TAX JURISPRUDENCE

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JUDGEMENTS 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 V/s. DILIP J. THAKKAR [ITA.NO.966/MUM/2020]	Whether amendment brought in Finance Act 2012, to reopen assessment upto 16 years in case of assets located outside India, is prospective or retrospective?	Relying upon the Explanation to section 149 (3) of Income Tax Act, ('Act'), Tribunal has held that amendment is retrospective.
GRI RENEWABLE INDUSTRIES S.L VS. ACIT [ITA No.202/Pun/2021]	Whether separate notification is required for granting the benefit of Most Favored Nation (MFN) clause under India Spain tax treaty (tax treaty)?	Once the tax treaty is notified, the Protocol, which is an integral part of the tax treaty, also gets automatically notified along with the tax treaty. Therefore, a separate notification is not required for granting benefit under the MFN clause.
INDIRECT TAX		
TAGHAR VASUDEVA AMBRISH [2022-TIOL-242-HC-KAR-GST]	Whether leasing of residential premises as hostel to students or working professionals is exempted under entry 13 of N.N. 9/2017–IGST(R) i.e. ''services by way of renting of residential dwelling by way of use as residence'?	High Court held that leasing out residential premises as hostel to students and working professionals is covered under said entry 13 of N.N. 9/2017–IGST(R).

SHREE DIPESH ANIL KUMAR NAIK [2022-TIOL-04-AAAR-GST]	Whether GST is applicable on sale of plot of land where primary amenities such as, drainage line, water line, electricity line, land leveling etc. are to be provided by the applicant?	Sale of developed plot of land amounts to supply of service as per Clause 5(b) of Schedule II to CGST Act and thereby liable to GST.

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

A. DIRECT TAX

Case 1 – DCIT V/s. DILIP J. THAKKAR [ITA.NO.966/MUM/2020]

Facts in brief & Issue Involved	• A search and seizure operation was carried out at residential premises of the taxpayer on 10.08.2011 wherein some papers were found in relation to foreign assets pertaining to AY 1999-2000. • Revenue reopened the assessment for AY 1999-2000 u/s 147 on 27.03.2015, for the alleged escapement of income from an asset located outside India. • Aggrieved by the order of revenue, taxpayer filed an appeal before Commissioner (Appeals) ('CIT (A)'). CIT (A) allowed the appeal on the ground that the amendment brought by Finance Act, 2012 in section 149 enhancing the time limit for reopening the assessments in case of income from assets located outside India from existing 6 years to 16 years with effect from 01.07.2012, was prospective in nature. Accordingly, said amendment could not have been applied to the assessments having already reached finality before the said amendment. • Aggrieved by the order of CIT (A), revenue filed an appeal before Tribunal.
Contentions of Appellant ('Revenue')	• Finance Act, 2012 amended the provision of section 149(1)(c) accordingly, assessment can be reopened up to 16 years from the end of the relevant assessment year, where income escaped assessment is in relation to any asset (including financial interest in any entity) located outside India.

	• Reliance was placed on the Explanation provided below section 149(3), which unambiguously provides that "the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012". • Therefore, it was argued by revenue that the amendment in Section 149(1), introduced with effect from 01.07.2012, is expressly stated to be retrospective in nature.
Contentions of Respondent ('Assessee')	• Even though the period for reopening the assessment in case of income from assets located outside India stood increased to 16 years, w.e.f. 01.07.2012, it could only take prospective effect and the amendment having already reached finality will remain unaffected by this amendment. • Revenue cannot reopen the assessment of AY 1999-2000, as time limit to reopen the same as per pre-amended law ended on 31.03.2006. • Reliance was also placed on the decision of Delhi High Court in case of Braham Dutt (100 Taxmann 324), wherein it was held that amendment was prospective in nature. Further, SLP filed by revenue was dismissed by Hon'ble Supreme Court.
Observations & Decision of ITAT	• Explanation to section 149 unambiguously provides that "the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, are applicable from 01.04.2012 and hence the amendment is retrospective. • Decision of Delhi High court is differentiated on the grounds that, there was no occasion before the High Court to refer to, or take note of, the Explanation below Section 149(3), introduced with effect from 01.04.2012, which categorically made the amendment retrospective. As regards dismissal of SPL by Supreme Court, it was observed that, dismissal of SLP is only elementary and does not amount to decision on law. • In the present case, the assessment year under consideration is 1999-2000 and the assessment was reopened on 27.03.2015 which is well within the period of 16 years, hence reopening is valid

	• Not dealing with the merits of the case, matter was remitted back to CIT (A) to pass order on merits within 180 days.
NASA Comments	• This decision will have impact on those case where reopening is challenged before first appellate authority or tribunal.

Case 2 – GRI RENEWABLE INDUSTRIES S.L VS. ACIT [ITA No.202/Pun/2021]

Facts in brief & Issue Involved	• Assessee, a tax resident of Spain, received fees for providing certain technical services and also royalties for implementation of SAP software process model. • Relying on the Protocol to the tax treaty having MFN clause read with Article 12 of the India-Portuguese tax treaty, assessee claimed that such royalties and FTS were taxable at 10 per cent instead of 20 per cent as provided in the tax treaty. • AO held that the tax rate of 10 per cent could not be applied because Section 90(1) specifically requires the issuance of necessary notification by the Government of India.
Contentions of Appellant	• The Protocol to the tax treaty provides for taxation of royalties and FTS in accordance with the provisions of DTAA between India and a member of OECD entered into after 01.01.1990 where such provisions provide for a lower rate or restrictive scope of taxation on royalties and FTS. • Applying said Protocol, the assessee placed reliance on India - Portugal tax treaty, according to which, the tax rate on royalties and FTS is 10 per cent instead of 20 per cent as provided in the tax treaty.
Contentions of Respondent	• AO contended that the tax rate of 10 per cent could not be applied because Section 90(1) specifically requires the issuance of necessary notification by the Government of India. • In order to import an MFN clause from another tax treaty having lower rate of tax or narrower scope of the definition of certain clause, it is necessary that such importing of the clause must be notified. • In the absence of any notification, the benefit of the relevant Article of the India- Portuguese tax treaty was not available to the tax treaty in terms of the Protocol.

Observations & Decision of ITAT	• Once the tax treaty is notified, the Protocol, which is an integral part of the tax treaty, also gets automatically notified along with the tax treaty. Therefore, a separate notification is not required for granting benefit under the MFN clause. • CBDT Circular No. 03 of 2022 specifying the need for a separate notification for importing the beneficial treatment from another tax treaty, overlooks the plain language of the provisions of Section 90 (1), which treats the MFN clause as an integral part of the tax treaty. • Notwithstanding that Circular issued by the CBDT is binding on the AO and not on the taxpayer or the Tribunal or other appellate authorities, the requirement contained in the said Circular cannot primarily be applied to the period prior to the date of its issuance, as the same is applicable prospectively and not retrospectively. • Hence, royalties and FTS were taxable at 10 per cent in terms of Protocol to the tax treaty having MFN clause read with Article 12 of the India-Portuguese tax treaty.
NASA Comments	• There has been considerable litigation with respect to application of the benefit of the MFN clause under the Indian tax treaties. • In the instant case, the Tribunal, while disregarding this Circular, observed that the protocol containing the MFN clause is an integral part of the tax treaty which gets notified with the tax treaty and hence, a separate notification is not required for granting benefit under the MFN clause.

B. INDIRECT TAX

Case 1 – TAGHAR VASUDEVA AMBRISH [2022-TIOL-242-HC-KAR-GST]

Facts in brief & Issue Involved	• Petitioner along with others has let out a Residential complex to M/s D. Twelve Spaces Pvt. Ltd. ("Lessee") who is engaged in the business of providing affordable residential accommodation to students on long-term basis (from 3 months to 11 months). • Petitioner filed an advance ruling application seeking clarification as to eligibility of exemption with regards to rent received from lessee under entry 13 of N.N. 9/2017–IGST(R) which exempts "services by way of renting of residential dwelling for use as residence".

	• Advance ruling authority as well as Appellate authority held that property rented out by petitioner cannot be termed as residential dwelling. Further, lessee itself is not using the said property as residence and hence, benefit of exemption is not available. • Being aggrieved with said order, petitioner preferred a writ petition before High Court.

Contentions of Petitioner	• Appellant submitted that following are sine qua non in order to claim exemption under Entry No. 13 mentioned above:
	  ○ There must be a service of renting;
	  ○ The property so let out must be a residential dwelling; and
	  ○ Such residential dwelling must be given for use as a residence.
	• Petitioner submitted that normal trade parlance meaning of the term 'residential dwelling' implies a residential accommodation used for long term stay.
	• The let-out property is a residential property on the records of Bruhat Bangalore Mahanagar Palike (BBMP)
	• Property is used by students for residential purposes.
	• No condition has been laid down in the exemption notification that lessee himself must occupy the building to claim the benefit of exemption. No such additional conditions can be read into the exemption notification.

Contentions of Respondent	• Relying on Supreme Court decision in case of Dilip Kumar And Company, respondent argued that exemption notification has to be strictly construed and any ambiguity therein has to interpreted in favour of revenue. • Lessee is engaged in leasing business and is registered as a commercial establishment under the Karnataka Shops and Commercial Establishment Act, 1961.
Observations & Decision of HC	• Entry 13 contained in N.N. 9/2017–IGST(R) is unambiguous and clear. The burden is on the petitioner to show that his case comes within the parameters of the exemption notification. • In normal trade parlance, residential dwelling means any residential accommodation for long term stay and it is different from hotel, motel, inn, guest house etc. which is meant for temporary stay.

	• The hostel is used by the students for the purposes of residence. Usually in hostels, the duration of stay is more than that compared to stay in hotel, guest house, club etc. • Honorable Supreme Court in case of Kishore Chandra Singh held that word 'residence' only connotes a place where a person eats, drinks and sleeps and it is not necessary that he should own such place. • The premises rented as hostel to the students falls within the purview of residential dwelling and same is used for the purposes of residence by the students. • The exemption notification does not require the lessee itself to use the premises as residence to claim benefit of the exemption.
NASA Comments	• High Court overturned the rulings pronounced by authorities and granted the exemption benefit based on end usage of residential premises. • This is indeed a welcome decision considering various adverse advance rulings issued on this subject matter. • Even after High Court decision, issue may arise as to what constitutes short term (temporary) accommodation or long term (akin to permanent) accommodation. It will be crucial to examine facts of each case to take an appropriate position in the matter.

Case 2 – SHREE DIPESH ANIL KUMAR NAIK [2022-TIOL-04-AAAR-GST]

Facts in brief & Issue Involved	• Appellant intends to sell its vacant land. It has got necessary approvals from Town Planning Authority ('TPA') which is subject to condition that appellant will provide basic amenities like sewerage and drainage line, water line, electricity line, land leveling for road, pipe line facilities for drinking water, street lights, telephone line etc. before selling of plot.
	• Appellant had sought advance ruling for taxability of sale of such developed plots. Gujarat advance ruling authority ruled as under:
	  ○ Rate for sale of developed plot will be charged on super built-up basis which includes charges towards common amenities.
	  ○ Sale of developed plot is not equivalent to sale of land.
	  ○ Sale of developed plot amounts to supply of service as per clause 5(b) of Schedule II to CGST Act.

	• Aggrieved by above ruling, appellant has preferred appeal before Appellate authority with following additional facts and submissions: ○ Appellant intends to sell the vacant land by dividing land into multiple plots for individual buyers. ○ To comply with the conditions of approval given by TPA, appellant proposes to enter into contract which mandates buyers to construct common amenities on their own by forming Association of person ('AOP') or any artificial judicial entity.
Contentions of Applicant	• Entire transaction is a composite supply wherein sale of land is the principal supply and development of common amenities is ancillary. Sale of land is not a taxable supply as per Schedule III to CGST Act and hence, impugned transaction shall not be liable to GST. • Appellant relied on ruling pronounced by Karnataka authority in case of M/s. Maarq Spaces Pvt. Ltd. wherein it was held that development of plot naturally bundled with sale of land is composite supply not liable to GST. • The proposed contracts with buyers would require them to construct common amenities by creating their own AOP. The sale value of land would not include charges for common amenities and thereby, there will be no recovery by appellant from buyers for allowing usage of common amenities. Transaction is merely a conditional sale of land and nothing beyond that. Hence, GST is not leviable when there is no construction or development activity undertaken. The said transaction shall be covered under clause 5 of Schedule III of CGST Act.
Observations & Decision of AAAR	• Appellant would mandate buyers to develop the common amenities by forming an AOP. This statement is contradictory to the conditions mandated by the TPA which provides that the said facilities are to be developed before selling plots. Also, appellant has made contradictory submissions for charging amount from buyers for development of common amenities. In absence of documentary evidence, amount charged by appellant is considered inclusive of value towards common amenities. • Impugned transaction shall not be considered as composite supply as it does not satisfy following essential conditions:

	○ Appellant is not registered person and hence is not a taxable person; and ○ Sale of land is a non-taxable supply and hence there are no two or more taxable supplies involved in the impugned transaction. • Sellers of developed plots charge the rate on super built-up basis which includes area used for common amenities. Thus, seller is collecting charges towards land as well as the common amenities. • Sale of developed plot is not equivalent to sale of land but is a different transaction which tantamount to rendering of service as upheld by Hon'ble Supreme Court in case of M/s. Narne Construction Pvt. Ltd. [2013 (29) STR 3 (SC)]. • Rulings relied by appellant is not binding on anyone except to the said applicant and his jurisdictional officer. • Sale of developed plot of land amounts to supply of construction services in terms of Clause 5(b) of Schedule II to CGST Act and is taxable at 18%. • Sale of developed plots is not covered under Clause 5 of Schedule III to CGST Act.
NASA Comments	• Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value. • Sale of developed plot is a transaction wherein land is being conveyed and sold which is out of GST domain. The pre-dominant intention of parties to such transaction is always to buy and sell developed land. • There are multiple advance rulings on this highly contentious issue taking divergent views. Trade and industry is totally perplexed and awaits much needed clarification from Government on this issue as the stake involved is enormous.

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

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