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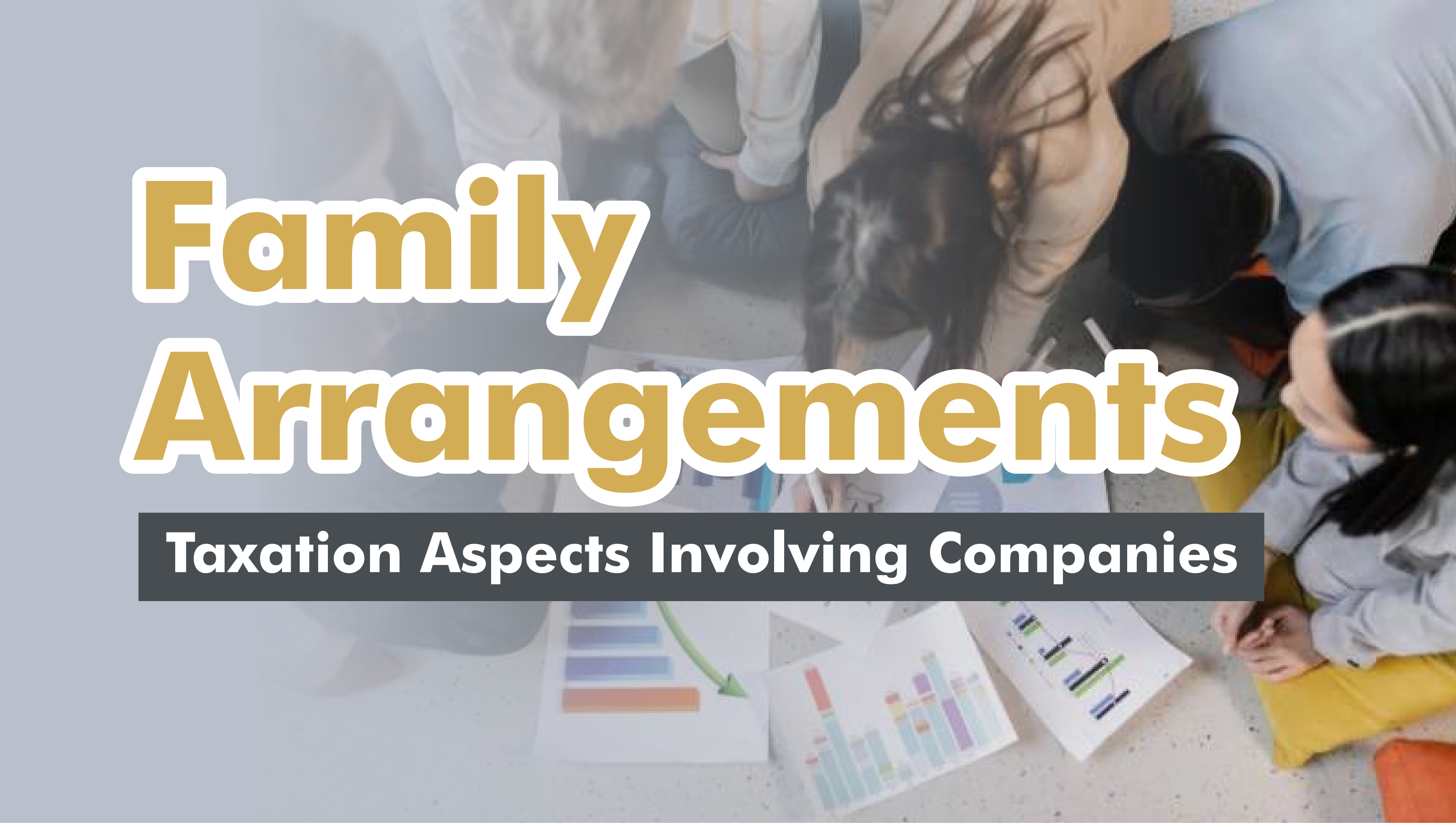

Family Arrangements

Taxation Aspects Involving Companies

Over the years, India has witnessed the rise of many prominent family empires. A family business generally starts with a small business being set up by a member, which is expanded into diversified business operations and the legacy of which passes through several generations ahead. Many families start their businesses with sole proprietorship, and the journey of many such family businesses is taken forward to a multinational brand parked in various legal entities. Such entities are operated and managed by different members of the family.

Over the period, with a generational change and changes in family sensitivities such as ideologies, value systems, aspirations, etc., differences in opinions or views between the family members may result in separation requiring allocation of family businesses and assets. Moreover, these aspects can hamper the operations and management of the entities. Even at a personal level, this could impact the family members' understanding of their rights and entitlements, family asset ownership, etc.

Hence to ensure a fair and equal division of family rights and assets a family arrangement is used to settle existing/potential disputes or differences.

What is a Family Arrangement?

A family arrangement is an agreement between members of the same family, intended to generally and reasonably benefit the family members either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation, or by saving its honor. The central idea of family arrangements is that rights are settled in a manner whereby a family's peace, happiness, and welfare are secured, and litigation is avoided.

The general principles of a family arrangement are **bonafide and voluntary nature**, **pre-existence of some antecedent title**, **claim, interest, or even a possible claim** in the property acknowledged by other parties to the arrangement, etc. Other aspects include arrangements undertaken to **end existing or potential differences between the family members, maintaining peace and harmony** and protecting the family from long-drawn litigation. The Supreme Court, in the case of Kale vs Dy. Director of Consolidation[1] has laid down the above principles as to what would constitute a valid family arrangement. Similar principles have also been followed or emanated from various other judicial precedents.

Typically, the understanding inter-se between the family members is documented through a family settlement deed.

Various Modes For Giving Effect to Family Arrangement

To give effect to a family arrangement, the following modes are generally used independently or in combination:

Taxation of Family Arrangements

Considering the objective for which the family

[1] *AIR 1976 SC 807*

arrangements are undertaken, it is a settled position that a transfer pursuant to a bonafide family arrangement entered between the individual family members cannot be considered as a 'Transfer' for the purpose of capital gains taxation. This is a principle that has been accepted and upheld by several judicial precedents[2].

In a nutshell, any capital gains or any other income arising from the family arrangement in the hands

of the individual's party to the family arrangement would not be subjected to taxation.

Interplay with Involvement of Corporate Structure

Considering the families would also be stakeholders in various closely held companies, as a part of the family arrangement, the shareholdings in the companies can be rejiiged. Where the arrangement is between the family members, the above principles should hold good, and the family arrangement should not be subjected to tax[3]. However, a question arises about the taxability when a corporate entity is also a party to the family arrangement. This is especially where any actions under the arrangement are required to be undertaken at the entity level.

Whether a corporate entity can be a party to the family arrangement was under consideration before the Karnataka High Court in the case of Sea Rock Investment Ltd.[4] and before the Bombay High Court in the case of B.A. Mohota Textiles Traders (P.) Ltd.[5] "In both these cases," it has been held that the company being a separate legal entity, the transfer of shares, even though under a family arrangement through Court, would be subjected to tax, and the principles discussed would not apply in such cases. The Courts held that such transfers would be assessable to capital gain tax. The Courts observed that extending the benefit of no taxability in such situations would amount to the lifting of the corporate veil, which would mean the denial of corporate existence. Interestingly, in both these decisions, the issue has been with respect to the taxability in the hands of the companies. In these cases, the companies were trying to take the benefit of non-taxability on family arrangements, pursuant to which the companies transferred the shares held by them to individual members of the family.

An interesting aspect for consideration would be whether this principle would hold good even when the corporate entities are involved in the arrangement, but the taxability under consideration is of the individuals. In this regard, it is pertinent to note the ruling of the Chennai Tribunal in the case of SKM Shree Shivkumar[6], where the receipt of assets, including cash, by the individual taxpayer from a company in which he had substantial interest, pursuant to a family arrangement, was held as non-taxable in the hands of the individual (applicability of deemed dividend provisions was ruled out in the hands of the individual).

This principle has also been recently applied by the

[2] *CIT vs R. Nagaraja Rao [2012] 21 taxmann.com 101 (Karnataka), CIT vs AL Ramnathan [2003] 128 TAXMAN 87 (MAD.)*
[3] CIT vs Kay Arr Enterprises [2008] 299 ITR 348 (Madras)
[4] [2009] 317 ITR 253 (Karnataka)
[5] [2017] 82 taxmann.com 397 (Bombay)
[6] [2014] 48 taxmann.com 346 (Chennai - Trib.)
[7] Sujan Azad Parikh vs DCIT [2022] 145 taxmann.com 167 (Mumbai - Trib.)

Mumbai Tribunal in the case of Sujan Azad Parikh[7]. In this case, the matter was referred to the Company Law Board (CLB). Based on the directions of CLB, under a family arrangement, the desired shareholding was to be achieved by way of buyback (i.e., other shareholders were given an exit under buyback mode). Noting that the transfer (an indirect increase of shareholding of desired family members) was under a valid family arrangement, it was held that the same would not be subjected to capital gains tax. Notably, the Tribunal has distinguished the Bombay High Court decision on the basis that in the said case, the taxpayer was a company that is not a family member.

Notably, this ruling pertained to the financial year 2006-07, where the shareholders were liable to capital gains tax on buyback. Thus, the Tribunal extended the relief of family arrangement in this case, considering the taxability of the individuals. While currently, buyback is subject to buyback tax in the hands of the company and consequently exempt in the hands of the shareholders, the outcome of the decision indirectly extends the exemption on account of family arrangement despite the involvement of a corporate entity.

Way Forward

Over the years, it has been a settled position that bonafide family arrangements between family members are not transfers liable for capital gains taxation. The challenges arise when the corporate structure gets involved. In such cases, Courts have held that where the income arises in the hands of the corporate entities, the same should be taxable as the corporate veil cannot be lifted at the instance of the family members and that the corporate entities cannot be considered to be part of the family.

However, Tax Tribunals in some of the recent decisions have upheld an interesting position that in the scenario where the corporate entities carry out a restructuring exercise and as an outcome, the same income arises to the family members due to deeming provisions (for e.g., dividends, deemed dividends, capital reductions, etc.) the tax exemption shall still be available. Notably, the decision is silent on the lifting of the corporate veil at the instance of the taxpayer. While possibly this aspect could be examined with a fresh lens when the matter reaches higher levels or even in other cases, this is certainly an interesting perspective on the issue.

Considering the contentious flavor of the issue, from a certainty standpoint, certain pre-steps from commercial, tax, and regulatory perspectives could be considered before implementing the arrangement to achieve the desired objectives. These could involve corporate restructuring exercises, realignment of shareholdings, and various plausible measures to bring the overall structure to an easily implementable and efficient state for giving effect to the family arrangement.

How Nexdigm can help

As the assets of individuals and businesses grow, so does the magnitude and complexity of a monetary risk. Tax efficiency for wealthy individuals or families is a fusion of assets held by the family and the expectations.

We work closely with promoters and family offices to provide tailor-made solutions through a comprehensive risk analysis of your profile to help your family or business achieve its intended objectives by reducing administrative work while balancing your lifestyle.

With over decades of extensive experience in handling complex tax matters, our dedicated team understands your needs and addresses them by providing innovative and comprehensive solutions.

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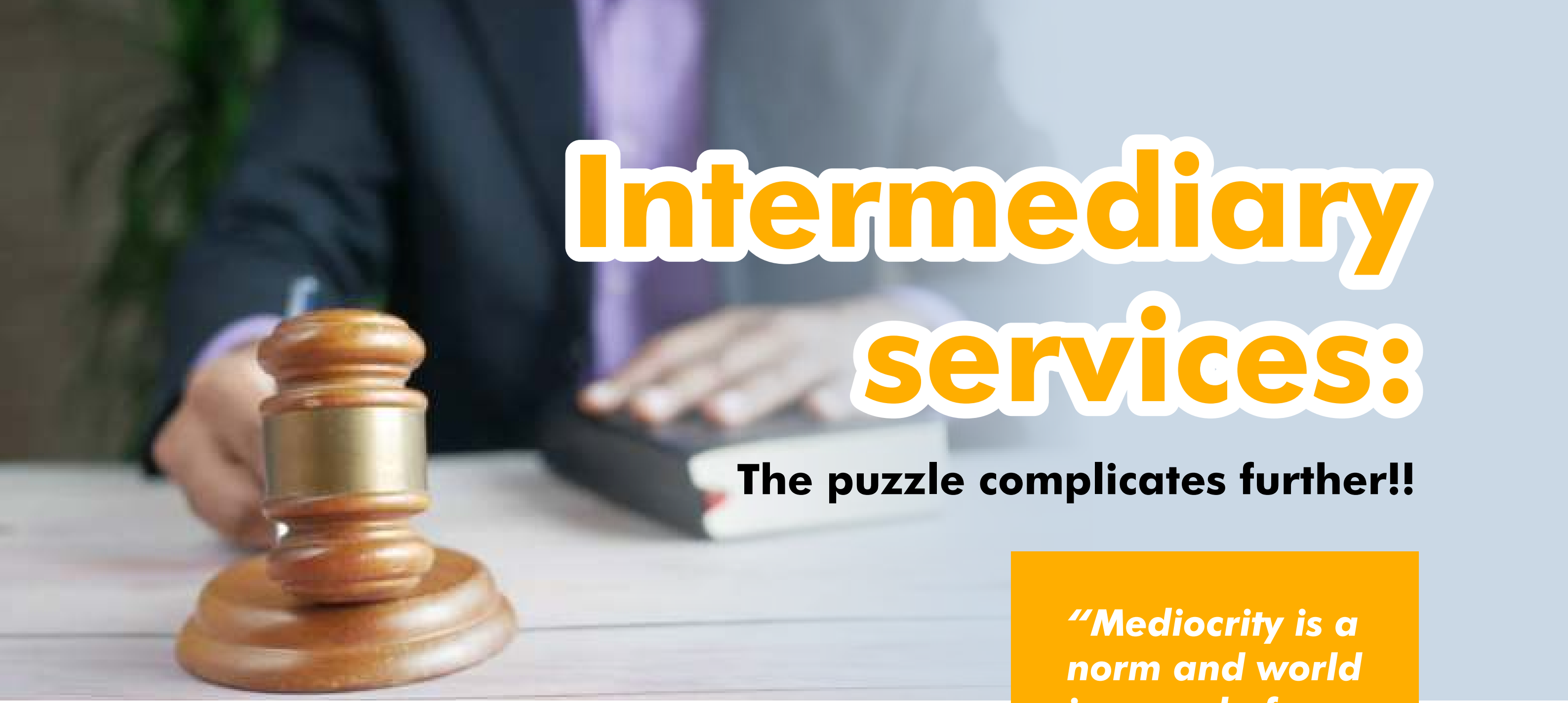

Intermediary services:

The puzzle complicates further!!

"Mediocrity is a norm and world is scared of excellence"

Introduction

Taxability of intermediary services has been a vexed issue under Indirect Tax laws since inception. This is one area which remained marred with constitutional challenges, in particular to Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') delineating the place of supply of 'intermediary services' to be location of supplier. Whilst constitutionality of said provision was upheld by the Division Bench of Gujarat High Court[1], a split verdict was rendered by the Bombay High Court[2] wherein the matter was referred to the Larger Bench. These High Court decisions caused lack of clarity for Indian intermediaries who faced with a dilemma regarding the road to be taken for future. Many such intermediaries continued to deposit GST in fear of being marred with interest liabilities for non-payment of taxes.

Much-awaited decision of the Larger Bench of Bombay High Court[3] was recently pronounced wherein Constitutionality of the provision treating place of supply of intermediary services as location of supplier was upheld. However, the applicability of the provisions were held to be restricted to the IGST Act and not otherwise. While the entire industry expected the third member of the Larger Bench subscribing to one of the views taken by the Division Bench of the High Court, the third member has taken an independent and a third view which has added to the confusion that persisted in the industry. The decision has added to the ambiguities into the concept which brings the entire scenario back to square one, or if one may say, even created new complexities that never existed.

In Part-1 and Part-2 of our Article, we had respectively analyzed Constitutional Validity of Section 13(8)(b) of the IGST Act and key tests for qualifying as an intermediary. *Vide* this Article, the Authors shall critically analyze and examine the recent Larger Bench decision of Bombay High Court on the subject matter.

Analysis of decision rendered by the Larger Bench

The Larger Bench of the Bombay High Court was concerned with the Constitutional Validity of Section 13(8)(b) of the IGST Act in so far as it prescribes place of supply of intermediary services to be location of supplier of services. It was urged on behalf of Petitioners that by way of deeming fiction created *vide* various provisions, supply of services by an Indian intermediary to a foreign recipient against convertible foreign exchange does not qualify as export of service within the meaning of Section 2(6), since place of supply of such services is location of supplier of services i.e. India. To such extent, the Petitioners contended that the provision is unconstitutional and should be struck down.

The High Court adopted a strange approach.

[1] *Material Recycling Association v. Union of India, TS-586-HC-2020(GUJ)-NT*
[2] *Dharmendra M. Jani v. Union of India, TS-272-HC(BOM)-2021-GST*
[3] *Dharmendra M. Jani v. Union of India, TS-138-HC(BOM)-2023-GST*

Instead of acknowledging whether place of supply is in India or outside India, it directly relied upon the age-old jurisprudence[4] to hold that services provided by Indian intermediaries to foreign recipient against convertible foreign exchange shall qualify as export since GST is a destination-based tax wherein tax is ultimately levied only upon final consumption that accrues within the taxing jurisdiction. It was noted that consumption / destination of services provided by Petitioners takes place outside India hence, services qualify as exports under Section 2(6) of the IGST Act. The High Court observed that Section 13(8)(b) has deemed an export of service (an inter-state supply) to be an intra-state supply thereby levying State GST on the said transaction, which is against the Constitutional Provisions of Article 246A, 269A, 286 to the effect that State Legislatures do not have legislative competence to levy tax on transactions of exports. With this conclusion, the High Court also held that exports by the intermediaries are inter-state supply.

The High Court also distinguished the judgment of Gujarat High Court[5] by holding that said judgment was on a different footing vis-à-vis the present proceedings. Accordingly, it was observed that Section 13(8)(b) of the IGST Act must be confined to the IGST Act and must not extend to the CGST Act by deeming an export transaction an intra-state supply and levying GST thereon. However, the High Court strangely then proceeded to analyze Section 13(8)(b) independent of this observation that transaction in question is export and is held that it is Constitutionally Valid, provided the same is confined to the IGST Act.

Author's take

On a profound reading of the above, the Authors are unable to agree with the reasoning adopted by the Larger Bench in coming to its conclusion. The Larger Bench has deemed the transaction as export of service by merely relying on the destination-based tax principles and without appreciating the basic tenets enshrined in provisions under Section 2(6) of the IGST Act. Transaction in question would never qualify as export of service since place of supply of such services is in India.

Surprisingly, the High Court deemed that place of supply of such export transaction is outside India [without appreciating Section 13(8)(b)] and treated it is an inter-state supply basis Section 7(5)(a) of the IGST Act. Hence, the entire judgment has been pronounced on the surmise that services by Indian intermediaries qualify as export of service and the same creates a circular loop around place of supply and export of services.

Notably, if Section 13(8)(b) is Constitutionally Valid, then place of supply is in India and hence tax will be leviable. Such transaction cannot be export

[4] All India Federation of Tax Practitioners v. Union of India, 2007 (7) STR 625
[5] Material Recycling Association v. Union of India, TS-586-HC-2020(GUJ)-NT

of service. On the other hand, if transaction in question is export of service, Section 13(8)(b) will be unconstitutional. The decision has thus created unreconcilable anomaly. In this regard, the High Court also has made a passing observation that it is not practicable to visualize a situation wherein IGST shall be levied on such a transaction.

Further, the Authors feel that Larger Bench has not appropriately addressed the decision of Gujarat High Court on the subject matter and has hastly concluded that same is not applicable whilst the same holds utmost importance. In the said decision, the High Court held that intermediary services to foreign recipients were also taxed in the *erstwhile* Service Tax regime and the same has continued in the GST regime. Therefore, no deeming fiction has been canvassed by the Parliament in form of Section 13(8)(b) and accordingly, the same was held to be Constitutionally Valid.

Parting Thoughts and way forward

In the considered view of Authors, supply of intermediary services is an inter-state supply basis residuary provision of Section 7(5)(c) of the IGST Act, since it neither find its place in Section 8 of the IGST Act nor in any other provisions of Section 7. Further, the Parliament is well within its powers to frame principles for place of supply of any transaction and hence Section 13(8)(b) is Constitutionally valid. Accordingly, such service can never qualify as export of service.

The High Court in the aforesaid decision has given preference to destination-based tax principles over the principles of place of supply. An implication can likely be traced in the research and development sector in respect of testing activities or repairing services performed on goods made physically available to Indian suppliers by foreign recipients. Place of supply of such services as per Section 13(3)(a) of the IGST Act is location where such services are performed i.e. India. Hence, once can argue that basis destination-based tax principles, such transaction shall also qualify as export of services.

The decision has further created apprehensions on the position that a taxpayer needs to adopt and seek refund of GST already paid / stop paying GST. The judgment will have ripple effects on various other provisions under GST law which deems place of supply and makes a transaction qualify as inter or intra supply. Given the repercussions, the department is likely to knock the doors of the Supreme Court.

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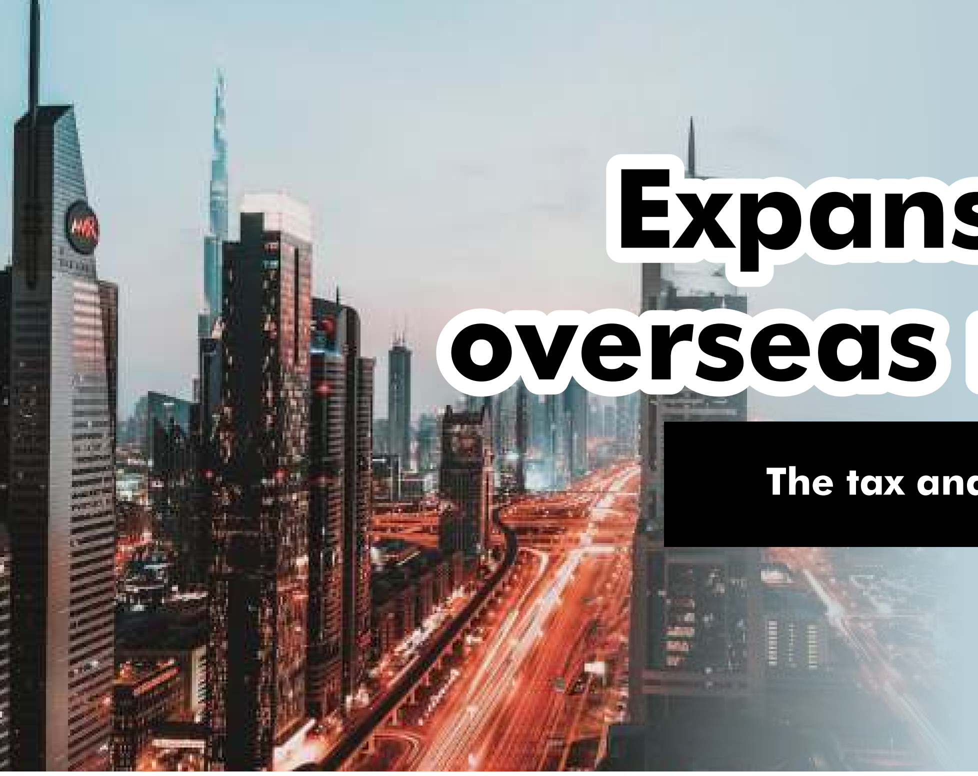

Expansion into overseas markets

The tax and regulatory framework

As the Indian GDP grows, the Indian Industry is also going global. Supplemented by digitalisation, the market for the Indian businesses is not only limited to India, but the playing field is expanded to the 'World Economy'. In recent years, there's been increased Indian investments in foreign countries in the form of Indian industries opening places of business – subsidiaries and joint ventures outside India. According to the Department of Economic Affairs, actual Overseas Direct investment (ODI) outflow from April, 2000 to July, 2023 stood at US$ 2,88,920 million, of which, Financial Year (FY) 2021-22 has seen actual ODI outflow of US$ 18,066 million. Top country of choice for ODI has been Singapore, followed by United States of America and United Kingdom. Easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value.

"Overseas Direct Investment" or "ODI" means investment in or acquisition of unlisted equity capital of a foreign entity or investment in 10% or more of the paid-up equity capital of a listed foreign entity. It also includes investment of less than 10% in a listed entity if such investment is with control in the foreign entity.

Indian investors keen to invest abroad are required to undertake a few compliances under various laws in India. As Indian investors are remitting their funds outside India with an objective to earn income outside India, two important laws to be complied with are 'Foreign Exchange and Management Act, 1999' (FEMA) and 'Income Tax Act, 1961' (IT Act). Non compliances under these laws can attract hefty penalties and can hinder the ease of doing business. This article enumerates some relevant aspects of these laws.

Some provisions of Foreign Exchange and Management Act, 1999 (FEMA):

Since overseas investments results in outflow of Indian foreign exchange the Reserve bank of India (RBI) governs ODI. The RBI announced a revised ODI policy on 22 August 2022. The ODI framework consists of Rules, Regulations and Directions as follows:

- Foreign Exchange Management (Overseas Investment) Rules, 2022
- Foreign Exchange Management (Overseas Investment) Regulations, 2022
- Foreign Exchange Management (Overseas Investment) Directions, 2022

Who can invest outside India?

An Indian entity may make an investment outside India. Indian entity includes a company formed under the Companies Act 2013, or a body corporate incorporated by any law for the time being in force or a Limited Liability Partnership formed under the Limited Liability Partnership Act, 2008 or a partnership firm registered under the Indian Partnership Act, 1932.

A resident individual may also make ODI by way of investment in equity capital or Overseas portfolio Investment (OPI).

The foreign entity should be an operating entity not engaged in financial services activity. A foreign entity having individual investment cannot have step down subsidiaries where the individual has control in the foreign entity.

Manner of making ODI and the pricing

An Indian Entity may invest in any of the following modes:

- Subscribe to the memorandum;
- Acquire or purchase the shares of a foreign entity.
- By way of rights issue or allotment of bonus shares

- The swap of securities
- Merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws
- Capitalisation of any amount due towards the Indian entity from the foreign entity subject to certain conditions.

Detailed instructions and conditions have been provided for each of the above modes of investment.

A resident individual may also acquire shares in overseas entities through inheritance, gift, acquisition of sweat equity shares, shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme subject to compliance with FEMA.

Further, pricing guidelines have been provided for acquisition of shares by an Indian entity. The transfer of shares by a non-resident or a resident to a resident Indian party may be made at arms length determined according to the internationally accepted pricing methodology for valuation.

Amount of ODI

The total financial commitment (FC) made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment should not exceed 400% of its net worth as on the date of the last audited balance sheet. Financial Commitment includes the total investment made in ODI, debt advanced and non-fund based facilities (eg. Guarantees) extended by Indian entity to all its foreign entities.

The investment by a resident individual is subject to the overall ceiling under the Liberalised Remittance Scheme i.e. US$ 250,000.

Any FC exceeding the aforesaid limit is subject to RBI approval.

Financial commitment in form of Debt

An Indian entity may advance a debt to a foreign entity in which it has made ODI and has acquired control in such foreign entity. Such loans must be duly backed by a loan agreement, and the rate of interest shall be charged on an arm's length basis.

Financial commitment in form of guarantee

Guarantees may be issued on behalf of the foreign entity or its step down subsidiary in which the Indian entity has acquired control. Guarantee may be a Corporate Guarantee or a Performance Guarantee, Personal guarantee by resident individual promoter or bank guarantee backed by collateral or a counter-guarantee by the Indian entity or group entity, issued by an Indian bank. Guarantee cannot be open-ended.

Where a guarantee has been extended jointly and severally by two or more Indian entities, 100% of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities for the purpose of FC limit. In case of performance guarantee, 50% of the amount of guarantee is reckoned towards the FC limit.

Unique Identification Number (UIN)

Every foreign investment is required to be reported to the RBI through the AD banker and an UIN is required to be obtained. An application in Form FC may be made along with the requisite documents to the AD banker for allotment of UIN on or before making an ODI. The UIN signifies taking record of the investment for maintaining the database. It is

not an approval of the RBI for the investment. Any remittance towards a foreign entity can be allowed by the AD bank only after obtaining the necessary UIN for such entity.

Other filings under FEMA

A person making an ODI is required to submit a copy of the share certificate with the AD banker. Further, such person also needs to file the Annual Performance Report (APR) with the AD banker for each foreign entity by 31st December every year and where the accounting year of such foreign entity ends on 31st December, the APR shall be submitted by 31st December of the next year.

Divestment of ODI by way of sale

The Indian entity may transfer its shares held in an overseas entity subject to complying with following conditions:

- It does not result in any write off of the investment made
- Such transfer must be at arms length price
- The Indian entity does not have any outstanding dues from the foreign entity
- Foreign entity must be operating entity from at least 1 year and relevant documentation is completed
- The Indian entity is not under investigation by any Indian regulatory authority
- The Indian entity is required to realise and repatriate to India all dues receivable from foreign entity with respect to its investment therein within 90 days from the date when such receivables fall due or date of such transferor divestment etc.

Relevant provisions under the Indian Income Tax law:

The foreign entity is likely to qualify as an associated enterprise and hence, the transfer pricing provisions shall apply. The transactions between the entities need to be at arms length.

Further, the income received from a foreign subsidiary or joint venture by the Indian entity could be in the form of dividends, royalties, service fees and interest. Such income may also be taxed in the source foreign country subject to the provisions of the tax treaty between the two countries. The Indian entity may be eligible to claim credit of the taxes paid in the source country against its tax liability on the same income in India. Such credit is subject to the provisions of the relevant tax treaty and the rules under the Indian Income tax law. Further, the credit cannot not exceed the tax liability in India on the same income.

Lastly, transfer of investment in foreign entity is taxable as capital gain. The transfer should be made at fair market value as prescribed under the Income tax law. Should the transfer be at lower that the prescribed fair market value, the differential is taxable in hands of both the transferor and the purchaser.

Conclusion:

ODI has gained significant momentum and has helped Indian entities enhance their brand value. However, it does require careful adherence to various laws and regulations. As ODI involves outflow of foreign currency from India, it is closely monitored by RBI. It thus becomes necessary to keep an eye on latest rules and regulations and consult legal and financial experts promptly.

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Taxability of Online Gaming

Morality vs Growth

Background

What is it that is making GST Council decide the highest rate of tax on face value in case of online gaming and the likes? Despite so many representations and pleadings, why the GST Council went ahead and took a harsh decision?

In the words of the Honorable Finance Minister, the Council does not want to kill any industry. But the industry cannot be encouraged to such an extent over essential goods and services. Hence, the idea seems to be to equate this industry with sin goods such as tobacco, cigarette etc. The background could be the rise in number of suicide cases due to debts owed to gaming companies, increase of addictive tendency especially in the youth and similar moral grounds.

However, the bold step shall certainly affect the growth of booming industry adversely. With a 28% to 30% CAGR growth in the last five years, the gaming industry was termed as a sunrise industry by the Hon'ble Prime Minister; however, now what remains unclear is how many sunrises will this industry see?

Taxability of the sector

With effect from 1 April 2023, Section 194BA were introduced in the Income Tax Act and were brought into effect from 1 April 2023. As per the said sections 30% TDS was made mandatory on net winnings from online gaming. While the industry was just adapting to this change, four months later, the GST Council sent another shocker to the industry and proposed 28% tax rate not on the platform fee but on the entire face value of bets placed! Further, it has also been proposed that no distinction shall be made between Game of skill and Games of chance and all games shall be subject to tax. Predictably, this was not well received by the industry and multiple representations were sent to the Ministry of Finance. However, on 11 August, an Amendment bill was passed in the Lok Sabha paving way for the aforementioned taxability of online gaming sector.

The Council has recommended 1 October 2023 for the implementation of the taxability for now. Having said that, the target seems a little ambitious considering the bill has to pass the test at the Upper House, receive presidential assent and get approved at the state assemblies as well.

The mechanics of taxing the sector would also overturn the recent judgment of Karnataka High Court in the case of ***Gameskraft Technologies Pvt. Ltd. vs. D.G. of GST Intelligence & Ors.*** While the revenue has challenged the decision before the Supreme Court, it seems that by virtue of this amendment, the Government does not wish to take any chances and settle the matter in law and in spirit. It is worth mentioning that the settled jurisprudence of past so many years will stand redundant as far as matters of game of skill vs game of chance are considered.

Interesting to note that the Online Gaming industry is regulated by Ministry of Electronics and Information Technology (MeitY) and it is still unclear whether MeitY will have a role to play in the proposed taxability of the sector.

It is also worth mentioning here that

How shall it impact the gamer?

Well, to say the least, online gaming is set to become expensive for the gamers. For every Rs. 100/- that they spend, in effect, there will be a sunken cost of Rs. 38/- to Rs. 43/- (Rs. 28 of GST and about Rs 5 to 10 of platform fees). Additionally, while TDS can be claimed as credit, it will also be deducted from the Net winnings. This sort of taxation is new to the gamers; nowhere across the world such taxes are levied on online gaming.

If one has to compare these taxes with other economies of the world, the Indian regime seems a little bizarre. In UK, a separate levy has been prescribed on remote online gaming which gets levied only on profits derived from such games. Hence, UK levies tax only on rake fees. In USA, tax is levied on Gross Gaming Revenue (GGR) which essentially is total amount wagered less prize money won. There are other examples also which point in the same direction. The question is why would GST Council do something which is unheard and unseen. Moreover, the move also seems to be in juxtaposition to the Government's aspiration of becoming a leader in the animation, visual effects, gaming, and comics sector.

Another important aspect to consider is that the gamers may move to illegal/ unreported platforms which are housed outside India to avoid the hefty taxes posed on similar transactions here. Consequently, cyber crime which is already at its peak will get fuelled up and citizens may end up losing privacy and money, both.

How will this impact the Government kitty?

Prima facie it may seem that the Government's kitty would be filling with treasures post this regime is implemented, but is it really so? If one believes on the concept introduced by the American economist, Mr. Arthur Laffer, then the revenue collections may not go up, instead, they may reduce. In 1974, Laffer developed a bell curve analysis to reflect the relationship between tax rates and tax revenues. The concept indicated that when tax rates are all time high, tax revenues are likely to reduce, due to disincentivizing of the taxpayers to engage in taxable activity.

A similar impact might be seen in the Indian Online Gaming Story as well! While the higher rate of taxes would lead to a rise in tax revenues initially, the laffer curve will kick in eventually leading to a stagnant followed by a declining trend in tax collection.

Conclusion

A move that is being termed as 'death knell', 'existential crisis' etc. has stirred up an old debate – Economics vs Morality! While economists are often blamed for side stepping the moral virtues, can morality really exist without economics? Countries with weak economies have higher crime rate and hence in our view, an equilibrium needs to be established between economics and morality. Both cannot exist without each other.

In the present case, the reason of levying highest rate of taxes on the face value of bets may seem like pushing morality a little forward. While it may to some extent lead reduction in addictions, it shall slowly but surely slaughter an upcoming industry. In our view a mid-way needs to be devised to ensure the protection of citizens from addiction and at the same time preserve the industry as well.

An important aspect to look out for will be the nature of this amendment. Whilst, the Government officials have released statements to media stating these amendments to be clarificatory, if the amendment is held to be a retrospective one, the industry is set to slide in doldrums. Another battle of litigations is set to arise wherein the constitutionality of such retrospective amendments can be challenged.

To conclude, the only hope that the industry currently holds, is the review of taxability which has been promised by the Council after six months. Like stated above, an equilibrium if established between would assist the sector to grow and preserve morality as well.

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Decoding GST Input Tax Distribution

Embracing Choice between ISD and Cross-charge

"Regretful echoes of the past reverberate, haunting our choices. Though we cannot rewind time, we can write a wiser future."

Background

Since inception of GST regime, there is an ongoing dispute among taxpayers and tax authorities on mandatory nature of Input Service Distribution ('ISD') mechanism for distributing Input Tax Credit ('ITC') on common input services and inclusion of employee cost in Cross-charge amount.

In Authors' view, GST law does not mandate Head Office ('HO') to adopt ISD mechanism for distributing ITC on input services procured from third parties. Instead, HO can Cross-charge common input services to Branch Office ('BO') by raising tax invoice. It may appear straight-forward on face, however, tax authorities had opposite view. There were contrary Advance Rulings mandating ISD mechanism. Contrary view also found mention in the Draft Circular which appeared in Agenda of 35th GST Council Meeting but never released due to objection of States. Similarly, GST law does not mandate Cross-charge of employee cost since employee of a taxpayer is of whole legal entity and not of a particular State. Despite that, there were contrary Advance Rulings mandating inclusion of employee cost in value of Cross-charge.

In GST Council's continuing endeavor to resolve ongoing controversies in GST law, the Central Board of Indirect Taxes and Customs ('CBIC') recently issued ***Circular No.199/11/2023-GST*** dated ***July 17, 2023*** ('Circular') to provide much-needed clarifications on aforesaid issues.

At the outset, the Circular is commendably straightforward and favorable in clarifying optional nature of ISD mechanism and non-includability of employee cost in Cross-charge value. Through this article, Authors' aim to explicate implications of the Circular including underlying dispute, implications of the Circular and whether it will provide expected relief to taxpayers or not.

Decoding the Circular

Optionality of ISD mechanism vis-à-vis Cross-charge – Taxpayers who opted one of these options can sit back with a sigh of relief. At same breadth, the Circular poses challenges for taxpayers who did not choose one of these options and retained full ITC at HO. In Authors' view, the Circular rightly does not cater to such taxpayers because HO cannot retain ITC relating to BOs. This clarification will cause undue hardship to taxpayers in exempt sector, as such taxpayers may not have opted either for ISD or Cross-charge mechanism.

Any Value (including Zero) for internally generated services – The Circular validates all past acts for internally generated services whether invoice was raised with value or no invoice was issued. The Circular is taxpayer friendly and rightly based on 2nd proviso to Rule 28 of the CGST Rules for taxpayers in taxable business. Ergo, in Authors' view, such value must exceed NIL. This is because Rule 28 forms part of valuation machinery and valuation provision intends to derive value of everything & cannot intend value to be NIL. This is also supported by Rule 32(5) which empowers Government to notify NIL value for specified services between distinct persons. In order to provide legitimacy to NIL value, Notification under Rule 32(5) ought to have been issued. To that extent, the Circular is incorrect. In addition, GST Portal does not accept NIL value while filing returns. In Authors' view, taxpayers may continue raising invoices at nominal value to avoid any future litigations.

No Cross-charge for employee cost – The Circular's affirmation of non-inclusion of employee cost in value of Cross-charge also provides much-needed clarity. This clarification is in line with past jurisprudence that an employee is of a legal entity and not of any HO or BO. Therefore, legally there is no supply of services from HO to BO to the extent of employee support.

Extended applicability of the Circular

Although the Circular specifically addresses Cross-charge of internally generated services, its principles find relevance in many other situations. These include stock transfers between different GSTINs, Cross-charge for various types of support (goods/services) between different GSTINs, related parties' transactions on free-of-cost basis (like corporate / personal guarantee), secondment cases etc. In all these situations as well, taxpayers operating in taxable business, may adopt any value for payment of GST which will be sufficient compliance of GST law.

Parting Thoughts

While the Circular offers much-needed clarity on multiple issues, there are certain aspects that warrant further examination and remain unaddressed. There are open questions like if employee cost has been fully kept outside ambit of Cross-charge, what else is left in Cross-charge. What will be fate of Cross-charge of internally generated services apart from employee cost in situations like leasing of assets, R&D support, marketing support etc. Taxpayers must carefully assess the Circular's applicability to their business and mitigate potential litigation in future.

Also, the GST Council in its last meeting decided to make ISD mandatory in future. Therefore, taxpayers already having ISD registrations may continue the same and those not having, may consider taking one timely. The latter ones can timely familiarize themselves with calculations and compliance procedures of ISD mechanism to be better prepared for future.

In Authors' view, despite few shortcomings, the Circular aims to resolve most of past disputes. Now all rest in hands of Departmental officers whether to abide by this or not. Let hopes of taxpayers' guide their path!!

The article was first published on Taxsutra.

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Getting acquainted with the concept of "deemed international transaction" in India

Background

Transfer Pricing ("TP") in India, was first introduced in 2001, in the Income Tax Act 1961 ("the Act") and has seen various developments in the past 2 decades. The TP provisions are based on Article 9 of the Organization for Economic Co-operation and Development Guidelines ("OECD") and were introduced to prevent the base erosion of India's tax base. Primarily intra-group cross border transactions were covered under the ambit of TP and later vide amendment in 2014 in the Act, the concept of deeming fiction u/s 92B(2) of the Act was introduced in the Indian TP provisions.

In the era of globalization and increasing trade between countries, many multinational companies, in their normal business operations, interact with their group companies for the purpose of global growth and expansion. With this increase in global presence, MNCs also developed a mechanism whereby the Global customer and vendor contracts were entered or negotiated centrally to ensure better synergies on the transactions and also to negotiate a better pricing due to their bargaining power at the group level and secure global business.

In achieving the above objective, and to avoid certain transfer pricing compliances in countries, certain MNCs started interposing a third party in the inter-company transactions. As a result of which, transactions which were required to be determined to be at arm's length, got excluded from scrutiny. To counter this, the deeming provisions were introduced to cover transactions which are disguised as transactions between independent parties but in substance are influenced by the group entities.

Similar to India, Bangladesh has also introduced the concept of deeming provisions.

What does "deemed international transaction" ('DIT') mean?

While India's TP provisions are largely based on the OECD Guidelines, the concept of DIT is not recognized in the OECD Guidelines.

India has specifically defined DIT in Sec 92B(2) of the Act as *"A transaction entered into by an enterprise with a person other than an associated enterprise shall, be deemed to be an international transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not"*

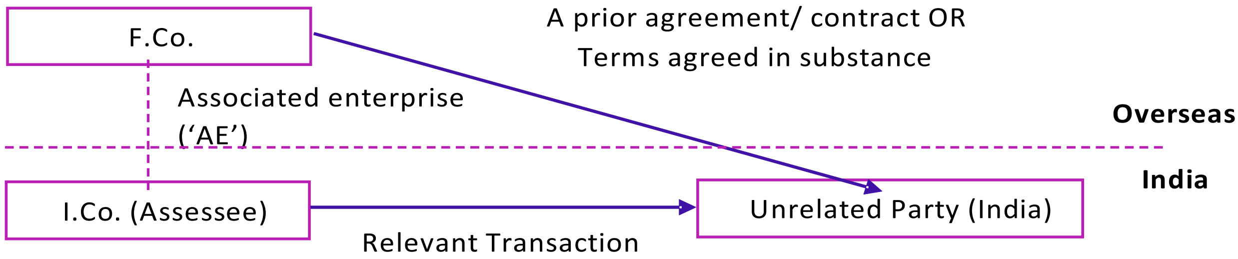

Fig 1

The transactions between two independent entities would come under the purview of DIT if the below-mentioned conditions are satisfied.

(i) There exists a prior agreement between the AE and unrelated party in respect to the transaction between unrelated party and the Assessee in India; OR
(ii) Terms of the transaction for the transaction between the unrelated party and the Assessee are determined in substance by the AE

In view of the above, the transactions between I Co. and unrelated party in India would come within the purview of the Transfer Pricing laws in India and shall be required to be undertaken having regard to the arm's length standard as required under the Indian Transfer Pricing Regulations.

Unlike in the condition stated in Sec 92B(1) of the Act, where either or both the contracting parties should be non-residents in order to constitute the transaction as an international transaction, the provisions of DIT shall apply even if both the transacting parties are resident in India, which was clarified vide amendment in the Finance Act, 2014[1].

<u>Despite nearly a decade since the introduction of DITs, there remain unresolved questions regarding whether specific transactions qualify as DITs. In the following section, we will address these issues and outline the relevant considerations. It's important to emphasize that the determination of whether a transaction falls under the definition of a DIT must be made on a case-by-case basis, taking into account the unique facts of each situation.</u>

<u>Reporting requirements</u>

It is pertinent to note that Sec 92B(2) of the Act specifically prescribes that *"a transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purpose of sub-section (1), <u>be deemed to be an international transaction</u>……"*. Thus, it clearly reflects that the provisions applicable to international transactions covered u/s 92 of the Act would be applicable to such transactions. This would entail reporting of such transactions in the Form 3CEB (under Clause 20) and maintenance of TP documentation to demonstrate that such transactions are undertaken having regard to the arm's length price as required under the Indian TP Regulations for the relevant year under consideration.

<u>While computing the amount of international transactions for the purpose of applicability of Master File provisions, whether DIT would be included in the quantum of international transactions?</u>

As per the Indian TP Regulation, Master File requirement[2] (Form 3CEAA- Part A & B) is applicable to the Indian entity that satisfies the following two conditions:

- The consolidated revenue of the group exceeds INR 500 Crores for the preceding year; AND
- The value of international transactions of the Indian entity for the reporting period,

[1] Section 92B(2) of the Act

[2] Sec 92D of the Act and Rule 10DA of the Rules

exceeds INR 50 Crores OR value of international transactions in respect of intangible property exceeds INR 10 Crores

As discussed above, DITs take a flavor of international transaction. Further, the total value of international transactions appear in Form No. 3CEB (which would include the quantum of deemed international transaction). Accordingly, in absence of specific clarification in relation to the definition of international transaction for the purposes of Master File, a view may be taken to consider the same in the value of

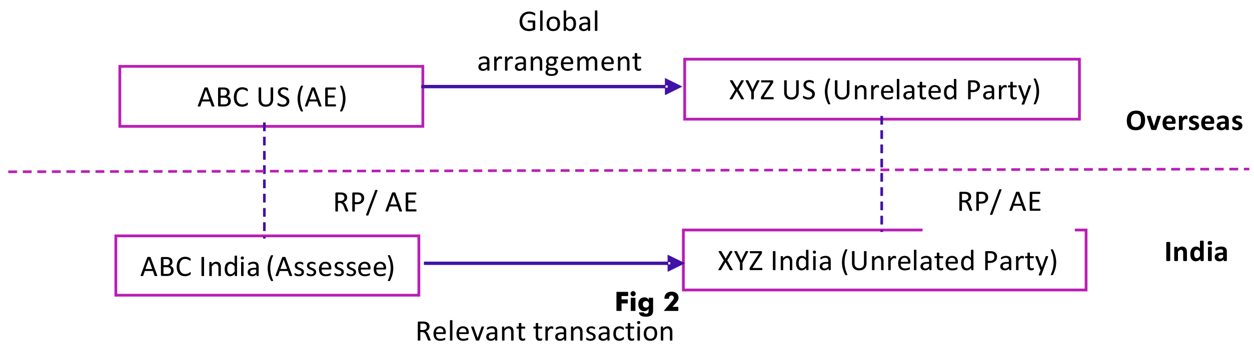

Fig 2

international transactions.

Global arrangement DIT in case of four party scenario

Often there are situations wherein pursuant to the global arrangements between 2 third parties, actual transactions are undertaken between the counterparts locally in India. Such arrangements require careful examination qua the facts of each situation.

It becomes pivotal to see if the negotiations and arrangements between the overseas entities have any specific reference of the Indian taxpayer wherein the prices and contractual terms are discussed and agreed specifically for the Indian taxpayer and unrelated party in India to evaluate the applicability of DIT. Also, it is pertinent to note that similar to a tri-party arrangement, there is no straight jacket answer for such arrangements for the applicability and each arrangement is required to be evaluated specifically to determine the applicability. A mere referral arrangement with the overseas entity under four party scenario may not typically tantamount to DIT as per the provisions of Indian Transfer Pricing Regulations.

Global price lists

There are various multinational group companies that maintain global price lists which could be used as a reference for group companies to negotiate the terms and pricing of the contract with independent customers. As highlighted above, it becomes prudent to evaluate the following criteria for evaluating the reporting requirements:

- Whether the global price list has any specific reference for the terms and conditions for the Indian taxpayer or is it applicable to the group as a whole;
- Whether the pricelist provides any price band within which Indian taxpayer is required to conclude on the prices with the end customers;
- Whether the price list has any specific price being agreed on behalf of the Indian taxpayer; and
- Autonomy available with the Indian taxpayer to negotiate the price and terms of the contract with the customer etc.

Also, in a scenario of global e-commerce space, where the products are sold at a uniform price globally, can it be said that the pricing decision is taken by AE and the terms of the contract with the customers are decided by the AE and customer, especially in a scenario when the customer doesn't have an option but to accept to the terms in order to buy a particular product or service on the digital platform. Such scenarios need to be evaluated in detail before coming to a conclusion on whether DIT is applicable or not.

Secondment cases

Seconding employees from overseas to Indian affiliates is a common practice among multinational enterprises in India. To determine whether DIT applies, it's essential to assess the contractual terms between the overseas entity, the Indian company, and the employee, as the broad definition of 'enterprise' encompasses individuals.

Restructuring transactions

Domestic enterprises engage in asset or business transfers, especially during global restructuring or division sales to third-party multinational groups. To assess the applicability of DIT, it's essential to analyze how local transactions are influenced by global arrangements in such cases, even if the terms and pricing are determined locally.

Approach of the Indian tax authorities

Similar to other transfer pricing issues, the DIT also has contrary views and judgements given across by various Courts across the country. However, majority of the decisions issued by the Higher Appellate authorities (especially Income Tax Appellate Tribunals ('ITAT')) have been in the favor of the taxpayers, especially where the tax authorities have alleged existence of DIT in a third-party scenario.

Illustrative list of the judicial precedents in this regard are as follows:

Gujrat Gas Trading Company Ltd. [I.T.A Nos. 3397, 3069/Ahd/14, 2407, 2340, 2339/Ahd/15, 2028, 1887/Ahd/16,1974 & 2006/Ahd/2017 Dy CIT]

- ITAT noted that the AE had no agreement with the unrelated party for the purchase of gas and it has provided only "negotiation services" and thus the provisions of DIT u/s 92B(2) of the Act would not trigger. Considering the AE would benefit from the long-term contract entered into with the unrelated party, commission was paid to the AE for availing of negotiation services.

Renault India P. Ltd. [I.T.A No. 1078/Mds/2017]

- ITAT holds that the master supply agreement between assessee and unrelated party as well as master License agreement between AE and unrelated party do not show any influence of the AE on the price determination for supply of cars by unrelated party to the assessee.
- Further, considering the AE had only 30% of shareholding in unrelated party, the influence that could be exerted by AE on the unrelated party was not such that it could freely

decide on the pricing of latter's products', holds that the other shareholder (70%) would not have acceded to such predatory pricing strategy unless it was advantageous to them.

Documentation is of paramount importance

Email communications, inter-company agreements, minutes of the meeting are some of the documents that the assessee can maintain which would be helpful to demonstrate the extent of involvement and influence of the AE in dealings with unrelated parties. Such documentation shall be maintained on a contemporaneous basis. This would also be more prevalent for cases relating to mergers and acquisitions at global level wherein the consideration of the taxpayer in India is detrained by way of valuation methodologies for the Indian taxpayer. Appropriate documentation (valuation report, minutes of the Board meetings and key discussions etc.) shall be maintained in this regard.

Unlike related party transactions, where there is a head start in terms of related party transactions disclosure in the financial statements, DITs are not specifically reported on the financial statements. The taxpayer needs to exercise due diligence to identify, evaluate and report such transactions in bonafide belief. The ICAI Guidance Note, 2020 issued by The Institute of Chartered Accountants of India ("ICAI") also states that the primary responsibility of identification/ analyzing DIT rests with the assessee.

In conclusion, the concept of DITs plays a crucial role in Indian transfer pricing regulations. As our discussion has shown, DITs can encompass a wide range of transactions, from the secondment of employees to dealings with global clients and even domestic asset transfers influenced by global restructuring. The complexity lies in the need for a case-by-case assessment, as the specific circumstances and contractual arrangements greatly impact whether DIT provisions apply.

Navigating the intricacies of DITs requires a comprehensive understanding of both local and international tax regulations, as well as a keen awareness of the global context in which these transactions occur. Tax authorities and MNEs alike must engage in careful scrutiny to ensure that these provisions are appropriately applied, avoiding potential disputes and ensuring a fair allocation of profits.

As the business landscape continues to evolve, the interpretation and application of DITs will remain a dynamic and evolving area within transfer pricing. Therefore, professionals, policymakers, and enterprises must remain vigilant, staying up to date with best practices to ensure compliance and promote transparency in the ever-shifting world of international business transactions.

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CONFOUNDING CONNECTION BETWEEN **GST AND LIQUIDATED** DAMAGES

Brief introduction to the issue

The service tax regime in its concluding years saw significant debate around the taxability of damages in the form of notice pay recoveries, cancellation charges, delayed payment or delayed supply charges. This issue was substantially settled by the Courts[1] and the Appellate Tribunal[2] by holding that such payments form damages, compensation, penalty, and do not constitute consideration for service. The CBIC also issued Circulars[3] to clarify the non-taxability of delayed payment charges.

The identical issues vexed taxpayers even under the GST regime. The act of '*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*' has been brought within the scope of 'service' vide Paragraph 5(e) of Schedule II of the Central Goods and Services Tax Act, 2017 ('CGST Act'). Anxious taxpayers have proactively sought advance rulings to determine the taxability of sums received for inadequate performance or non-performance under a contract. The Authority for Advance Rulings seem to be divided on the taxability of such payments.[4]

To nip this issue in the bud, the CBIC issued ***Circular No. 178/10/2022-GST*** dated August 3, 2022 ('Circular 1') and clarified the taxability of various payments received for non-performance, short-performance, delayed performance. The Circular 1 postulates the following guiding principles to determine the taxability of any sum under Para 5(e) of Schedule II of CGST Act:

- **Express agreement:** There has to be an express or implied agreement; oral or written. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or refraining or tolerating a situation.

- **Payment must be towards object of contract:** If the payment is merely an event in the course of the performance of the agreement and does not represent the 'object' of the contract, then it cannot be considered 'consideration'.

- **Liquidated damages are not consideration:** Liquidated damages are not consideration received for tolerating the breach or non-performance of contract. They are payments for not tolerating the breach of contract. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance.

The Circular 1 accordingly clarifies that damages, compensation and penalty not being object of

[1] *GE T & D India Limited v. CCE, 2020 (1) TMI 1096 - MADRAS HIGH COURT*

[2] *Lemon Tree Hotel v. CCE, 2019 (7) TMI 767 - CESTAT NEW DELHI; Southeastern Coalfields Limited v. CCE, 2020 (12) TMI 912 - CESTAT NEW DELHI; Rajcomp Info Service Limited v. CCGST, 2022 (2) TMI 955 - CESTAT NEW DELHI*

[3] *Circular No. 96/7/2007-ST dated August 23, 2007; Circular No. 121/2/2010-ST dated April 26, 2010*

[4] *In re: Achampet Solar Private Limited, 2022 (59) GSTL 478 (AAR-Telangana), In re: Fastrack Deal Comm Private Limited, 2021 (1) TMI 368 - AAR, GUJARAT; In re: Haryana State Warehousing Corporation, 2021 (48) GSTL 399 (AAR - Haryana)*

contract, do not form consideration for supply of any service, and hence are outside the purview of GST. At first glance, it seems that the CBIC has assimilated the contentions forwarded by taxpayers. However, CBIC moved away from its own understanding by suggesting in the Circular 1 that cancellation charges and delayed payment charges will be exigible to GST. It indeed has become important to analyse their taxability.

GST on cancellation charges

The Circular 1 extends two reasons to bring cancellation charges under the ambit of consideration for a supply. Firstly, the supplier provides the facility of cancellation to the recipient. Secondly, cancellation fee is aggregate of costs incurred in making arrangements for the intended supply and providing the facility of cancellation.

The Circular 1 displays an erroneous understanding of contract law by stating that the supplier allows cancellation of supply by customer on payment of cancellation fee as per commercial terms of the contract. Parties to a contract are always at a liberty to cancel the contract. The provision of its facility by the supplier is merely a reference to the manner in which such requests are factually entertained by the supplier. Except where specific performance can be sought under Specific Relief Act, 1963, cancellation of contract is a legal right enjoyed by the recipient / customer at all times. It is absurd to contend that hotels, airlines, travel agencies etc. provide an option to cancel upon payment of cancellation fee. Such language is employed by businesses to sound more appealing to prospective customers.

The imposition of damages however may ensue such cancellation. Damages can be liquidated or unliquidated, depending upon whether they are specified in contract. Providing a specific amount for damages in contract upon execution imparts the same with the character of liquidated damages. It is easier to ensure compliance of payment of liquidated damages without approaching courts. Unliquidated damages will inevitably involve litigation, atleast to adjudge the amount of damages, and would spoil the relationship shared with the customer. Both the payments are of however in the nature of damages, whether liquidated or unliquidated.

The second reason to treat cancellation charges as consideration is that it is made up of costs incurred by the supplier. Again, the Circular 1 lacks basic understanding of contract law and the concept of damages. The Indian Contract Act, 1872 ('Contract Act') provides for stipulation of liquidated damages in the following manner:

> *"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."*

Damages can be quantified by considering various elements. The court of Appeal in the case of ***Anglia Television Limited v. Reed***, ***(1972) 1 QB 60*** allowed recovery of pre-contract expenditure as damages. In this case a television artiste who was engaged to the lead role in a film repudiated the contract. The producer was unable to find a replacement and had to abandon the project. The loss of the project was not quantifiable, thus the Court allowed him to claim damages equal to the money spent by him in engaging a director, designer etc. that was within the reasonable contemplation of the parties. Thus, damages can be quantified either as loss of profits or as wasted expenditure. Damages may also be quantified as the measure of benefit enjoyed by the breaching party by reason of the breach. Liquidated damages represent the estimate regarding the anticipated or actual damages suffered by the aggrieved party in the event of a specified breach of contract by the other party.

The issue of taxability of cancellation charges is actually attributable to accounting of such amounts by the taxpayers. These charges are often booked as 'operating income' in the profit and loss statements, i.e. the profit earned through business operations, instead of 'other income'. Accordingly, the revenue reckons these sums as income earned against some business activity, i.e. supply undertaken by the taxpayer. Taxpayers ought to revisit the accounting adopted for such sums and record them as 'other income' to avoid any allegation emerging from the accounting treatment.

GST on late payment charges

The Circular 1 supports the taxability of late payment charges through the concept of composite supply. It states that late payment is a facility granted by suppliers which ought to be naturally bundled with the principal supply of goods and

services. It is important to understand the difference between late payments as credit or financing facility and as liquidated damages.

Late payments as liquidated damages

In any contract for supply, the goods or services are supplied subject to payment of the consideration on a specified date, either in whole or in part (instalments). When the recipient fails to pay on the specified date, the supplier can either refuse to deliver the goods or perform the service, or in case where the supply has already occurred impose late payment charges for the delay. The object of late payment charges is to compensate the buyer for the loss of time value of money.

The Circular 1 clarifies that in order to qualify as consideration, the payment must be made for the object of the contract. The object of a contract is supply of goods or services. The underlying rationale being that Section 2(31) of the CGST Act defines 'consideration' to include any payment in response to or for the inducement of supply of goods or services. Late payment charges are paid for delayed payment of consideration, as opposed to consideration which is paid for receiving supply of goods and services. Thus, late payment charges are merely liquidated damages and not consideration for an agreement to tolerate delayed payments.

Late payment fee as credit facility

Delayed payments can also be provided as an option by the supplier. Such facility is a credit facility or financing facility provided by the supplier, and is vastly different from late payment charges which are recovered as liquidated damages. An illustration of such transaction is provided under Paragraph 5 (Case 1) of ***Circular No. 102/21/2019-GST*** dated June 28, 2019 ('Circular 2'). Herein, the supplier agrees to sell the goods or provide services for two separate considerations. A lower consideration is charged upon lumpsum payment and a higher consideration is charged upon payments in instalments. In such cases, the higher sum charged through instalments constitutes the price of the supply itself and is already included in the transaction value. The concept of composite supply may in fact be applied to such transactions consisting of the principal supply of goods or services and ancillary supply of credit facility.

It is important to discern whether late payment charges are in nature of extension of credit facility or merely compensation for loss of time value of money. Due regard must be extended to the nature of arrangement under the contract, business

executed by parties, terms of contract, language employed and expectations of parties at the time of execution of contract. Consideration herein must also be attributed to Entry 27 of ***Notification No. 12/2017-CT(Rate)*** dated June 28, 2017 which exempts GST on interest accruing as consideration for credit facility.

Conflict between valuation and taxability

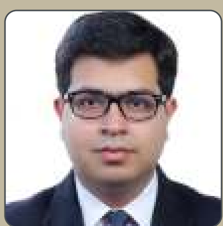
Section 15 of the CGST Act deals with the valuation of supplies. Section 15(1) deals with supplies between unrelated parties, and requires the transaction value, *viz*. price actually paid or payable for supply, to be considered as assessable value of the supply. Section 15(2) of the CGST Act mandates certain values to be added to the transaction value. These additional values *inter alia* cover '*interest or late fee or penalty for delayed payment of any consideration for any supply*' [Refer Section 15(2)(d)]. The CBIC in Circular 1 and Circular 2 also relies upon aforesaid provision to extend the applicability of GST on late payment charges.

The taxable event for levy of GST is 'supply' of goods and services. The term 'supply' refers to activity involving accretion in value at the hands of recipient. Simply put, the recipient must benefit from the supply so undertaken. The interest or late fee or penalty for delayed payment of consideration when recovered as liquidated damages represents an action undertaken against the recipient for breach of contract. In effect, Section 15(2)(d) of CGST Act indirectly extends the levy of GST on a transaction which is not a supply by including it for the purpose of valuation.

Article 246A of the Constitution of India, 1950 ('Constitution') empowers the legislature to legislate on goods and services tax on 'supply' of goods and services. Taxability of any amount which is outside the scope of levy (herein delayed payment charges), by making it part of the transaction value suffers from the vice of unconstitutionality. It will thus be important to restrict the applicability of Section 15(2)(d) of CGST Act providing for inclusion of delayed payment charges even where such charges are in the nature of liquidated damages for breach of contract, instead in lieu of supply.

Conclusion

The issues of taxability of cancellation fee and delayed payment charges are still open for litigation. Circular 1 and Circular 2 are definitely not the final word on their taxability. It will be interesting to see how the issue unfolds before the courts.



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Place of Supply of Goods under GST

Has the Mystery been solved?

It is dangerous to be right, when the Government is wrong – Voltaire

In the realm of GST, concept of 'Place of Supply ('PoS')' stands as a pivotal apropos determining nature of supply viz. inter-State supply or intra-State supply. Its significance lies in enabling tax collection by Centre / appropriate States, thus ensuring the implementation of intended destination-based tax system in the Country.

Since the birth of GST, the enigma of determining PoS in case of ex-works / Over the Counter ('OTC') sales has raised several doubts on taxability as well as tax collection mechanism. The conflict arises when the ownership of goods is transferred at seller's premises in one State without movement of goods as part of supply and thereafter goods are transported to other State by recipient. To address this situation, the GST Council in its 37^{th} meeting recommended to issue a Circular. The Draft Circular provided for determining PoS in case of OTC supplies basis address of recipient mentioned on tax invoice. Per contra, the provision under Section 10(1)(a) of the IGST Act does not provide so and is mainly dependent on interpretation of the words '*where supply involves movement*'.

Further, the disagreement between Department and taxpayers on interpretation of the phrase '*where supply involves movement, whether by the supplier or by recipient*' in Section 10(1)(a) of the IGST Act has led to unwarranted *lis*. To add fire to it, contrary views of High Court[1] and Advance Ruling Authority[2] caused unwarranted disputes and mystery for the business world. The issue posed a serious question to the Government to justify concept of destination-based tax system through adoption of GST.

The issue again invited attention of GST Council in its 50^{th} meeting where instead of issuing any clarification, insertion of a new clause under Section 10(1)(ca) has been proposed for determining PoS in case of OTC supplies to unregistered persons. The objective behind this is to protect the breakage of ITC chain due to implication of an alternate interpretation.

In this article, Authors have analyzed this issue arising from the existing provisions and have attempted to look into potential resolutions that the proposed amendment can have.

<u>Determining PoS basis present provisions</u>

Section 10 of the IGST Act provides as under:

- If the **supply involves movement of goods, whether by the supplier, recipient, or a third party**, PoS shall be location of goods where the movement terminates for delivery to recipient [Section 10(1)(a)].

- If the **supply does not involve movement of goods, whether by supplier or recipient**, PoS shall be location of goods at the time of delivery to recipient [Section 10(1)(c)].

The key distinction in above two situations lies in determination of the fact <u>whether supply involves</u>

[1] *Kun Motor Co. Pvt. Ltd. v. CST, 2018-VIL-554-KER*
[2] *Penna Cement Industries Limited, 2020-VIL-129-AAR*

movement of goods or not. Considering general dictionary meanings, the term 'involve' suggests being part of something. Thus, the supply agreement ought to clearly specify as to who is responsible for movement / delivery of goods involved in that supply.

Under GST law, term 'delivery' lacks a defined meaning. Taking shelter of the Sales of Goods Act, 1930 [Section 2(2)], 'delivery' means '*voluntary transfer of possession from one person to another*'. Further, Section 26 of the said Act provides that until the property in goods is transferred to the buyer, it remains at the seller's risk. As a corollary, once property in goods is transferred to the buyer, they are at buyer's risk, regardless of whether the formal delivery has taken place or not.

Applying this interpretation to the core of GST, in Authors' view, since the ownership and risk in case of ex-works sales (typically B2B transactions) transfers to buyer at sellers' premises, regardless of any subsequent transportation arrangement by buyer, PoS concludes in the State in which ex-works sales take place. Consequently, such transactions would be considered as intra-State supplies, attracting CGST and SGST.

Similarly for OTC sales (B2C transactions), where buyer takes immediate possession at seller's premises in one State and transports goods to other State, the risk and reward passes to the buyer in that State itself. Consequently, the same shall also be construed as intra-State supplies.

Prevalent dispute in light of broken ITC chain

Authors wish to highlight that in cases of ex-works / OTC transactions, retaining PoS in the selling State defeats the philosophy behind economic significance of consumption-based tax system. Critically, these situations are slightly different from the one where goods are retained at supplier's premises for consumption there itself. In such cases, PoS shall be the seller's premises only which is same as the final consumption.

Owing to the heap of confusions, taxpayers end up paying GST under different heads and thus are prone to protracted and pointless litigation. Clouds of unclear skies added to the misery of taxpayers and caused agony by questioning eligible ITC, issuance of unwarranted demand notices,

challenge to belated refund claims, demand of undue interest liability etc. Authors feel remorse that it took six long years to Government in correcting PoS position for such regular business transactions and finally, specific amendments shall be made in law by introducing them in Finance Act.

Effect of proposed amendment

Thanks to the 50th Council meeting *(more particularly the agenda document being made in public domain)* wherein the Council has finally heard the cries of taxpayers and has recommended amendment in Section 10 of the IGST Act. The new clause is simply in line with the recommendations given by the Law Committee, making address of recipient recorded on tax invoice as the basis for determining PoS in subject situations in sync with the philosophy of destination-based taxation.

Authors further invite attention to the point that GST Council emphasized that taking alternate interpretation for even B2B ex-works supplies would defeat the very purpose of destination-based tax system and would cause ITC loss to genuine taxpayers. Seemingly, the Council has aimed to interpret it on similar lines to safeguard the entire ITC chain and is not expected to bring any clarification / amendment to this effect.

Conclusion

Clearly, the proposed amendment would help in settling ongoing confusions for PoS in case of OTC supplies to B2C buyers. Due to lack of interpretation, taxpayers should not be subjected to recovery proceedings under Section 73/74 and levy of penalty for the past transactions. Till such time, taxpayers may continue existing practice and must request authorities to decide their issue only after amendment is effective due to involvement of interpretational issue at policy level.

In Authors' view, taxpayers can also take resort of Section 77 and Section 19 (CGST Act & IGST Act, respectively) which offer a waiver of interest on payment of GST under wrong head in specified situations.

Lastly, it will be important to see whether tax authorities will interpret the PoS provisions for ex-works / OTC supplies to B2B / B2C buyers on different tangent or on same parameters in light of the Council's agenda discussions. Only time will tell how much the proposed amendment will clear the air of doubts and save litigation.

The article was first published on Taxsutra.

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WORKS CONTRACTS

UNRAVELLING THE INTERPLAY BETWEEN MSME AND ARBITRATION ACTS

INTRODUCTION

The implementation of the Micro, Small and Medium Enterprises Development Act, 2006 **("MSMED")** Act aimed to provide assistance and protection to Micro, Small, and Medium Enterprises ("**MSMEs"**) by addressing issues related to their growth and payments. The establishment of the Micro and Small Enterprises Facilitation Council ("**MSEFC"**) was intended to ensure fairness and safeguard the interests of MSMEs. However, challenges arise in applying the MSEFC framework to Works Contracts, as such contracts do not conform to the Act's typical definition of an enterprise involving goods or services production. Consequently, uncertainty surrounds the applicability of the Act and the jurisdiction of Facilitation Councils in Works Contracts. This article seeks to clarify the interaction and constraints of the MSMES Act and Arbitration and Conciliation Act, 1996 ("Arbitration") Act in the context of Works Contracts. It aims to provide valuable insights to SMEs, buyers, arbitrators, and arbitral institutions, aiding them in effectively navigating this intricate landscape.

UNDERSTANDING WORKS CONTRACTS

According to the Central Goods and Services Tax Act, a Works Contract is legally characterized under Section 2 (119) as "a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract".

Works Contracts are legally binding agreements that involve construction, repair, or maintenance work and disputes in Works Contracts can arise from issues like non-payment, delays, defects, or changes in the scope of work. Resolving such disputes typically involves legal procedures, negotiations, or alternative dispute resolution methods like mediation or arbitration. Interestingly, Works Contracts are recognized as a distinct category by the Hon'ble Supreme Court due to their integration of goods and services, setting them apart from standard commercial agreements. However, determining the jurisdiction of MSME Facilitation Councils becomes challenging for Works Contracts as they don't fit neatly into the existing framework.

In the ordinary course of MSME-related business, any disputes are typically directed to the Micro and Small Enterprise Facilitation Councils (MSEFCs) established at district and state levels, as well as the National Board for Micro, Small, and Medium Enterprises operating nationally. These entities are tasked with adjudicating issues involving payment delays, breaches of contracts, and other complaints that arise between MSMEs and their buyers.

EXCLUSION OF WORKS CONTRACTS FROM MSMED ACT

The exclusion of Works Contracts from the jurisdiction of MSME Facilitation Councils has been a significant concern for the MSME sector. This exclusion leaves MSMEs involved in Works Contracts vulnerable without the protection and support offered by the council, raising doubts about the effectiveness of the MSMED Act. This exclusion is solely based on the unique nature of Works Contracts, which combine goods and services and involve complex project management.

However, this exclusion raises queries about the availability of effective mechanisms to resolve payment disputes in this specific sector, exclusively for those MSMEs engaged in Works Contracts that may now need to resort to alternative legal avenues or dispute resolution methods. It is difficult to ascertain whether a works contract primarily involves the sale of goods or the provision of services, which is crucial in establishing the council's jurisdiction and the composite and continuous nature of Works Contracts, encompassing supply, installation, and services, further complicates this determination. These jurisdictional challenges have implications for the application of the MSMED Act.

LEGAL JURISPRUDENCE

The legal doctrine vis-à-vis Works Contracts has experienced substantial progress via diverse progressive judgments pronounced by the Hon'ble Supreme Court and its Puisne Courts.

- *What constitutes a works contract?*

  In the case of *Kone Elevators India Pvt Ltd v. State of Tamil Nadu*,[1] the Supreme Court held that the substance of a contract is pivotal in determining its nature, irrespective of its form. The distinction between a contract for the sale of goods and a works contract lacks a fixed rule. The analysis should consider the attachment of the lift to the building and the labour involved. Contracts for lift supply and installation involve both goods and services. Lift components become permanent fixtures after skilled on-site assembly. If a composite contract combines supply and installation, it's a works contract, not a mere sale of goods. The previous ruling in Kone Elevators (supra), which differentiated based on incidental service, is overturned. The obligation to supply goods and perform installation fulfils the essential characteristics of a works contract. Consequently, the decision in Kone Elevators (supra), is not valid, and show-cause notices for reassessment were quashed and the assessment orders under dispute were annulled.

- *Is a Works Contract amenable to the MSMED Act?*

  The Bombay High Court, in the case of *Sterling and Wilson Private Limited and Ors. v. Union of India and Ors*.[2] dealt with a dispute stemming from a bid related to the design, installation, and servicing of firefighting and detection systems. The central issue revolved around whether Micro and Small Enterprises (MSEs) registered under the MSMED Act could avail of benefits in this context.

  The High Court of Bombay scrutinized the contract at hand and concluded that its fundamental nature wasn't centred around a typical sale of goods, but rather constituted a works contract. Drawing from legal precedents such as Kone Elevators, the court noted that when conflicts arise from the execution or non-execution of Works Contracts, the provisions of the MSMED Act cannot be invoked. This constraint was attributed to the intricate composition of Works Contracts, encompassing elements beyond simple goods transactions.

  Based on this evaluation, the court determined that the advantages and policies outlined in the MSMED Act couldn't be extended to the contesting MSEs involved in this scenario due to the specific nature of the contract. The verdict underscored the distinction between contracts primarily focused on goods sales versus those involving complex works, highlighting the limitations of employing the MSMED Act to address disputes emerging from Works Contracts.

- *Can MSEFC refer disputes to Arbitration even when prior arbitration agreements exist?*

  The case of *Mackintosh Burn Limited v. Micro and Small Enterprises Facilitation Council*[3] centred on the authority granted by the MSMED Act of 2006 to the MSEFC

[1] *Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu and Ors., MANU/SC/0424/2014.*
[2] *Sterling and Wilson Private Limited and Ors. v. Union of India and Ors., MANU/MH/1631/2017*
[3] *Mackintosh Burn Limited v. Micro and Small Enterprises Facilitation Council, MANU/WB/0243/2020*

for dispute resolution, particularly its ability to refer disputes to arbitration under Section 18. The dispute arose due to a payment discrepancy between Mackintosh Burn Limited and MSME, the third party involved.

MSME invoked the MSEFC to recover outstanding payments related to a demineralized water plant agreement. Section 18 of the Act outlines the process for initiating references to the Council, allowing parties engaged in disputes over amounts due under Section 17 to approach the Council. The Council can initiate conciliation or refer the dispute to alternative dispute resolution avenues. If conciliation fails, the Council can proceed with arbitration or refer the dispute to other entities following the Arbitration Act.

The Court thoroughly examined the provisions available under the MSMED Act, with a focus on Section 18(3)'s legal framework. It concluded that when the Council opts for arbitration or a referral, the parties are deemed to have entered into an arbitration agreement according to Section 7(1) of the Arbitration Act. This supersedes any prior arbitration agreement. The Court upheld the Council's authority to refer disputes to arbitration as outlined in Section 18(3).

As a result, the appeal was rejected, with the Court highlighting the significance of Section 18(3) and confirming the Council's capacity to refer disputes to arbitration, even when previous arbitration agreements existed.

- *Dispute resolution in the absence of an Arbitration clause under Works Contract?*

The case of *PL Adke v. Wardha Municipal Council*[4] was centred on a contract encompassing the planning, design, construction, operation, and maintenance of a water supply and sewerage system. A pivotal question emerged: Should the MSMED Act's provisions apply to the contracting party claiming Micro and Small Enterprise (MSE) status?

The Bombay High Court dissected the contract's essence, finding it to be an integrated, continuous, and indivisible works contract. This characterization stemmed from its ongoing execution, going beyond a mere sale of goods. Consequently, the court determined that the MSMED Act's benefits were inapplicable due to the contract's composite and sustained nature. Moreover, the absence of an arbitration clause rendered even the Arbitration Act's provisions inapplicable.

In essence, the court's judgment clarified that the MSMED Act's advantages could be curtailed when dealing with intricate and continuous Works Contracts. Furthermore, the absence of an arbitration clause could also restrict the scope of the Arbitration Act's application. This ruling emphasized that the contract's nature and clauses play a pivotal role in delineating the applicability of pertinent legal provisions.

APPLICABILITY OF THE ARBITRATION AND CONCILIATION ACT, 1996:

The applicability of the Arbitration 1996 to Works Contracts had earlier remained a contentious issue. Nevertheless, with the ever-evolving and growing legal jurisprudence and precedence, it has now become a settled principle of law that disputes/claims arising from Works Contracts are not amenable to the jurisdiction of the Facilitation Council constituted under the MSMED Act. However, Works Contracts are complex agreements, and the presence of an arbitration clause is crucial for resolving disputes. However, when Works Contracts don't include an arbitration clause, the Arbitration Act would fail to apply. In the case of M/S. P.L. Adke vs. Wardha Municipal Corporation[5] it was clarified that the MSMED Act's benefits could be restricted in cases involving composite and continuous Works Contracts and that the application of the Arbitration Act could also be limited by the absence of an arbitration clause in the contract.

A recent ruling by the Delhi High Court in the Tata Power Company Limited (TPCL) v. Genesis Engineering Company (GEC)[6] dispute clarified that the inclusion of an Arbitration clause in a Works Contract subjects the dispute to the Arbitration Act. The court ruled that the Work Orders from TPCL to GEC meet the criteria of Works Contracts based on the legal precedent set by the Supreme Court's "Kone Elevator India Private Limited vs. State of Tamil Nadu" (2014) as the said contract involves two components; the supply of materials like cables, wires, connectors, streetlights, and poles, followed by labour for installation.

During the ongoing Arbitration Petition, GEC initiated a reference under Section 18 of the MSMED Act to the Facilitation Council. The High Court, after examining cases like "Sterling and Wilson Private Limited vs. Union of India & Ors." and "Shree Gee Enterprises vs. Union of India," ruled that such disputes did not fall under the MSMED Act's purview. Consequently, GEC couldn't avail of MSME Act benefits and contested the proceedings. The court noted the presence of an Arbitration clause in the Contract's General Conditions, allowing Tata Power's Section 11(6) petition under the Arbitration Act. Thus, the Court became inclined to appoint a sole arbitrator to resolve the disputes.

Hence, even if an MSME operating within a Works Contract is not subject to the MSMED Act, it can seek safeguards under the Arbitration Act in the presence of a valid Arbitration Clause.

CONCLUSION

Addressing the practical hindrances encountered by MSMED Act when pursuing payment for Works Contracts necessitates the provision of unequivocal guidance concerning the jurisdiction of the Facilitation Council. Furthermore, despite a limited number of legal precedents regarding the applicability of the Arbitration Act to Works Contracts devoid of arbitration clauses, there is a definite requirement for explicit directives regarding its applicability. The establishment of a framework to handle disputes arising from Works Contracts, particularly those involving MSMEs, could further ensure an equitable and efficient mechanism for dispute resolution.

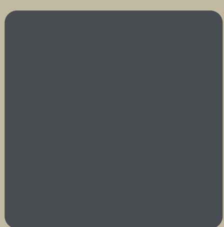
In conclusion, the jurisdiction of the MSME's Facilitation Council in matters of payment disputes within Works Contracts remains a subject that should be addressed individually for each case. The unique attributes of Works Contracts, their intricate composition, and the complexities in categorizing them within the existing legal structure pose challenges in the application of the provisions of the MSMED Act. While the legal precedents set by the Hon'ble Court of our nation provide guidance, there is an evident imperative for legislative clarity to establish an effective mechanism for resolving such disputes.

Until such clarity is attained, MSMEs should adopt a pragmatic approach, meticulously considering payment terms and collaboratively formulating contracts with their buyers when engaged in Works Contracts.

[4] *PL Adke v. Wardha Municipal Council, MANU/MH/2179/2021.*

[5] *Ibid at 5*

[6] *ARB.P. 1415/2022 Delhi High Court*



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Pre-import condition

When clarity leads to perplexity !!

Background

Advance Authorisation ('AA') Scheme under Foreign Trade Policy ('FTP') has been a crucial initiative in India's trade landscape and has been successful in boosting exports. The Scheme has certain conditions and restrictions, imposed to avoid any misuse. The Scheme requires certain class of exporters to fulfil the pre-import condition for availing benefit under this Scheme. Pre-import condition means that goods are imported first, and then final product manufactured using such imported goods, is exported.

Upon introduction of GST, exemption from IGST was not extended to imports made under AA Scheme. GST being in its nascent stage burdened Indian exporters to pay IGST, leading to significant encumbrances in working capital, Input Tax Credit ('ITC') accumulation etc. Cries of exporters were partially heard and IGST exemption was granted (effective October 13, 2017) on imports under AA Scheme, however only in cases where pre-import criteria was met. Apart from cases where the condition was imposed in FTP itself, it was not possible for other exporters to change business dynamics (many exporters were not even keeping track of the same) and adhere to this condition to claim IGST exemption. The industry faced a prolonged hue and cry during department investigations and more after contrary verdicts of Madras and Gujarat High Courts[1] where the constitutional validity of the condition was challenged. It was on January 10, 2019, the Government decided to part with the condition and bestowed benefit of IGST exemption to all AA holders without having to fulfill pre-import condition.

Finally, the issue reached doors of the Apex Court. The Supreme Court in case of ***UOI v. Cosmo Films Limited, 2023-VIL-47-SC*** upheld constitutional validity of pre-import basis that it cannot be struck down merely because of hardship caused to exporters. Further, the Court held that DGFT always had authority to impose pre-import condition on imports. Additionally, since pre-import condition was imposed and applicable on certain goods even prior to introduction of GST, all AA holders were never treated equally.

The Supreme Court while upholding the validity of the condition noted that importers are eligible to claim refund or ITC of IGST to be paid (due to violation of pre-import condition) within six weeks from the date of issuance of judgement and directed revenue to issue appropriate clarification for procedure to be followed. In light of this, CBIC has issued ***Circular No. 16/2023-Cus*** dated ***June 7, 2023*** ('Circular') and DGFT has issued ***Trade Notice No. 07/2023-24*** dated ***June 8, 2023***. Though issued in good intention, but unfortunately it has created unintended consequences and perplexity for importers. One that the much-awaited clarification is delayed and further is doubtful that it will serve justice in want.

This article critically examines the various aspects of the Circular and proposes course of actions for

[1] *Vedanta Limited v. UOI - 2018- VIL-490-MAD*
Maxim Tubes Company Private Limited v. UOI - 2019-VIL-80-GUJ

various categories of importers.

Dissecting the Circular

The Circular is a welcome move for the industry so far as it has clarified applicability of process of reassessment to importers at large (not limited to parties in SC case). Further, the Circular clarifies that applicability of exemption shall be evaluated for each consignment separately and not universally license wise.

The Circular clarifies the following:

- The decision of Supreme Court shall have bearing on importers at large (other than parties to SC decision) in import cases, where pre-import condition was not met.
- Post issuance of Out-of-Charge ('OoC'), duty can only be paid through TR-6 Challan.
- TR-6 Challan is not a prescribed document for availing ITC of IGST paid on imports under GST.
- Payment of duty through Challan does not enable transmission of details between Customs and GSTN portal for claiming ITC by importers.

Procedure dictated by Circular

- All importers who failed to satisfy pre-import condition and claimed exemption are required to approach authorities at the port of import for payment of IGST and Compensation Cess along with interest.
- The Assessment group at port of import will cancel OoC of relevant BoE, indicate reasons in remark and reassess it for payment of IGST along with interest through Challan.
- Post payment, jurisdictional authorities will make notional OoC for BoE to enable transmission of details to GSTN portal for claiming ITC.
- Refund of IGST paid by utilizing ITC on outward zero-rated supply will be available.

Notably, the Circular has been issued under Section 143AA of the Customs Act, 1962 for facilitation of trade and to maintain transparency in the import documentation.

While the intent of the Circular is to provide clarity, it creates more issues than it sorts. Some important issues are discussed below:

<u>Issue 1 – Eligibility to claim ITC</u>

Section 16(2)(a) of the CGST Act states that registered person must possess prescribed documents in order to claim ITC. In accordance with Rule 36 of the CGST Rules, Bill of Entry ('BoE') or any similar document prescribed under the Customs provisions is relevant document to avail ITC in respect of imported goods.

In authors' view, Challan is a valid mode of payment of IGST under Customs and ITC basis the same cannot be denied merely because of insufficient procedure prescribed under the Customs law or non-prescription of the same under GST law. Author emphasizes that this is a settled position in law that substantive right cannot be taken away due to procedural lapses. Surprisingly, the Circular fails to consider that importers do have an option to seek re-assessment of BoE or even amendment under the Customs law and can claim ITC basis that as well.

Since the Circular is issued under Section 143AA, similar process cannot be directly applied to any other case of short payment of IGST. The Circular will raise questions on ITC eligibility basis amendment or re-assessed BoE. Further, practical difficulties in getting re-assessment order or amendment in BoE is another painful story for importers, which is not taken up by Government.

This Circular raised another important question by determining the eligibility to claim ITC basis transmission of IGST details to GSTN portal. It is sad that the two wings of Government itself are unclear on this position even when GST is set to complete its 6 years. CBIC has already issued clarifications on this point that ITC reconciliation with GSTR-2A/2B shall not apply on imports[2]. Thus, Authors feel that this Circular perversely restricts ITC of IGST to be paid on imports by linking its transmission with GST portal.

Further, the Circular fails to clarify that time limit stipulated under Section 16(4) of the CGST Act to avail ITC is not applicable on import of goods. Hence the same shall not be barred by limitation.

<u>Issue 2 - Eligibility to claim refund</u>

[2] *Circular No. 123/42/2019-GST*

In authors' view, the Circular clarified but obvious point that refund of IGST paid at time of future export of goods will be eligible. To the contrary, the Circular remains silent on considering ITC claimed while computing refund of ITC on zero rated supplies made without payment of IGST under LUT when imports were made under AA without IGST. Legally, exporters will also be eligible to claim refund of unutilized ITC since the same shall now be added in Net ITC computation as stipulated in Rule 89(4) of the CGST Rules.

Importantly, it was expected that additional refund would be extended to exporters for past exports made. However, the Circular does not offer specific relief for importers. This differential treatment between various class of importers is in violation of Article 14 of the Constitution of India and does not serve purpose with which SC directed revenue to issue Circular.

<u>Issue 3 - Merits of payment of Interest</u>

The Circular states that importers will be required to make payment of IGST along with interest. Importantly, the Bombay High Court in the case of ***Mahindra & Mahindra Limited v. UOI, 2022-VIL-690-BOM-CU***, held that the Customs Tariff Act, 1975 ('CTA') does not have any substantive provision relating to levy of interest and penalty for payment of additional duty of customs. Similarly, there is no specific provision for levy of interest for IGST also under the CTA and hence, taxpayers can defend payment of interest.

However, it will be unlikely that the authorities will re-assess BoE without payment of interest. While ITC will be available to importers, payment of interest will be an additional cost. Importers can seek refund of interest paid by applying the ratio given in the case of ***Mahindra & Mahindra Limited (supra).***

Parting thoughts

Importers who are subject to department proceedings [SCN has been issued], must adhere to the procedures stated in the Circular and may seek refund of interest paid on legal grounds.

For importers who did not face any department proceedings can avoid discharging IGST now. Being an interpretational issue which the Supreme Court has now settled, extended period of limitation cannot be invoked against such importers.

The department Circular is beneficial for importers to some extent and has tried to explicate maximum possible issues at once. Yet it is interesting to watch whether departmental officers will actually guide the trade properly or will interpret this Circular for creating new set of controversies for the importers. Irrespective, the Circular is controversial and will raise many issues for other importers as well.

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