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By

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Dear Readers,

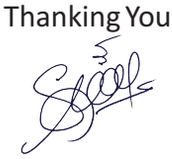
Greetings for the season!

Hope you are doing good and keeping you and your family safe in these times. I wish that things will reach normalcy at the earliest possible. This lockdown has a brighter side giving us time for introspection which we normally do not find. Hope everyone is utilising the time for introspection and compensating the family time, which we have missed all way long.

In this edition, we cover the second part of the taxation of gains arising from alienation of shares of Flipkart Singapore by Tiger Global Holdings. We also deal with the recent UK Supreme Court judgment in the matter of Martin Fowler and apply the rationale delivered therein to Indian context. This is also two part series and I urge everyone to read both the parts to comprehend the issue. We also deal in this edition, the most important part on the GST side which deals with the vires of Rule 117 which prescribes the time limit for availment of transitional credit. This is a three part series, whichI urge everyone not to miss all the parts for better understanding of the issues.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,



Suresh Babu S
Founder & Chairman

DIRECT TAXATION

INDIRECT TRANSFERS 2.0 – STUDY ON TAXABILITY OF GAIN ON ALIENATION OF SHARES - TIGER GLOBAL - PART II

Contributed by CA Suresh Babu S & CA Sri Harsha

(This article is Part II in a three part article. For the previous part, please refer to our previous edition of our journal).

Opening Remarks:

The acquisition of Flipkart by Walmart has attained considerable attention of media. The deal is to the tune US $ 16 Billion, making Flipkart as most valuable e-commerce marketplace in India. Now that the deal is done, the tax considerations/issues surface, one-after the other, the first being the issue of indirect transfers, which recently came up for consideration in the matter of Tiger Global. In this article, we shall deal with the recent judgment of Authority for Advance Rulings (for brevity 'AAR') in the matter of Tiger Global International II Holdings[1] . After setting out the ruling, taking this as a case study, we shall adventure to list out the favourable and adverse tax positions, position after MLI[2] and GAAR[3] .

In this part, we shall now deal with the positions favourable and against to Tiger Global Holdings when they challenge the said ruling before High Court. Without any further delay, let us proceed. We recommend reading of the previous part before starting this.

Positions favourable to Tiger Global Holdings:

Rationale of Honourable Supreme Court in Vodafone International Holdings BV[4] :

On Tax Avoidance - Principals enunciated by Ramsay:

The Honourable Supreme Court stated the test laid down in W.T. Ramsay Ltd[5] is 'look at'. According to the said test, the Revenue is to ascertain the legal nature of transaction and while doing so, it has to look at the entire transaction holistically and should not adopt a dissecting approach. The Court also stated that there is a difference between pre-ordained transaction which is created for tax avoidance purposes, on one hand, and a transaction which evidences investment to participate in India. In order to find out whether a given transaction evidences a pre-ordained transaction in the sense indicated above or investment to participate, one has to take into account the factors namely, duration of time during which the structure existed, the period of business operations in India, generation of taxable revenue in India, the timing of exit, the continuity of business on such exit.

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[1] 2020 (6) TMI 159 – Authority for Advance Rulings, New Delhi

[2] Convention on Multilateral Instruments

[3] General Anti-Avoidance Rules

[4] CGP Investment (Holdings) Limited (CGP), company incorporated in Cayman Islands which was holding single share, wherein the value of such share was derived from assets located in Hutchison Essar Limited (HEL), an Indian Company. CGP was holding a total of 52% of HEL through direct and indirect subsidiaries. Further, CGP was an indirect subsidiary of Hutchison Telecommunications International Limited (HTIL), a company incorporated in Cayman Island, listed in Hong Kong. HTIL was the vendor of single share of CGP and Vodafone International Holding BV (VIH), Netherland company was the buyer of such single share. The Revenue argued that inter alia, the interposition of CGP and transfer of share of CGP to VIH was to avoid tax and there is no role other than this for CGP in the entire transaction.

[5] (1981) 1 All E.R 865

The AAR denied examination of all these aspects only on the sole reason that the investment flowed to Singapore and not India. It is beyond doubt that the funds invested in Singapore have eventually flown into India towards equity or loan in Flipkart India. Further, the plea taken by Tiger Global Holdings to apply the India-Mauritius Treaty is also a factor which establishes that the funds have actually flown to India. The AAR would have examined the issue by taking the said aspect into consideration and in our opinion, that being done, the ruling may be different.

The Honourable Supreme Court stated that HTIL or VIH was not a fly by night operator/short time investor and held that if one applies 'look at' test, without invoking dissecting approach, then the transaction cannot be called as for avoidance of tax and applying the same to the facts of Tiger Global Holdings, the conclusion would be same as the Honourable Supreme Court's in the matter of Vodafone International Holdings BV (supra).

On Tax Avoidance – Taxation of Holding Structure:

Para 68 of the judgment deals with certain international aspects of holding structure, which assumes huge significance for the current context. The AAR has rejected the pleadings of Tiger Global Holdings that the heads and brains of those entities are outside Mauritius and the power of Mr Charles P Coleman can be felt all over those entities. The AAR also stated that the signing of cheques beyond certain a limit resting with Mr Charles P Coleman is not a coincidence and concluded that TGM USA is a beneficial owner of shares.

However, the AAR has not applied the principals enunciated in Para 68 of Vodafone International Holdings BV in true sense. Para 68 states that, it is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company both for tax and business purposes. The Court stated that in doing so, the foreign investors are able to avoid lengthy approval and registration process required for a direct transfer of an equity interest in a foreign invested Indian company and recognised such a practice makes taxation of such holding structures complicated and give rise to issues such as double taxation, tax deferrals and tax avoidance. The Court further stated that when it comes to taxation of holding structure, **at the threshold, the burden is on Revenue to allege and establish tax abuse, in the sense of tax avoidance in the creation of such structures and in the application of judicial anti-avoidance rule, the Revenue may invoke the 'substance over form' principle or 'piercing the corporate veil' test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant.**

The Court also stated that, if a structure is used for circular trading or round tripping[6] or to pay bribes, then such transactions, though having a legal form, should be discarded by applying test of fiscal nullity and similarly, in a case, where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such inter-positioning of that entity. However, the court stated that it has to be done at the threshold and the task of Revenue/Court to ascertain the legal nature of transaction and while doing so it has to look at the entire transaction as a

[6]Round Tripping is one of the methods of Treaty Shopping. While other forms of Treaty Shopping are normally allowed and encouraged by source countries, round tripping and abusive restructuring may not be entertained by applying JAAR.

whole and not dissecting approach. The Court stated that the **Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the 'look at' test to ascertain its true legal nature**. Applying the above tests, the court stated, **every strategic foreign direct investment coming to India, as in investment destination, should be seen in a holistic manner** and concluded **that the corporate business purpose of a transaction is evidence of the fact that the transaction is not undertaken as colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.**

Applying the above, it is imperative for AAR to apply the test of tax avoidance at threshold. The Supreme Court stated that an entity which has no commercial/business substance and has been interposed only to avoid tax, only in such cases, applying the test of fiscal nullity, the Revenue can discard the inter-positioning of that entity. However, the Revenue cannot start with the question as to whether the transaction is a tax deferment/saving device but that it should apply the 'look at' test to ascertain its true legal nature. In other words, the principal is that the courts cannot go beyond a document or transaction and the same has to be taken on face value unless the surrounding circumstances indicate that the transaction is a sham or tax avoidant.

That is, if the surrounding circumstances does not hint that the transaction to be a sham or tax avoidant, then the courts are not bound to discard the interposing entity, that is Tiger Global Holdings. The said entities should only be discarded, if the surrounding facts and circumstances indicate that the transaction is sham or tax avoidant. In the instant case, the money would have flowed from TGM USA to Mauritius entities, from there to Flipkart Singapore and ultimately into Flipkart India. There are no surrounding factors which hint the said transactions or arrangements are sham or tax avoidant. Just because the power to sign cheques vests with Mr Charles P Coleman, it cannot be stated that the funds should have directly going to Flipkart Singapore from TGM USA. If these kinds of tests are applied by AAR, then every foreign direct investment would be seen as sham or tax avoidant. The AAR also should have taken the matter holistically and apply the said tests instead of arriving at the conclusion that Tiger Global Holdings are 'see-through entities', which in a kind indicate the presumed mindset of AAR.

On Tax Avoidance – Subsidiaries – Role of CGP:

One of the arguments contended by Revenue in the matter of Vodafone International Holdings BV (supra) is that what was extinguished by HTIL, the vendor is the control in HEL and not a share of CGP and since such control is qua Indian company, the said extinguishment of control results in capital gains in India. Revenue further contended that the subsidiaries were never mentioned in the share purchase agreement entered between VIH and HTIL, which demonstrates that subsidiaries do not have any role to play. The Supreme Court negating the above contention of Revenue stated that it is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general guidelines to group subsidiaries and the fact that the a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed to be residence of the state in which the parent company resides. The court further stated if a company is a parent company, that company's executive directors should lead the group and the company's shareholder's influence will be generally employed to that end and this obviously implies a restriction on the autonomy of the subsidiary's executive directors and such a restriction, which is the inevitable consequences of any group structure and generally accepted both in corporate and tax laws. The Court further stated that a subsidiary normally complying with the request of parentcompany may not make

the subsidiary puppet. The fact that the parent company exercise shareholder's influence on its subsidiaries cannot obliterate the decision making power or authority of its subsidiary's directors. The Court then formulated a test that the decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform these activities on the authority of its own executive directors.

Rationale of Honourable Andhra Pradesh High Court in Sanofi Pasteur Holdings SA :[7]

The Honourable Andhra Pradesh Hight Court in the matter of Sanofi Pasteur Holdings SA[8] had an occasion to deal with taxation of indirect transfers vis-à-vis India-France DTAA. The said judgment being judgment post Vodafone International Holdings BV (supra) followed the principals laid down by the Honourable Supreme Court. Apart from those principals which are dealt above, we shall now proceed to understand the principals set out by the Honourable Andhra Pradesh High Court in the said matter.

On Tax Avoidance – Subsidiaries - Role of ShanH:

The Court after analysing the entire transaction, documents, agreements and others has concluded that ShanH (akin to CGP in Vodafone International Holdings BV and Tiger Global Holdings in the current case) incorporated in 2006 was not conceived as a pre-ordained scheme to avoid tax in India and the Revenue has also conceded on the same point. The stand of Revenue asserting that since MA and GIMD claim that capital gain is taxable only in France, therefore inferring incorporation of ShanH as part of pre-ordained scheme was struck down by the Court. The Court stated that the contention of Revenue was ambivalent and incoherent for the reason that calling ShanH as part of pre-ordained scheme because MA and GIMD claiming immunity from capital gains taxability transform the entirety of antecedent extortions by ShanH. The Court accordingly concluded that ShanH is a distinct entity of commercial substance, distinct from MA and GIMD incorporated to serve as investment vehicle, this being the commercial substance and business purpose i.e., foreign direct investment in India, by way of participation in SBL.

On Indirect Transfers vis-à-vis India-France DTAA:

The entire contention of the Revenue was that since ShanH is only an interposition entity between SBL and MA & GIMD, the same has to be kept aside and if that being done, then the transfer of shareholding by MA & GIMD in SBL, which is more than 10% to Sanofi, triggers tax liability under Article 14(5) of India-France DTAA. The said para distributes taxing right to source country, where the company in which shares are being sold, is resident, if the alienation is more than 10%. Since, in the instant case, the Revenue contends that what is being transferred is not shares of ShanH, but shares of SBL, the provisions of Article 14(5) gets triggered, once ShanH is kept out picture and Sanofi would have deducted tax while making payments to MA & GIMD. Further, the Revenue contended that the phrase 'alienation' used in Article 14(5) not covers direct transfers but also indirect transfers and accordingly, since ShanH derives value from the assets of SBL, transfer of ShanH indirectly results in transfer of SBL and accordingly said transaction would fall under ambit of Article 14(5).

However, Sanofi argued that, since ShanH is having a commercial substance, the same cannot be

[7] [2013] 354 ITR 316

[8] Sanofi Pasteur Holdings SA ('Sanofi'), France has purchased the entire share capital of ShanH SAS ('ShanH'), France, which was JV of Merieux Alliance ('MA') and Groupe Industriel Marcel Dassault ('GIMD'), France. As on the date of acquisition of ShanH by Sanofi, the former was holding 80% of shares of Shanta Biotech Limited (SBL) an Indian company. The contention of the Revenue inter-alia is, what was transferred is shareholding in SBL and not divestment in ShanH, being sham.

discarded and what was transferred is shareholding in ShanH and not SBL, since post transfer also ShanH continued to be the shareholder of SBL. Further, since, the said transaction is not falling under any of the paras of Article 14, it falls under residuary para, that is Article 14(6) and as per which the taxing rights vests with state in which the alienator is resident, that is France in this case. Since, there is no income which is accrued or arising or deemed to accrue or arise in India for MA & GIMD, there is no obligation on them under Section 195 of ITA to withhold tax and treating them as assessee-in-default is erroneous. Further, Sanofi, MA and GIMD argued that the UN Model Convention specifically mentions for incorporation in text of Article 14(5), situations covering indirect transfers and India, France choosing not to do so, nothing can be interpreted in Article 14(5) to cover indirect transfer.

The Honourable High Court has held that the contention of Revenue cannot be accepted to invoke the provisions of Article 14(5) of India-France DTAA and relying on South African Supreme Court of Appeal's judgment in the matter of Tradehold Limited[9] and various other judgments have concluded that the contention as proposed by Revenue is accepted would render the provisions of Article 14(4) otiose. Further, the Court stated that Article 14(5) does not postulate 'see-through' provision on true, fair and good faith interpretation and the phrase 'alienation' cannot be understood from a synonymous expression 'transfer' used in Indian domestic law, since to invoke Article 3(2), the phrase should be identical and not synonymous. The Court concluded that retrospective amendment by insertion of Explanation 5 to Section 9(1)(i) does not change the position under India-France DTAA and accordingly such transaction of sale of ShanH shares by MA and GIMD to Sanofi is not subjected to tax in India.

Applying the above rationales to Tiger Global Holdings:

Role of Tiger Global Holdings vis-à-vis CGP and ShanH:

The AAR clearly has not applied the above tests. They have not seen whether the TGM USA has a steering interference with Tiger Global Holdings core activities, so that no longer the latter is in position to perform those activities. The AAR simply stated that since strategic meetings were participated by General Counsel of TGM USA who directly reports to Mr Charles P Coleman, stated that the Tiger Global Holdings are nothing but mere puppets and it becomes imperative to see-through such entities. To this extent, it indicates that AAR has mis-applied or not applied the tests in true sense.

The Honourable Supreme Court in Vodafone International Holdings BV (supra), while dealing with the contention of the Revenue that CGP stood inserted at a later stage in the transaction was to bring in a tax-free entity (or to create a transaction to avoid tax) stated that CGP was an investment vehicle. Qua acquisition of CGP, VIH has obtained the same rights or entitlements as HTIL had and this was the motive behind VIH acquiring CGP.

Applying the said rationale, CGP in that transaction was akin to Tiger Global Holdings in the current transaction. Walmart Inc to acquire the same rights and entitlement that Tiger Global Holdings had in Flipkart Singapore, thereby, Flipkart India has purchased the shares of Tiger Global Holdings. Tiger Global Holdings can be said to investment vehicle and there is no necessity for them to hold shares of other companies apart from Flipkart Singapore to prove such point.

The Courts in numerous occasions has stated that revenue is not expected to sit in the armchair of the

[9] [2010] ZA SAC.61

business man and decide the mode in which business has to be carried.It is prevalent practice that there are subsidiaries created to hold separate investments, so that at later point of time, it would be easy to divest them. Just because a subsidiary does not hold investment in other companies, does not disentitle it from being an investment vehicle.

Further, applying the decision of Honourable Andhra Pradesh High Court in Sanofi Pasteur Holdings SA (supra), where in, it was held that incorporation of ShanH as an investment vehicle for making foreign direct investment into India has a commercial substance and hence cannot be called as sham to Tiger Global Holdings, would render the same conclusion.Tiger Global Holdings which was also incorporated as investment vehicle, cannot be stated to be sham or non-existent or call for application of 'see-through'. Tiger Global Holdings can be stated to have a commercial substance and business purposes, investing into Flipkart Singapore and finally into Flipkart India.

From the above, it can be clearly argued that the interposition of Tiger Global Holdings had actually a business sense when seen it holistically and applying the principals laid down by Honourable Supreme Court and Honourable Andhra Pradesh High Court and the transaction cannot on a prima facie basis be said for avoidance of tax.

Indirect Transfers – Article 13(4) of I-M DTAA[10] vis-à-vis Article 14(6) of I-F DTAA :[11]

Before applying the rationale of Sanofi Pasteur Holdings SA (supra), let us examine, what made Tiger Global Holdings invoke the provisions of India-Mauritius DTAA.

As stated in facts, Tiger Global Holdings sold shares of Flipkart Singapore to Fit Holdings S.A.R.L but claimed the benefit under India-Mauritius DTAA. Ideally, the DTAA which has to be referred is the Mauritius-Singapore DTAA, since the Tiger Global Holdings is resident of Mauritius and the shares belong to Singapore company, that making the source country, Singapore. Hence, the treaty which shall be applicable is Mauritius – Singapore DTAA and this may be one of the reasons that the AAR has stated that Tiger Global Holdings cannot invoke the benefit enshrined under India-Mauritius DTAA. Let us proceed to examine the same.

The reason why Tiger Global Holdings invoked India-Mauritius DTAA is Explanation 5 to Section 9(1)(i) of ITA[12] . Vide Explanation 5, it is clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India **shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.**

Normally, the situs of the share is where the company is incorporated and accordingly the situs of share of Flipkart Singapore would be Singapore but for the Explanation 5. Because of the said explanation, the deeming fiction gets triggered and the situs of shares of Flipkart Singapore travels from Singapore to India. It may be the said reason as to why Tiger Global Holdings have invoked the provisions of India-Mauritius DTAA, because the source jurisdiction has been shifted from Singapore to India.
Article 13 of India-Mauritius DTAA deals with Capital Gains. Article 13A and 13B have been inserted by

[10]India – Mauritius DTAA
[11]India – France DTAA
[12]Income Tax Act, 1961

amending the protocol to said DTAA. Vide such amended articles, the gains on alienation of shares acquired post 1st April 17 in a company shall be taxed in the state where the said company is resident and the tax rate shall not exceed 50% of the tax applicable on such gains in the resident state of company whose shares are being alienated. However, as evident that the above paras would apply only for the shares which are acquired prior to 1st April 17. In cases, where the shares were acquired prior to 1st April 17, the earlier position would continue, which was guided by Para 4. The unamended Para 4 used to state that gains from the alienation of property other than referred in Para 1 to Para 3, shall be taxable only in the contracting state of which alienator is a resident.

Since, in the instant case, Tiger Global Holdings have acquired the shares prior to 1st April 17, the gains would be taxable only in the state where the alienator is resident, that is Mauritius and not in India. Further, Article 13(4) being residuary in nature, would cover the indirect transfers like in the instant case, the shares of Flipkart Singapore and accordingly, the gains would be taxable only in Mauritius[13] . In fact this was the proposition laid down by Honourable Andhra Pradesh High Court in Sanofi Pasteur Holdings SA (supra), wherein they have stated that transfer of ShanH would trigger the residuary category and not Article 14(5) as contended by Revenue, as Article 14(5) does not support see-through. It is worth noting that there is no similar article to Article 14(5) of India-France DTAA in Article 13 of India-Mauritius DTAA.

The AAR without going through the said aspects like situs of Flipkart Singapore by virtue of Explanation 5 to Section 9(1)(i) and Article 13(4) of India-Mauritius DTAA has ruled that Tiger Global Holdings could not invoke the India-Mauritius DTAA since what is being dealt is not share of Indian Company, which in our view is grave injustice.

Now, we shall proceed to determine, whether there are any setbacks or adverse provisions against Tiger Global Holdings tax position.

Positions adverse to Tiger Global Holdings:

Tax Neutral situation in Vodafone International Holdings BV vis-à-vis Tiger Global Holdings:

One of the main reasons for Honourable Supreme Court to rule in the matter of Vodafone International Holdings BV (supra) that there is no tax avoidance could be the no tax position even if sale is done at level of Mauritian holding companies which were holding shares of HEL instead of sale of CGP, a Cayman Island company which was holding shares in all the Mauritian holding companies. The Hutchison structure was that CGP was holding shares in Array Holdings Limited, which in turn hold shares in five companies incorporated in Mauritius with downstream investment into HEL, India. In other words, had if VIH purchased shares in Mauritius subsidiaries instead of purchasing shares in CGP, there would not be any tax liability in the hands of Mauritius subsidiaries in light of India-Mauritius DTAA. Since, there was no tax liability either in the sale of shares at Mauritius subsidiaries level or at the level of CGP, the Honourable Supreme Court might have come to a conclusion that on a holistic basis, the role of CGP is not for tax avoidance or sham.
However, in the facts of Tiger Global Holdings, if they are treated as sham or puppets and by applying the

[13]The Honourable Supreme Court in the matter of Azadi Bachao Andolan reported in [2003] 263 ITR 706 has an occasion to deal with 'liability to tax' appearing in Article 4 of India-Mauritius DTAA and held that liable to tax and payment of tax are different aspects and non-payment of tax in Mauritius would not make any person not a resident of that state. Further, after referring to various foreign judgments namely Federal Court of Canada in Late John N Gladden and High Court of Australia in Lamesa Holdings BV has held that there is no necessity for the income to doubly taxed to claim the benefit under DTAA.

test of fiscal nullity, the residence gets shifted from Mauritius to USA and by applying the provisions of India-USA DTAA, Article 13 states that each contracting state may tax capital gains in accordance with the provisions of its domestic laws, which would definitely trigger a tax liability in India as compared to no tax position as per India-Mauritius DTAA. Even though there is a remote possibility for the courts to arrive at this conclusion, the above proposition cannot be ruled out. If this being applied, it becomes an adverse position for Tiger Global Holdings.

Reliance on Federal Court of Appeal's judgment in Prevost Car Inc[14] in Sanofi Pasteur Holdings SA:

The Honourable High Court of Andhra Pradesh in Sanofi Pasteur Holdings SA (supra) in arriving to the conclusion on the aspect of 'beneficial ownership[15] ' has placed reliance in the Federal Court of Appeal's judgment in Prevost Car Inc.

The facts in Prevost Car Inc is that, Prevost Car Inc (for brevity 'Prevost Inc'), a Canadian resident corporation has paid dividend to its shareholders, Prevost Holding BV (for brevity 'Prevost BV'), a corporation resident in Netherlands. Subsequent to such receipt of dividend by Prevost BV, substantially the same amounts were remitted to its corporate shareholders, Volvo, swedish resident company and to Henlys, a UK resident company, in terms of shareholder agreement between Volvo and Henlys. If Prevost Holding were to be treated as beneficial owner of the dividends, the rate of withholding under Canadian Income Tax Act was 5% and if Volvo and Henlys were treated as beneficial owners of dividends, then the rate of withholding is greater than 5%. The Tax Court of the Canada found that the beneficial owner of dividends was Prevost BV and not Volvo and Henlys against which the Canadian Revenue has appealed. The Federal Court of Appeal rejected the Canadian Revenue's contention that the expression 'beneficial ownership' has to be read as 'ultimate beneficial ownership' and agreed with the Tax Court's judgement wherein it was held that the beneficial owner of dividends is a person who receives the dividends for his/her own use and enjoyment and assumes the risk and control of the dividend received, is the person who enjoys and assumes all the attributes of ownership, the dividend is for the owners own benefit and this person is not accountable to anyone for how he deals with dividend income. The Federal Court of Appeal also endorse the view of Tax Court that Prevost BV cannot be said to be conduit in absence of any evidence to such an extent despite that Prevost BV did not have no physical office or employees in Netherlands or elsewhere nor was the evidence that dividends from Prevost Inc were ab initio destined for Volvo and Henlys with Prevost BV a mere funnel for flowing of dividends.

From the above, it is evident that the term 'beneficial ownership' has been legally interpreted as against the substance-over-form approach which is normally adopted by the courts all over the world. Even in the judgment of Sanofi (supra), the High Court has stated that what was being done in Prevost is a treaty shopping activity but continued to bless it and apply it to the facts of Sanofi, to hold that ShanH is not a sham entity and beneficial owner of shares of SBL.
However, the current trend across the globe is to apply substance over form approach when it comes to

[14] 2009 FCA 57

[15] The aspect whether the test of 'beneficial ownership' has to be applied only for incomes at Article 10, Article 11 and Article 12A of I-M Treaty or will also be applicable for incomes under Article 13 is not being discussed herein and proceeded with an assumption that they will apply to Article 13 since AAR was dealing with 'beneficial ownership'.

understanding of 'beneficial ownership' as against legal interpretation adopted in Prevost Car Inc[16] . Hence, if the substance over form is applied, the result in Sanofi (supra) may be different and the Courts while examining the issue with respect to Tiger Global Holdings may look at principals Sanofi (supra) with the above changed position.

Deeming Fiction under the Domestic Legislation vis-à-vis Treaty Application:

Ambulatory vs Static:

As stated earlier, the invocation of provisions of India-Mauritius DTAA by Tiger Global Holdings was for the sole reason that the situs of shares by fiction carved by Explanation 5 to Section 9(1)(i) was deemed to be in India. The question that arises now, is, whether the benefit arising as a consequence to the said deeming fiction can be granted to Tiger Global Holdings. In other words, the entire reason for insertion of Explanation 5 with a retrospective effect is to tax the transfer of shares which are located outside India but substantially deriving their value from the assets located in India and looked in that hue, whether it can be said that India gave up its taxing right to Mauritius vide the residuary Article 13(4)? Can it be stated that this was a conscious decision made by India and Mauritius at the time of signing of the DTAA? It is important to note that while dealing with coverage of indirect transfers under the residuary article in India-France DTAA in Sanofi (supra) matter, the India and France have chosen not to include the transactions which are in kind of indirect transfers under Article 14(5) and did such discussion happen between India and Mauritius?

Further, the Article 13(5) of India-Mauritius DTAA states that for the purposes of the said article, the term alienation means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective contracting states. The term 'transfer' has not been defined in the Article 3(1) of India-Mauritius DTAA. However, Article 3(2) states that in the application of provisions of this convention by a contracting state, any term not defined therein shall, unless the context otherwise requires, have the same meaning which it has under the laws in force of that contracting state relating to the areas which are subject of the convention.

Applying the provisions of Article 3(2), the phrase 'transfer' as defined in Section 2(47) of ITA can be accessed. The said phrase vide Explanation 2 states that for the removal of doubts, it is clarified that 'transfer' includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of share or shares of a company registered or incorporated outside India.

The above explanation essentially covers the indirect transfers. However, the said explanation was

[16]The Beneficial Ownership Limitation in Article 10, 11 and 12 OECD Model and Conduit Companies in Pre and Post BEPS Tax Treaty Policy: Do We (Still) Need It? By Robert J Danon

inserted with retrospective effect from 1st April 1962 by Finance Act, 2012. In other words, when the India-Mauritius DTAA was being negotiated, the said explanation was not on the statute book and now can it be said that the explanation which was not there at the time of negotiation but later got included by way of a retrospective amendment, should be read into the Article 13(5) of India-Mauritius DTAA? If this cannot be so, then the benefit under Article 13(5) cannot be invoked by Tiger Global Holdings, making the transaction subjected to tax in India. We shall proceed to examine the same.

First, as per Article 3(2), any term which has used in the convention but not defined has to be understood in accordance with the meaning laid down under the domestic legislation. Before, we proceed to examine, whether the term 'transfer' has to be understood in terms of ITA, first, we have to examine, whether the expression 'transfer' falls in the ambit of 'term' used in Article 3(2) to access the meaning under domestic legislation. The Honourable Mumbai ITAT[17] had an occasion to examine the said issue in the matter of Reliance Jio Infocomm Limited[18] , wherein the ITAT was interpreting the issue, whether the expression 'process' used in the definition of 'royalty' in DTAA, is a 'term', which calls for invocation of Article 3(2) and accordingly understand the said expression 'process' in terms of ITA. The ITAT has held that the 'term' is defined to mean a word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study, in addition to being a word, it connotes some kind of a point of reference, whereas a word is only a constituent of language. Accordingly, held that Article 3(2) will come into play only in respect of undefined treaty terms, which are in the nature of reference points and which have some peculiar significance as term employed in the treaty, and not all the undefined words and expressions used in treaty.

Applying the said rationale, can it be said the expression 'transfer' used in Article 13(5) falls under the ambit of 'term', to invoke the definition as per Section 2(47)? There are two views possible. One, since the expression 'transfer' expresses a concept and connotes some kind of reference, it is possible to say that the said expression would fit as 'term' to invoke Article 3(2). The other possible view is that since 'transfer' is used to explain the definition of 'alienation' used in Article 13, it becomes a word and not 'term' to invoke Article 3(2). However, for the purposes of this article, we assume that first view has higher possibility to succeed in court of law and accordingly proceed to understand the expression 'transfer' as 'term'. Now, this being done, the next important question, that would need to be answered is, what approach should be applied to understand the term 'transfer', ambulatory or static. If ambulatory approach is adopted, then the 'transfer' has to be understood as it exists in ITA as on the date when treaty is being applied. On the other hand, if static approach is to be applied, the expression 'transfer' should be understood without making reference to the retrospective amendment to the said definition under ITA. While this is not an easy exercise, especially, courts in India are divided on this and factoring the interplay of definition under domestic legislation vis-à-vis, defined and undefined treaty terms makes it more complicated, let us proceed to examine.

The Honourable Bombay High Court in the matter of Siemens Aktiongesellschaft[19] had an occasion to analyse the said issue. In the matter of Siemens Aktiongesellschaft (supra), the court was seized with a question as to whether the phrase 'royalty' which is not defined in the India-German DTAA has to be understood in terms of domestic legislation which define the said phrase. The assessee's argument was

[17]Income Tax Appellate Tribunal
[18][2020] 77 ITR (Trib) 578W (ITAT[Mum])
[19][2009] 310 ITR 320 (Bom)

that since the phrase 'royalty' has not been defined either under the said DTAA or ITA at the time of entering of the agreement between India and Germany, the definition under the ITA cannot be referred to. In other words, the assessee contends that the treaty is static. However, the court without not getting into detail, finding force from the aspect that the said treaty does not cover only taxes which are in force at the time of signing of the agreement but would also include any other tax as taxes of substantially similar character subsequent to the date of agreement, has not accepted the contention of the assessee that the law would be applicable or as defined when the DTAA was entered into. In a way, the court has endorsed the ambulatory approach as against static approach.

However, post Siemens Aktiongesellschaft (supra), there were numerous occasions when the courts were seized with the same question, as to treat, the DTAA as static or ambulatory. However, majorly, in all other occasions, the courts endorsed the static approach especially, when the terms under domestic law are amended with an intention to override the tax position that existed pre-amendment[20] . In short, it can be argued by the tax payer, the term in domestic legislation should be made applicable by adopting ambulatory approach, when it is beneficial to him. However, the tax authorities may not be accepting such proposition by quoting Article 31 of VCLT[21] which states the treaty has to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose.

If the courts take the view that since at the time of signing of India-Mauritius DTAA, the term 'transfer' cannot be understood to cover indirect transfers, then it may be ruled that Tiger Global Holdings would not be eligible to claim the benefit of Article 13(4) of India-Mauritius DTAA. This view also gains support from the following paras.

Indirect Transfers vis-à-vis Residuary Para

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The plea that the Honourable Andhra Pradesh High Court in the matter of Sanofi Pasteur Holdings SA (supra) already held that indirect transfers are covered under Article 14(6) of India-France DTAA may not be taken on face value, because the court therein was deciding whether the indirect transfer falls under Article 14(5) or Article 14(6) and held that since Article 14(6) is residuary, it would also cover indirect transfers. However, in case of India-Mauritius DTAA, there is no article like Article 14(5) and it has only the residuary which is similar to Article 14(6). Hence, in absence of a similar fight as existed in Sanofi Pasteur Holdings SA (supra) in Tiger Global Holdings, whether it can be interpreted that Article 13(4) includes indirect transfers is doubtful.

[20]New Skies Satellite BV – [2016] 382 ITR 114, Reliance Jio Infocomm Limited [2020] 77 ITR (Trib) 578W (ITAT[Mum]).

[21]Vienna Convention on Law of Treaties

Indirect Transfer vis-à-vis Article 31 of VCLT – John N Gladden's case:

In the matter of John N Gladden[22] , the Federal Court of Canada was seized with a question on taxability of capital gains arising on deemed disposition of shares. The facts in that matter are that Mr John N Gladden was a resident of USA and at time of his death, he holds shares in two privately held companies in Canada. The estate has filed returns in Canada by reporting capital gains as per the deemed disposition provision pursuant to Canadian Income Tax Act. However, the estate has claimed refund by invoking the provisions of USA-Canada DTAA, by stating that the treaty vide Article VIII, covers only sale or exchange and does not include deemed disposition. The deemed disposition was a subsequent amendment to the Canadian Income Tax Act, which was not in existence at the time of entering treaty. The Canada Revenue pressed for tax demand that deemed disposition is also covered under the treaty. The Federal Court of Canada stated that on application of interpretation suggested by Article 31 of VCLT, the sale or exchange cannot be said to be including the deemed disposition especially, when such tax was not on statute book in Canada at the time of entering the treaty.

Applying the same to the facts of Tiger Global Holdings, it would be tough for them to argue that the expression 'transfer' would include indirect transfers, since the same was not on statute book as on the date of entering India-Mauritius DTAA and ascribing the ordinary meaning of 'transfer', the indirect transfer would not fall under provisions of Article 13. Further, since the said income is not in the nature of fee for technical services or royalty, it may not be argued that the gain on alienation of shares would fall under the ambit of business profits to seek taxation only when there is permanent establishment in India. The income from alienation may be argued by tax authorities to fall under the Article 22 'Other Income' and by virtue of provisions of para 3, the income of a resident of a contracting state not dealt with in the foregoing articles and arising in the other contracting state may also be taxed in other state, that would be India.

Deeming Fiction in Domestic Law vis-à-vis Treaty – Mr Fowler's case:

Finally, the recent judgement of Honourable Supreme Court in the matter of Mr Fowler[23] had also an occasion to deal the applicability of deeming fiction in domestic legislation vis-à-vis treaty. Mr Fowler, a resident of South Africa (SA) has engaged in certain diving assignments in continental shelf of United Kingdom (UK). Mr Fowler pleaded that the diving income which he has earned to be treated as trade income (Article 7 of UK-SA DTAA), because the UK domestic legislations treat so. The HMRC[24] on the other hand pleaded that such income is in the nature of income arising from employment and treatment of divers income as trade income is only restricted to domestic legislation and cannot be applied to treaty. If the court found the contention of Mr Fowler to be correct, then there is no income arising for Mr Fowler in UK, since he does not have permanent establishment in UK. If the court found the contention of HMRC to correct, then Mr Fowler's income is taxable in UK, since as per the provisions of (Article 14 of UK-SA DTAA), the salaries would be taxable in the state where they arise, that is UK, in the instant case. The Supreme Court after examining the treaty provisions, the domestic law provisions and the decisions reached by lower courts, has confirmed that the deeming fiction erected under the domestic legislation cannot be applied to treaty provisions to characterise the income earned. The court stated that the

[22]85 DTC 5188
[23][2020] UKSC 22
[24]Her Majesty's Revenue and Customs

deeming fiction created is plainly not for the purpose of rendering a qualifying diver immune from tax in UK, nor adjudicating between the UK and SA as the potential recipient of tax and for the purpose of adjusting the basis of a continuing UK income tax liability which arises from receipt of employment income and accordingly held that applying deeming provision in domestic legislation so as to alter the meaning of terms in the treaty with the result of rendering a qualified diver immune from UK taxation would be contrary to its purpose and would produce an anomalous result. The Court further held that Article 3(2) of UK-SA DTAA should not be construed so as to bring qualifying diver within Article 7 rather than Article 14 would contrary to the purposes of treaty.

Applying the same to the facts in Tiger Global Holdings, the tax authorities can argue that reading of expression 'transfer' in Article 13(4) of India-Mauritius DTAA, so that Tiger Global Holdings immune from tax liability under the treaty would not be the objective of the treaty or the domestic legislation and accordingly demand the tax liability in India.

Conclusion on Taxability:

Having discussed the favourable and adverse positions to Tiger Global Holdings, we understand that the final taxability which would be decided by Courts, is not an easy task. From an academic view point, we have examined the different positions that are applicable to Tiger Global Holdings and they may be incomplete and not exhaustive. We are sure that this issue when settled by Honourable Supreme Court will be a significant step in taxation of 'Indirect Transfers'.

In the next part, we shall proceed to examine, the taxability of this structure in PPT and GAAR regime.

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DIRECT TAXATION

ROLE OF DEEMING FICTION IN DOMESTIC LEGISLATION VIS-À-VIS TAX TREATY – AN EXPOSITION BY UK SC IN FOWLER'S JUDGMENT - PART I

Contributed by CA Suresh Babu S & CA Sri Harsha

In a recent judgment of Fowler v. Her Majesty's Revenue and Customs[1] , the Supreme Court of United Kingdom had an occasion to deal with the role of deeming fiction in the domestic legislation and their applicability in the context of tax treaties. The said judgment elucidates certain important aspects which would have bearing on the international taxation. In this article, we would detail the facts, the reasonings and conclusions arrived by the Honourable Supreme Court of United Kingdom (UK SC) and also try to apply such principals to the Indian context to see the consequences arising thereof.

Modus Operandi:

We wish to deal the said issue in two part article. Part I deals with the exposition by UK SC in the matter of Mr Fowler. Part II deals with applying the rationale enunciated by UK SC to Indian context to a case study with our concluding remarks. Let us proceed further.

Background:

Mr Martin Fowler (Mr Fowler) is a resident in the Republic of South Africa (SA). Mr Fowler is a qualified diver and during the 2011-12 and 2012-13 tax years, he undertook certain diving engagements in the waters of UK Continental Shelf. The Court has assumed that he has undertook the said services as an employee, rather than as a self-employed contractor.

HMRC[2] claims that the said income earned by Mr Fowler is in the nature of employment income and accordingly as per the provisions of Article 14 of UK-SA DTAA[3], the said income is taxable in UK, because the provisions of Article 14 states that income arising from employment is taxable in a state where such employment is exercised. Since Mr Fowler has exercise the employment of diving engagements in UK, HMRC's claim is that the income is taxable in UK.

On the contrary, Mr Fowler contends that by virtue of UK domestic legislations, divers have been given a special dispensation to treat their employment income as income arising from trade and applying such deeming fiction to his situation, the character of income would be in the nature of trade and not employment. Since the character of income by virtue of applying a deeming fiction in domestic legislation is trade and Mr Fowler contends that he is guided by Article 7 of UK-SA DTAA and not Article 14. By applying Article 7 of UK-SA DTAA, the taxability of Mr Fowler's income in UK would arise only if there is a permanent establishment (PE) and in absence of such PE, there is no income which would be taxable in UK. Mr Fowler based his arguments by placing reliance on Article 3(2) of UK-SA DTAA, which states that terms used in DTAA but not defined has to be understood from the domestic legislations with deal with tax.

[1] [2020] UKSC 22 delivered on 20 May 20.
[2] Her Majesty Revenue and Customs
[3] Double Taxation Avoidance Arrangement

The Court of Appeal has agreed to the contention of Mr Fowler and stated that he has to be treated as self-employed and accordingly there would not be any taxation of his income in UK. The HMRC not satisfied with the order of Court of Appeal has approached the UK SC.

In the above set background, the UK SC has proceeded to examine the contentions of Mr Fowler and HMRC. Before opining on the same, the UK SC has made an observation that the outcome of decision by Court of Appeal would render the income earned by Mr Fowler not taxable in both the jurisdictions, namely UK (by virtue of Article 7) and SA (by virtue of Article 14). The UK SC stated that since the UK-SA DTAA does not speak about 'double non-taxation'and the question whether SA did tax the earnings of its residents employed abroad was not investigated, the same would not be of any help in construing the DTAA.

Analysis by UK SC:

The UK SC thereby is required to resolve under which particular Article of DTAA, the income of Mr Fowler gets covered. For answering this, it is important to understand the definitions of 'employment', 'business' and 'enterprise'. The Court observed that Article 3 which deals with definitions, has defined the terms 'business' and 'enterprise'. However, the term 'employment' has not been defined. Hence, in order to understand that definition of term 'employment', it is necessary to invoke the provisions of Article 3(2) of DTAA.

The Court then proceeded to examine the OECD Commentary on Model Tax Conventions on Article 7 and Article 14 (the predecessor article being Article 15). The Court specifically making reference to Para 8.1 of Commentary of OECD Model Tax Conventions observed that 'It may be difficult, in certain cases, to determine whether the services rendered in a State by an individual resident of another State, and provided to an enterprise of the first State (or that has a permanent establishment in that state), constitute employment services, to which Article 15 applies, or a services rendered by a separate enterprise, to which Article 7 applies or more generally, whether the exception applies'.

Having recognised the difficulty in arriving, whether a particular activity would be a contract of service or contract for service, the Court then proceeded to recognise that the said issue has to be decided based on the domestic law of the state applying the treaty is likely to prevail, but subject to two qualifications. The first one being, that the context may require otherwise (an article 3(2) situation) and the second qualification as expressed in Para 8.11 of the Commentary, which is

> the conclusion that, under domestic law, a formal contractual relationship should be disregarded must, however, be arrived at on the basis of objective criteria. For instance, a State could not argue that services are deemed, under its domestic law, to constitute employment services where, under the relevant facts and circumstances, it clearly appears that these services are rendered under a contract for provision of services concluded between two separate enterprises …. Conversely, where services rendered by an individual may properly be regarded by a State as rendered in an employment relationship rather than as under a contract for services concluded between the two enterprises, that State should logically also consider that the individual is not carrying on the business of the enterprise that constitutes that individual's formal employer

Having referred to the Commentary, the Court then proceeded to examine the domestic legislations to understand the terms which are not defined in the UK-SA DTAA. The Court referred to Section 4 of Income Tax (Earnings and Pensions) Act 2003 (ITEPA) for the purposes of definition of 'employment' and referred to Section 6 and Section 7 of ITEPA which dealt with 'employment income'. The Court after noticing that Section 6(5) of ITEPA which was amended by Section 882(1) and Para 585 of Schedule I to Income Tax (Trading and Other Income) Act, 2005 [ITTOIA] has recognised that the employment income as defined in section 4 of ITEPA is not charged to tax under section 6, if it is within the charge to tax under Part 2 of ITTOIA by virtue of Section 15 of that Act which deals with divers and diving supervisors.

In other words, the Court recognised that the employment income earned by divers and diving supervisors would not be charged to tax under ITEPA but subjected to tax under provisions of ITTOIA. Then, the Court proceeded to refer to Section 15 of ITTOIA which dealt with divers and diving supervisors
.
Before proceeding to examine further, it is noteworthy to understand the deeming fiction carved by Section 15(2) which is the heart of the subject issue. **Section 15(2) stated that the performance of duties of employment is instead treated for income tax purposes as the carrying on of a trade in the UK.** Mr Fowler by virtue of Article 3(2) invokes the deeming benefit enshrined in Section 15(2), wherein it was held that employment of diver is deemed to be carrying on a trade and accordingly pleading that his activity would fall under Article 7 instead of Articl1e 14.

The Court referring to the history behind the introduction of section 15 stated that, this class of divers commonly incurred their own costs, and therefore deserved the more generous expenses regime afforded to the self-employed, by comparison with employees and summarised the provisions of Section 15 as under:

- said section applies only to a particular class of employed divers, whose employment income would otherwise taxable under ITEPA

- the type of divers covered are defined by reference to a particular kind of diving, and only if undertaken in UK or related waters

- It may therefore apply only to part of the activities of diver under a particular contract of employment since they might also be engaged to do other types of divings as well, or diving of the specified type in other waters

The Court stated that the role of Section 15(2) was not to resolve some legal or factual uncertainty about whether such divers were genuinely employed or self-employed and held that on contrary, section 15 applies only to employed divers. The Court then proceeded to the observations made by the Court of Appeal qua interpretation of Section 15(2), wherein the later has held as under:

> What, then, is the state of affairs which section 15(2) requires us to imagine? In my judgment there can be no room for doubt about the answer to this question. It is that the relevant duties of Mr Fowler's actual employment are instead to be treated for income tax purposes as the carrying on of a trade in the UK. Accordingly, in the imaginary world which we have to enter, the actual earnings of Mr Fowler from his employment must instead be regarded as profits (or, more accurately, as receipts which form part of a computation of trading income) of the trade which he is now deemed to have carried on. It follows that this deemed trade is the only source, for income tax purposes, from which taxable income can arise to Mr Fowler in respect of his relevant activities

However, the Court has not agreed with the above interpretation by stating that the starting point is that the question which of Article 7 and 14 of UK-SA DTAA shall apply to Mr Fowler's diving activities depends upon the true construction of those articles. The articles have to be interpreted in the context of the treaty as a whole and its purposes, within the meaning of terms within those articles ascertained as required by Article 3(2) by reference to UK tax law. The Court held that nothing in Article 7 and Article 14 to be applied to the fictional, deemed world which may be created by UK tax legislation, unless the effect of Article 3(2) is that a deeming provision alters the meaning which relevant terms of treaty would otherwise have. If it is not for Section 15 of ITTOIA, the Court stated that there would not be any doubt that Article 14, not Article 7, would apply. The meaning of 'employment' is laid down in Section 4 of ITEPA, and his remuneration plainly constitutes employment income within sections 6 and 7 and UK tax law would not regard him as making profits from a trade, or his business that of an establishment.

The Court stated that the question is whether section 15 gives a different meaning to the relevant terms. In other words, whether in terms of section 15, the term 'employment' was given a different meaning to consider the activities of Mr Fowler as 'trading'for the purposes of Article 7? The Court stated that section 15(1) uses 'employment' and 'employment income' in exactly the same way as is prescribed by section 4, 6 and 7 of ITEPA, and the phrase 'performance of the duties of employment' in section 15(2) again uses 'employment' in the same way. **Section 15 is about the taxation of income arising from the performance of those duties of employment, but, introduced by the word 'instead', provides that the income is to be taxed as if, contrary to the fact, it was profits of trade.**

In simple words, the Court interpreted that since the meaning of 'employment' has not undergone any change qua the domestic legislation, it is only the method of arriving taxable income which was changed by using the phrase 'instead' in section 15(2), the phrase 'employment' cannot be called as 'trade' by virtue of Article 3(2). The Court stated that nothing in Section 15 purports to alter the settled meaning of the relevant terms of the treaty, rather it takes the usual meaning of the terms as its starting point, and erects a fiction which, applying those terms in their usual meaning, leads to a different way of recovering income tax from qualifying divers.

Conclusion arrived by UK SC:

The Court concluded that the purpose of Section 15 is to create a fiction not for the purpose of deciding whether diver is carrying on employment or trade but for the purpose of adjusting how that income is to be taxed, specifically by allowing a more generous regime for deduction of expenses. Then the Court proceeded to analyse the purpose for which the fiction is created. When inquired for what purposes and between whom the fiction is created, it is plainly not for the purpose of rendering a qualifying diver immune from tax in UK, nor adjudicating between UK and SA as the potential receipt of tax and it is for the purpose of adjusting the basis of a continuing UK income tax liability which arises from the exercise of employment income. The Court accordingly concluded that applying the deeming provision in section 15(2) so as to alter the meaning of terms in the Treaty with the result of rendering a qualifying diver immune from UK taxation would be contrary to its purpose and also produces anomalous results. The Court also held that Article 3(2) of the treaty should not be construed so as to bring a qualifying diver within Article 7 rather than Article 14 and doing so would be contrary to the purposes of treaty and stated that the claim of HMRC should succeed. Accordingly, the income of Mr Fowler on a purposive interpretation falls under the scope of Article 14 and not under Article 7, thereby vesting power to UK to tax such income since the subject income is arising out of exercise of employment in UK.

Take – Aways:

The following would be the significant take-aways from the above exposition by UK SC:

- The role of Article 3(2) should be construed in such a way that, an item of income otherwise which would fall under the treaty, whereby source country has a right to tax, cannot be taken away from that particular country, by virtue of a deeming fiction under the domestic legislation. In other words, the deeming fiction erected in domestic law in source country cannot act against the source country unless the context otherwise requires so. Doing so, would go against the purpose of treaty.

- By virtue of Article 3(2), the plain meanings of terms not defined under the treaty, have to be picked from the domestic legislation but not the fictions created surrounding them.

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GST

THE VIRES, RIGHTS AND RETROSPECTIVITY - TRANSITIONAL CREDIT - PART I

Contributed by CA Sri Harsha & CA Manindar

Introduction:

Claim of credit accumulated in the returns of erstwhile regime under GST[1] regimeby filing TRAN-01 return i.e. transitional credit is subject to vexatious litigation as many of the taxpayers failed to meet the due date prescribed in Rule 117 [2]. The reasons for not meeting the due date are due to inefficiency of GST Portal [3], taxpayers are not vigilant of the time limit or due to confusion and chaos that was prevailing at the time when this new tax was introduced. A large number of writ petitions were filed between various High Courts expressing the inability to meet the due dates mainly due to inefficiency of GST Portal and accordingly requesting the courts to permit the filing of these returns.

Based on various courts directions, Central Government admitted the inefficiency of GST Portal and sub-rule (1A) has been introduced in Rule 117 through which the due date has been extended to those categories of taxpayers who could produce evidence of their attempt to file the TRAN-01 return within due date but were unsuccessful due to technical difficulties of GST Portal. But the plight of those taxpayers who could not gather evidence relating to their attempt to file the TRAN-01 return was not addressed.

In this backdrop, the vires of Rule 117 which imposed the time limit for filing TRAN-01 was challenged on the ground that no such power was conferred under Section 140[4] of CT Act[5] and is taking away the vested right over the accumulated transitional credit of previous regime. The High Courts have taken different stand on this issue and some of them ruled in favour of taxpayers while others were in favour of Revenue. The Finance Act, 2020 made retrospective amendment[6] to read timelines into Section 140 in order to nullify those judgements that were ruled in favour of the taxpayer.

Modus Operandi:

We wish to deal the issues in three part series. Part I deals with introduction of time limit row and the framing of issues. Part II deals with the vires of the Rule 117. Part III deals with vested rights and retrospectivity of the amendment to Section 140 along with our comments. Let us proceed further.

Setting the tone – The Time Limit Row:

Before we delve into the themed aspects, it is imperative to understand the issue regarding applicability of time limit for claim of credit in GST regime, the credit which was accumulated in the returns under the previous regime by filing TRAN-01.

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[1] Goods and Services Tax
[2] Central Goods and Services Tax Rules, 2017
[3] www.gst.gov.in
[4] Section 140 deals with 'transitional arrangements for input tax credit'
[5] Central Goods and Services Tax Act, 2017
[6] The amendment is made effective vide Notification No. 43 dated 16.05.2020

In terms of the provisions of Section 140(1), a registered person who has accumulated CENVAT Credit of eligible duties in the last return filed under erstwhile regime shall be entitled to carry forward such amount into electronic credit ledger maintained in the GST regime subject to certain conditions. Further, section 140(1) provides that such carry forward of credit of previous regime into GST regime shall be in the manner as prescribed by rules.

Rule 117 of the CT Rules provided that every registered person to take credit under section 140(1) shall within 90 days from the appointed day submit a declaration in Form GST TRAN-01. In light of Rule 117, the credit of the previous regime shall be entitled to be taken into electronic credit ledger by filing TRAN-01 form within the time period prescribed.

As mentioned, many of the taxpayers missed the due date for reasons stated above. Many of the taxpayers approached the High Courts for relief by way of allowing them to file the TRAN-01 after the due date prescribed under Rule 117. It is in this context; questions were raised about the vires of Rule 117 on the reasoning that by prescribing the time limit for taking credit, it has traversed the originally enacted section 140 and also taken away the vested right of the taxpayer .Hence, the principal question before the courts is, whether Rule 117 has power to prescribe the time limit to transition the vested credit under the erstwhile regime to GST regime? Whether the credit which was already availed in the old returns can be stated to be a vested right and nothing can disturb, such credit?

As mentioned above, there were conflicting decisions on the above questions. In light of these legal developments, the provisions of section 140(1) were amended to insert the words 'within such time' with retrospective effect from 01.07.2017[7] .With this understanding of the issue involved, we will now examine the following important decisions of various High Courts which dealt with this time limit row.

In the matter of Willowood Chemicals Private Limited[8] - Gujarat High Court:

In this matter, the Gujarat High Court held that Rule 117 in so far as the prescription of time limit is concerned is intra vires. Vide para 24, it was held that this plenary prescription of time limit is neither without authority nor unreasonable.The Court stated *'It is in exercise of this rule making power, the Government has framed the CGST Rules, 2017 in which; as noted, sub rule (1) of Rule 117 has prescribed, besides other things, the time limit for making declaration in the prescribed form for every dealer entitled to take credit of input tax under Section 140.* ***Sub rule [1] of Rule 117 thus applies to all cases of credits which may be claimed by a registered person under section 140 of the Act and is not confined to sub section [3]. This plenary prescription of time limit within which necessary declarations must be made is, in our opinion, neither without authority nor unreasonable.***

The High Court further denied the contention of the petitioners that the prescription of time limit under Rule 117(1) takes away an existing right. The Court vide Para 25 stated that 'Section 140 of the Act envisages certain benefits to be carried forward during the regime change. As is well settled, the reduced rate of duty or concession in payment of duty are in the nature of an exemption and is always open for the legislature to grant as well as to withdraw such exemption. ***As noted in case of Jayam & Company [Supra], the Supreme Court had observed that input tax credit is a form of concession provided by the***

[7]Inserted vide Finance Act, 2020 and notified retrospective vide Notification 43/2020-CGST dated 16.05.2020.
[8]2018 (10) TMI 261 - Gujarat High Court

legislature and can be made available subject to conditions. Likewise, in the case of Reliance Industries Limited [Supra], it was held and observed that how much tax credit has to be given and under what circumstances is a domain of the legislature. In case of Godrej & Boyce Mfg. Co. Pvt. Limited [Supra], the Supreme Court had upheld a rule which restricts availment of MODVAT credit to six months from the date of issuance of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected.'

The High court held that the rule making power conferred under section 164 of CT Act confers power on the sub-ordinate legislature to provide for time limit and accordingly held that Rule 117 is not ultra vires. The High Court reached such conclusion stating that *'While the entire tax structure within the country was thus being replaced by a new framework, it was necessary for the legislature to make transitional provisions. Section 140 of the CGST Act, which is a transitional provision, essentially preserves all taxes paid or suffered by a dealer.* ***Credit thereof is to be given in electronic credit register under the new statute, only subject to making necessary declarations in prescribed format within the prescribed time. As noted, sub section [1] of Section 164 of the CGST Act authorizes the Government to make rules for carrying out the provisions of the Act on recommendations of the Council. Sub section [2] of Section 164 further provides that without prejudice to the generality of the provisions of sub section [1], the Government could also make rules for all, or any of the matters, which by this Act are required to be or may be prescribed or in respect of which, provisions are to be or may bemade by the rules. Combined effect of the powers conferred to subordinate legislature under sub sections[1] and [2] of Section 164 of the CGST Act would convince us that the prescription of time limit under subrule[1] of Rule 117 of the CGST Rules is not ultra vires the Act. Likewise, such prescription of time limitcannot be stated to be either unreasonable or arbitrary.*** *When the entire tax structure of the country isbeing shifted from earlier framework to a new one, there has to be a degree of finality on claims, credits,transfers of such credits and all issues related thereto. The petitioners cannot argue that without anyreference to the time limit, such credits should be allowed to be transferred during the process ofmigration. Any such view would hamper the effective implementation of the new tax structure and wouldalso lead to endless disputes and litigations. As noted in case of USA Agencies [Supra], the SupremeCourt had upheld the vires of a statutory provision contained in the Tamil Nadu Value Added Tax Actwhich provided that the dealer would have to make a claim for input tax credit before the end of thefinancial year or before ninety days of purchase; whichever is later.* ***The vires was upheld observing thatthe legislature consciously wanted to set up the time frame for availment of the input tax credit. Suchconditions therefore must be strictly complied with. Thus, merely because the rule in question prescribes atime frame for making a declaration, such provision cannot necessarily be held to be directory in natureand must depend on the context of the statutory scheme.'***

In the matter of Siddharth Enterprises[9]- Gujarat High Court:

The Gujarat High Court held that right to carry forward credit is a right or privilege acquired or accrued under the erstwhile laws which cannot be allowed to lapse. The Court stated that ***'The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date, i. e. 27. 12. 2017.'***

[9]2019 (9) TMI 319 – Gujarat High Court

The High Court further held that if the right to carry forward CENVAT credit for not being able to file the Form GST TRAN-01 within the due date offends the policy of the Government to remove cascading effect of tax. Vide Para 28, the court held that ***'The right to carry forward CENVAT credit for not being able to file the form GST Tran-1 within the due date offends the policy of the Government to remove the cascading effect of tax by allowing the input tax credit as mentioned in the Objects and Reasons of the Constitution 122nd Amendment Bill, 2014. The Objects and Reasons of the Constitution 122nd Amendment Bill, 2014 clearly set out that it is intended to remove the cascading effect of taxes and to bring out a nationwide taxation system.'***

The High Court held that Rule 117 which provides for time limit for transition credit is arbitrary and unreasonable. Vide Para 34, the Court held that *'Section 16 of the CGST Act allows the entitlement to take input tax credit in respect of the post-GSTpurchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, which ever is earlier.* ***Whereas, Rule 117 allows time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limitto allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.'***

In the matter of Nelco Limited[10] - Bombay High Court:

The Bombay High Court relied on decision of the Gujarat High Court in Willowood Chemicals Private Limited (supra) on the issue whether transitional credit is a vested right or not. Further, held that the rule making power with respect to time limit under Rule 117 is traceable to general rule making power under section 164. The Court by referring to various decisions of Supreme Court and decisions of High Court till that date held as under:

41. The Petitioner has sought to distinguish the decisions in Willowood and JCB India Ltd. contending that the Division Bench was not considering Section 140(1) and the right under different subsections of section 140 are different and operate in different fields and what is relevant for one class cannot be made applicable to another class. It is submitted that the decisions in JCB India Ltd. and Willowood have considered section 140(3) of the Act. We do not think these decisions can be distinguished in this manner. The decisions in JCB India Ltd. and Willowood have laid down a general principle of law. The question of credit in a transitional provision being a concession or a right was argued and has been considered. We have not been shown any decision of this Court to the contrary. As a matter of judicial discipline, we will have to follow the dicta laid down by the Division Bench of this Court in JCB India Ltd.

42. The decision of the Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (SC) cited by the Petitioner refers to MODVAT credit and in deciding a co-relation of the raw material and final product. ***The Apex Court held that it is not as if the credit can be taken only on the final product manufactured out of a particular raw material in which the credit is related.It was held that the credit maybe taken on a final product on the very day it has become available. It is in this context, the nature of MODVAT credit was held to be indefeasible. The learned Additional Solicitor***

[10]2020 (3) TMI 1087 - Bombay High Court

General has rightly distinguished this decision by pointing out that this decision does not consider the contingency of time limit on availment of credit, and also not in a transitionary provision. Under the impugned Rule, the input credit has been denied per se, but a timelimit has been placed on its availment.

43. The CENVAT Credit Rules prescribe conditions for availment of that credit. The rights and privilegesaccrued during the existing law have been saved under Section 174 of the Act. If what is saved from the earlier regime was conditional, then it cannot be converted to something without conditions in the new regime during the period of transition. If, ***before and after the GST regime, the availment of input credit is conditional, it cannot be that it is without any limit in the transitional period. With the advent of an entirely new tax regime, the earlier credit could have lapsed, but as and by way of concession it is permitted to be carried forward for a limited time.*** *Thus, going by the scheme of the Act, under Section 140(1), the reference to Input Tax Credit is not by way of a right, but as a concession….*

47. ***Thus the time limit in Rule 117(1) is traceable to the rule-making power conferred in Section 164(2).The credit envisaged under Section 140(1) being a concession, it can be regulated by placing a time limit. Therefore, the time limit under Rule 117(1) is not ultra-vires of the Act.'***

In the matter of Brand Equity Treaties Limited[11] - Delhi High Court:

The Delhi High Court considered this issue and held that transitional credit is a vested right and the same cannot be taken away through procedural law. The Court held as under:

21. Lastly, we also find merit in the submissions of the petitioners that Rule 117, whereby the mechanism for availing the credits has been prescribed, is procedural and directory, and cannot affect the substantive right of the registered taxpayer to avail of the existing /accrued and vested CENVAT credit. The procedure could not run contrary to the substantive right vested under sub Section (1) of Section 140……

There is no consequence provided in Rule 117 of GST Rules on account of failure to file GST TRAN-1. The argument of the respondents isthat the consequence is provided in Sub-Section (1) of Section 140 by way of a pre-condition for being entitled to transit the CENVAT credit in his electronic credit register under the GST regime. We do not agree. Section 140 (1) is categorical. It states that the registered person "shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day….". Only the manner i.e. the procedure of carrying forward was left to be provided by use of the words "in such manner as may be prescribed". ***The limitation on the right to carry forward the CENVAT credit is substantively provided by the proviso to the said section. Those are the only limitations on the said statutory right. Under the garb of framing Rules – which are subordinate legislation, the width of those limitations could not have been expanded as is sought to be done by introduction of Rule (1A). In absence of any consequence being provided under Section 140, to the delayed filing of TRAN-1 Form, Rule 117 has to be read and understood as directory and not mandatory. Further, even in ALD Automotive Pvt. Ltd. V Commercial Tax Officer(2019) 13 SCC 225, while dealing with the question of whether the provision prescribing time limit for claim of Input Tax Credit is directory or mandatory in nature, it was observed that "whether particular provision is mandatory or directory has tobe determined on the basis of object of particular***

[11]2020(5)TMI171-Delhi High Court

provision and design of the statute" and "such interpretation should not be put which may promote the public mischief and cause public inconvenience and defeat the main object of the statute". Therefore, in the present cases, the purport of the transitory provisions is to allow a smooth migration from the erstwhile service tax regime to the new GST regime and the interpretation must be in consonance with the said purpose.

*22.**We, therefore, have no hesitation in reading down the said provision [Rule 117] as being directory in nature, insofar as it prescribe sthe time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is notavailed within the period prescribed. This however, does not mean that the availing of CENVAT credit can be in perpetuity.** Transitory provisions, as the word indicates, have to be given its due meaning. Transition from pre-GST Regime to GST Regime has not been smooth and therefore, what was reasonable in ideal circumstances is not in the current situation. **In absence of any specific provisions under the Act, we would have to hold that in terms of the residuary provisions of the Limitation Act, the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit.***

In the matter of P.R. Mani Electronics[12] - Madras High Court:

The Madras High Court considered this issue after insertion of amendment to section 140(1) to provide for the time limit. It was argued on behalf of the petitioner that the transitional credit is a vested right and cannot be taken away by way of providing time limit under Rule 117. The Madras High Court considered the provisions of section16(4) of CT Act which provides for time limit for availing credit and held that in the context of transitional credit, the case for a time limit is compelling and disregarding the time limit and permitting a party to avail transitional credit, in perpetuity, would render the provision unworkable. Further, the Madras High Court relied on the decision of Bombay High Court in Nelco Limited (supra) to trace the rule making power to section 164. The observations of Court are as under:

*17. Section 140 of the CGST Act read with Rule 117 of the CGST Rules enables a registered person to carry forward the accumulated ITC under erstwhile tax legislations and claim the same under the CGST Act. In effect, it is a transitional provision as is evident both from Section 140 and Rule 117. **In light of the judgment of the Supreme Court in Jayam, the contention of the learned counsel for the Petitioner to the effect that ITC is the property of the Petitioner cannot be countenanced and ITC has to be construed as a concession. In addition, it is evident that ITC cannot be availed of without complying with the conditions prescribed in relation thereto. Prior to the amendment to Section 140 of the CGST Act, the power to frame rules fixing a time limit was arguably not traceable to the unamended Section 140 of the CGST Act, which contained the words "in such manner as may be prescribed", because such words have been construed by the Supreme Court in cases such as Sales Tax Officer Ponkuppam v. K.I. Abraham [(1967) 3 SCR 518] as not conferring the power to prescribe a time limit. Nevertheless, in our view, it was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers except that such rules should be for the purpose of giving effect to the provisions of the CGST Act. A fortiori, upon amendment of Section 140 by introducing the words "within such time", the power to frame rules fixing time limits to avail Transitional ITC is settled conclusively. In SKH Sheet Metals, the Delhi High Court concluded, in paragraph 26, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time.***

[12]2020 (7) TMI 443 – Madras High Court

Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time limit for transitioning credit. In this context, reference may be made to Section 16(4) of the CGST Act which provides as follows: Section 16(4): A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

***The above provision is indicative of the legislative intent to impose time limits for availing ITC. Besides, Section 19(3)(d) of the TNVAT Act itself imposed a time limit for availing ITC and further provided that it would lapse upon expiry of such time limit. In our view, keeping the above statutory backdrop in mind, in the context of Transitional ITC, the case for a time limit is compelling and disregarding the time limit and permitting a party to avail Transitional ITC, in perpetuity, would render the provision unworkable**. In this regard, we concur with the conclusion of the Bombay High Court in Nelco that both ITC and Transitional ITC cannot be availed of except within the stipulated time limit. Such time limits may, however, be extended through statutory intervention. As stated earlier, in SKH Sheet Metals, the Delhi High Court observed that ITC is the heart and soul of GST legislations in as much as such legislations are designed to prevent the cascading of taxes. There can be no quarrel with this conceptual position; however, it is not a logical corollary thereof that time limits for availing ITC and, in particular, Transitional ITC, are inimical to the object and purpose of the statute'.*

In a Snapshot[1] :

S. No	Ref	Judgement	Forum	Right	Rule 117	Rule 164	Period	J1	J2	J3	J4	J5
1	J1	Willowood Chemicals Private Ltd	Guj HC	N	Intra	Y	Prior	-	-	-	-	-
2	J2	Siddharth Enterprises	Guj HC[13]	Y	Ultra	-	Prior	NF	-	-	-	-
3	J3	Nelco Limited	Bom HC	N	Intra	Y	Prior	F	NF	-	-	-
4	J4	Brand Equity Treaties Limited	Del HC	Y	Ultra	N	Prior	NF	F	-	-	-
5	J5	P R Mani Electronics	Mad HC	N	Intra	Y	Post	-	-	-	D	-

Summarising the verdicts:

In the case of Willowood Chemicals Private Limited (supra), the Gujarat High Court considered this issue of time limit and held that the prescription of time limit within which the declarations must be made to avail credit is neither without authority nor unreasonable. The Court further held that the rule making power conferred under section 164 confers power on the sub-ordinate legislature to provide for time limit and accordingly held that Rule 117 is not ultra vires. Thus, the Gujarat High Court has held that the

[13]Different bench from the bench which has heard the matter of Willowood Chemicals Private Limited

transitional credit is not a vested right and the rule making power to provide for time limit under Rule 117 is traceable to general rule making power conferred under section 164. The High Court relied on the decisions of Jayam & Co [14], Reliance Industries Limited[15] and Godrej & Boyce Manufacturing Co Private Limited[16] to stated that the credit is not a vested right.

However, the different bench of Gujarat High Court in a subsequent judgment of Siddharth Enterprises(supra)has taken a diametrically opposite view stating that transitional credit is a vested right and substantial rule making power like providing for time limit cannot be traceable to general rule making power. The Gujrat High Court relied upon the judgments of Eicher Motors Ltd[17] and Dai Ichi Karkaria Limited[18] to hold the credit is vested right and cannot be taken away.

The Gujarat High Court in the matter of Filco Trade Centre Private Limited[19] ,examined the validity of the provisions of section 140(3) which denies the claim of transitional credit related to closing stock of inputs, inputs contained in semi-finished or finished goods as on the appointed day that were procured under invoices and other prescribed documents that were issued earlier than twelve months from the appointed day. The High Court that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing Cenvat credit rules was a vested right and it cannot be taken away by virtue of clause (iv) of sub-section (3) of Section 140 with retrospective effect in relation to the goods which were purchased prior to one year from the appointed day. The said decision was relied upon by Gujarat High Court in Siddhartha Enterprises (supra) to holdthat CENVAT Credit availed under erstwhile regime is a vested right and cannot be taken away by prescribing additional conditions like time limit through rules.

Subsequently, when the matter involving similar question was heard before the Bombay High Court in the case of Nelco Limited (supra), the Bombay High Court placing reliance on Willowood Chemicals Private Limited (supra) held that credit is conditional and cannot be a vested right. The Bombay High Court has not distinguished the judgment in matter of Siddharth Enterprises (supra) stating that the said judgment has not referred to the judgement of Willowood Chemicals Private Limited (supra). The Bombay High Court would have distinguished the judgment of Siddharth Enterprises (supra) despite of the fact that the said judgment does not make reference to Willowood Chemicals Private Limited (supra).

On the contrary the Delhi High Court in the case of Brand Equity Treaties Limited (supra) refused to consider the judgement in Willowood Chemicals Private Limited (supra) on the reason thatthe Gujarat High Court itself in the subsequent Siddharth Enterprises (supra) taken a contrary view. Further, the Delhi High Court held that the limitation to carry forward the CENVAT Credit was substantively provided by the proviso to the said section. The Court stated that these are the only limitations on the said statutory right and under the grab of framing rules, the width of the limitations cannot be expended. Further, the Court

[14](2016) 15 Supreme Court Cases 125
[15]2017 (9) TMI 1307 – Supreme Court
[16]1992 (7) TMI 292 – Supreme Court
[17]1999 (106) ELT 3(SC)
[18](1999) 7 Supreme Court Cases 448
[19]2018 (17) GSTL 3 (Gujarat)

also went on to hold that though the time limit is said to be arbitrary and unreasonable, the availment of credit cannot be just left to be a right in perpetuity. The Court stated that the time limit prescribed under the Limitation Act should act as a guiding principle as against time limit under Rule 117 and accordingly concluded that the credit can be availed within three years from the date of GST coming into effect.

The Madras High Court in the case of P.R. Mani (supra) refused to place reliance on the decision of Brand Equity Treaties Limited (supra) on the reasoning that it decided prior to retrospective amendment to section 140 to read time limit into section 140.The High Court relied upon the decisions of Willowood Chemicals Private Limited (supra) and Nelco Limited (supra) and held that the time limit is reasonable.

In light of these developments on this issue, an attempt is made in this article to refer to the views expressed by Honourable Supreme Court and various High Courts and the surrounding legal position to understand the vires of Rule 117, the vested right of the credit and the validity of retrospectivity to the said section. Accordingly, the article is th emed over the following aspects:

- Role of Delegated Legislation vis-à-vis Rule 117 (Vires)
- Vested Right on Credits (Rights)
- Validity of Retrospective Amendment to Section 140 (Retrospectivity)

Though each of the above aspects on its own is capable for debate at extensive lengths, we try to cover them in this single article as each of them are interlinked and capable of influencing the other one. Hence, we request the reader to proceed further with the above disclaimer. With the understanding of the issues involved, we will now proceed to examine each of these aspects by considering the evolved jurisprudence in subsequent parts.

[1]Check for Legends at the end of this article.

Legends:

Acronym	Detailed
SC	Supreme Court
HC	High Court
Y	Yes
N	No
Right	Vested Right
Rule 117	Vires of Rule 117
Rule 164	Power to prescribe time limit
Prior	Prior to amendment to Section 140
Post	Post to amendment to Section 140
F	Followed
NF	Not Followed
D	Distinguished

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