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# **TAX JURISPRUDENCE**

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CASE LAW ALERT – SEP 2023  
VOL -1

## EXECUTIVE SUMMARY OF 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.

| Case & Citation   | Issue Involved  | Decision  |
|---|---|---|
| <b>Direct Tax</b>   |   |   |
| <a href="#">Sarva Capital LLC [TS-467-ITAT-2023(DEL)]</a> | <p><b>Issue No. 1:</b> Whether the Assessing Officer can question the sanctity of the TRC issued by the competent authority of other tax jurisdiction; thereby questioning the residency of the entity &amp; deny the DTAA benefits?</p> <p><b>Issue No. 2:</b> Whether the CCPS acquired by the taxpayer before 01.04.2017 &amp; subsequently sold, after conversion into equity on 04.08.2017, is exempt under Article 13(4) of the India Mauritius DTAA?</p> | <p><b>Issue No. 1:</b> The Hon'ble ITAT relying on the Apex court ruling in case of Azadi Bachao &amp; jurisdictional High Court ruling in case of Blackstone Capital Partners along with placing reliance on CBDT circular no. 789 of 2000 held that TRC is sufficient evidence to claim not only the residency and legal ownership but also Treaty eligibility.</p> <p><b>Issue No. 2:</b> It is held that Article 13(3A) of India-Mauritius DTAA covers "gains from alienation of shares" and the word 'shares' is used in a broader sense which includes in its ambit all shares, including preference shares and thus, CCPS acquired prior to Apr 1, 2017 and converted into Equity Share on or after Apr 1, 2017 would fall within Article 13(4), hence would be exempt from tax.</p> |

| Indirect Tax   |   |   |
|--|---|---|
| <a href="#">Globolive 3D Private Limited vs UOI [TS-411-HC(BOM)-2023-GST]</a>      | Whether providing Satellite derived 3D model services to foreign recipient through electronic medium would fall within the purview of OIDAR [Online Information and Database Access or Retrieval services] defined u/s 2(17) of IGST Act or classify as "export of services" u/s 2(6) of IGST Act in the context of Sec 13 of IGST Act? | Hon'ble High Court of Bombay held that mere transferring of files through electronic medium cannot be considered as OIDAR u/s 2(17) of IGST Act. Moreover, the service qualifies the requirement of "export of services" as defined u/s 2(6) of IGST Act. |
| <a href="#">Aastha Enterprises vs The State of Bihar [TS-407-HC(PAT)-2023-GST]</a> | Whether purchasing dealer can claim Input Tax Credit (ITC) in respect of supplies for which payment has already been made to the supplier but the supplier has not deposited the tax to the government.   | Patna HC upholds denial of ITC benefit to purchasing dealer where the supplying/selling dealer has not paid up the amounts to the Government, despite collection of tax from the purchasing dealer.   |

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

## DIRECT TAX

### Case 1 – Sarva Capital LLC [TS-467-ITAT-2023(DEL)]

#### Facts in brief & Issue Involved:

- ♦ The taxpayer is a non-resident corporate entity incorporated under the laws of Mauritius and a tax resident of Mauritius; primarily incorporated for the purpose of making investments in India education, agriculture, healthcare, microfinance institutions and other financial services by way of equity shares.
- ♦ Taxpayer had acquired Cumulative Convertible Preference Shares (CCPS) on 18.03.2016 & Subsequently on 04.08.2017, the same were converted into equity shares.
- ♦ During the AY 2019-20, the taxpayer derived Long Term Capital Gain (LTCG) on sale of shares of 2 Indian Cos. i.e. Sewa Gruh Rin Ltd. and Veritas Finance Pvt. Ltd ('Veritas') & thereby claimed exemption under Article 13(4) of India-Mauritius DTAA in the return filed based on a valid TRC of Mauritius. Article 13(4) of the India Mauritius DTAA provides that capital gain (other than that referred to in paragraphs 1, 2, 3 and 3A) shall be taxable only in the country of resident.
- ♦ Subsequently, the taxpayer revised the return by offering the LTCG on sale of shares of Veritas to tax as per Article 13(3B) of DTAA. Article 13(3B) of the India Mauritius DTAA provides that Gains from the alienation of shares acquired on or after 1st April 2017 but sold before 31st March 2029, shall be taxable @ 50% of the applicable tax rate.
- ♦ The AO has brought the theory of substance over form to deny the dislodged the validity of TRC and denied the benefit of DTAA observing the taxpayer as a conduit entity and not the beneficial owner of income. AO has further believed that taxpayer has employed an arrangement for tax avoidance through treaty shopping mechanism.

- ♦ Further, the DRP endorsed the views of the AO; basis which the AO passed an order u/s143(3) r.w.s. 144(C) of the Act by taxing the LTCG under the domestic provisions of the Act.
- ♦ Aggrieved by the final order passed by AO, the taxpayer filed an Appeal before the Hon'ble Income Tax Appellate Tribunal (ITAT).

### **Observations and Decision of the Hon'ble Delhi ITAT:**

- ♦ The Hon'ble ITAT observed that Supreme Court in case of Azadi Bachao Andolan 132 Taxman 373 (SC) has interpreted "liable to taxation" under Domestic laws & DTAA. Further it was held that merely because tax exemption under certain specified head of income including capital gain from sale of shares has been granted under the domestic tax laws of Mauritius, it cannot lead to the conclusion that the entities availing such exemption are not liable to taxation; further held that 'liable to taxation' and 'actual payment of tax' are two different aspects.
- ♦ It further observed that the AO has miserably failed to establish the fact of taxpayer being a conduit company with reference to Article 27A of DTAA i.e. Limitation of Benefit clause as neither it has NIL/negligible business operations nor its expenses are below threshold limit.
- ♦ Further, the CBDT circular no. 789 dated 13.04.2000 & the Supreme court verdict, TRC has been issued by the competent authority of the other tax jurisdiction & will be treated as a valid piece of evidence for tax residency status & legal ownership. Recently decision of Azadi Bachao Andolan has been followed in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd. vs. ACIT, 146 taxmann.com 569 (Del) and held that TRC is sufficient evidence to avail Treaty benefits. Hence, the taxpayer is eligible to avail benefits under DTAA.
- ♦ As regards the issue of claim of exemption under Article 13(4) of the DTAA, Hon'ble ITAT observed that CCPS were acquired prior to 01.04.2017 which were later converted into equity which did not alter any of voting or other rights of taxpayer;

the only difference being preferential right in receiving dividend, repayment of capital.

- ♦ The Hon'ble ITAT held that Article 13(3A) of DTAA uses the expression 'gains from alienation of shares' wherein in broader sense it will cover all the shares including preference shares. Since taxpayer had acquired shares prior to 01.04.2017, capital gain derived therefrom will not be covered under Article 13(3A) or 13(3B). On the contrary, it will fall under Article 13(4) which is a residuary clause & hence gain would only be taxable only in the country of residence of taxpayer (i.e. Mauritius) and would be exempt from tax in India.

**NASA Comments: -**

- ♦ The Hon'ble ITAT has once again held that CBDT circular of 2000 and Azadi Bachao Andolan decision still hold good and TRC is a valid document and hence the AO cannot question the sanctity of the same in order to grant the DTAA benefits.
- ♦ In case of equity shares sold post conversion from CCPS which were originally acquired prior to 01.04.2017, the date of acquisition of the said equity shares will be considered as the date of acquisition of the CCPS & not the date of its conversion from CCPS to equity & accordingly exemption from Capital gains can be claimed under Article 13(4) of the India-Mauritius DTAA.
- ♦ It may be noteworthy to see whether a similar benefit would be available in case of conversion of CCDs post 01.04.2017 but acquired before 31.03.2017.
- ♦ It is a welcome move & will help the taxpayers in similar litigious situation.

## INDIRECT TAX

### Case 1 – Globolive 3D Private Limited vs UOI [TS-411-HC(BOM)-2023-GST]

#### Facts in brief & issues involved:

- ♦ Globolive 3D Pvt Ltd ("the Petitioner") entered into a Service Agreement with Emirates Defence Industries Co. PJSC ("foreign recipient") for supply of Satellite derived 3D City Model of Abudhabi, AL Ain, AL Dhafra. For executing the said technical service, petitioner imported Very High Resolution stereo satellite images from Earth Intelligence Ltd. and thereafter processed and digitalized the satellite images and sent the same via file transfer protocol ("electronic medium").
- ♦ Services rendered to foreign recipient were treated as export of services and therefore, refund of unutilized ITC u/s 54 of CGST Act was sanctioned by Deputy Commissioner initially.
- ♦ Assistant Commissioner later reviewed the Service Agreement and concluded that refund order was not legal and proper as the export provisions were not fulfilled. Hence, appeal was filed by Deputy Commissioner on the direction of Assistant Commissioner.
- ♦ The Appellate authorities allowed the department's appeal. Aggrieved by the said order, writ petition was filed before the court in absence of an Appellate Tribunal.

#### Contentions of Petitioner

- ♦ As per the service agreement entered between the parties, the agreement is for export of service. The petitioner has fully complied with the requirement of Section 13(12) of the IGST Act based on which the location of recipient of service was outside the Indian territory.

- ♦ Invoices under which the petitioner has received amounts in convertible foreign exchange clearly indicate that the buyer of services was Emirates Defence Industries Company, Abu Dhabi entities in U.A.E.
- ♦ Petitioner also contented that all the conditions as stipulated in Sec 2(6) of IGST Act are complied with and hence is entitled to refund of accumulated ITC on export of services.

### **Contentions of Department**

- ♦ The service of production of 3D city models after importing satellite images and after processing and digitalizing the images, producing satellite derived 3D city models and making online transfer of the same via FTP (File Transfer Protocol) i.e. online transfer, clearly established that the services provided by the petitioner was nothing but OIDAR service.
- ♦ There was no material submitted by the petitioner evidencing that the recipient is located at non-taxable territory and as per explanation to Sec 13(12) of IGST Act, place of supply of such OIDAR services shall be deemed to be in the taxable territory.
- ♦ Therefore, the conditions of export are not complied with as the recipient is situated in India and therefore order denying refund is valid in law.

### **Observations & Decision of Honorable High Court**

- ♦ HC observed that the agreement is clearly for a specialised work of providing 3D city models of Abudhabi, AL Ain, AL Dhafra. These are not works which would be freely available on the internet and / or are materials of the nature Section 2(17) would contemplate. In providing such services, the petitioner was required to transfer the files through electronic medium, but that would not mean that such services qua its nature, would fall under the definition of OIDAR. It is far different



from what is included in any of the electronic services as set out in the definition of OIDAR.

- ♦ If the interpretation to the Agreement in question as rendered by the respondents is to be accepted, it would lead to an absurdity in as much as any communication of information or providing of service through the medium of emails or any electronic transfer of data would be required to be held as OIDAR service, which is certainly not the purport and meaning an OIDAR service.
- ♦ Also, undoubtedly the consideration as received by the petitioner for providing of such service is received in convertible foreign exchange, although through the foreign recipients / representative M/s. Bayanat LLP.
- ♦ HC thus clarified that none of the conditions as provided for in the exception to section 13(12) were satisfied for the appellate authority to come to a conclusion that the person receiving such services was deemed to be located within the taxable territory. Hence, HC opined that the appellate authority is not correct in its conclusion that place of supply for such services was in taxable territory. Petitioner certainly qualifies all the requirements of export of service u/s 2(6) of IGST Act.
- ♦ Therefore, writ petition is allowed setting aside the impugned order and allowing the petitioner to claim refund.

#### **NASA Comments**

- ♦ This is a well-reasoned and favourable judgement bringing out a clear distinction between services merely delivered through electronic medium and OIDAR services.

## **Case 2 – Aastha Enterprises vs The State of Bihar [TS-407-HC(PAT)-2023-GST]**

### **Facts in brief & issues involved:**

- ♦ M/s. Aastha Enterprises ("the Petitioner") purchased goods from the supplier and paid the taxable value along with the tax amount to the supplier. However, the supplier did not deposit the tax amount to the government.
- ♦ The Petitioner claimed the ITC of the of the said tax amount and was of the view that since, the tax has been paid to the supplier, he is eligible to avail ITC.
- ♦ The Revenue Department issued the assessment order dated May 25, 2022 denying the ITC to the Petitioner on the ground that the Petitioner has not followed the condition stipulated under section 16(2) of the CGST Act thus, not eligible for such credit.
- ♦ Being aggrieved by the order the Petitioner filed a writ before the Hon'ble Patna High Court against the Assessment Order.

### **Contentions of Petitioner**

- ♦ The petitioner argued that since it had proof of payments through bank accounts, invoices, and goods movement, it should be entitled to ITC.
- ♦ Proceeding initiated against the Petitioner, who has already paid the tax would result in double taxation in the hands of Petitioner. The Department shall recover the tax from the supplier and not from the purchasing dealer (petitioner).

### **Contentions of Respondent**

- ♦ The Respondent emphasized section 16(2)(c) of CGST Act, 2017 which says that the tax charged is respect of supply on which ITC is to be claimed shall be paid to the Government.

- ♦ The Revenue department asserted that ITC eligibility is subject to conditions mentioned in the provision. They emphasized that ITC isn't an inherent right but a benefit or concession, and non-compliance with conditions can lead to its denial.


### **Observations & Decision of Honorable High Court**

- ♦ The conditions mentioned in clauses (a), (b) and (c) of section 16 of the CGST Act, 2017 which regulate the availment of input tax credit should be satisfied together and not separately or in isolation. On non-fulfilment of any one of the conditions, the recipient/ buyer cannot claim the input tax credit.
- ♦ The mere production of the tax invoice, establishment of the movement of goods and the consideration having been paid through bank accounts would not enable the input tax credit unless the credit is available in the ledger account of the recipient/ buyer. ITC implies credit being available for the purchasing dealer in its credit ledger by way of payment of tax by the selling dealer to the Government.
- ♦ With respect to the double taxation, the Hon'ble Patna High Court held that taxation has been held as a compulsory extraction made for the purpose of public by the welfare state and without the tax being paid to the Government, there is no question of double taxation.
- ♦ Mere fact that there is a mode of recovery in the statute would not absolve the petitioner from tax liability.
- ♦ If the Government recovers tax from selling dealer by utilizing the available machinery, the purchasing dealer could possibly seek refund but as long as the tax paid by the purchaser to the supplier, is not paid to the government, the purchasing dealer cannot raise a claim of Input Tax Credit under the statute.



## **NASA Comments**

- ♦ The ruling of above judgment would result into further financial strain on the business operations of the taxpayer.
- ♦ It is important to highlight here that various writ petitions are pending at various High Courts for deciding the constitutional validity of sec 16(2)(c).
- ♦ The favorable judgment in the case of Suncraft Energy Private Limited Vs. Assistant Commissioner of State Tax reported in Vol.1 of Aug'23 which allows claim of ITC in the same scenario is directly in contradiction to the above judgment.



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