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Dear Readers,

In this edition, we have come up with an article on analysis of doctrine of promissory estoppel vis-à-vis indirect tax enactments. We have taken the recent Supreme Court judgments, including the one, where the bench is divided in its opinion as to whether the doctrine of legitimate expectations should be given to the assessee, who has invested huge amounts on the promises made by the Government, especially, when there is no superior public interest shown.

The next one is on the interplay between the DTAA and Income Tax Act. We have touched upon various instances, where the DTAA and ITA clash and how do they operate in such scenarios. In the upcoming editions, we shall touch upon other facets of the same subject.

We have also collated certain important judgments under direct tax and indirect tax laws, provided our comments wherever necessary. There are so many other important judgments which were delivered in May 2023 and we shall come up with our summaries in the next editions.

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

DOCTRINE OF PROMISSORY ESTOPPEL VIS-A-VIS IDT

Contributed by CA Sri Harsha

The introduction of GST laws in the country has led to revisiting of various promises which were made by both the Central and State Governments for uplifting a particular place in a state or a state. Under the previous regime, there were many incentives given by Government to assesses who took the bold step to set-up manufacturing unit in remote areas, so that there would be economic development in such areas. However, post introduction of GST laws, such exemptions or incentives were revisited to see that there is no breakage in the credit chain and for other various reasons. The withdrawal of such exemptions or incentives mid-way always gives raise to issues.

On one hand, the manufacturer after making a substantial investment in such notified areas with a hope to enjoy the exemptions/incentives was left mid-way by unilateral amendment by the concerned Government, which withdraws the promised exemptions/incentives.On the other hand, the Government quoting that there cannot be any promissory estoppel against a statute finds that its act of withdrawing exemption/incentive are in accordance with the law.

The Courts are left to resolve this quandary .In this article, we have taken few judgments, where the Courts tried to resolve the issue and tried to lay down a bunch of principles to determine, when the doctrine of promissory estoppel and doctrine of legitimate expectation were upheld against the Government. Before adverting to understand the rationale delivered by various judgments, it is necessary to understand as to what is the doctrine of promissory estoppel and doctrine of legitimate expectation.

Doctrine of Promissory Estoppel:

The nature of promissory estoppel is well-established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is in the interposition of equity which has always, true to its form, stepped in to mitigate the rigour of strict law.

(Chief Justice PN Bhagwati in Godfrey Philips India Limited (1985) 4 SCC 369)

The doctrine of promissory estoppel means when an individual with an intention of forming a relationship which is lawful makes a clear promise to another individual and the latter individual acts on it, that promise becomes an obligation for the individual who made the promise. Hence, then going back from its words is not permissible.

The above doctrine is used by the assessees to argue that based on the promises made by the Government, they have acted to their detriment and post that, the Government cannot go back on the promises. A small example can give us a right perspective with what we are dealing.

Let us say, a company has invested a substantial amount in setting up of a manufacturing unit based on the promise received from the Government that there would be exemption from payment of tax for a period of 10 years from the date of commercial production. However, after, say, 3 years, the Government has withdrawn the exemption. The question that would come up is, whether the company can approach a Court seeking its intervention from estopping the Government from doing away with the exemption notification? Whether there can be any equity pleaded by the company before the Court, so that the Court can direct the Government to stop withdrawing of exemption? We shall answer the above based on analysis of certain judgments.

Doctrine of Legitimate Expectation:

A person may have a legitimate expectation of being treated in a certain way but an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The existence of a legitimate expectation may have a number of different consequences; it may give locus standi to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so; or it may mean that, if the authority proposes to defeat a person's legitimate expectation, it must afford him an opportunity to make representations on the matter. The Courts also distinguish, for example in licensing cases, between original applications, applications to renew and revocations; a party who has been granted a licence may have a legitimate expectation that it will be renewed unless there is some good reason not to do so and may therefore be entitled to greater procedural protection than a mere applicant for a grant.

(Halsbury's Laws of England, Fourth Edition)

The doctrine of legitimate expectation is broader than doctrine of promissory estoppel. The doctrine of legitimate expectation is a public law remedy, whereas the doctrine of promissory estoppel is confined to private parties. More about this at the end of this article.

With the above in mind, now let us proceed to examine certain judgments wherein the above concepts are illustrated.

Supreme Court in Unicorn Industries [1]:

In this case, the Supreme Court was dealing with the validity of withdrawal of exemption notification to tobacco and tobacco products based on the doctrine of promissory estoppel.

The facts were that the Unicorn Industries were enjoying the benefit of notification which provided exemption from payment of excise duty for a period of 10 years having satisfied all the conditions of the said notification. However, the State of Sikkim has amended the exemption notification, whereby the exemption available erstwhile to Unicorn Industries was removed. The said action was challenged before

[1] 2019 (368) ELT 202 (SC)

the Sikkim High Court, wherein the High Court has held that Unicorn Industries was entitled to exemption from payment of excise duty for a period of 10 years from the date of its commercial production. The Union of India aggrieved by this [2] has approached the Supreme Court.

The Revenue contended that the withdrawal of exemption is in the public interest and the said action cannot be found fault. The exemption initially (given in 2003) was extended based on public interest and after understanding the ill-effects of the tobacco and tobacco products, the exemption was withdrawn (from 2007). The Revenue relied on many cases, wherein it was held that there cannot be application of doctrine of promissory estoppel against the Government.

Unicorn Industries argued that that it is only on account of the representation given by Union of Indian and State of Sikkim that there would be 100% exemption from payment of excise duty for a period of 10 years, they have established plants or units in such remote areas. Having invested huge amounts based on the promises made by Union and State, it is not permitted in law to resile from the assurance given by them. Accordingly, they pleaded the action of Sikkim High Court holding that they are entitled for exemption does not need any interference. The respondents have placed reliance on the judgment in Motilal Padampat Sugar Mills Co. Limited[3] , Godfrey Philips India Limited [4] and Pawan Alloys & Casting Private Limited vs. UP State Electricity Board & Ors[5] .

The Supreme Court after hearing both the parties has stated that the issue is no more res integra. The Court stated that the settled legal position is that there cannot be any doctrine of promissory estoppel against the Government, when the larger public interest demands so. Since in the instant case, there is a looming larger public interest, the Court reversed the judgment of Sikkim High Court and upheld the withdrawal of exemption. For reaching the said conclusion, the Court referred and relied upon the following judgments.

In Kasinka Trading[6] :

The Supreme Court referred to the decision of Kasinka Trading, wherein the Court was asked to validate the withdrawal of exemption notification under the Customs Act, 1962 before its actual period. The exemption notification in that case was to be valid till 31st March 1981. However, the same was withdrawn with effective from 16th October 1980. The Court held that doctrine of promissory estoppel is applicable against the Government only where it is shown such an action is based on fraud or manifest injustice.

The Court held that there is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, there should be clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine of promissory estoppel and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press aid to the doctrine.

[2] Along with this decision of Sikkim High Court, there is another decision of Guwahati High Court, wherein similar relief is given by the said High Court. Against both the above judgments, the Union has approached SC. For ease of understanding, we are referring only to Unicorn Industries.

[3] (1979) 2 SCC 409

[4] (1985) 4 SCC 369

[5] (1997) 7 SCC 251

[6] 1994 (74) ELT 782 (SC)

The Court finally stated that the doctrine of promissory estoppel cannot be invoked in the abstract and the Courts are bound to consider all the aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must forever be present to the mind of the Court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

The Court finally held that the withdrawal of exemption notification prior to its actual date cannot be faulted with. The Court stated that where the Government acts in public interest and neither any fraud or lack of bona fides is alleged, it would not be appropriate for any Court to find fault with the action of the Government.

<u>In Shree Durga Oils Mills :</u>

In this case, the Supreme Court was dealing with withdrawal of exemption notifications issued under the Orissa Sales Tax Act, 1947. The exemptions were withdrawn and the aggrieved assesses found fault with the withdrawal and approached the Courts to strike down such withdrawal based on the doctrine of promissory estoppel.

The Supreme Court stated that the withdrawal of notifications was done in public interest as the State of Orissa has urged that the exemptions provided by them caused a financial crunch in the State. After a reconsideration of the financial position, the State have decided to withdraw such exemption notifications. Since the said actions were done in the public interest, the Supreme Court could not find fault with the action and stated that the doctrine of promissory estoppel cannot be applied here in light of overarching public interest.

<u>In Shrijee Sales Corporation :</u>

The Supreme Court was seized with a similar situation as in the case of Kasinka Trading (supra). Dealing with the validity of withdrawal of exemption notification before the prescribed end date prescribed, the Court held thatonce public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where the notification provides for a date till which such exemption continues but withdrawn before such date. The Court held that the Government is competent to resile from a promise even if there is no manifest public interest involved, provided, of course, no one is put in any adverse situation which cannot be rectified.

<u>In Kanak Exports :</u>

The Supreme Court while considering for withdrawal of incentives to the exporters of the specified items held that, the incentive scheme in question was in the nature of concession or incentive which was a privilege of the Central Government. It was for the Government to take a decision to grant such a privilege or not. Grant of exemption, concession or incentive and modification thereof are the matters of domain of public decision of Government, and it was further reiterated that when the withdrawal of such

incentives was shown to have been done in public interest, the Courts would not tinker with the policy decisions.

Supreme Court in Hero Moto Corp Limited :

The challenge raised an important question before the Supreme Court as to whether the Union of India can be directed to adhere to representation made by it vide its Office Memorandum (OM) dated 7th January 2003 even after the enactment of GST laws. Vide the above OM, the Union of India has promised that the industries which undertake substantial expansion in notified areas, would be exempted from payment of excise duty for a period of 10 years from the date of commercial production. In pursuance of such OM, a notification was issued under Section 5A of Central Excise Act, 1944 wherein the exemption for payment of excise duty a period not exceeding 10 years from the date of publication of said notification or from date of commencement of commercial production, whichever is later.

On introduction of GST laws in India with effective from 01st July 2017, the said notification issued under Central Excise Act, 1944 was withdrawn by issuing a Notification No 21/17 – CE dated 18th July 2017 and as a result the exemption that was provided vide OM ceased to operate with effective from 01st July 2017.

The petitioner (Hero Motor Corp Limited) based on the promises made by Government under OM has invested a substantial amount for expansion and started commercial production from 7th April 2008. The exemption available under OM was availed till 30th June 2017 and consequent to its withdrawal, the petitioner could not avail the exemption. However, a budgetary support policy was put in place to compensate 58% of the CGST and 29% of IGST as center's share instead of 100% which existed prior to removal. The budgetary support policy was implemented in consequence to the deliberations at the GST Council Meeting.

The petitioner challenged the above reimbursement of 58% of CGST and 29% of IGST and not providing 100% refund of CGST before the Delhi High Court. The Delhi High Court dismissed the said writ petition. Similar petitions were filed by another petitioner (Sun Pharma Laboratories Limited) before Sikkim High Court and the said petitions were also disposed. Aggrieved, the petitioners approached the Supreme Court.

The petitioners argued that perusal of OM would reveal an unequivocal representation made by Central Government to commercial entities who were desirous of setting up industrial units in the specified States and by relying on such promises, the petitioner have altered their position to their detriment and as such, the Central Government is estopped from resiling from the representation made by it to petitioners. The quantum of refund only to extent of 58% has been achieved in arbitrary and irrational manner and even under the earlier regime of excise duty and all other levies collected by Central Government, the States were entitled to share therein, and it was not for the first time under GST laws, the Center and State share was kicked in. When the excise duty (which was to be also shared to state) has been compensated at 100%, the same should be applicable during GST regime also.

The Revenue has argued that a sea change has occurred with the advent of GST from 1st July 2017 and in light of overwhelming public interest, the earlier exemption was rescinded. The Revenue argued that the exemption would anyways be discontinued in light of proviso to Section 174(2)(c) of CT Act and thereby the petitioner would not be eligible to any exemption. However, as a good gesture, the Central Government continued to support the petitioner through budgetary support policy.

The Supreme Court stated that there is no doubt that vide OM, there was unequivocal promise given to entities for allowing exemption from payment of excise duty. However, after 01st July 2017 there was a sea change in the way indirect tax laws were administered by introduction of GST laws.

The Court further stated that on perusal of Section 174(1), it is evident that Central Excise Act, 1944 were repealed. However, in terms of Section 174(2)(c), such repeal shall not affect any right, privilege, obligation, or liability acquired or accrued or incurred under the impugned act or repealed acts or orders under such repealed acts. However, the proviso to Section 174(2)(c) in clear terms provided that any tax exemption granted as an incentive against investment through a notification shall not continue as a privilege if the said notification is rescinded on or after the appointed day.

Accordingly, the Court stated that a benefit granted under OM stands rescinded in view proviso to Section 174(2)(c). The question that needs to be answered was whether, despite a subsequent statute specifically providing for rescinding the benefits granted under an earlier statute, the Central Government can be compelled to stand by the representations made by it through earlier notifications? In simple words, the question that the Court needs to consider was, whether doctrine of promissory estoppel could operate against a statute? The Court answered in negative and held that there cannot be any promissory estoppel against a statute in light of overwhelming public interest. The Court referred to the below decisions to reach the conclusion.

In Indo-Afghan Agencies Limited[11] :

This is the case relied by petitioners (Hero Motor Corp Limited). The matter that fell for consideration is that on the basis of a trade notification which allowed exporters to import raw materials to the extent of 100% of the FOB value of exports, Indo-Afghan Agencies Limited was granted import license only to certain part of FOB value instead of 100% of FOB value. The action was challenged before the High Court of Punjab. The High Court stated that since the scheme granting of entitlement to the extent of 100% of FOB value of exports, the action of the authorities granting import certificate only to certain extent is not in accordance with the law and against the principles of natural justice. The matter reached Supreme Court and the Court held that the arbitrary reduction of claim is contrary to the export promotion scheme and accordingly held that the authorities need to extend the import certificate for the balance amount also. The Supreme Court (in the instant case) stated that reliance by petitioners on Indo-Afghan Agencies Limited is misplaced as the issue as to whether the benefit provided by previous enactment can be taken away by subsequent enactment is valid or not has not fell for consideration in Indo-Afghan Agencies Limited.

[11](1968) 2 SCR 366

In M Ramanatha Pillai [12] ***:***

The Constitution Bench of Supreme Court in this case was dealing with as to whether estoppel could arise against a state in regard to abolition of posts. The Bench after referring to the American Jurisprudence has held that a state is not subject to estoppel to the same extent as in an individual or a private corporation. Otherwise, it might be rendered helpless to asserts its power in Government. Therefore, the Court held that as a general rule the doctrine of estoppel will not be applied against the state in its government, public or sovereign capacity except where it is necessary to prevent fraud or manifest injustice.

In Gwalior Rayon Silk Manufacturing (Wvg) Co. Limited [13] ***:***

In this judgment, the Supreme Court was dealing with an issue as to application of promissory estoppel when a right to compensation for acquisition of forest land as provided in the earlier statute was taken away by a subsequent statute. The Constitution Bench has held that it is presumed that the Legislature knows need of its people and will balance present advantages against possible future disadvantages. It has been held that if a new enactment is constitutionally enacted by the legislature, then the fact that, at an earlier stage, the Government was toying with idea of paying compensation to owners of private forests would be of no consequence. The companies pleaded that applying the doctrine of promissory estoppel, the Government must be estopped from enacting a legislation contrary to the agreement, the said pleading was negated by the Constitutional Bench by stating that when the Legislature exercises its power for public good, the earlier representation would not operate against the Government as equitable estoppel.

In Motilal Padampat Sugar Mills Co. Limited [14]

In this case, the Supreme Court was dealing with action of State Government on the grounds of estoppel. The State Government had represented that an exemption from sales tax would be granted to new industrial units and based on the assurance, the appellant had established the industrial unit. However, subsequently, the Government decided to rescind the said concession. The Court stated that there can also be no promissory estoppel against the exercise of legislative power. The legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel and accordingly held that the State Government cannot resile from its obligation, since the petitioner has acted to his detriment based on the assurances of the former.

The above is one of the judgments wherein the Supreme Court has deviated from its trend of holding that there cannot be any promissory estoppel against the Government. The said judgment was later considered and overruled in another judgment, which is discussed in the subsequent paragraphs.

In Jit Ram Shiv Kumar and Others : [15]

In this case, the municipal committee established a small mandi and decided that the purchasers of the plots for sale in the mandi would not be required to pay octroi duty on goods imported within the said

[12] (1973) 2 SCC 650
[13] (1973) 2 SCC 713
[14] (1979) 2 SCC 409
[15] (1981) 1 SCC 11

mandi. Subsequently, the municipal committee started imposing octroi duty. The said action was challenged before High Court and ultimately landed before Supreme Court. The two-judge bench on a survey of all the cases has held that there cannot be promissory estoppel against the exercise of legislative function of the State. The two-judge bench observed that the decision of Supreme Court in Motilal Padampat Sugar Mills Co Limited (supra) was not in tune with other judgements.

In Godfrey Philips India Limited :[16]

In this judgment, the Supreme Court was seized with commenting on correctness of the decision in Jit Ram Shiv Kumar and Others (supra) and held that since doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise or representation made by it, the Court would not raise an equity in favor of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority.

The Court after referring to the above judgments and taking note of the discordant views in Motilal Padampat Sugar Mills Co. Limited (supra) and Jit Ram Shiv Kumar and Others (supra) has stated that a common thread can be noticed in all the above judgments, it was consistently held that there can be no estoppel against the legislature in the exercise of its legislative functions and held that the action of withdrawal of OM cannot be found fault with. If it is faulted, then there is no use for the proviso to Section 174(2)(c) and accordingly held that there cannot be any claim of estoppel.

Uttarakhand High Court in Titan Industries Limited[17]***:***

In a recent judgment, the High Court was seized with an important question as to the validity of the action of the department of Central Excise by taking away the benefit available under the Notification No 50/2003 – CE.

The facts of the case were that the petitioner (Titan Industries Limited) has put up a unit in one of the Khasra Nos. which were forming part of annexure which allowed exemption from payment of central excise duty. The petitioner has intimated to the department that they are investing huge amounts of money in such notified Khasra Nos. thereby eligible for exemption from payment of duty. After a certain period, the department has amended the annexure and removed the Khasras in which the petitioner has put up the new facility from the exemption list. Thereafter the department has demanded payment of central excise duty for the clearances made from such Khasras.

The petitioner has challenged the above removal of Khasras through a writ petition before the High Court. The matter thereafter reached to Supreme Court and came back to High Court for fresh consideration. In the second round of litigation before the High Court, the petitioner contested the removal of Khasras thereby leading to denial of exemption on the grounds of doctrine of promissory estoppel. Since, the petitioner has made a huge investment in the notified Khasras on the belief that they

[16](1985) 4 SCC 369
[17](2023) 6 Centax 2 (Uttarakhand)

would be eligible for exemptions, the Government cannot withdraw the exemption. The Respondent has contested that the power of Court cannot be extended to include the omitted Khasras in the exemption list. Thereafter, the respondent has relied on certain judgments wherein it was held that the doctrine of promissory estoppel cannot be applied to the actions of Government.

The High Court has held that the action of the Government/Department of Central Excise in removing the Khasras is not in accordance with the law on equity. The High Court stated that the doctrine of promissory estoppel would not be applicable to Government only in cases where there was shown a superior public interest. In absence of such superior public interest, the Government is bound by the doctrine of promissory estoppel. Accordingly, referring to the decisions of Supreme Court in Shrijee Sales Corporation vs. Union of India (supra), in absence of superior public interest, the High Court held that there cannot be any withdrawal of Khasras where the petitioner has already set up his factory.

Apart from the above, the High Court has also made reference to the Supreme Court decision in MRF Limited vs Assistant Commissioner and Others (2006) 8 SCC 702, wherein it was held that where a right has already accrued, for instance, the right to exemption of tax for a fixed period and the conditions for that exemptions have been fulfilled then the withdrawal of exemption during the fixed period cannot affect the already accrued right. The High Court also analyzed the issue from a different angle by making reference to the provisions of Section 38A(c) of Central Excise Act, 1944, which states that any rule, notification or order made or issued is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, appeal, suppression or rescinding shall not affect any right, privilege, obligation or liability acquired, accrued or incurred and held that by virtue of the above provision, the notification cannot be withdrawn.

The above judgment of Uttarakhand High Court is against majority of the decisions of the Supreme Court which have been discussed in the above paragraphs. However, the High Court has justified that the doctrine of promissory estoppel would trigger when the Government fails to show the public interest. Since, in the instant case, the Government could not show the public interest, the High Court concluded that the doctrine of promissory estoppel gets applied, and the Government cannot resile from its promise. The judgment was passed by High Court without taking reference to the decision of Supreme Court in Hero Moto Corp Limited (supra). It would have been a flawless judgment if the above decision is also taken into consideration and distinguished from the current facts.

Supreme Court in KB Tea Product Private Limited[18]:

In a recent judgment, the Supreme Court had an occasion to deal with the validity of the amendment to the definition of 'manufacture' in West Bengal Sales Tax Act, 1994. The two-judge bench is divided on the validity of the amendment to the said definition.

The facts were that the assessee being a small-scale industrial unit has invested certain sum to be eligible for exemption under Section 39 ibid. The exemption is for a period of seven years subject to obtaining a certificate from the prescribed authority. The petitioners based on the promises made by the Government had invested a sizeable amount and accordingly got the certificate for claiming exemption

[18](2023) 6 Centax 114 (SC)

from payment of sales tax. This continued for certain period. Post that, the definition of 'manufacture' under the subject sales tax act was amended to exclude the activity of 'blending of tea'. In light of the above amendment and consequent exclusion, the petitioner was made ineligible for claiming the exemption under Section 39. The said section being applicable to manufactured products and in light of the amended definition, the petitioner's activity cannot be called as manufacture, the petitioner ceased to be eligible for exemption.

The petitioner challenged the above amendment on the ground of violation of doctrine of promissory estoppel before the High Court of Calcutta. The High Court has disposed the writ petitions against the petitioner and aggrieved by that the petitioner reached the Supreme Court.

Before the Supreme Court, it was pleaded by the petitioner that the petitioners have altered their position to avail the benefit under the scheme and incurred additional cost. Since the petitioners have made substantial expenditure, the State cannot take away such benefits unless overriding public interest is shown. The Revenue on the other hand argued that once the definition has been amended, the petitioner ceased to be manufacturers and accordingly they are not eligible for the exemption. The Revenue argued that the High Court has rightly held that what was taken away is an 'existing right' and not a 'vested right' as argued by Petitioners. Further, the Revenue stated that exemption is a policy decision, and no one claim the same as right.

As stated above, the bench was divided in the view. One of the justices MR Shah has held that as per the settled position of the law, no one can claim exemption as matter of right. The exemption is always on fulfillment of certain conditions and the same can be withdrawn by State. The decision of revoking an exemption can be found fault by court only if such decision is found to be so arbitrary. Since, the definition of 'manufacture' was amended to exclude the activity of blending of tea, the petitioners has lost the eligibility to claim the exemption from payment of tax. As far as the pleadings with respect to the doctrine of legitimate expectation and promissory estoppel, Justice MR Shah has stated that there is no substance. He stated that there cannot be any promissory estoppel against the statute as per the settled position of law and accordingly upheld the decision of Calcutta High Court.

Another Justice Krishna Murari has written a separate opinion. Though he agreed with Justice MR Shah on the aspect of the exemption is an existing right and not a vested right, he penned a separate opinion with respect to the aspect of legitimate expectation and on doctrine of promissory estoppel. He stated that doctrine of legitimate expectation flows from the doctrine of rule of law. The doctrine of rule of law ensures that laws are applied equally and consistently, while the doctrine of legitimate expectation ensures that the public authorities act reasonably and consistently in their decision-making processes. He expounded that when a legitimate expectation of a specific outcome is created by a public authority, the said public authority is required to consider such expectation created by it when making a decision that affects the interests of the individual or group concerned. If the public authority fails to do so, the individual or group has a right to challenge the decision and seek a remedy, such as an order to enforce the legitimate expectation, as is the situation in the case at hand.

He referred to decision of KGMadhavan Pillai & Ors[19] , wherein the doctrine of legitimate expectation was first introduced in Indian jurisprudence. In the said case, the government had issued a sanction in favor of KG Madhavan Pillai & Others (respondents) therein to open a new school and to upgrade certain already existing schools. However, subsequently such sanction is kept in abeyance. The Supreme Court opined that the original sanction given by the government gave raise to legitimate expectation in the minds of respondents and this was breached by subsequent direction for abeyance and hence there was a violation of principles of natural justice.

The next decision dealing with the doctrine of legitimate expectation was in the case of Navivoti Coop. Group Housing Society & Ors[20] , wherein the original policy for allotment of land to housing societies was based on principles of seniority, and seniority under the said policy was decided on the basis of date of registration. Subsequently, a change was made to original policy, wherein the criteria for deciding seniority was changed from the date of registration to the date of approval of the final list. The said deviation on the touchstone of legitimate expectation was challenged before the Supreme Court. The Court held that the original policy, as well as the past practice of allotting land, gave rise to a legitimate expectation to the parties therein of a predictable pattern of allotment, and the new change in policy broke such expectation. This interpretation expanded the width of the doctrine of legitimate expectation further, and extended it to not just an explicit guarantee, but also to expectations arising out of past practice.

Then reference was made to Food Corporation of India vs. Kamdhenu Cattle Feed Industries [21], wherein the Supreme Court held that the duty of public authorities to act in a reasonable manner, entitles every person to have a legitimate expectation to be treated in such a reasonable manner. It was further held in the above case that while such a legitimate expectation might not be an enforceable right, however the failure to take into account such expectation may deem a decision of public authority to be arbitrary. Justice Krishna Murari has stated that in his opinion that the above decision rendered by Court, remarkably weaves in the doctrine of rule of law, the doctrine of legitimate expectation, and the doctrine of arbitrariness together, and firmly roots the doctrine of legitimate expectation within Article 14 of Constitution of India.

Then he moved to analyze the decisions relied by Revenue wherein it was held that the doctrine of legitimate expectation cannot be applied to a statute. He referred to the decision of MRF Limited, Kottavam[22] , wherein the Supreme Court held that legitimate expectation, as a ground of challenge, can be done away with in circumstances wherein it has been demonstrated by public authority that the withdrawal of the said expectation has been done on grounds of public interest. Also referred to the decisions of Howrah Municipal Corporation & Ors vs Games Rope Company Limited[23] and Madras City Wine Merchant Association & Another vs State of Tamil Nadu & Anr [24], wherein it was held that public interest overrides legitimate expectation.

[19][1988] 4 SCC 669
[20][1992] 4 SCC 477
[21][1993] 1 SCC 71
[22][2006] 8 SCC 702
[23][2004] 1 SCC 663
[24][1994] 5 SCC 509

Having referred to the above decisions, Justice Krishna Murari stated that on the basis of above discussions, legitimate expectation can be inferred against a statute, provided that such a claim of legitimate expectation is in public interest, and for a statute to claim a bar against legitimate expectation, it must demonstrate that the shift in policy is for the advancement of public interest. Further, he opined that doctrine of promissory estoppel, and the doctrine of legitimate expectation are two separate principles, and as such, the blanket ban on promissory estoppel against a statute cannot be applicable to the doctrine of legitimate expectation. The doctrine of promissory estoppel is a remedy in private law; however, the doctrine of legitimate expectation is a remedy in public law and rooted in Article 14 of Constitution of India and thereby susceptible to more judicial review. He then proceeded to chart out the principles for application of legitimate expectations:

- The expectation must be reasonable.
- The expectation must be based on a clear representation.
- The representation must be made by an authorized person.
- The representation must be legitimate.
- The public interest must be demonstrated.
- Public Interest must supersede the change in policy.
- The expectation must be based on a legitimate interest.
- The expectation must be protected.

By applying the above principles to factual matrix in the case of KB Tea Product Private Limited, he held that since there is no demonstration of public interest by making amendment to the definition of 'manufacture', the action of amendment and thereby the petitioners losing the exemption was held to be arbitrary. Hence, he held that the authority must be made accountable to the legitimate expectation created by it and therefore directed the State Government to extend the benefits of original amendment till the expiry of such benefit as per the original position.

Conclusion:

From the above analysis of judicial decisions, it can be understood that the doctrine of promissory estoppel cannot be enforced against a State/Government. In similar vein, the doctrine of legitimate expectation cannot also be claimed against a State/Government. However, it is important to show the superior, overriding, overarching public interest. Though it can be argued that the public interest need not be shown for rejecting the application of doctrine of promissory estoppel, the same can be still challenged on the ground of doctrine of legitimate expectation. The Uttarakhand High Court in Titan Industries Limited (supra) and separate opinion in KB Tea Product Private Limited (supra) points out to application of these doctrines stating that the Governments failed to show the superior public interest. Now, that the bench is divided in KB Tea Product Private Limited (supra) and will be referred to the larger bench, we need to see, as to how these doctrines evolve and applied to indirect tax enactments.

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DIRECT TAX

INTERPLAY BETWEEN THE INCOME TAX ACT AND DTAA -PART I

Contributed by CA Sri Harsha & CA Narendra

Introduction:

DTAA[1] has been entered into between various countries or tax jurisdictions in order to provide relief to the taxpayer from the potential double taxation. This relief is generally provided by sharing the taxation rights between countries viz interest, dividend, royalty/FTS, or by way of Article 23A/23B of the DTAA i.e., providing exemption to the income earned in source state or providing credit of taxes paid in the source state.

On the other side, domestic law created/formed by the state under its sovereign right tries to tax the income as per the provisions contained therein. However, domestic laws may not provide benefits as those provided in DTAA. This is because the DTAA would be finalized after the due negotiations between two sovereign states which results in more benefits to the taxpayer.

When two separate legislations/codes operate in relation to taxation, it may result in rising of conflicts between those two legislations/codes. When there is a conflict between the two legislations, the question arises is which legislation/code prevails over the other legislation.

Two views are available with regard to the interpretation of international laws viz monist view and dualist view. Under the monist view, international law is considered as an integral part of domestic law and such international law overrides domestic law. On the other hand, under the dualistic view, international law is considered a separate law from that of domestic legislation and such international law comes into operation in the country only by way of separate legislations. As such, international law is not considered as a superior law to domestic law.

[1]Double Taxation Avoidance Agreement.

The Hon'ble Madras High Court in the case of T. Rajkumar[2] , while adjudicating the constitutional validity of insertion of section 94A, has provided a detailed discussion with respect to monist view and dualist view.The High Court has observed that like the Philosophical Concepts of Dvaitha (dualism) and Advaitha (monism), the principles of international law also contain two theories namely (i) monism and (ii) dualism.

The High Court has point outed that the SC[3] onmany occasions held that India follows dualistic approach for interpretation of international law. However, the SC in the case of Azadi Bachao Andolan[4] and P.V.A.L. Kulandagan Chettiar[5] has held that the provisions of DTAA shall override the provisions of ITA (a detailed discussion is provided below).

However, with regard to the SC decision in the case of Azadi Bachao Andolan (supra) and P.V.A.L. Kulandagan Chettiar (supra), the High court has observed that section 90(2) does not deal with the question of conflict between a DTAA and the provisions of a statute. It merely deals with the option given to an assessee, to whom an agreement referred to in Section 90(1) applies, to choose either the provisions of the DTAA or the provisions of the Act, whichever is more beneficial to him.

The High Court has further observed that no question arose directly either in Azadi Bachao Andolan (supra) or in Kulandagan Chettiar (supra) as to whether or not the Parliament has the power to make a law in respect of a matter covered by a DTAA. Therefore, the observations found in these two decisions, to the effect that the provisions of

[2][2016] 68 taxmann.com 182 (Madras)
[3]Supreme Court
[4][2003] 132 Taxman 373 (SC)
[5][2004] 137 Taxman 460/267 ITR 654

the DTAA will have effect even if they are in conflict with the provisions of the statute, cannot be stretched too far to conclude that the Parliament does not have the power to make a law in respect of a matter covered by a DTAA.

In this Article, the concept of section 90/90A of the ITA[6] has been discussed to understand the interplay and interaction between the ITA and DTAA.

DTAA vs.Income Tax Act - India:

Normally, any legislation in India is formulated by the parliament at the central level. However, in respect of DTAA, parliament has delegated the power to enter into DTAA with the other countries to CG[7] by way of section 90/90A of the ITA. Section 90/90A of the ITA empowers the CG to enter into an agreement with the other country/association to attain the following objectives:

- To provide the relief from the income charged in both the countries,
- To eliminate the double taxation in respect of income earned by the taxpayer.
- For exchange of information for the prevention of evasion or avoidance of income tax.
- For recovery of income under the ITA and corresponding law in other country.

By utilizing the powers conferred by section 90/90A of the ITA, CG has entered into DTAA with the majority of countries in the world. When interpreting the DTAA with the other country, the question arises whether the provisions of DTAA overrides the domestic law or not.

CBDT Circular[8] states that the correct legal position is that where a specific provision is made in the DTAA, that provisions will prevail over the general provisions contained in the ITA. Further, Circular specifically pointed out the provisions of the DTAA[9] which states that the laws in force in either of the countries shall continue to govern the taxation of income in the respective countries except where express provision to the contrary is made in DTAA. Accordingly, the Circular states that income and tax shall be computed by following the provisions of the DTAA irrespective of the provision of the ITA.

The Hon'ble Gujarat High Court in the case of Arabian Express Line Ltd. of United Kingdom[10] has held that provisions of DTAA overrides the specific provisions contained in the ITA. The same view has been held by various juridical fora, and subsequently, the same has been upheld by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra).

The Hon'ble SC has held:

'If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.'

[6] Income Tax Act, 1961.
[7] Central Government
[8] Circular: No. 333 [F. No. 506/42/81-FTD] dated 2-4-1982.
[9] Article 23/24/25 which deals with the 'Avoidance of Double Taxation'.
[10] [1995] 82 Taxman 6 (Gujarat).

Given the above, it is clear that the provisions of the DTAA overrides the provisions of ITA if such provisions are inconsistent with the ITA. Further, section 90(2) provides relief to the taxpayer which states thatwhere the CG has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. Which means that subsection 2 of section 90 tries to provide more relief to the taxpayer by virtue of which a taxpayer may choose the provisions of the DTAA or ITA whichever is more beneficial to him. The Hon'ble SC in the case of P.V.A.L. Kulandagan Chettiar (supra) has held as follows:

'Where liability to tax arises under the local enactment provisions of sections 4 and 5 of the Act provide for taxation of global income of an assessee chargeable to tax thereunder is subject to the provisions of an agreement entered into between the Central Government and Government of a foreign country for avoidance of double taxation as envisaged under section 90 to the contrary, if any, and such an agreement will act as an exception to or modification of sections 4 and 5 of Income-tax Act. The provisions of such agreement cannot fasten a tax liability where the liability is not imposed by a local Act. Where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the provisions of the Act, as is clear from the provisions of section 90(2) of the Act.'

Given the above, it can be concluded DTAA provisions override the provisions of the ITA to the extent they are in conflict with domestic law. However, the question arises is whether the taxpayer is allowed to choose provisions of ITA in respect of certain types of income and provisions of DTAA for certain types of income for the same assessment year. There are two views on this aspect and judicial precedents in future may resolve the issue. Further, there are multiple occasions wherein the domestic law contains special/specific provisions which are not specifically mentioned/discussed in the DTAA. Let us proceed to analyze the practical situations where provisions of DTAA override domestic law.

Business Connection vs. PE:

Section 9 of the ITA deals with the concept of income deemed to accrue or arise in India. section 9(1)(i) of the ITA deals with the concept of business connection which states that all income accrue or arise through or from any business connection in India is deemed to accrue or arise in India and taxable under the provisions of the ITA. However, the term 'business connection' is not defined under the ITA. The Hon'ble SC has defined the business connection in detail.

On the other hand, under the DTAA, business profits are taxable in India only if such taxpayer has PE [11] in India. Further, unlike domestic law, the term PE is defined under Article 5 of the DTAA.

On comparison of two term business connection and PE, it can be understood that the term business connection is much wider in scope than PE. Which means that existence of PE always gives arise to business connection in India.

[11] Permanent Establishment

However, existence of business connection may or may not result in PE in India. Accordingly, there may be situations wherein the taxpayer may have a business connection India but not PE. In such a scenario, business profits are not taxable in India as there is not PE in India.

Scope of income viz. dividend, interest or royalty/FTS under ITA vs DTAA:

Under domestic law, fees for technical services is taxable under section 9(1)(vii) of the ITA which provides detailed definition for the term 'fees for technical services'. However, under the DTAA, such an income is taxable under Article 12. Article 12 of the DTAA provides a narrow definition for the term 'fees for technical services'.

The judicial fora in India including the Hon'ble SC on many occasions have held that while determining whether a particular income covered under the definition of 'fees for technical services', provisions of DTAA shall prevail over the provisions of the ITA.

For example, treaties entered into by the India with some countries viz. Canada, Netherlands, Portugal, UK, USA etc., the term fees for technical services does not include 'managerial service' though the same is included in the provisions of domestic law.

Further, DTAA entered into by India with some countries viz. Canada, Netherlands, Portugal, Singapore, UK, USA etc., services provided by the assessee is treated as fees for technical services only if such services satisfy the 'make available' test.[12]

In the above situations, the judicial fora have held that, though the services are covered under the definition of 'fees for technical services' under the domestic law, as such services are not covered under the DTAA, payment made for services are not taxable in the source country. This is because the provisions of DTAA overrides the provisions of domestic law.

Similarly, section 9(1) (vi) of the ITA deals with the definition of royalty and the scope of royalty is much wider than the definition contained in Article 12 of the DTAA. Applying the same ratio, taxpayer may not be taxed in India as the transaction entered by the taxpayer may not fall under the definition of royalty under the DTAA though the same is treated as royalty under section 9(1) (vi) of the ITA.

Rate of Tax under ITA vs. DTAA:

As per the provisions of ITA, income tax payable by the taxpayer shall be increased by applicable surcharge and cess. For example, section 115A of the ITA states that FTS is taxable at the rate of 10 percent. However, such rate of 10 percent under section 115A shall be increased by surcharge at the applicable rates and cess of 4 percent. On the other hand, Article 12 of DTAA[13] states that FTS earned in India is taxable at the rate of 10 percent.

However, DTAA does not contain any provision which states that such rate of tax shall be increased by surcharge and cess. In this regard, the question arises is whether the taxpayer, when rate of tax as per DTAA is considered, is required include the surcharge and cess while computing the tax payable.

[12] For a detailed discussion on FTS, read our Article - MSS vis-a-vis Ancillary Clause.pdf (sbsandco.com)

[13] DTAA entered by the India with majority of countries contains 10 percent rate for FTS.

The Kolkata Tribunal in the case of DIC Asia Pacific Pte. Ltd. [14]has held that *'the provisions of Articles 11 and 12 must find precedence over the provisions of the Income Tax Act and restrict the taxability, whether in respect of income tax or surcharge or additional surcharge – whatever name called, at the rates specified in the respective article. In any case, education cess was introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India Singapore tax DTAA on 24th January 1994. In view of the specific provisions to the effect that the scope of Article 2 shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1", and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess.'*

Same view has been held by the Kolkata Tribunal in the case of BOC Group Ltd [15], Mumbai Tribunal in the case of Sunil V. Motiani [16], J.P. Morgan Securities Asia (P.) Ltd.[17], Capgemini SA [18] and Delhi Tribunal in the case of FCC Co. Ltd.[19].

The reason behind the above interpretation is that the Article 2 of DTAA which deals with the 'taxes covered' states that, in the context of India, income tax includes any surcharge thereon imposed under the ITA. Which means that rate of tax covered under the DTAA is inclusive of surcharge. Further, judicial fora have held that the term cess has same meaning as that of surcharge. Hence, the rate of tax contained in DTAA shall be final and shall not be increased by any surcharge and cess.

[14][2012] 22 taxmann.com 310 (Kol.)
[15][2015] 64 taxmann.com 386 (Kolkata - Trib.)
[16][2013] 33 taxmann.com 252 (Mumbai - Trib.)
[17][2014] 42 taxmann.com 33 (Mumbai - Trib.)
[18][2016] 72 taxmann.com 58 (Mumbai - Trib.)
[19][2022] 145 taxmann.com 649 (Delhi - Trib.)

Section 206AA vs. DTAA:

Section 206AA of the ITA states that any person who is entitled to receive any income in India has to furnish his PAN[20] to the payer. Failing to furnish such a PAN to the payer attracts higher TDS in respect of such payment. In this regard, the question arises is whether the provisions of section 206AA are applicable to non-residents.

Applying the same ratio as enumerated in the above SC judgements, assessee cannot be taxed at higher rate under the domestic law when reduced rate is provided in the DTAA. Judicial fora on multiple occasions have held that the provisions of section 206AA cannot be applicable to non-resident if such income/rate of tax is covered by a DTAA between India and country of residence of such taxpayer.

The Pune Tribunal in the case of Serum Institute of India[21] has held that *'where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act.'The above judgement has been upheld by the many judicial fora including the Hon'ble Delhi HC in the case of Danisco India Pvt Ltd [22]and Karnataka High Court in the case of Wipro Ltd.[23]*

Considering the compliance burden, the provisions of section 206AA has been amended through the Finance Act, 2016 so as to provide that the provisions of section 206AA are not applicable to non-residents or foreign company in respect of specified sum viz. dividend[24], interest, royalty/FTS and capital gain subject to the conditions provided in Rule 37BC of IT Rules[25].

[20]Permanent Account Number
[21]ITA 792/PN/2013
[22][TS-63-HC-2018(DEL)]
[23][2023] 146 taxmann.com 129 (Karnataka)
[24]Dividend is added from 24.07.2020
[25]Income Tax Rules, 1962

Claiming of FTC in India:

As per the Article 25 of the DTAA, taxpayer being a resident in India can claim the credit of taxes paid outside India in respect of income earned in that country. In this regard, in order to provide a mechanism to provide credit, Rule 128 has been inserted into the IT Rules. Rule 128(8) read with Rule 128(9) states that taxpayer is required to file Form 67 within the due date for filing the return of income under section 139(1) to claim the credit of foreign taxes.

In this regard, the Bangalore Tribunal in the case of Brinda RamaKrishna [26] has held that provision of DTAA overrides the domestic law and assessee shall not be denied foreign tax credit if Form 67 is not filed within the due date for filing the return of income under section 139(1). Same view has been upheld by the Bangalore Tribunal in the case of Sanjiv Gopal[27] Vinodkumar Lakshmipathi [28]and Hertz Software India (P.) Ltd [29] and Mumbai Tribunal in the case of Sonakshi Sinha[30].

Considering the various representations made to the CG, Rule 128(9) has been amended with effective from 01.04.2022 which states that in order to claim foreign tax credit, taxpayer is required to file Form 67 on or before the end of relevant assessment year provided return of income is filed under section 139(1) or section 139(4).

[26][TS-1059-ITAT-2021(Bang)]
[27][2022] 145 taxmann.com 378 (Bangalore - Trib.)
[28][2022] 145 taxmann.com 235 (Bangalore - Trib.)
[29][2022] 139 taxmann.com 448 (Bangalore - Trib.)
[30][2022] 142 taxmann.com 414 (Mumbai - Trib.)

GAAR provisions vs DTAA - Section 90(2A):

Till now, provisions of section 90(2) have been discussed in detail and the conclusion is that the taxpayer can choose the provisions of the ITA and DTAA whichever is more beneficial to him. However, a new Chapter XA has been inserted into the ITA popularly known as GAAR[31] provisions. In this regard, section 90 of the ITA has been amended by way of inserting a subsection (2A) which state that notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him. Which means that the provisions of GAAR would override the provisions of the DTAA.

[31]General Anti Avoidance Rules

SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. **Madhya Pradesh High Court in the case of M/s. Durge Metals [1] - Show Cause Notice fails to provide the relevant information and material thereby disabling the petitioner to respond to the same, requires to be set-aside:**

   In the given case, a writ petition has been filed by the petitioner challenging the impugned order stating that the same is non-speaking order and failed to comply with the provisions of Section 74 of CT Act and Rule 142 of CT Rules.

   The contention of the petitioner is that the show cause notice issued by the department is vague and failed to provide the relevant information and material thereby disabling the petitioner to respond to the same. In the said case, as the assessee failed to respond to the notices issued by the department, the respondent has passed all the necessary orders and dismissed the appeal filed by the petitioner on the ground of non-responding to the notices issued.

   The Revenue contended that the petitioner has filed the reply to the letter issued which makes him aware that the show cause notice is not vague and further contended that the petitioner has never pointed out that the show cause notice is vague in the appeal memo filed by them.

   On hearing of both parties, the Honorable High Court held that even though the said ground is specifically not mentioned in the appeal memo but the fact that the provision of section 74 of CT Act make it incumbent upon the Revenue to ensure the show cause notice to be speaking enough to enable the assessee to respond to the same and further contended that Section 75 of CT Act is complete code in itself which prescribes for various stages or determination of wrongful utilization of ITC which is required to subject to affording of reasonable opportunity of being heard to the assessee. Since the statute itself prescribes for affording reasonable opportunity, it is incumbent upon the Revenue to afford the same and any deficiency in that regard vitiates the end result. Accordingly, the writ petition has been allowed and quashed the impugned order and the show cause notice issued to the petitioner.

   Our Comments:

   The above judgment would help assessee's where the notices were issued in a routine manner without making any reference to the specific allegations. It is settled law that the show cause notice is the foundational document for the litigation proceedings. If there is a fault with the show cause notice, the fault cannot be corrected at a later stage and the Revenue would be forced to litigate the matter from the inception again. Hence, absolute care has to be gone into while issuing the show cause notice.

[1] 2023 (5) TMI 749 – Madhya Pradesh High Court

It is not out of place to mention the recent Supreme Court judgment in Merino Panel Product Limited[2], wherein the Honorable Court vide Para 28 and Para 29 stated that just because an incorrect methodology for arriving the assessable value would not itself vitiate the show cause notice. The Court stated that if there is power with the officer to issue a notice, the notice cannot be set aside just because the officer has used an incorrect methodology to arrive at demand. The Court stated that the distinction between the basis of liability to pay additional excise duty and determination of the actual amount should not be lost sight of. The former is the bedrock on which the notice lies and will form the foundation for further proceeding on the assessee, whereas the later should not be seen in such a tight perspective. The Court stated that if the notice alleges shortfall in payment of excise duty on completely non-existent and inapplicable grounds, the proceeding would be vitiated by the simple reason that the assessee has a right to know in clear and unambiguous terms the exact nature of their liability. The assessee can only frame a response defending themselves based on the infractions that have been pointed in the notice. If subsequently, Revenue argues that an incorrect provision was cited and the liability in fact arises from a different source altogether, the assessee would be left in an untenable position as it would have only responded to what was stated in the notice itself.

Hence, it is important for the Revenue to quote the specific section under which an allegation is being framed against the assessee. If that is not done, then the notice lacks the basic pre-requisites and can be challenged for striking it.

2. **Rajasthan High Court in the case of Malik Khan[3] - Non-Maintainability of Writ Petition, where the assessee fails to file the appeal against the impugned order with Appellate Authority within the prescribed time limit:**

In this case, the petitioner has filed the writ petition challenging the order passed by respondent deciding ex-parte on the grounds of non-responding to the notices. The petitioner has approached the High Court after failing to file the further appeal within the time limit prescribed under Section 107 of CT Act.

The Revenue contested that the writ petition filed by the petitioner is not maintainable on the grounds that the petitioner has failed to comply with the provisions of the Actas they have the remedy to file the appeal challenging the said order with the appellate authority within the prescribed time limit.

After hearing both parties, the Honorable High Court held that since the petitioner has not filed the appeal challenging the impugned order before the appellate authority within the limitation period and directly filed the present writ petition after the said period, the same is not maintainable. Resultantly, the petition is quashed.

[2] (2023) 2 SCC 597

[3] 2023 (5) TMI 883 – Rajasthan High Court

Our Comments:

The powers of High Court under Article 226 are wide. However, the same cannot be usurped for non-genuine instances, like the one above. The Honorable Supreme Court in Glaxo Smith Kline Consumer Health Care Limited [4] has set aside the action of High Court allowing the Writ Petition, wherein the petitioner has failed to approach the appellate authority within the prescribed time limit set in the statute. The Supreme Court in Glaxo Smith Kline Health Care Limited (supra) has held that though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law. The Supreme Court held that what it cannot do under its plenary power (Article 142), it is unfathomable as to how High Court allowed the petition.

3. **Supreme Court in Interarch Building Products Private Limited [5]- The value of service portion in execution of works contract shall be made as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 or as per Composition Scheme but the assessee cannot opt to pay service tax on the whole value of contract (including material) along with benefit of input tax credit:**

In an interesting case, the Revenue has approached Supreme Court seeking set-aside of the decision of CESTAT. The facts were that Interarch Buildings Product Private Limited (assessee/Interarch) was engaged in business of manufacture, supply and erection at the site of pre-fabricated/pre-engineered steel buildings and part thereof. The assessee has availed the credit of Rs 112 Crores (approx..) on building material during June 2007 to March 2012 and used the same to discharge the output liability. The Revenue has issued a show cause notice alleging the irregular availment of credit, since the assessee being engaged in works contract services, the credit on building materials was not available. The Revenue contended that since the service provided by assessee merit classification under 'works contract services', the assessee was mandated to follow either Rule 2A of Service Tax (Determination of Value) Rules, 2006 or adopt the Composition Scheme. In any of the above methods, the assessee was not eligible to avail the credit and required to pay tax only on the services portion. Since, the assessee availed the credit, the same was proposed to be recovered.

The assessee contended that the methodology provided in Rule 2A of Service Tax (Determination of Value) Rules, 2006 or Composition Scheme is optional and not mandatory. Hence, where the assessee has opted to pay service tax on the gross value of the contract (including material portion), then he should be eligible to avail the Cenvat Credit on such materials also. Accordingly, the assessee contested that the credit is eligible.

The matter reached the CESTAT, wherein the contentions of the assessee were upheld. The CESTAT has stated that where the value cannot be determined as provided in Section 67(1) to Section 67(3), then only value can be determined as provided in Rules. Accordingly, the CESTAT held that since the value can be determined using provisions of Section 67, there is no mandatory requirement to go to the rules and value the service. Hence, the availment of credit by assessee was held to be in accordance with the law.

[4] 2020 (5) TMI 149 – Supreme Court
[5] (2023) 6 Centax 40 (SC)

The Revenue aggrieved by this, approached the Supreme Court. The Court framed a short question as to whether there is any legal right for the assessee not to opt the methodology as per Rule 2A or Composition Scheme and pay tax on the gross amount and thereby take credit? The Court after referring to the decisions of Gannon Dunkerly& Co[6] and Larsen & Toubro Limited [7]has held that the assessee does not have any such legal right. The Court stated that the assessee's contention that the Rule 2A and Composition Scheme uses the word 'subject to provisions of Section 67' to mean that the former was optional does not have any substance. If such an interpretation is accepted, then the Court stated that Rule 2A and Composition Scheme would render otiose. The Court held that only tax has to be paid on the services portion either by opting for Rule 2A or Composition Scheme. Hence, the action of assessee paying tax on the entire contract value and thereby availing the credit is not in accordance with the scheme of service tax law. Hence, the decision of CESTAT was set aside and the matter is remanded for working out the liability as per Rule 2A.

Our Comments:

An interesting judgment. There is no power under the service tax law which allows to charge tax on the value of goods and accordingly it is not possible for the assessee to pay service tax on the total value and thereby take the credit of materials. The above judgment also opens up certain issues under the GST laws. Now that under the CT Act, there is power to charge tax both on goods and services, can an interpretation be taken that the value of goods and services can be split and tax may be paid each component separately disregarding the concept of works contract services as composite supply or can the assessee take a view that the rate of tax for construction services provided to buyers for residential project that is at 5% is optional and can take the credit and discharge the tax on the entire contract value? May be or May be not. We need to wait and see.

4. **Rajasthan High Court in the case of GajrarSinghRanawat [8] – Revenue has passed the order to reverse the credit, where the supplier of goods has already discharged the tax on supplied items:**

In the present case, the writ petition was filed challenging the Section 16 of CT Act relating to availment of input tax credit by the service receiver based on the facts that he is in possession of invoices, good has also been received and the invoices is also reflected in the recipients GSTR-2A.

The revenue without looking into the facts of actual procedure laid down to availment of input tax credit, it disallowed the credit claimed by the petitioner and passed the order to reverse the credit claimed by them.

In the present matter, the revenue has also admitted that they did not go through the fact that supplier has already discharged the tax liabilities on the same and passed the said impugned order. Hence, writ petition has been disposed by quashing the said impugned order and given directions to pass fresh order after providing opportunity of being heard to the petitioner.

[6](1993) 1 SCC 364
[7]2015 (39) STR 913 (SC)
[8](2023) 6 Centax 101 (Raj.)

SUMMARY OF JUDGEMENT

SUMMARY OF IT DECISIONS

Contributed by Team SBS

1. **Patna High Court in Pankaj Kumar[1] - Introduction of section 45(5A) vide Finance Act, 2017 is held to be prospective but not retrospective since the amendment is a substantive and not a clarificatory change:**

The Patna High Court had held that the section 45(5A) of ITA inserted vide Finance Act,2017 is not a clarificatory change and accordingly held as a prospective amendment. The High Court concluded that since the new provision does not remove unintended consequences faced by the assessees on account of existing provisions and is a substantive change providing additional reliefs in capital gain computation, the said amendment cannot be held retrospective. The plea of the assessee is dismissed in this regard.

The facts of the case were that the assessees had filed writ petitions raising the question of law as to whether Section 45(5A) is a retrospective amendment. Their primary contention is that the sub-section (5A) which says that the year of taxability of transfer of immovable property under a specified agreement (joint development agreement/JDA) shall be the year of issuance of completion certificate, is the remedy to the trouble being faced by the assessees in the existing provision which makes theyear of transfer of immovable property as the year of taxability. And since the amendment was to provide benefit only for Individual and HUF assessees, it was argued that the intention of the legislators is to provide the same benefit to the said assessees from the inception of the provision and hence, it should be held as retrospective.

The court relying on the interpretation in Godrej& Boyce MFG Co. Ltd[2] held that if any amendment or any new insertion of a provision is clarificatory in nature, if it is an expression of intent which the legislature always intended to hold the field, then it could be retrospective. Whereas if there is a substantive change in legal rights and obligations, it would not be curative and hence prospective. In the current case, sub-section (5A) was inserted w.e.f. 01.04.2018 to provide the benefit of taxability to those assessees who have entered into JDA after 01.04.2018.

The Court held that it cannot be said that the legislature is intended to provide the amended benefit from the inception of the provision because, if it is so, then the said provision would be made applicable to all the assessees or it would be clearly expressed in terms. Since, nothing can be inferred from the said provision, the said amendment cannot be held retrospective.

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[1] [TS-256-HC-2023(PAT)]

[2] (2010) 43DTR 177(Bombay)

Our Comments:

It would be tough to argue that the provisions of Section 45(5A) are retrospective in nature. Though it is tempting for an assessee to argue, the same shall be contrary to the existing jurisprudence. However, the assessee may argue that the year of taxability shall be the year of issuance of completion certificate taking the clue from Section 45(5A). It can be argued that the intent to tax the same as in the year of issuance of completion certificate is evident from the insertion of the said sub-section and accordingly plead that for the years prior to insertion of Section 45(5A), the same logic should be considered.

2. **Gujarat High Court in M/s Sahil Infra Creative Private limited [3] - Where the notice issued under unamended provisions of section 148 is treated as notice under amended section 148A(b), then the objections filed under the former notice shall be deemed to be the reply filed to the latter:**

The assessee in the underlying case had filed objections on 12.10.2021 to the notice received under section 148on 30.06.2021. While the assessee was expecting a speaking order from the Assessing officer in reply to his objections, no such action is being taken by AO. Meanwhile, the landmark ruling in Ashish Agarwal case has been pronounced by the Apex Court on 23.05.2022 in which it was held that all the notices issued between 01.04.2021 and 30.06.2021 under old regime of section 148 shall be deemed to be issued under new amended provisions. However, the assessee was not served any new notice. Subsequently, the assessee came across the IT portal and came to know that the earlier notice issued under section 148 has been treated as section 148A(b) notice and order under section 148A(d) also being passed without providing any opportunity to put forth his case before the AO. It was also argued that even the objections filed by assessee to the earlier notice have not been considered in passing the said order and hence violating the principles of natural justice by the AO.

Having heard the rival contentions, it was held that the provisions of old section 148, the new provisions of section 148A and also the directions rendered by the Supreme Court in Ashish Agarwal (supra) come up with a common thread in the reassessment procedure i.e., a reasonable opportunity of being heard shall be given to the assessee to put forth his case and plead for justice.Whereas in this case, the assessee is deprived of his fundamental right to defend his case bypassing the order without attending to the objections filed by him. Held that the principles of natural justice have been violated and the matter was remanded to the AO to pass fresh order under section 148A(d) by treating the objections filed by the assessee as reply filed under section 148A(c). Accordingly, the order passed by AO is set aside.

3. **Karnataka High Court in Sandhya Srivatsan [4] - Condonation for delay under Section 119(2)(b) shall be allowed for filing revised return if a bonafide reason is established – Held that the unclaimed TDS can be claimed by filing a revised return:**

The Karnataka High Court had quashed the impugned order passed under section 119(2)(b) rejecting assessee's application for condonation of delay in claiming TDS credit and seeking permission to carry forward the same to the future AYs.

[3] [2023] 150 taxmann.com 219 (Gujarat)

[4] [TS-199-HC-2023(KAR)]

The facts were that the assessee had received advances in respect of development agreement after deduction of applicable TDS. However, while filing the return of income, the assessee had not claimed the said TDS even it was reflecting in Form 26AS. The assessee had realized her mistake and made attempts to claim the TDS. After the rectification requests being rejected by the assessing officer, a condonation request under Section 119(2)(b) has been filed by the assessee before the competent authority. However, the same was rejected on the ground that the assessee had failed to file the revised return for such AY and no condonation would be accepted on mere negligence of the assessee.

It was argued by the assessee that the non-claim of TDS which was being clearly reflected in Form 26AS is due to a bona fide error made by the assessee being thinking that since the TDS is deducted on advance amounts, the same has to be claimed in the year in which such advances would be offered to tax in income tax return. But the revenue has argued that there was no provision in the act to provide opportunity for correcting the mistake made by the assessee after failing to file revised return to rectify the assessee's mistakes.

However, the Court had held that whenever there is a genuine and bona fide reason on assessee's stand, the authorities are ought to exercise their powers conferred under section 119 to provide the assessee an opportunity to rectify the mistake. In the current case, there was a bona fide error due to which the assessee had not claimed the TDS. Hence, the request under section 119(2)(b) ought to be accepted and hence the order rejecting the assessee's plea shall be set aside.

Our Comments:

The legislature has given discretionary powers to the Income Tax authorities in allowing assessee's request for condonation of the delay occurred while complying with the provisions of income tax act. But paramount care must be taken while deciding whether the assessee has a bona fide reason in such non-compliance, otherwise the power would be mis-utilised and be ultra vires to the intention of the legislature. CBDT over the years have providing instructions in this regard, imposing conditions to be met by the income tax authorities in allowing an assessee's request. On the other hand, it is the responsibility of the taxpayers too to be aware of the compliances to avoid unwanted disturbances because, since the powers are discretionary, the chance of getting a favour order even in a bona fide case is doubtful.

4. **Karnataka High court in Sanath Kumar Murali [5] - While applying the provisions of section 149(1)(b),in respect of escapement of Income chargeable to tax, the term "income" shall mean the income chargeable as Capital Gains but not the entire sale consideration:**

The debate in the underlying ruling is whether the term "income" referred in section 149(1)(b) shall mean the entire sale consideration of a capital asset or income chargeable as capital gains. The facts were that the department had identified an unreported sale transaction pertaining to AY 2016-17, value of Rs.55 lakhs and since the amount escaped exceeds Rs.50 lakhs, revenue had opened assessment in 2023, even the 3 years period have been lapsed. The capital gain if computed on the above sale transaction amounts to Rs.33 lakhs. Revenue argues that the total sale consideration

[5] [TS-286-HC-2023(KAR)]

should be treated as income escaped from the assessment because if the profit from such sale is held to be the escaped income, then such low value transactions would get ignored from revenue's observation.

However, on a plain interpretation of section 149(1)(b), the threshold limit of Rs.50 lakhs does not refer to just the term "income" instead refers to the term "income chargeable to tax". From understanding the provision of section 48 which provides mechanism for computation of capital gain, it can be inferred that the sale consideration reduced by the cost of acquisition shall be chargeable to tax as capital gains. Moreover, it cannot be said that the assessee had escaped the income of Rs.55 lakhs in the instance case when the assessee is liable to pay tax only on Rs.33 lakhs.

The court had held that just because the stage at which the notice is issued is at a premature stage, the entirety of the consideration ought not to be taken as income chargeable to tax under Section 149.Besides that, the memorandum explaining the provisions of Finance Act,2021 does not in any way lead to giving a different interpretation to the words, "income chargeable to tax". Hence the words used in Section 149 for determining the extended time limits shall be interpreted in terms of plain wordings of section 149 and cannot be construed differently.

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