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# SBS Wiki

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By

**SBS and Company LLP**
**Chartered Accountants**

## CONTENTS

Dear Readers,

Greetings for the season!

In this edition, we bring you, the second part of the article on the understanding of the depth of the most litigative entry in the indirect taxation sphere, which is agreeing to the obligation to refrain from an act or tolerate an act or to do an act.

The next article is on the changes to the existing faceless assessment scheme thereby clearing ambiguities and providing more clarity.

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**

**GST**

## AMBIT OF 'AGREEING TO OBLIGATION TO REFRAIN FROM ACT OR TOLERATE AN ACT OR TO DO AN ACT' - PART II

Contributed by CA Sri Harsha

When the positive list of taxation under service tax laws was done away with the introduction of negative list, a new concept of 'declared services' was introduced with effective from 01 July 12. Declared services are list of activities or transactions, which were specifically covered under the definition of 'service' under the pre-GST[1] laws to clear away the ambiguity, if any, and to drive home the point that such activities or transactions are also services. When the negative list was phased out with the advent of GST laws, majority of the entries of declared services were carried and incorporated into GST laws vide Schedule II of CT Act .[2]

In the earlier part of the article, we have seen leading judgments in the European VAT context dealing with this particular entry. With the above part in the mind, let us proceed to analyse the judgments delivered in the Indian context in Part II of this article to understand the taxability.

[1]Goods and Services Tax

[2]Central Goods and Services Tax Act, 2017

| S.No. | Judgment | Forum | Era | Remarks |
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| 1 | Jaipur Jewellery Show[3] | CESTAT – New Delhi | Positive List[4] | • The question that arose for determination was, appellant who was engaged in provision of business exhibition service, is required to pay tax on the cancellation charges collected from customers. Some of the customers, after booking the booths, proceed for cancellation of the same and the booking amount was being refunded after deduction of cancellation charges. Further to the cancellation charges, appellant also collected certain penal amounts which were recovered from customers who violate the booth sizes and increase the heights of the booths. The tax authorities demanded tax on such cancellation and penal charges.<br><br>• The Tribunal has held that such cancellation charges were collected for putting the appellant in an inconvenience position by its customers and not for any provision of any service and the same are not subjected to tax. As far as the penal charges were concerned, the Tribunal stated that, whatever name it is called, the same was for extra space and accordingly taxable. |
| 2 | Reliance Life Insurance Company[5] | CESTAT – Mumbai | Positive List | • The tax authorities demanded service tax on the surrender or partial withdraw charges which were earned by the Appellant from the subscribers of Unit Link Insurance Plan. The case of the revenue was that the amount recovered was towards the past expenses incurred by the appellant and accordingly the same were subjected to tax.<br><br>• The Tribunal stated that there was a clear prescription under the taxable service entry as to what would amount to value of service in case of unit linked insurance policy. The Tribunal stated that the surrender or partial withdraw charges does not fall under the said prescription, the same cannot be subjected to tax under the said service. The Tribunal also observed that the objective of levy of such charges would be evident from the Insurance Regulatory Development Authority's circular, wherein it was stated that the same are levied to discourage subscribers from withdrawal of scheme. The Tribunal stated that the charges were in the nature of penal or liquidated damages and cannot be formed part of taxable value. |

[3] 2016 (12) TMI 344 –CESTAT New Delhi

[4] Prior to 01.07.2012

[5] 2018 (4) TMI 107 – CESTAT Mumbai

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| 3 | Repco Home Finance Limited[6] | CESTAT (LB) - Chennai | Positive List | • The Larger Bench was occupied with a question, whether the foreclosure charges collected by the banks from customers would be subjected to service tax under the category 'banking and other financial services'.<br><br>• In HUDCO[7] , the division bench of Ahmedabad Tribunal held that service tax would be chargeable on such foreclosure charges. In Magma Fincorp [8], division bench of Kolkata Tribunal has held that such foreclosure charges would not be subjected to service tax. Considering the divergent views, the matter was referred to Larger Bench (LB).<br><br>• The banks main contention before the LB was that foreclosure charges are not consideration for a service provided by them but to end an existing service. On the other hand, the revenue's contention was that the foreclosure charges are paid over and above the interest and it is a facility available to borrower and hence the same would be subjected to tax.<br><br>• The LB has referred to the Supreme Court's judgment in Bhayana Builders [9], wherein the apex court stated the distinction between 'conditions to a contract' and 'consideration for a contract' has to be seen and the conditions contained in contract cannot be seen in light of 'consideration' for the contract and merely because the service recipient has to fulfil such conditions would not mean that the same would form part of the value of the contract. |

[6][2020] 117 taxmann.com 755 (Chennai – CESTAT) (LB)
[7][2012] 17 taxmann.com 14
[8][FO No 75221-75222 of 2016 dated 03.02.16]
[9][2013] 38 taxmann.com 221

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| | | | | • The LB has also made reference to judgment of European Court of Justice in case of C-277/2005 in Societe Thermale d'Eugenic-les-Bains, where in the court was seized with a question as to the taxability of the deposit made by the customer to hotelier. The customer makes a deposit with hotelier, and where the customer exercises the cancellation option available to him, the deposit would be retained by hotelier. If the customer avails the room, the deposit is applied to the service fee. The question is when the customer exercises the cancellation option, the hotelier retains the deposit, whether such retention of deposit would be subjected to tax under European VAT? The Court stated that the exercise of cancellation option made available customer, does not constitute the fee for service provided by hotelier, since the deposit does not constitute consideration for supply of an independent and identifiable service.<br><br>• The LB after that referred to the definition of 'consideration' as per Contract Act and stated that if the consideration is not at the desire of promisor, it ceases to be a consideration. Since the banks would not desire pre-mature termination of loan advanced by them, it could not be said that the foreclosure charges are at their desire. The foreclosure results in a unilateral act of borrower in repudiating the contract and consequently breach of one of the essential terms of loan agreement. The breach of contract can be remedied by injured party can be placed in same position in which he would have been if the contract was not made (restitution) or injured party can be placed in a position in which would have been if the contract is performed (expectation interest). The LB stated that expectation interest is a popular measure for damages arising out of breach of contract and the foreclosure charges, therefore, not a consideration for performance of lending services but imposed as a condition of contract to compensate for loss of 'expectation interest' when the loan agreement is terminated prematurely. |

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| | | | | • The LB then stated that foreclosure of loan is, therefore, a material breach of contract as it curtails the loan service period unilaterally, which can prompt the promis or to claim damages and cannot be called as consideration. Accordingly, the LB held that foreclosure charges are recovered as compensation for disruption of service and not towards 'lending' services and the foreclosure charges should not be viewed as alternative mode of performance because they arise upon repudiation of specified terms of contract and are intended to compensate the injured party. |
| **4** | GE T&D India Limited[10]<br><br>(Followed in Rajasthan Rajya Vidhyut Prasaram Nigam Limited)[11] | High Court - Madras | Negative List[12] | • The petitioner in this case was an employer whose employment contract with employees provides for a notice period prior to quitting from employment, ranging from two to three months. In case, if the employee wants to quite immediately, then instead of serving the notice period, he can pay certain amounts and leave. The petitioner has allowed certain employees to leave by making payments and the tax authorities proceeded to seek tax on such amounts stating that petitioner has provided a service of facilitation of termination of employment.<br><br>• The tax authorities demanded tax on the notice pay recoveries by referring to the entry in declared services, that is Section 66E(e). The tax authorities stated that the petitioner has tolerated an act of employee immediate quitting of service and such toleration results in provision of service.<br><br>• The High Court stated that petitioner/employer cannotbe said to have tolerated the act of employee but permitted a sudden exit. The Court stated that though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of stipulation of non-compete clause, but notice pay cannot fall into such a category, since it does not give rise to rendition of service either by employer and employee and accordingly quashed the notices. |

[10][2020] 119 taxmann.com 55 (Madras)
[11][2022] 135 taxmann.com 6 (New Delhi – CESTAT)
[12]Post 01.07.2012

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| 5 | South Eastern Coalfields Limited[13]<br><br>(Followed in Neyveli Lignite Corporation Limited[14] , Ruchi Soya Industries Limited[15] , Paradip Port Trust[16] and Rajacomp Info Service Limited [17]) | CESTAT – New Delhi | Negative List | • The Appellant is engaged in business of mining and selling of coal. While entering contracts, certain clauses were incorporated providing penalty for non-observance/breach of terms of contract. The said clauses are primarily inserted to safeguard the interest of the Appellant.<br><br>• In pursuance of such contracts, Appellant has collected an amount towards compensation/penalty from buyers of coal on the short lifted/un-lifted quantity of coal, amount towards compensation/penalty from contractors engaged for breach of terms and conditions and damages towards material breach of clauses in contract. The demands were made by making reference to Section 66E(e).<br><br>• The Tribunal stated that the considerations contemplated in the current contracts was for supply of coal and the intention of the parties was not to flout the terms of the agreement so that the penal clauses gets attracted. The penal clauses are in nature of providing a safeguard to the commercial interest of appellant and it cannot be said that recovering sum by invoking penalty clauses is the reason behind the execution of contract for an agreed consideration.<br><br>• The Tribunal stated that recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss.<br><br>• The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance. |

[13][2021] 124 taxmann.com 174 (New Delhi – CESTAT)
[14][2021] 128 taxmann.com 405 (Chennai – CESTAT)
[15][2021] 129 taxmann.com 368 (New Delhi – CESTAT)
[16]2022 (2) TMI 1010 – CESTAT Kolkata
[17]2022 (2) TMI 955 – CESTAT New Delhi

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| | | | | • The Tribunal further stated ***the situation would have been different if the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E(e).***<br><br>• The Tribunal referred to decision in Lemon Tree Hotel , wherein the issue thar arose for consideration was whether forfeiture of amount received by hotel from a customer on cancellation of booking would be leviable to service tax under Section 66E(e). The Tribunal therein has held that the customers has paid amounts to hotel to avail the accommodation services, and not for agreeing to the obligation to refrain from act, or tolerate an act or a situation, or to do an act and accordingly no tax was required to be paid on cancellation charges.<br><br>• The Tribunal also referred to the decision of KN Food Industries [19], wherein the issue that arose for consideration was, when the capacity of the assesse was not utilised completely for manufacturing by M/s Parle, ex-gratia charges were claimed to compensate the assessee from financial damage or injury. The tax authorities proposed to tax such amounts. The Tribunal therein has stated that to invoke provisions of Section 66E(e), there has to be first concurrence to assume an obligation to refrain from an act or tolerate an act, which are clearly absent in the instant case.<br><br>• The Tribunal held that, in the instant case, if the delivery of project gets delayed, or any other terms of the contract gests breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owning to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant. **As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. As such the present ex-gratia charges made by the M/s Parle to the appellant were towards making good the damages, losses or injuries arising from "unintended" events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.** |

[18] Final Order No 50820/2019 dated 08.03.19

[19] 2020 (1) TMI 6 – CESTAT Allahabad

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| | | | | • Accordingly, the Tribunal held that the amounts collected for breach of clauses in contract, non-lifiting/short-lifiting of coal and similar amounts would not be taxable under Section 66E(e). |
| **6** | Ratnamani Metals & Tubes Limited [20] | CESTAT – Ahmedabad | Negative List | • The issue before the Tribunal was that, whether the amounts received by assessee towards liquidated damages for compensating against poor quality of material supplied by supplier, would fall under the declared services of Section 66E(e). The Tribunal stated that both the lower authorities have failed to distinguish the 'consideration' from 'liquidated damages' and accordingly remanded the matter for fresh adjudication. |
| **7** | M.P. Poorva Kshetra Vidyut Vitran Co Limited[21] | CESTAT – New Delhi | Negative List | • The issue that arose for consideration was that, whether, assessee engaged in distribution of electricity, collected amounts towards liquidated damages from contractors and supplier when they failed to ensure compliance of terms of contract, would be subjected to tax under Section 66E(e).<br><br>• The Tribunal following South Eastern Coalfields Limited (supra) has held that such amounts would not be subjected to tax under Section 66E(e). |
| **8** | Shriram Pistons & Rings Limited [22]<br><br>(For more like this, please refer to HCL Learning Limited[23] ) | CESTAT – Allahabad | Negative List | • The employer was served with a notice demanding service tax on the amounts recovered from the employee for breach of terms of employment contract. The Tribunal following the decision of GE T&D India Limited (supra) has stated that recovery is out of salary already paid and accordingly such amounts would not fall to tax under Section 66E(e). |

[20][2021] 125 taxmann.com 35 (Ahmedabad – CESTAT)
[21][2021] 126 taxmann.com 182 (New Delhi – CESTAT)
[22][2021] 126 taxmann.com 183 (Allahabad – CESTAT)
[23][2020] 115 taxmann.com 170 (Allahabad – CESTAT)

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| **9** | Amit Metaliks Limited [24] | CESTAT – Kolkata | Agreements dated in Positive list and payment received in negative List | • The Appellant entered into development agreement with various landowners for developing the said lands. However, for various reasons the landowners could not pool other lands as per the agreement entered with the appellant developer and finally agreed for payment of Rs 45,08,09,200/- as full and final settlement for termination of development agreement. Also, the appellant has received Rs 1,97,50,000 as compensation from a supplier towards non-supply of manganese ore. The tax authorities have demanded tax on both amounts under the provisions of Section 66E(e).<br>• The Tribunal held that amount received for termination of the development agreement would not fall under Section 66E(e) for the reason that compensation resembles more like actionable claim and referred to various decisions to drive home that the consideration is in the nature of actionable claim.<br>• Further, the Tribunal also stated that since the development right is a benefit emanating from transfer of immovable property, which is excluded from the definition of 'service', the settlement amount also would not be termed as consideration for service.<br>• As far as the compensation received for non-receipt of goods, the Tribunal stated that those are in the nature of liquidated damages and accordingly would not fall under ambit of Section 66E(e). |
| **10** | Steel Authority of India Limited [25] | CESTAT- Chennai | Negative List | • The question that arose was, whether the amounts received as liquidated damages, forfeiture of earnest money deposit and ground rent[26] can be called as consideration for tolerating an act and accordingly be subjected to tax under Section 66E(e).<br>• The Tribunal referring to the decisions of South Eastern Coalfields Limited (supra) and M P Poorva Kshetra Vidyut Vitran Co Limited (supra) has struck down the demand |

[24][2021] 127 taxmann.com 248 (kolkata – CESTAT)

[25][2021] 128 taxmann.com 400 (Chennai – CESTAT)

[26]Ground rent is recovered for extension of due date for payment of full sale value at a cost of Rs 500 per lot for every day of, extension granted.

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| **11** | MNH Shakti Limited [27] | CESTAT – Kolkata | Negative List | • The appellant was allotted certain coal mines. Pursuant to a Supreme Court order, the said allocation was cancelled and stood transferred to a new allottees. Since the appellant has already invested substantial amounts of money in the mines, the mines act provided for payment of compensation by the new allottees to the appellant. The said amounts were received and the tax authorities demanded tax under Section 66E(e).<br><br>• The Tribunal stated that the question of tolerating something and receiving a compensation for such tolerance pre-supposes that the person had a choice to tolerate or not, the person chose to tolerate, such tolerance was for a consideration as per an agreement to tolerate and the tolerance was a taxable service.<br><br>• The Tribunal stated that none of the above elements were visible in the current set of facts. The appellant had no choice of tolerating cancellation or not. The appellant has not chosen to tolerate the cancellation, since the cancellation is pursuant to Supreme Court's order and there was no consideration for such toleration.<br><br>• The Tribunal further stated that even where any amount is received under a contract as a compensation or liquidated or unliquidated damages, the same cannot be 'consideration'. The amounts received are by operation of law and cannot be called as consideration for tolerating an act and dropped the demand. |

[27][2021] 132 taxmann.com 115 (Kolkata– CESTAT)

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| **12** | Tirupati Balaji Furnaces (P) Limited [28] | CESTAT – New Delhi | Negative List | • The appellant has received amount on account of non-performance of the agreement to sale and non-compliance of conditions of contract by supplier of goods. The tax authorities demanded tax on such amounts stating that appellant agreed to oblige to refrain from any act or to tolerate an act or situation or to do an act.<br><br>• The Tribunal stated that the nature of amount involved is clear that these amounts are not received by appellant in lieu of rendering of any service. Neither the appellant is carrying on any activity to receive compensation nor can there be any presumption for intention of other party to breach or violate the contract and suffer losses. The only purpose is for minimum compensation and of forfeiting the earnest money is to ensure that the default act is not undertaken again or repeated. The Tribunal stated that in any way the amount can be said to be received as consideration for tolerating an act and by referring to decision of South Eastern Coalfields Limited (supra) and Steel Authority of India Limited (supra) has set aside the demand. |
| **13** | Achampet Solar Private Limited [29] | AAR[30] –Telangana | GST [31] | • The question that arose before AAR was, whether the amounts collected as liquidated damages from service provider for delay in commissioning would be subjected to tax under GST?<br><br>• The AAR held that the applicant collected liquidated damages which were imposed for covering the loss of revenue and costs borne by applicant due to delay. The AAR held that these charges are consideration for tolerating an act and since Section 2(31)(b) of CT Act which defines 'consideration' includes the monetary value of an act or forbearance, the amounts are taxable. |

[28] [2021] 132 taxmann.com 264 (New Delhi – CESTAT)
[29] 2022 (2) TMI 715 – AAR Telangana
[30] Authority for Advance Ruling
[31] Period post 01.07.2017

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| **14** | Parvaitya Plywood (P) Limited [32] | AAR – Uttarakhand | GST | • The AAR was seized with a question as to whether the amounts forfeited in tenders would be subjected to tax under GST laws. Further, whether the amounts recoverable for damage of material by labour, would be subjected to tax?<br><br>• The AAR held that the forfeiture of deposit in case the tenderer cannot pay the balance amount as agreed in auction constitutes a different service in the nature of agreeing to tolerate an act and accordingly be subjected to tax. The AAR also held that the penalty amount collected for damage caused by labour would also be subjected to tax.<br><br>**Our Comments:**<br><br>• The above is clear departure from established judicial precedents. Under the pre-GST laws, the amounts which were forfeited and collected as penal charges were clearly out of tax net. Though the tax authorities tried to demand tax on similar lines under the declared service entry, the tribunals/courts have rejected the same. Though there is no change in such entries in pre and post GST laws, the AAR without regard to the previous judgements, has held the amounts are taxable under GST laws. |
| **15** | Bajaj Finance Limited[33] | AAAR[34] – Maharashtra | GST | • The AAR has held that the amount of penal charges/penalty defined in the loan agreement (entered by applicant with customers) is being collected for the reason that the customers have delayed the payment of EMI and applicant has tolerated such act and accordingly such amounts are taxable under the Entry 5(e) of Schedule II. The AAR has brushed away the contention of applicant that the said amount is nature of additional interest.<br><br>• Hence, the AAAR was occupied with a question as to whether the said penal charges/penalty would be subjected to tax in the hands of applicant under the Entry 5(e) of Schedule II or can be called as interest to be exempted from payment of tax? |

[32][2020] 115 taxmann.com 62 (AAR- Uttarakhand)
[33][2019] 108 taxmann.com 1 (AAAR – Maharashtra)
[34]Appellate Authority for Advance Ruling

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| | | | | • The AAAR after referring to the various clauses of agreement, stated that the agreement uses the phrases 'default interest', 'penal charge' and 'bounce charges' and all of them are exclusive. Accordingly, AAAR has stated that the amounts collected from customers for delay in payment of EMI are in the nature of 'penal charges' and not 'penal interest' and hence would be a consideration for toleration of an act.<br><br>**Our Comments:**<br><br>• The above is clear departure from established judicial precedents. Under the pre-GST laws, the amounts which were forfeited and collected as penal charges were clearly out of tax net. Though the tax authorities tried to demand tax on similar lines under the declared service entry, the tribunals/courts have rejected the same. Though there is no change in such entries in pre and post GST laws, the AAR without regard to the previous judgements, has held the amounts are taxable under GST laws. |
| **16** | Amneal Pharmaceuticals (P) Limited [35] | AAR – Gujarat | GST | • The employer at the time of appointing any employee at its factory clearly mentioned that services of employee can be terminated by giving three months' notice or notice pay in lieu of notice period from either side.<br><br>• The question before AAR was, whether the said notice pay recovered from employees is taxable under GST laws? The AAR has held that notice pay is a sum mutually agreed between the employer and the employee for breach of contract and can be regarded as consideration for toleration of act and accordingly taxable under Entry 5(e) to Schedule II of CT Act.<br><br>• The AAR stated that the decisions in the case of GE T&D (supra) and HCL Learning Systems (supra) pertains to the service tax regime and cannot be applied to GST and accordingly not followed them. |

[35][2021] 123 taxmann.com 191 (AAR- Gujarat)

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| | | | | **Our Comments:**<br>• The above is clear departure from established judicial precedents. The AAR having referred to such judgments have conveniently disregarded them stating that those pertain to service tax law and cannot be applied to GST regimes.<br>• Even under the service tax law, the entry agreeing to tolerate an act was in existence. The courts have clearly stated that the amounts recovered from employee in form of notice pay would not amount to toleration of an act. However, the same was not followed by AAR in the current case. |
| **17** | TP Ajmer Distribution Limited [36] | AAAR – Rajasthan | GST | • The applicant is engaged in supply of electricity to customers and it recovers electricity charges from customers as per tariff rates and also recovers cheque dishonour fees from customers in cases where cheques given by customers get dishonoured. The AAR has held that such cheque dishonour charges are subjected to GST under Entry 5(e) of Schedule II to CT Act.<br>• The AAAR has upheld the order of AAR which confirmed payment of tax on the cheque dishonour charges collected by applicant.<br>**Our Comments:**<br>• The above is clear departure from established judicial precedents. Under the pre-GST laws, the amounts which were forfeited and collected as penal charges were clearly out of tax net. Though the tax authorities tried to demand tax on similar lines under the declared service entry, the tribunals/courts have rejected the same. Though there is no change in such entries in pre and post GST laws, the AAR without regard to the previous judgements, has held the amounts are taxable under GST laws. |

[36][2019] 103 taxmann.com 227 (AAAR- Rajasthan)

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| **18** | North American Coal Corporation India (P) Limited [37] | AAR – Maha | GST | • The applicant has entered an agreement with Sasan Power Limited (SPL) for provision of technical and consultancy services for a definite period of time. Before completion of said time agreed under the agreement, SPL has stopped taking services from applicant as it engaged its in-house consultants.<br><br>• The applicant has made request to SPL to release the amounts agreed, but SPL denied the same. The applicant has invoked arbitration proceedings to claim the amounts as per the agreement and certain liquidated damages. The question that arose is, whether such liquidated damages are subjected to tax?<br><br>• The AAR has held that if the arbitrator awards the liquidated damages, the same would be for tolerating an act in terms of Entry 5(e) and accordingly subjected to tax.<br><br>**Our Comments:**<br><br>• The above is clear departure from established judicial precedents. Under the pre-GST laws, the amounts which were forfeited and collected as penal charges were clearly out of tax net. Though the tax authorities tried to demand tax on similar lines under the declared service entry, the tribunals/courts have rejected the same. Though there is no change in such entries in pre and post GST laws, the AAR without regard to the previous judgements, has held the amounts are taxable under GST laws. |

[37] [2018] 98 taxmann.com 331 (AAR – Maharashtra)

From the above, it is evident that the Courts/Tribunals in the pre-GST laws have clearly stated that the amounts received for non-satisfaction in conditions of contract are different from the considerations of the contract. The same would not be subjected to tax. However, the ruling under the GST laws have completely ignored the said jurisprudence and started inventing the wheel again. Hence, unless a clear guideline is available, it would be impossible to determine, whether the said amounts are taxable or not.

The jurisprudence under European VAT as observed in the introduction part is also not of great help. The larger bench of CESTAT in the matter of Repco Home Finance Limited (supra) has referred to the judgment of Societe thermale d'Eugenie-les-Bains (supra) to hold that foreclosure charges would not be taxable. However, the judgment of Societe thermale d'Eugenie-les-Bains (supra) was distinguished in subsequent judgments in European context, but the Repco Home Finance Limited (supra) was continued to be adopted by subsequent judgments in India. Though, the judgments of European VAT cannot be directly applied to the Indian context, especially, while dealing with contracts which have amounts which are penal, the exercise, whether the said amounts would be subjected to tax or not has to be carefully seen.

From the survey of judgments under European VAT and Indian laws, we can state that as long as there an identifiable service, the amounts paid for it, may be called as consideration and be subjected to tax. However, if there is no identifiable service, then the amounts cannot be called as consideration. The judgment of European Court in Societe thermale d'Eugenie-les-Bains (supra), would be of help here, as the deposit was not paid towards an identifiable service, the court held that the same cannot be subjected to tax. The same was applied in case of foreclosure charges, forfeiture of tender deposits, liquidated damages and penal charges. The context under which the Entry 5(e) would trigger is, when there was an express identifiable service is available and provided for a consideration. We cannot start looking for a transaction to call as service/supply, since there is an amount involved. Having said so, we conclude this piece with a word of caution that the real ambit of this entry is still in the process of evolution.

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**DIRECT TAXES**

## REPLACEMENT OF FACELESS ASSESSMENT SCHEME

Contributed by CA Sri Harsha & CA Narendra

As there are flaws in existing Faceless Assessment Scheme (for brevity 'FAS'), it is proposed to replace the existing Faceless Assessment Scheme under section 144B by the Finance Bill, 2022. For details of possible litigations in existing scheme, we recommend to read our Article on Various Hues Of Draft Assessment Orders – Section 144Band Section 144C - Part III at Sbs Wiki E Journal Nov 2021 - SBS AND CO LLP.For better understanding of the proposed Faceless Assessment Scheme, this Article is prepared on comparative basis.

| Existing FAS | Proposed FAS |
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| ***Cases Covered under FAS:*** | |
| • Section 144B states that assessment under section 143(3) or section 144, in the cases referred to in this section, shall be completed under Faceless Assessment Scheme. | • Section 144B states that assessment under section 143(3) or section 144 ***or under section 147,*** in the cases referred to in this section, shall be completed under Faceless Assessment Scheme. |

**Authors' Comments:**

- Under the existing Scheme, there is no reference to search and reassessments, even though such assessments have to be completed in accordance with the provisions of section 143 (3), in section 144B which may create some ambiguity. In the proposed amendment, a reference to section 147 has also been made to provide more clarity in respect of search and reassessments.

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| ***Initiation of assessment proceedings under FAS:*** | • NFAC shall assign the case to a specific AU through an automated allocation system. |
| • National Faceless Assessment Center (for brevity 'NFAC') shall serve a notice under section 143 (2) for scrutiny. | • NFAC shall intimate the assessee the assessment shall be completed under FAS. |
| • Assessee has to file his response within 15 days of receipt of Notice under section 143 (2). | • A notice under section 143 (2) or section 142 (2) shall be serves on the assessee through NFAC. |
| • NFAC shall intimate the assessee the assessment shall be completed under FAS. | • Assessee has to file his response to the above notices within the time specified in such notices. |
| • NFAC shall assign the case to a specific assessment unit (for brevity 'AU') in any one regional faceless assessment center. | |

**Authors' Comments:**

- Existing provisions states that NFAC before allocating the notices to AU, a notice under section 143 (2) has to be served on the assessee for initiating scrutiny proceedings. However, it does not provide procedure for issue of notice under section 142 (2).

- In the proposed Scheme, it is provided that NFAC shall first assign the case of AU before issue of notice under section 143 (2). Once the case is assigned to AU, such AU may take care of such case viz. issue of notice under section 143 (3) or section 142 (1) though NFAC.

***Conducting of Assessment under FAS:***

- AU may make a request ***to the NFAC*** for
  - Obtaining further information from the assessee.
  - Conducting of certain enquiry or verification by verification unit (for brevity 'VU').
  - Seeking technical assistance from the technical unit (for brevity 'TU').
- Where a request for information is made by the AU,
  - NFAC shall issue an appropriate notice on the assessee.
  - Assessee shall file the response to the notice within the time limit specified therein (or extended time limit) to the NFAC.
- Where a request for conducting of certain enquiry or verification has been made by the AU,
  - NFAC shall assign such request to VU and
  - NFAC shall forward the report of VU to AU.
- Where a request for seeking technical assistance has been made by the AU,
  - NFAC shall assign such request to TU and
  - NFAC shall forward the report of TU to AU.

- AU may make a request ***though the NFAC*** for
  - Obtaining further information from the assessee.
  - Conducting of certain enquiry or verification by VU.
  - Seeking technical assistance in respect of determination of ALP, valuation of property, withdrawal of registration, approval, exemption or any other technical matter by referring to TU.
- Where a request for information is initiated by the AU,NFAC shall issue an appropriate notice on the assessee and assessee shall file the response to the notice within the time limit specified therein (or extended time limit) to the NFAC ***which shall forward the same to AU.***
- Where a request for conducting of certain enquiry or verification has been made by the AU,
  - NFAC shall assign such request to VU and
  - NFAC shall forward the report of VU to AU.
- Where a request for seeking technical assistance has been made by the AU,
  - NFAC shall assign such request to TU and
  - NFAC shall forward the report of TU to AU.

**Authors' Comments:**

- While there is major change in respect of this part, as stated above, powers have been shifted from NFAC to AU in respect of cases assigned to such AU with regard to issue of notice or raising of request for enquiry/verification or seeking technical assistance etc.

***Best judgment Assessment under FAS:***

- Where the assessee fails to comply with the notice issued under FAS, notice under section 142 (2) or directions under section 142 (2A), NFAC shall serve a show cause notice under section 144 for making best judgment assessment.
- Upon receipt of notice, assessee shall submit his response to the show cause notice within the time specified in the notice.
- If assessee fails to respond to the show cause notice, NFAC shall intimate the same to AU.
- Where the assessee fails to comply with the notice issued under FAS, notice under section 142 (1) or notice under section 143 (2), the NFAC shall intimate the same to AU.
- AU shall, though NFAC, serve a show cause notice to the assessee under section 144 for making best judgement assessment.
- Upon receipt of notice, assessee shall submit his response to the show cause notice within the time specified in the notice to the NFAC which shall send the same to AU.
- If assessee fails to respond to the show cause notice, NFAC shall intimate the same to AU.

**Authors' Comments:**

- While there is no major change in respect of this part, as stated above, powers have been shifted from NFAC to AU i.e., responsibility to issue show cause notice has been shifted to AU and NFAC may act as a communication channel between the assessee and the AU.

**Pre-Completion of the Assessment under section FAS:**

- AU shall make a draft order (for brevity 'DAO') with the information available with it (either normally or under best judgement) either accepting the return of income or making any variation (adjustment) to the income and forward such DAO to the NFAC.
- Upon receipt of such DAO, NFAC may:
  - **In case of no variation is proposed, finalize the assessment and send assessment order to the assessee. or**
  - **Provide an opportunity of being heard to the assessee by serving a show cause notice. or**
  - Assign the DAO to review unit (for brevity 'RU') for conducting review of the DAO (whether or not AU made variation in DAO).
- RU may concur with the DAO or may propose changes to DAO and inmate the same to NFAC.
- AU shall prepare computation of income and
  - Forward the same to NFAC, if there is no variation prejudicial to the assessee. or
  - Serve a show cause notice to the assessee through NFAC, if there is variation prejudicial to the assessee.
- Upon receipt of show cause notice, assessee shall file his response to the NFAC. NFAC shall forward such response to the AU. If no response is filed by the assessee, NFAC shall intimate the AU.
- Upon receipt of such response/intimation from NFAC, AU shall prepare a computation of income and send the same to NFAC.
- Upon receipt of such income computation, NFAC, basis the guidelines issued by the CBDT, may
  - Convey the AU to prepare a DAO which shall forward the same to NFAC. Or

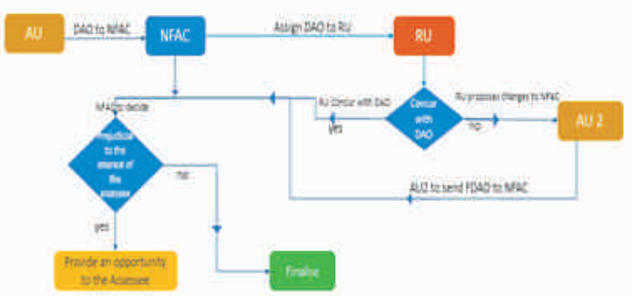
- **If RU concur with the DAO, NFAC shall finalise the assessment or provide an opportunity of being heard, as the case may be.**

- If RU proposes any changes to DAO, NFAC shall assign the case to another assessment unit other than which as prepared DAO (for brevity 'AU2').

- AU2 shall, after considering the changes proposed by RU, prepare final draft assessment order (for brevity 'FDAO') and send the same to NFAC.

- **NFAC, upon receipt of FDAO, complete the assessment or provide an opportunity of being heard, as the case may be.**

- If NFAC finalizes the assessment, proceedings under FAS would come to an end.




- If NFAC provides an opportunity of being heard (as DAO or FDAO is prejudicial to the interest of the assessee), assessee may furnish the response to the show cause notice.

- If assessee fails to provide reply to the opportunity of being heard, NFAC shall proceed to finalise the assessment (read the next part).

- If assessee submits the response, NFAC shall forward the same to AU.

- AU after considering the submission prepare revised draft assessment order (for brevity 'RDAO') and forward it to NFAC.

  - Assign such computation of income to RU for review.

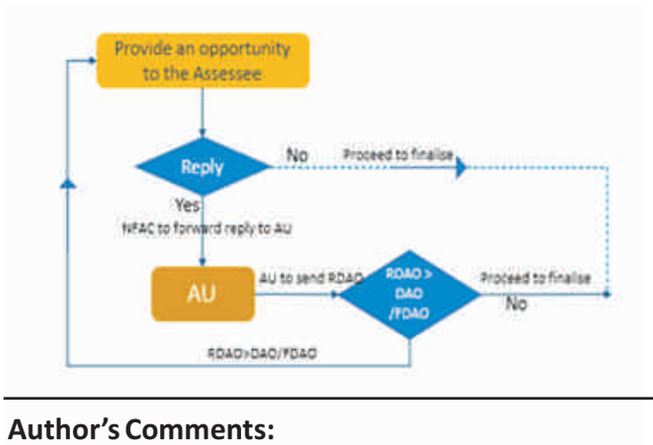
- RU shall conduct the review of income computation and send review report to NFAC which shall forward the same to AU (which has made the income computation).

- AU after considering the review report, accept or reject modifications proposed by RU and after recording the reasons for rejecting, prepare DAO and send the same to NFAC.

- **If such RDAO is prejudicial to the interest of the assessee when compared to DAO/FDAO (RDAO>DAO/FDAO), NFAC shall provide an opportunity of being heard to the assessee.**

- If such RDAO is not prejudicial to the interest of the assessee when compared to DAO/FDAO (RDAO<=DAO/FDAO), NFAC shall proceed to finalize the assessment.

- If assessee fails to provide reply to the opportunity of being heard, NFAC shall proceed to finalise the assessment (read the next part).




**Author's Comments:**

- Under the existing scheme, there is a lot of confusion regarding DAO, FDAO or RDAO. Under the proposed amendment, these concepts have been removed in total.

- Under the existing scheme, AU has to prepare DAO and send it same to NFAC to proceed further. However, in the proposed amendment, AU can directly issue, through NFAC, show cause notice if there is any variation which is prejudicial to the interest of the assessee.

- Under the existing scheme, if there are any changes proposed by RU, NFAC shall reassign case to another AU2 for making modifications. However, in the proposed amendment, no second AU will come into play.

- Under the existing scheme, power has been given to RU for making modifications to the proposed variation. However, in the proposed amendment, RU can only send report to AU which may or may not be accepted by the AU. However, AU has to record reason if it rejects the changes proposed by RU.

- Under the existing scheme, upon receipt of submission to the DAO/DAO, AU shall prepare RDAO and cycle of providing opportunity of being heard will repeat. However, under the proposed amendment, as AU prepares draft order after considering the submission made by the assessee against show cause notice, this concept has been removed.

**Completion of the Assessment under FAS:**

- At the last, NFAC shall check whether the assessee is an eligible assessee under section 144C or not.
- If yes, NFAC shall forward such DAO/FDAO/RDAO to such eligible for DRP route (read the next part).
- If No, NFAC shall complete the assessment and send assessment order to the assessee.
- In case of eligible assessee under section 144C, NFAC shall forward such DAO to the assessee (read the next part).
- In other cases, NFAC shall convey the same to AU for preparing the final assessment order.

**Author's Comments:**

- While there is no change in this part, it is provided that if at any stage of the proceedings before it, the AU having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and the interests of the revenue, is of the opinion that it is necessary to do so, it may, upon recording its reasons in writing, refer the case to the NFAC stating that the provisions of section 142 (2A) may be invoked.

**DRP procedure under FAS:**

- Where the eligible assessee receives DAO/FDAO/RDAO, such assessee shall file his acceptance with the NFAC within time limit specified in section 144C (2) i.e., 30 days from the end of the month in which such order is received by the assessee.
- Where the assessee files his response or not within the time specified above, NFAC shall proceed to complete the assessment and send assessment order to the assessee within the time limit specified in section 144C (4).
- Where the assessee files objections with the DRP, NFAC upon receipt of directions from the DRP forward such directions to the AU.
- AU upon receipt of directions, prepare DAO (again) and send it to NFAC. NFAC upon receipt of DAO, complete the assessment within the time limit specified in section 144C (13) i.e.,
- Where DAO is serviced on the eligible assessee, such eligible assessee may within the period specified in section 144C (2):
  - File acceptance to the variations proposed to the NFAC or
  - File objections before the DRP with a copy to NFAC.
- NFAC upon receipt of such acceptance or if no objections are filed by the assessee, intimate the same to AU.
- AU shall pass final assessment order and send the same to NFAC.
- If objections are filed before the DRP and NFAC, NFAC shall intime the same to AU.
- NFAC upon receipt of directions from DRP, forward the same to AU. AU shall pass the final assessment order inconformity with the DRP directions and send same to NFAC.
- NFAC upon receipt of final assessment order from AU, send the same to assessee and complete the assessment.

**Author's Comments:**

- Under the existing scheme, there in an ambiguity regarding the filing of objections before the DRP. If the assessee decides to file objections before the DRP, whether the assessee is required to file copy to NFAC or jurisdictional assessing officer is not clearly provided.

- In the proposed amendment, it is clearly provided that the assessee has to file its objection if any with the NFAC so that NFAC will intimate the AU so that such AU will not pass the final assessment order till the completion of DRP proceedings.

**Other Major Amendments:**

- Under the existing scheme, NFAC is acting as a nodal office for completion of assessment under FAS. However, under the proposed amendment, NFAC may act as mere communication channel for completion of assessment under FAS. There are no regional assessment centers as well under the proposed amendment.

- Under the existing scheme, any electronic record has to be signed by using DSC or EVC. However, this condition has created inconvenience to the assessee. Hence, CBDT has provided submission through e-filing portal is considered as affixing DSC/EVC. Under the proposed amendment, it is specifically provided in the section that assessee can authenticate the electronic record by logging to e-filing portal.

- **Under the existing scheme, section 144B(7) (vii) states that the assessee or his authorised representative, as the case may be, may request for personal hearing so as to make his oral submissions or present his case before the income-tax authority in any unit. However, allowing the request made under section 144B(7)(vii) is at the discretion of the revenue. This clause has created lot of litigation at various fora.**

- **Hence, it is specifically provided in the proposed amendment that once the assessee files request for personal hearing, revenue shall the request for such personal hearing.**

- In respect of special cases covered under section 142 (2A), NFAC upon receipt of request from AU, forward the reference to jurisdictional PCCIT, CCIT, PCIT or CI. In such a circumstance, NFAC shall transfer the case from AU to jurisdictional assessing officer.

- **Provisions of section 9, which states that assessments hall be non est if such assessment is not made in accordance with the procedure laid down under this section, which has resulted in decisions against the revenue at judicial fora has been omitted with retrospective effective from 01.04.2021.**

*This article is contributed by CA Sri Harsha & CA Narendra, Chartered Accountants. The author can be reached at harsha@sbsandco.com*

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