Missive – June 2018

S.P.NAGRATH & CO. LLP
CHARTERED ACCOUNTANTS

Dear Patron,

Greetings!

It is a great pleasure to present our next edition of "Missive".

We trust you will enjoy reading our publication.

We solemnly request you to kindly share your feedback for improvement.

Regards,

SPN

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Notification No. 22 /2018 – Central Tax dated 14th May, 2018

Waiver of late fee for filing GSTR-3B by select taxpayers

The late fee payable for failure to furnish GSTR-3B by the due date for each of the months from October, 2017 to April, 2018, has been waived for registered persons whose declaration in FORM GST TRAN-1 was submitted but not filed on the common portal before 27th December, 2017. Provided that the persons have filed GST TRAN-1 on or before 10th May, 2018 and GSTR-3B for the said months, on or before 31st May, 2018.

Notification No. 23 /2018 - Central Tax dated 18th May, 2018

Due date for filing GSTR-3B for the month of April 2018 extended to 22nd May 2018

Notification No. 24 /2018 - Central Tax dated 28th May, 2018

NACIN notified as the authority for conducting the examination for GST Practitioners

The National Academy of Customs, Indirect Taxes and Narcotics (NACIN), Department of Revenue, Ministry of Finance, Government of India, has been notified as the authority to conduct the examination of GST Practitioners as per Rule 83(3) of CGST Rules.

Notification No. 25/2018 – Central Tax dated 31st May, 2018

Time limit to furnish GSTR-6 by ISD for the months of July, 2017 to June, 2018 extended

Time limit for filing of monthly returns (GSTR 6) by Input Service Distributors (ISD) for the months of July, 2017 to June, 2018 extended till 31st July, 2018.

Circulars/Orders

Circular No.44/18/2018-CGST dated 2nd May, 2018

Issue related to taxability of 'tenancy rights' under GST

Doubts were raised as to,-

(i) Whether transfer of tenancy rights to an incoming tenant, consideration for which is in form of tenancy premium, shall attract GST when stamp duty and registration charges is levied on the said premium, if yes what would be the applicable rate?

(ii) Further, in case of transfer of tenancy rights, a part of the consideration for such transfer accrues to the outgoing tenant, whether such supplies will also attract GST?

As per section 9(1) of the CGST Act there shall be levied central tax on the intra-State supplies of services. The activity of transfer of tenancy right against consideration in the form of tenancy premium is a supply of service liable to GST. It is a form of lease or renting of property and such activity is specifically declared to be a service in Para-2 of Schedule II i.e. any lease, tenancy, easement, license to occupy land is a supply of services.

The contention that stamp duty and registration charges is levied on such transfers of tenancy rights, and such transaction thus should not be subjected to GST, is not relevant. Merely because a

transaction or a supply involves execution of documents which may require registration and payment of registration fee and stamp duty, would not preclude them from the scope of supply of goods and services and from payment of GST. Thus a consideration for the said activity shall attract levy of GST.

To sum up, the activity of transfer of 'tenancy rights' is squarely covered under the scope of supply and taxable per-se. Transfer of tenancy rights to a new tenant against consideration in the form of tenancy premium is taxable. However, renting of residential dwelling for use as a residence is exempt [Sl. No. 12 of notification No. 12/2017-Central Tax (Rate)]. Hence, grant of tenancy rights in a residential dwelling for use as residence against tenancy premium or periodic rent or both is exempt. As regards services provided by outgoing tenant by way of surrendering the tenancy rights against consideration in the form of a portion of tenancy premium is liable to GST.

Circular No. 3/1/2018-IGST dated 25th May, 2018

Payment of IGST on goods supplied while being deposited in a customs bonded warehouse (warehoused goods)

Transfer/sale of goods while being deposited in a customs bonded warehouse is a common trade practice whereby the importer files an into-bond bill of entry and stores the goods in a customs bonded warehouse and thereafter, supplies such goods to another person who then files an ex-bond bill of entry for clearing the said goods from the warehouse for home consumption.

It has been clarified that IGST shall be levied and collected at the time of final clearance of the warehoused goods for home consumption i.e., at the time of filing the ex-bond bill of entry and the value addition accruing at each stage of supply shall form part of the value on which IGST would be payable at the time of clearance of the warehoused

goods for home consumption. In other words, the supply of goods before their clearance from the warehouse would not be subject to the levy of IGST and the same would be levied and collected only when the warehoused goods are cleared for home consumption from the customs bonded warehouse.

This Circular would be applicable for supply of warehoused goods, while being deposited in a customs bonded warehouse, on or after the 1st April, 2018.

Circular No. 45/19/2018-GST dated 30th May, 2018

Clarifications on refund related issues

Claim for refund filed by an Input Service Distributor, a person paying tax under section 10 or a non-resident taxable person:

It has been clarified that in case of a claim for refund of balance in the electronic cash ledger filed by an ISD or a composition taxpayer; and the claim for refund of balance in the electronic cash and/or credit ledger by a non-resident taxable person, the filing of GSTR-1 and GSTR-3B is not mandatory. Instead, the return in FORM GSTR-4 filed by a composition taxpayer, the details in FORM GSTR-6 filed by an ISD and the return in FORM GSTR-5 filed by a non-resident

taxable person shall be sufficient for claiming the said refund.

Application for refund of integrated tax paid on export of services and supplies made to a Special Economic Zone developer or a Special Economic Zone unit:

Certain errors committed by registered persons at the time of filing GSTR 3B showed supplies to SEZ unit/Developer on payment of IGST in column 3.1(a) instead of 3.1(b) of GSTR-3B whilst they have shown the correct details in Table 6A or 6B of GSTR-1 for the relevant tax period and duly discharged their tax liabilities. Such persons were unable to file GST RFD-01A for claim of refund because of inbuilt

validation mechanism which restricts refund claim to amount figuring in 3.1(b) of GSTR-3(b).

It has been clarified that for the tax periods commencing from 01.07.2017 to 31.03.2018, such registered persons shall be allowed to file the refund application in FORM GST RFD-01A on the common portal subject to the condition that the amount of refund claimed shall not be more than the aggregate amount of integrated tax/cess mentioned in the Table under columns 3.1(a), 3.1(b) and 3.1(c) of FORM GSTR-3B filed for the corresponding tax period.

Refund of unutilized input tax credit of compensation cess availed on inputs in cases where the final product is not subject to the levy of compensation cess. For instance, cess is levied on coal, which is an input for the manufacture of aluminum products, whereas cess is not levied on aluminum products.

Section 16(2) of IGST Act states that subject to the provisions of section 17(5) of the CGST Act, credit of input tax may be availed for making zero rated supplies. Further, as per section 8 of the GST Cess Act, all goods and services specified in the Schedule to the Cess Act are leviable to cess under the Cess Act and vide section 11(2) of the Cess Act, section 16 of the IGST Act is mutatis mutandis made applicable to inter-State supplies of all such goods and services. Thus, all supplies of such goods and services are zero rated under the Cess Act.

Moreover, as section 17(5) of the CGST Act does not restrict the availment of ITC of compensation cess on coal, it is clarified that a registered person making zero rated supply of aluminum products under bond or LUT may claim refund of unutilized credit including that of compensation cess paid on coal.

Such registered persons may also make zero-rated supply of aluminum products on payment of IGST but they cannot utilize the credit of the compensation cess paid on coal for payment of IGST in view of the proviso to section 11(2) of the Cess

Act, which allows the utilization of the input tax credit of cess, only for the payment of cess on the outward supplies. Accordingly, they cannot claim refund of compensation cess in case of zero-rated supply on payment of integrated tax.

Whether bond or LUT is required in the case of zero rated supply of exempted or non-GST goods and whether refund can be claimed by the exporter of exempted or non-GST goods?

In case of zero rated supply of exempted or non-GST goods, the requirement for furnishing a bond or LUT cannot be insisted upon. It is thus, clarified that in respect of refund claims on account of export of non-GST and exempted goods without payment of IGST, LUT/bond is not required. Such registered persons exporting non-GST goods shall comply with the requirements prescribed under the existing law (i.e. Central Excise Act, 1944 or the VAT law of the respective State) or under the Customs Act, 1962, if any.

Further, the exporter would be eligible for refund of unutilized input credit of central tax, state tax, union territory tax, integrated tax and compensation cess in such cases.

What is the scope of the restriction imposed by rule 96(10) of the CGST Rules, regarding non-availment of the benefit of notification Nos. 48/2017-Central Tax dated the 18.10.2017, 40/2017-Central Tax (Rate) dated 23.10.2017, 41/2017-Integrated Tax (Rate) dated 23.10.2017, 78/2017-Customs dated 13.10.2017 or 79/2017-Customs dated 13.10.2017?

Rule 96(10) of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of IGST. This is to ensure that the exporter does not utilize the input tax credit availed on other domestic supplies received for making the payment of IGST on export of goods.

However, the said restriction is not applicable to an exporter who has procured goods from suppliers

who have not availed the benefits of the specified notifications for making their outward supplies. Further, the said restriction is also not applicable to an exporter who has procured goods from suppliers who have, in turn, received goods from registered persons availing the benefits of these notifications since the exporter did not directly procure these goods without payment of tax or at reduced rate of tax.

Thus, the restriction under Rule 96(10) of the CGST Rules is only applicable to those exporters who are directly receiving goods from those suppliers who are availing the benefit under the specified notifications.

Summary of Advance Rulings

Liquidated damages liable to 18% GST – Maharashtra AAR

Animal carcass in LDPE bags constitute unit container supply – Maharashtra AAR

Freight, material price & service cost for tower installation, taxable as 'composite works-contract – West Bengal AAR

Hindi vocabulary learning books classifiable as 'exercise books'

28% GST on E-rickshaw tyres and covered under Tariff Heading 4011; Soya-bean based transformer coolant taxable at 12% – Maharashtra AAR

Disposal of used 'cash carrying vans' constitutes "supply"; Members differ on ITC eligibility – Maharashtra AAR

Maintenance of railway tracks constitutes 'works contract', liable to GST at 18% - West Bengal AAR

Dug-up roads restoration by Municipal Authorities not ‘sovereign’ function; Reinstatement charges taxable – Maharashtra AAR

Electricity generation using coal from related entity not ‘job-work’, taxable as ‘goods’- Maharashtra AAR

Declaring name on packages sold from exclusive stores, constitutes 'supply under brand-name' – Maharashtra AAR

No 'service' in food & beverages supplied onboard trains & platforms, taxable as 'goods'

Machinery provisions available to exclude 'land value'; Superstructure construction taxable at 18%

'Dried Tobacco Leaves' constitute "unmanufactured tobacco" taxable at 28%, not 5% GST

Private institute coaching students for entrance examinations liable to 18% GST – Maharashtra AAR

Solar Power Plant involves element of 'permanency'; EPC agreement taxable as "works contract"– Maharashtra AAR

No transitional credit of Krishi Kalyan Cess – Maharashtra AAR

PVC Floor Mats liable to 18% GST and classified under tariff heading 3918 – Maharashtra AAR

Ayurvedic skincare products constitute "medicaments"; Pronouncements on erstwhile Chapter Notes need revisit

No GST registration where person engaged in exempt supplies, except under RCM – West Bengal AAR

Promotion of courses 'ancillary' to facilitating recruitments to foreign universities, liable to GST – West Bengal AAR

Supply of UPS & battery under a single contract at a combined single price, taxable as 'mixed supply' – West Bengal AAR

Severed rubber trees / wood constitute "goods", taxable at 18% under HSN Code 4403

Recovery of canteen expenses from employees taxable, absent continuation of pre-GST exemption

Supply of goods to the International passengers going abroad by the applicant from their retail

outlet situated in the Security Hold Area of the airport cannot be treated as zero rated supply or export – Delhi AAR

Caesar stone imported by the applicant to be classified under HSN Code 6810 – Maharashtra AAR

The activity of "printing of photographs from media" is classifiable under SAC 9989 and taxable at 12% – West Bengal AAR

Customs Law: Tariff

Notification No. 45/2018-Customs dated 23rd May 2018

Increase in import tariff rate on specified goods

First Schedule to the Customs Tariff Act has been amended to increase the rate of custom duty on the following goods-

HSN	Goods	Rate of duty
0802 31 00	Walnuts (In shell)	100%
2106 10 00	Protein concentrates and textured protein kg.	40%

Notification No. 46/2018-Customs dated 23rd May 2018

Seeks to amend Notification No. 50/2017 dated 30 June 2017

HSN	Goods	Rate of duty
0802 12 00	All Goods	100%
1001 19 00	Wheat	30%
2106 10 00	Protein concentrates and textured protein	40%

Customs Law: Non-Tariff

Notification No. 3/2018-Customs (N.T/CAA/DRI), 4/2018-Customs (N.T/CAA/DRI) and 5/2018-Customs (N.T/CAA/DRI) dated 1st May 2018, 14th May 2018 and 28th May 2018

The Director General, Revenue Intelligence, hereby appoints officers to act as a common adjudicating authority to exercise the powers and discharge the duties conferred or imposed on officers in respect of specified notices for the purpose of adjudication of show cause notices. Such notices include:-

M/s Konica Minolta Healthcare India (P) Limited

M/s Gourav Enterprises,

M/s Electro Steel Steels Limited

M/s A. I. Metals (P) Ltd.

M/s Global Archana Products

M/s Vertex Inc.

M/s BASF India Ltd.,

M/s Sparkle Port Services Limited,

M/s Dilip Buildcon Ltd, and

M/s EMD Locomotive Technologies Pvt. Ltd. etc.

Notification No. 36/2018-Customs (N.T.) dated 11th May 2018

CBIC has prescribed Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2018.

Such regulations will apply to the import of goods through all customs stations where the Indian Customs Electronic Data Interchange System is in operation.

Salient features of the regulations are as follows,

The authorized person shall enter the electronic integrated declaration and the supporting documents himself by affixing his digital signature and enter them on the Customs Automated System and he may also get the electronic integrated declaration made on the customs automated system along with the supporting documents by availing the services at the service Centre.

The authorized person shall file the bill of entry before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing.

The bill of entry shall be deemed to have been filed and self-assessment completed when after entry of the electronic integrated declaration on the customs automated system or by way of data entry through the service Centre, a bill of entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration and the self-assessed copy of the Bill of Entry may be electronically transmitted to the authorized person or printed out at the service Centre.

After the completion of the assessment, an order permitting clearance under subsection (1) of section 47or section 68, as the case may be, shall be made, after examination of the imported goods if so required and the order under regulation 5 may be recorded on the customs automated system and conveyed electronically to the authorized person, the custodian, and to any other person (s) designated by the authorized person.

The authorized person shall retain, for a period of 5 years from the date of presentation of the bill of entry, the assessed copy of the bill of entry, digital or otherwise, and all supporting documents in original, which were used or relied upon by him in submitting the electronic integrated declaration, and shall produce them before Customs in connection with any action or proceedings under the Act or under any other law for the time being in force.

Any authorized person who contravenes any provision of these regulations or who fails to comply with any provisions of these regulations shall be liable to a penalty which may extend to fifty thousand rupees.

Exchange Rate Notification

Notification No. 43/2018-Customs (N.T.) dated 17th May 2018

S.No.	Foreign Currency	Rate of exchange of one unit of foreign currency equivalent to Indian rupees	
		(For Imported Goods)	(For Export Goods)
1.	Australian Dollar	52.15	50.40
2.	Bahrain Dinar	185.60	173.7
3.	Canadian Dollar	54.05	52.30
4.	Chinese Yuan	10.85	10.5
5.	Danish Kroner	10.95	10.55
6.	EURO	81.50	78.85
7.	Hong Kong Dollar	8.75	8.5
8.	Kuwait Dinar	232.15	217.2
9.	New Zealand Dollar	47.9	46.05
10.	Norwegian Kroner	8.55	8.25
11.	Pound Sterling	93.35	90.40
12.	Qatari Riyal	19.25	18.00
13.	Saudi Arabian Riyal	18.7	17.5
14.	Singapore Dollar	51.4	49.85
15.	South African Rand	5.65	5.25
16.	Swedish Kroner	7.95	7.65
17.	Swiss Franc	69.00	66.80
18.	UAE Dirham	19.05	17.85
19.	US Dollar	68.65	66.95

S.No.	Foreign Currency	Rate of exchange of 100 units of foreign currency equivalent to Indian rupees	
		(For Imported Goods)	(For Export Goods)
1.	Japanese Yen	62.55	60.50
2.	Kenya Shilling	64.90	60.65

Notification No. 42/2018-Customs (N.T.) dated 15th May 2018

Fixation of Tariff Value of Edible Oils, Brass Scrap, Poppy Seeds, Areca Nut, Gold and Silver

Table-1

S.No.	Chapter/ Heading/ Sub-Heading/ Tariff Item	Description of goods	Tariff value (US $Per Metric Tonne)
1.	1511 10 00	Crude Palm Oil	655
2.	1511 90 10	RBD Palm Oil	672
3.	1511 90 90	Others – Palm Oil	664
4.	1511 10 00	Crude Palmolein	678
5.	1511 90 20	RBD Palmolein	690
6.	1511 90 90	Others – Palmolein	680
7.	1507 10 00	Crude Soya bean Oil	800
8.	7404 00 22	Brass Scrap (all grades)	3788
9.	1207 91 00	Poppy seeds	2576

Table-2

S.No.	Chapter/ Heading/ Sub-Heading/ Tariff Item	Description of goods	Tariff Value (US $)
1.	71 or 98	Gold, in any form, in respect of which the benefit of entries at serial number 356 and 358 of the Notification No. 50/2017-Customs dated 30.06.2017 is availed	425 per 10 grams
2.	71 or 98	Silver, in any form, in respect of which the benefit of entries at serial number 357 and 359 of the Notification No. 50/2017-Customs dated 30.06.2017 is availed	537 per kilogram

Table-3

S.No.	Chapter/ Heading/ Sub-Heading/ Tariff Item	Description of goods	Tariff value (US $ Per Metric Tonne)
1.	080280	Areca nuts	3946

Circulars, Notifications & CBDT Press Release

SECTION 56 OF THE INCOME-TAX ACT, 1961 - INCOME FROM OTHER SOURCES - CHARGEABLE AS - NOTIFIED PROVISIONS OF CLAUSE (viib) OF SUB-SECTION (2) OF SECTION 56 OF SAID ACT SHALL NOT APPLY TO CONSIDERATION RECEIVED BY A COMPANY FOR ISSUE OF SHARES THAT EXCEEDS FACE VALUE OF SUCH SHARES SUBJECT TO SPECIFIED CONDITION

NOTIFICATION NO.SO 2088(E) [NO.24/2018 (F.NO.370142/5/2018-TPL (PT)], DATED 24th May, 2018

Central Board of Direct Taxes notifies that the provisions of clause (viib) of sub-section (2) of section 56 of the said Act shall not apply to consideration received by a company for issue of shares that exceeds the face value of such shares, if the consideration has been received for issue of shares from an investor in accordance with the approval granted by the Inter-Ministerial Board of Certification under clause (I) of sub-para (3) of para 4 of the Notification Number G.S.R. 364(E), dated 11th April, 2018 and published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (dated the 11th April, 2018 issued by the Department of Industrial Policy and Promotion.

This notification shall be deemed to have come into force retrospectively from the 11th April, 2018.

SECTION 139A OF INCOME TAX ACT, 1961 - PERMANENT ACCOUNT NUMBER - REQUIREMENT FOR OBTAINING PAN CARD UNDER SECTION 139A EASED FOR CORPORATE ASSESSEES

CBDT PRESS RELEASE DATED 14th April, 2018

In case of a company, an application for incorporation, allotment of Permanent Account Number (PAN) and allotment of Tax Deduction and Collection Account Number (TAN) may be made through a Common Application Form submitted to the Ministry of Corporate Affairs (MCA). In these cases, the Certificate of Incorporation (COI) issued by MCA contains a mention of both PAN and TAN.

Finance Act, 2018 amended section 139A of the Income-tax Act, 1961 and removed the requirement of issuing PAN in the form of a laminated card. Hence, it is clarified that PAN and TAN mentioned in the COI issued by MCA shall also be treated as sufficient proof of PAN and TAN for the said company assesses.

INCOME-TAX (SIXTH AMENDMENT) RULES, 2018 - AMENDMENT IN RULES 11U & 11UA

NOTIFICATION NO. SO 2087(E) [NO.23/2018 (F.NO.370142/5/2018-TPL)], DATED 24th April, 2018

In exercise of the powers conferred by sub-section (2) of section 56 read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Government

hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:—

1. (1) These rules may be called the Income-tax (6th Amendment), Rules, 2018.

(2) They shall come into force from the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962 (hereinafter referred to as the principal rules), in rule 11U, clause (a) shall be omitted.

3. In the principal rules, in rule 11UA, in sub-rule (2), in clause (b), the words "or an accountant" shall be omitted.

As a result of above, CBDT notifies to debar Chartered Accountants (CAs) from conducting valuation of unlisted shares for determining fair market value (FMV) thereof as per Discounted Free Cash Flow Method.

CBDT PRESS RELEASE, DATED 5th April, 2018

Finance Act, 2018 has amended Section 16 of the Income-tax Act, 1961 to provide that a taxpayer having income chargeable under the head "Salaries" shall be allowed a deduction of Rs. 40,000/- or the amount of salary, whichever is less, for computing his taxable income.

The pension received by a taxpayer from his former employer is taxable under the head "Salaries". Accordingly, any taxpayer who is in receipt of pension from his former employer shall be entitled to claim a deduction of Rs. 40,000/- or the amount of pension, whichever is less, under Section 16 of the Act.

PIB PRESS RELEASE, DATED 1st June, 2018

New Benami Transactions Informants Reward Scheme, 2018 Launched By Income-Tax Department

With the objective of obtaining people's participation in the Income Tax Department's efforts to unearth black money and to reduce tax evasion, a new reward scheme titled "Benami Transactions Informants Reward Scheme, 2018", has been issued by the Income Tax Department. This reward scheme is aimed at encouraging people to give information about benami transactions and properties as well as income earned on such properties by such hidden investors and beneficial owners.

Under the Benami Transactions Informants Reward Scheme, 2018, a person can get reward up to Rs. One crore for giving specific information in prescribed manner to the Joint or Additional Commissioners of Benami Prohibition Units (BPUs) in Investigation Directorates of Income Tax Department about Benami transactions and properties as well as proceeds from such properties which are actionable under Benami Property Transactions Act, 1988, as amended by Benami Transactions (Prohibition) Amendment Act, 2016.

Foreigners will also be eligible for such reward. Identity of the persons giving information will not be disclosed and strict confidentiality shall be maintained.

Details of the reward scheme are available in the Benami Transactions Informants Reward Scheme, 2018, copy of which is available in Income Tax offices and on the official website of Income Tax Department www.incometaxindia.gov.in.

Case Laws

SHRI DILIP RANJREKAR VS THE ASST. COMMISSIONER OF INCOME TAX, CIRCLE-1(2)(1), BANGALORE [ITA NO. 858/BANG/2016] (BANGALORE ITAT)

Issue Involved

Taxability of EPF interest accrued after retirement.

Facts of the Case

The taxpayer had retired from the Company in April 2002 after working for 26 years. As on the date of retirement, the balance in the PF account was INR 37.94 lakh. The PF balance was withdrawn after 9 years in April 2011, by which time the balance had grown to INR 82.01 lakh. The taxpayer did not include any part of the withdrawal in his income-tax return.

Hon'ble Tribunal Held that

The Tribunal held that, while the balance of INR 37.94 lakh outstanding as at the date of retirement was exempt from tax, as is further reinforced from the fact that no taxes were deducted at source on the withdrawn amount by the Trustees of the PF, the interest earned subsequent to the retirement was taxable. The Tribunal observed that, though there is a provision for the balance accumulated in the fund to be retained even after the cessation of employment, the exemption is limited to the accumulated PF balance due and payable only up to the date of cessation of employment. Any further interest accrued cannot be construed as earned in the capacity of an employee.

Further, the same will be considered for taxation in the year of accrual where the individual follows a mercantile system of accounting.

Dinesh Pandey v. Deputy Commissioner of Income Tax, Central Circle-19, New Delhi, IT Appeal No. 3562 (Delhi) of 2017 [assessment year 2012-13] [2018] (Delhi - Tribunal)

Issue Involved

Where assesse director of a company received an advance from said company for blocking deal of sale and purchase on behalf of company, sum advanced to assesse was for business purposes, and same could not be taxed in assesses hands as deemed dividend under section 2(22)(e).

Facts of the Case

The assesse was a director of company, SEPL in which he held 50 per cent shareholding. SEPL was engaged in the business of acting as commission agent for sale and purchase of ships. The assesse was actively involved in the negotiations for sale and purchase of ships with the interested parties. In the course of such negotiations, the assesse required funds to block the deal or where advances had to be paid to intermediary brokers. For such purposes SEPL had provided advance to the assesse.

The Assessing Officer treated the amount of advance received by assesse from SEPL as deemed dividend in the hands of the assesse. Accordingly, an addition was made to the assesse income.
On appeal, the Commissioner (Appeals) confirmed the action of the Assessing Officer.

Hon'ble Tribunal Held that

Business transactions are outside the purview of Section 2(22)(e) of the Act. The words "loans or advances" can be applied to loans or advances simplicitor and not to those transactions carried out in the course of business. It is quite possible that in the course of business between the company and a shareholder, the company may be required to give advance in mutual interest. By granting an advance for the business purpose of the company is served and which is not the sum, which it otherwise would have distributed as dividend, cannot be brought within the deeming provision of treating such advance as deemed dividend.

In the circumstances and facts of the case such advances cannot be a subject matter of section 2(22)(e) of the Income-tax Act, 1961. Accordingly addition on this account so confirmed by the ld. CIT(A) is directed to be deleted. Thus grounds of the assesse are allowed.

Assistant Commissioner of Income Tax, Circle 25(1), New Delhi vs. Vipin Kumar Gupta. IT Appeal No. 4923 Delhi of 2014 [Assessment Year 2010-11] [2018] (Delhi - Tribunal)

Issue Involved

Where assesse paid certain amount as commission to export agents, in view of fact that all activities of agents were performed overseas and, moreover, they did not have any office or business operation in India, commission income could not be said to accrue or arise in India in terms of section 9(1)(i)

Facts of the case

The Assesse was engaged in the business of trading of fabrics, manufacturing and trading of readymade garments in the domestic market as well as in the international market. During relevant year, the assesse paid commission on export sales to its two agents appointed in UAE.

The assesse case was that since agents were non-resident situated outside India and, the payment had been made for services rendered outside India, no income was deemed to accrue or arise to the agents in India, hence, provisions of section 195 were not applicable.

The Assessing Officer rejected the assesse explanation. He took a view that payments made to non-resident agents were covered under section 9(1)(i) and, thus, tax was liable to be deducted while making payment in question. Since assesse did not deduct tax at source while making commission payments, he disallowed same under section 40(a)(ia).

The Commissioner (Appeals), however, accepted the assesse submissions and

deleted disallowance made by the Assessing officer.

Hon'ble Tribunal Held that

For taxing any payment which constitutes income for foreign entities, it is sine qua non that some part of the income must be attributable to the operation carried out in India which can be held to be deemed to accrue or arise in India. If no operation or business is carried out in India through any business connection by the foreign entity, then no income can be said to deemed to accrue or arise in India. If these agents were independent in status which is not in dispute, then Explanation to clause (1) of Section 9 clarify that term 'business connection' includes a person acting on behalf of the non-resident who;

(i)	Has or habitually or regularly exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident.
(ii)	Has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident or
(iii)	Habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident.

Thus, in case of an agent having an independent status and is acting in the ordinary course of his business then the aforesaid conditions has to be fulfilled. Here in this case nothing has been brought on record that any of the person was acting on behalf of these non-resident agents in India, and therefore, it cannot be safely inferred that there no business connection of these agents in India. There has to be an existence of real and intimate relations between the trade activities by a non-resident carried on outside India and the activities within India and such a relation contributes directly or indirectly to the earning of income to the non-resident in its business. This factum ostensibly has not been proved on the basis of any material on record that these non-residents had carried out any operation in India for earning income by the activities carried out within India. Thus, order of the ld. CIT (A) is confirmed and the appeal filed by the Revenue is dismissed.

TRANSFER PRICE

Deputy Commissioner of Income tax, New Delhi vs. Caparo Engineering India (P.) Ltd.

Facts of the case

The Assesse Company was engaged in the business of manufacturing of sheet metal components and weld assemblies, metal fasteners, aluminum foundry, forging and tool room. International transactions of purchase of capital goods, sale of finished goods, commission on sales and reimbursement of expenses, were declared in Form No. 3CEB. The assesse

has entered into an agreement for availing expert services of its AE and commission was paid as per the terms of the Agreement. For determination of ALP for commission payment, the assesse applied Profit Split Method (PSM) as the most appropriate method.

Proceedings before the Assessing Officer (AO) / Transfer Pricing Officer (TPO)

The TPO did not dispute the ALP of any transaction except commission payment of INR 1.11 Crore. In the absence of any substantiation of the ALP of the international transaction of payment of commission under PSM method, the TPO observed that no sales were made through the AE for which the alleged commission was paid. The assesse was found to have made fixed payment of US $ 31,500 per month in performance of its Agreement. The TPO opined that no tangible and concrete benefit was reaped by the assesse. In his opinion, no independent party would get into such an agreement where it would incur cost on provision of no services. The ALP of this international transaction was accordingly taken at Nil on application of Comparable Uncontrolled Price (CUP) Method. The Assessing Officer made this addition proposed by TPO.

Proceedings before the CIT(A)

The CIT(A) observed that as per the terms of the Agreement, the AE was to create market for the assesse in the US, for which it was to be paid commission @ 2% of the FOB value of the sales. If the AE did not succeed in its efforts, the assesse was to pay US $31,500 per month, being, the estimated expenditure incurred by the AE in performance of the services performed. AE hired three marketing professionals exclusively for the assesse operations. Considering above, the CIT(A) held that 75% of the payment made to the AE for intra-group services should be allowed as deduction.

Decision of ITAT

No basis can be traced from the order of CIT(A) for allowing deduction at 75% of the total commission payment;

It is established beyond doubt that three employees were found to have been specifically deployed by the AE for the business operations of the assesse, which deciphers that the international transaction entered into by the assesse with its AE was genuine and bona fide;

While applying the CUP method by TPO, it was obligatory upon him to bring on record some comparable uncontrolled instance as per the mandate of rule 10B(1)(a)(i). Not even a single comparable instance has been brought on record to facilitate a comparison between the price for the services by the assesse vis-à-vis that paid by other comparable in similar uncontrolled circumstances;

The assesse has also not substantiated the ALP under the PSM as claimed by it, as has been recorded by the authorities. We, therefore, also disapprove the benchmarking by the assesse of the international transaction of payment of Commission;

It is noticed that the action of the TPO in determining Nil ALP of the international transaction on the ground that no benefit accrued to the assesse and then the AO making addition simply on the basis of recommendation of the TPO, is not in

accordance with the judgment of the Hon'ble jurisdictional High Court in CIT v. Cushman & Wakefield (India) (P.) Ltd. [2014], in which it has been held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such service exists or benefits did accrue to the assesse. Such later aspects have been held to be falling in the exclusive domain of the AO;

In the instant case, the AO in his order has taken the ALP of the international transaction at Nil on the basis of such recommendation of the TPO without carrying out any independent investigation for the deductibility or otherwise of such payment in terms of section 37(1) of the Act. This addition has been made by the AO in his order without invoking section 37(1) of the Act;

Accordingly, the matter is set aside and sent to the file of AO/TPO for deciding it in conformity with the above discussion and the law laid down by the Hon'ble jurisdictional High Court in the case of Cushman & Wakefield (India) (P.) Ltd.

SPN Comments:

Proper application of most appropriate method and substantiating the same through valid documentary evidences is utmost important. The TP Report should clearly demonstrate the justification of method applied and determination of ALP;

This decision clearly brought this fact into picture that authority of TPO is limited to conduct transfer pricing analysis for determining ALP of an international transaction and not to decide if any service exists or benefits accrue as the same falls in exclusive domain of AO.

M/s. Britannia Industries Ltd vs. DCIT, Circle 7(1) Kolkata

Facts of the case

The assesse is a public limited company and is engaged in the business of manufacturing and trading of bakery and dairy products. During the year, Assesse provided corporate guarantee to ABN and AMRO Bank NV (now, The Royal Bank of Scotland NV) for its AEs. For the purpose of determination of ALP, free quotes were obtained from Royal Bank of Scotland which was 0.25% and Indus Ind Bank which was 0.15%. The average of above two i.e. 0.20% was adopted as ALP by the assesse.

Proceedings before the Transfer Pricing Officer (TPO) / Dispute Resolution Panel (DRP)

The TPO determined ALP at 3%. The DRP considered it reasonable to impute a percentage of 150 bps as the interbank lending rate varied between 150 and 2bps, as found by the TPO. It also took into account the factor that the AE had low credit rating. It directed the TPO to substitute 150 bps i.e. 1.5% in place of 3%.

Decision of ITAT

Interbank lending rate adopted by DRP as a bench mark for determination the ALP of the charge for giving a corporate guarantee, is not appropriate, as these rates are for fund based transaction. Issuance of a corporate guarantee is a non-fund based transaction;

Free quotes taken by the Assesse for the very same transactions do constitute material for determination of ALP;

The free quote given by Royal Bank of Scotland i.e. 0.25% constitutes the ALP of this International Transaction in question. The average adopted by the Assesse as ALP is not the right approach as averages do not always give logical results. As this quote is the basis on which this transaction has taken place, this should be taken as the ALP.

SPN Comments:

This judgment establishes a fact that corporate guarantee is a non-fund based transaction and interbank lending rates should not be considered as benchmark as these are used for fund based transactions.

Audit & Assurance

Companies (Amendment) Act, 2017

The Companies (Amendment) Act, 2017 received assent of President of India on 3th January, 2018 which consists of 93 sections.
As on date 70 sections has been notified. The Ministry of Corporate Affairs has notified 42 sections on 8th February, 2018 and 28 sections on 7th May, 2018.

The major sections notified are as follows:

Associate Company (notified on 7th May, 2018)

Section 2(6) of the Companies Act, 2013 defines the term 'associate company' means a company in which that other company has a **significant influence**, but which is not a subsidiary company of the company having such influence and includes a joint venture company.
As per Explanation to Section 2(6) – **'Significant Influence'** means control of at least twenty per cent of **total share capital**, or of business decisions under an agreement;

Companies Amendment Act, 2017, substitutes the explanation by

a) **'Significant Influence'** would mean control of at least twenty per cent of the **total voting power** (instead of total share capital) or control or participation in business decision under an agreement.
b) The expression 'Joint Venture' means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

Key Managerial Personnel (notified on 8th February, 2018)

As per Section 2(51) — **'Key managerial personnel'**, in relation to a company, means—
(i) the Chief Executive Officer or the managing director or the manager;
(ii) the company secretary;
(iii) the whole-time director;
(iv) the Chief Financial Officer; and
(v) such other officer as may be prescribed;

In Companies Amendment Act, 2017, in Section 2 in clause (51), (a) in sub-clause (iv), the word "and" shall be omitted; (b) for sub-clause (v), the following sub-clauses shall be substituted, namely:—(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and (vi) such other officer as may be prescribed;

Net Worth (notified on 8th February, 2018

As per Section 2(57) — **'Net Worth'** means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

In Companies Amendment Act, 2017, in clause (57) of section 2, for the words **"and securities premium account",** the words **'securities premium account and debit or credit balance of profit and loss account,"** shall be **substituted**;

Subsidiary Company (notified on 7th May, 2018)

As per Section 2(87) — **'subsidiary company'** or —subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) Controls the composition of the Board of Directors; or

(ii) Exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

In Companies Amendment Act, 2017, In Section 2 in clause (87), in **sub-clause (ii),** for the words — **'total share capital'**, the words — **'total voting power'** shall be **substituted**.

Turnover (notified on 8th February, 2018)

As per Section 2(91) – **'turnover'** means the aggregate value of the realization of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year;

In Companies Amendment Act, 2017, – **'turnover'** means the **gross amount** of revenue **recognised in the profit and loss account** from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year;

Amendment in Section 123 (notified on 8th February, 2018)

As per Section 123, **'Declaration of Dividend'** (*1*) No dividend shall be declared or paid by a company for any financial year except—

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (*2*), or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both; or

(b) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

(2) For the purpose of clause (a) of sub-section (1), depreciation shall be provided in accordance with provision of Schedule II.

(*3*) The Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared:
Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

In Companies Amendment Act, 2017, in section 123 of the principal Act, after clause (a) in sub-section (1) the following proviso was inserted:
"Provided that in computing profits any amount representing unrealized gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value **shall be excluded**; or";
(ii) In the second proviso, for the words "transferred by the company to the reserves", the words "transferred by the company to the **free reserves**" shall be substituted;
(b) for sub-section (3), the following sub-section shall be substituted, namely:—
"(3) The Board of Directors of a company may declare **interim dividend** during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:
Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a **rate higher than the average dividends** declared by the company during immediately **preceding three financial years.".**

Corporate Social Responsibility (not yet notified)

As per Section 135, Sub Section (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees

five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
As per Sub-Section (5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least **two per cent of the average net profits** of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:
Explanation. — For the purposes of this section — **'average net profit'** shall be calculated in accordance with the provisions of section 198.

In Companies Amendment Act, 2017, in section 135(1) of the principal Act, for the words **"any financial year",** the words **"the immediately preceding financial year"** shall be **substituted** and after sub-section (1) the following proviso shall be inserted, namely:—
"Provided that where a company is not required to appoint an independent director under section 149(4), it shall have in its Corporate Social Responsibility Committee two or more directors";

In sub-section (5), for the Explanation, the following Explanation shall be substituted, namely:—
'Explanation— for the purposes of this section **"net profit"** shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.

Substitution of new Section for section 185 (Loans to Directors, etc.) (notified on 7th May, 2018)

For section 185 of the principal Act, the following section shall be substituted, namely:-

(1) **No company shall**, directly or indirectly, **advance any loan**, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—

(a) Any director of company, or of a company which is its holding company or any partner or relative of any such director; or
(b) Any firm in which any such director or relative is a partner.

(2) A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom **any of the director of the company is interested**, subject to the condition that—

(a) a **special resolution** is passed by the company in general meeting:

Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

(b) the loans are utilised by the borrowing company for its **principal business activities.**

Explanation — for the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means—

(a) any private company of which any such director is a director or member;
(b) anybody corporate at a general meeting of which not less than twenty-five per cent of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
(c) anybody corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

(3) Nothing contained in **sub-sections (1) and (2)** shall apply to—

(a) the giving of any loan to a managing or whole-time director—

i. as a part of the conditions of service extended by the company to all its employees; or
ii. pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or

(c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

(4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,—

i. the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees;
ii. every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and
iii. the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

Amendment in Section 186 (Loan and Investment by Company) (notified by 7th May, 2018)

As per sub-section (2), "No company shall directly or indirectly —

(a) give any loan to any person or other body corporate;
(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more.

The Companies (Amendment) Act, 2017 inserted the In Section 186 of the principal Act, the following explanation shall be inserted after sub-section (2),

"For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company".

For sub-section (3), the following sub-section shall be substituted, namely:—

(3) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by special resolution passed in general meeting.

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply:
Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4).

For sub-section (11), the following sub-section shall be substituted, namely:—
"(11) Nothing contained in this section, except sub-section (1), shall apply—

(a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

(b) to any investment-

i. made by an investment company;

ii. made in shares allotted in pursuance of clause (a) of sub-section (1) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate;

iii. made in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.

The Companies (Amendment) Act, 2017 inserted the following explanation after Section 186

(a) the expression-"investment company" means a company whose principal business is the acquisition of shares, debentures or other securities (a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities) is not less than fifty one percent of its total assets or its income derived from these investment not less than fifty one percent as its gross income.

The Ministry of Corporate Affairs (MCA) on 7th May, 2018 issued various notifications notifying the sections of Companies Amendment Act, 2017 and amend the following rules:

Companies (Specification of Definition Details) Amendment Rules, 2014

The MCA amended Companies (Specification of Definition Details) Rules, 2014 by Companies (Specification of Definition Details) Amendment Rules, 2014. As per Rule 2(1)(r) of the Companies (Specification of Definition Details) Rules, 2014, "Total Share Capital" means the aggregate of the:

a) Paid-up share capital; and
b) Convertible preference share capital

Companies (Specification of Definition Details) Amendment Rules, 2014, omits the definition of **"Total Share Capital"** from the rules.

Companies (Audit and Auditors) Amendment Rules, 2018

The MCA amended Companies (Audit and Auditors) Rules, 2014 by Companies (Audit and Auditors) Amendment Rules, 2018.

The Explanation to Rule 3(7) of Companies (Audit and Auditors) Rules, 2014 stated that if the appointment is not ratified by the members of the Company, the Board of Directors shall appoint another individual or firm as its auditor following the procedure laid in the Companies Act 2013.

The Companies (Amendment) Act, 2017 has omitted the above-mentioned Explanation to Rule 3(7) of Companies (Audit and Auditors) Rules, 2014.

The Rule (9) of the Rules, 2014 provides that in case of criminal liability of any audit firm, the liability other than fine, shall devolve only on the concerned partner or partners, who acted in a

fraudulent manner or abetted or as the case may be, colluded in any fraud. This Rule has been omitted by Companies (Audit and Auditors) Amendment Rules, 2018. This means that in case any firm acted in a fraudulent manner or abetted or colluded in any fraud, then all partners of audit firm can be held for criminal liability.

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