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CERTIFICATE COURSE ON FEMA & RELATED COMPLIANCES

In this Virtual Certificate Course on FEMA & related compliances conducted from 7th to 11th September, 2020, Opening Remarks was given by Sridhar Ramachandran Partner at Grant Thornton Bharat LLP, Anup Vijay Kulkarni Senior Associate at J Sagar Associates discussed about Foreign Direct Investments whereas the session on Export and Import of Goods and Services was taken by Manish Tyagi Partner at MHA Legal.

Nidhi Goyal Managing Director at Avinav Consulting shared her insights on External Commercial Borrowings (ECB), Investigations by Enforcement Directorate / Compounding by RBI was conducted by Manish Tyagi Partner at MHA Legal.

CERTIFICATE COURSE ON INTERNATIONAL TAX

Certificate Course on International Tax was conducted on 2nd, 4th, 9th, 11th, 16th, 18th, 23rd & 25th September, 2020. In which Pranshu Goel Partner at Ashok Pranshu & Co. discussed about Introduction to International Taxation: An Overview and Double Taxation Avoidance Agreements; Lalith Kumar Chartered Accountant and Shreyansh Kochar Chartered Accountant had a indepth discussion on International Tax Treaties that received a good response from the audience.

CERTIFICATE COURSE ON NEGOTIATING CONTRACTS

Our Virtual Certificate Course on Negotiating Contracts along with our Knowledge Partner Aarna Law conducted from 22nd to 24th September, 2020 provided the hands on experience to the participants with strategies, tactics, and a deeper understanding of contracts to improve their contract negotiating skills. In this highly interactive webinar, participants were explained the Legal Issues and Contract Language, elements of negotiation, advanced contract drafting and dispute management from our experts Mysore Prasanna (Pras), Rajashree Rastogi and Aakash Sherwal from Aarna Law.

DIGITAL SYMPOSIUM ON GOODS & SERVICES TAX - AN ADVANCED TRAINING COURSE

Achromic Point and BRICS CCI jointly organized an advanced Training Course on Goods & Services Tax along with Avinav Consulting as Knowledge Partner on 25th, 27th August, 1st, 3rd, 8th, 10th, 14th, 15th & 17th September, 2020.
The programme commenced with a Key Note Address delivered by Dr B B L Madhukar Director General at BRICS CCI; Welcome Address and the session on Place Of Supply Of Goods And Services – Domestic And International Transactions taken by Nidhi Goyal Convener at BRICS CCI Indirect Tax Committee. Overview of GST and Journey So Far in Three years, Input Tax Credit, Block credit, Reversal of credit and How to prepare replies to Departmental notices, Enquiry, communications, Show-cause notices, drafting appeals were discussed by Yogesh Gaba Managing Partner-Indirect Tax at GABA & CO. whereas FCM / RCM, Time Of Supply were taken by Ashok Batra Senior Partner at A K. Batra & Associates.
The next day Archana Jain Senior Director at Avinav Consulting gave insights on Issues in Refunds, Inverted duty Structure, exports, Supplies to SEZ; Deepak Suneja Partner at NITYA Tax Associates and Aasmee Mangla Managing Associate at NITYA Tax Associates shared their experience on Valuation and related issues. Puneet Agrawal Founding Partner at ALA Legal shared his insights on Litigation including search, seizure and assessment, Last Day K. Prathiba Joint Director at Lakshmikumaran & Sridharan Shivam Mehta Partner at Lakshmikumaran & Sridharan had an indepth discussion on Industry Sector wise – case studies.

The buzz around Tax Collection at Source ('TCS') on Sale of Goods, Section 206C (1H) of the Income-tax Act, 1961 ('the Act')

I. What's the Buzz?

In a country like ours, one of the most efficient way of an upfront collection of tax and simultaneously keeping an eye on the business transactions, has been the provisions around Tax Deducted at Source (TDS) and TCS, and therefore the focus of the government of India in recent years appeared to be on bringing in new provisions around TDS and TCS on time to time basis.

The existing provision of section 206C(1) of the Act provides for collection of tax at source on certain specified goods (viz. Alcohol for human consumption, Tendu leaves, timber, forest produce, scrap, minerals) at a specified percentage. With a view to widen the provisions of TCS, a new sub-section (1H) has been introduced in section 206C by the Finance Act, 2020. The provisions of sub-section (1H) of section 206C have been made applicable from 1 October 2020 and it provides that TCS shall be applicable on sale of goods exceeding INR 50 lakhs during the year.

II. Provisions of Section 206C(1H) of the Act

The newly introduced clause provides that:

- Every person, being a seller,
- who receives any amount as consideration for sale of any goods,
- of the value or aggregate of such value exceeding fifty lakh rupees,

- in any previous year,
- other than the goods being exported out of India or goods covered in sub-section (1) or sub-section (1F) or sub-section (1G),
- shall,
- at the time of receipt of such amount,
- collect from the buyer,
- a sum equal to 0.1 per cent,
- of the sale consideration exceeding fifty lakh rupees,
- as income-tax.

** where the buyer doesn't provide PAN or Aadhaar, the prescribed TCS rate under section 206C(1H) shall increase to 1% (section 206CC of the Act).*

*** where TDS provisions are applicable on such sale of goods, TCS is not leviable.*

**** clause (1-I) and (1J) of section 206C gives power to the Board to bring guidelines (after necessary approvals & process) and that such guidelines shall be binding on the Tax department and the seller, both.*

III. Some important aspects of section 206C(1H) to be noted are:

- TCS is applicable on the seller of the goods whose total sales, turnover or gross receipts (including goods and service) from the business exceeds INR 10 crores during preceding previous year.
- TCS is applicable on the sale consideration (excluding sale of services) exceeding INR 50 lakhs and the threshold for INR 50 lakhs has to be seen for the entire FY (including period before 1 October 2020), although TCS is leviable on the consideration received in excess of INR 50 lakhs, after 1 October 2020.
- TCS does not apply to export of goods out of India and import of goods into India.
- As per the Press release dated 13 May 2020 with respect to Reduction in rate of TDS and TCS, TCS rate under section 206C(1H) shall be reduced rate of 0.075% instead of 0.1% and that reduced rate is not applicable in the absence of PAN/ Aadhaar of the buyer.

IV. Circular 17 of 2020 dated 29 September 2020 and Press Release dated 30 September 2020 issued by Central Board of Direct Taxes ('CBDT')

- It has been clarified that the collection is required to be made at the time of receipt of amount of sales consideration after 1 October 2020,
- Provisions of section 206C(1H) of the Act are not applicable to certain transactions (including shares and securities) carried out through specified exchanges,
- TCS to be collected on any sales consideration / amount received post 1 October 2020, including advance received for sale,
- In relation to applicability to sale of Motor Vehicle, where provision of section 206C (1F) are not applicable, provision of section 206C(1H) shall apply,
- It has been clarified that no adjustment on account of sale return or discount or indirect taxes including GST is required to be made for collection of TCS under section 206C(1H) of the Act.

V. Important Considerations

- Practically, many companies may face certain issues while applying the TCS provisions on sale of goods on an invoicing basis, especially in cases of advance consideration, sales return, discounts etc. Companies shall be careful while applying the TCS in their current invoicing system, to avoid any litigation in future.
- For determination of the sales consideration, one has to consider the amount of sale of goods to the buyer in the entire Financial Year (i.e. from 1 April to 31 March), however, the charge for TCS shall apply only on the sales consideration (in excess of INR 50 lakhs) received post 1 October 2020. To elaborate further with an example, following 3 scenarios may help understand this better:

1. Where sales of goods to a buyer for the period 1 April 2020 to 30 September 2020 is INR 75 lakhs and in October, sales consideration from such buyer is INR 10 lakhs, TCS is leviable on INR 10 lakhs (and not on INR 35 lakhs i.e. INR 85 lakhs minus INR 50 lakhs).

2. Where sales of goods to a buyer for the period 1 April 2020 to 30 September 2020 is INR 25 lakhs and in October, additional sales consideration from such buyer is INR 40 lakhs, TCS is leviable on INR 15 lakhs (i.e. amount in excess of 50 lakhs or in other words INR 65 lakhs – INR 50 lakhs). However, where the INR 40 lakhs consists of INR 25 lakhs received for sale between 1 April 2020 to 30 Sept 2020 (state above) and INR 15 lakhs towards advance for additional sale, no TCS is to be levied until the threshold exceeds INR 50 lakhs.

3. Where sales of goods to a buyer for the period 1 April 2020 to 30 September 2020 is INR 25 lakhs and in October, sales consideration from such buyer is INR 20 lakhs, TCS is not leviable until the threshold exceeds INR 50 lakhs.

- A very important consideration remains that whether the TCS is to be collected on the value of invoice including the GST or excluding the GST? The CBDT, vide circular no. 17 of 2020 dated 29 September 2020, has clarified that no adjustment shall be made for GST for collecting TCS on sales consideration. In this regard, a reference can also be made to the case of McDowell & Co vs. CTO, 1986 AIR 649, 1985 SCR (3) 791, wherein the Hon'ble Supreme Court held that excise duty paid by the buyer is the cost of product and is the consideration for sale of the product. Accordingly, a better view appears to be that GST charged would form part of consideration for purchase of goods

even though from seller's perspective, it needs to be remitted to the Government, however from buyer's perspective, it still represents part of sale consideration payable to the seller.

VI. Concluding Remarks

The introduction of new provisions related to TCS on sale of goods saw some mixed reactions (neutral and negative) from various industries and corporates. Although, the Finance Act, 2020 had extended the applicability of the provisions to 1 October 2020, thereby extending some relaxations on compliance burden for initial part of the year, however the practical application clarifications remained unaddressed. Recently, the government has brought in the welcoming guidelines (at the last moment) which has clarified many doubts of the Industry, however it would be interesting to note the on ground applicability and the challenges that may arise once the practical application of the provisions begin.

Some of the aspects that requires consideration on the part of Buyer and Sellers includes:

- Implementation of the provisions in the current accounting system and ensuring necessary training within the accounting teams
- To consider the appropriate timing charging the TCS amount (i.e. whether at the time of sales invoices to be raised or to issue a separate debit notes later on)
- Reconciliation of the amount of TCS paid by the buyer and collected by the seller

It is important that all the companies shall be meaningfully considerate while applying the new provisions and in case of doubts, it is always advisable to seek advice from the professional consultants.

The above article is authored by CA. Ashu Gosain who is Executive Partner with a professional consulting firm comprises of senior Ex-Big4 professionals and is based out at Gurgaon, India. The Author comes with more than a decade long experience of advising corporates and MNC's on their various tax matters including working with Big 4 consulting firms in the past, both in India and abroad. For any queries/ detailed discussions, he is reachable at +91-; : 9357: :

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FACELESS APPEAL SCHEME 2020

Hon'ble Prime Minister launched 'Transparent Taxation Platform: Honouring the Honest' on 13 August 2020 comprising of Faceless Assessments, Faceless Appeals and Taxpayer's Charter. While the Faceless Assessments and Taxpayer's Charter were launched on 13 August 2020 itself, the Faceless Appeal Scheme (Scheme) was launched on 25 September 2020.

Introduced formally during Budget 2020 with delegated powers granted to the Income Tax Department under sub-sections (6B), (6C) and (6D) to section 250 of Income Tax Act, 1961 (Act), the CBDT prescribed the procedural aspects of the Scheme vide Notification Numbers 76 and 77 of 2020 dated 25 September 2020. The Scheme is effective from the date of publication of the notification in the official gazette, i.e. 25 September 2020.

As per CBDT Press Release dated 25 September 2020 (Press Release), 88% of the pending appeals will be handled under the Scheme while 85% of the present Commissioner of Income Tax (Appeals) (CIT(A)) would be allocated under the Scheme.

The Scheme aims to provide for an equal opportunity to the income tax department represented by National E-Assessment Centre (NeAC)/ National Faceless Assessment Centre thereby giving legal strength where such a process is usually adopted by CIT(A) in a physical appellate process.

Similar to Faceless Assessment Scheme, this Scheme will utilize artificial intelligence, machine learning, data analytics etc. in its process, wherever applicable, i.e. allocation of cases/ analysis of the order.

Coverage

In terms of the press release, all the appeals would get covered by the Scheme except for

the appeals relating to serious frauds, major tax evasion, sensitive and search matters, and the matters pertaining to international tax and black money.

Key features

- Faceless Appeal Proceedings would be headed by National Faceless Appeal Centre (NFAC) headquartered at Delhi;
- All the communication between the taxpayers and the department/internal communication amongst the appellate

authorities or the NeAC would be via NFAC;
- Appellate functions would be performed by Regional Faceless Appeal Centre (RFAC);
- NFAC would have Principal Chief Commissioner of Income Tax, Commissioner of Income Tax, Additional/Joint Commissioner of Income Tax, Deputy/ Assistant Commissioner of Income Tax and Income Tax Officers assisting Principal Chief Commissioner and Commissioner;
- RFACs have been set-up at Delhi, Mumbai, Chennai and Kolkata, with approx. 300 CIT(A)s (each constituting an independent appeal unit) stationed across India, report to them;
- All departmental communication either with the taxpayer appellant or amongst themselves, would carry Document Identification Number (DIN) and all the responses filed by the taxpayer appellant would be digitally signed or electronically authenticated using EVC, as may be applicable;
- Unlike Faceless Assessment Scheme, the Faceless Appeal Scheme doesn't provide for 15 day timeline for compliance with the notices, which may be done within the time specified in the notice or within such extended time as may be permitted.

Procedure

The Faceless Appellate Process is briefly enumerated as under:-

Initial Process

- Pursuant to e-filing of appeal before CIT(A) in Form 35 under the e-filing portal (i.e. www.incometaxindiaefiling.gov.in), the appeal filed will be allocated to an appeal unit located in any RFAC using an automated allocation system;
- If any appeal has been filed belatedly, or an application has been filed for filing/acceptance of the appeal without payment of taxes due on income as per tax return/advance taxes, the appeal unit may admit/reject the appeal under intimation to the NFAC. Admission/rejection of appeal pursuant to its belated filing/ non-payment of taxes may be intimated by NFAC to the taxpayer appellant;
- Pursuant to the admission of appeal/ where there is no requirement of admission (i.e. other than the belated filing of appeal/ exemption application referred above), appeal unit may request NFAC to:-
  - Obtain such further information/document/evidence from the taxpayer appellant, as may be necessary for the disposal of the appeal;
  - Obtain a report from NeAC or the tax officer on the grounds of appeal, a

document of evidence filed by the taxpayer appellant;
    - Direct NeAC or the tax officer to conduct such further enquiry as may be necessary for the disposal of the appeal;
- Upon receipt of the above request, NFAC will issue the notice to NeAC/ tax officer and the taxpayer appellant to furnish the information/report within the time specified in the notice or such extended time as may be permitted upon the filing of an adjournment application in this behalf;

Additional Ground of Appeal

- A taxpayer may file an additional ground of appeal, clearly specifying the reasons for the omission of such ground of appeal at the time of filing the appeal, in the form/manner to be specified by NFAC;
- In case, the additional ground of appeal has been filed by the taxpayer appellant, the same shall be forwarded by NFAC to NeAC or the tax officer for the comments;
- NeAC or the tax officer may furnish their comments within the time specified or such extended time as may be allowed;
- Comments received from NeAC, or the tax officer may be forwarded by the NFAC to the appeal unit;
- Appeal Unit may after considering the application filed by the taxpayer appellant for an additional ground of appeal and the comments received from NeAC/ tax officer may file either reject or admit the additional ground of appeal;
- The additional ground(s) of appeal to be admitted, only if the appeal unit is satisfied that the omission of the ground of appeal was not wilful or unreasonable;
- Admission/rejection of additional ground of appeal will be intimated by NFAC to the taxpayer appellant.

Additional Evidence

- A taxpayer may also file an application for additional evidence in the manner to be prescribed by NFAC, clearly specifying as to how its case is being covered by Rule 46A of Income Tax Rules, 1962 (Rules);
- Where an application for filing additional evidence has been received, NFAC will forward the same to NeAC or the tax officer for furnishing their report on the admission of additional evidences in terms of Rule 46A of the Rules;
- NeAC or the tax officer may furnish their report on additional evidence within the time specified or within such time as may be extended;
- Upon receipt of the report from NeAC or the tax officer, the appeal unit may either admit or reject the application for additional evidence, with detailed reasons to be recorded therein, under intimation to NFAC. NFAC will intimate the taxpayer appellant accordingly;
- Pursuant to the admission of additional evidence, the appeal unit may grant an opportunity to NeAC or the tax officer to examine or cross-examine the witness/document/evidence furnished by the taxpayer appellant and/or furnish any further document/ evidence or witness in rebuttal to the additional evidence/ witnesses furnished by the appellant. A notice to this effect may be sent by NFAC to NeAC or the tax officer;
- NeAC or the tax officer may furnish their report on the additional evidence or witnesses filed by the taxpayer appellant within the specified timeline or such extended timeline as may be allowed; Request by NeAC for issuing necessary directions
- NeAC or the tax officer, as the case may be, may request the appeal unit, via NFAC, to issue necessary directions to the taxpayer appellant or any other person to furnish any document/evidence/witness relevant to the appellate proceedings;
- Upon receipt of such request, the appeal unit may specify such document or notice

or evidence to be furnished by the taxpayer appellant as it may deem fit;
- Pursuant to receipt of such notice from NFAC, the taxpayer appellant or other person will file its response within the time specified in the notice or such other time as may be extended. It may also request for personal hearing via video conferencing if it feels necessary;
- Response received from the taxpayer appellant and/or other person shall be forwarded by NFAC to the appeal unit;

Enhancement of Income

- Where the appeal unit intends to enhance the assessment or penalty or reduce the refund, it may prepare, and the NFAC may issue a show cause notice to the taxpayer appellant specifying the reasons for enhancement or reduction of the refund;
- Taxpayer Appellant may file its response to the notice within the time specified in the notice or within such extended timeline as may be permitted. It may also request for a personal hearing via video conferencing;

Appeal Order

- Basis the material available on record, appeal unit shall prepare a draft appeal order(DAO) and will forward the same to NFAC;
- NFAC shall:-
  - where the aggregate amount of tax, interest, fee or penalty in respect of the issues disputed in appeal, exceed an amount to be specified by NFAC, it may allocate the DAO, for the purposes of review, to an appeal unit other than any appeal unit which has prepared the DAO;
  - in other cases, examine the DAO using a risk management strategy, whereunder, NFAC may either:-
  - finalize the DAO; or
  - allocate the DAO, for the purposes of review, to an appeal unit other than appeal unit which has prepared the DAO;
- Where the reviewing appeal unit concurs with the DAO, NFAC will finalize the DAO and shall communicate the same to the taxpayer appellant, NeAC or the tax officer, Principal Commissioner or Chief Commissioner;
- However, where the reviewing appeal unit proposes certain variations to the DAO, NFAC will allocate the appeal to the third appeal unit, i.e. the appeal unit other than the one preparing the DAO or reviewing the DAO;
- The third appeal unit after considering the variations proposed will follow the process of 'enhancement of income', where the variations result in enhancement of income or reduction of refund, else prepare a revised DAO;
- Upon receipt of the revised DAO, NFAC will pass the DAO and shall communicate the same to the taxpayer appellant, NeAC or the tax officer, Principal Commissioner or Chief Commissioner.

The NFAC may transfer the appeal to the jurisdictional CIT(A) at any stage of the faceless appellate proceedings, with the prior approval of CBDT.

Penalty Proceedings for Non-Compliance during appeal proceedings

Similar to Faceless Assessment Scheme, the Scheme also provides for initiation of penalty proceedings for non-compliance with any notice/direction issued during the course of the faceless appellate proceedings

Rectification of the Appeal Order

The Scheme also provides for rectification of the appeal order passed under the Scheme upon an application filed either by the:-

- Taxpayer appellant; or
- NeAC or the tax officer; or
- Appeal unit preparing/reviewing/revising DAO; or

- Any other person

with a view to rectify any mistake apparent from a record emanating from the appeal order passed under the Scheme.

Closing Remarks

The Scheme finds its roots from the Faceless Assessment Scheme, which has been adopted mutatis mutandis to appellate proceedings. Similar to Faceless Assessment Scheme, both the departmental officers and the taxpayers would need to gear up themselves and follow certain ideologies under Faceless Appeal Scheme as well, including, training to the departmental officers and timely compliance with the notices, articulation of the submissions, maintenance of documentation trail, etc. by the taxpayers.

Let's hope that CBDT could issue appropriate clarifications to the following aspects, which under the present contours of the Scheme, appear to be unclear:-

- Appropriate opportunity of being heard, either by way of filing responses or personal hearing, via video conferencing, or both, would be provided to the taxpayer appellant at the time of:-
  - Admission or rejection of appeal;
  - Admission or rejection of additional ground of appeal;
  - Admission or rejection of additional evidence;
- Provisions of the Act which provide for levy of penalty for non-compliance with a notice issued during the course of the appellate proceedings, for the provisions of section 272A of the Act don't deal with such a scenario;
- Opportunity to the taxpayer appellant to present its case, before preparation of the DAO, where there is no enhancement of income/reduction of refund ore revising the DAO, by way of issuance of a notice;
- Opportunity to the taxpayer appellant to examine/cross-examine the witness/other information, document, evidence furnished by NeAC or the tax officer or any other person pursuant to an enquiry ordered by NFAC or otherwise,

for appeal before CIT(A) is the first stage of the appellate process and lays the foundation for any further appeal before the Appellate Tribunal, High Courts and the

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REFUND UNDER INVERTED DUTY STRUCTURE

Government Overriding Parliament

Post October 2017, the Department started receiving huge refund applications under Inverted Duty Structure ('ISD') and was surprised to see the amount it would have to pay back to taxpayers. If one reads the minutes of Goods and Services Tax ('GST') Council meetings late in Year 2017 and throughout Year 2018, the refund under IDS made the States worried.

In April 2018, the Government amended the Central Goods and Services Tax Rules, 2017 ('CGST Rules') to disallow the refund under ISD to the extent Input Tax Credit ('ITC') related to 'input services'. In June 2018, the amendment was made retrospective from July 1, 2017. It was expected that the taxpayers would move to the Courts.

In this write-up, we have discussed the two High Courts' decisions on the matter and why, in our view, both the decisions are unsatisfactory.

Decisions of Gujarat High Court and Madras High Court

VKC FOOTSTEPS (GUJARAT HC)	VEEKESY FOOTCARE (MADRAS HC)
Section 54(3) allows refund of input services under inverted duty structure	The main provision of S. 54(3) is restricted by the proviso
The expression 'any unutilised input tax credit' includes input services also	Reading proviso as merely providing scenarios for refund would make the expression 'credit accumulated on account of', redundant
The expression 'input tax credit' includes both inputs and input services	The word 'inputs' has to be given a meaning as defined in CGST Act and usage of 'inputs' & 'input services' separately in the same section indicates that the legislation treats both differently.
Net ITC should be read down as input tax credit on 'inputs' and 'input services'	Classification between 'inputs' and 'input services' is valid
Rule 89(5) cannot restrict refund to ITC on 'inputs'	Rule 89(5) is not ultra vires the CGST Act
No decision on power of CG to given retrospective effect to Rules	CG has power to amend the Rules retrospectively

It is notable that in the Madras HC, the case was argued extensively touching upon every aspect of the matter whereas the arguments in Gujarat HC were revolving around the meaning of 'input tax credit'.

Having said that, we believe that the two fundamental arguments were not made in either of the cases which could have the maximum impact and thus, the Courts too could not comment on the same. These arguments pertain to:

a) The manner in which the amendments in CGST Rules ware made; and

b) The history behind proviso to Section 54(3)

Excessive Delegation vis-à-vis Subordinate Law-making Process

Going by the discussions in multiple GST Council meetings, one would find that the amendment proposed and made in Rule 89(5) was in sheer disrespect to the law-making process and to that effect, suffers from the vice of an excessive delegated legislature.

Further, the scope of the expression 'on the recommendation of the GST Council' vis-à-vis the process followed in this particular case needs due consideration by the Courts.

History Behind the Proviso vis-à-vis The Context of 'Inputs'

Unlike the arguments placed before the

Madras HC, the arguments on the context of the term 'inputs' were not placed before the Gujarat HC Court.

The arguments for the context were placed basis the common parlance theory relying upon a couple of Supreme Court decisions. It was also argued that the irrespective of applicability of common parlance meaning to the term 'inputs', the ITC on input services must be read into the proviso to Section 54(3). The rationale for the same was that the rule of casus omissus is not absolute or universal.

The Court rejected the argument on the basis that Section 54 itself uses two different expressions viz. 'inputs' and 'input services'. Thus, there is no reason to read the context otherwise.

In our view, the arguments taken before the Court on the context was valid, however, should have been backed by the real purpose and history behind the proviso to Section 54(3) itself. The Supreme Court had on number of occasions held that the Rule of Cases Omissus can only be overruled by applying the Principle of Purposive Construction, if at all can be applied.

The history behind the proviso to Section 54(3) is contained in various documented deliberations happened in the last 12 years for implementing GST in India. These documents are crystal clear on the context of the term 'inputs' so as to include input services.

Conclusion

Respecting the Madras HC decision, we believe that the ultimate decision by the Gujarat HC holds good in law although not backed by the arguments the likes of which were placed before the Madras HC.

We also believe that the arguments on the following stances could have made a favourable impact:

a) The process for amending Rule 89(5) suffers from vice of excessive delegation; and

b) The history behind the proviso to Section 54(3) is clear that the term 'inputs' include input services.

Yogesh Gaba

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ARTICLE ON THIRD PARTY FUNDING (TPF) IN INDIA

Part III of III

1. Introduction to Part III

The third and final part of this series delves into why TPF is not more prevalent in India – be it with respect to domestic or foreign funders. The authors also explore the regulatory framework under FEMA, the socio-cultural aspects of TPF and what steps can be taken towards making TPF more ubiquitous.

2. Pros and cons of TPF:

Before turning to the pressing question as to why TPF is a rarity in a seemingly litigious environment, it becomes necessary to examine the pros and cons of TPF itself.

2.1 Pros:

a. TPF could increase the populace's access to justice. This might well be the noblest of causes to push TPF into the Indian market. Access to justice is after all the reason why the concepts of maintenance and champerty were born.

b. TPF may level the playing field between large institutions / corporates and the average, everyday litigant. It is seen as a way of leveraging capital (infused by the funder) to enforce a party's rights. A poor man with a cause of action equipped with TPF is a poor man no longer. TPF offers the means that emboldens Davids to take on Goliaths. A party receiving TPF is less likely to be intimidated into accepting an offer of settlement on the lower side.

c. It could offer access to a speedier method of dispute resolution. A litigant who might otherwise turn away from the prospect of Alternative Dispute Resolution (ADR) when faced with the costs it could incur, will no doubt be more open to participating if he had the resources of a funder at his disposal. This, in turn, encourages litigants towards methods of ADR thereby reducing the backlog of cases brought

before the Courts.

d. TPF may help in weeding out discreditable claims. The exhaustive due diligence conducted by funders ensures that only meritorious claims ultimately receive funding. This also offers prospective litigants a peek into how much water their claim holds, prior to initiation of proceedings.

e. Parties could offload arbitration costs onto the funder leaving their balance sheets and cash flows unaffected. An advantage of TPF is that it would allow parties to continue conducting their business without financial strain or threat of pending proceedings.

f. A party backed by TPF may have the added advantage of the wealth of experience and wisdom the funder brings. The funder's expertise might even contribute towards enhancing the efficiency and performance of counsel and other interested parties.

g. Since TPF is an unexplored market for investors, it would allow them the freedom to negotiate for higher returns.

2.2 Cons:

a. There will always be the possibility of funders taking a gamble by encouraging frivolous proceedings before arbitral tribunals or Courts with the hope of some financial gain.

b. TPF could bring about financial disparity between parties which may have an adverse impact on prospects of a settlement. The financially weaker party may be forced to settle for a 'less than reasonable' offer despite having a meritorious claim.

c. TPF could contribute to prolonging proceedings. A party having a meritorious counterclaim may find itself pitted against a well-funded opponent capable of dragging the dispute out with the hope of either frustrating the litigant or forcing a settlement.

3. Why then is TPF not more prevalent in India?

While the pros appear to far outweigh the cons, the reality remains that TPF is yet to make a significant impact on the Indian disputes landscape. One would think that given the plentiful opportunities, TPF would have by now made its mark and forayed into domestic litigation even. Sadly, that is not the case. Some of the reasons that come to mind are:

a. First and foremost, the misconception that TPF is barred under the principles of maintenance and champerty. Recent surveys have indicated that almost 70 % believed that TPF of litigation was prohibited under Indian law.

b. Thus far, only 4 States have brought about amendments to the CPC to specifically capture TPF within the ambit of prescribed procedural law. It is therefore no wonder that the aforesaid misconception perseveres.

c. While funders receive a sum contingent upon the outcome, Indian law explicitly bars counsels from taking contingency fees. This could have raised doubt as to whether funders could be perceiving this as a lack of incentive driving advocates to win.

d. Although provisions are made for representative suits, class-action suits in India are disincentivised, if not altogether prohibited, by our legal framework. Such suits, if successful, would attract the imposition of exemplary costs on the defendant. Without class-action suits, the stakes in the remainder of cases under litigation are simply not high enough for a sizeable return and therefore fail to catch the eye of a prospective funder.

e. It is also possible that the lack of a

centralised repository of information and data inhibits the funders ability to make conclusive risk-assessments within limited time.

f. Unpredictability that is inherent in litigation in India: This stems from changes in the roster and shifting jurisdictions to transfer of cases between Courts. All key factors that undoubtably influence a funder's decision during risk analysis. A glaring example would be the frequent modification of the 'specified value', one of the factors that determines whether a dispute falls within the jurisdiction of a Commercial Court or otherwise.

g. Given that there aren't many home-grown financiers for TPF in India, foreign funders seek to fill the void. One of the significant hurdles faced by the foreign investors is the assessment of whether the foreign exchange transaction for TPF is permitted or prohibited under Indian laws such as the Foreign Exchange Management Act, 1999.

4. Socio-cultural aspects to watch for:

One of the aspects of TPF that is often overlooked is its socio-cultural impact. While the focus has always been on improving the social desirability of TPF to the extent that there can be no doubt when TPF is hailed as the provider of access to justice and the facilitator towards enforcement of rights, the flipside is rarely ever spoken of. TPF brings with it the risk of an increased volume of litigation, frivolous and otherwise. But these are known and are to be expected. India is at a stage where TPF is only now beginning to gain traction. This exposes society to a variety of unknown and therefore unexpected risks – for instance, it could create a culture for funding personal injury litigation and claims. In order to keep such risks becoming credible threats, a comprehensive and robust legislative and regulatory framework is key.

5. The road towards securing a future for TPF in India:

The first step for India would be to acknowledge TPF by way of legislation expressly permitting and regulating it. It will be critical that the funder's interreference in legal strategy be regulated. Provisions will also have to be made with respect to regulating disclosure of TPF during the dispute resolution process. Special rules will become necessary to bind the funder into protecting confidentiality of parties especially where documents are disclosed either on request or by order of the adjudicating authority. Lastly, confidentiality should not only extend to information shared by the client with his funder, but also to information that is otherwise considered to be legally privileged.

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CRYPTOCURRENCY AS A METHOD OF TAX EVASION AND ITS TREATMENT UNDER INDIAN LAWS

I. INTRODUCTION

The future of cryptocurrency in India seems as uncertain as a vaccine for COVID-19. However, the scope of uncertainty has not been able to thwart the growing obsession among the Indian population pertaining to the novel technology. Bitcoin, the first cryptocurrency, was developed in 2009 by Satoshi Nakamoto[1]. Since then, the surge in the value of bitcoin has surprised the world. The tremendous rise in value has led to a significant percentage of the Indian people to tear their hair in utter dismay, regretting not having invested in them. To put meat to bones, the value of one bitcoin stands at INR 7,56,576 lakhs at present[2]. This increase proves that an investment in 2009, when bitcoin was valued at an extremely nominal price, would have substantiated into thousands of crores today.

It has been more than a decade since cryptocurrency has managed to make its presence felt in the Indian financial shores, but a concrete regulator is yet to come into existence. While countries like Japan, Canada and the United Kingdom have had a welcoming stance towards the virtual mode of exchange, India and Russia have adopted a stricter and more vigilant attitude. However, even though countries have allowed the trading and exchange of bitcoins, these countries have viewed cryptocurrencies from varying perspectives. Japan embraces cryptocurrencies as assets, while the United Kingdom treats it at par with private currency[3]. The sdecentralised distributed ledger technology has thus, led to considerable speculation regarding their status.

II. INDIAN PERSPECTIVE

Talking about widespread speculation and anxiety surrounding the future of cryptocurrencies in India, the noteworthy factor has to be the ' 'government's passive outlook towards the virtual medium of

1 Meenu Gupta, 'Cryptocurrencies in India: Time to tax high amount of gains' [2017] 88 taxmann.com 301 (Article).
2 '#1 Simple Bitcoin Price History Chart (Since 2009)' <https://www.buybitcoinworldwide.com/price/> accessed 8 September 2020.
3 Sweekar Bhardwaj, 'Cryptocurrency – Is it a new Era of technology or a Paradigm of Uncertainties' [2018] 89 taxmann.com 33 (Article).

exchange. It is evident from the periodic circulars and notifications released by the RBI that they are not convinced by the positive stance taken by other countries. The central bank of the country, in consonance with the ideology of the Central Government, has refused to assert the status of a legal tender to cryptocurrencies like Bitcoin and Ethereum. The traditional physical currency of """rupee""" is deemed to be the only national currency that the government approves as legal tender and it would take something unreal to change their resolute standpoint. The dubious attitude of the government towards cryptocurrency can be attributed to concerns over national security, market imbalance and tax evasion.

SCOPE AND JURISDICTION

Before dealing with issues arising in taxation of trading and transactions in cryptocurrencies, first of all it must be understood that income earned from any business—whether legal or illegal—is taxable and the Income-tax law does not make any distinction between a legal and illegal business[4]. Thus, even though it is not accepted as legal tender and the warning circulars have repeatedly emphasised on lack of government backing, it is taxable. The next concern would be the jurisdiction of transactions as it is a decentralised system allowing exchanges between varying currencies. In case of a person resident in India, his total incomes includes all incomes from whatever source derived which: (a) is received or is deemed to be received in India, or (b) accrues or arises or is deemed to accrue or arise to him in India; or (c) accrues or arises to him outside India. So, if a resident assessee enters into cross-border transaction involving cryptocurrency, his income from such transactions is taxable in India. It is immaterial that the operating server is located outside India[5].

In case of transactions between non-resident persons income arising from transfer of a cryptocurrency, whether of a capital nature or a revenue nature, is not taxable in India, even if the operating server is located in India. However, when a non-resident person enters into a transaction with a person resident in India, such transactions would be taxable, and the Indian counterpart would have to comply with the requirements of "Deduction of tax at source" under section 195 of the Act[6]. Permanent Establishment is a concept in taxation that determines which jurisdiction has a right to tax the company. After the Reserve Bank of India (in 2018) barred banks from dealing in cryptocurrency, several cryptocurrency exchanges such as BuyUCoin, among others, looked to shift their headquarters elsewhere to avoid Indian laws from applying to them.

STATUS

Another vital factor in determining tax liabilities of cryptocurrency investors should be the status attributed to them. There have been contrasting opinions pertaining to the treatment of Bitcoin. It has been treated as property, trading voucher[7], legal tender, investment, long terms and short term capital gains. However, the Indian tax authorities have failed to ascertain a particular status to it. As a result, there have been immense confusion regarding levying of taxes. If the wallet balance of a Bitcoin trader is accorded the status of a property, then it has to be taxed under the Income Tax Act. With effect from 1st June 2013, the buyer of property is required to deduct TDS @ 1% from the amount payable to the seller. This amount is then required to be deposited by the buyer with the income tax department.

On the other hand, if cryptocurrencies were to be treated as goods under the Sale of Goods Act, 1930, it is to be taxed under the GST regime. Section 2 of the Act defines "good" as "every kind of movable property other than actionable claims and money and

4 C.I.T. v. Piara Singh, (1972) 83 I.T.R. 678(Punjab).
5 Dindayal Dhandaria, 'Taxation of Cryptocurrencies in India'[2017] 88 taxmann.com 299 (Article).
6 Section 195, Income Tax Act 1961.

includes stock and shares, growing crops, grass and things attached to or forming part of the land which is agreed to be severed before sale or under the contract of sale."[8] Further, in the case of Tata Consultancy Services v. State of Andhra Pradesh[9] the Supreme Court appraised computer software as "goods" liable to sales tax. Since a cryptocurrency fundamentally is a software or its kind, henceforth, it should be treated as "goods" under the law, and transfer of bitcoins should be treated as barter transaction.

The definition of "capital asset" given in section 2(14) of the Act[10] is wide enough to include 'property' of any kind held by an assessee, whether or not connected with his business or profession. Although the word "property" has not been defined, yet it signifies every possible interest which a person can acquire, hold or enjoy. Therefore, a cryptocurrency, being an intangible asset, can be deemed as a 'capital asset' and is liable to be taxed as such, depending upon the intention of the person to hold it as an investment or otherwise. On the basis of the prescribed period of holding, the gain would be determined as short-term or long-term. If a cryptocurrency is held for a period exceeding 36 months from the date of purchase, it will be considered as long-term capital gain and taxed @ 20% with the benefit of indexation. If it is held for a period of less than 36 months from the date of purchase, it will be considered as short-term capital gain and taxed as per the slab rates applicable to the taxpayer[11].

Overall, ambiguity remains over the status and taxation of cryptocurrency in India. In May, 2020, several cryptocurrency exchanges approached the Reserve Bank of India to seek clarity on this matter.

TAXATION UNDER INDIAN LAW

A cryptocurrency is essentially a product of complex software puzzles solved by "miners" which require prodigious computational power and resources. Miners compete with

7 supra note 1, ¶ 7.4.
8 Section 2, Sale of Goods Act 1930.
9 [2004] 141 Taxmann 132/271 ITR 401 at [84]
10 Section 2(14), Income Tax Act 1961.

supra note 3, ¶4. 11
supra note 1, ¶3. 12
C.I.T. v. B. C. Srinivasa Setty, 128 ITR 294. 13
Section 115BBE, Income Tax Act 1961. 14
supra note 3, ¶5. 15

each other to derive a solution to the puzzle, which is then registered by employing distributed consensus system to validate the waiting transactions by including them in the blockchain[12]. Thus, it can be said that acquisition of bitcoin through the process of mining amounts to a """self-generated asset""". Trading of self generated asset cannot be taxed as capital gain, it has to be treated as business income and taxed accordingly. Miners could find this to be an appropriate tool to evade taxes since in cases where cost of acquisition cannot be ascertained, it cannot be taxed under the capital gains column of the business[13]. Thus, this could prove to be subtly effective for the miners and might lead to exemption of taxes.

As per section 115BBE of the Act[14] inserted by the Finance Act, 2012 w.e.f. 1-4-2013 and prior to its amendment by Taxation Laws (Second Amendment) Act, 2016, any person, who is unable to substantiate the source of his income, could voluntarily opt to pay income-tax @ 30.90% (including surcharge) and convert his black money into white money at a rate which is lower than that payable under the Income Declaration Scheme, 2016. After demonetisation, some officials said in news bulletins that penalty @ 200% shall be levied on unreasonable and disproportionate income of cash deposited. Having realised that no such penalty could be imposed, section 115BBE was hurriedly amended by Taxation Laws (Second Amendment) Act, 2016 so as to levy tax at a higher rate, i.e., @ 77.25% (including surcharge and cess)[15]. Further, if the income is not disclosed in the return and is determined by the Assessing Officer, then a penalty @ 10% would be leviable u/s. 271AAC of the Act, totalling to 83.25%.

Direct Taxation of Cryptocurrencies

The definition of "capital asset" under the Income Tax Act is expansive and covers all sorts of property except those expressly excluded under the Act. Therefore, any gains arising from the transfer of bitcoins must be considered as capital gains if they have been held for investment. Depending upon the period of holding, they can be termed as Long Term Capital Assets and Short Term Capital Assets.

The determination of 'cost of acquisition' (COA) of bitcoins as capital assets is not always straightforward. Bitcoins are considered as 'self-generated assets', which makes the COA technically unascertainable. It has been held in Commissioner of Income Tax v. B.C Srinivasa Shetty and Bawa Shiv Charan Singh v. CIT that where the COA is indeterminable, capital gains would not be chargeable on the said costs.

Section 2(13) of the Income Tax Act provides for an inclusive definition of business, would cover any cryptocurrencies held as 'stock in trade'. This treatment of cryptocurrency essentially means holding it for furtherance of business. Profits from trading in cryptocurrency, therefore, are chargeable to tax under Section 28 of the Income Tax Act. The profits might not be realised in terms of money, but they would fall under the previously mentioned provision even if they were 'in kind'. Any expenditure incurred for such trade, like purchasing computing power as capital asset should be allowable for tax deduction under Sections 30 to 43D of the Income Tax Act.

CRYPTOCURRENCIES AS A METHOD OF TAX EVASION

As has been briefly discussed above, cryptocurrencies present immense potential for tax evasion as they don't operate within a specific jurisdiction and are not subject to taxation at source. Moreover, since their existence isn't dependent on intermediaries like banks, they do not become subject to traditional methods of curbing tax evasion. As a result, cryptocurrencies have the potential for, and are often used for, illicit

16 Section 271AAC, Income Tax Act 1961.

transactions on the internet. The nature of cryptocurrency means that it is challenging for authorities to identify users, detect suspicious activities, or obtain transaction records.

There is also the legislative grey are of whether self-reporting or disclosure requirements already present under Indian Law apply to cryptocurrency exchanges or wallet reporters. If such requirements do not extend, then the Enforcement Directorate does not have the legal power to access relevant information and enforce penal legislations such a the PMLA, where required. These problems arise out of the nature of cryptocurrencies, which prevent the government from knowing whether a transaction has taken place or not. In this context, various government agencies will have to set up a robust framework to recognise possible points at which transactions can be identified (such as conversion of cryptocurrencies into legal tenders via exchanges), and begin taxing such points.

III. CONCLUSION

The Draft Banning of Cryptocurrency & Regulation of Official Digital Currency Bill released[17] in 2019 seeks to ban all forms of cryptocurrency usages. The bill proposed to penalise people found guilty of trading, mining, issuance, holding, selling, disposal, and even using cryptocurrencies for any kind of business. While the debate surrounding the advantages and drawbacks of cryptocurrency seems to fill the air with uncertainty, the government has an clear plan of action. The government had not explicitly banned the cryptocurrency transactions previously. However, this bill looks like exactly why the RBI or SEBI did not get the nod from the government to treat it as legal tender, virtual currency or securities. The approach of other countries, like Japan or the United States, towards cryptocurrency, has failed to impress the Indian authorities. The Indian government feels that the number of ways in which cryptocurrencies could be misutilised is a lot more than the number of ways it could turn out to be beneficial, with the current economic situation and the GDP reaching a record low of -23.9% in India, adding cryptocurrency as legal tender could prove to be extremely detrimental to the situation at large.

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17 'Draft Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019 | PRSIndia' <https://www.prsindia.org/billtrack/draft-banning-cryptocurrency-regulation-official-digital-currency-bill-2019> accessed 7 September 2020.

Tax Court Speaks!

An insight into the recent key judicial rulings

S No	Tax Issue	Legal take away	Judicial Body	In the case of
1	Transfer of a capital asset under a gift - Section 47(ii)	'gift' of shares by assessee-company to its associated entity as part of internal restructuring for consolidation of onshore media assets, is not a transfer under section 47(iii) Section 47(iii) makes it very clear that any transfer of a capital asset under a gift or will or an irrevocable trust shall not be liable to income tax under the head 'capital gains'	High Court of Bombay	Asian Satellite Broadcast Pvt. Ltd. Vs ITO WRIT PETITION NO.2749 OF 2019
2	Article 13 of tax treaty	When short and long term capital gains earned by the assessee during the year are exempt under Article 13 of the India-Mauritius DTAA, there would be no occasion for seeking adjustment of the brought forward STCL against such exempt income	ITAT Mumbai	Goldman Sachs Investments (Mauritius) Limited Vs DCIT ITA No.2201/Mum/2017
3	Concealment penalty u/s 271(1)(c)	Where the addition is made merely on estimation, the provisions of section 271(1)(c) of the Act are not attracted	ITAT Mumbai	ACIT VS Ehara Engineering Pvt. Ltd. ITA NO. 3295/MUM/2019
4	Reasons for reopening assessment	When assessee has not requested for reasons to reopen assessment, AO under no obligation to provide the same. This does not render the reassessment liable to be quashed	ITAT Jaipur	Malti Khandelwal Vs ITO ITA No. 1046/JP/2019

S No	Tax Issue	Legal take away	Judicial Body	In the case of
5	Depreciation on acquired consumer contracts / goodwill	Depreciation allowable on claim on 'customer contracts' and goodwill acquired under slump-sale agreement	ITAT Mumbai	Demag Delaval Industries Turbomachinery Pvt. Ltd Vs ACIT I.T.A. No. 211/Mum/2008
6	Allowability of year end provision u/s 37 and u/s 40(a)(ia)	Year end provision of expenses based on estimation of previous month's expenditure is not an adhoc provision No disallowance can be made in the context of section 40(a)(ia) as no payment was exactly identified or quantified	ITAT Mumbai	DCIT Vs HDFC Sales Pvt. Ltd. ITA No. 852/Mum/2019
7	Benefit u/s 54F	Nature of plot on which house is constructed, whether it is commercial or agricultural or otherwise and whether assessee is residing in said house regularly is totally irrelevant as far as claim of deduction u/s 54F of the Act is concerned	ITAT Jaipur	Sarita Devi Garg Vs ITO ITA No. 1024/JP/2019
8	DAPE - Article 5 of India-Mauritius tax treaty	DAPE under Article 5 is not constituted when such agent is of an independent status and provides services to the enterprise in the ordinary course of its business	ITAT Mumbai	DDIT Vs Overseas Transport Co. Ltd ITA no.3129/Mum./ 2002
9	Nature of reimbursement of expenses as FTS	Reimbursement of sales promotion expenses to UAE-based agent is not FTS under section 9(1)(vii) of the Income Tax Act, 1961. Thus no disallowance u/s 40(a)(i) as well	ITAT Mumbai	ACIT Vs Gepach International I.T.A. No. 5943 & 5942/Mum/2018
10	Nature of physical inspection services as FTS	Services limited only to physical inspection of the material to examine if it resembles the quality specified by the assessee where no technical knowledge is required is not FTS under section 9(i)(vii) of the Income Tax Act, 1961	High Court of Karnataka	DIT Vs JEANS KNIT PVT. LTD I.T.A. NO.383 OF 2012
11	Reimbursement of expenses and TDS thereon	Plain reimbursement to a non-resident would not be income chargeable under the Income Tax Act, 1961 and consequently, should not attract obligation to deduct tax source Reimbursement of expenses incurred on behalf of assessee is not FTS as it is not in nature of income in hands of payee	ITAT Bangalore	Bangalore International Airport Vs ITO ITA No 536 to 539 / Bang/ 2006

S No	Tax Issue	Legal take away	Judicial Body	In the case of
12	Bifurcation of business agreements	Revenue cannot prevent assessee from arranging their business in the way which is beneficial to them, within the permissible limits of law Revenue cannot force the assessee to enter into any agreement in any particular form, but at the best, the Revenue can probe into the genuineness of the transaction or the correctness of the quantum of expenditure	ITAT Delhi	Chander Nagar Chemicals And Mineral Private Limited, Vs ITO ITA No. 2070 & 3072/Del/ 2017
13	TDS on adhoc year end provisions	Once, the assessee has claimed adhoc expenses by debiting into profit and loss account, it needs to deduct TDS on such expenditure, even if not credited to respective parties account Disallowance u/s 40(a)(ia) to be made	ITAT Mumbai	Tata Sky Limited Vs ACIT ITA No. 3214/Mum/2014
14	Disallowance u/s 68 – What is to be proved by assessee	Assessee required to prove identity, genuineness and the creditworthiness of the shareholders Onus on the assessee to establish 'source of source' only when the shareholder is a resident. There is no such requirement if shareholder is a non-resident	ITAT Mumbai	Vodafone India Limited VS DCIT ITA No. 1835/Mum/2018
15	Short payment of DDT and consequences	Short payment of DDT does not liable the same to be added to income. There is no provision in the Income Tax Act, 1961 that if the dividend distribution tax paid is short, it can be taxed as an income of the assessee	ITAT Delhi	DLF Limited VS ACIT ITA No.4061/DEL/2013
16	Taxability of offshore supplies	As offshore supplies are not taxable in India, hence tax deducted by buyer in India eligible for tax credit for the seller	ITAT Bangalore	ABB AB C/o ABB India Limited Vs Dy. Commissioner of Income Tax IT(I.T)A Nos.464/Bang/2018 & 2878/Bang/2019
17	Renovation of house and benefit u/s 54F	Amount spent on renovation would amount to construction of a residential house Sec. 54F exemption benefit is available on the amount of renovation expenses spent on 'residential unit' within 3 years from date of transfer of original asset	ITAT Hyderabad	Juveria Begum Vs ITO 2224/Hyd/18

S No	Tax Issue	Legal take away	Judicial Body	In the case of
18	Disallowance of amount spent in cash u/s 40A(3)	40A(3) disallowance covers expenditure incurred in cash in foreign currency as well Merely because the expression "rupee" has been mentioned in section 40A(3) of the Act, it would not debar applicability of the provision to the expenditure incurred in cash in foreign currency	ITAT Mumbai	Ramlord Apparels Vs ACIT ITA no.7349/Mum./2018
19	Section 54 benefit when investment made prior to sale of asset	Investment / advance payment made by assessee towards purchase of flat prior to sale of original capital asset is eligible for exemption The investment in the new asset for the purpose of deduction under Section 54F need not be out of sale consideration received on sale of the original asset	High Court of Madras	Moturi Lakshmi Vs ITO TAX CASE APPEAL NO.181 OF 2019
20	Assessment basis information in news article	Assessment concluded based on a news article does not constitute adequate material on record The information disseminated through the media is devoid of facts and may not be technically correct. Further, such news articles are not authored by technical/field experts so as to ensure that nuances of the transaction are reported correctly	ITAT Bangalore	Reindeer Software Solutions Pvt. Ltd Vs ACIT ITA No.1354/Bang/2017

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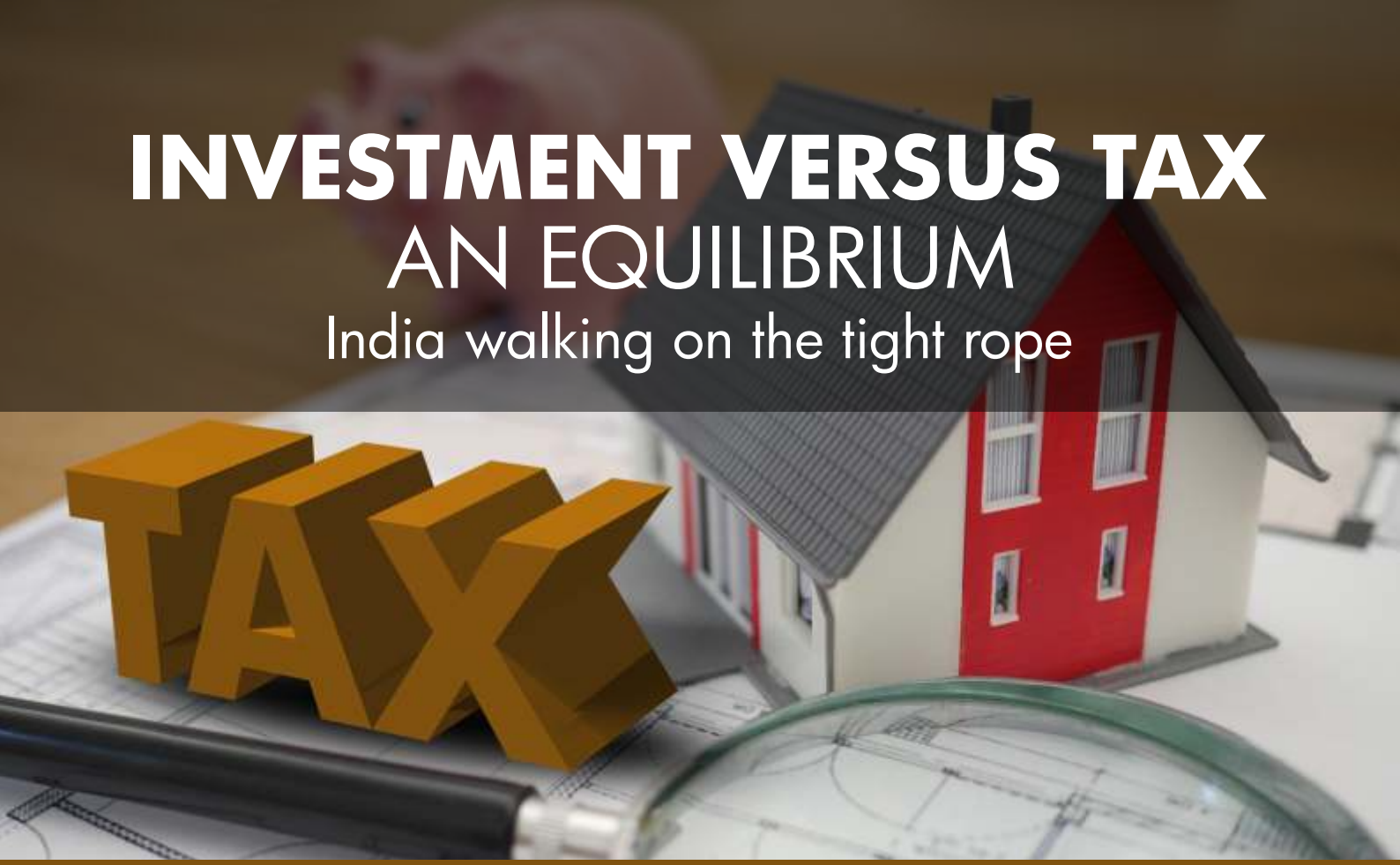
INVESTMENT VERSUS TAX
AN EQUILIBRIUM
India walking on the tight rope



International Tax Dispute in context to India is not a new phenomenon. India has been quite aggressive with respect to its tax positions.

Under the bilateral tax treaties and multilateral tax treaties (in the current scenario), the resolution through Mutual Agreement Procedure "MAP" is actively opted in the multinational business world.

Action 14 of the OECD on Base Erosion and Profit Shifting ("BEPS"), to make dispute resolution under MAP more effective, proposed a compulsory and binding arbitration (subject to certain conditions) to settle the disputes.

However, India expressed its dissent to the proposal. Being a developing nation, India has following reservations to the proposal.

(a) The proposal impinges sovereign rights in taxation

(b) Limits the ability to apply domestic law for taxing non-residents and foreign companies

However, on the detailed analyses of the proposal, following emerge as noteworthy:

(i) Requirement of mutual agreement of the countries on the rules relating to appointment of arbitrator

(ii) Agreement on the arbitration process

(iii) Regional restriction on the chair of the arbitration panel

(iv) Right to select one of the arbitrator

(v) Option to terminate the arbitration proceedings

(vi) Option to not accept the arbitration outcome

In view of the above, it becomes difficult to envisage a situation leading to infringement of sovereign right of any state in the entire arbitration process.

Agreeing to the proposal of arbitration by India, could have helped India to send a positive message for the International Business Community to think about India as preferred business destination. However, by expressing its dissent to the proposal of arbitration, the perception of India being aggressive country with respect to tax get's stronger.

Recently the permanent court of Arbitration at The Hague has awarded in favour of Vodafone denying the claim of Government of India in a tax dispute.

The operative part of the award, which is available in the public domain so far, states as follows:

(a) The challenge by the government to the jurisdiction of the tribunal is incorrect;

(b) Vodafone is covered with the scope of the ' guarantee of fair and equitable treatment';

(c) India breached this guarantee by asserting upon Vodafone the " liability to tax notwithstanding the supreme court judgement";

(d) Such a breach must be ceased or else would result into " International Responsibility"; and

(e) India must partially defray the costs of legal representation to Vodafone

This is not the first jolt for India under the Investment Treaty. One of the major illustration to such jolt is award in favour of White Industries against India in the year 2011.

Generally the Indian Government has been swift to agree to the outcomes of the International Forums despite of negative impact, but in the matter of Vodafone Indian Government has been vocal and stated "will consider all options and take a decision on further course of action including legal remedies before appropriate fora".

Given the legal and other practical challenges, this will not be an easy walk for India.

Considering the fact that India has already taken a position that the matter is beyond the Tribunal's jurisdiction, the acceptance of award by India is remote.

Even if India somehow decides to accept the award, the retrospective amendment made in the past will crop up as a deterrent, which India will have overcome judiciously through another legislative amendment.

India's dream to become a preferred destination for manufacturing hub and to make its dream project 'Make In India' to achieve unprecedented heights, India will have to carefully walk on this rope balancing both the ends….**Investment and Taxes**.

In case India denies to the acceptance of the award, there is a very remote chances that Vodafone will let India go easily and give up the battle after carrying it so far. The chances of Vodafone to push for the acceptance of award through Indian Judiciary is quite high.

The retrospective amendment to turn down India's apex court's relief granted to Vodafone and preclusion (of all matters pending before judicial forum/arbitration) for review by the committee formed for approval of the application of retrospective amendments, by government of India, did not left a good taste for Foreign Investors to choose India as an preferred destination.

Coupled with revision of its bilateral investment treaties to exclude taxation matters "in view of the fact that taxation is an integral function of the states's sovereignty and hence such matters need not be escalated under treaty dispute settlement mechanism" and dissent from arbitration proposed under Multilateral Instruments ("MLI") was another dampener to the sentiments of the Foreign Investors towards India.

Vodafone has brought India again on the crossroads, where the eyes of International Investors are keenly gazing, which road India will choose.

Sanjeev Gupta
Advocate ,
KRS Legal

2020 Upcoming Events |

S. No	Topic	Date
1.	Workshop on Mitigating Corporate Frauds and Cyber Crime	13th October – Session 1 14th October – Session 2 15th October – Session 3 16th October – Session 4
2.	Virtual Training on Mergers and Acquisitions	19th October – Session 1 20th October – Session 2 21st October – Session 3 22nd October – Session 4
3.	Webinar on BEPS and MLI	4th November – Session 1 5th November – Session 2 6th November – Session 3 7th November – Session 4
4.	Direct Tax Summit- Virtual Conference	6th November, 2020
5.	Certificate Course on Investigation Report Writing	3rd November – Session 1 5th November – Session 2 10th November – Session 3 12th November – Session 4
6.	Certificate Course on Cyber- Readiness (Business, legal and Financial Risks)	18th November – Session 1 20th November – Session 2 25th November – Session 3 27th November – Session 4 2nd December – Session 5 4th December – Session 6
7.	Digital Workshop on Data Analytics for Internal Auditors	24th November – Session 1 26th November – Session 2 1st December – Session 3 3rd December – Session 4
8.	Certificate Course on Detecting and Preventing Internal and External Fraud	7th December – Session 1 8th December – Session 2 9th December – Session 3 10th December – Session 4 11th December – Session 5
9.	Virtual Session on Labour Codes - Key Issues and recent Amendments	8th December – Session 1 9th December – Session 2 10th December – Session 3 11th December – Session 4
10.	Seminar on Claims Management	14th December – Session 1 15th December – Session 2

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