot be said that the power is in any way unfettered or uncanalised so as to amount to the total effacement of legislative controls.

Thus, in the facts of the present case, the rule involved prohibited the enrollment of a person who is otherwise qualified as an advocate for the reason that he is engaged in practicing other profession namely doctor. The said rule making power can be traceable to the Act itself considering the fact that the Bar Councils are entrusted by the legislature itself to regulate entry to legal profession. It is in this context, the vires of said rule has been upheld by tracing the same to the overall objects and intents of the legislation.

In the matter of Kunj Behari Lal Butail & Others[10] - Supreme Court:

To consolidate and amend the laws relating to ceiling on landholdings in the State of Himachal Pradesh, the Himachal Pradesh Ceiling on Land Holdings Act, 1972 was enacted. Section 26(1) of the Act provides that the state government may, by notification, makes rules for carrying out the purposes of this Act. Vide such powers, Himachal Pradesh Ceiling on Land Holdings Rules, 1973 were framed. Rule 3 of said rules deals with 'areas to be treated as subservient to tea plantations'. The said rule has a proviso which states that no land, treated as subservient to tea planation under the sub-rule and exempted from the operation of the Act under Section 5(g) thereof, shall be transferred by the landowner in any manner, without the permission of the state government. The said proviso was not there in the text of Rules as originally framed and has been inserted by amendment through notification. It was this notification and rule was challenged by the appellants because their effort at alienating a piece of land subservient to a tea planation was sought to be put into jeopardy. The Supreme Court after hearing both the parties, stated vide Para 13 as ***'It is very common for the legislature to provide for a general rule-making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule-making power is not expressed in such a usual general form then it shall have to be seen it the rules made are protected by the limits prescribed by***

[10] (2000) 3 SCC 40

parent act. (See: Sant Saran Lal v. Parsuram Sahu, AIR Para 19). From the provisions of the Act we cannot spell out any legislative intent delegating expressly, or by necessary implication, the power to enact any prohibition on transfer of land. We are also in agreement with the submission of Shri Anil Divan that by placing complete prohibition on transfer of land subservient to tea estates no purpose sought to be achieved by the Act is advanced so also such prohibition cannot be sustained. Land forming part of a tea estate including land subservient to a tea planation have been placed beyond the ken of the Act. Such land is not to be taken into account either for calculating the area of surplus land or for calculating the area of land which a person may retain as falling within the ceiling limit. We fail to understand how a restriction on transfer of such land is going to carry out any purpose of the Act, We are fortified in taking such view by the Constitution Bench decision of this Court in Bhim Singhji v. Union of India whereby sub-section (1) of Section 27..

We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation without laying down any guidelines; ***it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.*** *Accordingly, the said rule was struck down.*

In this said case, the Honourable Supreme held that it is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it is required to examine whether the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power has not been expressed in such a general form, then it shall be protected by the limits of parent Act. The Honourable Supreme Court further held that such general ruling making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

In the matter of Global Energy Limited and Another[11] - Supreme Court:

The Parliament has enacted Electricity Act, 2003. In exercise of its jurisdiction conferred by Section 178 of the said Act, the Central Electricity Regulatory Commission (CERC) made the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and Other Related Matters), Regulations 2004. In terms of provisions of the said Act as also the regulations, inter alia, license is required to be taken by a person who is desirous of dealing in inter-state trading. Appellant (Global Energy Limited) is a public limited company incorporated and registered under the Companies Act, 1956. Appellant has applied for license to deal in inter-state trading and requested for grant of interim permission since it was engaged in dealing inter-state prior to commencement of the Act. CERC has granted the said interim permission. By reason of an order, the said application was allowed and CERC granted the license and directed the Appellant to publish a notice as per the terms of Section 15. Meanwhile, the regulations are amended and inserted a new regulation 6A which dealt with disqualifications. CERC has rejected the application stating that the said regulations will come into effect retrospectively and thus appellant was disqualified. The Honourable Supreme Court making reference to Regulation 6A stated that the said provision is imperative in character and couched in negative language. It provides for disqualifications. In Para 24, the Supreme Court states ***'Indisputably, a subordinate legislation should be read in context of the Act. Thus read, Regulation 6-A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader. It affects the credit of the***

[11] (2009) 15 Supreme Court Cases 570

applicant. It also affects the credit-effectiveness, namely (1) financial integrity of the applicant, (2) his competence, (3) his reputation and character; and (4) his efficiency and honesty. It affects a pending proceeding. Because of the said amendment, an interim license granted in favour of the appellant stood revoked. This however, would not mean an amendment made in a regulation would under no circumstance, affect pending proceeding. In Para 25, it states, ***'It is now well-settled principle of law that the rule-making power 'for carrying out the purposes of the Act' is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of provisions of the said Act.*** In Para 27, it states ***'The power of regulation-making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of license. It does not lay down any pre-qualification therefor. Provisions for imposition of general conditions of license or condition laying down the pre-qualifications therefore and/or the conditions/qualifications for grant of revocation of license, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of license also. Accordingly, struck down Rule 6-A.***

The Honourable Supreme Court in this case also held that it is a well-settled principle of law the rule making power 'for carrying out the purposes of the Act' is a general delegation and the same cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of said Act.

In the matter of Travelite (India)[12] – Delhi High Court:

In this matter under Service Tax law, the Honourable Delhi High Court was dealing with the vires of Rule 5A(2) of the Service Tax Rules, 1994 which provided for audit by department that are not contemplated by the Finance Act, 1994. The High Court has held that ***'The mere fact that a rule-making power is phrased in terms that indicates a general delegation of power, cannot lead to the inference that such power may be exercised to make rules that exceed the bounds of the statute. Rules may only give effect to the statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute.It is apparent that the only type of audit within the contemplation of the statute is that stipulated for in Section 74A, i.e. a special audit when only certain circumstances are fulfilled. The Parliament thus had a clear intention to provide for only a special audit. The fact that Section 74A prescribes the conditions meriting such special audit compels the necessary inference that the Parliament did not intend to provide for a general audit that "every assessee" may be subjected to, "on demand". This Court is thus of the opinion that any attempt to include provision for such a general audit through the back-door, such as through the impugned rule, is ultra vires the rule making power conferred under Section 94(1). Rule 5A(2) must consequently be struck down'.***

[12] 2014 (35) STR 653 (Del.)

In light of the above decisions, one can figure out the scope the scope and ambit of general rule making power as under:

- Whether a particular piece of delegated legislation is traceable to general rule making power or not is required to be determined considering the overall purpose and object of the parent act. If the rule in question is in line with the overall objects of parent act, then same can be upheld and does not suffer from the vires of excessive legislation.

- It is common for legislature to provide for general rule making power. If the rules made by exercising such general rule making power, then it is required to examine whether the rules so framed fall within the scope of general powerso confirmed. Such general ruling making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

Extrapolating the above Principles to Rule 117:

Now, the question is whether by virtue of general power making rule under Section 164(2), can the time limit under Rule 117 can be prescribed to regularise or transition the erstwhile credit into the GST regime or whether the said time limit should be prescribed specifically in the provisions of Section 140(1)? Let us proceed to answer this keeping the above jurisprudence in perspective.

Judgement	Reasoning	Applying to Rule 117
KI Abraham	• The SC in this matter was concerned with the validity of prescription of time limit for submission of forms. The assessee took the plea that Section 13(4) which deals with rule-making power for various issues laid down therein, does not make a mention of time limit as one of the items for which rules can be made. • The SC stated that the power of Section 13(4)(e) was only to prescribe the particulars that should be made available in the form but does not state that the rule can be made for providing time limit for submission. • Accordingly, the SC held that in absence of such power of prescription of time limit in the said rule-making sub-section, the rules cannot provide the time limit. The SC also made reference to Section 13(4)(g), another rule making sub-section, which has specific reference to the time limit for the issue mentioned therein. By reference, SC stated that since the sub-section which was under consideration does not have any specific mention of time limit, the plea of Revenue stands failed.	• SC was considering the provisions of Section 13(4) of Central Sales Tax Act, 1956. • The said section unlike Section 164 of CT Act, lays down various items for which rules can be made. • Among such various items, one item has a mention about the time limit and the other does not have mention of time limit. • It was under such a situation, the SC referring to the other items which prescribe time limit, stated that the item under consideration does not have the mention of time limit and accordingly rule made in light of such power mentioning time limit is ultra vires. • We are of the view that the ratio of this judgment cannot be applied to position under CT Act for two reasons. • One, that the SC was considering the vires of rule-making power, where there were multiple items under the rule-making section. Whereas, in Section 164, there were no multiple items and it is a pure case of general rule -making power. Since there would not be an occasion under Section 164 to find time limit mentioned in one item and not being mentioned in another item, in absence of items, the judgment cannot be straight away applied. If Section 13(4) was also similar to Section 164, the conclusion of SC may have been different favouring the Revenue.

		• Two, the SC was not dealing with the transition credit, but credit for the first time. We believe that there would be lot of difference between the transition credit and first time credit. In the later case, substance has to be given importance than the procedure, where as in the former, the procedure is important than substance, since the substance was dealt at time of grant of credit in the first instance. • Hence, we are of the view that the decision of SC cannot be applied directly to the position under CT Act and even if applied, it would be favourable to Revenue rather than assessee.
Maharashta State Board of Seconday and Higher Education	• The SC was considering the vires of Regulation 104 which stated there cannot be any right to revaluation of answer books. • The SC reversed the judgement of HC by stating whether a rule is in excess of power of subordinate legislation has to be determined with reference only to specific provision contained in the statute conferring the power to make rules and also object and purpose of the Act. • The SC further held that it is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the effacious achievement of the objects and purposes of the Act. It is not for the	• From the rationale delivered by SC, it is evident that to determine whether Rule 117 is ultra vires or intra vires, what has to be seen is whether the rules are within the scope of the Act, then the rules should be held valid and courts cannot substitute whether a particular aspect has to be dealt by the act or rules. • Hence, applying this to Rule 117, as long as the said rule is within the boundaries set by the Act and comes from valid rule making authority, the same has to be held valid. The Courts should not decide upon whether the time limit should be specified in the Act or rules. • Hence, we are of the view, that since Rule 117 is within the boundaries of the parent act and stems from valid rule making authority, the prescription of time limit under Rule 117 should be considered to be intra vires.

	Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute.	
Dr Haniraj L Chulani	• The SC in this case was considering the vires of Rule 1 framed by State Bar Council under Section 28 and Section 24 of Advocates Act. • The petitioner challenged the said rule by stating it suffers from vice of excessive delegation of legislative power. • The SC stated whether there is an excessive delegation of power or not has to be examined keeping the objects of Act and rules framed in this connection.	• Applying the said rationale to the current position under CT Act, the time limit prescription under Rule 117 cannot be said to be excessive if the objective of GST laws is kept in perspective. • The GST laws were promogulated to get all possible indirect taxes under one umbrella and ensure that there is no cascading effect of taxes. If seen under this light, it would be evident that the time limit fixed under Rule 117 to get the erstwhile credit into GST regime is reasonable and does not suffer with excessive delegation. • If the Rule 117 provides that such credit cannot be availed, then such prescription would have been said to be ultra-vires, but just because a sun set clause is mentioned in Rule 117 to debar the taking credit after the said period cannot make such rule ultra vires.

Kunj Behari Lal Butail & Others	• The SC in this matter held that the rule which was made going beyond the parent act is ultra vires and liable to be struck down. • In the facts of this case, the rule was dealing with an aspect which the parent act did not provide for and such rule was also not advancing the object of the act and in such circumstances the said rule was struck down.	• Applying the said rationale to the position under CT Act, it is evident that what is prescribed under Rule 117 is not beyond the scope of the parent act. • Further, the said rule does not bring into existence substantive rights or obligations or disabilities which are not contemplated vide the provisions of CT Act. • Mere prescription of time limit by which the assessee has to file the return to get the past credit into GST regime cannot be said to be dealing with substantive rights or obligations or disabilities. Failure to comply with the said rule would result into certain disabilities, and such a position by itself cannot be stated to be taking away the substantive rights.
Global Energy Limited	• The SC in this matter held that the rule which was made going beyond the parent act is ultra vires and liable to be struck down. • In the facts of this case, the rule was dealing with an aspect which the parent act did not provide for and such rule was also not advancing the object of the act and in such circumstances the said rule was struck down	• Applying the said rationale to the position under CT Act, it is evident that what is prescribed under Rule 117 is not beyond the scope of the parent act. • Further, the said rule does not bring into existence substantive rights or obligations or disabilities which are not contemplated vide the provisions of CT Act. • Mere prescription of time limit by which the assessee has to file the return to get the past credit into GST regime cannot be said to be dealing with substantive rights or obligations or disabilities. Failure to comply with the said rule would result into certain disabilities, and such a position by itself cannot be stated to be taking away the substantive rights.

Travelite (India)	• The Delhi HC in this matter stated that the rule which was providing for audits for which the parent act has not provided is ultra vires.	• Applying the same to position under CT Act, since Rule 117 is dealing with the items or aspects which are laid down in Section 140, the same can be said to be intra-vires.

From the above, it can be argued that the prescription of time limit under Rule 117 is within the competence of Section 164 and accordingly the said rule is intra-vires. The act of amending the provisions of Section 140(1) inserting the time limit is only out of abundant caution and that by itself cannot be leading to the conclusion that Rule 117 is ultra-vires. However, there is nothing certain in the tax law, there also may exist an alternat view, which we detail hereunder.

Possible Alternate View:

The Gujarat High Court in Willowood Chemicals Private Limited (supra) opined that the prescription of time limit under Rule 117(1) is not ultra vires the Act and is very much required to attain a degree of finality on claims, credits, transfers of such credits and all issues related thereto. The Gujarat High Court relied upon the Honourable Supreme Court decision in the case of USA Agencies[13] under Tamil Nadu Value Added Tax Act which upheld a time limit provision to claim input tax before the end of financial year or before ninety days of purchase whichever is later by stating that the legislature consciously set up time frame for availment of input tax credit and these conditions are to be strictly complied with.

However, the Gujarat High Court has not examined the fact whether such rule making power under said Act is traceable to general rule making power. Further, they relied on the Honourable Supreme Court Judgement under said Act, wherein the substantial provision of time limit was brought into the Statue itself.

Whereas in the facts of the present case, the time limit condition was not expressly provided for in section 140(1) as prevailing prior to amendment. Hence, a view may be taken that the decision of Gujarat High Court in Willowood Chemicals Private Limited (supra) is short sighted to the extent it does not examine the fact that bringing time limit by a delegated legislation to affect the availment of credit can be traceable to general rule making power in view of the above discussed legal position on general rule making power.

On the contrary, the Gujarat High Court in the case of Siddharth Enterprises (supra) has taken a view that the right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CT Act and, therefore, it cannot be allowed to lapse under Rule 117, for failure to file declaration form TRAN-1 within the due date. The Court also observed under para 34 that Section 16 of the CT Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier. Whereas, Rule 117 allows time-limit only up to 27th

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December 17 to claim transitional credit on pre-GST purchases. Therefore, the Court held that it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution was the conclusion arrived by the Court. Thus the Gujarat High Court taken a view that transitional credit is a vested right which cannot be taken away by delegated legislation by providing for time limit under delegated legislation i.e. Rule 117.

In the case of Nelco Limited (supra), the Bombay High Court refused to place reliance on the Honourable Supreme Court decision ofDai Ichi Karkaria Limited (supra) for the reason that in that matter, the issue involved was not of transitional credit and did not consider the contingency of time limit on availment of credit. Accordingly, the Bombay High Court held that time limit in Rule 117(1) is traceable to rule-making power conferred in section 164(2). The Bombay High Court held that the transitional credit is not a vested right and cannot be considered as indefeasible. Since the said decision have not taken the spirit behind Dai Ichi Karkaria Limited (supra), the judgment may require reconsideration.

The Delhi High in the case of Brand Equity Treaties Limited (supra) wherein it was held that the procedure under Rule 117 could not run contrary to section 140. The Delhi High Court held that transitional credit is a substantial right in itself and it cannot be restricted by providing for time limit under rule 117. However, the Court set a higher period of 3 years taking clue from the provisions of Limitation Act.

Hence, it can be argued by taking clue from Siddharth Enterprises (supra) and Brand Equity Treaties Limited (supra), that credit being a vested right, the same cannot be regulated by rules like Rule 117 and accordingly the credit once availed should be made available in GST regime, if such claim is made within a period of 3 years from the appointed day.

Concluding on the vires, we are of the view that there is a great possibility for the courts to hold that Rule 117 is intra vires because the prescription of time limit for getting the past credits into the GST regime cannot be said to be excessive delegation or create substantive rights which are not provided by the parent act. However, as stated above, there is an alternate view possible and only the Supreme Court should put a rest to this. Let us wait and see how the story ends.

Now, that we have finished dealing with vires, let us proceed to examine, whether the transitional credit is a vested right or not. This is also helpful to decide the vires as stated above. In the next part, we shall proceed to deal with same.

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