THE MONTHLY MAGAZINE FROM CASC

GST UPDATES

EXCEL TIPS

RECENT JUDGEMENTS

INDIAN ECONOMY ROUND UP

VOLUME-3 ISSUE-6 JUNE 2024

CASC BULLETIN

INDEX

Date	Topic	Speaker
13.06.2024 (Thursday)	Arbitration - Case Studies	Mr. V.S.Jayakumar Senior Advocate
27.06.2024 (Thursday)	Handling GST Litigations	CA. Manimaran Kathiresan

The meetings will be held at CASC at 6.30 p.m. and will be preceeded by fellowship over High Tea at 6.00 p.m

CASC Annual Members are requested to renew their subscription for 2024 - 2025

EDITORIAL

Mistakes Can also be Reconsidered

Each and everyone of us are bound to commit mistakes, but accepting our mistakes and expressing a willingness to correct them is what Reconsideration means. Justice N.Anand Venkatesh of the Madras High Court while delivering a lecture organised jointly by the Madras Bar Association Academy and Rakesh Law Foundation, has criticised one of his own judgements in a civil suit, and said that it required reconsideration. Only when we come forward with a willingness to correct it Evolution happens. He said that Evolution happens not only by learning, even by Unlearning sometimes.

Consumer Protection Act - Not for Advocates

The Supreme Court is of the view that professionals have to be treated differently from persons carrying out business and trade. Advocates cannot be held liable under the Consumer Protection Act 1986 for deficiency of services. This has overruled the judgement of 2007 National Consumer Disputes Redressal Commission which held that the services provided by lawyers are covered under section 2 (o) of the Consumer Protection Act 1986. The clarification given by Justice Trivedi was that they also can be sued in the ordinary course of law for negligence but they are not covered under the Consumer

Protection Act. All professionals requires a high level of education, training and proficiency, and which involves skill and specialised kind of mental work operating in specialised spheres that achieving success would depend on many other factors beyond one's control. Thus A professional cannot be treated at par with businessmen or traders or service providers of products or goods as contemplated in the Consumer Protection Act.

CSR Rules - Tweaking

There is a proposal under review by the centre about the norms of Corporate Social Responsibility, about its scope and coverage to be widened. The reason behind is not to focus on the penalty structure which discourages companies from its non-compliance. These deliberations have already commenced and once it is finalized this will be a part of amendments to the companies Act 2013 and the relevant rules.

Digital Public Goods - Galore

The Indian government is set to create a unified portal that will compile all digital public goods (DPGs) such as Aadhaar, Unified Payments Interface (UPI), and Open Network for Digital Commerce (ONDC) into a single accessible location. This initiative, primarily coordinated by the Ministry of Electronics and Information Technology, aims to streamline access to various government services, enhancing both user experience and operational

transparency. This portal will not only list active services but also those under development. Portal is expected to detail the tasks each DPI performs, the number of users, the technology used (noting if it's based on open protocols), and any specific requirements needed to access these services. Presently, nearly 60 DPGs have been developed at various levels across the country. Hence navigating through multiple platforms for accessing different Governmental services can be eliminated and simplified process can be undertaken.

Appeal

We, at Chartered Accountants Study Circle, request members to contribute articles for the bulletin and you may contact the editorial board regarding the same. We have been regularly conducting technical programmes every month. Members are requested to attend the programmes conducted by CASC and are also requested to send their suggestions and / or value additions to the services provided by CASC including this Bulletin. The same can be sent as hard copy to the office of the CASC or emailed to admin@casconline.org or any of the members of the Management Committee of the CASC. Any member interested in using the CASC platform for addressing our members on technical topics may kindly feel free to contact us by way of email at admin@casconline.org.

For and behalf of Editorial Board

Bhuvaneswari.R.V.

CA. BHUVANESWARI R.V

GLIMPSES FROM OUR MONTHLY REGULAR MEETINGS

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RECENT JUDGEMENTS IN VAT / CST / GST

CA. V.V. SAMPATHKUMAR

Natural Justice: Petitioner asserted that he was unaware of proceedings culminating in the impugned order because the intimation and show cause notice were uploaded on the "View Additional Notices and Orders" tab on the GST portal and not communicated to the petitioner through any other mode. It is clear that the tax proposal was confirmed only because the petitioner failed to reply to the SCN by enclosing relevant documents. Therefore, it is just and appropriate that the petitioner be permitted to contest the tax demand on merits, and stating so, the impugned order is set aside and the matter is remanded for reconsideration subject to the condition that the petitioner remits 10% of the disputed tax demand as agreed to within a period of three weeks from the date of receipt of a copy of this order. **M/s. Silver & C.Z. International, Vs. The Assistant Commissioner (ST) (FAC), Moore Market Assessment Circle, Chennai-6. W.P.No.9769 of 2024 DATED: 15.04.2024**

Not annexed documents: Tax liability was imposed because the

petitioner replied without annexing documents. As a consequence of such order, ITC to the extent of about Rs.1.04 crore was reversed. In the petitioner's reply, the petitioner has stated that outward supplies do not give rise to tax liability after setting off ITC. The petitioner has also asserted that proper bills and other documents are available. In these circumstances, it is just and appropriate that an opportunity be provided by the petitioner to contest the tax demand on merits albeit by putting the petitioner on terms. The impugned order is set aside on condition that the petitioner remits a sum of Rs.5,00,000/- towards disputed tax liability as agreed to within three weeks from the date of receipt of a copy of this order.

M/s.Sri Rajaa Store, Vs The State Tax Officer, Choolai Assessment Circle, Chennai -6. W.P.No.9597 of 2024 DATED: 12.04.2024

Credit Notes: The explanation of the petitioner was not duly examined from the perspective of ascertaining whether the amount reflected as ITC tallies with the value of credit notes issued by the petitioner. Since such exercise was not carried out and findings were recorded confirming the tax demand merely because credit notes were not duly reported in GSTR 1 or in the auto populated GSTR 2A, the impugned order called for interference on this issue. The matter is remanded for re-consideration by the respondent. The respondent was directed to provide a reasonable opportunity to

the petitioner, including a personal hearing, and thereafter issue a fresh order after taking into consideration the contentions of the petitioner. **M/s.Oasys Cybernetics Private Limited Vs State Tax Officer, Vepery Assessment Circle, Chennai 6. W.P.No.9624 of 2024 DATED: 12.04.2024**

Personal Hearing: Ld Government Advocate, accepted notice and pointed out that the petitioner failed to provide proper bifurcation of turnover pertaining to its pan-India operation and Tamil Nadu operations. She further submits that the petitioner should have appeared before the assessing officer at the personal hearing and submitted all relevant documents. It is noted that in response to the personal hearing notice from the respondent, the petitioner issued communication dated 27.12.2023 stating that the petitioner is currently occupied with the filing of the annual returns for financial year 2022-2023 and therefore requires a deferment of the personal hearing scheduled on 28.12.2023. From the impugned order, it appears that this request was not entertained and the order was issued on 31.12.2023. Although the order refers to a personal hearing notice issued on 31.12.2023, there is nothing on record to indicate that such personal hearing notice was issued. On examining the impugned order with regard to turnover discrepancy as between the different returns, it is noticeable that the petitioner explained the difference in its reply dated

28.07.2023 by pointing out that the lower amount was inadvertently reported in the GSTR 1 statement, which was subsequently rectified by filing the annual return. This aspect has not been noticed in the impugned order and conclusions were recorded without providing a personal hearing to the petitioner. Therefore, the impugned order is unsustainable. **M/s. L&T Finance Limited, Vs. The Assistant Commissioner, Valluvar Kottam Assessment Circle, Chennai-6. W.P.No.9652 of 2024 DATED: 12.04.2024**

Interest: Learned senior standing counsel, submits that the petitioner collected taxes in respect of the outward supply of goods/services the petitioner failed to remit tax. He also submits that the petitioner discharged the liability after the commencement of proceedings and therefore is not entitled to the benefit of the proviso to Section 50(1) in respect of applicable interest. The Hon" ble Court observed and held that the impugned order records that the petitioner discharged GST liability on 31.03.2019, 03.04.2019 and 23.04.2019. The order discloses that 100% penalty was imposed. By taking into account the fact that the petitioner discharged the GST liability in 2019 and the fact that 100% penalty was imposed, it is just and appropriate that the petitioner be permitted to present a statutory appeal. Since the time limit for filing such appeal expired, the petitioner shall be put on terms and

is subject to the condition that the petitioner remits a sum of Rs.2.5 lakhs towards interest liability as agreed to within a period of three weeks from the date of receipt of a copy of this order. **M/s.Alamelu Construction Vs. The Assistant Commissioner of GST & Central Excise, Division-III, Puducherry-10. W.P.No.9681 of 2024 DATED: 12.04.2024**

Input tax credit: The petitioner has placed on record a certificate dated 31.10.2023 received from one M/s. Fivestar Impex India Private Limited stating that the supply was made under invoice dated 01.11.2017. A certificate from Chartered Accountant is also on record. The said certificate provides the details of invoice dated 01.11.2017 for a total value of Rs.18,82,000/-. The e-mail dated 18.10.2023 is also on record. These documents were not taken into account while issuing the impugned order. For such reason, the order impugned herein calls for interference. Therefore, the impugned order is set aside and the matter is remanded to the respondent for reconsideration **M/s.AP Studio Enterprises Vs. The Assistant Commissioner (ST)(FAC), Chepauk Assessment Circle, Chennai-35. W.P.No.9701 of 2024 DATED: 12.04.2024**

Movement of goods: On perusal of the petitioner's reply, it appears that the petitioner submitted original tax invoices, the ledger account pertaining to the supplier

concerned, bank statement and relevant GSTR returns. The petitioner does not appear to have submitted e-way bills, lorry receipts, weighment slips and the like to establish actual movement of goods. On examining the impugned order, it appears that the tax proposal was confirmed largely on the ground that there was no proof of actual movement of goods. By taking into account the nature of documents submitted by the petitioner, which include the bank statement showing payments made to the supplier, the GSTR 2A indicating the availability of ITC, it is just and appropriate that the petitioner be provided an opportunity to produce relevant documents to prove actual movement of goods. As a condition for remand, however, it is also necessary to put the petitioner on terms. Stating so, the impugned order dated 30.08.2023 was set aside and the matter is remanded for reconsideration on condition that the petitioner remits 20% of the disputed tax demand as agreed to within a period of two weeks from the date of receipt of a copy of this order. **Ravi Chitra Vs.1.The Assistant Commissioner (ST), Medavakkam Assessment Circle, Chennai-35. 2.The Bank Manager, HDFC Bank, Perungudi, Chennai-96 W.P.No.9339 of 2024 DATED: 08.04.2024**

Mismatch: Tax demand pertains to mismatch between the petitioner's GSTR 3B returns and the auto-populated GSTR 2A. The impugned order records that the tax liability

was confirmed because the petitioner did not file a reply to the show cause notice or participate in proceedings. In these circumstances, subject to putting the petitioner on terms, it was stated by the Hon'ble Court that it is just and appropriate to provide another opportunity to the petitioner. Stating so, the impugned order dated 28.08.2023 is set aside subject to the condition that the petitioner remits 10% of the disputed tax demand as agreed to within a period of two weeks from the date of receipt of a copy of this order, and the matter is remanded for reconsideration. **M/s.Sri. Kalai Constructions Vs The Deputy State Tax Officer-I, Harur Assessment Circle W.P.No.9341 of 2024 DATED: 10.04.2024**

Opportunity: The petitioner was provided several opportunities to contest the claim for penalty. Upon receipt of the intimation and show cause notice, the petitioner could and should have placed on record documents indicating movement of goods between the group entities. Such documents could have been in the form of e-bills, lorry receipts, weighment slips and the like. Instead of submitting such documents, the petitioner merely requested for further time to provide the documents by citing the fact that notices pertaining to five assessment periods were issued. Therefore, the petitioner cannot be absolved of responsibility for the current state of affairs. It should, however, be noticed that substantial amounts were imposed as penalty

without taking into account documents that the petitioner claims is in his possession. The reply dated 11.01.2024 of the petitioner seeking an additional thirty days' time is also a material consideration. When these facts and circumstances are considered cumulatively, a case is made out to provide the petitioner another opportunity, and stating so, the order impugned herein is set aside subject to the condition that the petitioner remits 5% of the penalty imposed under the impugned order as a condition for remand. Such amount shall be remitted within three weeks from the date of receipt of a copy of this order. **Tvl. Shriniwas Impex, Vs The State Tax Officer, Podanur Circle, Coimbatore-18. W.P.No.8667 of 2024 DATED: 08.04.2024**

Tax on wastage: On examining the petitioner's reply dated 11.12.2023, it was noticed that the issue relating to wastage was not responded to by the petitioner, possibly by oversight. Consequently, in the impugned order, the tax demand was confirmed because the petitioner did not reply. The petitioner has placed on record the show cause notice pertaining to assessment period 2017 -2018, wherein the tax demand pertaining to wastage was dropped after noticing the judgment in ARS Steels. In these circumstances, the interest of justice warrants that the petitioner be provided another opportunity. The order impugned herein is set aside and the matter is remanded for reconsideration subject to the petitioner remitting 10% of the

disputed tax demand pertaining to wastage as agreed to within two weeks from the date of receipt of a copy of this order. The petitioner is also permitted to submit a reply to the show cause notice with regard to this issue within the aforesaid period. **Tvl.Sakthi Steel Industries, Vs. 1. State Tax Officer Group-IX, Intelligence-I, Chennai-6. 2.Commercial Tax Officer, Chennai Central Tamil Nadu. W.P.No.9155 of 2024 DATED: 05.04.2024**

Rejection of reply: The operative portion of the order does not contain any reasons for rejecting the petitioner-s reply. Since these findings are not supported by reasons, the impugned order is not sustainable. Therefore, the impugned order dated 28.12.2023 is set aside and the matter is remanded for reconsideration. **Mr.S.Sivakumar Vs The State Tax Officer (Inspection-I), Office of Joint Commissioner (ST)(INTL), Vellore - 1 W.P.No.9335 of 2024 DATED: 08.04.2024**

Section 74 and Classification: The challenge is on the ground that the ingredients of Section 74 of GST Act are not made out. It is possible for the petitioner to respond to the respective show cause notice and indicate that none of the ingredients of Section 74 are made out. Even if the assessing officer disregards the

same and issues assessment orders on such basis, it would be still possible for the petitioner to challenge such orders in accordance with law. As regards the challenge on the ground that the proposed classification is entirely based on the judgment of the Hon'ble Supreme Court in Westinghouse Saxby, it is always open to the petitioner to refer to the first schedule of the Customs Tariff Act, 1975 and the HSN Explanatory notes and contend that the classification under Chapter 84 is the correct classification These WPs are disposed of on the following terms:(i) The petitioner shall reply to the respective SCN on or before 29.04.2024; (ii) Upon receipt of the petitioner's reply, the respondent is directed to provide a reasonable opportunity to the petitioner, including by way of personal hearings; (iii) The respondent is further directed to consider all contentions raised by the petitioner objectively and not in a pre-determined manner by taking note of the observations in this order. **M/s. BASF Catalysts India Private Limited Vs Deputy Commissioner (ST)-I, LTU, Chennai-35. W.P.Nos.9508, 9512, 9513, 9516 & 9519 of 2024 DATED: 08.04.2024**

(The Author is a Chennai based Chartered Accountant in Practice. He can be reached at vvsampat@yahoo.com)

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CASE LAWS - GST

1. GST – ADVANCE RULING – DREDGING AND EARTHWORK EXCAVATION SERVICES PROVIDED TO GOVT. OF DELHI – PURE SERVICES – COVERED UNDER SL.NO.3A OF NOTIFICATION NO.12/2017-C.T.(R) – EXEMPT

CA. VIJAY ANAND

In RE: Dredging & Desiltation Company Pvt. Ltd. 2024 (83) GSTL 83/(2024) 15 Centax 266 (AAR. GST. WB), the applicant has been awarded work order by Government of Delhi (Irrigation and Flood Control Department) for "removal of hump (silt/earth/manure/sludge etc.) by dredging from Khyala Bridge D/S RD (41980m) to Basaidarapur Bridge (RD 45350m) at Najafgarh Drain" and the applicant has entered into a contract with the concerned department of Government of Delhi for the execution of above-mentioned work. This work includes the provision for desilting/removal of silt/earth/manure/sludge etc. from the bed of Najafgarh Drain in entire width of

Najafgarh Drain including in or under foul condition upto desired level as per direction of the Engineer-in-Charge using suitable and adequate and latest technology machinery without obstructing the flow of drain and leveling and dressing of stacking area on the bank/berm and construction of dykes within the reach if required for drying, disposal of excavated silt/earth/manure/sludge etc. within the reach as per directions of Engineer-in-Charge within lead of 2 kms.

The desilted/excavated material is to be taken away by agency for environmental safe disposal at his direction with all lead and lift. The contract constitutes mainly of dredging and earthwork excavation which is pure service work and the cost of material transferred and consumed for execution and completion of the works contract is less than 5 (five) percent of the total work order value. An application was filed seeking advance ruling as to the following:-

1) Whether Government of Delhi - Irrigation and Flood Control Department comes under the purview of Union Territory?

2) Will this supply be covered under Sl. No. 3 of Notification No. 9/2017 Integrated Tax (Rate) dated 28-6-2017- or

Sl.No. 3A of Notification No. 12/2017- Central Tax (Rate) dated 28-6-2017 as amended from time to time?

3) What will be the rate of GST in our case?

The authority observed as under:

1. The applicant has been intimated by the Office of the Executive Engineer, Civil Division No. I, I & FC Department, Government of NCT of Delhi in respect of acceptance of tender on behalf of the President of India. The tender is related to the work for removal of hump (silt/ earth/manure/sludge etc.) by dredging from Khyala Bridge D/S RD (41980m) to Basaidarapur Bridge (RD 45350m) at Najafgarh Drain. The work of removal of silt/ earth/manure/sludge etc. is to be carried out from the bed of Najafgarh Drain in entire width of Najafgarh Drain including in or under foul condition up to desired level using suitable, adequate and latest technology machinery without obstructing the flow of drain.

2. The work also includes leveling and dressing of stacking area on the bank/berm and construction of dykes within the reach if required for drying, disposal of excavated silt/earth/manure/sludge etc.

within the reach within lead of 2 kms. The desilted/excavated material is to be taken away by agency for environmental safe disposal with all lead and lift. The applicant undertakes the work of desilting and cleaning of Najafgarh Drain.

3. As per the website of Wikipedia that the Najafgarh drain or Najafgarh nalah (nalah in Hindi means rivulet or storm water drain), which also acts as Najafgarh drain bird sanctuary, is another name for the northernmost end of River Sahibi, which continues its flow through Delhi, where it is channelized, and then flows into the Yamuna consequent to which it is imperative that one examines first whether the activities of desilting and cleaning of the drain falls under the purview of "Public health sanitation conservancy and solid waste management" listed at serial number 6 of the Twelfth Schedule [Article 243W of the Constitution (Seventy- Fourth Amendment) Act, 1992].

4. Oxford Dictionary defines 'Sanitation' as conditions relating to public health, especially the provision of clean drinking water and adequate sewage disposal and 'Conservancy' as a body concerned with the preservation of natural resources or the conservation of wildlife and environment.

5. Hence, the term 'sanitation conservancy' should refer to a body which performs services (or refer to the services) which are concerned with regard to maintaining sanitation services for e.g., provision of clean drinking water, sewage disposal etc.

6. World Health Organization has defined 'Sanitation' as a 'big idea' which covers the following [Source: scribd.com]:-

- Safe collection, storage, treatment and disposal/reuse/ recycling of human excreta (faeces and urine);
- Management/reuse/recycling of solid wastes (trash or rubbish);
- Drainage and disposal/reuse/ recycling of household water (often referred to as sullage or grey water);
- Drainage of storm water;
- Treatment of disposal/reuse/ recycling of sewage effluents;

7. On going through the nature and scope of work being undertaken by the applicant, the instant work falls within the ambit of matter listed at Sl. No. 6 of the Twelfth Schedule of 243 W of the Constitution of India, i.e. "Public health sanitation conservancy and solid waste management".

8. The records submitted by the applicant also includes

certificate issued by the Executive Engineer, Civil Division-I, Irrigation & Flood Control Department, Government of NCT of Delhi, New Delhi, wherein he has certified that "the works contract constitutes mainly of dredging and earthwork excavation which is pure service work and the cost of material transferred and consumed for execution and completion of the work contract is less than 5 (five) percent of the total work order value, if any required". This clearly establishes that there is an element of goods also in the supply, although in a small percentage.

9. Therefore, the instant supply is found to be a composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply.

10. Now, entry at Sl No. 3A of Notification No. 9/2017-Integrated Tax (Rate) dated 28-6-2017, as amended [Sl. No. 3A of Notification No. 12/2017-Central Tax (rate) dated 28-6-2017, as amended] describes that Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply provided to the Central

Government, State Government or Union territory or local authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution is exempted.

11. Arising out of the above, the instant supply made by the applicant to Government of NCT of Delhi shall be covered under the aforesaid entry.

Hence, the authority ruled that the supply of services being undertaken by the applicant for removal of hump (silt/earth/manure/sludge etc.) by dredging at Najafgarh Drain as awarded by the Irrigation and Flood Control Department, Government of Delhi are covered under Sl. No. 3A of Notification No. 12/2017- Central Tax (Rate) dated 28-6-2017 and therefore shall be exempted from payment of tax.

2. GST – TAX OR ITC NOT INVOLVING FRAUD – VIOLATION OF PRINCIPLES OF NATURAL JUSTICE – ORDER SET ASIDE

In Alok Steel Industries Pvt. Ltd. v. State of Jharkhand 2024(83) GSTL 204/(2024) 14 Centax 328 (Jhar.), the assessee is engaged in the business of manufacturing of Sponge Iron

and M.S. Billet and was issued a Notice in Form GST ASMT-10 for the period 2018-19 pointing out certain discrepancies in the return filed by it in GSTR-3B as compared to GSTR-2A which was followed by the issue of a Summary of Show Cause Notice dated 27-9-2019 contained in Form GST DRC-01 wherein the Department exercised power u/s 73(1) of the JGST Act' as to why tax, interest and penalty be not imposed upon the Petitioner.

Although no date for compliance of the said notice was intimated to the Petitioner, the Petitioner, on 22-10-2019, itself filed its reply to the aforesaid Summary of Show Cause Notice. Thereafter, no communication was made to the Petitioner regarding adjudication order and/or summary of order and, due to widespread of COVID-19 Virus, National Lockdown was imposed. During the month of September, 2023, for the first time, Petitioner was communicated Summary of the Order dated 4-9-2020 contained in Form GST DRC-07, which was uploaded in the GSTN Web Portal of the Petitioner confirming the demand of tax, interest and penalty.

Thereafter, pursuant to the application by the assessee, a

certified copy of Summary of Order in Form GST DRC-07 and Order-sheet were supplied to the Petitioner on receipt of which the assessee filed a writ petition before the high court which observed as under:-

1. The instant application is squarely covered by the decisions in the cases of M/s. NKAS Services (P.) Ltd. V. State of Jharkhand 2022 (63) GSTL 18 (Jhar.) and M/s. Godavari Commodities Ltd. V. State of Jharkhan 2022 (65) GSTL 194 (Jhar.) In the instant case, only 'Summary of Show Cause Notice' has been issued and no proper Show Cause Notice has been issued to the Petitioner.

2. In the instant case, it would transpire that Summary of Show Cause Notice in Form GST DRC-01 was issued to the Petitioner on 27-9-2019 and, although no date of compliance was given, the Petitioner, suo-motu, filed its reply on 22-10-2019. Thereafter, no date of hearing was fixed in the matter and, straightaway, vide order-sheet dated 2-9-2020, it has been recorded that Summary of Demand in Form GST DRC-07 is being issued to the Petitioner.

3. Thus, no opportunity of hearing was also granted to the Petitioner before the

impugned demand was raised upon the Petitioner. This issue is also squarely covered by a Bench decision of this Court in the case of /s. Godavari Commodities Ltd. V. State of Jharkhan 2022 (65) GSTL 194 (Jhar.), wherein it was held that while interpreting Section 75(4) and 75(5) of the JGST Act, that an Opportunity of hearing shall be granted on request or where any adverse decision is contemplated.

Hence, the petition was allowed and the Summary of Order issued in form GST DRC-07 was set aside with liberty to initiate fresh proceeding in accordance with law, if so advised.

3. GST –DETAILED REPLY FILED AGAINST SCN PROPOSING TO DEMAND TAX NOT TAKEN INTO ACCOUNT IN THE OIO NOR ANY FUTHER OPPURTUNITY GIVEN TO THE ASSESSEE – OIO IS NOT SUSTAINABLE

In Shri Krishna Industries v. Commissioner of Delhi, GST 2024(83) GSTL 337/(2024) 16 Centax 123 (Del.), SCN was issued to the assessee for claiming ITC under declaration of ineligible ITC and ITC claim from cancelled dealers, return defaulters and tax non-payers for which a detailed reply was furnished by the assessee giving full

disclosures under each of the heads.

Thereafter, the Order in Original was passed mentioning the fact that the reply of the assessee person as well as data available on GST Portal has been checked/ examined and the reply/ submission of the Taxpayer was not found to be satisfactory. On a writ petition the High court observed as under:

1. The observation in the OIO was not sustainable for the reasons that the reply filed by the petitioner is a detailed reply and the proper officer had to at least consider the reply on merits and then form an opinion whether the reply was not satisfactory rather than merely holding that the reply is not satisfactory which ex-facie shows that Proper Officer has not applied his mind to the reply submitted by the petitioner.

2. Furthermore, if the Proper Officer was of the view that reply was not satisfactory and further details were required, the same could have been specifically sought from the petitioner, however, the record does not reflect that any such opportunity was given to the petitioner to clarify its reply or furnish further documents/ details.

Hence, the order was set aside and the matter was remitted to the Proper Officer for re-adjudication after intimating the assessee of the details/documents to be furnished and after giving the assessee an opportunity of furnishing the details / documents and personal hearing and appearance during the personal hearing.

4. GST – OIO PASSED RECORDING THAT THE REPLY FILED BY THE ASSESSEE WAS NOT SATISFACTORY WITHOUT SPECIFING THE DETAILS OR MANNER NOR GIVING FURTHER OPPURTUNITY TO THE ASSESSEE – ORDER NOT SUSTAINABLE

In Max Healthcare Institute Ltd. v. UOI 2024(83) GSTL 347/(2024) 16 Centax 177 (Del.), the assessee was issued a SCN for which a detailed reply was filed . Thereafter, the OIO confirmed demand holding that the reply filed by the assessee was devoid of merits. On a writ petition, the high court observed as under:

The observation in the impugned order dated 24-12-2023 cannot sustain as the petitioner filed a detailed reply. Proper Officer had to at least consider the reply on merits and then form an opinion whether the reply was devoid of merits. He merely held that the reply is devoid of

merits which ex-facie shows that Proper Officer has not applied his mind to the reply submitted by the petitioner.

1. If the Proper Officer was of the view that further details were required, the same could have been specifically sought from the petitioner.

2. However, the record does not reflect that any such opportunity was given to the petitioner to clarify its reply or furnish further documents/ details.

Hence, the order was set aside and the matter was remitted to the Proper Officer for re-adjudication, after intimating the assessee of the details/documents to be furnished and after giving the assessee an opportunity of furnishing the details / documents and personal hearing and appearance during the personal hearing.

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RELEVANCE OF BENEFICAL OWNER TEST FOR CAPITAL GAINS

CA. K. PRASANNA

Introduction

The tax treaty acts as a distributive rule between the source and residence countries so that the objective of double taxation is addressed. Specific qualification criteria/parameters[1] are built into the Tax Treaty, which prevents taxpayers from taking advantage of the treaty benefits. We often come across the term 'beneficial ownership' ('BO') as part of passive income streams such as 'Dividend', 'Interest' 'Royalties', and 'Fees for Technical Services'. With regard to these income streams, we are clear that the recipient has to satisfy the requirement of BO, and the question arises whether the requirement of BO is to be satisfied in case of capital gains earned by the taxpayer. This aspect has attained significant momentum after the Delhi High Court's ruling in Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd[2], wherein the Court observed that the concept of BO is relevant only to three transactions i.e., dividend, interest, & royalty, and not for capital gains[3].

[1] Person, Residence, Arm's length, Limitation of Benefits etc.
[2] W.P.(C) 2562/2022
[3] Para 61 of the ruling

History of BO

If one were to trace the origin of BO, the League of Nations, although not use the term, but raised similar issues and in 1928, they left few questions for further consideration[4]. The Canada-US Treaty was the first to use the term BO and later was picked up by the UK in several of its treaties. The BO was introduced as a measure to counter treaty shopping[5], and if the recipient of the income is the BO, then the treaty provides a reduced source rate of taxation.

The definition of BO is limited & not exhaustive, and the meaning was developed over the years. The original definition in the OECD model commentary[6] had excluded agent/nominee and later excluded conduit companies[7]. In 2011, the commentary (Article 10) explained the BO in following words:

"The recipient of a dividend is the "beneficial owner" of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person".

Despite the term being used for more than 40 years, there is no precise definition, and very limited guidance or clarity is provided in the commentaries to achieve certainty. Further, an option is left to the respective countries to

[4] Beneficial Ownership: What Does History (and maybe policy) Tell Us by Richard Vann
[5] Beneficial Ownership - after Indofood by Philip Baker
[6] 1977 Commentary
[7] Based on OECD Report on Conduit Companies in 1986

negotiate to include an anti-abuse provision to address certain treaty shopping or other forms of abuse.

Since the scope of the article is only on the applicability of BO to capital gains article, the history is written in brief. The detailed history and origin are left for discussion another time.

Application of BO for capital gains?

The observation in the Blackstone ruling (supra) has reignited a controversy as to whether the test of BO is applicable for capital gains. In the following paras, I have discussed the merits and demerits of the application of the term 'BO' in capital gains article:

Arguments against application of BO to capital gains article

- The term' Beneficial ownership' is included only in dividends, interest, Royalties, and FTS artilce. It is not included in the Capital Gains article. The intention of introducing BO is to clarify the meaning of the words "paid to resident"

In the context of dividend[8]:

"……In the context of Article 10, the term "beneficial owner" ***is intended to address difficulties arising from the use of the words "paid to" in relation to dividends*** *rather than difficulties related to the ownership of the shares of the company paying*

[8] Para 12.6 of Art 10 to OECD Model Convention, 2017

these dividends. For that reason, it would be inappropriate, in the context of that Article, to consider a meaning developed in order to refer to the individuals who exercise "ultimate effective control over a legal person or arrangement."

In the context of interest[9]:

Since the term "beneficial owner" was added to address potential difficulties arising from the use of the words "paid to a resident" in paragraph 1, ***it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country*** *(in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term "beneficial owner" is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries1), rather,* ***it should be understood in its context, in particular in relation to the words "paid to a resident", and in light of the object and purposes of the Convention****, including avoiding double taxation and the prevention of fiscal evasion and avoidance".*

From the above, it clearly manifests that the term BO is used only when the term' paid'

[9] Para 9.1 of Art 11 to OECD Model Convention, 2017

is used, which is evident in the passive income streams mentioned above and not in the context of 'Capital Gain'. The Capital Gain article does not use the term paid: hence the question of invoking BO should not arise unless expressly stated.

- **Article 31** of the Vienna Law of Convention of Tax Treaties ('VCLT') provides that the "Treaty shall be interpreted in good faith" in light of object and purpose. While India is not a member, the Indian Courts have adopted the VCLT as a customary international law for interpreting tax treaties[10]

In international tax treaties, **respect for negotiated bargains** between contracting states is fundamental to ensure tax certainty and predictability and to uphold the principle of ***pacta sunt servanda***, pursuant to which parties to a treaty must keep their sides of the bargain[11].

Where the treaties never envisaged a situation of BO for capital gains, applying it would be against the objects and purpose; hence, the same cannot be added to the text. The treaty should be interpreted to implement the treaty partners' intentions[12].

[10] Ram Jethmalani v. Union of India [2011] 339 ITR 107
[11] Canada v. Alta Energy Luxembourg S.A.R.L [2021] SCC 49 - Para 1
[12] J. N. Gladden Estate v. The Queen, [1985] 1 C.T.C. 163 (F.C.T.D.)

- The **Andhra Pradesh High Court** in **Sanofi Pasteur Holding SA**[13] has observed the following when the revenue argued a 'see-through approach' under Article 14(5) as a purposive interpretation.

  "……***Where the operative treaty's provisions are unambiguous and their legal meaning clearly discernible and lend to an uncontestable comprehension on good faith interpretation, no further interpretive exertion is authorized*** *for that would tantamount to usurpation (by an unauthorized body – the interpreting Agency/Tribunal), intrusion and unlawful encroachment into the domain of treatymaking under Article 253 (in the Indian context), an arena off-limits to the judicial branch; and when the organic Charter accommodates no participatory role, for either the judicial branch or the executors of the Act.*[14]"

- The United Nations Committee[15] has requested Professor Philip Baker to submit his consulting paper on the issue of BO, i.e., whether or not this concept can be applied to other articles of the UN Convention (such as Articles 13 and 21). Post the difference of opinion, the sub-committee has decided

[13] 354 ITR 316
[14] Para 22 of the ruling
[15] 4STM_EC18_2008_CRP2_Add1 - Third session of the Tax Committee

not to make any changes to the commentary to Article 1 and undertake a new project to review the BO concept, including its application to other article. Prof. Philip Baker, in his paper, has observed as follows:

"So far as I am aware, the inclusion of a beneficial ownership limitation in the capital gains article of specific, ***bi-lateral conventions is not part of the current treaty practice*** *of any state.*[16]"

- The **Mumbai ITAT,** in **Blackstone FP Capital Partners Mauritius V Ltd vs. DCIT**[17] has made the following observations:

"We find that unlike in article 10 or article 11 of the Indo Mauritius tax treaty, ***which specifically provides for beneficial ownership of interest or dividend in order to be entitled for a treaty protection, there is no such provision in article 13 of the Indo Mauritius tax treaty****. Article 10(2), for example, make it a condition precedent for availing treaty protection to dividend income that "recipient is the beneficial owner of the dividends", and Article 11(4) similarly provides that treaty protection can be availed when interest income is "derived and beneficially owned" by a person resident of the contracting state.*

[16] Para 54 of the report of Prof. Philip Baker
[17] TS-381-ITAT-2022 - Para 8

Such rider is however missing in article 13. It would appear to us that the concept of beneficial ownership being a sine qua non to entitlement to treaty benefits cannot, in the absence of specific provision to that effect, cannot be inferred or assumed**…..**"

- The Supreme Court of Canada in **Her Majesty vs Alta Energy Luxembourg SARL**[18]has observed as follows:

"…***BO is utterly foreign to Art 13***[19]*. ……For all these reasons, beneficial ownership would not be an appropriate anti-avoidance tool to curb tax treaty exploitation involving art. 13 dealing with the realization of capital gains….*[20]"

- The Spanish Supreme Court, in **Colgate Palmolive Case**[21] in the context of application of beneficial ownership in the Royalty article between Spain – Switzerland DTAA, the Court observed that the treaty article does not include BO in Royalty. Hence the concept of BO cannot be construed by resorting to OECD because soft law documentation cannot supersede DTAA[22]. The relevant text of the treaty is reproduced below:

[18] 2021 SCC 49
[19] Para 148
[20] Para 149
[21] ECLI:ES: TS:2020:3062
[22] The relevance of the beneficial ownership concept in tax treaty clauses that do not include it in their wording: a note on the Colgate-Palmolive case by Aitor Navarro

"Art 12 (2) - However, such royalties may be taxed in the Contracting State in which they arise, and according to that State's law, but the tax so charged shall not exceed 5 per cent of the gross amount of the royalties."

- Reference is invited to the tax treaty between **Singapore and Israel**[23]**,** where a specific requirement of BO in the Capital Gains Clause is bilaterally negotiated between the countries. The relevant text is reproduced below:

*"Art 13(5) - Gains derived by a resident of a Contracting State from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident, **if that resident is the beneficial owner of the property from which the capital gains are derived**".*

Arguments favouring application of BO to capital gains article

- The use of terms like "derived', or 'alienation', is indicative of the fact that only the real owner will be entitled to the gains. Accordingly, the aspect of BO is inherently present in the Capital Gain article[24].

[23] Reference taken from Beneficial Owner - Concepts and Trends presentation by CA Anish Thacker

[24] Capital Gains - 'Beneficial' Owner Alone (Not Nominee or Intermediary) Can Avail DTAA Exemption by CA Ashish Karundia

- The Korean Supreme Court in **KT Co Ltd**[25] denied Art 13 benefits to Malaysia Co under Korea-Malaysia DTAA, treating the Malaysian entities as a conduit entity. The Korean tax authorities held that the Malaysian entities to be conduits established for availing treaty benefits between Malaysia and Korea.

- The Russian Arbitral Court[26] applied the concept of beneficial ownership introduced in their domestic law in 2015 to deny treaty benefits on the sale of Russian Co shares by a Cypriot entity (Russia-Cyprus DTAA). The Court adopted the BO provisions under the domestic laws of Russia for the transaction on a retrospective basis. Based on the peculiarity of the transaction, the Court held that the transaction was structured in a way that avoided Russian taxes[27]. The Court observed that the Cypriot entity's only link was to pass on the funds to Russia.

- The **Bombay High Court** ruling in **Aditya Birla Nuvo Ltd. vs. DDIT**[28] rejected the Treaty benefits to Mauritius Co applying BO.

[25] Reported in Around the Globe Series by Taxsutra - TS-894-FC-2013(KOR)
[26] Resolution of the Arbitration Court of the Volga-Vyatka District No. F01-3058/2017 of 7 August 2017 on case No. ?11-6602/2016
[27] Beneficial owner as "all-in" test: the massive Russian weapon against treaty shopping by Milogolov Nikolay S and Melkova Elena V
[28] TS-5445-HC-2011(BOMBAY)-O

In this regard, it is pertinent to note the observation of the Mumbai ITAT in the case of Blackstone FP Capital Partner (supra) as follows:

"…..As a careful look at the text of the said judgment would show that it was a case in which the assessee had claimed that "AT&T Mauritius qualifies as a beneficial owner of the shares in the ICL" (see para 26 f) and it was thus not even the case of the assessee that the assessee is not required to be a beneficial owner to claim the treaty protection. It was in this backdrop that the matter was proceeded with. ***In our considered view, therefore, this judgment cannot be an authority for the proposition that the requirements of "beneficial ownership" can be read into the provisions of Article 13****. This decision, therefore, will have no bearing on the said question…..*[29]"

- The Mumbai ITAT in Blackstone FP Capital Partner (supra) further observed that *"…..it is absolutely fundamental that as what constitutes "beneficial ownership" must also be examined and categorical findings are given as to how these requirements of beneficial ownership are satisfied in the present case. These reasons are also necessary so that, if necessary, we, as indeed the Hon" ble Courts above, can take a call on the correctness of the stand of the*

[29] Para 9 of the ITAT Order

*Assessing Officer. **Both of these foundational issues, i.e. whether the concept of "beneficial ownership" is inbuilt in the scheme of Article 13 and, if so, what are the connotations of "beneficial ownership" in this context, need to be adjudicated upon by the Assessing Officer.** As these fundamental issues are being remitted to the file of the Assessing Officer for adjudication by way of a speaking order…..*[30]"

In the Miscellaneous Petition[31], the Mumbai ITAT has observed that "…***We had expressed our prima facie views on this aspect*** *but as none of the parties was head on that aspect, we had remitted it to the file of the Assessing Officer for proper adjudication on this foundational aspect*". The matter was recalled for adjudication by tribunal itself.

Conclusion

If one were to look at the judgment of the Delhi High Court closely, the revenue never argued the application of beneficial ownership to capital gains rather, they were arguing on the control and management of the Singapore entity for determination of its residential status i.e, whether it is located in Singapore or in the US.

[30] Para 10 of the ITAT Order
[31] TS-984-ITAT-2022 - Para 5

Nevertheless, the Hon'ble High Court took its liberty and went on to deal with the aspect of the application of BO to Capital gains and ruled its application negative. While the order of the High Court is pending before the Supreme Court, it is not clear whether the question of the beneficial owner is also challenged as part of the Special Level Petition.

While the arguments are on both sides, in my view, there is a strong merit in the non-applicability of capital gains, as the intent of BO seems to be addressing specific aspects of treaty shopping in the specified articles. Further, it will be interesting to see the relevance of the BO test when a transaction/ arrangement is questioned under the Principal Purpose Test/General Anti Avoidance Rules, etc.

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SUMMARY OF AAR/AAAR

No requirement to pay tax under Reverse Charge Mechanism on specified services by SEZ Unit

In case of M/s. Waaree Energies Limited (referred to as "applicant") (GUJ/GAAR/R/2024/09 dated 16th April 2024)

Facts of the case:-

- The Applicant is procuring GTA, legal services & security services which are liable to tax under reverse charge in terms of Notification No. 10/2017 – IT (Rate). The Applicant being an SEZ Unit is of the view, that they are not liable to pay GST under RCM.

Question before AAR:-

- Whether the applicant being an SEZ unit is required to pay tax under reverse charge mechanism on specified services in accordance with Notification No. 10/2017 – IT (Rate) as amended?

Interpretation of law by the Applicant:-

- Section 7 of SEZ Act, 2005 provides for exemption to all

services procured from Domestic Tariff Area (DTA) and further in terms of section 51, the provisions of SEZ Act, 2005 have an overriding effect on all other laws including taxation laws. CBIC has issued a clarification in the context of RCM on procurement of service by IFSC SEZ to the effect that, unit in SEZ can procure services where they are required to pay GST under RCM without payment of IGST provided the SEZ Unit furnishes a Letter of Undertaking.

- Rule 30 of SEZ Rules, 2006 provides that DTA supplier supplying goods or services to a unit shall clear the services, as in the case of zero-rated supply as per section 16 of IGST Act, 2017 either under bond or legal undertaking or under any refund procedure permitted under GST.

- Notification No. 18/2017 – IT (Rate) exempts services imported by a unit in SEZ for authorized operations from the whole of IGST. In terms of section 2(o) of SEZ Act, 2005, receipt of services by a SEZ Unit from DTA is also to be treated as imports.

- Even assuming that NN 10/ 2017 – IT (Rate) is applicable, there is the option of supply of services under LUT without payment of IGST as provided in respect of supplies made from DTA to SEZ unit under section 16(3) of IGST Act, 2017

- Reverse charge notifications cannot have any application in the instant case.

Observation of AAR

- Clarification was sought, as to whether the SEZ unit is liable to pay GST in respect of legal services, sponsorship services etc. received by an SEZ unit in IFSC, Gandhinagar, from a unit in DTA, which are chargeable to GST under RCM.

- Tax Research Unit, CBIC, New Delhi, clarified the following:- *Since the intention of the Legislature is not to tax supplies to unit in SEZ or a SEZ Developer which have been zero rated, it is, therefore clarified that a unit in SEZ or the SEZ developer can procure such services, where they are required to pay GST under reverse charge without payment of IGST provided the SEZ Unit or developer furnishes a letter of undertaking in place of a bond.*

- There is no denying fact that the aforementioned clarification was given to a specific SEZ Unit and is not a circular. However, there is no bar in borrowing the rationale of the aforementioned clarification. The applicant SEZ Unit can procure the said services for use in authorized operations without payment of IGST provided the applicant furnishes a LUT or bond as specified in Notification No. 37/2017 – CT.

Ruling of the AAR:-

- The applicant being an SEZ unit, is not required to pay GST under RCM on specified services subject to furnishing a LUT or bond.

Provision of marketing services to foreign universities qualifies as export of service and not intermediary?

In Re: M/s. Center for International Admission and Visas (CIAV) – Telangana AAR - TSAAR Order No.09/2024 dated May 09, 2024

Facts of the case:-

- The Applicant has entered into agreements with foreign universities to provide referral services. Broadly, under the scope of services, the Applicant provides referrals of the aspirants who wishes to apply and study aboard to the universities located outside India.

- The Applicant is responsible to prepare the case of the aspiring student and refer it to the concerned foreign university, as per the requirement of the aspiring student and the fitment to the university. The Applicant is not bound to refer student to a college or university, in particular. On the contrary, the Applicant considering the merits of the aspiring student and particulars of the college/ university, refers the case.

- It is pertinent to note that the university retains full and complete discretion about whether to accept a student application for enrolment. The Applicant has no authority to guarantee the acceptance of a student by the university. Thus, the Applicant works as an independent contractor providing its own service of 'marketing/ recruitment/ referral' to the foreign universities.

Question before AAR:-

- Whether the services provided by the applicant would qualify as export of services or as intermediary ?

Observations of AAR:-

- The Applicant is nowhere contractually connected with the prospective students, who it refers to the foreign university. It is the foreign university which renders consideration to the Applicant for undertaking the engagement as per the agreement.

- The person who is contractually responsible for making payment for a supply shall be considered as recipient of such supply. As per the terms of the underlying agreement, consideration is payable in convertible foreign exchange by the foreign university for the services rendered to it by the

Applicant. The Applicant cannot have any contractual arrangement with the prospective students. Therefore, the recipient of the services of the Applicant, is the foreign college and university and not the student(s).

- A perusal of the terms of the underlying agreements between the Applicant and foreign universities amply clarifies that the Applicant is not an agent of foreign university. The Applicant cannot represent himself as an agent or broker or a similar person to enter into a contract, with third parties i.e. the prospective students, on behalf of foreign universities.

- In fact, neither the Applicant has any role or responsibility for services provided by foreign universities to the prospective students nor it can influence or interfere in the selection process of prospective students. The applicant is an alien to the arrangement between the foreign university, and prospective students. Similarly, the prospective student is under no obligation to join the foreign university, they have been referred to; the decision to join remains entirely at their discretion. The terms and conditions of the agreement reflects that the Applicant is under a principal-to-principal contractual relationship with

the foreign universities, whereby it is providing its independent and main service of marketing and referral to its service recipient i.e., foreign universities.

- The applicant is only facilitating the aspirant students and introduces them to the college and if these students gets admission to the college, the applicant gets certain commission which is in nature of promoting the business of the college. So the nature of service provided by the applicant is that of promotion of business of their client, for which, in turn, they get a commission. The same would be covered under services of marketing and referral, which is not the principal service provided by the main service providers i.e, foreign universities. As the applicant did not arrange or facilitate main service i.e., education by foreign universities, in that circumstances, the applicant cannot be called as an intermediary.

Ruling of AAR:-

The activity of the Applicant for the foreign universities should qualify as 'export of service' in terms of Section 2(6) of IGST Act. The Applicant should not be considered as 'intermediary' for the purpose of Section 2(13) of the IGST Act

ITC eligibility on Demo cars purchased by a dealer.

M/s. Landmark Cars East Private Limited – West Bengal AAR Order No. 01/WBAAR/2024-25 dated April 04, 2024

Facts of the case:-

- Applicant is an authorised agent of Mercedes Benz for supply of cars, related spare parts and is also engaged in providing various services such as repairs, warranties, roadside assistance and servicing.

- Applicant functions as a self-employed commercial agent with the responsibility of brokering the sales of vehicles on behalf of Mercedez Benz India (MB India).

Question before AAR:-

1. *Whether the applicant is entitled to claim input tax credit charged and paid on inward supply of car from Mercedes Benz India which are used for demonstration purpose to the potential customer interested in buying Mercedes Benz Car, commonly known as Demo cars?*

2. *Whether amount received by the applicant from Mercedes Benz INDIA towards reimbursement of "Loss on Sale of Demo Car" constitute as supply?*

Interpretation of law by the applicant:-

- The Applicant records demo cars as purchase of inventory

(Stock in Trade) in its books of account. When these cars are sold, they are removed from the inventory and entire sale proceeds are accounted for in Sales account.

- In the motor vehicle industry, a demonstration vehicle is an indispensable tool for promoting sales. It allows potential customers to experience the vehicle first-hand through test drives, helping them make informed purchase decisions. Demo vehicles provide customers with the opportunity to take a test drive, which is a critical step in the car buying process. This first-hand experience can significantly influence a customer's decision to purchase a vehicle. Motor vehicle dealers are typically required to acquire demonstration vehicles from their principal supplier. These vehicles are acquired as a business necessity to support the dealership's sales and marketing efforts.

- Section 16(1) of the CGST Act, 2017 inter-alia entitles every registered person to take ITC on purchase of goods used in the course or furtherance of business. Any activity conducted with the purpose of achieving business objectives, ensuring business continuity, and promoting business stability inherently qualifies as an activity in the course or furtherance of business.

- Procuring demo vehicles is in the course or furtherance of business. Therefore, the applicant meets all the conditions specified in section 16(1) for claiming ITC on the procurement of demo vehicles.

- Section 17(5)(a)(A) does not specify a timeline for when the purchased car must be sold. It simply requires that the intent to resell the car exists. When a dealer acquires a car, their clear intent is to resell it as promptly as possible.

- As per the demo car policy, it is mandatory for the applicant to purchase demo cars, use them as demonstration / test drive vehicles and sell them after they have been used for a specified mileage or period, as referred in the policy. Failure to comply with this requirement could disrupt the applicant's business. As the demo car purchased, is ultimately for further sale, ITC should not be blocked. Motor vehicle which is purchased by the applicant remains the same make and model motor vehicle at the time of its sale. Section 17(5) doesn't prefix the word 'motor vehicle' with the word 'new', it merely prescribes that the person should use the motor vehicle in further supply of same vehicle.

- When a loss is incurred at the time of selling a demo car, MB INDIA reimburses this loss to

the applicant. As per the agreement, the applicant is initially bearing the loss and subsequently recovering it from MB INDIA. This aligns with the concept of 'tolerating an act or a situation' and would accordingly be liable to tax. The applicant is issuing tax invoice along with GST to recover the loss amount from the MB INDIA. The applicant submits that such transaction should be treated as a part of the main supply, and hence, MB INDIA is required to issue a credit note for the same.

- In the present case, the initial invoicing for the demo car is based on the agreed pricing. The Applicant is required to sell the demo car in the market after a specified holding period of 3 to 6 months. This sale can result in either a profit or a loss. If a loss occurs during the sale, MB INDIA commits to reimburse this loss. Conversely, if a profit is realized, MB INDIA retains the right to recover this profit.

- It is essential to understand that in both situations - the reimbursement of losses and the recovery of profits are inherently linked to the sale of the demo car. Rather than treating these transactions as separate and potentially taxable supplies of services under the category of 'tolerating an act', MB INDIA should issue specific Credit Notes in the case of a

loss incurred during the demo car sale and Debit Notes when a profit is realized in alignment with the provisions of Section 34 of the GST Act.

Observations of AAR:-

- The provisions of the CGST Act nowhere specifies that ITC shall not be available in respect of any outward supplies which is made at a price lower than its procurement value. Section 17(5)(a)(A) restricts input tax credit in respect of motor vehicles, with a specific seating capacity, for transportation of persons except when they are used for further supply of such motor vehicles. The word 'such' as used in the expression 'further supply of such vehicles' relates to the vehicle only that was purchased. The fact that the condition of a demo vehicle at the time of its further supply has undergone some deterioration does not imply that the vehicle when supplied by the applicant has ceased to be such vehicle that was purchased. The demo vehicles are purchased all along for further supply with the condition that they will be kept for a specific period of time. Restriction of input tax credit as imposed in section 17(5)(a)(A) of the GST Act is not applicable on purchase of demo vehicles which are supplied by the applicant after the specified time.

- Any activity or transaction as specified in para 5(e) of Schedule II of the CGST Act, 2017 would constitute a supply of services if the said activity or transaction fulfills two parameters, (i) there must be a "consideration", and (ii) the activity or transaction is made or agreed to be made "in the course or furtherance of business"

- The applicant has entered into an agreement with MB INDIA with a specific condition towards 'Demo Car Loss Sharing" knowing very well that it may suffer a loss at the time of selling of demo vehicle since the vehicle would have undergone some deterioration while providing test drive facility to the prospective buyers. This compensation is paid as a result of the contract and therefore would qualify to be a 'consideration' vide the settled precedents.

Ruling of AAR:-

- The applicant is entitled to claim input tax credit charged and paid on inward supply of car which are used for demonstration purpose and supplied further after a specified time period.

- The amount received by the applicant from Mercedes Benz India towards reimbursement of "Loss on Sale of Demo Car" shall be regarded as consideration received against supply of services of 'agreeing to tolerate an act'

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DIVIDEND, ELECTION AND MONSOON BONANZA FOR INDIA

CA. KANDASWAMY

The Central Board of Directors of Reserve Bank of India, have approved a transfer of Rs 2,10,874 crores as surplus to the Central Government for FY 202-24, on 22nd May 2024. To put in perspective, this amount was 141% higher than Rs 87416 crores of such transfer for FY 2022-23.

RBI's fund transfer to Government will not be treated as a revenue income, but this inflow will help the Central Government to reduce its fiscal deficit for the current fiscal. This transfer can help the government to borrow less from the market, with a potential to reduce the borrowing costs on the one side, and preventing the government from crowding out corporate borrowing programme.

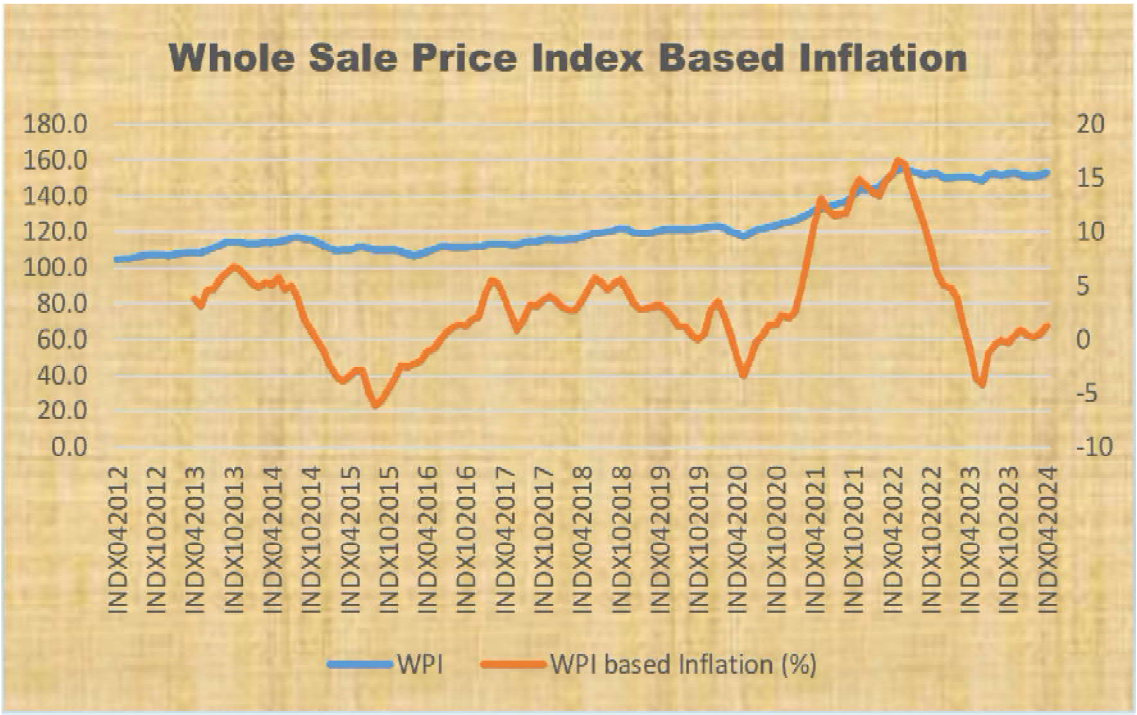
The interim budget had set a fiscal deficit target of 5.1% of the GDP for 2024-25, down from 5.8% in 2023-24. The interim budget had factored in Rs 1.02 lakh crores of surplus to be transferred from RBI to Government, and the incremental Rs 1.08 lakh crores is about 0.35% of GDP, and gives leg

room for the new Government which will present the full budget for FY 2024-25!

The General Elections for Lok Sabha and a few State assemblies have potential to improve spending in the economy in general and the rural economy in particular. In the past few years, the Indian GDP growth was powered by Capita Formation to a great extent, and government spending to some extent. The weakest link was the poor growth in agricultural income, which is estimated to have grown by mere4.7% in FY 2022-23, and this growth tumbled down to mere 0.7% in FY 2023-24.

Indian Meteorological Department (IMD) has forecast the Southwest Monsoon seasonal rainfall over the country as a while to be normal at 96% of the Long period Average with a model error of +/-4%. As a result, the rural income and spending is expected to be better for FY 2024-25.

The WPI based inflation has been racing ahead from 0.2% in February 2024 to 0.5% in March 2024, which has further ascended to 1.3% in April 2024. Low base of the previous year is helping WPI based inflation to remain lower, as the country witnessed negative inflation for the period from April 2023 to December 2023.



The pace of growth in Coal Production has been consistently decelerating from 18.4% surge in October 2023 to 10.9% growth in November 2023, which gave way for 10.8% increase in December 2023. Breaking the decelerating trend, Coal production improved by 11.6% in February 2024, largely due to the leap year benefit of 29 days in February 2024 as against 28 days in February 2023. The deceleration trend continued in March 2024, when coal production recorded mere 8.7% growth on y o-y basis.

The pace of growth in Steel production too generally decelerated from robust 16.3% growth in August 2023, which came down to 14.8%, 13.6%, 9.8%, 8.3% growth in September 2023,

October 2023, November 2023 and December 2023 respectively. But the steel sector recorded acceleration in the pace of growth in production to 8.7% in January 2024 and to 9.1% growth February 2024, only to record sharp deceleration to mere 5.5% growth in March 2024!

Steel industry is facing the challenge of rising carbon emissions amid growing demand. India's per ton crude steel emission is 25% higher than the global average and is attributed to a slew of factors like lack of natural gas, the quality of available iron ore, which requires beneficiation for use in Direct Reduced Iron (DRI) processes and the limited availability of scrap.

On the contrary, there was general acceleration in the pace of growth in power generation from mere 1.2% growth in December 2023 leaving way for 5.7% increase in January 2024 and 7.5% rise in February 2024, and finally 8.0% in March 2024

Overall, 8 infrastructure industries together recorded 5.2% growth in March 2024, down from Leap year benefit ceded 7.1% growth recorded in February 2024, and still representing decent growth from 4.1% growth recorded in January 2024. Viewed differently, India recorded healthy 10.4% growth in 8 infrastructure industrial production in FY 2021-22, but the growth has decelerated therefrom to 7.8% in FY 2022-23 and to 7.5% in FY 2023-24.

India started off FY 2024-25 on a weak note from merchandise trade point of view. Our import of Petroleum, Crude & Products surged by 20.2% to US$16.463 billion while that of gold imports trebled (209% rise) to US$ 3.115 billion in April 2024. As a result, India's merchandise imports in April 2024 surged by 10.3% to US$ 54.09 billion while exports were relatively flat at US$ 34.99 billion (US$ 34.62 billion in April 2023).

India's merchandise exports recorded mere 1.1% growth to US$ 34.99 billion while service exports recorded 14.7% increase to US$ 29.57 billion in April 2024. On the contrary, service imports recorded sharp 21.6% spike to US$ 16.97 billion during this period.

Overall, trade deficit widened by 149% to US$ 6.51 billion due to faster pace of rise in merchandise and service exports, than the pace of increase in merchandise and service imports.

India's short to medium term advantages range from fiscal boost from RBI transfer to Government, Union Elections led additional spending and predictions of good monsoons giving hope for better growth in Rural Economy. Rate cuts in US can usher in strong growth in Capital Formation with increased FDI inflows into India.

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EXCEL TIPS

DROP FUNCTION

CA. DUNGAR CHAND U JAIN

DROP function in Microsoft Excel is a dynamic array function introduced in Excel 2021 for Microsoft 365 subscribers. It allows users to remove specified elements from an array or range and return the remaining elements as a new array. This function simplifies the process of filtering data without the need for complex formulas or manual operations.

Syntax :

=DROP(array, rows,[columns])

The DROP function syntax has the following arguments:

array The array from which to drop rows or columns.

rows The number of rows to drop. A negative value drops from the end of the array.

columns The number of columns to exclude. A negative value drops from the end of the array.

How Drop function works :

The 5 simple facts below will help you better understand the how DROP function works :

DROP is a dynamic array function. You enter the formula in the upper left cell of the destination range, and it automatically spills the results into as many columns and rows as needed.

The array argument can be a range of cells, an array constant, or an array of values returned by another function.

The rows and columns arguments can be positive or negative integers. Positive numbers drop rows/columns from the start of the array; negative numbers - from the end.

The rows and columns arguments are optional, but at least one of them should be set in a formula. The omitted argument defaults to zero.

If the absolute value of rows or columns is greater than or equal to the total number of rows and columns in the array, a #CALC! error is returned. In other words, Excel returns a #CALC! error to indicate an empty array when rows or columns is 0.

Excel returns a #NUM when array is too large.

Examples :

Consider the following table containing sales data for different products:

	A	B
1	**Product**	**Sales (INR)**
2	Product A	₹100
3	Product B	₹150
4	Product C	₹200
5	Product D	₹120
6	Product E	₹180
7		

Example 1 :

=Drop (A2:A6, 2) returns

Product C
Product D
Product E

Example 2 :

To drop 1st two products along with price, the formula to be used in A9 is =Drop(A2:B6,2)

Likewise, to drop last two products along with price, the formula to be used in A13 is =Drop(A2:B6,-2)

8	=DROP(A2:B6,2)	
9	Product C	₹200
10	Product D	₹120
11	Product E	₹180
12		
13	=DROP(A2:B6,-2)	
14	Product A	₹100
15	Product B	₹150
16	Product C	₹200
17		

Example 3 :

To drop 2 rows and 2 column, the formula is =Drop(A2:B6,2,1)

18	=DROP(A2:B6,2,1)
19	₹200
20	₹120
21	₹180
22	

Example 4 :

Sort and drop : In situation when you want to re-arrange the values in the source array before dropping some columns or rows, leverage the SORT function that can sort the array by any column you want in ascending or descending order.

For example, you can sort the below range by the 2nd column (named Price) from highest to lowest using this formula:

=SORT(A2:B6, 2, -1)

And then serve the sorted array to the DROP function instructing it to omit the 2 lowest results:

=DROP(SORT(A2:B6, 2, -1),-2)

=SORT(A2:B6, 2, -1)	
Product C	₹200
Product E	₹180
Product B	₹150
Product D	₹120
Product A	₹100
=DROP(SORT(A2:B6, 2, -1),-2)	
Product C	₹200
Product E	₹180
Product B	₹150

Note : In case there are not enough empty cells below or/and to the right of the formula, a #SPILL error occurs. To fix it, the spill range has to be cleared.

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SUMMARY OF CASE STUDIES - DIRECT TAXES, DISCUSSED DURING 24TH ARC HELD @ MUNNAR

REPLY TO CASE STUDY 1 : ON SEC 43B(H)

Facts of the Case :

S.No	Particulars	Dates
1	Date of Purchase (on Credit)	25th February 2024
2	Date of Balance Sheet	31st March 2024
3	Date of Payment	30th April 2024

Reply to Question No. 1:

Disallowance under Sec 43B(h) would arise only when the following conditions are satisfied

a) Payment is made to an Enterprise as defined in Sec 2(e) of the MSMED Act 2006

b) Such enterprise is a Micro or Small enterprise as defined in Sec 2(h) and 2(m) of the MSMED Act 2006

c) Payment is made beyond the time-limit prescribed in Sec 15 of the MSMED Act 2006

Definitions under MSME Development Act 2006 are as follows,

- Sec 2(e) of the MSMED Act defines "enterprise" as follows,

  Enterprise means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act 1951 or engaged in the providing or rendering of any service or services.

- Section 2(h) of the MSMED Act defines "micro-enterprise" to mean an enterprise classified as such under sub-section (1) of Section 7.

- Section 2(*m*) of the MSMED Act defines "small enterprise" to mean an enterprise classified as such under sub-section (1) of Section 7

Classification as provided in Sec 7 of the MSMED Act 2006 is as follows,

- Micro enterprise is an enterprise where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;

- Small enterprise is an enterprise where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and

- Medium enterprise is an enterprise where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

In the present facts of the case, the payment is a made to a MSME Dealer. Although Dealers are allowed to be registered under the MSME Act (Udyam Portal) for the limited purpose of availing credit facility, they do not qualify as enterprise for the purpose of definition of Sec 43B(h) of the Income Tax Act 1961.

So, no disallowance arises for delayed payment of purchase amount.

Reply to Question No. 2:

Proviso to Sec 43B states as follows,

Provided that nothing contained in this section ***except the provisions of clause(h)*** *shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return*

In view of the above specific provision, restricting the applicability of proviso

to Sec 43B to cases mentioned in clause (h) of Sec 43B, it cannot be argued that the benefit of proviso to Sec 43B should be given to amounts paid within the due date allowed under Sec 139(1).

If the amount due to Micro or Small enterprise is not paid before the Balance Sheet date ie, 31st March of each year, the amount thereof is to be disallowed in the computation of total income and will only be allowed in the year of payment of such amount.

Reply to Question No. 3:

In order to answer this question, lets us assume that disallowance under Sec 43B(h) is applicable in the first place.

The "appointed date" is defined in Sec 2(b) of the MSMED Act 2006 to mean the day following immediately after the expiry of the period of 15 days from the day of acceptance or the day of deemed acceptance of any goods or services by a buyer from a supplier.

Explanation to Sec 2(b) of the MSMED Act 2006 defines the day of acceptance to mean

a) The day of actual delivery of goods or rendering of services or

b) Where any objection is made in writing by the buyer regarding the

acceptance of goods or services within fifteen days from the date of delivery of goods or rendering of services, the day on which the objection is removed by the supplier.

In the question raised, the date of receipt of fresh goods (date of removal of objection) ie, 15th April 2024 would be treated as the "day of acceptance" for the purpose of calculating the "appointed date".

In the present facts of the case, as the payment is made within 15 days from the day of acceptance ie, on 30th April 2024, no disallowance would arise.

Reply to Question No. 4:

In the case of presumptive taxation under Sec 44AD, the profits and gains from a business is deemed to be a sum equal to 8% of the Total turnover or gross receipts of the assessee in a previous year or a sum higher than the aforesaid sum as claimed to have been earned by the assessee.

Sec 44AD starts with a non-obstante clause which is as follows,

"*Notwithstanding anything to the contrary contained in Sec 28 to Sec 43C……..*"

Hence, all allowances which are required to be reduced from the profits are deemed to have been allowed and all disallowances which are required to be added to the profits are deemed to have been so added.

In view of the deeming fiction, no further disallowance under Sec 43B(h) can be further made to the profits admitted under Sec 44AD.

Hence, if M/s ABC filed its Return of Income opting for presumptive taxation under Sec 44AD, no further sum is required to be disallowed under Sec 43B(h).

However, there is one contrary decision on the same decided by Panaji bench of the ITAT which is Good Luck Kinetic Vs ITO 69 SOT 416, (2015) 172 TTJ 268 wherein it was held that Sec 43B overrides Sec 44AD and therefore disallowance under Sec 43B would arise even when the presumptive provisions are applicable.

But the entire scheme of presumptive taxation is to simplify the process of levying the tax on income. So, the above decision requires re-consideration in view of intention of the law. Also, in Gopalsingh R. Rajpurohit Vs ACIT 149 Taxman 32 (Ahd) it was held that additions u/s 40A(3) are not sustainable when presumptive taxation is followed since the provisions of Sec 28 to 43C including Sec 40A(3) would not be applicable.

Even when addition is made by estimation of profits, no further disallowance are allowed to be made.

Indwell Constructions 232 ITR 776 (AP)

In the context of 40(a)(ia) r.w.s 44AD

a)	Mark Construction	(2012) 23 Taxman 398 (Kol.)
b)	Bipinchandra Hiralal Thakkar	(2021) 124 taxmann.com 236 (Surat Trib)
c)	Jaharlal Mukherjee	ITA No. 73 (Kol of 2014) dated 05.08.2015

Considering the law laid down in the above caselaws, one can take a stand that no disallowance under Sec 43B would arise when profits are offered under Sec 44AD of Income Tax Act 1961.

REPLY TO CASE STUDY 2 : ASSESSMENT IN RESPECT OF "OTHER PARTY" IN SEARCH

Facts of the Case :

1. Search was conducted on XYZ and a ledger titled PQR was found. AO noted that the transactions pertain to PQR and accordingly handed over the seized material to AO of PQR for action under Sec 153C.

2. Notice under Sec 153C was issued on PQR after recording satisfaction. During assessment AO observed that transaction of PQR in ledger maintained by XYZ did not match with transactions of XYZ in the ledger maintained by PQR.

3. PQR stated that the ledger titled PQR found with XYZ did not belong to PQR alone but contained transactions with its associates as well. PQR stated that it can confirm the transactions between PQR and XYZ but not the transactions between associates and XYZ.

4. PQR also stated that satisfaction has not been properly recorded under Sec 153C.

5. AO rejected the contentions and made addition for the difference as undisclosed income.

Answers :

1. Whether the AO was justified in issuing notice under Sec 153C of the IT Act?

a) Sec 153C states as follows,

Notwithstanding anything contained in section 139, Section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(*a*) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(*b*) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A :

b) The Hon'ble SC in the case of M/s Calcutta Knitwears in its judgment in Civil Appeal No.3958 of 2014 dated 12.3.2014 has laid down that for the purpose of Sec 158BD of the Act, recording of a satisfaction note is a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person u/s 158BD.

c) Circular No 24/2015 dated 31.12.2015 clarified that for the purpose of assessments u/s 153C, the same principles as laid down by the Hon. SC in the above case would apply as both relate to assessment of connected person.

d) DCIT Vs M.G. Metalloy Pvt. Ltd. (ITAT Delhi) - 3631/Del/2019 – The seized documents mentioned in the satisfaction note were found to be unrelated to the assessee and non-incriminatory.

e) Therefore, the AO of the PQR was required to note his satisfaction that the material belonged to the PQR before issuance of the Notice.

f) From the facts of the case, it would appear that proper satisfaction of existence of undisclosed income belonging/pertaining to PQR does not seem to have been established. It is not clear as to whether the AO of XYZ has recorded satisfaction of existence of undisclosed income. Materials seized could not be fully related to undisclosed income of PQR.

g) In the present case, the AO of PQR was not correct in issuing Notice under Sec 153C as there was no proper recording of satisfaction by the AO.

2. Whether the action of the AO in making the addition of the unmatched transactions from the extracted ledger of M/s XYZ is correct, particularly in the absence of concrete evidence other than the branch name of PQR?

Sec 153C postulates addition of undisclosed income of a person other than the searched person whose materials are found in the premises of

the searched person. The procedures laid down in Sec 153C are to be strictly followed starting from recording of satisfaction by the AO of the searched person.

Addition has to be based on incriminating documents found as a result of search.

In the present case, neither is the material found during the course of search belonging entirely to PQR nor a proper satisfaction is recorded.

Hence, addition on the basis of material seized without confirming the validity of the data appearing in the same is not correct and such additions have to be deleted.

3. **Whether the onus is on the department or the assessee to prove that the transactions belonged/did not belong to the assessee.**

SC's decision in Supermall (2021) 130 taxmann.com 451 (SC) ; 423 ITR 281

Scope of Sec 153C: The SC has clarified that Sec 153C is not an independent provision but part of the scheme of search and seizure provisions. Sec 153C empowers the tax authorities to assess the undisclosed income of any other person on the basis of the documents seized during the search conducted on a person or entity.

Applicability of Sec 153C: The SC has emphasized that Sec 153C can only be invoked if the seized material pertains to a person other than the searched person. The court has held that there must be some incriminating material found during the search.

Timelines for assessment: The SC has clarified that the assessment of income u/s 153C has to be completed within a period of six months from the end of the month in which the documents or assets are handed over to the AO. This is an important clarification as it sets a clear timeline for the tax authorities to complete the assessment of income u/s 153C.

Opportunity of being heard: The SC has held that a reasonable opportunity of being heard must be given before passing the assessment order u/s 153C. The principles of natural justice must be followed.

Burden of proof: The SC has clarified that the burden of proof lies on the tax authorities to establish that the undisclosed income belongs to a person other than the searched person.

The court has held that the tax authorities must show some incriminating material found during the search operation, which leads to the belief that the undisclosed income belongs to a person other than the searched person.

Once the tax authorities establish this, the burden shifts to the person against whom the assessment is proposed to be made to prove that the undisclosed income belongs to them.

REPLY TO CASE STUDY 3 : DTVSV SCHEME AND RE-ASSESSMENT

Facts of the Case :

1. During the course of Assessment of M/s ABC, the AO disallowed the interest on borrowed funds by stating that the assessee did not disallow any interest under Sec 36(1)(iii) in respect of investment made in sister concern abroad.

2. Assessee filed an appeal and during the pendency of appeal, it availed the benefit of DTVSV Scheme and closed the matter

3. AO issued Notice under Sec 148A for 3 reasons

i) There are calculation errors in interest disallowed on proportionate basis and the disallowance has to be enhanced

ii) Audit query pointed out that the assessee has not substantiated the deposit of demonetised notes as there were no questions asked by the AO in original assessment.

iii) Employees share of ESI/PF was not disallowed in the original assessment.

Answers :

1. **Whether the action of the AO is justified in re-opening an assessment already concluded by availing the DTVSV Scheme?**

The action of the AO in re-opening an assessment already concluded by availing the DTVSV Scheme is bad in law for the following reasons.

h) Section 5(3) of DTVSVS provides that every order passed u/s 5(1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.

i) Hence, the matter which was a subject matter of the DTVSV Scheme has attained finality and the same cannot be subjected to re-opening. It is NOT the amount of income in respect of the issue in the DTVSV which has attained finality but the matter or the issue itself which has attained finality. Hence, the same cannot be subjected to re-opening.

2. Whether the issue not considered at the time of original assessment be re-visited under Sec 148A without any concrete evidence/material that income has escaped assessment.

Notice under section 148 can be issued only if there is an information with the assessing officer which suggest that income chargeable to tax has escaped assessment in the case of assessee for the relevant assessment year.

Information has been defined as per Explanation 1 of Section 148 of the Act - Information with the AO which suggests that the income chargeable to tax has escaped assessment-

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal.

Before the issue of Notice under Sec 148A, the AO must conduct enquiry with respect to the information which suggests that the income chargeable to tax has escaped assessment.

There must exist new tangible material on hand for the AO to issue Notice under Sec 148A. Re-appraisal of same information amounts of "Change of Opinion" and the same is not permissible reason/ground for re-opening of concluded assessments.

In the present case, the audit objection must state the grounds on which assessment was not made in accordance with the provisions of the Act. The non-verification of an item during the course of assessment does not amount to not completing the assessment in accordance with the provisions of the Act.

Hence, as the audit objection, in the present facts of the case, does not amount to information and therefore the AO is not required to issue a Notice under Sec 148A of the Income Tax Act 1961.

3. Is the notice for re-opening valid for a period beyond 3 years, if the income escaping the assessment on matters other than those settled by DTVSV scheme does not exceed Rs 50 lakhs

Sec 149 of the Income Tax Act 1961 states as follows,

No notice under section 148 shall be issued for the relevant assessment year,—

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (*b*);

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the

form of –

(i) an asset;

(ii) expenditure in respect of a transaction or in relation to an event or occasion; or

(iii) an entry or entries in the books of account, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more

Hence, no Notice under Sec 148 can be issued after the lapse of 3 years from the end of the assessment if the amount of income escaping the assessment is less than 50 lakhs.

In this case, if reopening is held to be bad in respect of interest disallowance proposed to be enhanced and covered by DTVSVS, the income purported to have escaped assessment would fall below Rs 50 lacs. In such an eventuality, the reopening would become bad in law.

Normally, one cannot give life to a reopening by bringing precluded things as permissible for the purpose of reopening. If this is held to be permissible,

then all assessments would be in a position to be reopened at any stage beyond 3 years by simply ensuring that the aggregate of the items considered for reopening exceeds Rs 50 lacs. This cannot be the intention of the legislature.

4. **If the assessee is able to demonstrate that there was sufficient cash balance in the books of accounts as on 8th November 2016 than the SBNs deposited, can the AO still call for bank slips to verify deposits of demonetised notes.**

   In the case of **Lakshmi Rice Mills vs Commissioner of Income Tax** (97 ITR 258, Patna High Court), it was held that when the books of account of the assessee were accepted by the revenue as genuine and the cash balance shown therein was sufficient to cover high denomination notes held by the assessee, then the assessee was not required to prove the source of receipt of said high denomination notes, which were legal tender at that time.

Hence, the AO need not call for the bank slips to verify the deposits of demonetised notes.

However, if the AO still calls for bank slips, it is advisable to submit the same to prove that assessee had adequate source for deposit of SBNs. The requirement for submission arises from the fact that assessee can hold both

SBNs and non-SBNs in his cash balance as on 8th November 2016. So, it is advisable to submit all the evidence available with the assessee to ensure adequate grounds against re-opening of assessment.

REPLY TO CASE STUDY 4 : CASH DEPOSITS DURING DEMONETISATION

Facts of the Case :

1. M/s PA is a pharmaceutical distributor. It deposited Rs 40.82 lakhs of SBN money into its bank acount from 10.11.16 to 23.11.16. AO allowed benefit of Rs 27 lakhs from opening cash balance and disallowed Rs 13.82 lakhs, thereby taxing it as unexplained investment and taxed it as per Sec 115BBE.

2. M/s PA admitted that they collected SBNs even after 08.11.16 relying on Press Note and newspaper clipping. However, AO did not accept the submission.

Answers :

1. **Advice M/s PA on various provisions of the Income Tax Act as also the effect of demonetisation and the carrying on of the business in SBNs post demonetisation, particularly with reference to legality and taxation of such amounts?**

a) M/s PA, under an honest belief collected SBNs during the demonetisation period. Although the same is an offence under other laws, it has no impact on the taxability under the Income Tax Act 1961.

b) As long as M/s PA is able to prove that the source of deposit is his sales money, the AO cannot tax the same as unexplained investment. The basic premise for taxability of unexplained investment is the source of income is not explainable. In the present case, M/s PA is clearly able to explain the source of cash deposit which is his sales money.

c) Hence, even though M/s PA committed an offence, there would be no taxability on account of the same under the Income Tax Act 1961. However, M/s PA would be liable under other laws.

2. How would you guide him in filing an appeal and successfully pursing the same?

M/s PA would have to ensure that he explains the source of cash deposit in the following ways during the course of appeal

a) Sales made in the demonetisation period vs cash collected

b) Purchases made either before or during the demonetisation period to justify the sales made during demonetisation period.

c) Quantity reconciliation

d) Sales Tax paid during that period and Sales Tax returns filed during that period

e) Sales made during the demonetisation period Vs Sales made prior to demonetisation period Vs Sales made in the previous year during the period corresponding to demonetisation period.

f) Cash collected during the demonetisation period Vs bank counterfoils for deposit of money

g) Cash book during the demonetisation period

h) Manner in which the payments are made to the creditors for purchases made before or during the demonetisation period

Submission of above information and any additional information would be helpful in pursuing the case at the appellate forums.

3. Examine the aspect of taxability under IT Act, even though the transaction may be prohibited under some other law or notification.

Prohibition for dealing in demonetized notes is probably an offence under a different law and may not lead to an automatic disallowance under Income Tax Act. This is not a case of incurring an expenditure which is prohibited by law so as to fall within the clutches of Sec 37 of

the IT Act. On the contrary, where despite dealing in prohibited currencies, the same has been offered as income, it would amount to double taxation if the same amount is taxed again.

ITO Vs Ashapura Petrochem Marketing Pvt Ltd (ITAT Ahmedabad) – ITA No. 511/Ahd/2020

Findings of ITAT - Thus it is clearly established that AO on one side accepting the source of cash deposit and on the other side, he is making the cash deposit as unexplained cash credit which is self-contradictory.

Hirapanna Jewellers Vs ACIT (ITAT Vizag) - ITA No.253/Viz/2020

Findings of ITAT - It is held that once the assessee admits the sales as revenue receipts, there is no case for making addition u/s. 68.

Sri Bhageeratha Pattina Sahakara Sangha Niyamitha VS ITO – ITA Vs No.646/Bang/2021 (Order Dt. 18.02.2022)

The AO noticed that the assessee society has deposited "Specified bank notes" (demonetized notes) in the account maintained by it with CDCC Bank, Hosadurga. When enquired about the sources for making the above deposits, the assessee submitted that they represent cash received by it from its members towards repayment of loan, Pigmy collection, etc. The case of the A.O is that the assessee has collected the demonetized notes after 8.11.2016 in violation of the notifications issued by RBI.

Accordingly, he has taken the view that the above said amounts represents unexplained money of the assessee.

ITAT noticed that the assessee had explained as to why it has collected demonetized notes after the prescribed date of 8.11.2016. The assessee had explained that it has stopped collection after the receipt of notification dated 14.11.2016 issued by RBI. ITAT was unable to understand as to how the contraventions, if any, of the notification issued by RBI would attract the provisions of sec. 68 of the Income tax Act. Accordingly, addition was deleted.

Considering the above caselaws, one can conclude that accepting SBNs during the demonetisation period would not lead to taxability as long as one is able to prove the source of cash deposit to the satisfaction of the AO or CIT(A) or any other appellate authority.

REPLY TO CASE STUDY 5 : PRINCIPLE OF MUTUALITY

Facts of the Case :

1. Madras Cricket Club earns income by way of subscription and services to members as well as non-members

2. It also lets out room through booking made by it's members, though the guests staying there may be non-members

3. It also earns interest on deposits placed with banks, which are its Corporate members.

Law relating to Principle of Mutuality

The principle of mutuality is routed in common sense. A person cannot make profit from oneself. Implies that a person cannot earn profit from association that he shares a common identity with.

Essence of the principles lies in the commonality of the contributors and the participants who are beneficiaries.

The three principles which have to be satisfied for invoking the Principle of Mutuality are as follows,

(1) the identity of the contributors to the fund and the recipients from the fund,

(2) the treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate, and

(3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

The crucial issue that arises for consideration in cases where it is claimed that on the basis of the principle of mutuality, the receipts by the "society" or "club" is exempt from taxation, has been succinctly stated by the Judicial Committee of the Privy. Council in Fletcher vs. Income Tax Commissioner 1971 (3) All ER 1185 at page 1189], thus :

".....Is the activity, on the one hand, a trade, or an adventure in the nature of trade, producing a profit, or is it, on the other, a mutual arrangement which, at most, gives rise to a surplus?"

In substance, the arrangement or relationship between the club and its members should be of a non-trading character.

Where a number of persons combine together and contribute to common fund for financing of some venture or subject and have no dealing or relation with any outside body, then any surplus returned to those persons cannot be regarded in any sense as profit. There must be complete identity between the contributors and the participants. Trading between persons associating together in this way does not give rise to profits which are chargeable to tax. The trade or activity is mutual **CIT v. Bankipur Club Ltd. [1997] 92 Taxman 278 (SC), 226 ITR 97 (SC)**

The law recognises the principle of mutuality and has excluded all businesses involving such principle from the purview of the Income tax Act, 1961,

except those mentioned in clause (vii) of section 2(24) of the Act. Chelmsford Club v. CIT **[2000] 109 Taxman 215 (SC) 243 ITR 89**

In **CIT Vs Cawnpore Club 140 Taxman 378 (SC)**, the question which the HC decided was that the doctrine of mutuality applied and therefore the income earned by the assessee from rooms let out to its members could not be subject to tax.

In **Bangalore Club Vs CIT 29 taxmann.com 29 (2013), 350 ITR 509**, the club sought exemption from payment of income tax on the interest earned on fixed deposits kept with banks which were corporate members of the said club on the basis of doctrine of mutuality. However, tax was paid on interest earned on fixed deposits kept with non-member banks. The question was whether the principle of mutuality would apply to the funds deposited in the member banks. Having regard to the fact that the said funds were raised from the contribution of several members including member banks which were corporate members of the club and the interest derived from it were utilized by several members of the club. The HC held that the principle of mutuality was not available in respect of a nationalized bank holding a FD on behalf of the customer. Consequently, the HC reversed the decision of the Tribunal. On appeal to SC, held that till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the

Club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the Club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Hence, in the present case, with the funds of the mutuality, the member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the "privity of mutuality", and consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the case before us the first condition for a claim of mutuality is not satisfied.

Moving forward, the SC stated that the second condition to claim exemption from tax on the principles of mutuality demands that surplus funds must be in the furtherance of the objects of the club which is not the case here. These were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality.

The 3rd condition of mutuality principle, i.e, the impossibility that the contributors should derive profits from contributions made by themselves

to a fund which could only be expended or returned to themselves. This principle requires that the funds must be returned to the contributors as well as expended solely on the contributors. True, that in the present case, the funds do return to the Club. However, before that, they are expended on non-members i.e. the clients of the bank. The Apex Court held that the interest earned from member banks do not qualify the test of mutuality.

The Supreme Court in the case of **Secunderabad Club v. CIT [2023] 153 taxmann.com 441 457 ITR 263** through a detailed and illuminating judgment has ruled that the interest income earned on fixed deposits (FDs) made by Clubs in the banks which are members of those Clubs has to be treated like any other income from other sources within the meaning of Section 2(24) of the Income-tax Act,1961 (the Act).

In other words, it was held that "Mutuality does not exempt from tax, interest income earned by clubs from FDs in banks, irrespective of whether the banks are corporate members of the club or not."

In a lone decision of the Telangana High Court in the case of **Jubilee Hills International Centre, Hyderabad Vs ITO 457 ITR 70 (2023)**, it was held that amount received from non-members not taxable. However, if one carefully examines the facts of the case, it can be found from the assessee was able to successfully argue and establish the fact that there was no net surplus (gains) arising from the transactions with non-members. Hence, the hon'ble Telangana High court held that income from non-members is not taxable.

The principles that emanate from the decision in Secunderabad Club are as under-

- Principle of mutuality would not apply to interest income earned on fixed deposits made by the appellant Clubs in the banks irrespective whether the banks are corporate members of the club or not.
- If there is an entry of a third party or non-member to deal with the contributions of or funds of the club or to utilize the funds of the club and return the same with interest, then, the relationship of the parties is not on the basis of a privity of mutuality. The essential condition of mutuality, i.e., identity between the contributors and participators would end. The relationship would then be like any other commercial relationship such as that between a customer and a bank where the fixed deposit is made by the customer for the purpose of earning an interest income.
- If the principle of mutuality is to apply, then, where a number of people contribute to a fund are ultimately paid the surplus from the fund, it is a mere repayment of the contributors' own money. However, if the very same surplus fund is not applied for the common purpose of the club or towards the benefit of the members of the club directly but is invested with a third party who has the right to utilize the said funds, subject to payment of interest on it and repayment of the principal when desired by the club, then, in such an event, the club loses its control over the said funds.

- Further, the interest generated on the fixed deposits or investment made is a commercial activity, thereby permitting the bank to utilize the fixed deposit amount for its banking business and derive profits from the said banking business by way of lending the amount for a higher rate of interest while paying a lower rate of interest on the fixed deposit made by the club. Thus, identicality between the contributors to the common fund and the participators in it which is a sine qua non for the application of the principle of mutuality would get ruptured.
- When surplus funds of a club are invested as fixed deposits in a bank and the bank has a right to utilize the said fixed deposit amounts for its banking business subject to repayment of the principal along with interest, then, the identity is lost.

Answers to Questions in CaseStudy 5 :

1. **Is entire income of the club exempt on the principles of Mutuality**

   Entire income of the club is not exempt due to two reasons,

   a) There are transactions with non-members also.

   b) Transactions with member-banks are carried on commercial lines.

2. **The income of the club to the extent it relates to the services to the members alone are exempt, while that to non-members are taxable.**

   Yes, the above statement is correct with respect to income other than interest income. Income earned from member-banks is also taxable and not exempt under principles of mutuality

3. **Room rent is completely exempt as it is booked by members**

   No. It is not exempt to the extent used by non-members and taxable.

4. **Room rent is exempt only to the extent occupied by members**

   Yes, in this case, room rent is exempt.

5. **Interest Income earned from banks are totally exempt on the principles of mutuality**

   No, interest income is fully taxable.

6. **Interest income as far as those received from banks that are corporate members are taxable while others are exempt.**

   No, the interest income is taxable whether it is received from member-banks or non-member banks.

REPLY TO CASE STUDY 6 : DONATIONS & INCIDENTAL ACITIVITIES

Facts of the Case :

1. KP is a registered society formed for carrying on the charitable activity of Education

2. Assessee runs 2 schools and an Arts College – One school is a CBSE affiliate and the other a matriculation school following state syllabus.

3. During a survey conducted under Sec 133A, the following were noticed by the AO

a) Collection of compulsory donations for new admissions to the schools. The same are shown as voluntary when they are infact compulsory in nature. According to the AO, donations are in contravention of TN Education Institutions (Prohibition of Collection of Capitation Fee) Act, 1992. Pre-printed receipts are given and necessary declarations are obtained from parents confirming the same.

b) For all incidental activities such as sale of text books, plying of buses, running canteen etc, no separate books of accounts are maintained.

c) Excess Fee was collected in contravention with TN Schools (Regulation of Collection of Fee), Act 2009. However, it is to be noted that the former is applicable only to education institutions offering degree and diploma courses. Assessee is running a CBSE school to which TN schools (Regulation of Collection of fee) Act 2009 is not applicable.

4. AO denied exemption under Sec 11 and brought to tax the excess gross receipts over revenue expenditure and levied tax on the same.

Answers :

Line of Defence to be taken in appeal are as follows,

1. Collection of donations which are not voluntary in nature.

a) According to the assessee, all donations are voluntary in nature, which is supported by the declarations given by the donors. In many cases,

admissions have been given free, in respect of other cases, the donations collected are very nominal. Assessee makes appeal for donations for development of the institution to which the parents respond, but there is no compulsion.

b) All donations collected have been utilized for the objectives of the trust and there is no finding by the AO that the same has been utilized for the benefit of the trustees.

c) The AO must have conducted enquiries with the parents of the students and must have decided on the facts of the case. Without conducting the required enquiry, concluding on the basis of pre-printed donation receipts and declaration forms is not correct and legal on the part of the AO. Further, the AO disregarded the statement of the Trustee which is also not correct. The AO failed to contradict the statement of the Trustee with evidence. Hence the Trustee's statement must not be ignored.

2. Separate books for incidental activities.

a) The segmental accounting, fulfils the condition for maintaining separate books of accounts as segmental accounting entries are posted. The concept of maintaining separate books of accounts in the era of software accounting gets fully diluted as facts and figures can be culled out from the very same books of accounts. In any case, proviso to sec 2(15) permits such other activities within certain threshold limits and the tabulation

would establish that the respondent is not overshooting the threshold limits. So, the condition of maintaining separate books of accounts does not gets vitiated.

b) Maintenance of separate books is prescribed by the Sec 11(4A) and the same is vital for claiming exemption under Sec 11. However, where it can be proved that the maintenance of separate books can be done easily and the profits relating to those incidental activities can be established easily, any defect in not maintaining separate books of accounts would only be a technical defect and does not jeopardise the entire exemption. Maintenance of separate set of books of accounts is a factual finding and hence, adequate care must be exercised in ensuring that department does not record such a finding in the survey conducted by them.

3. Excess Fee collected

a) Compliance with all laws material to running a Trust/society are vital for two purposes

i) To avoid cancellation of registration as such non-compliance is a specified violation under Sec 12AB.

ii) To avoid non-renewal of registration under Sec 12AB.

While for the purpose of cancellation of registration by the CIT(Ex), the matter relating to non-compliance with applicable laws must attain

finality, there is no such condition when it comes to renewal of registration under Sec 12AB. So adequate care must be exercised in ensuring that the trust/society always complies with all laws material in discharging its charitable activity.

b) As regards excess fees, it is to be noted that CBSE schools are allowed to collect fees commensurate with the facilities provided and strictly as per the CBSE guidelines.

c) The decision in the case of CIT Vs MAC Public Charitable Trust (Mad) TCA No 323/2021 – dated 21.10.2022 is not applicable to the assessee's case in as much as the same is rendered in the context of college education and not for schools.

d) It is also the case of the assesssee that the provisions of Sec 11(4A) is not attracted and the activities of the assessee are not against the principles laid down by the Hon SC in the case of Queens Educational Society vs CIT 372 ITR 699. Assessee is solely existing not for profit as alleged by the department.

e) As far as generating income from incidental activities are concerned, these are activities incidental to main objects.

f) The above issues and the arguments were considered by the ITAT Chennai bench in the case of DCIT Vs Sindhi Educational Society ITA No 975-981/CHNY and decided the appeal in favor of the assessee.

REPLY TO CASE STUDY 7 : DEEMED DIVIDEND

Facts of the Case :

1. NMM, shareholder of EFG Pvt Ltd, manufacturing chemicals. EFG procures raw materials from ABC, a partnership firm.

2. EFG pays advances to ABC for procuring goods and ABC in turn advances money to NMM.

3. NMM periodically repays to ABC such that by year end the balance is brought to NIL.

4. ABC periodically supplies goods against advances received though at times there are balances due from EFG.

5. A search conducted in the premises of NMM and EFG brough to light these transactions. The department also noticed that the transfers from ABC to NMM was within a few minutes after the so-called advances were credited to the bank account of ABC.

6. AO considered the above arrangement as withdrawal of funds of the company by the director and invoked Sec 2(22)(e).

Answers :

Action of the AO is not correct.

CIT Vs Rajkumar 181 Taxmann 155 (Delhi HC) – held that trade advances would not come under the ambit of deemed dividend.

LIC of India vs Retd. LIC Officers Assn. (2008) 3 SCC 321 - interpretation would alloy the rule of purposive construction with noscitur a sociis, as was done by the Supreme Court - Each word employed in a statute must take colour from the purport and object for which it is used. The principle of purposive interpretation, therefore, should be taken recourse to.

CIT vs Nagindas M. Kapadia (1989) 177 ITR 393 - the Court excluded from the ambit of "dividend", monies which the assessee had received towards purchases.

Shri M Kirankumar Vs ACIT ITA No 3374/CHNY/2019 – The allegation of the department was that the assessee had undertaken circuitous transactions and had indirectly borrowed funds from the company. The Hon HC observed that the said transaction was undertaken during the normal course of business and there being no personal/individual benefit accrued to the assessee, sec 2(22)(e) cannot be invoked.

CIT Vs Pravin Bhimshi Chedda 48 Taxmann 151 (2014) – Similar view as above was taken by the Hon Bombay HC.

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