Volume-103 February-2023 Pages 1-18

For Private circulation only

SBS Wiki

monthly e-Journal

By

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Dear Readers,

In this 103rd edition, we have authored articles around interesting issues. The article on GST implications on issues arising from arbitration award is a must read. This article deals with the GST implications based on the nature of amount that is involved in the awards. For ease of understanding, we have framed the article dealing with five different issues.

The next article is Part II of the series dealing with 'All About Recognized Provident Fund, Approved Superannuation Fund and Gratuity Fund'. We cover the ASF and Gratuity Funds aspects in this part. Hope you will find it interesting.

We have also collated certain important judgments under direct tax and indirect tax laws, provided our comments wherever necessary.

I hope that you will have good time reading this edition and please do share your feedback.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

GST IMPLICATIONS ON ISSUES ARISING FROM ARBITRATION AWARD

Contributed by CA Sri Harsha

We all know arbitration is one of the alternate dispute resolution me chanisms widely used. Whenever there is a dispute between the parties to the contract and the contract provides for arbitration, the dispute is to be resolved by opting to arbitration. Both the parties to the contract appoint an arbitrator and thereafter an arbitration tribunal gets constituted. The arbitration tribunal hears both the parties and passes an award. The award is equivalent to a decree of court unless it is stayed. The general trend is that the courts do not involve much in the arbitration matters respecting the party autonomy. Only in rarest occasions, the courts interfere with the awards. In other words, the award of the arbitration tribunal is almost final and binding on the parties.

With the above brief background on arbitration, we shall proceed in this article to deal with various issues that arise from the arbitration award that have implications under the GST laws. Needless to say, that the spectrum of arbitration is very wide, and it is not possible to cover analysis on each aspect. Hence in this article, we restrict ourselves to analysis of those major issues which we have handled.

Issue #1:

A contract has been entered prior to introduction of GST laws. The said work is exempted from payment of service tax. The service provider has completed the provision of service and claimed majority of the amounts under the said contract. There were certain disputes between the provider and receiver qua the price of the contract. The matter has reached arbitration after the introduction of GST laws and an award was passed in favour of provider allowing his claim for additional price. The recipient has agreed to pay the said amount. Now, the recipient pays the amount to provider in GST regime. Whether such amount is subjected to GST?

Response:

From the facts above, it would be evident that the provision of service has been completed during the service tax regime. The dispute is with relation to the price of the contract which has been completed in all respects. There is no supply happening during GST regime except for receiving the money as per the arbitration award.

In this background, let us proceed to examine the tax implications under the GST laws. Section 142(10) of CT Act[1] states that save otherwise provided, the goods or services or both supplied on or after the appointed day in pursuance of contract entered prior to the appointed day, shall be liable to tax under the provisions of CT Act. In other words, in light of Section 142(10), though the contract is entered prior to GST regime, if the goods or services or both are supplied during GST regime, then the tax under GST laws is applicable. However, the said section is subject to any other provisions dealing with similar situations.

[1]Central Goods and Services Tax Act, 2017

This brings us to the provisions of Section 142(11)(b) and Section 142(11)(c). Section 142(11)(b) states that, notwithstanding anything contained in Section 13, no tax is required to be paid under the CT Act, to the extent that the tax was leviable on the said services under the provisions of service tax law. Section 142(11)(c) states that, where any tax was paid on a supply both under VAT[2] and service tax law, tax shall be leviable under the provisions of CT Act to the extent of supplies made after the appointed day and the taxable person is entitled to take credit of taxes that were paid under the earlier regime.

On a combined reading of Section 142(10), Section 142(11)(b) and Section 142(11)(c), the following scenarios are evident:

- If the service is already leviable under the provisions of service tax law, then there cannot be any tax under the provisions of CT Act to such an extent, notwithstanding anything contained in Section 13, that is time of supply for services.

- However, if a transaction is subjected to both VAT and service tax, let us say, a works contract service, then there will be a tax to the extent of supplies made under the GST regime, though the contract is entered prior to the GST regime. If the taxpayer has paid tax on such supplies (that are yet to be provided and provided in GST regime), he can claim the credit of such taxes.

In Scenario – 1, let us assume that the contract in the issue is a pure service. Then, in terms of Section 142(11)(b), there cannot be any tax under the provision of CT Act, though the amount is received under GST regime. This is because, the said service is leviable to tax under the service tax and hence the said service cannot be subjected to tax under the provisions of CT Act. This presents us with two incidental questions. One being, since the service is exempted during the service tax regime, can it be said to be 'leviable to tax' in terms of Section 142(11)(b), to fall under its ambit? Second, assuming we pass the muster of the first aspect, then, whether the receipt of amount under GST regime, would not create any tax implications under provisions of CT Act? Let us proceed to examine the same.

In our opinion, the issue is fairly settled, that 'leviable to tax' includes the scenarios, where there is no requirement to pay tax because of an exemption. Even the service is exempted, it can still be said, the same is leviable to tax. Payment of tax is fiscal aspect and should not be confused with the liability/leviable to tax. Hence, we can conclude that though the service is exempted under the service tax regime, we can still say that the same is leviable to tax and accordingly falls under the ambit of Section 142(11)(b).

The second issue, as to the receipt of the award amount during GST regime, would create any issue under the provisions of CT Act is to be now analysed. This also, in our view, should not create any issues, especially, when the provisions of Section 142(11)(b) use the expression 'notwithstanding anything contained in Section 13'. In other words, the receipt of payment may have created any issue in other situations, since the receipt also triggers the time of supply (that is time when tax is to be paid). However, since the provisions of Section 142(11)(b) in clear terms state that there cannot be any tax under the provisions of CT Act, notwithstanding anything contained in Section 13, the receipt alone cannot trigger any tax under CT Act.

[2]Value Added Tax

In Scenario – 2, let us assume that the contract in the issue is a works contract service. In such a scenario, we must analyse the implications under the provisions of CT Act from the lens of Section 142(10) and Section 142(11)(c). From a close reading of the two sections, it would be evident that there would be tax implications under the provisions of CT Act, only where there are supplies made under the said Act. In the instant case, from the facts, it is evident that, there is no supply happening after the introduction of GST laws. The supply has been completed/terminated prior to GST regime. In such a case, there cannot be any tax under the provisions of CT Act, since there is no supply. However, the incidental question, that, whether receipt of award amount create any issues under the provisions of CT Act, needs to be analysed.

If one observes that expression 'notwithstanding anything contained in Section 13' used in Section 142(11)(b), however, not used for Section 142(11)(c). Would that make, the receipt of the amount taxable under the provisions of CT Act?

In our view, there cannot be any tax under the provisions of CT Act, without establishing a supply in the first place. As discussed earlier, since there is no supply during the GST regime, the receipt of money (award amount) cannot alone imply there will be a tax liability.

Issue #2:

A contract has been entered prior to introduction of GST laws. The said work is subjected to payment of service tax.The service provider has completed the provision of service and claimed majority of the amounts under the said contract. There were certain disputes between the provider and receiver qua certain additional works which the provider has done but not forming part of the contract. The provider has raised invoices/RA Bills for the works done on the service receiver. The service receiver has not accepted such invoices/RA Bills by stating that such works are not forming part of the original contract. However, the plea of the provider is that such additional work is mandatory, or situation based which must be done to complete the contracted work.

The matter has reached arbitration after the introduction of GST laws and an award was passed in favour of provider allowing his claim for additional work. The recipient has agreed to pay the said amount. Now, the recipient pays the amount to provider in GST regime. Whether such amount is subjected to GST?

Response:

In this case, the dispute is not qua the additional price but for the additional services provided. However, such services were provided under the service tax regime. Further, the provider has raised invoices/RA Bills on the service receiver. The same were not accepted. Since, the provider has to pay tax on accrual basis, the receipt of payment from the receiver does not have any bearing on the obligation to pay tax. Hence, the provider should have paid service tax. In such a case, there cannot be any tax under GST regime, because, there were no supplies made during GST regime. Since the service is leviable to tax under the provisions of service tax law, the same will not be subjected to tax under Section 142(11)(b) and since there are no supplies during GST regime, the taxability under Section 142(11)(c) would also does not kick in. Hence, the service provider is liable to service tax and not GST.

Further, if the service provider is waiting for the certification of the service receiver to raise invoice/RA Bills, then, the question arises, what tax is required to be paid? Even in such case, since the service receiver has now approved the service done (in light of instructions of the arbitration tribunal), the appropriate tax would be service tax. The provider should raise an invoice with service tax, collect the same and remit to the credit of the government. The receiver would lose an opportunity to claim the credit of such tax because the timing of such payment is not in alignment with the prescribed timeline to carry erstwhile credits to GST regime.

As discussed as part of Issue #1, the receipt of amount in GST regime, by itself, would not trigger any obligation under GST laws. Since there is no supply happening under GST laws, the receipt of consideration will not attract tax.

Issue #3:

A contract has been entered prior to introduction of GST laws. The said work is chargeable to tax under the service tax regime. The service provider has completed the provision of service and claimed majority of the amounts under the said contract. There were certain disputes between the provider and receiver qua the duration of contract. The provider argued that the recipient has breached the terms of contract thereby resulting a loss to the provider. The matter has reached arbitration after the introduction of GST laws and an award was passed in favour of provider allowing his claim for the amounts incurred for additional period as damages. The recipient has agreed to pay the said amount. Now, the recipient pays the amount to provider in GST regime. Whether such amount is subjected to GST?

Response:

In this case, the primary thing that comes to mind is, whether the taxability must be analysed from service tax law or GST laws? We have done an analysis of similar question qua Issue #1 above. We have concluded that the said services are taxable under the service tax alone and not GST, just because there was a receipt during GST regime.

We shall take the above conclusion and move forward making necessary changes because of change in facts in this issue.

Since the service was taxable during the service tax regime, the question that arises is, whether the said amount is taxable under the service tax law? To answer this, we need to examine the nature of amount which was received. Whether the said amount is for provision of additional work or provision of any service or just receipt of damages for breach of contract? The answer to this would determine the taxability. If it was for additional work or for provision for service, then there is no doubt on applicability of service tax. However, if it is damages, then we must examine, whether such determination/receipt of damages attracts tax under the service tax law? Let us proceed to examine the same.

From the facts, it is evident that the amount takes the colour of damages, because the provider is seeking amount for the violation of terms of contract and not for provision of any additional work. Since there is no additional work provided, there would not be any tax implication unless the amount can be considered as consideration for any other service provided. Is there any other service provided by the provider? Can we call the toleration of delay by the service provider is a service [declared service qua Section 66E(e)] and accordingly the amount received from the receiver is a consideration for such service?

In our view, the above seems doubtful. The amount received by provider is for the breach of terms of contract by recipient and are damages but not a consideration for toleration of an act. This is also cleared by Circular 178/10/2022 dated 3rd August 2022. The Circular stated where there are damages for violation of contract, they are to be treated as mere flow of money and not a consideration for any services provided. Accordingly, we can conclude that the said receipt of damages is not subjected to service tax.

Another issue that springs up is, if the damages are to be treated as mere flow of money from one person to another person, then such a transaction would be out of the definition of 'service' under Section 65B(44). Once the said transaction is out of the ambit of 'service', then one may argue that it has not pass the muster of Section 142(11)(b), thereby inviting the analysis under the GST laws, because the said amount has been received during the GST regime.

In our view, the said transaction does not also satisfy the definition of 'service' under Section 2(102), because of specific exclusion for transaction in money. Since the Circular 178 has clarified that the same is mere flow of money, the said transaction cannot also be subjected to tax under the GST laws based on the aspect of receipt.

Issue #4:

Continuing with facts from Issue #3, let us assume that the arbitration tribunal, apart from the principal claim, also allowed claim for interest on the award amount. In such case, whether the said interest is subjected to tax?

Response:

This issue seems interesting for two reasons. One, what would be the nature of interest? Two, whether there can be a tax under GST laws, especially, in light of Section 15(2)(d) of CT Act, when there was no supply in first place? Let us proceed to explore both the aspects.

The first aspect is, what is the nature of interest? Will it have the same nature or different from the principal? This is important because, if the interest takes colour from the principal, then in the instant case, the interest can also be called as damages. If not, the taxability of interest must be examined in a separate hue than the damages.

In our view, the main reason for award of interest is to compensate the time value of money. Hence, the interest should take the colour of the principal amount. Since, in the instant case, the interest is awarded by the arbitration tribunal for damages, the interest pay out shall also take the colour of damages. As discussed above, since damages are mere flow of money, there will not be any tax implications on the receipt of interest.

The second aspect is, since interest for delayed payment of consideration for supply is to be included in the transaction value as per Section 15(2)(d), will interest be taxable? In our view, since in the instant case, there is no supply of service or goods or both, just mere transaction in money, damages being flown from one party to another, the question of transaction value would not only arise. Then, in such a scenario, how can interest be included in the transaction value in terms of Section 15(2)(d). In other words, in order to include the interest in transaction value, the interest should be for delayed payment of consideration and that consideration should be for a supply. In absence of supply, the interest cannot be brought to tax.

The Bombay High Court in the case of Angerlehner Structural and Civil Engineering Company vs. Municipal Corporation of Greater Bombay[3] has dealt with taxation of interest arising from arbitration award. The High Court stated that the interest arising from arbitration amount should be taxable under Section 15(2)(d) of CT Act, though the arbitration dealt with a contract which was entered prior to GST laws and award was also issued prior to introduction of GST laws. The High Court has gone by the fact that the amount of interest is being received after introduction of GST laws, the same was taxable under the provisions of GST laws.

However, in our view that the above judgment has concentrated mainly on the aspect, whether the said amount is taxable under forward or reverse charge (because the supplier is entity outside India) and not, whether the said amount is actually taxable under the provisions of GST laws. The Court vide Para 8 stated that if the supplier is contesting on applicability of GST on the interest amount, then they are obliged to hear the Union of India. Since, the supplier has not insisted on the same, the Court proceeded to examine the second issue, as to who is liable to pay the tax (on the presumption that GST is liable) on such amounts. Hence, the above judgment should be taken with the above aspect in background and cannot be applied universally.

Issue #5:

Continuing with the common facts above, the arbitration tribunal apart from the award of the principal amount and interest, also awarded the service provider certain costs incurred by him for the arbitration proceedings. The arbitration tribunal has asked the service receiver to pay 50% of the costs incurred by service provider towards arbitration proceedings apart from payment of other amounts. In such case, whether there will be any tax implications on the awarded arbitration cost to the service provider, when he receives the same from the service receiver?

[3] 2022 (6) TMI 424 – Bombay High Court

Response:

This is one of the most common issues. The arbitration tribunal as the final aspect before passing award, also awards costs incurred by the successful party to be reimbursed by the other party. Depending upon the facts and various other parameters, the tribunal concludes that the losing party must pay the winning party, partial or full amount incurred on arbitration proceeding by the winning party. In such cases, whether such amounts paid by service receiver (the losing party) to the service provider (the winning party) attract tax under GST laws?

Let us proceed to examine the same by taking an example. Let us say, the service provider has incurred Rs 1 Crore as cost towards the arbitration proceedings. The same includes, the fee paid to arbitral tribunal, the fee paid to the advocates who represented the service provider and other incidental expenses. Now, having won the dispute, the arbitration tribunal asked, service receiver to pay 50% of the above amount to the service provider. Now, the service receiver must pay 50% of Rs 1 Crore in line with the arbitration award. Should the service provider have to put tax on the said amount while raising the invoice for collecting the above amount from the service receiver?

In our view, the above transaction does not attract tax. The sole reason is that there is no supply happening from the service provider to the service receiver. The service receiver is paying only on the instruction of the arbitration tribunal, certain portion of the cost incurred, but not as a consideration for any supply. Hence, there should not be any tax on that particular transaction.

Further, the tax to be paid under reverse charge mechanism is for the services provided by the arbitral tribunal to a business entity. This is clear from Entry 3 of Notification No 13/2017 – CT (R) and accordingly reverse charge kicks only when the payment is made to the arbitral tribunal but not inter-se. In simple words, when the service provider and service receiver pay the arbitral tribunal, their respective share of fees, then the said transactions are taxable under reverse charge, independently, in their own hands. However, when one party is paying the other party, the cost incurred as a result of direction of arbitral tribunal, there cannot be a tax under reverse or forward charge.

This article is contributed by CA Sri Harsha. The author can be reached at harsha@sbsandco.com

DIRECT TAX

ALL ABOUT RECOGNIZED PROVIDENT FUND, APPROVED SUPERANNUATION FUND AND GRATUITY FUND - PART II

Contributed by CA Sri Harsha & CA Narendra

In Part I, the concept of recognized provident fund ('RPF') has been discussed. In this part, concepts of approved superannuation fund ('ASF')and gratuity fund will be discussed.

Approved Superannuation Fund [ASF]:

The term ASF is defined under section 2(6) to mean a superannuation fund which is recognized by the PCCIT/CCIT/PCIT/CIT in accordance with the rules contained in Part B of Fourth Schedule to the ITA [1]. The procedure for obtaining registration has been provided in the rules contained in Part B of Fourth Schedule.

Tax Implications on contributions to ASF:

There are certain deductions/exemptions available in respect of contributions made to ASF. Let us proceed to understand the tax implications on contributions made to ASF.

Employer's Contribution to ASF:

As far as employer's contribution to ASF, section 36(1)(iv) states that the contribution to a ASF is to be allowed as expenditure subject to the limit as may be prescribed.

In this regard, Rule 87 of IT Rules[2] provides that employer's contribution to ASF shall not exceed 27% of the salary as reduced by contribution to RPF. If employer's contribution is to RPF is 12%, contribution to ASF shall not exceed 15% of the salary.

In addition to the provision of 36(1)(iv), it is required to analyse the provision of section 43B, to claim deduction in respect of the employer's contribution to ASF. Section 43B states that notwithstanding anything contained in other provisions of ITA, employer's contribution to ASF shall be allowed as a deduction only if such contribution is paid to the respective ASF account within the due date specified for filing the return of income under section 139(1). If the amount is not paid within the due date but paid after such date, the deduction is allowed in the year in which such amount is paid to the ASF account.

The next aspect is taxability of employer's contribution in the hands of the employee. In this regard, section 17(2)(vii) states that aggregate contribution to provident fund, national pension scheme and/or approved superannuation fund in excess of Rs.7,50,000 shall be considered as perquisite and taxable accordingly.

Which means that aggregate contribution to three funds in excess of Rs.7,50,000 shall be considered as perquisite under section 17(2).

Interplay between the RPF and ASF:

As discussed earlier, employer's contribution to RPF in excess of 12 percent of salary is considered as salary under section 17(1) however on the other hand aggregate contribution to three funds in excess of Rs.7,50,000 shall be considered as perquisite under section 17(2).

[1] Income Tax Act, 1961
[2] Income Tax Rules 1962

Let us consider an example for better understanding:

Mr. A, an employee is drawing the following salary from his employer:

Particulars	INR (lakhs)
Basic Salary	100
Employer's contribution to RPF	25
Employer's contribution to ASF	10
Total	**135**

Let us compute the taxable income of Mr.A:

Particulars	INR (lakhs)
Basic Salary	100
Salary as per Section 17(1)(vi) [25- (100*12%)]	13
Perquisite as per Section 17(2)(vii) (25+10-7.5)	27.50
Total Income	140.50

From the above example, it can be understood that though the actual amount/benefit received by Mr. A is Rs.135, total income is computed at 140.50. This is because section 17(1) and section 17(2) of ITA tries to tax the same income.

Employee's Contribution to ASF:

Though the employee makes contribution to ASF from his salary income, employer collects the contribution from the employee and remits the same to the provident account of the employee. As the employer is collecting the amount from the employee, in order to make sure that the amount is remitted to the account of the employee within a time, certain checks have been provided in the ITA.

Section 2(24)(x) of the ITA states that any amount received from the employee as a contribution to the superannuation fund shall be considered as income in the hands of the employer. However, once the amount is remitted to the employee's superannuation account, such amount is allowed as deduction under section 36(1)(va).

However, unlike the employer's contribution, if the amount is not remitted to the ASF account within the due date under section 36(1)(va) then, such amount is permanently disallowed no deduction is allowed even if such amount is credited to the ASF account in the next year.

For the purpose of section 36(1) (va), due date has been defined to mean due date specified under the respective Acts. However, certain High Courts have held that employer is eligible to claim deduction under section 36(1) (va) even though the amount is not remitted within the due date specified under respective Act but before the due date for filing the return of income under section 139(1). High Courts have come to such a conclusion by taking recourse to the provisions of section 43B.

In order to provide clarification on the due date, section 36(1)(va) has been amended by the FA[3] which states provisions of section 43B are not applicable for the purpose of determining the due date under section 36(1)(va). This amendment has been inserted by way of Explanation to section 36(1)(va).However, judicial fora have held that the amendment to section 36(1)(va) by way of Explanation is applicable prospectively and not retrospectively. This argument has initiated another line of litigation.

Recently, the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd [4] has held that the non-obstante clause would not in any manner absolve the employer's obligation to deposit the amounts deducted by it from the employee's income, unless the same is deposited on or before the due date as per the respective acts as given in section 36(1)(va).

[3]Finance Act 2021

[4][2022] 143 taxmann.com 178 (SC)

SC also held that the leeway granted to assesses to allow deductions on deposits made beyond the due date, but before the date of filing the return, cannot be applicable in the case of amounts held in trust, as of the employees in the given case. They are deemed to be held as income of the employers only with the object of ensuring the timely deposit of the same as per the respective laws. Hence, if the employer fails to deposit the monies collected towards ESI and PF from its employees within the said time limits of respective acts, the eligibility to claim such sums as deduction is lost forever.

The next aspect would be tax implication in the hands of the employee in respect of employees' contributions to ASF.

In this regard, section 80C states that employees are eligible to claim deductions upto an amount of Rs.1,50,000 while computing the taxable income for the year.

Annual Accretion to RPF, ASF and NPS:

Annual accretion to the funds specified section 17(2)(vii) is taxable as perquisite under section 17(2)(viia).

The computation mechanism has been provided in Rule 3B of IT Rules.

Amount paid by ASF:

Section 10(13) of the ITA states that any payment from an approved superannuation fund made in the following situations is exempt from tax—

- on the death of a beneficiary; or
- to an employee in lieu of or in commutation of an annuity on his retirement at or after a specified age or on his becoming incapacitated prior to such retirement; or
- by way of refund of contributions on the death of a beneficiary ; or
- by way of refund of contributions to an employee on his leaving the service in connection with which the fund is established otherwise than by retirement at or after a specified age or on his becoming incapacitated prior to such retirement, to the extent to which such payment does not exceed the contributions made prior to the commencement of this Act and any interest thereon; or
- by way of transfer to the account of the employee under a pension scheme referred to in section 80CCD and notified by the Central Government.

Approved Gratuity Fund:

Section 2(5) defines the approved gratuity fund to mean a gratuity fund which has been and continues to be approved by the PCCIT/CCIT/PCIT/CITin accordance with the rules contained in Part C of the Fourth Schedule to ITA.

Part C of the Fourth Schedule provides that gratuity funds shall be created as irrevocable trust and shall be created with the sole purpose of provision of gratuity to the employees.

Rule 101 of IT Rules states that amount contributed to the fund (including interest received on such fund) shall be invested in post office savings account, savings/current account with the schedule account or group gratuity scheme of LIC and other investments as specified in Rule 67.

Further, receipt of gratuity to the employee is exempt from tax under section 10(13) subject to the limits specified therein.

Tax Implications in the hands of RPF, ASF and gratuity fund:

Till now, taxability in the hands of the employer and the employee has been discussed. Now, let us proceed to analyse the income tax implications in the hands of respective funds namely RPF, ASF and gratuity fund.

Section 10(25) states that that any income received by the trustee on behalf of RPF, ASF and approved gratuity fund is exempt from tax and these funds are assessable under sub clause (iv) of first proviso to section 164(1).

Requirement to file Return of Income:

The question arises is whether the above funds are required to file income tax return under the ITA. In this regard, section 139 states that any person other than a company is required to file a return of income if his total income exceeds maximum exemption limit which is not chargeable to tax. Which means that if the total income does not exceed maximum exemption limit, it may be required to file return of income.

However, in the case of RPF, ASF and gratuity fund, it would be having income by way of interest which is exempt under section 10(25) (iv) and hence, its total income does not exceed maximum exemption limit.

Further, CBDT Circular No. 18/2017 dated 29th May 2017 states that:

"it has been decided that in case of below mentioned funds or authorities or Boards or bodies, by whatever name called, referred to in section 10 of the Income-tax Act, whose income is unconditionally exempt under that section and who are also statutorily not required to file return of income as per section 139 of the Income-tax Act, there would be no requirement for tax deduction at source, since their income is anyway exempt under the Income-tax Act:

> *(xi) Provident fund to which the Provident Funds Act, 1925 (19 of 1925) referred to in sub-clause (i), recognized provident fund referred to in sub-clause (ii), approved superannuation funds referred to in sub-clause (iii), approved gratuity fund referred to in sub-clause (iv) and funds referred to in sub-clause (v) of clause (25);"*

Considering the above, total income of RPF, ASF and gratuity fund is exempt from tax and hence, these funds are not required to file return of income.

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SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. **High Court of Karnataka in the case of M/s. Wipro Limited[1] - Benefit of Circular 183[2] should be extended in case of bonafide error (quoting of wrong GSTIN):**

   In this case, petitioner has preferred the writ petition to allow him to access the GST portal to rectify the error in Form GSTR-1 that has been uploaded during FY 2017-18, FY 2018-19 and FY 2019-20, so as to enable the recipient to take the credit of the tax paid by the petitioner.

   The petitioner has invited attention of the Court to the circular that has been issued to prescribe the procedure for allowing the recipient to take credit, where there were bonafide errors which got crept in while filing the returns for the period FY 2017-18 and FY 2018-19.

   Since, the present plea is relating to the same years, the petitioner pleaded that the said circular should be applied to him, specifically when the procedure mentioned in the Circular is adopted. The Revenue argued that the Circular cannot be applied to the facts of the instant case.

   After hearing both parties, the High Court held that the Petitioner had wrongly shown the GSTIN of another recipient instead of actual recipient and since the procedure outlined in circular is followed, the credit should be allowed to the recipient. The Court further held that though the Circular is issued for FY 2017-18 and FY 2018-19, since the errors are identical for FY 2019-20, the benefit of the circular should be applicable for FY 19-20 also.

2. **High Court of Orissa in the case of M/s Vedanta Limited[3] – Refund is qua a registered person and not unit wise and there is no legal backup for supplementary refund claim:**

   In this case, the petitioner has three units under a common GSTIN. The petitioner is engaged in export of goods and supplies to SEZ units. Since they are engaged in zero rated supplies, they have become eligible for refund of unutilised input tax credit in terms of Section 54 of CT Act read with Rule 89 of CT Rules. The petitioner has applied for the refund and accordingly received the same. Later, they re-calculated refund unit wise and they have understood that they have lost certain input tax credit as refund by applying refund on a consolidated basis. Hence, to obtain the additional refund (unit wise instead of consolidated claim) they have lodged a supplementary claim. The refund sanctioning authority has rejected the refund stating that there cannot be a refund claim unit wise especially, when all the units have common GSTIN. Aggrieved by this, the petitioner has approached the High Court invoking writ jurisdiction.

[1] TS-02-HC(KAR)-2023-GST
[2] Circular No. 183/15/2022-GST dated 27.12.2022
[3] [2023] 146 taxmann.com 262 (Orissa)

The petitioner argued that refund being the substantive right, the same cannot be denied just because the rules do not provide for claim of refund unit-wise. The petitioner stated when the refund is calculated unit-wise, because of higher input utilisation compared to turnover and other units, the thermal unit is eligible for higher refund as compared to the consolidated claim. The petitioner stated that Circular 125/44/2019 – GST is to be struck down since it states that there cannot be any supplementary claim, when there is no such prohibition under Section 54 read with Rule 89. The Revenue objected to the petition stating that when they have a single GSTIN and refund being granted qua GSTIN, it is not in accordance with the law to make a refund claim unit-wise, that too, in supplementary mode. The Revenue also argued that GST laws recognize refund in one category in respect of any tax period identified by GSTIN and hence, the unit-wise claim is not in accordance with the law.

The Court after hearing both the parties has held that reading of 'any' in Section 54 without any ambiguity admits that three units of the petitioner having common GSTIN are to be treated as one 'person' in terms of Section 25 read with Section 2(84) and (94) of CT Act. In light of the above, the petitioner cannot make a claim unit-wise by treating each unit as a separate registered entity. The Court further stated that when the petitioner has filed original refund application on consolidated basis, cannot at a later stage make a supplementary claim based on unit-wise. The Court after referring to various decisions namely TVS Motor Company Limited [2019] 13 SCC 403, Jayam & Co (2016) 96 VST 1 (SC) and others has held that credit is not a substantive right, but a concession provided by the statute and accordingly rejected the ground of petitioner.

Our Comments:

The High Court has rightly held that there is no provision for claiming the refund unit-wise especially when the taxpayer has registered all the three units under a consolidated GSTIN. Since the GST laws allow registration for each unit separately, the taxpayer has to do the calculations for deciding whether to go for registration unit-wise or on a consolidated basis. Once a decision has been taken and registration is obtained, they cannot change the status as it suits them. Hence, it is advisable to do the math before deciding on the registration.

3. High Court of Allahabad in the case of Skyline Automation Industries [4]- Non-Provision of Intimation vide Part A of DRC-01A prior to issuance of show cause notice under Section 74 is void ab-initio:

In the present case, the authority has passed an order under Section 74(9) of CT Act without issuing show cause notice in terms of Rule 142(1A) of CT Rules. The said order was challenged by the petitioner stating that there cannot be any adjudication of the matter resulting in order without issuing a show cause notice in the first place. The revenue has argued that though they have not issued any show cause notice, they have given enough opportunities to present the case.

[4] [2023] 146 taxmann.com 159 (Allahabad)

The Court stated that without following the procedure prescribed under Rule 142(1A) of CT Rules, there cannot be any order under Section 74(9) of CT Act. The subsequent reminder will not cure the defect and accordingly held the order passed is bad in law. However, the Court has given the revenue to re-initiate the proceedings by following the procedure stipulated in the law.

4. High Court of Kerala in Pappachan Chakkiath[5] - Time Extension for passing Order under Section 73(10) also applies for issuance of show cause notice under Section 73(2):

In an interesting case, the petitioner has approached the High Court seeking cancellation of the order passed by the tax authorities citing the same was passed without jurisdiction. The plea of the petitioner is that under Section 168A of CT Act, there was an extension of time limit for issuance of order for Financial Year 2017-18 till 30.09.2023 and such extension cannot be used for issuance of show cause notice under Section 73(2). In other words, the petitioner argued that the said extension is applicable only for orders and not for notices (which is a precursor to the order).

The Court stated that the time limit for issuance of notice under Section 73(2) has been linked with the time limit for passing of order under Section 73(10). In such case, if the latter is extended, it is obvious that the former also gets extended. Accordingly, the court upheld the order passed stating that the same were within the jurisdiction.

[5] 2023 (1) TMI 982 – Kerala High Court

SUMMARY OF JUDGEMENT

SUMMARY OF IT DECISIONS

Contributed by Team SBS

1. **Madras High Court in BNY Mellon Technology Private Limited[1] - The time limit prescribed for TPO to complete assessment before 60 days prior to the last date to complete assessment under section 153 is mandatory in nature and the word 'prior to' should be interpreted differently from the word 'to':**

The facts in the case were that the last date for completion of assessment in the said case is 31.12.19 after extending the time limit by 12 months on account of referring the case to TPO. Accordingly, as per section 92CA(3A), the TPO had to pass the order before 60 days prior to the last date on which the time limit for assessment expires. TPO actually passed the order in 01.11.19. To determine the validity of the TPO's order, the question has arisen whether the last date on which the time limit for assessment expires is 31.12.19 or 01.01.20thereby deciding whether last date for passing order by TPO is 01.11.19 or 31.10.19.

The revenue has drawn attention to the General Clauses Act, 1897 and contended that where the word 'to' is used in an act for determining the time limit, it shall be interpreted as 'up to that date' and such date shall be included. Therefore 'the date before 60 days prior to the last date of assessment 'would mean 60 days calculated by including 31.12.19 also and hence the last date for TPO's order would be 01.11.19 by leaving the AO a period of 60 days to complete his assessment.

The court has held that the last date for completion of assessment expires on 23:59:59 hours of 31.12.19 but not on 01.01.20 and the words used in the act are 'prior to the last date' but not 'to the last date'. So, 60 days' time limit shall be determined by excluding 31.12.19. Accordingly, the last date for passing TPO's order would be 31.10.19 leaving a period of 60 days to AO for completion of assessment.

The court has also held that the time limit prescribed under section 92CA(3A) is mandatory in nature but not directory. It is because though the word 'may' suggest that the provision is directory in nature, the court had held that while interpreting a provision or rule, the purpose and object behind the use of the words shall be understood rather than considering the literal meaning of the word.

Our Comments:

The Hon'ble Madras High court had explained that the Act needs to be understood in its entirety to interpret a provision or rule. When the law itself is clear, then the need to interpret the same from the context of General Clauses Act is not much required. However, the purpose and object of the legislature has to be interpreted and the consequential effects of the interpretation shall be considered so as to match the interpretation with the intention of such enactment.

[1] [2022] TS-876-HC-2022(MAD)-TP

2. Delhi ITAT in Sameer Malhotra[2] - Tie Breaker questionnaire is important but not exclusive. The permanence of home is to be determined on qualitative and quantitative basis:

The facts of the case are that the assessee had worked in India for 8 months during the assessment year and served his employment for the remaining 4 months in a new company in Singapore. Accordingly, the assessee had become resident for both the countries and hence the tie breaker test is made to determine the residency of the assessee under Article 4(2) of India-Singapore DTAA. The AO determined that since the assessee had a let-out property in India along with savings accounts, investments, his centre of vital interests is with India and is resident of India as per Article 4(2).

Tribunal had inferred that permanent home means a place arranged by the assessee to stay continuously but not occasionally. Being primarily resided in Singapore along with his family and being attained the Tax Residency Certificate from Singapore authorities, the assessee can be said to have his centre of vital interests with Singapore than India. Also, the habitual mode would mean the place where the assessee resides which is also Singapore in the assessee' s case. Hence, he is considered as resident of Singapore. Also, Article 15 of the treaty says that any remuneration earned in a country on exercise of employment in that country would be taxable in that country itself and hence the said income would be taxable in Singapore itself.

3. Bangalore Tribunal in Dans Energy Private Limited[3] - Internal comparables for a loan shall be preferred when the denomination of the loan from associated entity and from comparable third parties is the same irrespective of the geographical location of the loan:

The assessee had taken a loan from its associated enterprise and calculated its arm length price (ALP) using an internal comparable i.e., another loan taken by the assessee from an uncontrolled third party. TPO contended that for computing ALP, preference shall be given to external comparable rather than internal since the internal comparable transaction would not reflect the true independent nature which is required for comparison purpose. TPO also contended that, moreover, both the loans are taken from a different geographical location which rules out the comparable nature for the transaction.

The Tribunal had explained that clause (ii) of rule 10B(3) of Income Tax rules, 1962 refers to two things. Firstly, the comparison can be done with the ' same enterprise having a comparable uncontrolled transaction' and secondly, it can be done with 'an uncontrolled enterprise having a comparable uncontrolled transaction'. Thus, it is evident that rule 10B(3) permits consideration of both internal comparables and external comparables for computing ALP.

Accordingly, the Tribunal has held that when the internal comparables are available with the same denomination as of the international transaction, then preference shall be given to the same over external comparables. The fact that the geographical location of both the transactions is different could not simply rule out the internal comparable. Even if the denomination of loan is different, necessary adjustments need to be done to bring it to ALP. If it is determined to consider external comparables, then such uncontrolled enterprise should be having of same credit rating, loan should be of same nature, terms etc., which makes it suggestible to consider internal comparables to avoid such deviations.

[2] TS-1010-ITAT-2022 (DEL)
[3] TS-906-ITAT-2022(Bang)-TP

4. **Karnataka High Court in Subex Ltd[4] - NO TDS liability on year end provisions, reversed in next year as payee is not identified:**

The assessee challenged the addition made by assessing officer by disallowing the year-end provisions made towards legal charges, by contending that the payee is not identified in order to deduct the tax and the said provisions are reversed in the next year and tax is deducted on the actual incurrence of the expense and paid to the government within due time.

Karnataka High Court by relying on the ruling given in Volvo India Pvt. Ltd.[5] has held that the focus is to be made on the fact that whether the income is accrued to the payee to deduct the tax at source. Also, mere existence or absence of the entries in the books cannot be decisive or conclusive factor in deciding the right of assessee in claiming the deduction. The Court held that what is to be seen is whether the payee to whom the income is taxable is identified at the time of making such provision or not. If there is no such identification, then the assessee has no liability to deduct the tax while making the provision. Moreover, the assessee had offered to tax such provision in the next year by reversing it and deducted the tax when the expense had occurred. Hence, the assessee is held to be not liable to deduct tax when the payee for any expense is not identified.

5. **Orissa High Court in Mr Mahimananda Mishra[6] – The tax on deemed dividend should be paid by the shareholder and this is clear from provisions of Section 2(22)(e):**

The assessee is a partner in a partnership firm holding 20% of the share. The assessee also holds 36.95% of share capital in the M/s Orissa Stevedores Limited (OSL). OSL has given loan to the partnership firm to the tune of Rs 3,75,78,685/- during AY 2011-12. The AO has held that such an amount is to be treated as deemed dividend in terms of Section 2(22)(e) of IT Act.

The Assessee took the matter to CIT (A) who has confirmed the demand and ordered the beneficial shareholder to pay tax on the deemed dividend. However, ITAT has remanded the matter to CIT(A) as to determine as to who as to pay tax, the firm or the individual shareholder?

When the matter reached High Court, the High Court stated that it is clear from the provisions of Section 2(22)(e), that the shareholder is obliged to pay the tax on deemed dividend and not the entity which holds the share in OSL, that is firm and held that ITAT needlessly remanded the matter.

[4] TS-1014-HC-2022(KAR)
[5] ITA No. 369/2018 (KAR)
[6] 2023 (1) TMI 780 – Orissa High Court

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