TAX JURISPRUDENCE

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N. A. SHAH ASSOCIATES LLP
Chartered Accountants

JUDGEMENTS / ADVANCE RULINGS UNDER DIRECT AND INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

EXECUTIVE SUMMARY

CASE & CITATION	ISSUE INVOLVED	DECISION
DIRECT TAX		
DCIT Vs. Kilitch Healthcare India Ltd [TS-223-ITAT-2022(Mum)]	Whether dividend discount model can be applied for valuation of preference shares under the provision of section 56(2)(vii)(b) of the Act read with Rule 11UA?	The Hon'ble ITAT upheld the Order of CIT(A) on the ground that Preference shares are different from Equity Shares hence method applicable to equity shares cannot be applied for valuation of preference shares.
Taj TV Ltd. (ITA No. 6588 & 6741/Mum./2019)	Whether taxpayer's Indian distributor constitute its dependent agent PE in India? If considered as PE, whether any further profits need to be attributed if PE is already remunerated at arm's length price?	To constitute a dependent agent PE in India, the distributor needs to habitually exercise authority to conclude contracts on behalf of the taxpayer. If agent is remunerated at arm's length price, then no further attribution of profit is required.
INDIRECT TAX		
M/S. Aristo Bullion Pvt. Ltd. [2022-TIOL-03-AAAR-GST]	Whether ITC of one business segment (Gold/silver) availed by the appellant can be utilized against the output tax liability of another segment (Castor oil	AAAR held that inter segment ITC utilization cannot be denied merely on the ground that the inputs have no nexus with outward supply.

	seed) with the same the GSTIN?	
M/s Shree Arbuda Transport [TS-116-AAAR (GUJ)-2022-GST]	Whether provision of various services for a single consolidated rate as a package would be treated as a "Mixed supply" or "Composite supply"? What would be the applicable HSN code and GST Rate for such bundle of services? Whether appellant is eligible to avail ITC?	Bundle of various supplies is a **'mixed supply'**. Applicable Service Accounting Code ('SAC') is 996719 ('Other cargo and baggage handling services') and GST Rate for such 'mixed supply' is 18%. ITC cannot be denied merely on the ground that one of the constituent services of the mixed supply attracts Nil rate of tax.

The brief analysis of above referred decisions and rulings are given below.

A. DIRECT TAX

CASE 1 – DCIT (Appellant) **V. KILITCH HEALTHCARE INDIA LTD** (Respondent) **[TS-223-ITAT-2022(MUM)]**

Facts in brief & Issue Involved	• The taxpayer is engaged in the business of manufacturing of pharmaceuticals mainly injection. In this decision, there were 3 issues, however, this alert covers issue in relation to taxability u/s 56(2) (viib) of the Act on issue of preference shares. • During the AY 2015-16, the taxpayer had issued 4,20,000 redeemable preference shares of Rs 10 each at a premium of Rs. 990 per share. For the purpose of 56(2)(viib), the taxpayer obtained a valuation report from Independent chartered Accountant who valued the same based on dividend discount model. • AO rejected the dividend discount model and adopted Net Assets Value ("NAV") method and made the addition of Rs.33,26,40,00/- u/s 56(2) (viib) of the Act. • CIT(A) allowed the appeal of the taxpayer against which department appealed before Hon'ble ITAT.
Contentions of Respondent (taxpayer)	• Taxpayer submitted that NAV or DCF Method specifically applies to valuation of equity shares and in Rule 11UA(1)(c)(c) which applies to 'preference shares', no specific method is prescribed. • Further, taxpayer submitted that Dividend Discount Method is similar to DCF Method. • Taxpayer submitted that a preference share having face value of Rs. 100 redeemable at premium of 20% at the time of redemption will fetch Rs. 120 irrespective of the value of the assets of the company, hence contented that valuation of equity share is different from valuation of preference shares. • NAV of the company represents the value available to equity shareholders, who are the real owners of the company and not preference shareholders.
Observations & Decision of ITAT	• Preference shares and Equity shares in no manner can be considered on same footing as there is difference in Voting rights, Rate of dividend, Payment of dividend, participation in management, Winding up, etc.

	• Technical Guidance on Valuation of shares issued by ICAI is more applicable in case of valuation of Equity Shares and not in case of Preference Shares. • If the method adopted by the taxpayer is in accordance with the method contained in the Act read with Rules, the AO cannot disregard the same without cogent reasons. • The NAV method is specific to Rule 11UA(1)(c)(a) i.e. for valuation of Equity Shares only. For other shares and securities i.e. for valuation of Preference Shares, rule 11UA(1)(c)(c) is applicable, in which no method is prescribed. • It was not permissible in law for the Assessing Officer to adopt NAV method for valuation of preference shares and hence, addition made by the AO was unsustainable.
NASA Comments	• The present ruling clarifies that for computing Income chargeable to tax under section 56(2)(viib), the position that preference shares is different from equity shares and hence methodology to be adopted in case of Valuation of Unquoted Preference Shares in all case cannot be NAV provided basis of Valuation is clearly established with prudent assumptions and conditions. • In the present case, preference shares were non-convertible hence dividend discount model was applied which cannot be applied in case of compulsory/optionally convertible preference shares.

CASE 2 – TAJ TV LTD. (ITA NO. 6588 & 6741/MUM./2019)

Facts in brief & Issue Involved	• The taxpayer is a Mauritian company engaged in the business of telecasting its sports channel "Ten Sports". • The taxpayer had appointed Taj Television (India) Pvt. Ltd. ("Taj India") as an advertising sales agent and distributor in India. The taxpayer did not have any branch or office in India and all the telecasting was done from outside India. • In the return of income, the taxpayer did not offer "advertisement spot sales" and "distribution income" to tax. The taxpayer was of the view that it did not have a PE in India as the transactions were entered on principal-to-principal basis at arms' length price and

	further, that Taj India had not habitually exercised any authority to conclude contract on behalf of the taxpayer. • However, the Assessing Officer ("AO") held that Taj India constitutes dependent agent PE of the taxpayer in India in respect of both, advertisement income and distribution income. • The Ld. CIT(A) following earlier order of the Co-ordinate Bench of Tribunal in taxpayer's own case held that the taxpayer has does not have any PE in India with respect to the distribution function but has PE for advertisement function. • Being aggrieved, the taxpayer and department both filed an appeal before Tribunal.
Contentions of Respondent (taxpayer)	• The taxpayer contended that the issue of existence of its PE in India in respect of distribution income has been decided in its favour by various decisions of the Tribunal in its own case for preceding years, however with respect to advertisement revenue, the issue was left upon. • The alternative plea of the taxpayer was that the arm's length analysis conducted in respect of advertisement revenue was also accepted by the Transfer Pricing Officer ("TPO") and thus no further profit needs to be attributed to the alleged PE in India. • The department argued that as per the addendum to Advertisement Sales Agency Agreement and Distribution Agreement, Taj India had the authority to enter into agreements with third parties on behalf of the taxpayer. Hence, Taj India constituted dependent agent PE in India of the taxpayer.
Observations & Decision of ITAT	• To invoke the provisions of Article 5(4)(i) of the DTAA, both the conditions i.e. (a) person has concluded the contract and (b) person habitually exercise the authority to conclude the contract, need to be satisfied. • Since the department has neither established nor brought anything on record to prove that Taj India had habitually exercised the authority to conclude the contract on behalf of the taxpayer, Taj India cannot be held to be dependent agent PE of the taxpayer in India with respect to the distribution revenue.

	• In respect of advertisement revenue, the Tribunal observed that the department has accepted that Taj India was remunerated at arm's length price and transfer pricing analysis was also accepted by TPO. • The Tribunal, following its earlier decision in taxpayer's own case, accepted the alternative plea of the taxpayer and held that as Taj India was remunerated at arm's length price, no further profit needs to be attributed in respect of advertisement revenue for taxation in India. • However, issue of existence of PE in India with respect to advertisement revenue, was left open by the Tribunal.
NASA Comments	• The decision reconfirms: o the position that the agent will not constitute dependent agent PE if it does not habitually exercise authority to conclude contracts. o the principle laid down by the Hon'ble Supreme Court in the case of E-funds IT Solution Inc. [2017] 399 ITR 34 (SC) that if agent is already remunerated at arm's length price then no further profit can be taxed, even on existence of PE in India. • Since DTAAs have been amended on account of Multilateral Instrument signed by India and other treaty partners, taxpayer needs to re-evaluate the PE position based on such amended DTAAs.

B. INDIRECT TAX

CASE 1 – M/s. ARISTO BULLION PVT LTD [2022-TIOL-03-AAAR-GST]

Facts in brief & Issue Involved	• Appellant is engaged in following two business activities: o Segment-I -Manufacturing and trading of Gold and Silver Bullion (Taxable under GST); o Segment-II - Trading of Castor oil seeds (procuring from unregistered person-without GST and selling @ 5% GST) • Appellant sought an advance ruling on issue whether GST liability on supply of Castor oil seed can be discharged through ITC balance available in the Electronic Credit Ledger built-up mainly out of ITC availed in bullion business.

	• Gujarat AAR ruled that ITC earned on inward supplies of Gold & Silver Dore bars etc. cannot be utilised for discharging GST liability on Castor Oil Seeds as there is no nexus between inward supplies (Gold / Silver Dore bars) and outward supplies (Castor Oil Seeds). • Appellant preferred an appeal against above referred ruling with Appellant Authority for Advance ruling (AAAR).
Contentions of Appellant	• Section 16(1) of CGST Act provides only eligibility/conditions of taking ITC and it does not impose any restriction on utilizing the legitimately earned ITC credited to electronic credit ledger. • To be eligible to take ITC on supply of goods or services, ITC should be used or intended to be used in course or furtherance of business i.e. entire business. • Section 49(4) of CGST Act, 2017 states that amount available in electronic credit ledger may be used for making any payment towards output tax. Thus, once such input tax credit is validly taken, it can be utilized for payment of output tax on any taxable or zero-rated outward supply of the appellant. • Input tax credit of various inputs and input services pertaining to various business segments of appellant, is available as common pool in Electronic Credit Ledger, which can be utilized towards discharging GST liability of any outward supplies.
Observations & Decisions of AAAR	• AAAR observed that: o The inputs like Gold & Silver Dore bars, etc. are undisputedly intended to be used in the course or furtherance of business of appellant. o ITC on inward supplies (Gold & Silver Dore bars) on which appellant intends to avail input credit are not covered under "blocked ITC" provisions as per Sec 17(5) of CGST Act, 2017. o If ratio of AAR is adopted as a principle, taxpayers selling large number of commodities would require maintaining separate input tax credit accounts in respect of each commodity which is not required as per GST law. o Once, taxpayer validly takes ITC, the same merges into common pool of ITC in the Electronic Credit Ledger, which is not to be maintained commodity wise.

	• AAAR ruled that: o payment of output tax on Castor Oil Seeds against the ITC taken on Gold & Silver Dore Bars etc. cannot be denied merely on ground that inward supplies has no nexus with outward supply. o AAAR set aside the ruling of AAR.
NASA Comments	• This ruling comes as a great relief to trade and businesses who have multiple business segments/verticals. • Ruling by AAAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value.

CASE 2 – M/S SHREE ARBUDA TRANSPORT [TS-116-AAAR (GUJ)-2022-GST]

Facts in brief & Issue Involved	• Appellant, M/s. Shree Arbuda Transport, plans to own a fleet of commercial vehicles and also hire vehicles for transportation as well as clearing agency business. • Appellant intended to provide following services at a single consolidated rate (per container) which includes transportation and clearing of agricultural produces meant for export: o Clearing and Forwarding charges; o Transportation of cargo containing agricultural produces; o Providing labours for loading of cargo into containers; o Transportation of empty container from CFS / empty container yard to client's warehouses at various locations; o Other allied services; and o Obtaining Customs related certificates/clearing. • Appellant raised following questions before Authority for Advance Ruling ['GAAR']: o Whether provision of all above services for a "Single consolidated Rate" as a package would be treated as "Mixed supply" or "Composite supply"? o What shall be the applicable HSN code and GST Rate for such bundle of services? o Whether the firm shall be eligible to avail ITC on the following: - GST paid on purchase, repair & maintenance cost of such Commercial vehicles;

	- GST paid on services received from CFS, Port, Labour contractor etc. for above referred package of services provided to customers. • GAAR observed that the issue brought before them had not yet materialised i.e. the application for Advance Ruling had been filed on 13.10.2019 but no agreement had been signed so far by the appellant with the exporter and therefore GAAR is of the opinion that without any agreement or any other relevant documents having been provided by the appellant, it would not be possible to give a decision in the matter for which the appellant has filed an appeal. • Aggrieved by ruling of the GAAR, Appellant preferred an appeal against said ruling with Appellant Authority for Advance ruling (AAAR).
Contentions of Appellant	• **Question-1: Whether "Mixed Supply" or "Composite Supply"?** Appellant is of the view that the supply is mixed supply on following grounds: ○ Intention of applicant is to quote a single price for the bundled service. ○ The bundle service is not a naturally bundled. ○ Appellant will raise fixed rate consolidated invoice for supply of services and not provide item wise / service wise bifurcation. • **Question-2: What would be the applicable HSN?** ○ As per Section 8(b) of CGST Act, 2017, "a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax." ○ In the present case, among all the services in the bundled service, highest rate of tax is applicable on Clearing and Forwarding services i.e. 18%. Therefore, the entire bundle will be taxed at 18%. As the bundled service in question is a combination of services, it will be classified under HSN 999799 bearing description 'Other Services nowhere else classified'. • **Question-3: Is appellant eligible to take ITC?** ○ Appellant submits that it fulfils all the conditions of Section 16(2) of the CGST Act, 2017 and they are eligible to claim Input Tax

	Credit with regards to the Inward Supplies procured for making the subject outward supply. ○ Appellant further submits that as the tax on entire bundled service is discharged at 18%, the supplies which would have enjoyed exemption is also being taxed at 18%. As the appellant is not rendering any exempt supplies, they are eligible to claim entire ITC.
Observations & Decision of AAAR	• The very purpose for creating the Authority for Advance Ruling is to help the applicant in planning his activities and bringing in certainty in determining tax liabilities. There is nothing wrong if the applicant seeks Advance Ruling by describing his activities in detail before signing an Agreement. It is open for the Advance Ruling Authority to seek more details, clarification or supporting documents from the applicant and the decide the appeal on merit on the basis of detailed submissions received. • **Question-1: Whether "Mixed Supply" or "Composite Supply"?** ○ Supply of bundled services would be either 'composite supply' or 'mixed supply', as defined under the provisions of Section 2(30) and Section 2(74), respectively, of the CGST Act, 2017. ○ To treat any supply as 'composite supply' one of the essential requirements is that two or more taxable supplies of services should be naturally bundled in the ordinary course of business and one of which should be a 'principal supply'. ○ AAAR observed that the services to be supplied by the appellant are generally not bundled in the ordinary course of business and are treated as different services and generally provided at separate rates. So, the bundled services do not fall under the definition of 'composite supply'. ○ To consider any supply of service as mixed supply, there should be two or more individual supplies or any combination thereof, made in conjunction with each other for a single price where such supply does not constitute a composite supply. The requirements of 'mixed supply' are fulfilled in given case.

	• **Question-2: What would be the Applicable HSN?** As per Section 8(b) of CGST Act, the mixed supply would be treated as supply of that supply which attracts the highest rate of tax. In the given case, there are more than one supplies which attract the highest rate i.e.,18%. The predominant supply among such supplies would be classifiable under HSN / Service Code (Tariff) 996719 with description as 'Other cargo and baggage handling services.' • **Question-3: Is appellant eligible to take ITC?** The single price to be charged which attracts the highest rate of 18% and the said single price includes the value of exempt supply i.e., transportation of rice and hence no question arises of denying ITC merely on the ground that one of the constituent services of mixed supply attracts Nil rate of tax, if provided separately.
NASA Comments	• AAAR validly rejected the order of AAR ruling that Advance Ruling Authority cannot give ruling for business transactions proposed to be undertaken by applicant. AAAR has clearly brought out legislative intent to provide a platform to the taxpayer to resolve the legal disputes arising in future business propositions. • This is a well-reasoned and unbiased ruling based on reasonable interpretation of provisions in respect of classification of supplies, mixed or composite supplies, its taxability and corresponding eligibility of ITC. • Ruling by AAAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value.

We will be glad to provide any elaboration or elucidation you may need in this regard.

N. A. Shah Associates LLP
Chartered Accountants
Address: B 21-25 / 41-45, Paragon Centre,
Pandurang Budhkar Marg, Mumbai – 400013.
Tel: 91-022-4073 3000, Fax: 91-022-4073 3090
E-mail Id: info@nashah.com