SBS Wiki

monthly e-Journal

100th Edition

By

SBS and Company LLP
Chartered Accountants

CONTENTS

Dear Readers,

It is a proud moment for our organisation on achieving this rarest milestone. The one in your hand is the 100th edition. When we thought to release our first edition, we were bit sceptical, whether we could continue to do this for at least couple of months. But we are here, releasing our 100th edition.

Authoring articles which require detailed research and study is not an easy task. Repeating this for 100 times is a herculean task. At this juncture, I asked a question to myself. How did we do this? The only answer I got was, that we took the monthly release of journal to our heart and thought this is one of the few ways to show the passion we have towards the profession. Undoubtedly, the feedback that we have been receiving from the readers was another motivation to keep the journal live and kicking.

On this occasion, I would like to share one cherishing anecdote. Me and my partner were off to deliver a seminar out of Hyderabad. The journey to the venue from Hyderabad is close to 3 hours. One of the speakers of the same seminar was a senior chartered accountant who has immense expertise in the areas of direct taxation. The organisers have introduced us to the said senior professional. When we were introduced to him, the organisers have stated that these people are from SBS firm and release a monthly journal containing detailed articles. The senior professional smiled at us and to our surprise shown a copy of our recent journal in his hand. He said since it is a long ride from Hyderabad, he has taken a print of the recent edition to read in the car. We are much elated to find a copy of journal in his hand. We felt so happy that our journal was read by senior professionals not as a routine forward but with a serious intent of taking a print and reading it out. Incidents like these, kept on motivating us and helped us in reaching this milestone.

I would like to take this opportunity to thank all the article contributors who have penned such wonderful articles on the most happening topics, with special reference to Mr. Harsha, Designated Partner, for his persistent effort in contributing such beautiful piece of art, to entice the readers, and ensuring that Wiki is released monthly on dot, with out any delay. It would be an exaggeration, that readers have complemented us for this effort.

Special thanks to our publication partner for timely delivery of Wiki, and our IT partner for posting in the portal and transmission to clients.

I am happy that we have reached to our 100th edition and looking forward to many more. I could not wish anything more than your continuous support. Hope all these articles will help everyone in understanding and better preforming their works. We are also coming with concept books in next few months. The concept book is around a single concept analysed from dimension of multiple laws. As given, we request your same support for the future editions and the concept books.

From this edition, we started summarising important decisions in the areas of direct and indirect taxation for the benefit of readers. We wish to add summaries for the judgments in other laws in the upcoming editions.

Thanking You,

Suresh Babu S
Founder & Chairman

Dear Readers,

It is the dream of every child, to score a ton and raise their bat to the fans in the stands. Today is that day for SBS Wiki. This is our 100th edition and a time to pose like the 'god of cricket', to the readers in and outside the stadium. We scream a big 'thanks' from deep of our hearts for the constant motivation and support extended in coming up with the journal.

As an organisation, we have penned close to 400 original articles. This is no small deal, and I will not say that it was easy for us. Every article took a toll on us. We had bitter arguments and sour fights leading to uncompromised versions, which you see. The journal was designed to have articles which are deep in subject matter and ignite a though to reader. I hope that majority of the articles have served their objective and the number of hits the articles has received on our blog indicate the same too. The journal provided the clients to be aware of the contemporary issues which the industry faced with and thus serving the core objective.

Over a period, we have been receiving huge appreciations and compliments from the readers that how our blog and articles helped them in their day-to-dayworks, and we express our great gratitude for the same and try to come up with better content than as of now. We are constantly improvising ourselves.

I once again convey my thanks to all the stakeholders (inside and outside) the organisation who has contributed to this milestone. This is not a single man's achievement but an achievement of many people. Wish to continue many more articles which helps us and the readers to be sharp and aware.

Thanking You,

Sri Harsha
Partner

ॐपूर्णमदःपूर्णमदिम्पूर्णात्पूर्णमुदच्यते |

Om poornamadah poornamidam poornaat poornamudachyate

पूर्णस्यपूर्णमादायपूर्णमेवावशिष्यते ||

Poornasya poornamaadaaya poornamevaavashishṣyate

ॐशान्तःशान्तःशान्तः ||

Om shaantih shaantih shaantih

Dear Readers,

The above is the Shanti mantra of IshaVasya Upanishad, part of Yajurveda. The reference above is to mark the importance of "Poornathvam" or **"complete form"**. This 100thedition of the Journal Wiki denotes the mark of completion of the basic foundation for a skyrocketing future in knowledge sharing series by SBS.

As an insider, associated with the team, I am aware of the background orchestra, the time and effort invested by the contributors, research team and technical team, in bringing out articles which decipher the intricacies from trade and professional perspective, and the feed back received for the articles is the proof that, the motive of knowledge sharing of Wiki is well achieved.

Articles published in Wiki, are not mere excerpts from the relevant judgement or notification, but have a detailed analysis, including the issues or matters which have not been properly dealt or addressed, thereby giving the reader, a greater perspective and better understanding of the core subject or issue on hand, rather than just getting information of what the judgement or notification had dealt with.

I have read majority of the articles of Wiki, but over the period, I seem to have lost control on the articles released in Wiki, and I am awestruck, each and every time, of the content that is available, when i visit SBS website/Wiki App, to search for a particular article.

Appreciations and Compliments are the two things, which motivate everybody, and Wiki is not an exception. I take this opportunity to thank all the readers of Wiki, for their positive feedback, appreciations and compliments, which motivate us in bringing more relevant articles on the contemporary issues.

I take this opportunity to congratulate the management team of SBS, and the team of contributors, for their persistent efforts in their untiring mission of knowledge sharing, and also thank for making me a part of Wiki.

Thanking You,

D.V.K.Phanindra
Practicing Company Secretary
An Insider

TESTIMONIALS

I have been the regular reader of SBS Wiki. Analysis of various judgments is excellent. Mr. Harsha andteam deserve great appreciation for the selfless services rendered to the tax fraternity. Articles onthe GST law are really useful. It may be observed that considerable time and energy are spent in thepreparation of each article. Unless a person has interest and exposure to these complicated subjects it is just not possible to pen such nice articles. Congratulations on the release of the 100th edition

– P V Subbarao, Senior Practising Professional

I am a regular reader of SBS Wiki which is a knowledge bank. It contains useful, relevant and important information in a precise, simple and easy to understand language. I wish SBS Wiki to see 1000th edition soon

– Sreedharan Sampath, Professional from Industry

I have read all their 99 editions. I have been eager always and enthusiastically awaited their new editions. It has been one of things like my morning filter coffee. I thank team SBS for their committed and importantly consistent effort. As someone who is an avid reader, I have a liking for their work as it stands out in being high quality content. I am as eager awaiting for the 100th edition. Great work and well, continue the good work. Thank you for educating us continuously

- Sriram Subramanian, Entrepreneur

Suresh Babu Sannareddy creator of SBS and company LL.P is doing wonderful professional service in both Telangana Hyderabad Andhra Pradesh Sricity nurturing and encouraging promoters entrepreneurs directors and also fellow professionals with right advise knowledge dissemination wishing SBS and His team many laurels

– V C R Kumar, Entrepreneur

Accessibility at all times. Present interaction. Articles on varied subjects of significance and blogs are very informative and full of knowledge

– Ambarish, CEO, Pearl Mines and Minerals Private Limited

SBS has been very professional in their approach and their initiative of SBS Wiki has been extremely thoughtful and helpful for everyone across employed, businesses, etc. I have been interacting with Mr. Suresh and Mr. Kanakaraj and their approach and knowledge have been highly appreciated. Thank you SBS and SBS Wiki
– Sreekanth Putha, Professional from Industry

Its unique journal from known expert colleagues **– Madireddy Nagireddy, Practicing Professional**

It is very very good. It helped a lot in all aspects **– Lenin Babu, Professional from Industry**

At outset I Thanks for SBS team on account of publishing 100 wiki journal. Wiki monthly journal helps me to update and enhance knowledge base for Acts implemented by Govt of India, tax laws, foreign payments, audit issues and interpretation of various court judgements. This helps me for implementation and providing clarifications to higher authorities and various government organisations. Apart from these articles helped me for swift disposal various cases
– V Nageswara Rao, Finance Officer at Central Government Organization

Thorough professionalism store house of state of the art knowledge on legal and financial management
- Thilotham Kolanu, Entrepreneur

The best e-journal on various tax issues, with reference to latest case laws & judgements, that keeps us updated. The analysis of various amendments or new provisions, with an expert's opinion at the end helps a lot to gain knowledge & understand them better. I am a great fan of your journal and eagerly wait for it, from the first day of every month. Thanks a lot for your efforts & All the very best, Dear Suresh & Team SBS
- Naga Pradeep Avadhanam, Professional from Industry

The way you come up with different topics on Income Tax, FEMA, Corporate Laws etc., covering not only the latest amendments but also pitch your opinions on case studies which are in ambiguity that makes the reader handy with your opinions, user friendly on the topics and also enlightened with latest amendments – Balaram Bheemshetty
– Practising Professional

Excellent knowledge sharing. Helpful in understanding issues and taking proactive steps
– S V Ramachandra Rao, Entrepreneur

Its current and well written and well laid **– Pattabhi Ram, Entrepreneur**

SBS WIKI is best journal. Day by day it is coming with articles covering the current issues of practice, latest amendments in law and core areas where one should focus while doing practice
– Sreehari Reddy Koduru - Practising Professional

Great Depth of analysis and Good current issues covered...Kudos **– Madhu, Entrepreneur**

SBS wiki has helped me and my family not only with the tax services but also in ways such as helping in our financial planning and giving valuable advices on our investments. I cannot thank them enough for their valuable insights and customised handling of our tax compliances. In the past 4 years of my personal journey with this firm i have developed a trustworthy and a beautiful relation with them
– Shashank Gampa, Entrepreneur

In the busy life it is very difficult to practicing professional to study various updates on Tax and Audit matters SBS team devoting lot of their time and doing really research on all the valuable contents and changes to help to the professional in all the fields. I am congratulating all the team and expressing thanks and regards for their valuable submissions
- Nageswara Rao G, Practicing Professional

GST

GST ON TDRS FOR COMMERCIAL PROJECTS

Contributed by CA Sri Harsha

We are aware that the taxability of Transferable Development Rights (for brevity 'TDR') has undergone a significant change with effective from 01st April 2019. The liability was shifted on the developer subject to certain conditions. The reasoning of such a shift to developer only if has unsold flats as on the date of completion certificate appears to be inspired from the Honourable Hyderabad Tribunal in the matter of Vasantha Green Projects [1].

With the shift of burden of the taxability of TDRs on the developers, has provided a great relief to the land owners. Unless the land owner intends to sell his share prior to completion certificate, there is no requirement for him to obtain the registration under GST laws. As discussed in our previous articles, the land owner is only obliged to pay tax on two transactions. One, being the transfer of development rights to the developer and two, being the sale of flats falling his share to the customer prior to the completion certificate. Since, the taxation on transfer of development rights has been shifted to the developer, he is relieved from the burden of registration qua such transaction. The other transaction which compels his to obtain registration is sale of flats falling to his share prior to completion certificate. If the land owner retains or sells them post completion certificate, then there is no obligation to register under GST laws.

With the taxation of TDRs shifted to developer, everyone was of the belief that the problems surrounding the taxation of TDRs have come to end. However, that being possible only in Utopia, a new problem has surfaced.

The troubling question is, whether the shifting of taxation of TDRs on the developer is only pertaining to the residential projects or it applies to the commercial projects also? The main contribution to this issue, is the inadequate language used in the Entry 5B in Notification No 13/2017 – CT (R).The said entry states that services supplied by any person by way of transfer of development rights for construction of a project by a promoter. The supplier of service is mentioned as 'any person'. The recipient of service is mentioned as 'promoter'.

If one sees the Entry 5B in isolation, it is possible to argue that the burden of taxation on TDRs is shifted to promoter (developer) even in cases where a commercial project is involved. This is primarily for the reason that there was no mention about whether Entry 5B applies only to residential project. Now, let us proceed to examine, whether Entry 5B applies only to residential or applies both to residential and commercial. In our view, the Entry 5B is applicable only for residential projects and not to commercial projects. The reason for the conclusion is explained as under.

Normally, the land owner is obliged to pay the tax on the TDRs supplied. However, on an isolated reading of Entry 5B of Notification No 13/2017– CT (R), it appears that for all supplies of TDRs, the developer is responsible for payment of tax under reverse charge. This is for the reason that the said entry nowhere uses the expression which would mean, that it covers only TDRs which are supplied for construction of residential apartments, making it possible for every TDRs supply to be taxable under reverse charge.

[1] 2018 (5) TMI 889 – CESTAT Hyderabad

However, on a close reading of the situations and circumstances which led to the birth of Entry 5B of Notification No 13/2017,– CT (R) a different view may emerge. It is important to note that the reverse charge on TDRs supplied for the purposes of construction of residential apartments is exempted in the hands of land owner by virtue of Entry 41A of Notification No 12/2017 – CT (R) subject to a condition that the developer is obliged to pay tax under reverse charge on such supply to the extent of his unsold apartments.

In order to provide legal support for such proposal of payment of tax under reverse charge by developer which is mentioned in Entry 41A of Notification No 12/2017 – CT (R), the Entry 5B is inserted to Notification No 13/2017 – CT(R). This is also for the reason that the Notification No 12/2017 – CT (R) has not been issued in exercise of powers under Section 9(3) of CT Act. Hence, there may be a challenge to the stipulation of payment of tax under reverse charge by developer if it is mentioned only in Notification No 12/2017 – CT (R). In order to overcome this, the Government has inserted entry in Notification No 13/2017 – CT (R), which is the notification exercised using powers under Section 9(3).

Hence, on a combined reading of Entry 41A of Notification No 12/2017 – CT (R) and Entry 5B of Notification No 13/2017 – CT (R), it should be interpreted that the reverse charge obligation is only on the developer who has received TDRs for construction of residential apartments only if he has unsold flats as on the date of issuance of completion certificate. Hence, it appears that the reading of Entry 5B of Notification No 13/2017 – CT(R) in isolation to mean that developer, who has received TDRs for construction of commercial apartments is not in accordance with the law.

Further, assuming that the said interpretation is in accordance with the law, then there should be an entry which should provide exemption for supply of TDRs in the hands of land owner in similar terms to Entry 41A of Notification No 12/2017 – CT (R). Since there is no specific entry exempting the supply of TDRs in the hands of land owner which are given for construction of commercial apartments, the interpretation that the developer is liable to pay tax under reverse charge in light of Entry 5B of Notification No 13/2017 – CT (R) is not in accordance with the law.

Further, assuming that the said interpretation is in accordance with the law, what would be the tax that is liable to be paid by the developer if he has unsold flats as on the date of completion certificate. For the residential projects, a detailed modus operandi is provided, where a maximum cap of tax liability is also stipulated. However, for commercial, nothing is prescribed. Does that mean, there is no requirement for stipulation, since, the developer is obliged to pay tax on the unsold flats at the rate that is applicable to the TDRs. It is also important to note that the TDRs are taxed at the rate of 18%, whereas the commercial apartment is taxed at the rate of 12% (after availing the 1/3rd deduction towards land). In such a situation, it cannot be left for an obvious or a fallout interpretation. The same has to be specified in clear text. In absence of such a text, it is highly illogical to shift the burden on the developer.

In commercial projects, it is obvious the land owner and developer wants to retain the apartments, so that they can generate rent, which is unlikely in the residential project. Hence, in every commercial project, there is high chance that the developer has unsold inventory. In all such cases, asking him to pay tax, especially, when credit is also not available, is antithesis to the business interest.

Despite of the above, what will be the position of the land owner if the developer insists that the levy of tax on TDRs is under reverse charge and not forward charge? Will the land owner be immune from the tax authorities, if they claim that the taxation on TDRs is under forward charge and not reverse charge? Will the payment by developer under reverse charge provide immunity to the land owner? Not an easy task on the land owner. He has to fight till the tribunals to get that sort of relief. Hence, it is important for the Council to provide more clarity on this transaction before it becomes another contentious issue.

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

INCOME TAX

SALE OF SPACE FOR ONLINE ADVERTISEMENT IS ROYALTY & TAXABILITY OF PAYMENTS FOR GOOGLE ADWORDS PROGRAMME

Contributed by CA Sri Harsha & CA Narendra

Introduction:

When it is seen from the commercial perspective, the word 'advertisement' plays a vital role in the success of any business or commercial activity. The main objective of any advertisement is to reach out to customer and increase awareness of brand/product/service.

The word 'internet/digital' has changed the lifestyle globally including the way of conducting a business or transaction. Advertisement is not an exception indigital model and in fact online advertisement has created lot of new business opportunities across the globe.

Before understanding income tax implications on digital advertisement, it is required to understand how such digital advertisement would be made.

Under digital / online advertisement, companies provide advertisement space/content to intended advertiser and such space be provided on website/servers owned by such companies. Against the service of providing online space for advertisement, customer who intends to place advertisement pays the fee for such services (ex: Google, Facebook, LinkedIn etc.)

In the above-mentioned transaction, when the payment is being made to foreign companies, especially when the servers are maintained outside India, how to tax such income was a big challenge to tax authorities across the globe.

Online advertisement is one among the transactions which are performed through digital mode. To tackle the issue of taxation of digital economy, OECD[1] has come out with Action Plan 1 of BEPS[2] project which deal with Tax Challenges Arising from Digitalization. Under the Action Plan 1 of BEPS, OECD has recommended to implement any of the following measures to tackle the issue of taxation of digital economy:

- Introduction of Equalization levy.
- Introduction of SEP[3]
- WHT[4] on e-commerce transaction

In this Article, the concept of online advertisement and its taxation under the ITA[5] has been discussed. To tackle the taxation of online advertisement, Government of India through the Finance Act,2016 has introduced concept of equalization levy. Besides the equalization levy, section 9(1)(vi)of the ITA deals with the taxation of income by way of royalty. After the introduction of equalization levy, there was a big debate across the industry whether the payment made for online advertisement space is taxable as royalty or equalization levy.

Amount Paid to Advertisement Space – Royalty?:

In the case of Yahoo India (P.) Ltd [6], assessee has made payment to the Hongkong based company for placing a banner advertisement which is known as web banner. In this case, assessee acquires online/digital space from the Hongkong based company to place the advertisement of a third party. Assessee has contended that the payment is in nature of business income and as Hongkong company does not have business connection in India, such payment is not liable to tax in India.

[1]Organisation for Economic Co-operation and Development
[2]Base Erosion and Profit Shifting
[3]Significant Economic Presence
[4]Withholding Tax
[5]Income Tax Act,1961
[6][2011] 11 taxmann.com 431 (Mumbai)

However, revenue has contended that the assessee has acquired the advertisement space for a specific period which is in nature of payment made for the use or right to use any industrial, commercial or scientific equipment and hence, payment made to Hongkong Company is taxable in India as royalty.

In this regard, the Mumbai Tribunal has held that uploading and display of the advertisement on its portal is the responsibility of the Hongkong company and assessee is required to provide to banner(content) to Hongkong company. Accordingly, the Tribunal has held that as there is no use/right to use of the said equipment by the assessee, such payment is taxable only as business income and not as royalty. Same view has been followed by Mumbai Tribunal in Pinstorm Technologies (P.) Ltd [7].

Similarly, when payment is being made to Facebook Ireland Inc for purchase of online advertisement space, relying on the judgement in the case of Yahoo India (P.) Ltd (supra), the Delhi Tribunal in the case of Lenskart Solution (P.) Ltd[8] has held that those payments are not taxable in India in the absence of permanent establishment.

In case of ESPN Digital Media (India) (P.) Ltd [9], Indian company has entered into agreement with the UK Company to purchase online advertisement space which was to be sold to advertisers in India. In this regard, the AO[10] has considered that Indian company is making the payment for use of right to use Industrial, commercial or scientific equipment hence, such payment is taxable. In this regard, the Chennai Tribunal has held that there is no such use or right to use of any industrial, commercial or scientific equipment. Further, Tribunal has held that the legislature's intention to insert equalization levy is to tax payment made for online advertisement. If such payment is taxed royalty, it may vitiate the intention behind the insertion of equalization levy. Hence, the tribunal concluded that the payment made by the Indian company for purchase of online advertisement is not taxable as royalty.

Google AdWords Programme:

The issue has come up for a discussion in the context of Google AdWords Programme. Google has implemented different approach while providing the online advertisement program. In this case, Google India Limited ('Google India') has entered into agreement with Google Ireland Limited ('Google Ireland') to provide IT and ITeS service. In addition to the provision of above service, Google India has entered into distribution agreement with the Google Ireland in respect of Adwords Programs. Unlike to the facts of the Yahoo India (P.) Ltd (supra), Google India acted as distributor of AdWords Program.

Considering the above facts, Bangalore Tribunal in the case of Google India (P.) Ltd[11] has found that, based on the access to personal information, IP address, history of user and contents of more than 2 million websites, assessee [Google India] was in a position to provide effective campaign to the advertiser. Tribunal has further found that assessee [Google India] has not just provided distribution services but also provided various services termed as ITeS services to enable the Google Ireland to provide more effective and focused advertisement services.

Further, Tribunal has found that in the case of Yahoo India (P.) Ltd (supra), assessee is either an advertiser or acts on behalf of some other advertiser and has purchased space from the owner of search engine to display it advertisement. Hence, in those cases it was held that payment made to foreign entities are taxable only under business head.

[7] [2012] 24 taxmann.com 345 (Mumbai)
[8] [2022] 140 taxmann.com 242 (Delhi - Trib.)
[9] [2022] 140 taxmann.com 442 (Chennai - Trib.)
[10] Assessing Officer
[11] [2022] 143 taxmann.com 302 (Bangalore - Trib.)

However, in the present case, Google India has not merely purchased the advertisement space but provided distribution services for AdWords program. Under such distribution agreement, assessee must provide pre-sale and after sale services with the help of ITeS division. Further, Bangalore Tribunal has held that equalization levy is applicable only on services but not for use of IPR, copy right or intangibles. Accordingly, Bangalore Tribunal has held that payment made by the Google India to Google Ireland is liable to tax in India as royalty.

Aggrieved by the above judgement, Google India has approached the High Court of Karnataka. Considering the appeal filed by Google India, the Karnataka High Court has held that some material gathered behind back of the assessee has been used by the Tribunal and those material neither supplied to the assessee nor found place in the Tribunal's order. Accordingly, the Karnataka High Court has remanded the matter to the Tribunal to decide the appeal fresh.

Meanwhile, the long-litigated matter in respect of payment made towards usage of a copyrighted article as royalty has been completed at apex court level. The Hon'ble Supreme Court (SC) in the case of Engineering Analysis Centre of Excellence (P.) Ltd[12] has held that payment made by the end users or distributers to non-residents for under distribution agreement in respect of resale of computer software program is not a payment for royalty.

In Remand Proceedings:

In the second round of proceedings, the Tribunal has made the following observations:

- In respect of invoking provision of section 9(1)(vi), Tribunal has relied upon the SC judgment in case of Engineering Analysis Centre of Excellence (P.) Ltd (supra) and held that as the provisions are treaty are more beneficial to the assessee, definition under Article 12(3) of India – Ireland treaty must be considered in determining whether such payment is royalty or not.

- Provision of ITeS by Google India are not interlinked with distribution agreement for AdWords program. Even otherwise, those tools, intangibles or software of Google Ireland has not been transferred to Google India.

- Royalty under Article 12(3) of India – Ireland DTAA is defined to mean payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft or for information concerning industrial, commercial or scientific experience.

- In order to treat the payment made by the Google India as royalty, there has to be a use or right to use of any copy right. As far as AdWords program is concerned, it is essential a computer software and issue relating to the computer software has been resolved by the SC in the case of Engineering Analysis Centre of Excellence (P.) Ltd (supra).

- Considering the various facts of the case, Tribunal has held that none of the rights in copy rights have been transferred by the Google Ireland to Google India.

- With regard, applicability of use of or right to use trademarks, other brand features and the process owned by Google Ireland for the

[12][2021] 125 taxmann.com 42 (SC)

purpose of distribution of AdWords program, Tribunal has held that Google Ireland grants non-exclusive and non-sublicensable license during the term to display Google brand features solely for the purpose of distributor's marketing and distribution of AdWords program under the terms and subject to the conditions. Hence, such payment cannot be considered as royalty.

- Further, with regard to classifying the payment as consideration for use of or right to use industrial, commercial or scientific equipment, Tribunal has upheld the findings of the CIT(A) who held that Google Ireland has not parted with the copyright it holds in the AdWords program and hence it cannot be said that any kind of technical knowhow has been transferred to Google India.

- Further, the Tribunal has opined that while interpreting the definition of royalty under Article 12(3) of India-Ireland treaty, it is relevant to take note of international jurisprudence. In this regard, the Tribunal has relied upon report of the TAG[13] of OECD where in the TAG has recommended that payment made for online advertisement shall be taxable as business income under Article 7 of the treaty.

- Further, the High-Powered Committee on electronic commerce and taxation which has been setup by the CBDT, has accepted the recommendations of the TAG and recommended to tax such payment as business income under Article 7 of the treaty.

- Further, Tribunal has also referred to the introduction of the equalization levy by the Finance Act,2016 to tax the payment made for online advertisement.

- Finally, considering the jurisprudence by various Tribunals and Courts, the Bangalore Tribunal has held that payment made by the Google India to Google Ireland for Adwords Program is not taxable as royalty.

Author's Comments:

While determining the taxability of payment made by the Indian company, Tribunal has analysed various categories of payments under Article 12(3) which may be beneficial other matters as well.

Once again Tribunal has reiterated that definition of 'royalty' under Article 12(3) has to be considered if such definition is more beneficial to the assessee. This view has also been upheld by the Chennai Tribunal in the case of ESPN Digital Media (India) (P.) Ltd. (supra) wherein the Tribunal has held that unilateral retrospective amendments made to section 9(1)(vi) cannot override the more beneficial definition of royalty under Article 12/Article 13.

Though, the payment under AdWords program by Google India is different from payment made by the other advertisers viz. payment made to Yahoo, Google Ireland etc. by other Indian entities, Tribunal has held that payment made by the Google India to Google Ireland is also not taxable. Further, Tribunal has held that these payments are taxable under equalization levy which may be considered as more clarification from the judicial fora.

[13] Technical Advisory Group

This article is contributed by CA Sri Harsha & CA Narendra, Chartered Accountants. The author can be reached at harsha@sbsandco.com

COMPANIES ACT

AMENDAMENTS TO CSR PROVISIONS

Contributed by CS D V K Phanindra

All are aware that the concept of Corporate Social Responsibility (CSR) was introduced by the Companies Act, 2013 (Act) with effect from 01.04.2014, not a mandatory provision, but over the years, the provisions have been made mandatory and the implementation taken seriously.

The amendment to the CSR Rules made vide Notification[1] dated 22.01.2021, shows the intensity and the transparency with which the ministry wants the corporates to implement the provisions in letter and spirit. Please refer our CSR articles published in our earlier editions.

Vide Notification[2] dated 20.09.2022, the ministry has made further amendments to the CSR Rules, and an effort is made in this article to briefly outline the amendments made out to the CSR provisions, inter-alia vide the previous notifications and the present referred notification. The same is outlined into 2 categories, (i) amendment to reporting requirement; and (ii) amendment to provisions under the Section.

Amendment to Reporting Requirements:

1. Filing of **CSR-2**, (being the report on Corporate Social Responsibility) by every company was also mandated vide sub-rule (1B) of Rule 12 of Companies (Accounts) Rules, 2014, and accordingly, time was provided for the Company to file **Form CSR-2**, for the FY 2020 -2021, till **31.05.2022** and later extended till **30.06.2022**, vide Notification[3] dated 31.05.2022

2. Notification dated 31.05.2022, further provides that for the financial year 2021-22, Form CSR-2 shall be filed separately on or before 31stMarch, 2023 after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be.

3. Amendment is made to the exemption registration requirement with (IT Department) of the entities through which the CSR activities can be undertaken by the Company:

   - a company established under section 8 of the Act, or a registered public trust or a registered society, **exempted under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10** or registered under section 12A and approved under 80 G of the Income Tax Act, 1961, established by the company, either singly or along with any other company; or

   - a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government; or

   - any entity established under an Act of Parliament or a State legislature; or

[1]Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, Dt: 22.01.2021
[2]Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022; Dt: 20.09.2022
[3]Companies (Accounts) Third Amendment Rules, 2022, Dt: 31.05.2022

- a company established under section 8 of the Act, or a registered public trust or a registered society, **exempted under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10** or registered under section 12A and approved under 80 G of the Income Tax Act, 1961, and having an established track record of at least 3 years in undertaking similar activities.

From the above, an entity exempted under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10 and having 80 G, is also eligible for CSR registration.

4. In line with the above amendment to the type of entities, was made to form CSR-1, being the form required to be filed by an entity for undertaking the CSR activities and obtaining the CSR Registration Number. Only on obtaining a CSR Registration, any entity is eligible to receive the CSR funds from corporates.

Amendment to CSR Provisions:

The requirement of constitution of CSR Committee and compliance of the provisions of Section 135 (2) to (6), now extends to such Companies which have unspent CSR amounts, **and the express provision contained in the sub-rule (2) of rule (3) that the provisions of CSR will not be applicable to the Company, which cease to comply with the CSR applicability provisions for Three consecutive years, is deleted.**

Every Company which is required to undertake impact assessment (i.e., every company having average CSR obligation of Rs.10 Crore or more in the three immediately preceding financial year) may book the expenditure towards CSR for that financial year, which shall not exceed **2 % of the total CSR expenditure for that financial year or Rs.50 lakhs whichever is higher.** (Earlier it was 5 % of the total CSR expenditure or Rs.50 lakhs whichever is less).

The Annual Report on the CSR activities to be annexed to the Board Report, was also amended, to be effective from the date of the notification i.e., **20.09.2022.** So, any Company with CSR obligations, preparing the Board report on or after **20.09.2022,** is bound to annex the CSR Annual report on CSR activities in the new format.

From the above it is clearly evident that the ministry has taken all steps for serious implementation of the CSR provisions in letter and spirit. The introduction of the CSR-2, is a step towards this objective. The contents of the CSR-2, which is required to be filed annually, contains the extracts of the Annual Report on CSR activities, which hither to was only attached as an annexure to the Board report and as an PDF attachment to the annual return form. Now with the CSR-2, all the information relating to the CSR expenditure are to be keyed-in, with the details of the beneficiaries, and their CSR registration number

Additionally, it is also noticed that basis the CSR-2 filed for the financial year 2020 – 21, Companies have received notices from the Registrar of Companies, on the non implementation, non-spending of the CSR amounts.

There is no second though that the object of CSR is far reaching, only implemented in true letter and spirit, and Ministry has initiated all possible ways for monitoring the CSR spending not only from the end of the Corporates, but also from the recipients side, and only eligible entities receive the CSR funds.

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SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. Delhi High Court in Seema Gupta vs. Union of India & Ors [1]- Renting of Residential Dwelling under reverse charge is challenged especially when the renting is not taken in business account:

An interesting issue has come up before the Honorable Delhi High Court in the above matter. Seema Gupta, the writ petitioner has challenged the constitutional validity of insertion of an entry in reverse charge notification Entry 5AA in Notification No 13/2017 – CT (R) [inserted by way of Notification No 5/2022- CT (R)].

The said entry was introduced with an intention to bring the renting of a residential dwelling to a registered taxable person under the ambit of reverse charge mechanism, wherein the registered person is obliged to pay tax. Prior to this insertion, the renting of residential dwelling was exempted from payment of tax [Entry 12 of Notification No 12/2017 – CT (R)].

The petitioner was registered as a proprietor under GST laws for the purpose of carrying the business. The petitioner argued that since she was registered for the purposes of carrying the business, the Entry 5AA in Notification No 13/2017 – CT (R) is making her to pay tax under reverse charge, though the rent is met from her personal account and not taken in her business account. The petitioner stated that the denial of exemption on sole reason that they have registered under the GST laws lacks the intelligible differentia and accordingly to be set aside as it violated Article 14 of Constitution of India.

The Respondent has filed an affidavit clarifying that renting of residential dwelling to a proprietor or registered proprietorship who rents it in his personal capacity for use as his own residence and not for use in the course or furtherance of business of his proprietorship firm and such renting is in his own account, then the same shall continue to be exempted from tax. The Respondent has also stated that an appropriate proposal is put forward before the GST council to get more clarity in the said entry that the reverse charge obligation kicks in only if the residential dwelling is used for the purposes of business.

Our Comments:

This is a welcome move and certainly evident that the Government has not thought about this situation before introduction. An appropriate amendment in the reverse charge notification would put an end to the prospective litigation.

[1] 2022 (9) TMI 1387 – Delhi High Court

2. Karnataka High Court in Shree Renuka Sugars Limited[2] - Once an assessee has chosen the writ jurisdiction despite, he given an opportunity to pursue the alternative remedy, he cannot seek the benefit available in the alternative remedy:

This is another interesting issue. A show cause notice was issued demanding tax on supply of Extra Neutral Alcohol (ENA). The said notice was challenged in writ petition before the Single Judge of High Court. The Learned Single Judge has granted an interim stay order subject to a condition that the petitioner furnishes a bank guarantee for 25% of the amount demanded.

The said order asking the petitioner to pay 25% of the demand amount was challenged before the larger bench of the High Court. The petitioner pleaded that he cannot be made worse off by filing the writ petition. The petitioner pleaded that if he had appeared before the notice issuing authority and obtained an order and challenged the same under Section 107 of CT Act, then in terms of Section 107(7), he would have got a stay, if 10% of demanded amount is paid. However, by approaching the writ jurisdiction, he was asked to pay 25% of the demand as deposit. The petitioner pleaded this cannot be the case.

The larger bench stated that when the petitioner has himself approached the single member bench in writ proceedings, despite of the fact that he has right to go before the notice issuing authority and thereby appeal, cannot seek the rescue under Section 107(7) and accordingly upheld the order of single member bench.

Our Comments:

It is unfortunate that the petitioner has asked to pay 25% of the demanded amount. The taxability of ENA was not given any clarity though this was a discussion point in many GST council meetings. Further, the notice issuing authorities do not take into consideration the credit that was foregone which was used for making the supply of ENA. It is possible that taxpayers do not take credit since they have taken a stand that GST was not payable on supply of ENA. However, the notice issuing authorities do not take the said credit while determining the demand. Hence, the demand will be more. Further, asking them to deposit of 25% on such high amounts of demand is kind of unwarranted. Normally, writ petitions are filed to obtain stay order without any deposit. However, it is necessary to be prepared for these kinds of eventualities. In one of our client's case, the High Court has asked to pay 25% of demanded amount. The tax authorities started to pursue the client to pay him 25% of tax, interest and penalty. We have filed another application for intervention of High Court to restrict 25% on the tax amount only and got the same in the favor of Client.

3. Calcutta High Court in RP Buildcon Private Limited & Anr[3] - Simultaneous audit for the same period by three different authorities should not be pursued

In this matter, the petitioner has approached to a larger bench of Honorable High Court against the order of single member bench. The issue involved is that the petitioner has been subjected to scrutiny/audit/investigation by three authorities for the same financial years. The anti-evasion, the

[2]2022 (9) TMI 986 – Karnataka High Court
[3]2022 (10) TMI 501 – Calcutta High Court

superintendent of audit commissionerate and range superintendent have tried to proceed for the same financial years. The petitioner pleaded that they have already been responding to the audit commissionerate and meanwhile, the other two authorities have initiated the proceedings and asked to quash the other two proceedings. The respondent stated that the other two authorities have started the proceedings because that they were not aware that audit commissionerate is already pursuing the case. The Court allowed the plea of the petitioner and passed restraint orders on the other authorities for the same period.

Our Comments:

This is also another disappointing issue under the GST laws. Concurrent audits for the same period, each claiming that they have right to carry the audit/investigation/proceedings is seriously harmful in the interests of business. There are already judgements in place where it was stated that though the taxpayer falls under the state jurisdiction, the center jurisdiction can investigate and vice-versa. Though those judgments are in place, this judgment proves that there is still an opportunity for taxpayer if the proceedings were tried to be conducted for the same period simultaneously.

SUMMARY OF JUDGEMENT

SUMMARY OF DIRECT TAX DECISIONS

Contributed by Team SBS

1. **Jaipur Tribunal in the case of Prakash Chandra Mishra[1] - No Equalization levy is deductible when the person running the advertisement (ad), the target audience and the person displaying the ad are all located outside India:**

The Jaipur Tribunal has held that the assessee is not liable to deduct equalization levy ('EL') on the advertisement charges paid to a non-resident on behalf of his clients who are non-residents having no Permanent Establishment, where the target audience are also located outside India. In this regard, considerations have been given to the provisions of section 165A of Finance Act,2016 and section 9 of the ITA[2] where the intent of the statute has been clearly depicted that only those transactions that are having a territorial nexus with India can be covered under the purview of EL.

Mere recording of the entire gross receipts as income in his books of accounts by the assessee does not conceal the fact that assessee is acting merely as a conduit for channelizing the funds between the person wanting to advertise (non-resident clients) and the platform on which such advertisement is to be done i.e., Google PacificPte. Ltd, Singapore ('Google Singapore'). Even though the contract between the Google Singapore and the assessee clearly indicates that the assessee is only its customer and cannot be an agent, it cannot change the fact that the digital advertising service has been ultimately consumed by non-resident having no territorial nexus with India.

The Jaipur Tribunalhas relied on SC judgment in the case of Ishikawajma-Harima Heavy Industries Limited[3] where it has been observed that the territorial doctrine plays an important role in assessment of tax. It was observed that only such part of income as is attributable to the operations carried out in India can be taxed in India. Hence the aforesaid transaction lacksthe two prominent pre-requisites for imposition of any tax in India that were understood from the intent of the statute viz.**(i) services to be rendered in India or(ii) utilized in India.** Since the two conditions are not satisfied in the current case, the said amounts that are paid to Google Singapore by the assessee does not come under the purview of EL and hence non-deduction of the EL does not invoke the provisions of section 40(a)(i) of the ITA. Therefore, it was held that the disallowance of the said expense in the books of the assessee is not acceptable in the eyes of the law.

Our Comments:

The Jaipur Tribunal has provided a clarification on applicability of EL when the ultimate advertiser and targeted customer are located outside India. While coming to such conclusion, Tribunal has verified substance of the transaction and found that the assessee is just a conduit between the Google Singapore and ultimate advertiser. Further, Tribunal has relied on section 165A of the Finance Act,2016 to interpret the intention of the legislature to insert provisions of EL.

[1]143 taxmann.com 121 (Jaipur - Trib.)
[2]Income Tax Act,1961
[3][2007] 3SCC 481 (SC)

2. Mumbai Tribunal in the case of Michael Page International Recruitment Pvt. Ltd[4] - DRP[5] can pass rectified orders under Rule 13 within 6 months from the end of the month in which the order was passed:

In this case, the DRP has issued directions based on which AO has passed the assessment order. However, the directions so contained in the DRP's order incorporated directions relating to another group concern with a somewhat similar name that of the assessee. Upon realization of mistake, DRP has rectified the mistake and passed rectified order. In this regard, the assessee has filed an appeal before the Tribunal and contended that the assessment order is vitiated in law as AO has not applied the mind while passing the assessment order as the order is passed based on directions relating to another assessee. Further, as rectified order is issued after the expiry of time limit for issuing the directions, such directions and consequent assessment order is bad in law.

The tribunal stated that, where the time limit is not set out in the statute, it is indeed open to the court or Tribunal to consider as to what will constitute a reasonable time limit for passing such an order. The Tribunal had referred to a similar precedent [6] where it was held that one must examine the scheme of the act to determine the time limit for a particular action when the same was not provided in the statute itself. By taking stand to that, that Tribunal in Mahindra & Mahindra (Supra)has prescribed the time limit to pass order under section 201(1) or 201(1A) which thereafter has brought into effect by the government itself by amending the section 201, by Finance (No. 2) Act, 2009.

Also by referring to the provisions of section 254(2) of the Act, where it provides that a period of six months shall be provided to Appellate Tribunal to rectify any mistake apparent from any order passed by it, Tribunal has concluded that when a higher forum like Appellate Tribunal can be permitted to rectify its mistakes in six months, it would not be appropriate to leave the DRP with no time to rectify any mistakes in the orders passed by it.

Hence, Tribunal held that six months' time limit can be considered as reasonable time to DRP to pass orders under Rule 13 and since the DRP, in the present case, had passed rectified orders within one month which is within the reasonable time, the Assessing Officer (AO) has to give effect to such orders accordingly. Given that, since the AO has not given effect to the rectified order passed by DRP, the matter is remitted to AO for carrying out necessary rectifications of the impugned order as specified by DRP.

Our Comments:

Unlike normal assessments, Transfer Pricing has a special consideration when it comes to assessment and appeal procedures. However, some of the aspects have not been specially covered for these assessments. Through the Finance Act, 2022, provisions of Section 263 have been amended to provide the income tax authorities to revise the transfer pricing orders. Similar amendments to section 154 may also to be provided to rectify the orders of the DRP within a specified time.

[4][TS-808-ITAT-2022(Mum)]

[5]Dispute Resolution Panel

[6]Mahindra & Mahindra Ltd[(2009) 122 TTJ SB 577 (Mum)]

3. Supreme Court in the case of Checkmate Services P. Ltd[7] - Disallowance of employees' contribution of ESI & PF in case of delay in depositing such contributions before the due date specified under respective acts:

Disallowance of employee's contributions to welfare scheme was a like a never-ending story as different High Courts have interpreted section 36(1)(va) differently. In order to provide clarification to disallowance, section 36(1)(va) has been amended through the Finance Act, 2022. Even after such amendment, judicial fora have held that such clarification is not applicable retrospectively. Recently, Supreme court has provided much clarification with regard to the disallowance of employees' contribution to welfare fund. The Supreme Court ('SC')had interpreted the non-obstante clause of section 43B and 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).

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.

Our Comments:

Interpretation provided by the Hon'ble SC is big relief to the revenue. This is because, even though section 36(1)(va) contains an explanation from the begging regard the due date for depositing the employees' contribution to welfare funds, some High Courts have provided relief to the assessee by taking recourse to section 43B (though this section does not provide such relief). If the above judgment has been received much before the, there would not been amendment by the Finance Act, 2022.

4. Supreme Court in the case of Ahmedabad Urban Development Authority[8] -Much clarity is provided on the definition of 'charitable activities' under section 2(15) of the ITA with regard to advancement of any other object of general public utility:

SC has held that Parliament intended, through the amendments was to proscribe, involvement or engagement of advancement of any other object of general public utility, from any form of activities that were trade, business or commerce, or engage or involve in providing services in relation to trade, business or commerce- for a fee, cess or other consideration. The inclusion of the term 'in the nature of' in section 2(15) was by design, to clarify beyond doubt, that not only business, trade or commerce, but all activities in the nature of, or resembling them, were proscribed. Likewise, service in relation to such activities, i.e., services relating, or pertaining to, such proscribed activities, too were forbidden.

[7][TS-791-SC-2022]

[8][2022] 143 taxmann.com 278 (SC)

SC has provided detailed explanations to each type of charitable trusts/bodies viz. Authorities/Corporations established by the Statute, Statutory regulatory bodies/authorities, Trade Promotion bodies/councils/ associations/organisations, non-statutory bodies, Sports associations, and private trusts. SC has held that the charging of any amount towards consideration for such an activity (advancing general public utility), which is on cost-basis or nominally above cost, cannot be considered to be "trade, commerce, or business" or any services in relation thereto. It is only when the charges are markedly or significantly above the cost incurred by the assessee in question, that they would fall within the mischief of "cess, or fee, or any other consideration" towards "trade, commerce or business". In this regard, the Court has clarified through illustrations what kind of services or goods provided on cost or nominal basis would normally be excluded from the mischief of trade, commerce, or business, in the body of the judgment.

Our Comments:

or comments on this judgment, please see the 'Our comments' section under the below judgment.

5. **Supreme Court in the case of New Noble Educational Society[9] - A much clarity is provided on exemption to Charitable Institutions engaged 'solely' in providing education services:**

It was held that where the language in the law is unambiguous and capable of one meaning, then the interpretation need not be expansive, rather can be understood by its plain terms. Hence held that the requirement of charitable institution to engage 'solely' for educational purposes and 'not for the purpose of profit' means the institution must engage 'exclusively/only' for educational purposes. Merely applying the 'predominant test' in defining the meaning of the word 'solely' does not hold justifiable and SC has overruled the judgements[10] that are passed basing on the predominant test.

There is no bar on generation of any profits in the course of providing education or educational activities. The only bar is on the objective with which the activities are being carried out. If the objective appears to be profit-oriented, then the exemption under section 10(23)C would not be eligible to such institutions. The profits referred to in section 11A also mean only those profits that may be incidentally generated by imparting education or its related activities.

It was also held that registration of trust or charities under its respective state acts would enable the concerned authority to ascertain the genuineness of the trust, charities etc., and held the same obligatory. Further, the court has set aside the arguments contending that the examination of books of accounts would only be at the stage of assessment and held that commissioner is free to call for any books or such documents to satisfy himself with regarding to the genuineness in achieving the objects of the trust, charities etc.

Our Comments:

The back-to-back judgments by the SC with regard to charitable activities creates a big news to trusts/societies. In the former judgment, SC has interpreted the term advancement of any other

[9] [2022] 143 taxmann.com 276 (SC)

[10] American Hotel and Lodging Association, (2008) 10 SCC 509 and Queen's Education Society (2015) 8 SCC 47.

object of general public utility with regard to trade, commerce or business while in the later judgment, SC has provided strict rule of interpretation to the term 'solely' and held that the curve out provided by way of incidental business shall be interested in the context of providing educational services. The above judgements need to be analyzed carefully by trusts which are claiming exemption under section 11 and every educational society while conducting any other activities which may affect claiming of exemption under section 10(23C).

6. Mumbai Tribunal in the case of Wockhardt Limited[11] - Between the conflicting decisions of non-jurisdictional HCs, Tribunalmust apply the non-jurisdictional HC decision of larger Bench

When there are conflicting decisions of non-jurisdictional High Courts on an issue, but no decision of a jurisdictional High Court, the decision of the court having a larger bench shall be given priority over the decision of the court with a smaller bench without giving effect to the rule that the decision favorable to the assessee shall be considered.

It was construed that when the legal contentions are passed by several judges, the decision that is rendered, even if not unanimous, has the advantage of input from a larger number of legally trained minds. Hence, the decisions of the benches with a larger number of Judges will be placed on a higher pedestal than the decisions of the benches with a lesser number of Judges.

Our Comments:

Mumbai Tribunal has taken different and interesting interpretation when applying the non-jurisdictional High Court Judgments. Though the judgment given by the Mumbai Tribunal looks different, it has arrived at a logical conclusion by holding that larger bench decision shall prevail over single bench decision when it comes to applying the non-jurisdictional High Court Judgement.

[11]ITA No.2633/Mum/2015 (Mum ITAT)

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