Volume-40 November-2017 Pages 1-12

SBS Wiki

monthly e-Journal

By

SBS and Company LLP
Chartered Accountants

CONTENTS

DIRECT TAXES

IMPORTANT ASPECT OF ACQUISITION OF ASSET UNDER THE HEAD CAPITAL GAIN

Contributed by CA Ramaprasad T

As per section 45 of ITA, 1961 income from transfer of capital asset is chargeable to tax under the head Capital Gains in the year in which transfer took place. This section is subject to provisions of Section 54/54B/54D/54EC……

Assessee can claim deduction or exemption for capital gain arising on transfer of capital asset by investing or purchasing a new asset referred to in various sections mentioned in Section 54/54B/ 54D/54 EC etc.

Section 2(47) which defines the word 'transfer' in the context of capital asset provides that allowing the possession of immovable property by contract of nature referred to in section 53A of Transfer of Property Act[1] is chargeable to tax in the hands of transferor.

Whether buyer or transferee take reference to the above definition and claim exemption under the head capital gain by taking possession of the immovable property without registered sale deed.

Judicial Analysis:

86 taxmann.com 217- Chandigarh Tribunal Anil Bishnoi vs Ass. CIT

Facts:

Assessee sold for a consideration of Rs. 1,29,00,000/- and claimed deduction U/S 54B by purchasing agricultural lands one worth of Rs. 28,84,500/- through registered sale deed and other one of Rs. 1,00,00,000/- through agreement to sell which is not registered.

Assessing Officer has denied exemption in relation to the investment of Rs. 1,00,00,000/- on the contention that the purchase was not registered. He further contended that to claim exemption the assesse should buy the property through a registered deed. He further observed that the word purchase is not akin to the word transfer as defined U/S 2(47).

Assessee contended that entire purchase consideration is paid through cheque and possession of the land is taken by him with right to use the land or to sell it further.

The assessee has file an appeal against the order of AO before CIT(A). The CIT(A) upheld the order passed by the AO.

Further assessee has filed an appeal before tribunal against the order of CIT(A).

[1]C.S.ATWAL vs CIT 59 Taxmann.com 359 the Punjab and Haryana High Court held that the provisions of section 53A of Transfer of Properties Act are not applicable in case of un registered agreement.

The ITAT held that if capital gains are deemed to have been earned by the assessee on transfer of land as per the provisions of Section 2(47) of the Act, as per which the registration of the sale deed is not necessary, the consequences are that the seller or the assessee is said to have transferred his right in property and consequently those rights are acquired by the transferee;

If in the case of transferor, the same is to be treated as sale, then, we do not find any reason to give a different meaning to the word 'Purchase'. If someone has sold a property, consequently the other person has purchased the said property. If the transfer of property is complete as per the definition of transfer u/s 2(47) of the Act, the assessee is made labile to pay tax on the capital gains earned by him, on the same analogy, the transfer is also complete in favour of the purchaser also.

Gulshan Malik vs CIT 223 Taxman 243 – DELHI HIGH COURT

Facts: -

The assessee and his wife had booked an apartment by payment of certain amount and buyer's agreement was executed. Subsequently, assessee has entered into an agreement to sell to sell their booking rights or interest in the apartment.

The AO treated the income from transfer of allotment rights as 'Short Term Capital Gain' and denied exemption U/S 54 on reinvestment. The CIT(A) and ITAT upheld the order of the AO.

The High Court held that enjoyment of property as well any interest in any of transferable capital asset was included within the ambit of 'Capital Asset'. Even booking rights or rights to purchase the apartment or to obtain its letter was also capital asset.

Sanjeev Lal vs CIT- 46 taxmann.com 300- Supreme Court

Facts: -

The assessee has acquired a residential property in terms of will executed by his grandfather. The assessee has entered into an agreement to sell in respect of the said property and received certain amount by way of earnest money. However, the sale deed was executed later and purchased a new residential house beyond one year from the date of executing the sale deed but the new purchase was within in one year prior to the date of executing the agreement to sell.

The AO held that the assessee was not entitled to deduction U/S 54 considering the date of execution of sale deed.

Assessee filed an appeal before CIT(A) who upheld the order of AO. Later the ITAT and High Court also upheld the decision of AO.

The Honorable Supreme Court held that *"even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation one can say that some right, in respect of the said property, belonging to the assessee had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed".*

Looking at the provisions of section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred.

Conclusion: - Considering the harmonious construction of the provisions which subserve the object and purpose should also be made while constructing any provisions of the Act and more particularly when one is concerned with the exemption from payment of tax.

The definition of the word transfer which provides that allowing the possession of immovable property in part performance of contract nature is chargeable to tax the same analogy can applied while claiming the exemption U/S 54/54B/ 54F etc. where by buyer has taken possession of immovable property but the registration of sale deed was not done.

This article is contributed by CA Ram Prasad Partner of SBS and Company LLP, Chartered Accountant. The author can be reached at caram@sbsandco.com

DIRECT TAXES

TP CHALLENGES TO BE FACED AND COMPLIANCES

Contributed by CA Suresh Babu S

1. Form 3CEB

Section 92E requires every person entering into an international transaction or specified domestic transactions with their related parties to obtain an accountant's report to be submitted on or before the due date for filing tax return. Form 3CEB prescribed is declaration by the accountant about examination of accounts with an Opinion on information and documents prescribed by Rule 10D and maintained by the assesse.

Challenges

- Transaction not having effect on profits, income, losses and assets should it be reported by way of note or disclosed as an international transactions in the Form 3CEB. Example: Disclosure of the amount receivables/payables from/to the AE

- Earlier the reporting in certain cases was being done by way of providing details of such transactions by way of only notes to the Form 3CEB. In order to further streamline the reporting, the format of the Form 3CEB was revised in June 2013, which now includes **specific clauses asking for information** on such types of international transactions.

- All of these changes coupled with enhanced powers of the Transfer Pricing Officer to scrutinise any international transaction not already referred to him by the Assessing Officer or reported in Form 3CEB, has led to mounting pressure on the taxpayer to make full disclosure about any and all international transactions.

- Identify the impact of change in definition of international transactions

  – How to report business restructuring reorganization
  – How to value and determine ALP of intangible assets like customer list, human capital and any other kind of intangibles

- Check for application of method with relevance to the international transactions.

- Identification and reporting of international transactions to be reported which are received or provided free of cost in the Form 3CEB

- Penalties under section 271 BA of INR 1,00,000 are attracted on failure to report any transaction in form 3CEB. 2% of the value of international transactions u/ 271BA.

2. TP Documentation

What is Transfer Pricing Report?

Section 92D, of the Income Tax Act requires companies having International transactions > 1crore and Domestic Transactions (tax holiday related entities and their transactions)> 20 crores with their related parties, to maintain information and documentation as prescribed in Rule 10D.

Challenges in furnishing information as per rule 10D:

- Availability of financial information of comparables
- Availability of External Comparables which are functionally similar
- Transaction-wise analysis vs. aggregation approach
- Determination/Availability of CUP data
- Availability of documentation to substantiate benefit test (Management fees/ Intra-group services)
- Availability of Independent Comparables. Companies having no related PROCPL party transactions
- Selection of Tested Party
- Selection of PLI
- Selection of most appropriate method
- Reliability and sources of data to present the industry overview.
- Penalty under section 271AA, Sec 271G- 2% of the value of transaction.

3. Undoing of SDT – TP provisions under Sec 40A (2)(b):

- Initially from 2012 to 2016, section 92BA of the Act, inter-alia provide that any expenditure in respect of which payment has been made by the assessee to certain "specified persons" under section 40A(2)(b) are covered within the ambit of specified domestic transactions.

- **In order to reduce the compliance burden of taxpayers, the indian government through FA 2017 has removed the SDT compliances for transactions section 40A(2)(b) and has excluded it from the scope of SDT Provisions u/s 92BA.**

- Event though there is change in the scope of the SDT provisions, form 3CEB has not been modified till date. Thus, Assessee's and professionals have to take note of this significant change and maintain notes for non-disclosure and document the positions to be taken for the Specified Domestic transactions and attach the same along with Form 3CEB upload.

4. **Safe Harbour Rules (SHR) -**"Safe harbour" is defined as circumstances in which the tax authority shall accept the transfer price declared by the taxpayer to be at arm's length. (Rule 10TD of the Income Tax Rules). The last date for filing safe harbour application for FY 2016-17 is 30-11-2017 or before filing the return of income. (details of SHR are provided in our SBS WIKI)

Challenges

- The SHR cover only certain specified/eligible transactions. Therefore w.r.t the other transactions, one would need to consider benchmarking the same in its TP documentation in the normal course. Such transactions can still be subject to a routine TP audit/adjustments, if not properly benchmarked.

- Form 3CEFA is a self declaration to be signed by the person authorized to sign the tax return and not in the nature of a Chartered Accountant's (CA) certificate. Thus it creates a more onerous obligation on the taxpayer to ensure that the election is made after satisfying all the eligibility criterion and a detailed review of the SHR.

- Its not just the prescribed margins/mark-ups which needs to be met, one would also need to satisfy the other prescribed pre-conditions,like falling within the definitions prescribed in the SHR, to be eligible to opt for the SHR

- Definitions prescribed under the SHR are very technical (relating to software development, contract R&D etc.). Need to undertake a detailed interview/ discussion with the business team of the taxpayer to technically evaluate the coverage/appropriate classification of activities undertaken as IT, ITeS, KPO & Contract R&D.

- Maintenance of the following documents is required which could be potentially called for during scrutiny process.

  (a) TP documentation and inter company agreements detailing the FAR profile as well as the activity profile of the taxpayer;
  (b) details on the list of employees in India and at the AE location, their qualifications and role played by the parties to satisfy that the prescribed conditions are met [Rule 10TB(2)];
  (c) Email correspondences exchanged during the year, copies of project reports/SOWs as evidence with regard to the actual conduct of the parties;
  (d) Segmental details with evidences where the taxpayer has opted for more than one category of eligible international transaction with different prescribed mark-ups.

This article is contributed by CA Suresh Babu S, Partner of SBS and Company LLP, Chartered Accountants. The author can be reached at suresh@sbsandco.com

GST

INPUT TAX SEAMLESS CREDIT MILES TO GO

Contributed by CA Sri Harsha & CA Manindar

Introduction:

GST reform is lauded globally because of its seamless credit feature which negates the cascading effect of taxes to ensure that entire tax burden is on consumer and not on business. This will encourage more number of business to come under tax net and ensures optimum tax compliance. The input tax mechanism under the Indian GST, though far more effective compared to earlier regime, yet some legislative changes are required to be made to achieve further reduction in cascading effect and procedural simplifications. This article aims to highlight various provisions of input tax credit mechanism that requires reconsideration

a. Clarity required on time of eligibility of ITC for GST Payment under RCM:

Under service tax law, CENVAT Credit of reverse charge service tax liability would be available only after the date of payment of tax. Coming to GST, Section 41 provides for availment of input tax for a month on provisional basis by filing the corresponding return in GSTR-2 which includes supplies covered under reverse charge.

The impact of the said section is that a registered person, who is required to pay GST under reverse charge for a month say July is entitled to claim input tax credit in the same month though the payment of such tax would be made on or before 20th of August.

Whereas section 16(2) prescribes the conditions to be satisfied for claiming input tax credit. One of them is that the tax charged in respect of input supply has to be actually paid to Government. Further, Rule 36(1)(b) provides that input credit relating to reverse charge supplies can be claimed on the basis of invoice issued by recipient to supplier under section 31(3)(f) subject to payment of tax.

In view of above referred legal provisions, the time of entitlement of ITC on reverse charge supplies is ambiguous. GST Twitter handle account clarified that ITC can be claimed and used for the month for which the reverse charge liability is paid and not after the day of payment of said tax. However, as the said clarification does not have any legal sanctity, it is appropriate to clarify the same suitably.

b. GST is payable on advances, but corresponding ITC can be claimed only upon receipt of goods/services:

The liability to pay GST arises upon the time of supply of goods or services as provided under section 12 and 13 respectively. Accordingly, GST is required to be paid upon receipt of advances towards supply of goods or services. However, one of the essential condition prescribed under Section 16(2) for claiming of ITC is that the goods/services must be received by the buyer is will have a bearing on working capital of the tax payers especially in sectors like construction where huge amounts of advances are involved.

c. Ambiguity over eligibility of ITC on certain motor vehicles of the nature of dumpers, tippers:

Section 17(5)(a), ITC in respect of motor vehicles and other conveyances is restricted. ITC can be availed only in cases where they are further supplied or used for transportation of passengers, imparting driving skills or for transportation of goods. Dumpers, tippers are also a species of motor vehicles which requires registration under Motor Vehicles Act, 1988 as motor vehicles. However, these are not used for transportation of goods but are used generally in construction sites and mining areas. In view of this reason, ambiguity exists over the ITC eligibility of dumpers and tippers. An appropriate clarification is required to be issued in this regard to assure ITC availment on these goods.

d. Requirement of ITC restriction on non-exempt supplies should be liberalized:

Section 17(1) and (2) provides for restriction of common ITC attributable to non-business and exempt supplies. Sub-section (3) provides that exempt supplies includes transactions relating to sale of securities, land and buildings. Unlike the case of supply of exempt goods or services, these items are nothing but business investments whose supply is occasional and are of huge value. Requirement of reversal of common ITC in view of these supplies would wipe out substantial ITC. Further, it is important to note that common input supplies are procured with an intention to carry out the business of supplying goods or services but not to dispose of any investments. Therefore, such harsh provision will significantly contribute to the cascading effect of taxes. In view of this reason, the requirement of reversal of ITC on sale of securities and buildings should be limited to those cases where they are held as stock-in-trade, but such requirement should be waived of in case where they are held as investments.

e. Value of securities for restricting common ITC should be trading margin:

Under the erstwhile Rule 6 of the CENVAT Credit Rules, 2004, the value of securities to be considered for reversal of common CENVAT Credit shall be the higher of the difference between sale price and purchase price or one percent of purchase price of securities traded. A similar provision should have been given under GST law also as securities continue to be outside GST. Absence of such beneficial provision may lead to excess restriction of common ITC.

f. Interest should be excluded from the purview of exempted turnover:

Under the erstwhile Rule 6 of the CENVAT Credit Rules, 2004, the value of interest or discount received on deposits, loans, advances are excluded from the value of exempted turnover and total turnover for reversal of common CENVAT Credit. Interest continues to be exempt under GST, but a similar beneficial provision is absent under GST law. Every business entity would be deriving some sought of interest income on their deposits with banks. This will lead to every entity required to make compliance under section 17(1), (2), (3) of CGST Act, 2017 to restrict the common ITC towards interest income. The status quo of earlier tax regime should be maintained by making suitable amendments in the law in order to relieve many taxpayers who otherwise fall outside the requirement to restrict common ITC.

g. ITC in respect of motor vehicles and other conveyances:

Section 17(5) blocks ITC in respect of various inward supplies of goods and services. Clause (a) blocks ITC in respect of motor vehicles and other conveyances. Does this mean that only the ITC with respect to inward supply of motor vehicle alone is restricted or the ITC in respect of all expenditure related to motor vehicle say repairs, maintenance etc. are restricted? Section 17(5)(a), uses the phrase 'ITC in respect of motor vehicles'. In the case of State of Madras vs. Swastik Tobacco Factory (1966)3SCR79(SC) wherein it was held that the expression "in respect of goods" means only on the goods and cannot take in the raw material out of which the goods were made. In view of restricted meaning to the phrase 'in respect of', ambiguity exists over the availment of ITC on repairs and maintenance of motor vehicles. An appropriate clarity is required to be provided on this aspect.

h. ITC should be allowed on inward supplies consumed in other States:

GST law does not permit ITC availment of those intra-state inward supplies where supplier and recipient are in different states. For example, a registered person of the State of Telangana visits Delhi on a business purpose and stays in a hotel. The hotel will charge CGST and Delhi State SGST towards these accommodation services. In such scenario, the registered taxable person located in the State of Telangana cannot take ITC though the said service is procured for his business in Telangana. On the other hand, a person who has obtained registration of input service distributor can freely take ITC of any state intra-state service irrespective of the nature of GST paid. Said provisions are discriminating and act as obstacle for seamless flow of input tax credit. Further, our Prime Minister has acclaimed GST as a reform to unite India into a single economic union. If this is the objective of GST, this kind of restriction on ITC would be futile. An appropriate amendment should be made in this regard to ensure that India is really a single economic union.

i. Implications for denial of ITC on food, beverages and other supplies:

Section 17(5)(b) denies ITC on supply of food, beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply is used for making an outward supply of similar category. Under erstwhile CENVAT Credit Rules, 2004, CENVAT Credit of these items are restricted only when the expenditure is incurred for personal consumption of employees. However, under GST, ITC is denied even in cases where these expenditure is incurred for business and not for personal consumption of employees. It is required to make suitable amendments to maintain status quo of existing regime.

j. Facility of availing ITC in respect of certain procurements:

In most of the companies, certain expenditure would be of the nature of reimbursements to employees who incur business expenditure on behalf of the company due to business expediencies. Say, a marketing manager of a company visits various places to promote sales of the company thereby incurs expenditure towards hotel, traveling etc.If the invoice has not been taken with company's GSTN number, then the corresponding ITC of GST charged on such bills will not be available to the company in view of the reason that the supplier upload these details as B2C supplies in their GSTR2 whereas GSTN portal facilitates ITC availment only in case of B2B supplies. Due to this

in their GSTR2 whereas GSTN portal facilitates ITC availment only in case of B2B supplies. Due to this reason, there is a possibility that tax payers may not claim ITC on reimbursements towards B2C invoices though the supplies are in fact B2B. This will contribute to cascading effect. An appropriate mechanism say option to claim ITC on such reimbursements on self-declaration basis along with the support invoice shall be made available to the recipient in order to facilitate credit availment in such situations.

k. No ITCon Inputs & Capital Goods used in manufacture of Electricity for use in Production:

Electricity was not excisable goods, yet CENVAT Credit was allowed under the erstwhile CENVAT Credit Rules, 2004 on inputs used in manufacture of electricity that is captively consumed in factory for production of dutiable goods. Electricity is outside the GST tax net as they continue to be subjected to electricity duty by States. There is no corresponding provision under GST to prescribe for availing ITC on inputs and capital goods used in manufacture of electricity for captive consumption to manufacture goods that are subject to GST. In such absence, manufacturers may not be legally entitled to avail ITC on such inputs and capital goods that are used in manufacture of electricity for captive consumption. This will certainly shoot up the cost of the goods and thereby contributes to the cascading effect which is against the objective of GST.

l. Reverse charge is an exempted supply:

Section 17(3) of the CGST Act, 2017 provides that for restriction of common ITC attributable to exempt supplies, supplies on which GST is payable by recipient on reverse charge basis shall also be included in exempt supplies. This requirement is not in accordance with the spirit of GST. The tax on these supplies are paid by recipient and therefore they cannot be considered as exempt supplies. By treating these supplies as exempt supplies, there will be a significant cascading effect on these notified reverse supplies and their cost would increase. As full tax is going to be collected from recipient in cash, there must be an appropriate provision in the GST law to allow the corresponding supplier to claim refund of ITC attributable to these supplies in the manner similar to refunds in cases where supplies of goods or services have inverted duty structure.

m. Valuation on Inter-unit transfer of Capital Goods should be clarified:

Rule 28 of the CGST Rules, 2017, for the purpose of payment of GST, require valuing goods transferred from one unit to another unit of same entity based on open market value of the said goods. Second proviso to the said rule states that the value adopted shall be deemed to be open market value if the unit receiving the goods are eligible to take ITC of the GST paid by supplying unit and the goods are intended for further supply by recipient unit. With respect to goods normally traded by an entity, the proviso will limit the issue of fairness in valuation that may emanate on inter-unit transfer of goods. However, as the capital goods are not intended for further supply be recipient, the said proviso relating to deemed open market value may not apply, keeping issue of fairness in valuation wide open. Further, selling of capital goods of particular type by a unit is rare and occasional. In such circumstances, reference to similar transaction between un-related parties to arrive at open market value may not be available. Therefore, valuation of inter-unit transfer of capital goods may be subjective and prone to litigation.

In order to overcome the practical challenges on valuation of inter-unit transfer of capital goods, it is advisable to prescribe a separate valuation rule for capital goods where value can be arrived at by way of reduction in original purchase price based on percentage points depending on the no of quarters for which the asset is put to use.

CONCLUSION:

In view of the above discussion, it is amply clear that the provisions of ITC under the CGST legislation are not completely eliminating cascading effect. Seamless credit is still not within the sight of taxpayer. Certain rational amendments are required to be made to the CGST Act, 2017 in order to move in the direction of seamless credit.

This article is contributed by CA Sri Harsha Vardhan K & CA Manindar K Partners of SBS and Company LLP, Chartered Accountants. The authors can be reached at harsha@sbsandco.com & manindar@sbsandco.com

TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Insights into Start-ups and Structuring thereof	03/11/2017	CA Suresh Babu	SBS - Hyd
2	Valuation under GST Laws	10/11/2017	CA Manindar	SBS - Hyd
3	Overview on Real Estate Regulatory Authority (RERA)	17/11/2017	CA Rajesh & CA Harsha	SBS - Hyd
4	Recent updates in Companies Act,2013	24/11/2017	CS Phanindra DVK	SBS - Hyd
5	SIA-6 Analytical Procedures	01/12/2017	CA Bhyrav	SBS - Hyd

Note:

The timings for the above events shall be from 16:30 hrs to 18:30 hrs. We request the recipients of "SBS Wiki" who are interested to attend the above events to send confirmation of your participation two days in advance to make appropriate arrangements. The relevant material will be hosted at slideshare shortly after the session. The link to download is *http://www.slideshare.net/Team-SBS*

Interesting Issues in Income from Property - CA Ramprasad

Valuation under GST Laws - CA Manindar

By

Team SBS

Hyderabad: 6-3-900/6-9, #103 & 104, Veeru Castle, Durganagar Colony, Panjagutta, Hyderabad, Telangana
Kurnool: No. 302, 3rd Floor, V V Complex, 40/838, R.S. Road, Near SBI Main Branch, Kurnool, Andhra Pradesh
Nellore: 16-6-259, 1st Floor, Near Santi Sweets Opp: SBI ATM, Vijayamahal Centre, SPSR Nellore, Andhra Pradesh
Tada: 8-3-425/2, Flat No. 202, 2nd Floor, Bigsun Avenue, Near SRICITY, TADA, SPSR Nellore Dist, Andhra Pradesh
Visakhapatnam: # 39-20-40/6, Flat No.7, Sai Yasoda Apartments, Madhavadhara,Visakhapatnam (Urban),Vizag, Andhra Pradesh
Bengaluru: B104,RIRCO, Santosh Apartments, Wind Tunnel Road, Murugeshpalya, Old Airport Road, Bengaluru, Karnataka.

Disclaimer:

*The articles contained in **SBS Wiki**, are contributed by the respective resource persons and any opinion mentioned therein is his/their personal opInion. **SBS Wiki** is intended to be circulated among fellow professional and clients of the Firm, to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). The information provided is not for solicitation of any kind of work and the Firm does not intend to advertise its services or solicit work through **SBS Wiki.** The information is not intended to be relied upon as the sole basis for any decision. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.*

***SBS AND COMPANY LLP [Firm]** does not endorse any of the content/opinion contained in any of the articles in **SBS Wiki,** and shall not be responsible for any loss whatsoever sustained by any person who relies on the same.*

To unsubscribe, kindly drop us a mail at kr@sbsandco.com with subject 'unsubscribe'.