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By

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Dear Readers,

In this edition, we have analysed the changes made to the Finance Bill, 2023 at the time of passing it as an act. There are certain interesting changes, which I think will be of interesting read.

The next article is on the GST implications on gift of under-constructed flats to related parties. This is also an interesting read considering the complications and overlap of multiple laws.

We have also collated certain important judgments under direct tax and indirect tax laws, provided our comments wherever necessary.

I hope that you will have good time reading this edition and please do share your feedback.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

GST IMPLICATIONS ON GIFT OF FLATS – PRIOR TO COMPLETION CERTIFICATE

Contributed by CA Sri Harsha

In this article, we shall analyse an important aspect relating to the tax implications under the GST laws, on gifts made to related parties of flats in a residential or commercial complex, prior to obtaining completion certificate. We shall take a case study to analyse the tax implications.

Let us say, a landowner, Mr X has entered a development agreement with a developer, M/s ABC. The development agreement is entered on 01 April 2022, for conceiving a commercial project. Vide the terms of the development agreement, Mr X is entitled a total of 2 lakhs Sft[1] , out of the total 5 lakhs Sft of the project.

Mr X in April 2023 executed a gift deed to his brother, divesting himself of all the rights pertaining to 5,000 Sft, out of his total entitlement of 2 lakhs Sft. Mr X has executed a gift deed in favour of his brother qua 5,000 sft. The gift deed, inter-alia, clearly stipulates that the above property is under construction and on completion of such construction by developer in terms of development agreement, the brother would get the possession. Further, the gift deed states that Mr X has gifted this out of love and affection towards his brother.

Now, the question, which is the subject of this article, what are the tax implications under the provisions of CT Act[2] on such gift? If the gift deed is executed post obtaining the completion certificate of the project, then, I think, everyone would agree, the said gift would be a gift of immovable property being flats, and accordingly not a subject matter of GST laws. However, if the gift deed is executed prior to the obtaining of completion certificate, what would be the tax implications? Would the same be subjected to tax or would it be indifferent, when the gift deed is executed, whether pre or post completion certificate, since what was gifted is an immovable property and consequently should be out of the tax net. Let us proceed to examine the same.

At first blush, the question seems to be easy. Since, what is being gifted are the flats and a gift deed is executed in the manner provided in Section 123 of Transfer of Property Act, 1882 and which is registered in terms of Section 17 of Registration Act, 1908, should not invite an examination under the GST laws. However, on a detailed examination, we may reach to the same conclusion, that the gift is not taxable, but the means to reach such end is not an easy thing. Before we proceed further, a bit of basics provides us a right perspective.

Section 7 of CT Act deals with the scope of supply. As per Section 7(1)(a), all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course of furtherance of business are covered with in the ambit of supply. Once a transaction or activity falls under the scope of 'supply', then in terms of Section 7(1A), they shall be treated either as goods or services as mentioned in Schedule II. Section 7(2)(a) states that notwithstanding anything contained in Section 7(1), activities or transactions specified in Schedule III shall be neither treated as supply of goods nor services.

[1]Square Feet

[2]Central Goods and Services Tax Act, 2017

On a detailed examination, Section 7(1)(a) states that all forms of supply of 'goods or services or both' made or agreed to be made for a 'consideration' 'in the course of furtherance of business' would qualify to be supply. Hence, in order to fall under the ambit of supply, the subject item should be either 'goods' or 'services' or 'both' and should be made for a consideration and that should be in the furtherance of business.

In the case study taken above, Mr X has gifted flats to his brother. Let us examine, whether the said transaction or activity, satisfies, the three conditions for qualifying to be a supply.

Whether the gift of flats, would be a gift of 'goods' or 'services' or 'both' or something else:

Vide Section 2(52) of CT Act, 'goods' is defined to mean every kind of moveable property other than money and securities but includes actionable claims, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract supply. From the above, it would be evident that the flats in the instant case do not fit under the definition of 'goods', because they are not moveable property. Would it be a service then?

Vide Section 2(102) of CT Act, 'services' is defined to mean anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

From the above, one can infer that the scope of 'services' is very wide in nature. It covers everything except goods, money and securities. Hence, there is a chance, that gift of flats involved in the instant question, would be falling under the ambit of 'services'.As discussed earlier, if an activity or transaction falls under the ambit of 'supply', then in terms of Schedule II, the said activity or transaction would be treated as either supply of goods or services.

Hence, the chance that the gift of flats falling under 'services' would also get heightened by the presence of Entry 5(b) in Schedule II to CT Act. The said entry states construction of complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate. We shall for time being park the pointer that Para 5(b) of Schedule II only 'sale' and not 'gift'.

The above can be better understood when read in conjunction with Para 5 of Schedule III. The said entry states that sale of land and subject to clause (b) of Paragraph 5 of Schedule II, sale of a building. In simple words, in a normal transaction, that is sale of flat to an unrelated customer, the transaction of sale of flat/building is a Schedule III transaction subject to the provisions of Para 5(b) of Schedule II.

Accordingly, if the transaction of sale of flat/building does not fit under the Para 5(b) of Schedule II, then it fits under Para 5 of Schedule III, thereby becoming a transaction or activity which is neither supply of goods nor services.

Para 5(b) of Schedule II states that if consideration is received before the issuance of completion certificate, then the construction of complex, building or civil structure or part thereof, shall be a service. Only in cases, where the entire consideration is received after issuance of completion certificate, then the said transaction would be out of Para 5(b) of Schedule II and thereby fitting under Para 5 of Schedule III.

Hence, in the instant case, the gifts of flats being done prior to completion certificate, there is a chance to call such gift to fit under Para 5(b) of Schedule II. However, Para 5(b) of Schedule II covers only 'sale' and not 'gift'. 'Sale' and 'gift' are two different types of transfers (more about this later) and argue that the 'gift' does not fit therein. The counter argument would be that what is described in Para 5(b) of Schedule II throws light on the intention of the legislature and it is not mandatory for a particular transaction to be specified in Schedule II to call it is a 'goods' or 'services'. In absence of mention in Schedule II, the transaction can still be decided, whether it is a 'goods' or 'services' by applying the common principles and taking clue from Para 5(b) of Schedule II, where sale transactions are covered, gifts can also be tagged as services.

We are not concluding this here and will revisit soon. Now, let us proceed to examine, the next aspect, to qualify as 'supply', the 'consideration'.

Gift vis-à-vis Consideration – Good Consideration vs Valid Consideration:

This is the crucial aspect in the entire discussion. The term 'gift' is not defined in the GST laws. Hence, the same needs to be understood as per Section 122 of Transfer of Property Act, 1882. As per Section 122, a gift is transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another called the donee, and accepted by or behalf of the donee.

From the above, it is evident that one of the essential conditions to call a transfer as a 'gift', is the same should be without consideration. The Supreme Court in Smt Shakuntala & Ors vs. State of Haryana AIR 1979 SC 843 held that the essence of 'gift' as defined in the Transfer of Property Act that it should be without 'consideration' of nature defined in Section 2(d) of Contract Act. Hence, we can conclude that there is no 'consideration' in gift.

Also, we shall look at the definition of 'consideration' as per Section 2(31) of CT Act, before completely concluding on this. The first part of the definition deals with majorly monetary payments and the second part deals with non-monetary aspects. It is not out of place to mention that the definition of 'consideration' also includes the non-monetary aspects. Hence, this should not pose any problem to the reliance on the above Supreme Court judgment.

If there is no consideration, then, we can conclude that there is no 'supply', in case of gift. However, the story does not end there. This is because, Section 7(1)(c) states that activities specified in Schedule I, made or agreed to be made without a consideration are deemed to be falling under the scope of 'supply'.

In other words, if an activity or transaction gets mentioned in Schedule I, then the same shall fall under the ambit of 'supply' even there is no consideration. Para 2 of Schedule I deals with supply of goods or services or both between distinct persons as specified in Section 25, when made in the course or furtherance of business.

Accordingly, if there is a supply of goods or services or both between related persons, when made in the course or furtherance of business, then the same would be supply even though there is no consideration involved. Explanation (a)(viii) to Section 15 deems 'members of the same family' are deemed to be related persons. Though the expression is vague, for the purpose of this article, we can safely conclude that Mr X and his brother are members of the same family.

Hence, from the above, one may argue that it is true that, gift does not involve consideration, but for the purposes of GST laws, it may still fall under the ambit of 'supply', by virtue of deeming fiction under Schedule I. Gift having no consideration is a dispensation for the purposes of Transfer of Property Act, 1822. However, for the purposes of GST laws, it can be treated as 'supply', when such gift is happening between related persons.

Also support may be garnered for the purpose of above argument from the proviso to Para 2 of Schedule I, which states that gifts not exceeding Rs 50K in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both. This indicates that the legislature intends to subject the gifts exceeding Rs 50K when extended by employer to employee. When there is no consideration at all qua gifts, how can the legislature stipulate that, if gifts exceed a specified value, then they would be treated as supply. This indicates that, it was a conscious decision to bring tax on gifts, though there is no consideration involved as per the Transfer of Property Act read with 'consideration' as per Section 2(d) of Contract Act.

Further, the above argument can be extended by referring to Para 5 of Schedule III. The said para states that 'sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of a building'. Here also, the 'gift' is not covered. We all know that 'sale' and 'gift' are two different concepts, though they may fall under the definition of 'transfer' as per Section 5 of Transfer of Property Act (Refer Bimal Kumar Das vs. Corporation of Calcutta - AIR 1978 Cal 420). So, in absence of specific mention of 'gift' in Schedule III, one cannot infer the same in the ambit of 'sale', especially when the former is without consideration and later is with consideration. They are class apart.

Since there is no mention of 'gift' in Schedule III and specific mention in Schedule I (in context of employer and employee), one can argue that gifts are covered under the ambit of 'supply'. Applying this to the instant case, the gift of semi-constructed flats to his brother by Mr X would fall under the definition of 'supply' when read with Para 2 of Schedule I and Para 5(b) of Schedule II.

If the gift is qua immovable property that is after completion of construction and obtaining completion certificate, then, one can argue that it does not fall under Para 5(b) of Schedule II and thereby becomes transaction in immovable property. Since it would be a transfer of immovable property, it would not fall under the ambit of Para 2 of Schedule I, since the said entry deals with supply of goods or services or both but not immovable property[3] . One cannot take shelter under Para 5 of Schedule III, because it talks about sale of a building and not gift.

[3]There is no clear escape for this too. The definition of 'services' as per Article 366(26A) of Constitution of India to mean anything other than goods. Further, Section 2(102) of CT Act also states that it covers anything other than goods. Hence, technical speaking, the land or immovable property or anything similar would also fall under the definition of 'service', though sounds absurd. The saving grace is available only for sale of land and sale of building subjected to clause Para 5(b) of Schedule II.

The counter argument can be, the 'consideration' mentioned in Section 7, Para 2 of Schedule I and Para 5(b) of Schedule II is a 'valid consideration'.Though the definition of 'consideration' as per CT Act, would cover non-monetary aspects also, that cannot be extended to include the 'love and affection'.

The counter argument be that even under Para 5(b) of Schedule II, the word 'sale' is mentioned, as discussed earlier. Hence, one can argue that the transaction of 'gift' would not be covered under Para 5(b) of schedule II. Further, placing reliance on Shakuntala & Others (supra), wherein the Supreme Court was dealing with an aspect of tenancy and land laws. In that case, a gift was made to the donees before a cut off period to be out of the surplus areas. The saving clause of the act in that context provided that the lands will be out of surplus computation if they are transferred for a 'consideration' before a cut off date. The appellants therein transferred certain lands vide gifts. The Revenue authorities took the view that the said transfers which are done as gifts are not covered under the savings clause, because they are not transferred for 'consideration'. The appellants argued that there is love and affection, which definitely amounts to consideration and hence covered by savings clause. The Supreme Court stated that even though the word 'consideration' is not defined under the Transfer of Property Act, it has been used in the sense as in Indian Contract Act, which excludes natural love and affection. The appellants tried to argue that 'good consideration' such as is founded on natural duty and affection, would amount to consideration under the savings clause. The Court stated that 'good consideration' is generally used in antithesis to valuable consideration, which has necessarily to be excluded in case of gift by virtue of definition in Section 122 of Transfer of Property Act.

So, applying the above rationale to the instant case, the 'consideration' mentioned in Section 7 is the 'valuable consideration' and not the 'good consideration'.Extending the said rationale to the Para 2 of Schedule I and Para 5(b) of Schedule II, leads to a more clear picture. So, one can argue that there is no consideration when Mr X has gifted the flats to his brother. So, the supply as per Section 7(1)(a) should fail. Though are related, the Para 2 of Schedule I comes to life, only when, the 'consideration' as mentioned in Section 7(1)(a) is absent. In other words, what is not 'consideration' for Section 7(1)(a), cannot also be 'consideration' for Para 2 of Schedule I and Para 5(b) of Schedule II. The consideration can be in non-monetary but not 'good consideration'. Hence, it can be argued that in absence of 'consideration', the entire 'supply' fails including those mentioned in Schedule I.

The above seems logical but for the existence of proviso to Para 2 of Schedule I, which in clear terms deals with gifts which are given by employer to employee. Even though the proviso deals with gifts between employer and employee, indirectly, it says, all other gifts are covered. But the larger question would be, whether the 'gift' which is without a valid consideration can be found in Schedule I? This the courts must crack. It can also be argued that the proviso only provides for exceptional situations of gifts extended between employer and employee and does not cover all other gifts. This view also garners support from the interpretation that the role of Schedule I is of deeming fiction and the same cannot be extended for the purposes other than it is provided for.

Hence, from the above, we opine that, it would be very tough to convince the tax authorities that gift of flats before obtaining completion certificate would be out of the scope of 'supply' either under Section 7(1)(a) or Para 2 of Schedule I.

Whether 'Gift' can be said 'in course or furtherance of business':

As discussed above, this the third condition that must be fulfilled for calling a transaction or activity as 'supply'. Even if assuming that the transaction or activity falls under Para 2 of Schedule I, the same will also be called as 'supply', only when done in course or furtherance of business. Hence, it is essential to examine, whether the transaction of 'gift' can be said to be done in course or furtherance of business. The below examination is done with an assumption that there exists a 'consideration'.

Section 2(17) defines 'business' in an inclusive manner. Irrespective of profit motive or volume or frequency, activities or transactions are included in the above definition. Hence, the frequency with which the landowner engages does not actually matter for the purposes of GST laws and calls it as business. However, the important question is that, whether the 'gift' can be said to be done by the landowner in course or furtherance of business?

The 'gift' as discussed earlier is without consideration and more of a personal in nature. Further, there is nothing the landowner intends to achieve by gifting the flats, which can be said to be in course or furtherance of business. Hence, landowner's action, that is, Mr X's action of gifting the flats to his brother is a private transaction and cannot be said to be in course or furtherance of business.

Since, this condition fails, the transaction of 'gift' would not fall under the purview of 'supply' either under Section 7(1)(a) or Para 2 of Schedule I.

Alas, there can be a counter argument. If one reads the Para 4(a) of Schedule II, it is stated that where goods are forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, such transfer or disposal is a supply of goods by the person. Though this paragraph deals with goods, it kind of shows the intent of the legislature, what meaning would it give to 'in course or furtherance of business'. If goods are gifted by Mr X to his brother, then the same is said to be supply of goods, thereby deeming that such supply is in course or furtherance of business. Hence, applying the above logic, one can argue that the gift is also done in course or furtherance of business despite there is no specific provision for service as existed for goods vide Para 4(a) of Schedule II.

Hence, on this aspect also, there is no clarity, which makes it much harder for convincing the authorities that the 'gift' is out of tax net.

Though the 'gift' transactions are not that normal and routine, we think much attention is not given to the above ambiguity. We need to wait for further developments to take a conclusive view on this.

Before concluding, one more aspect needs attention. If the immovable property is not in existence at the time of gift deed done by Mr X to his brother, then what is registered under Section 17 of Registration Act read with Section 123 of Transfer of Property Act? Can an execution of gift deed would mean that there is an underlying immovable property?

The Supreme Court in the case of Vasudev Ramchandra Shelat vs. Pranlal Jayanand Thakar & Others (1974) 2 Supreme Court Cases 323 was dealing with the validity of gift deed. The facts of the case were that Mr U, made a will and died childless. His widow Mrs B, obtained under the will, inter alia, certain shares. Mrs B executed a registered gift deed donating all the shares to her brother. Mrs B also expired but before she died, she had signed blank transfer forms, apparently intended to be filled in by the donee (the brother), so as to enable him to obtain the transfer of the donated shares in the registers of various companies and share certificates in his name. However, before the death of Mrs B, the registers of the various companies have not been amended to include her brother's name. The respondent, nephew of Mr U, disputed the claim of the brother, since the shares have not been registered in his name. Single Judge of Gujarat High Court heard the matter and held that Shelat (brother/donee) was entitled to the shares covered by registered gift deed to which the blank transfer forms could be related. The matter has been appealed to a Division Bench of High Court, which reversed the decision of Single Judge stating that gift was incomplete for failure to comply with the formalities prescribed by Companies Act for transfer of shares. The matter then reached to Supreme Court for consideration.

The Supreme Court held that wide definition of 'property' under Section 6 of Transfer of Property Act includes not mere shares as transferable, movable property, but would also cover as a separable form of property, a right to obtain shares which may be antecedent to the accrual of rights of shareholder upon the grant of a share certificate by the company. The Court stated that Section 6 of Transfer of Property Act justifies splitting up of rights constituting 'property' in shares between 'the title to get on the register' and the 'full property in the shares of company'. The first was held to have been acquired by mere delivery, with the required intention, of the share certificates and blank transfer forms. The second is only obtained when the transferee, in exercise of his right to become shareholder, gets his name register in place of transferor. This antecedent right in the person to whom share certificate is given with a signed blank transfer form under a transaction meant to confer a right or title upon him to become a shareholder, is enforceable so long as no obstacle to it is shown to exist in any of the articles of association of a company or a person with superior right or title, legal or equitable, does not appear to be there.

The Court held that in the present case the donor delivered the registered gift deed together with the share certificates to the donee. On these facts, the donation of the right to get share certificates made out in the name of donee becomes irrevocable by registration as well as delivery. The actual transfers in the registers of the companies concerned were to constitute mere enforcements of this right and non-completion of the same cannot make the gift incomplete or invalid.

Applying the above rationale, the gift deed executed by Mr X to his brother entitles him a right to get the construction completed. Hence, the gift deed conveyed the rights over the property. Unlike in the above case of Shelat (where shares which are movable property), we are dealing here with immovable property which should be done by compulsory registration under Section 17 of Registration Act. Hence the gift deed needs to be registered, which gives the brother right to get the construction completed and there after become the owner of such properties covered under the deed. This view also raises another interesting aspect as to, what is gifted is the right to get the immovable property constructed and not the immovable property which is to follow. In our view, that may not be right interpretation because the gift deed essentially conveys the immovable property, though as on the date of execution, the exact square feet is not ascertained. Since, there is a registered development agreement along with registered supplementary agreement, the argument that what Mr X gifted is a future property is remote.

With the above discussion, we would leave you with the complicated maze surrounding taxation of gifts. Though the gift of immovable property (whether pre or post completion certificate) should be out of tax net in clear terms, the current legislature does not support that in unequivocal terms. Hence, more clarity is required to avoid necessary litigation.

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DIRECT TAX

DIRECT TAX AMENDMENTS TO FINANCE BILL

Contributed by CA Sri Harsha & CA Narendra

Finance Minister on 01.02.2023 has introduced the Finance Bill, 2023 in the Parliament with considerable changes to ITA[1] .Refer to our Wiki - Budget Edition[2] for detailed discussion on the provisions of Finance Bill,2023.

However, while passing the Finance Bill,2023, few amendments have been made to the Bill. In this article, changes made to the Bill have been analysed.

Extension of Exemption under Section 47(viiad) to Abu Dhabi Investment Authority:

Through the FA, 2021, in order to encourage the relocation of foreign fund to IFSC, certain tax exemptions have been provided under the ITA if such fund is relocated to IFSC on or before 31.03.2023.For the purpose of claiming exemption, foreign fund i.e., original fund has been defined under section 47 (viiad) to mean a fund established outside India which fulfils certain conditions.

In the Finance Bill, 2023, it was proposed to extend the time limit from 31.03.2023 to 31.03.2025.

Now, through the amendments, exemption has been made applicable to, in addition to the foreign fund, an investment vehicle in which Abu Dhabi Investment Authority is the direct or indirect sole shareholder or unit holder or beneficiary or interest holder and such investment vehicle is wholly owned and controlled, directly or indirectly, by the Abu Dhabi Investment Authority or the Government of Abu Dhabi.

Inclusion of Specified Mutual Fund within the scope of Section 50AA:

In the Finance Bill, 2023, it was proposed to insert a new section 50AA in order to consider gain arising from the transfer of market linked debentures as gain arising from transfer of short-term capital asset and taxable accordingly.

Now, while passing the Bill, the above provisions have been made applicable to 'Specified Mutual Fund' as well.

'Specified Mutual Fund' has been defined to mean a mutual fund where not more than 35% of its total proceeds are invested in equity shares of domestic companies. Which means that income arising from certain debt mutual fund is taxable as short-term capital gain.

However, grand fathering has been provided in respect of those investments made on or before 31.03.2023.

Exemption for transfer of interest in JV by PSU:

A new clause (xx) has been inserted in section 47 to state that transfer of interest in a joint venture by public sector undertaking/company in exchange of shares of a Government foreign company is not chargeable to tax.

A consequent amendment is made to section 49 in order to determine the cost of acquisition.

[1]Income Tax Act, 1961
[2]SBS-Budget-Edition-23.pdf (sbsandco.com)

Amendments with respect to IFSC:

Capital Gain under Section 10(4H):

A new section 10(4H) has been inserted to state that gain arising to a non-resident or unit of IFSC (engaged primarily in the business of lease of aircraft) from the transfer of shares of a domestic company, being a unit of IFSC, is exempt from tax subject to the following conditions:

- Such domestic company shall primarily engage in the business of lease of aircraft.
- Such domestic company commences operation on or before 31.03.2026.
- The provisions of this section are applicable for 10 years or 31.03.2034 whichever is earlier.

Dividend income from aircraft leasing IFSC Unit:

A new section 10(34B) has been inserted to exempt the dividend income received by a unit of IFSC primarily engaged in the business of leasing of an aircraft from a company being a unit of IFSC primarily engaged in the business of leasing of aircraft.

Dividend Income from IFSC Unit:

Provisions of section 115A has been amended to state that dividend income received by a non-resident or a foreign company from a unit in IFSC shall be chargeable to tax at the rate of 10%.

Tonnage Tax Scheme to IFSC Unit:

Section 115VP has been amended to state that unit of IFSC may avail the benefit of tonnage taxation by making an application within 3 months from the date on which deduction under section 80LA ceases.

Enhancing the deduction under Section 80LA:

Under the existing provisions of Section 80LA (1), income referred to in Section 80LA(1) is eligible for deduction to extent of 100% for the first 5 consecutive years and 50% in next five years.

Now, section 80LA has been amended to state that income referred to in section 80LA (1) is eligible for 100% deduction for subsequent 5 years as well.

Amendments relating to Business Trust:

In the Finance Bill,2023 it was proposed to insert a new section 56(2)(xii) in order to tax income received by a unit holder from the business trust provided that income is not exempted under sections 10(23FC) and 10(23FCA) and the income is not taxable to business trust under section 115UA.

The object behind the above amendment has been explained by the Memorandum to the Finance Bill,2023.

Now, through the amendment, section 56(2)(xii) has been inserted with the specific formula. Section 56(2)(xii) states that any specified sum received by a unit holder from a business trust, *with respect to a unit held by him, shall be considered as a income from other source:*

Specified sum = A – B – C. where,

A = aggregate sum distributed by a business trust with respect to such unit during the previous year or earlier previous years, to such unit holder, which is not in the nature of income referred to in section10(23FC) or section 10 (23FCA), not chargeable tax under section 115UA.

B= amount at which such unit was issued by the business trust.

C = amount charged to tax under this clause in any earlier previous years.

Further, section 48 has been amended to state that cost of acquisition of unit of business trust shall be reduced by any sum distributed by the business trust which is not in the nature of income referred to in:

- Section 10 (23FC).
- Section 10 (23FCA).
- Section 56(2)(xii)
- Section 115UA.

However, as income received by a specified person from the business trust is exempt under section 10(23FE), the above-mentioned income made exempt from tax in the hands of the specified person.

No TDS on interest payable to business trust:

Section 193 contains provisions for deduction of tax at source in respect of interest on securities.
Section 193 has been amended to state that TDS provisions are not applicable in respect of interest payable to business trust by a special purpose vehicle referred to in section 10(23FC).

Widening the definition of 'Sikkimese' retrospectively:

Section 10 (26AAA) provides exemption to Sikkimese in respect of certain income. Through the amendment, the exemption under section 10 (26AAA) has been extended to, in addition the existing, any individual (or his father or paternal grandfather) who domiciled in Sikkim on or before 26.04.1975.

The above amendment is retrospective from 01.04.1990.

Marginal Relief under new regime of taxation:

In the Finance Bill,2023, it was proposed to increase the rebate under Section 87A to Rs.25,000 if the assessee opts for the new regime of taxation. Thereby, income up to Rs. 7,00,000 is not taxable under the new regime.

Now, through the amendment, a marginal relief has been provided in respect of income chargeable to tax under the new regime.

Enhancing the tax rate under Section 115A:

Under the existing provisions of section 115A, income, inter alia, being a royalty or a fee for technical services (FTS), earned by a non-resident or a foreign company is chargeable to tax at the rate of 10% with applicable surcharge and cess.

Now, through the amendment, the rate of tax under section 115A has been enhanced to 20%.

With the amendment, the non-resident or foreign company is liable to tax at the rate of 20% with applicable surcharge and cess.

Effect of amendment on filing of ITR:

Under the treaty, royalty or FTS is chargeable to tax at the rate of 10/15% against the rate of tax under section 115A at 10% plus applicable surcharge and cess. Hence, till now, in majority of the cases, the rate under the ITA would used to beneficial for the non-residents.

Section 115A(5) further provides exemption from filing the return in India if the tax is deducted at the rate provided under the ITA. Since, the rate under ITA used to be beneficial, the non-residents used to opt for the rate as per ITA, so that, they would be out of the obligation of filing ITR.

Now, with the enhanced rate under Section 115A, non-residents may not be in a position to choose the rate under ITA thereby may not be eligible to claim relaxation under section 115A(5).

The amendment is indirectly compelling the non-residents to comply with the requirements of filing ITR in India. This is because, exemption as provided in 115A(5) for filing of ITR in India is applicable only when the tax at source is deducted at the rate provided under the ITA.

Which means that if the non-resident wishes to avail concessional rate under the treaty, exemption as provided under Section 115A may not be applicable and they may be required to file the return in India.

Effect of amendment on filing of Form 10F:

Non-residents who are claiming the benefits of treaty must submit Form 10F. With the amendment, as non-residents may claim concessional rate under the treaty, they may be liable to submit Form 10F.

Further, Notification No. 03/2022 mandates the electronic filing of 10F. However, considering the difficulties, a partial relaxation has been provided till 31.03.2023 from electronic filing of Form 10F.

The date has been further extended to 30.09.2023 vide Notification dated 28.03.2023 if non-residents are not obligated to apply PAN.

Which means that a non-resident wishes to avail the concessional rate under the treaty has to file the ITR in India accordingly, such non-residents are under the obligation to apply PAN. Once the PAN is required to be obtained, Form 10F may be required to be filed electronically.

New Tax Rate for interest on Long-Term Bond or Rupee Denominated Bond:

Section 194LC read with section 115A states that interest income on long term bond or rupee denominated bond is chargeable to tax if such amount is borrowed between 01.04.2020 and 31.07.2023 which is listed on any IFSC.

Now, through the amendment, a new clause has been inserted whereby such interest in respect of amount borrowed from 01.07.2023 is chargeable to tax at 9%.

TDS on online Gaming is effective 01.04.2023:

Through the Finance Bill,2023, it was proposed to insert a new Section 115BBJ to tax income from online games separately at the rate of 30% which is applicable from FY 2023-24. Further, in order to discharge TDS obligations, it was proposed to insert a new section 194BA with effective from 01.07.023.

Now, through the amendment, it is stated that the TDS provisions under section 194BA are effective from 01.04.2023.Further, section 206AB has been amended to state that the provisions of higher deduction under section 206AB are not applicable to TDS covered under section 194BA.

TCS on Credit Card payment in Foreign Currency:

Under section 206C(1G), TCS shall be collected on foreign remittances under LRS. However, no clarification has been provided in respect of payments made by credit card on foreign tours.

In this regard, Hon'ble FM while passing the Finance Bill, 2023 in the Lok Sabha has made the following statement:

"It has been represented that payments for foreign tours through a credit card are not being captured under the Liberalised Remittance Scheme (LRS) and such payments escape tax collection at source (TCS)".

Further, the word 'out of India' has been removed from the provisions of section 206C(1G).

Accordingly, now credit card spends are also brought into the ambit of TCS.

Higher TCS Rate under Section 206CC and Section 206CCA is capped at 20%:

Through the Finance Bill,2023, provision of section 206C(1G) has been amended to increase the TCS rate to 20%, in certain circumstances, for remittances under LRS.

On the other hand, section 206CC (failure to provide PAN to the collector) and section 206CCA (non-filers of ITR) states that TCS shall be collected at twice the rate provided in the respective sections.

Which means that failure to provide PAN/failure to file ITR may attract TCS at the rate of 40 percent. Hence, section 206CC and section 206CCA have been amended to state that maximum rate of TCS is 20 percent.

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SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. Supreme Court in M/s Shiv Enterprises [1] - High Court erred in quashing the show cause notice on the basis that there is no intent to evade payment of tax:

The petitioner before the High Court[2] was a dealer of copper scrap. During the goods are in transit, the authorities have inspected the vehicle. The invoice and e-way bill are found to be proper. However, the goods were detained on the pretext that the genuineness of the tendered documents need verification and accordingly issued Form MOV-2 and the petitioner was directed to station the conveyance carrying goods at the office of Assistant Commissioner. A reply was filed against Form MOV-2.

During the investigation, it was told to the petitioner that, it has been found that inward supply is from Balbir Enterprises. The said Balbir Enterprises does not have any inward supply but was engaged in outward supplies to various dealers which were worth of Rs 33 Crores and input amount involved is Rs 6 Crores and since the petitioner has made purchases from said supplier, he was issued a show cause notice as to why he should not be liable to proceeded under Section 130(1) of CT Act.

The petitioner invoked writ jurisdiction and approached the High Court for quashing the above show cause notice. The High Court after considering the particulars of the notice has stated that every detention under Section 129 should lead to confiscation under Section 130. The punishment in form of confiscation as specified under Section 130 is more stringent than detention under Section 129. The High Court held that where the goods in transit are in contravention of the provisions of the Act invites detention under Section 129 and to invoke Section 130, the supply should not only be in contravention, but such contravention should be with an intent to evade payment of tax. The High Court held that a person can be attributed intent to evade payment of tax only if the contravention of the provisions of the Act or rules made thereunder has some direct nexus with his action. The petitioner cannot be held liable under Section 130 for contravention of the provisions of law by other person in the supply chain and wrongful claim of input tax credit may be result of a bonafide claim as well and does not necessarily involve intent to evade payment of tax. The High Court further stated that the wrong claim of input tax credit is not one of the five conditions mentioned under Section 130(1) to invoke the said section. Accordingly, the High Court has quashed the show cause notice.

The Revenue has appealed before the Supreme Court. The Supreme Court has stated that the High Court has erred in setting aside the notice since there was clear prescription as to intent for evading tax. Hence, the Court stated that the act of High Court is premature and accordingly restored the notice. However, the High Court's order qua releasing of the goods in question were not disturbed.

[1] 2023 (1) TMI 842 – Supreme Court
[2] 2022 (2) TMI 296 – Punjab and Haryana High Court

Our Comments:

The High Court in clear terms has stated that there is no intent to evade payment of tax especially when the petitioner cannot be held responsible for a contravention which is not stipulated in Section 130(1) and does not have any nexus with his action. However, the Supreme Court appears not to consider all those aspects and stated that High Court has rejected the notice prematurely. Maybe the action of High Court would have been in order, if the petitioner has waited for the proceedings to culminate into order and that order is in challenge before the High Court.

2. **Sakshi Bahl & Anr vs. The Principal Additional Director General[3] - High Court quashed the provisional attachment order issued by DGGI on the bank accounts of persons who are not covered under Section 122(1A)**:

This is another classic case of mis-utilisation of power. The petitioner bank accounts were frozen based on the directions of DGGI. The petitioners approached the High Court seeking the cancellation of the order. The petitioner stated that the provisions of Section 83, that is provisional attachment can be resorted on persons who are covered under Section 122(1A)[4] and since they do not fit under any of the categories mentioned therein, the banks accounts cannot be frozen.

The High Court inquired as to why the bank accounts were frozen. The Revenue stated that during the course of investigation of Mr Rajiv Chawla who engaged in issuing fake invoices involved passing of fake credits, it has come to know that there were funds transferred from the account of Mr Rajiv Chawla to the petitioners. The petitioner happened to be sister and her son of Mr Rajiv Chawla. The authorities were of the view that the funds lying in the account of petitioners belonged to Mr Rajiv Chawla and accordingly proceeded to attach them provisionally under Section 83.

The High Court held that it is not necessary to examine the nature of payment made by Mr Rajiv Chawla to the petitioners and it is clear that the petitioner are not those persons covered under Section 122(1A). Accordingly, the High Court has set aside the provisional attachment order by noting that the attachment of accounts is a draconian step and cannot be resorted unless the conditions mentioned in Section 83 are satisfied.

Our Comments:

The power under Section 83 is widely misused. It is a nightmare for the genuine people who must approach the High Court for seeking of quashing of such orders. The Supreme Court in Radha Krishan Industries vs. State of Himachal Pradesh [2021 (48) GSTL 113 (SC)] has held that the power to provisional attachment is draconian and must be exercised with due caution. However, the same is not followed in true spirit, which often creates problems for genuine tax payers or in the above case, non-tax payers.

[3] 2023 (4) TMI 48 – Delhi High Court

[4] person who retains benefit of a transaction involving supply of any goods or services or both without issue of any invoice or issues a false or incorrect invoice [Section 122(1)(i)] or issues any invoice without supply of goods or services or both without supply of goods or services or both in violation of the provisions of the Act [Section 122(1)(ii)] or takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of provisions of the Act [Section 122(1)(vii)]or takes or distributes input tax credit in contravention of Section 20 [Section 122(1)(ix)]

3. TonboImaging India Private Limited vs. Union of India[5] – Rule 89(4C) of CT Rules which puts condition or limitation taking away the right to claim refund is arbitrary and unreasonable and needs to be struck down:

This is an interesting case. The petitioner involved herein is engaged in business of certain specialised products/goods. The petitioner exported various customised/unique products during the period May 2018 to March 2019. Since they qualify as 'zero rated supplies' under Section 16 of Integrated Goods and Services Tax Act, 2017 (IT Act), the petitioner has applied for refund of unutilised input tax credit under Section 54 of CT Act read with Rule 89 of CT Rules.

Meanwhile the Rule 89(4)(C) was amended with effective from 23.02.2020. SCNs were issued to petitioner rejecting the refund on the ground that the petitioner has not complied with the amended Rule 89(4)(C). The petitioner submitted that the amended rule is applicable with effective from 23.02.20 and is not applicable for the period involved in the refund claim. Without considering the above, the authorities has confirmed the rejection of the refund involved. Against such an order, the petitioner has filed a writ petition.

The crux of the arguments of the petitioner was that amended Rule 89(4)(C) is arbitrary and discriminatory and hence it has to be struck down. The petitioner argued that the amended rule provides a methodology to determine the turnover of zero rated supply of goods. As per the amended rule, the turnover of zero-rated supply of goods means the value of zero rated supply of goods made during the relevant period without payment of tax under the bond or LUT or the value which is 1.5 times the value of like goods domestically supplied by the same or similarly placed supplier, as declared by the supplier, whichever is less.

The petitioner argued that the above condition of 1.5 times of value of like goods domestically supplied by the same supplier or similarly placed supplier is restricting the refund of input tax credit which is never the objective of the parent section, that is Section 54. The petitioner argued that by virtue of this rule, if there are no domestic supplies made by supplier or similarly placed supplier, then the exporter would not be eligible for refund[6] , because the turnover of zero rated supply of goods in such cases shall be the value of zero-rated supply of goods or 1.5 times of domestic supplies, whichever is less. Since the domestic supply of similar goods is zero, which is the lower among the actual supplies and deemed supplies, then turnover of zero-rated supply of goods would be zero. Once the numerator is zero, the refund would be zero.

Hence, a rule which tries to put a condition which is not there in the main section should be struck down. Further, the petitioner argued that the said condition is only made applicable to the tax payers who export the goods without payment of tax and does not apply to tax payers who export goods with payment of tax and hence to be held as discriminatory in terms of Article 14 of Constitution of India. The petitioner argued that there is no intelligible differentia for allowing the full refund to the

[5](2023) 4 Centax 443 (Kar)

[6]Refund is obtained by using the formula (Turnover of Zero-Rated supply of goods + Turnover of Zero-Rated supply of services)/Adjusted Total Turnover * Net Input Tax Credit.

exporters with payment of tax and exporters without payment of tax and hence fails the test as mentioned in Article 14. Further, the petitioner argued that it is impossible to find out similarly placed supplier even assuming that the said rule is valid. The petitioner also argued that in absence of similarly supplier, the rule does not provide a way forward and hence considering all the above, the said rule has to be struck down.

The High Court has agreed in total with the submissions of the petitioner and struck down the Rule 89(4)(C) as arbitrary and discriminatory.

Our Comments:

The entire reasoning as to why the condition was brought in Rule 89(4)(C) is that certain exporters are inflating the value of zero-rated supply of goods so that they can be eligible for higher refunds. However, it can be said there is inadequate legislature as challenged by the petitioners and accepted by High Court. This is a welcome move but need to see how the authorities take the above judgment while passing the refund orders. No doubt, it would be hard for every assessee to approach the High Court. Hence, it is essential that a clarification or any other prudent measure is brought in to restrict undue advantage for fraudulent exporters instead of punishing genuine ones.

SUMMARY OF JUDGEMENT

SUMMARY OF IT DECISIONS

Contributed by Team SBS

1. **Ahmedabad Tribunal in the case of Adani Vizhinjam Port Pvt. Ltd [1]- TDS deducted on grant provided under concession agreement shall be allowed under section 199 of ITA irrespective of the fact that the amount has not been offered to tax in the same year:**

The assessee was denied refund of TDS claim under Section 199 of the ITA on two instances. Firstly, tax deducted on the interest income earned on the deposits made by the assessee out of the proceeds of the loan amount during the construction period of the asset which it had capitalized to the cost of the asset in the books. Secondly, the assessee had entered into a concession agreement with Government of Kerala for developing and operating a port in Kerala under which the assessee had received 10% of the funded work as advance which is shown as other liabilities in the books. Since the assessee had not offered any of the above income to tax, the AO had rejected the refund of the TDS amount by emphasizing the provisions of section 199 & rule 37BA.

The Tribunal, after analyzing the facts of the first instance, has explained that since the interest income is inextricably linked with the construction project, the assessee has rightly reduced the same from the cost of the project. Accordingly, it has held that such reduction of income from the cost of asset would indirectly deem to be offering the income to tax in the relevant year and so, the assessee is rightly eligible for the tax deducted on the interest income under section 199.

For the second instance, the Tribunal has identified that the grant received by the assessee under concession agreement is merely in the nature of reimbursement of the cost incurred for the project but not the income of the assessee and the entire amount will be amortized over the concession period after the completion of the project but will not be recognized as revenue in the books in the future. Resultingly, the Tribunal after relying on various precedents, has held that where the income on which tax is deducted is not assessable to tax in any year, the government has no authority to retain such amount in its account and thus the assessee is eligible for refund of such amount.

OurComments:

Post amendment of section 199 by the Finance Act, 2008, the condition which provides that "TDS credit is available for the year only if the income is assessable for that year" has been removed which made it obvious that the assessee can claim the TDS credit if the income is not at all assessable to tax in any year read with rule 37BA and hence the tax amount has to be rightfully refunded to the assessee when the tax is deducted and paid to the Central Government by the deductor.

[1][TS-91-ITAT-2023(Ahd)]

2. Delhi High Court in the case of OYO Hotels & Homes (P.) Ltd[2] –Refund amount cannot be withheld by the department merely because of various number of scrutiny issues to be examined:

The assessee in its return of income for AY 2020-21, claimed a refund of Rs. 43 crores and subsequently, received an intimation order confirming the said refund. However, the refund had not been credited to the assessee. After making enquires with the department, the assessee has been informed that its case has been selected for scrutiny under various issues, by which the assessing officer is of opinion that the scrutiny might lead to demand and thus granting the refund to the assessee would likely to adversely affect the revenue. Accordingly, the refund amount has been withheld by the AO by invoking the provisions of section 241A of the Act.

The HC,by analyzing section 241A of the Act, had explained that it is not the intention of the legislature to withhold the refund in every case where notice under section 143(2) had been issued. The AO has to apply his mind judiciously and such application of mind has to be found in the reasons which are to be recorded in writing. However, in the given case, the AO had withheld the refund merely on account of the case being selected by the scrutiny but had not made any objective assessment of the relevant circumstances that would lead to the adverse effect of the revenue.

Accordingly, the HC by applying its interpretation in Maple Logistics P. Ltd[3] had held that it would be wholly unjust and inequitable for the AO to with hold a refund by citing the reason that a scrutiny notice has been issued and thus had set aside the withholding order passed by AO.

3. Calcutta High Court in the case of The Durgapur Projects Limited[4] – Section 50C is not applicable on transfer arising from compulsory acquisition by Government:

The facts of the case were that the assessee had received compensation on account of compulsory acquisition of its land by NHAI [5]. However, the Stamp duty value of the aforesaid land is higher than the compensation received by the assessee. Hence, the assessing officer has invoked the provisions of section 50C and made an addition.

The Hon'ble Calcutta High Court has observed that the transfer of land was not on account of an agreement between two private parties, but it was the case of the compulsory acquisition of land. Therefore, the transaction cannot be treated as a transaction between two private parties where there may be room to suspect the correct valuation and the apparent sale consideration which was reflected in the sale documents. The High Court has held that the intention behind the insertion of section 50C was to control transactions where the correct marker value is not mentioned and there is suppression of correct value by the parties to the transaction. As in the instant case, it is an acquisition of land by the Government by way of compulsory acquisition, the appellant department cannot be heard to say that there was suppression of the value and consequently the question of invoking Section 50C of the Act does not arise.

[2][TS-91-ITAT-2023(Ahd)]
[3]2019 SCC OnLine Del 12366
[4]TS-81-HC-2023(CAL)
[5]National Highway Authorities of India

Our Comments:

A suitable clarification or amendment is to be made/provided to Section 50C stating under which instances the said provisions are not applicable. Recently, we have seen scrutiny notice, where it tried to propose addition under Section 50C, when the assessee has purchased an asset in auction conducted by an asset reconstruction company. There is no true value indict or than an open auction. Invoking Section 50C in such cases goes completely against the intention as to why it was brought in the first place.

4. Supreme Court in the case of Mantra Industries Limited[6] – SC allowed the Revenue to file review petition before the High Court in faceless assessment:

The Hon'ble Bombay High Court has quashed the assessment order for non-adherence to the procedure prescribed under section 144B of the ITA. The High Court has quashed the assessment order by considering the provisions of section 144B(9) which states that any assessment made shall be non-est if such assessment is not made in accordance with the procedure laid down under section 144B. Further, the High Court has made serious remarks in para 9 of the judgment wherein it states that *'Respondents are put to notice, and Mr. Sharma to circulate this order right from the Revenue Secretary to everybody in the Finance Ministry, that if such orders are continued to be passed, this Court will be constrained to impose substantial costs on the concerned Assessing Officer to be recovered from his/her salary and also direct the department to place such judicial orders in the career records of such Assessing Officer'*

In the SLP filed by the revenue against the above order, the Hon'ble Supreme Court has held that observations made in para 9 are unwarranted and not required. Accordingly, the observations made in para 9 of the impugned order are ordered to beexpunged. Further, through the Finance Act, 2022, provision of section 144B(9) has been removed from the statute retrospectively. Hence, the Supreme Court has allowed the revenue to file the review petition before the Bombay High Court.

5. Bangalore Tribunal in Google India Private Ltd[7] - Google India is not a DAPE of Google Ireland:

Google India being anassessee acts as the Distributor for the Adwords program whereby the advertisements which appear on the Google website are sold in India for Indian business establishment. The assessee has entered into a distribution agreement for marketing and distribution of the Adwords program. During the year, the assessee has received an amount of Rs.167,32,01,616 from the advertisers out of which, an amount of Rs.119,82,61,984 has been paid by the assessee to Google Ireland.

In this regard, the assessing officer has disallowed the payment made to Google Ireland under section 40(a) (ia) for non-deduction of tax at source under section 195. Further, assessing officer has stated that assessing being a dependent agent of Google Ireland, portion of amount is attributable to Indian operation. Otherwise, such amount is taxable as royalty or FTS.

[6][TS-154-SC-2023]

[7][TS-156-ITAT-2023(Bang)]

As far as royalty/FTS is concerned, the matter is already covered by the co-ordinate bench ruling in its own case[8] . Further, with regard to DAPE, the Bangalore Tribunal has analysed the agreement between the assessee and Google Ireland and held that the assessee cannot be treated as DAPE of GIL. Accordingly, the distribution fees paid by the assessee to GIL is not liable for TDS under section 195 of the ITA and therefore no disallowance u/s.40(a)(i) is warranted.

[8]ITA No.1513-1516/Bang/2013.

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