Newsletter
May 2022

Vishnu Daya & Co. LLP
Chartered Accountants

Contents

Direct Tax – Notifications

Notifications issued by CBDT in the month of April 2022

1. **CBDT notifies ITR 7 for AY 2022-23**

   Notification no. 23 / 2022, dated 1st April 2022.

   CBDT notifies ITR 7 for AY 2022-23.

   Click here to read / download the copy of the notification.

2. **CBDT notifies conditions for return-filing by persons specified under Sec.139(1)(b).**

   Notification no. 37 / 2022, dated 21st April 2022.

   CBDT notifies Rule 12AB. Rule 12AB contains additional conditions for furnishing return of income by specified persons (assessees other than Company or a firm) referred to in Section 139(1)(b) read with clause (iv) of 7th proviso to Section 139(1). The conditions are that during the previous year: (i) total sales, turnover or gross receipts in the business exceeds Rs.60 Lakh. or (ii) total gross receipts in profession exceeds Rs.10 Lakh. or (iii) aggregate of TDS and TCS is Rs.25,000/- or more, but Rs.50,000/- or more for an individual resident aged 60 years or more. or (iv) aggregate of deposit in one or more savings bank account is Rs.50 Lakh or more.

   Assessees other than Company or firm need not file the return if total income does not cross basic exemption limit. In order to expand the tax base, the above-mentioned additional conditions are laid by CBDT.

   Click here to read / download the copy of the notification.

3. **CBDT notifies ITR-U for filing updated Return under Sec.139(8A).**

   Notification no. 48 /2022, dated 29th April 2022.

   CBDT ITR-U and Rule 12AC by Income-tax (11th Amendment) Rules, 2022. Rule 12AC provides that the Updated Return under the Section 139(8A) relating to AY 2020-21 and subsequent AYs shall be in the Form ITR-U and to be verified in the manner indicated therein.

   ITR-U requires the reasons for updating the income. This includes reasons such as returns previously not filed, income not reported correctly, wrong heads of income chosen, etc. ITR-U also requires a disclosure whether the updated return is leading to reduction in carried forward loss or unabsorbed depreciation or tax credit and if so the assessee is also required to specify the AYs getting affected due to the updated return.

   Click here to read / download the copy of the notification.

Direct Tax – Legal Rulings

Domestic and International Tax Rulings in the month of April 2022

1. **SC: Wipro Finance's loss on forex loan repayment taken for business expansion allowable under Sec.37(1). Rejects Sec.43A plea**

   Wipro Finance Ltd [TS-283-SC-2022]

   SC allows Wipro Finance's appeal against Karnataka HC ruling and upholds ITAT's decision allowing fresh claim for treating exchange loss on forex loan as revenue expenditure which was erroneously capitalised while filing return of income. SC holds that Section 43A is not applicable in the present case since Assessee did not acquire any asset from outside India for its business.

   Assessee Company entered into an agreement with Commonwealth Development Corporation for borrowing GBP 5 Mn to carry on its project for expanding its primary business of leasing and hire purchase of capital equipment to existing Indian enterprises whereas Assessee suffered loss due to forex difference at the time of repayment.

   For AY 1997-98, Assessee filed return of income including loss due forex difference of Rs.1.10 Cr. but claimed additional loss of Rs.2.46 Cr. before ITAT on the basis that it was wrongly capitalised in the return of income. SC finds substance in Assessee's submission and observes that the loan was wholly and exclusively used for the purpose of business of financing the existing Indian enterprises, who in turn, had to acquire plant, machinery and equipment to be used by them.

   Click here to read / download the copy of the ruling.

2. **SC: Approves Allahabad HC Full Bench judgment holding no deemed registration under Sec.12AA**

   Harshit Foundation Sehmalpur Jalalpur Jaunpur [TS-319-SC-2022]

   SC dismisses Special Leave Petition preferred by Harshit Foundation where Allahabad HC held that there is no specific provision allowing deemed registration under Section 12AA with respect to application not decided within a period of six months. SC observes, "*the Full Bench of the High Court has rightly held that even if in a case where the registration application under Section 12AA is not decided within six months, there shall not be any deemed registration. We are in complete agreement with the view taken by the Full Bench of the High Court.*"

   Click here to read / download the copy of the ruling.

3. **HC: Upholds disallowance of bonus paid to directors in lieu of dividend. Reiterates settled legal position.**

   SRC Aviation P. Ltd [TS-276-HC-2022(DEL)]

   Delhi HC dismisses Assessee's appeal, holds no substantial question arose where payment made by private limited company to its directors as bonus was disallowed under Section 36(1)(ii).

   Assessee-Company paid bonus of Rs.1 Cr. each to its two shareholders-directors holding 50% of the equity shares each in AY 2011-12 and Rs.1.5 Cr. for AY 2014-15 which was disallowed by the Revenue on the grounds that bonus was paid to avoid payment of dividend distribution tax which was confirmed by the CIT(A) and the ITAT.

HC observes that the simple test is that had the bonus or commission not been paid, it would have added to the profits or dividend of the company. Also that the deduction is permissible only if the sum paid is bonus or commission for services rendered. Finds that in the instant case there is not even an iota of word that amount paid is commission for services rendered or bonus, and that it is not the case of the Assessee that there was any term of employment nor a case that any special services was rendered by the directors.

HC observes that the question of law in the instant context was settled and that there was no substantial question of law in the present cases. Finds that the lower authorities have held that payment of bonus or commission in the instant case was not allowable as deduction and thus dismisses the appeals in absence of any substantial question of law.

Click here to read / download the copy of the ruling.

4. **ITAT: Upholds Sec.56(2)(viib) addition resulting from rounding-off of shares' issue price.**

Royal Accord Realtors Pvt. Ltd. [TS-281-ITAT-2022(Mum)]

Mumbai ITAT dismisses Assessee's appeal, confirms addition of Rs.48.75 Lakh resultant of shares issued at a round figure closest to the FMV determined in terms of Section 56(2)(viib). Holds that Section 56(2)(viib) does not provide for rounding off of any sort.

Assessee-Company engaged in real estate business allotted 1.25 lakh equity shares to another company, issued at premium during AY 2014-15. Revenue found FMV of the shares was determined at Rs.3560.77 per share as per Rule 11UA, but the shares were issued at Rs.3600 per share and made addition of Rs.48.75 lakh based on differential of Rs.39 per share under Section 56(2)(viib) which was confirmed by the CIT(A), against which Assessee preferred the instant appeal.

On perusal of Section 56(2)(viib), ITAT observes that the provisions are attracted when the consideration for issue of shares exceeds fair market value of the shares. Holds that the provisions of section 56(2)(viib) or Rule 11UA are plain, clear and unambiguous and nowhere provide for rounding off to nearest rupee or multiple of ten or hundred.

Click here to read / download the copy of the ruling.

5. **ITAT: Non-compete fee, 'a right in personam', ineligible for depreciation under Sec.32.**

Sagar Ratna Restaurants Pvt. Ltd. [TS-325-ITAT-2022(DEL)]

Delhi ITAT dismisses Assessee's appeal, disallows depreciation on non-compete fees.

Assessee-Company acquired a restaurant and treated the payment made towards non-compete fee to the transferor as capital expenditure. Accordingly, Assessee claimed depreciation on non-compete fee for AY 2014-15, which was disallowed by the Revenue and upheld by the CIT(A).

ITAT disagrees with Assessee's submission that since such depreciation was allowed in earlier AYs, it would be allowable for impugned AY. ITAT finds that unlike the rights mentioned in Section 32(1)(ii) which an owner can exercise against the world at large and can be traded or transferred, in case of non compete fee, the advantage is restricted only against the seller, and remarks that *"it is not a right in rem but in personam"*.

Click here to read / download the copy of the ruling.

6. **ITAT: Managerial Services, IC Labour Charges not taxable as FIS since 'make available clause' not satisfied.**

Everest Global Inc. [TS-247-ITAT-2022 (DEL)]

Delhi ITAT allows Assessee's appeal, holds that consideration received for managerial services and inter-company labour charges received by the Assessee did not satisfy the make available clause as per Article 12(4) of the India-US DTAA, thus, not taxable in India as Fees for Included Services (FIS).

Assessee, a US-based Company, operating as a global services advisory and research company, received an amount towards services offered to its wholly owned subsidiary which was held to be in the nature of fee for technical service / fee for included services under the Act /India-USA DTAA.

Observes that Assessee's case finds support from the MOU annexed to the India-US DTAA explaining the FIS wherein it is clarified that clause 4(b) of Article 12 excludes any service that does not make technology available to the recipient of services. Thus, ITAT opines that services provided by the Assessee are not technical services as also did not require any technological knowledge. Remarks that these services did not result in any enduring benefit to the Indian subsidiary by way of any knowledge which could be applied by it on its own in future without depending on the Assessee and holds them to be not taxable as FIS.

Click here to read / download the copy of the ruling.

7. **ITAT: Sub-contracting charges paid by Infosys to Chinese subsidiary taxable as FTS, under amended Sec.9 & India-China DTAA**

Infosys Limited [TS-272-ITAT-2022(Bang)]

Bangalore ITAT holds that subcontracting charges paid by Infosys to its Chinese subsidiary constitutes Fees for Technical Services (FTS) under Section 9(1)(vii), liable for withholding of tax under Section 195.

Assessee-Company entered into sub-contracting agreement with its Chinese subsidiary for certain overseas work in China and made payment for such sub-contracting without deducting tax at source in AY 2011-12. Revenue passed order under Section 201(1)/(1A) holding Assessee to be assessee-in-default, concluding that the sub-contracting charges were in the nature of FTS.

ITAT rejects Assessee's contention that the twin conditions laid down by SC in *Ishikawajima Harima* i.e., the services being (a) utilized in India, and (b) rendering in India, are not satisfied, opines that the issue whether the impugned payment comes within the purview of Section 9(1)(vii) is squarely covered by Mumbai ITAT ruling in *Ashapura Minichem*, wherein it was held that the retrospective amendment to Section 9, by the Finance Act, 2010 by substitution of Explanation negated the SC ruling in *Ishikawajima Harima* and thus it is no longer necessary that, in order to invite taxability under Section 9(1)(vii) the services must be rendered in India's tax jurisdiction.

Click here to read / download the copy of the ruling.

8. **ITAT: Holds MOL Corp's revenue from product licencing fees, cloud services not taxable as royalty.**

M/s. MOL Corporation [TS-307-ITAT-2022(DEL)]

Delhi ITAT allows Assessee's appeal, holds revenue from licensing Microsoft Software products, cloud services not taxable as royalty.

Assessee, a US-based company and a subsidiary of Microsoft Corporation received consideration of 3373.74 Cr as revenue from licensing of Microsoft software products and Rs.11.35 Cr. from online services termed as

'cloud services' which was held to be taxable as royalty. ITAT finds Revenue followed a persistent approach in holding sale of Microsoft Retail Software Products to Indian Distributors as royalty under the Act as well as under India-US DTAA.

ITAT notes that sale of software products does not give rise to royalty income is affirmed by the SC ruling in Engineering Analysis. As regards income from cloud service being considered as royalty, ITAT notes that the cloud base services do not involve any transfer of rights to the customers in any process and did not include providing any copy of the said software to the customer. Thus, holds that the subscription fee is not royalty but merely a consideration for online access of the cloud computing services for process and storage of data or run the applications.

Click here to read / download the copy of the ruling.

9. ITAT: Upholds denial of Sec.11 exemption by invoking Sec.13 but remits appeal on plea of mutuality.

Media Research Users Council [TS-254-ITAT-2022(Mum)]

Mumbai ITAT holds Section 13(3) applicable to deny exemption under Section 11 where Not-for-Profit Company's Director indirectly controlled a company with which there was revenue sharing agreement.

Observes that the Revenue, in the instant case, established that by piercing the corporate veil, the Director falls within the meaning of Section 13(3) and 13(2)(e) and thus, rejects Assessee's submissions and upholds denial of exemption under Section 11.

As regards Assessee's alternate plea for application of concept of mutuality, ITAT remarks that if revenue from non-members is less than 5% of the gross revenue, it can be regarded as mutual entity and directs the Revenue to redo the assessment under the concept of mutuality.

Opines that Assessee has shared revenue with related concern, which is indirectly related by applying the concept of controlling the affairs by exercising the control of management. Remarks that when it is clear that the said Director has management control, the corporate veil has to be lifted and concurs with the application of Section 13(3).

With respect to Assessee's plea for application of mutuality concept which is rejected by the Revenue, ITAT finds that Assessee dealt with 140 non-members and subscription from them amounted to 3.60% of the gross subscription. Disagrees with Revenue's contention that it falls under significant dealing with non-members and remarks that "*whenever a mutual concern deals with the members they have to allow the facilities to non-members also due to various reasons for survival*". Also that "*When compared to their gross revenue, if it is within range, say less than 5% of their operation, still it will be regarded as mutual concern/entity.*", and observes that it was the entity's responsibility to maintain required books of account to establish exclusiveness.

Finds that Assessee kept the record of dealing with non-members and thus remits the issue back to the Revenue for evaluate the allowability of benefit under mutuality concept to the Assessee. Directs the Revenue to redo the assessment under mutuality concept.

Click here to read / download the copy of the ruling.

10. ITAT: Private Discretionary Trust taxable as AOP, not Individual, basis definition of Person under Sec.2(31).

Mamania Family Trust [TS-284-ITAT-2022 (Mum)]

Mumbai ITAT dismisses Assessee's appeal, confirms CIT(A)'s order assessing private discretionary trust as an AOP. Rejects Assessee's reliance on CBDT Circular No. 6/2012 on the grounds that the Circular refers only to the difficulty in accepting the return by e-filing software where the status of private discretionary trust is shown as 'individual' which is not relevant for the purpose of taxability in the light of Explanation to the definition of person under Section 2(31).

Assessee engaged in running a plastic industry was subjected to reassessment on the grounds that since Assessee was running a plastic industry, its status was that of an AOP / BOI. It was also observed that Assessee provided facilities like staff welfare, conveyance expenses, PF contribution etc. and was thus required to furnish its return for fringe benefits (FBT) but had failed to do so. At Revenue's insistence, Assessee furnished a FBT return, declaring total value of fringe benefits at NIL whereas assessment under Section 115WE read with section 115WG was completed assessing the fringe benefits at Rs.25.45 Lakh.

ITAT finds that CIT(A) relied on the SC ruling in *Indira Balkrishna* and proviso to Section 164(1) wherein it is stated that in certain circumstances, income of the discretionary trust shall be assessed to tax as AOP.

As regards Assessee's reliance on the CBDT Circular, ITAT finds that CIT(A) rejected this argument on the grounds that the departmental circular referring to the discretionary trust as 'individual' was not relevant in view of the explanation to Section 2(31), and that the Circular refers to the difficulty in accepting the return by existing e-filing software if the status of private discretionary trust is shown as 'individual'. Thus, refuses to interfere with the CIT(A)'s order.

Click here to read / download the copy of the ruling.

Direct Tax / PF / ESI compliance due dates during the month of May 2022

Due Date	Form	Period	Comments
07.05.2022		April 2022	Payment of equalization levy
07.05.2022	Challan No. 281	April 2022	Due date for deposit of tax deducted /collected for the month of April, 2022.
15.05.2022	TDS certificate	March 2022	Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M in the month of March 2022.
15.05.2022	ESI Challan	April 2022	ESI payment.
15.05.2022	E-Challan & Return	April 2022	E-payment of Provident fund
15.05.2022		January 2022 to March 2022	Quarterly statement of TCS deposited for the quarter ending March 31, 2022
30.05.2022		April 2022	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA / 194-IB / 194-IC in the month of April 2022.
30.05.2022	Form No. 49C	Financial Year 2021-22	Submission of a statement by non-resident having a liaison office in India.
30.05.2022	TCS certificate	4th Quarter of FY 2021-22	Issue of TCS certificates for the 4th Quarter of the Financial Year 2021-22
31.05.2022	Form 24Q, 26Q, 27Q	January 2022 to March 2022	Quarterly statement of TDS deposited for the quarter ending March 31, 2022,
31.05.2022	Form No. 61A	Financial Year 2021-22	Due date for furnishing of statement of financial transaction as required to be furnished under sub-section (1) of section 285BA of the Act.
31.05.2022	PAN application		Application for allotment of PAN in case of non-individual resident person, which enters into a financial transaction of Rs. 2,50,000 or more during FY 2021-22 and hasn't been allotted any PAN.

MCA Updates

1. **MCA Permits companies to conduct AGMs/ EGMs through VC till December 31, 2022.**

   MCA permits companies to conduct their AGMs/EGMs through VC or Other Audio Visual Means (OAVM) or to transact items through postal ballot up to December 31, 2022, in accordance with the framework provided in earlier Circulars issued in this regard.

2. **MCA Exempts banks from charge-creation compliance for charge created in RBI's favour.**

   MCA amends Companies (Registration of Charges) Rules, 2014 to insert a new sub-rule under Rule 3 which pertains to registration of creation or modification of charge, with the RoC. Further provides that, nothing contained in Rule 3 (compliance w.r.t. registration of charge creation/modification) shall apply to any charge required to be created or modified by a banking company u/s 77 (Duty to register charges, etc.) in favour of RBI when any loan or advance has been made to it u/s 17(4)(d) of the Reserve Bank of India Act, 1934.

3. **MCA amends Nidhi Rules, increases paid-up equity share capital, net owned funds requirement.**

   MCA amends Nidhi Rules, 2014 w.e.f. April 19, 2022, *inter alia* provides that a public company desirous to be declared as a Nidhi shall apply in Form NDH-4, within a period of 120 days of its incorporation for declaration as Nidhi, if – (i) it has not less than 200 members, and (ii) it has Net Owned Funds of Rs. 20 lakh and more.

   MCA Inserts provisos under Rule 3A (Declaration of Nidhis) to state that any company which has not complied with the requirements of the said Rule, or fails to comply with such requirement on or after the commencement of the Amendment Rules, or in case the application submitted by the company in Form NDH-4 has been rejected by the Govt., shall not raise any deposit from its members or provide any loan to its members under the provisions of these rules from the date of such non-compliance, or from the date of commencement of above said rules, or the date of rejection of application, whichever is later.

   Modifying the rules governing incorporation, enhances the minimum paid up equity share capital requirement for a Nidhi from Rs. 5 lakh to Rs. 10 lakh, while specifying that every Nidhi existing as on the date of commencement of the Amendment Rules shall comply with this requirement within a period of 18 months from the date of such commencement.

   Further, w.r.t. membership, the Amendment Rules lay down that a member shall not transfer more than 50% of his shareholding (as on the date of availing of loan or making of deposit) during the subsistence of such loan or deposit, as the case may be, provided that the member shall retain the minimum number of shares required under Rule 7(3) (i.e. a

minimum of 10 equity shares or shares equivalent to Rs. 100) at all times.

Further, requires every Nidhi to maintain Net Owned Funds (excluding the proceeds of any preference share capital) of not less than Rs. 20 lakh (earlier, Rs. 10 lakh) or such higher amount as the Central Govt. may specify from time to time. Lastly, amending the provisions governing "Branches", defined as a place other than the registered office of Nidhi, stipulates that after obtaining approval from the Regional Director, the Nidhi shall publish advertisement, as per format NDH-5, in a newspaper in vernacular language in the place where it carries on business at least 30 days prior to such closure, informing the public about such closure, and notifies the said format, while also laying down certain amendments in forms NDH-2, NDH-3 and NDH-4.

4. Nidhi Companies to seek Central Govt. declaration before commencing business.

MCA amends the Companies (Incorporation) Rules, 2014, *inter alia* inserts a proviso under Rule 12 (application for incorporation of companies) specifying that in case of a Company being incorporated as a Nidhi, the declaration by the Central Government u/s 406 of the Companies Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the company, w.e.f. April 8, 2022.

Further, notifies revised format for Form No. INC-20A (Declaration for commencement of business), and adds a declaration at the end of Form No. INC-32 (SPICe+), for the company to declare that it shall not commence the business of Nidhi, unless all the required approvals including the declaration to be issued u/s 406 of the Act have been obtained from the Central Government.

5. PAN, address, e-mail ID of company members cannot be inspected.

MCA amends the Companies (Management and Administration) Rules, 2014, thereby specifying that certain particulars pertaining to shareholders of a company shall not be made available for inspection. Further states that particulars viz. the address or registered address, e-mail ID, Unique Identification Number and PAN, of the register or index or return in respect of the members of a company shall not be made available for any inspection u/s 94(2) of Companies Act, 2013 or for taking extracts or copies u/s 94(3).

6. Due dates:

For filing form 11 – Annual return for LLP – May 31, 2022.

For filing form CSR 2 for FY 2020-21 – May 31, 2022.

FEMA Updates

1. **Amendment to Non-Debt Instruments (NDI) Rules pursuant to DPIIT Press Note No. 1 (2022 Series) Dated March 14, 2022 with regards to permitting foreign investment in Life Insurance Corporation of India (LIC) and other modifications for further clarity of the existing FDI Policy NDI Amendment Rules 2022 dated April 12, 2022**

   The Government of India had reviewed the extant FDI Policy for permitting foreign investment in Life Insurance Corporation of India and other modifications for consistency and further clarity of the existing FDI Policy. Accordingly, the said amendments have also been made in NDI Rules.

2. **Limits for investment in debt and sale of credit Default Swaps by Foreign Portfolio Investors (FPIs)**

   A.P. (DIR Series) Circular No. 29 dated April 19, 2022
   Investment Limits for the financial year (FY) 2022- 23:

   a. The limits for FPI investment in Government securities (G-secs), State Development Loans (SDLs) and corporate bonds shall remain unchanged at 6%, 2% and 15% respectively, of outstanding stocks of securities for FY 2022- 23.

   b. As hitherto, all investments by eligible investors in the 'specified securities' shall be reckoned under the Fully Accessible Route (FAR) in terms of A.P. (DIR Series) Circular No. 25 dated March 30, 2020.

   c. The allocation of incremental changes in the G-sec limit (in absolute terms) over the two sub-categories – 'General' and 'Longterm' – shall be retained at 50:50 for FY 2022-23.

   d. The entire increase in limits for SDLs (in absolute terms) has been added to the 'General' sub-category of SDLs.

3. **Legal Entity Identifier (LEI) for Borrowers**

   a. On a review, it has been decided that the guidelines on LEI stand extended to Primary (Urban) Co-operative Banks (UCBs) and Non-Banking Financial Companies (NBFCs). It is further advised that non-individual borrowers enjoying aggregate exposure of ₹5 crore and above from banks and financial institutions (FIs) shall be required to obtain LEI codes as per the timeline. The timeline for obtaining LEI by borrowers are:

Total Exposure	**LEI to be obtained on or before**
Above ₹ 25 crore	April 30, 2023
Above ₹ 10 crore, up to ₹ 25 crore	April 30, 2024
₹ 5 crore & above, up to ₹10 crore	April 30, 2025

   b. "Exposure" for this purpose shall include all fund based and non-fund based (credit as well as investment) exposure of banks/FIs to the borrower. Aggregate sanctioned limit or outstanding balance, whichever is higher, shall be reckoned for the purpose.

   c. Borrowers who fail to obtain LEI codes from an authorized Local Operating Unit (LOU) shall not be sanctioned any new exposure nor shall they be granted renewal/enhancement of any existing exposure. The Departments / Agencies of Central and State Governments (not Public Sector Undertakings registered under Companies Act or established as Corporation under the relevant statute) shall be exempted from this provision.

   d. These directions are issued under sections 21, 35A and 56 of the Banking Regulation Act, 1949, sections 45JA and 45L of the Reserve Bank of India Act, 1934, section 30A of the National Housing Bank Act, 1987 and section 6 of the Factoring Regulation Act, 2011.

Indirect Tax Updates

Customs

1. In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government amends certain notifications of the Government of India in the Ministry of Finance (Department of Revenue).

   Click here to read / download the Notification No. 23/2022 dated, 30th April 2022.

2. In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), read with section 110 of the Finance Act, 2018 (13 of 2018) the Central Government makes amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 11/2018-Customs, dated the 2nd February, 2018, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 114(E), dated the 2nd February, 2018.

   Click here to read / download the Notification No. 24/2022 dated, 30th April 2022.

Indirect Tax Rulings

1. **Legal-consultancy services availed by Lehman Brother for winding-up doesn't prove 'business entity' existence**

   Lehman Brothers Securities Pvt. Ltd [TS-155-CESTAT-2022-ST]

   Conclusion: CESTAT Mumbai allows Lehman Brothers Securities (assessee) to claim refund of service tax paid by them 'under protest' under Reverse Charge Mechanism (RCM) for the legal consultancy services received by them for winding up of their business. Notes that in present case, there is no dispute that assessee have stopped their business activity after the year 2008 and are in the process of winding up, and for that purpose, they received certain Legal consultancy services and discharged service tax 'under protest' on reverse charge basis.

   Commissioner rejected the refund application based on the apprehension that the assessee 'can' carry out activity related to their business as they have not surrendered their registration under the Companies Act, 1956 and therefore they fall under the preview of definition of 'business entity'.

   Clarifies, for applicability of the definition of 'business entity' as per Section 65B(17), the assessee has to normally or in normal course, indulge in any activity which is profit motivated. Hence, merely because the assessee is still registered under the Companies Act and has not get the said registration cancelled, does not mean that they are carrying out 'Business activity'.

   Observes that, Revenue has neither alleged in SCN that earned any profit from their business activity not placed any document on record to show that assessee has indulged in any business activity, Therefore, terms Commissioner's apprehension as 'totally unfounded' remarking "appellant cannot be saddled with any tax liability only on the basis of apprehension". So far as the submission that assessee are availing legal consultancy services raises suspicion, finds that the same is also without any basis as no evidence has been placed on record, while

allowing the assessee's appeal with consequential relief.

2. Upholds denial of Education Cess credit on procurements from 100% EOU

Venus Wire Industries Pvt. Ltd [TS-156-CESTAT-2022-EXC]

Conclusion: CESTAT Mumbai affirms Adjudicating Authority's order which held that in case of inputs procurement by domestic manufacturer from EOUs, availment of CENVAT credit is not inclusive of Education Cess (EC) and Secondary Higher Education Cess (SHEC), in terms of Rule 3(7) of CENVAT Credit Rules, 2004.

Notes that, assessee procured inputs like stainless steel wire rods from one supplier (a 100% EOU) and availed credit of CVD and Cess (EC and SHEC) which according to Department is not contemplated by formula prescribed in Rule 3(7) for availment of CENVAT credit. Takes note of the formula which provides that 'credit shall be limited to 50%' and admissibility of such restriction by both parties during the course of the arguments. On being questioned to falsify Department's claim and substantiate that credit availed was correct, remarks, "We find that the excess availment of credit was accepted ..".

Finding that assessee wrongfully availed excess credit which they have reversed subsequently on being pointed out, relies on own decision in Encore Healthcare where it was held that credit admissibility in such circumstances should be as per Rule 3(7), and declares, "the impugned order does not require any interference inasmuch as the admissibility of credit of duty is concerned". On Revenue's contention that interest requires to be paid in view SC decision in Ind-swift Laboratories Ltd., concurs that "denial of excess credit availed…is upheld along with interest". However, agrees with assessee that, no penalty can be imposed as the issue involved is about the interpretation of provisions and no mala fides can be imputed per se, while allowing assessee's appeal partially.

3. Distinguishing between 'compensation' and 'consideration', quashes demand on 'Notice Period Pay'

XL Health Corporation India Pvt. Ltd [TS-202-CESTAT-2022-ST]

Conclusion: CESTAT Bangalore debunks confirmation of adjudged demands on assessee for collection of certain amount as 'Notice Period Pay' or 'Bond Enforcement Amount' from their employees, who want to quit the job without notice or do not serve the organization.

Explains that, "term 'notice pay' mentioned in the employment contract cannot be considered as a service, more specifically as the taxable service inasmuch as neither of the parties to the contract have provided any service to each other", thus, rules out applicability of Section 65B (44) and Section 65B (22) defining the phrase 'service' and 'declared service' for consideration of such activity as a service. Carves out distinction between the amount received as compensation and the term 'consideration' "inasmuch as the latter is received for performance under the contract" whereas, "the former is received, if the other party fails to perform as per the contractual norms".

Relies on Madras HC ruling in the case of GE T&D India Ltd. as also on a couple of Tribunal decision and thus, finds the issue as "no more open for any debate"

4. 2022-TIOL-504-HC-AHM-GST

Aggarwal Dyeing And Printing Works Vs State Of Gujarat

GST - Petitioner has inter alia sought a direction to the Respondent No. 3 to revoke cancellation of the registration of the writ applicant. direction to the Respondent No. 2 to consider the Appeal on merits. award costs etc. - Controversy in all these writ applications is in the narrow compass i.e. Whether the show cause notice seeking cancellation of registration and the consequential impugned order cancelling

registration under the GST Act, 2017 is valid and sustainable in eye of law?

Held: It is settled legal position of law that reasons are heart and soul of the order and non-communication of same itself amounts to denial of reasonable opportunity of hearing, resulting in miscarriage of justice - Assignment of reasons is imperative in nature and the speaking order doctrine mandates assigning the reason which is the heart and soul of the decision and said reasons must be the result of independent re-appreciation of evidence adduced and documents produced in the case - Wherever an order is likely to result in civil consequences, though the statute or provision of law, by itself, does not provide for an opportunity of hearing, the requirement of opportunity of hearing has to be read into the provision - Show cause notice, though issued in the prescribed form does not elaborate the reasons and the one-line reason mentioned is nothing but the reproduction of either of the reasons provided under rules regarding cancellation of registration - Respondent authority i.e. the Assistant/Deputy Commissioner, State tax Officer ought to have at least incorporated specific details to the contents of the show cause - Any prudent person would fail to respond to such show cause notice bereft of details thereby making the mechanism of issuing show cause notice a mere formality and an eye wash - Respondent authority has failed to extend sufficient opportunity of hearing before passing impugned order, inspite of specific request for adjournment sought for - Even the impugned order is not only non-speaking, but cryptic in nature and the reason of cancellation not decipherable therefrom - Thus, on all counts the respondent authority has failed to adhered to the aforesaid legal position - Bench, therefore, has no hesitation in holding that the basic Principles of natural justice stand violated and the order needs to be quashed as it entails penal and pecuniary consequences - Liberty granted to the respondent No. 2 to issue fresh notice with particulars of reasons incorporated with details and thereafter to provide reasonable opportunity of hearing to the writ applicants, and to pass appropriate speaking orders on merits - Writ applications allowed: High Court

5. 2022-TIOL-477-HC-ALL-GST

AJAY VERMA Vs UoI

GST - Petitioner submits that the impugned show cause notice and the impugned assessment order are without jurisdiction inasmuch as pursuant to the decision of the GST Council vide Agenda item no. 28 of the Minutes of the IX GST Council Meeting dated 16.1.2017, the designated committee passed the order no. 04/2018 dated 12.9.2018 issued by the Commissioner of Commercial Tax, Uttar Pradesh providing for single interface under the Act and whereby the petitioner i.e. taxpayer was assigned to the Central Government Officer and, therefore, the show cause notices issued by the State Officer i.e. the respondent no. 4 and the impugned assessment order passed by him both are without jurisdiction and, therefore, deserve to be quashed.

Held: Neither on issuance of notice nor during the course of assessment proceedings, did the petitioner inform the respondent No.4 that his case was assigned to a Central Officer - After the assessment order dated 09.08.2021 was passed by the respondent No.4, it came to notice that the case was assigned to a Central Officer - Hence, the respondent No.4 wrote letters to the Central Officer who informed vide letters dated 22.11.2021 and 03.12.2021 that as per Act the proceedings shall be completed by the officer who initiated it, i.e. by the respondent No.4 - Sub section (91) of Section 2 and Section 6 of the CGST Act/UPGST Act read with the minutes of the meeting of the GST Council dated 16.1.2017 agenda Item no. 28 and the order no. 04/2018 dated 12.9.2018 jointly issued by the State and Central authorities, leads to an irresistible conclusion that proper officer under the UPGST Act and proper officer under the CGST Act both have jurisdiction over assessees falling within their territorial jurisdiction but for administrative convenience, assignment of taxpayers have been made by the designated committee at

the State level - Present case is not a case of inherent lack of jurisdiction rather it is a case of error of jurisdiction on account of non-allotment of case of the petitioner assessee to the respondent no. 4/State officer - It is not a case that the state officer i.e. the respondent no. 4 lacks inherent jurisdiction but it is a case where the jurisdiction has been exercised by the respondent no. 4 in the absence of any objection or pointing out by the petitioner that the case has been assigned to a central officer - Impugned show cause notice and the impugned assessment order do not suffer from any inherent lack of jurisdiction and instead it is the result of contributory error of jurisdiction by the respondent no. 4 - Had the petitioner objected to it at the initial stage or during the course of assessment proceedings, the position could have been rectified by the respondent no. 4 by informing the central officer to complete the assessment proceedings - Writ petition is dismissed leaving it open for the assessee-petitioner to challenge the impugned assessment order in appeal under section 107 of the CGST/UPGST Act: High Court

6. 2022-TIOL-503-HC-MAD-GST

ALGAE LABS PVT LTD Vs STO

GST - Vehicle along with spray dryer were seized by the respondent on the ground that the address of the Consignee mentioned as No. 5/150, South Karumpattor, South Thamaraikulam, Kanyakumari, Tamil Nadu - 629708, was not a place mentioned in the GST Registration of the petitioner - Petitioner has challenged the impugned order of demand of tax and penalty under Section 129 of the Act.

Held: Both the petitioner and the respondent admit that as on date the above said address has been included in the petitioner's place of business in the GST Registration - Thus, there is a *post facto* inclusion of the address, which was mentioned in the tax invoice raised by the supplier and in the E-way Bill - As there is no attempt to evade tax, impugned order is quashed and set aside - Writ Petition is allowed: High Court

7. 2022-TIOL-283-CESTAT-BANG

MEDGENOME LABS LTD Vs CCT

ST - The issue to be decided is, whether the service provided by appellant qualifies as export of service - Appellant-M/s. MedGenome Labs Limited is a service provider and MedGenome Inc., USA is service recipient - The service which is provided by appellant to their foreign client is analysis report of samples and not any goods - The collection of samples, analysis thereon is conducted by appellant in India - Undisputedly, appellant is not receiving any goods from their foreign client but conducting the tests - The entire emphasis of Revenue to hold that appellant's activity does not fall under export of service viz. that the appellant are providing services in respect of goods i.e. samples - The samples are blood and tissue extracted from human body - Appellant have neither purchased said goods nor is saleable - They paid the cost only for service for extraction of samples - Therefore, sample cannot be treated as saleable goods - For this reason, condition of Rule 4 is not satisfied - Place of provision of service is clearly the location of recipient of service, which is country of appellant's clients - The service is not specified in Section 66 of Finance Act - There is no dispute that the payment of such service has been received by appellant as a service provider in convertible foreign exchange - Appellant have clearly satisfied the conditions required for treating the service as export of service - Therefore, appellant's service, being export of service, cannot be chargeable to service tax - Since the appeal is decided on its merits itself, Tribunal need not go into the issue of calculation of demand for which Revenue has filed the appeal: CESTAT

8. 2022-TIOL-268-CESTAT-MUM

PFIZER LTD Vs CCE & ST

CX - The appeal is directed against impugned order upholding the order of Deputy Commissioner rejecting the refund claim - When the Revenue seeks to deny the credit distributed by input credit distributor to amongst more than one office unit, then the credit is sought to be denied in a particular unit - For whatever reason the same credit would be admissible to another unit to whom this credit could have been properly distributed even after the amendment made in 2012, i.e., the total credit distributed to all the units remained the same, the only question can be with regard to the correctness of credit distributed to a particular unit - If credit is sought to be denied at one place, input credit distributor should have been asked to distribute this credit to the other unit - Since this credit is admissible either to unit or its sister concern, no merits found in argument advanced by revenue on unjust enrichment - The credit otherwise could not be expunged by any other method other than that provided in Rule 14 of Cenvat Credit Rules, 2004 from the books of account - Claim of revenue that the debit made under protest and the communication of audit should be treated as an appealable order, cannot be acceded to - No merits found in impugned order, same is set aside: CESTAT

9. 2022-TIOL-292-CESTAT-MUM

RADIUS CORPORATE SOLUTIONS INDIA PVT LTD Vs CCGST

ST - Issue relates to denial of CENVAT credit on renting of immovable property for want of registration and on other input services for absence of nexus - Concerning availment of CENVAT credit on those premises which were either not registered or got registered subsequent to filing of refund application for which credit was denied with consequential rejection of refund, it can be said that the issue is no more *res integra*, in view of plethora of decisions already pronounced wherein it is established that CENVAT credit is also admissible on premises that had been registered subsequently - In respect of rest of CENVAT credits against which refund was denied to appellant, it is to be seen if those are infect excluded from the purview of input service and falling within the definition of 'Exclusion Clause' - As can be seen from the order passed by Commissioner (Appeals), arguments were led in that direction like Air Travel services and Hotel Accommodation services were taken for attending meetings/conferences/seminars with various clients of company and for annual meetings but as could be seen from the last para of order, he had distinctly observed that relevant documentary trail, and not invoices alone, can establish the purpose of use of the services if for personal or business - It would be just and proper to remand the matter to Commissioner (Appeals) for such examination of additional proof concerning availment of input services by appellant except for Renting of Immovable property which is held in favour of appellant: CESTAT

10. 2022-TIOL-427-HC-KERALA-ST

SWATHI CONSTRUCTIONS Vs CCGST & CE

ST – Appeal to CESTAT - It is contended that the pre-deposit payable as contemplated u/s 86 of the Finance Act, 1994, in the instant case was Rs.18,06,057/- and that with all bonafide, petitioner deposited an amount of Rs.12,50,000/- leaving Rs.5,56,057/- as balance unpaid towards the pre-deposit - Since the petitioner found it financially impossible to make the balance of the mandatory pre-deposit, he has approached this Court seeking relief from such a pre-deposit.

Held: After the amendment to section 35F of the Central Excise Act r/w Section 86 of the Finance Act, 1994 came into force on 06.08.2014, no discretion is available with the courts of law to waive the mandatory requirement of pre-deposit of 7.5% even if it is assumed to be onerous in the circumstances of the case - When the Statute does not provide for waiver of a pre-deposit, it is impermissible for this Court to act contrary to the legislative intention merely on the plea of financial hardships - If such pleas are entertained, and directions are issued for waiving the pre-deposit, there will be no end to such demands - Further if orders are issued, contrary to the Statute the same will destroy the very scheme of the Statute including the consequent amendment - No merit in this writ petition and the same is dismissed - However, liberty is granted to the petitioner to make the balance of the pre-deposit within a period of one month and if so made the Tribunal will consider and dispose of the appeal on merits: High Court [para 8, 10]

11. NAA: No case of profiteering by Realtor where project started and flats allotted post-GST

DGAP vs Alton Buildtech India Pvt. Ltd. [TS-155-NAA-2022-GST]

Conclusion

NAA holds that there is no contravention of Section 171(1) of the CGST Act, 2017 where the respondent-realtor has launched the Phase II of affordable housing project 'Aangan' after implementation of GST. Concludes that, apparently, there was no pre-GST tax rate or ITC availability that could be compared to determine whether there was any benefit that was required to be passed to buyer. Derives that, authority in earlier **order** has confirmed profiteering to the tune of Rs. 6.24 crores by the respondent w.r.t the Phase I of said project for not passing on additional ITC benefit (10.25%-0%) to buyers by way of commensurate reduction in prices of flats. However, finds that, w.r.t Phase II, chronology of event suggest that the service rendered by respondent by way of construction and development of project was not in existence during pre-GST regime, also, draw of lots , allotment of units and receipts of payments took place post-GST era (i.e. after July 1, 2017). Also takes note of the fact that Phase III of the project it is yet to be launched and had not been registered with RERA till date. Apprises that 'this order having passed...falls within the limitation prescribed under Rule 133(1).." for following reasons, viz (i) the quasi-judicial matter was pending owing to lack of required minimum quoram from April 29, 2021 to February 23, 2022 and was restored w.e.f February 23, 2022 onwards, (ii) owing to Covid-19 pandemic, the Supreme Court, vide its **order** dated January 10, 2022, had extended the period of limitation till February 28, 2022:NAA

12. AAAR: Preferential Location Service different from construction, attracts 18% GST

In the matter of DLF Ltd [TS-1266-AAAR(HAR)-2020-GST]

Haryana AAAR holds that Preferential Location Service Charges (PLS) collected along with consideration for sale of properties attracts GST at 18% where sale/transfer of constructed property has taken place before the issuance of completion/occupation certificate (CC/OC). Classifies same under Group 99722 (Real Estate Services on a fee or commission basis or on contract basis), and also clarifies that PLS collected after OC/CC issuance is "*not outside the scope of supply*". Further, observes that, PLS collected along with consideration for sale of properties attracts 18% GST where sale/transfer of constructed property has taken place before issuance of completion/occupation certificate under new projects which commence on or after April 01, 2019.. Rejects Applicant's plea that PLS is nothing but construction service (thus entitled to 1/3rd abatement from total transacted value of immovable property), as, despite the preferential location coming into existence as a consequence of the

construction activity undertaken by the Developer, the amount charged for the Preferential Location is a consideration paid by the buyer for provisioning of an exclusive service. Remarks "In the Scheme of Classification, the service of provisioning of preferential location is not classified/classifiable under construction service", moreover, PLS can be offered even after CC/OC issuance, thus would fall beyond scope of said service. Explains that, different rates of the houses can be on account of different locations, thus "premiumness of a location attracts a commensurate consideration which the buyer pays for an identified advantage", which makes it an exclusive service capable of being provided even by a dealer in immovable property. Elucidates that PLS collected is not outside the scope of supply and refers to SAC 997213 which governs 'Trade Services of Buildings', and when a building is sold as stock in trade, the same would qualify as supply, Also caveats that, Applicant cannot claim adjustment/refund of GST amount as there cannot be excess GST paid in respect of SAC 99799 which attracts 18% GST. Differs from West Bengal AAAR ruling in Bengal Peerless Housing Development Company, on the aspect of classification. Lastly, envisages that the PLS is a separate service other than construction service, therefore, for determining value of the same, the Entry of Notification no. 11/2017, applicable exclusively to construction service shall not be applicable: AAAR HAR

13. AAAR: ITC ineligible on gift distribution, third-party canteen service. No GST on coupons distributed to employees.

In the matter of Muasashi Auto Parts India Pvt. Ltd. [TS-1269-AAAR(HAR)-2020-GST]

Haryana AAAR holds that ITC of GST charged by vendor for canteen services provided by appellant to employees is "not admissible". Appellant engaged in the manufacture and supply of auto parts and in terms of the Factories Act, 1948 is providing canteen facility against a nominal amount i.e. without commercial objective is recovered by way of card punch or coupon sale to avoid wastage of food and resource and in order to maintain discipline. As for the question relating to ITC on GST charged by vendor for canteens services availed by it for the employees, upon reading section 16 and 17 (5) (b) coupled with the AAR ruling on the issue notes that, w.e.f. February 01, 2019 wherein the section 17 (5) (b) has been substituted, Indicates that, respective positioning of colons and semi-colons in Section 17(5) makes it distinctly clear that "Input Tax Credit on the 'Food and Beverage ' services are available only when the registered person is making an outward supply of the same category of goods or services". Further, on the question of GST on distribution of coupons among employees, AAAR observes that, as activity itself has been held outside the tax net, "there is no need for the valuation of the same for taxation purposes". Examining the question regarding taxability of the 'canteen services' being provided to employees, mandatorily and at 'no-profit' under the Factories Act and at a highly subsidised nominal value, AAAR opines that "a provisioning of canteen service to employees is not a taxable activity chargeable to GST". To substantiate this view, AAAR reasons that, no-profit and mandatory services are tied to the employer's obligation towards the employees which are "uniformly available to all the employees and are not restricted to any class of employees….available to the employees…as a facility in the course of their employment…". Further denies ITC on gift items namely, sweets, dry fruits, electronic items and gold-silver coins etc. used in 'Business Promotion while clarifying that "…17(5) clause (g) clearly forbids ITC admissibility on the items of personal consumption.": AAAR HAR

14. AAAR: Rendering diagnostic images to hospitals/clinics not 'Healthcare Service' but 'input-service for Diagnosis

In the matter of Siemens Healthcare (P) Ltd. [TS-1270-AAAR(HAR)-2020-GST]

Haryana AAAR holds that provision of installing/operating MRI/CT scanners, etc. by Siemens Healthcare in the premises of its customers (clinical establishment) and providing diagnostic images is not exempt. Dismisses appeal against AAR order on finding that provision of diagnostic images to hospitals and clinical establishments who in turn take valuable opinion from experts does not qualify as 'Healthcare Services'. Adds that, services is not given to patient and 'Diagnosis' is not complete unless a Radiologist reviews them, thereby declares that, Appellant's activity remains "an Input Service for providing diagnosis". Appellant is engaged in selling, establishing and maintaining the medical diagnostic / imaging equipment at the premises of their client viz. hospitals and other clinical establishments. Appellant submits that the diagnostic imaging services would involve providing to its customers visual representations of the interior of a human (i.e. patient's) body to assess the current medical condition of patients by their customers. Appellant claims that as per the Board's Circular No. 32/6/2018-GST dated February 12, 2018 (Circular), doctors and technicians even without their contract with the patient is eligible for exemption. In rebuttal to this submission, the AAAR observes that there are kind of Technicians and CBIC circular No. 32/6/2018-GST refers to the ones who are 'Emergency Medical Technicians' or the services of technicians who are akin to Para-medics performing a role/activity amounting to 'Healthcare services' and consequently exempt from GST. Perusing the relevant entry at Sl. No. 74 regarding 'HealthCare Services' of Notification No. 12/2017- CTR dated June 28, 2017 and Circular, categorically states that "the exemption provided vide the Notification is to 'Services' and not to Technicians or Doctors/Medical Practitioners or Para-Medics or Ambulance Operators.". Thus, comprehends that appellant does not meet the dual criteria of (a) being a health care service and (b) being a clinical establishment finding that "services being provided by the Appellant are not by way of diagnosis, but are the input service of provisioning of diagnostic imaging services under the contract/agreement for further provisioning of Diagnostic service to the patients by….medical practitioner / pathologist / radiologist". Thus, disentitles appellant to exemption opining that it, "is not an independent establishments for providing diagnostic services….. Since…the appellant can't be said to provide diagnosis services to the patient & hence not eligible to the exemption". Distinguishes reliance on SC decision in Tata Oils while stating that Appellant has nor pleaded that intent of the legislature is also to exempt inputs/input-services consumed for providing Health-care services nor there is any notification or clarification providing such exemption (to input services): AAAR HAR

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